Neutral Citation Number: [2018] EWHC 1974 (Admin)

Case No: CO/340/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 July 2018

Before:

HIS HONOUR JUDGE KEYSER Q.C.
sitting as a Judge of the High Court

- -

Between:

THE QUEEN **on the application of MARC ARIE BECKER**	**Claimant**
- and -	
HERTFORDSHIRE COUNTY COUNCIL	**Defendant**
-and-	
ALISTAIR PINKERTON	**Interested Party**

- -
- -

Ned Westaway (instructed by **Richard Buxton Environmental & Public Law**) for the **Claimant**
Richard Turney (instructed by **Hertfordshire County Council Legal Services**) for the **Defendant**
Charles Streeten (instructed by **Woodfines LLP**) for the **Interested Party**

Hearing dates: 19 July 2018

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Approved Judgment

H.H. Judge Keyser Q.C. :

Introduction

1. The claimant, Mr Marc Becker, is, together with his wife, the owner and occupier of a house and land known as Kemprow Farm, Kemprow, Aldenham, Hertfordshire. Kemprow Farm lies on Oakridge Lane, also known at that point as Kemprow Road, which is a two-lane rural road. The property is almost directly opposite the junction between Oakridge Lane and a smaller public highway called Blackbirds Lane.

2. The interested party, Mr Alistair Pinkerton, is a farmer. He farms Blackbirds Farm, an arable farm that is situated within the Metropolitan Green Belt. Blackbirds Farm lies on Blackbirds Lane and can also be accessed via a private lane, which joins the public highway at Oakridge Lane. The Farm itself comprises some 440 ha of land, of which 206 ha is held by the interested party on an agricultural tenancy from the defendant, Hertfordshire County Council. The interested party has other holdings in the vicinity, which he farms as part of the same business activity as Blackbirds Farm but which are not contiguous with the Farm and can only be accessed from the Farm via the public highway. One such holding is called School Field and another is called, among other things, Garston.

3. On 25 September 2009, the defendant, as local planning authority, granted to the interested party planning permission ("the 2009 Permission") for the change of use of the existing silage pits at Blackbirds Farm to use for open windrow composting of green waste. The site to which the permission related ("the 2009 Site") was an area immediately to the north-east of the main farm buildings and comprised the silage pits and a reception area where vehicles would bring the green waste to the site. The 2009 Permission was subject to various conditions, which I shall describe and discuss in detail later. One of these related to the approval by the defendant of the location of any maturation pads for the compost produced at the site. However, no planning permission was granted for the use of any land for the maturing of compost. The interested party implemented the 2009 Permission and proceeded to mature compost at various maturation pads that had been approved by the defendant's officers; the need for planning permission was, however, overlooked. One of those maturation pads was at Broad Field, which is part of Blackbirds Farm and is accessible from the 2009 Site across land comprising part of the Farm. Another was at School Field. When ready for use, compost from the maturation pads was taken to various locations on Blackbirds Farm and to Garston for use there.

4. In time, issues arose concerning breaches of planning control in respect of the operation of the 2009 Site and the use of the maturation pads, including Broad Field and School Field. The interested party made three planning applications to the defendant: two for variation of the conditions on the 2009 Permission and one for permission for the use of Broad Field as a maturation pad. The defendant granted those applications and on 13 December 2017 made three decisions under the Town and Country Planning Act 1990 ("the 1990 Act"):

    1) Pursuant to section 73A, to grant retrospective planning permission to the interested party for the continued use of a pad for the maturing of compost at Broad Field ("the Broad Field Permission");

2) Pursuant to section 73, to vary condition 2 on the 2009 Permission;

3) Pursuant to section 73, to vary conditions 6 and 7 on the 2009 Permission.

(I shall describe more accurately below the precise nature of the two decisions under section 73.)

5. With permission granted by Mr Rhodri Price Lewis Q.C., sitting as a deputy High Court judge on 4 April 2018, the claimant applies for judicial review of those three decisions.

6. The remainder of this judgment will be structured as follows. First, I shall set out the facts in more detail. Second, I shall summarise the grounds on which the decisions are challenged. Third, I shall refer to some general points of law that are relevant to the challenge to the decisions. Fourth, I shall consider the grounds of challenge in turn.

7. I am grateful to Mr Westaway, Mr Turney and Mr Streeten, counsel respectively for the claimant, the defendant and the interested party, for their helpful written and oral submissions.

Facts

8. The 2009 Permission was subject to eighteen conditions, among which the following may be noted:

> "2. DELIVERY AND OPERATING HOURS
>
> Unless prior approval in writing by the Waste Planning Authority [i.e. the defendant] has been given, no deliveries shall take place at the site except during the following hours:
>
> 7.30am – 5.00pm Monday to Friday (no deliveries on Saturdays, Sundays or Public and Bank Holidays)
>
> Unless prior approval in writing by the Waste Planning Authority has been given, no operations shall be undertaken at the site except during the following hours:
>
> 7.30am – 5.00pm Monday to Friday
>
> 8am – 12.30pm on Saturdays (no operations on Sundays or Public and Bank Holidays)
>
> Reason: To minimise the adverse impact of deliveries and operations on the surrounding area in terms of noise, traffic generated and general disturbance."

> "3. GREEN WASTE THROUGHPUT

The maximum throughput of green waste shall not exceed 8,000 tonnes per annum.

Reason: In the interest of the amenity of nearby residential properties."

"5. RESALE OF GREEN WASTE COMPOST

The compost generated from the green waste composting hereby permitted shall be used wholly on the land at Blackbirds Farm and there shall be no resale of the compost under any circumstances.

Reason: In the interests of the amenity of nearby residential properties."

"6. VEHICLE MOVEMENTS

Throughout the lifetime of this planning permission, the combined total number of vehicle movements associated with the green waste composting activity shall be no more than 10 vehicle movements (5 in and 5 out) including HGV vehicles over 7.5 tonnes movements per day at the site, from Mondays to Fridays, and no more than 6 vehicle movements (3 in and 3 out) at the site on Saturdays.

Reason: In the interests of highway safety and so that there shall be no adverse effects upon the free and safe flow of traffic along the public highway in the vicinity of the site."

"7. VEHICLE REGISTER

A register shall be kept of all vehicles visiting the Site. The register shall be maintained, continually updated and made available for inspection upon the request of officers of the Waste Planning Authority during normal working hours. The register shall include the vehicle registration number, the nature and quantity of the load (tonnage of waste imported) and the date and time of arrival or departure from the site.

Reason: In the interests of highway safety and to minimise adverse effects upon the free flow of traffic along the highways in the vicinity of the site and to assist the Waste Planning Authority in monitoring the site."

> "18. AREAS USED FOR COMPOST MATURATION
>
> Prior to the removal of any waste for maturation, details of the location of the maturation areas shall be submitted to the Waste Planning Authority. Only those areas which have received approval for maturation purposes shall be so used.
>
> Reason: To minimise the adverse impact of operations on the local community."

9. Condition 18 caused some confusion, though it ought not to have done so. It appears that the defendant's officers proceeded on the basis that approval of maturation pads, as required by that condition, was sufficient to render the use of those pads lawful. It was not: the use of sites as maturation areas was subject to a requirement of planning permission. This misapprehension went uncorrected for some years.

10. In brief, the composting operation is as follows. Green waste is brought to the 2009 Site, where it is shredded and formed into windrows within the sileage pits. It remains in the sileage pits for some seven to fourteen days; during this period it is monitored and its temperature is kept under observation. The material is then moved to one of four maturation pads on sites agreed by the Environment Agency; these are required to be at least 250 metres from the nearest residential properties. There the green waste is stored in open windrows of up to 4 metres in height and is turned regularly while it matures. The maturation process takes approximately six weeks, depending on the time of year, the weather conditions, and the type of material being composted. During the composting process the material is classed as waste. However, when the screening of the material shows that it has achieved the Publicly Available Specification 100 (BSI PAS 100) it ceases to be waste and is classed as compost.

11. In 2011 the claimant and his wife purchased Kemprow Farm and went to live there with their children. In 2014 he began to complain to the defendant about odour and noise from the composting operations at the 2009 Site, about HGVs making early morning deliveries to the site, and about disturbance caused by movements from the 2009 Site of HGVs and tractors (sometimes referred to as JCBs, though I shall generally refer only to tractors) with trailers; this last complaint related both to access at anti-social hours and to the transporting of compost to other sites. In 2016 the claimant, who was unhappy with the defendant's response, provided to it a copy of an opinion from Mr Westaway to the effect that operations at Blackbirds Farm were in breach of conditions 2, 5 and 6 of the 2009 Permission and that operations at the maturation sites were not subject of any planning permission and were therefore in breach of planning control.

12. Having taken its own advice on the matter, the defendant in due course confirmed its acceptance of the substance of the claimant's case regarding breaches of planning control. On 22 December 2016 it wrote to the interested party, confirming that it had investigated complaints made about his composting operation:

> "The outcome of these investigations is that the county council has come to the view that it was incorrect to approve the four maturation areas in the way that it did. The County Council's legal view is that planning permission for the maturation areas should have been applied for in their own right and that it was

> wrong to approve these by way of the discharge of Condition 18 of the planning permission. Consequently, none of the maturation areas have the benefit of planning permission and their use for the maturation of green waste into compost is unlawful. I therefore request that you cease using these maturation areas forthwith. If you do not, the County Council may need to consider enforcement action.
>
> In addition, the County Council is now of the view that Condition 6 of the planning permission, which places a restriction on vehicle numbers, applies to **all** vehicles associated with the composting process, including:
>
> - Tractors (JCBs) and trailers moving the material to the maturation areas and returning either empty or with finished product from those areas,
>
> - collection lorries leaving empty to collect, and returning with, green waste,
>
> - as well as staff cars.
>
> The vehicle register that you are required to keep under Condition 7 should log the details of all of these vehicles.
>
> Furthermore, the County Council has concluded that the land you farm at Garston does not, in a planning context, form part of Blackbirds Farm and, as such, you are prohibited from taking finished compost to this land as it would be in breach of Condition 5 of the planning permission."

13. On 2 March 2017 the defendant wrote to the interested party's solicitors. It referred to the maturation sites, confirmed its view that condition 6 applied to all vehicles, not just HGVs, and continued:

> "Although Blackbirds Farm has planning permission for the open windrow composting of green waste, the inability to use the maturation areas—and the manner in which the conditions should be read—probably impacts upon the efficient and effective running of the composting activity. It is therefore envisaged that your client may wish to make an application(s) for the use of maturation areas and/or the variation of certain conditions attached to the extant planning permission. Officers would be willing to assist in providing advice in respect of these."

14. Instead of applying in the manner suggested by the defendant, on 1 May 2017 the interested party submitted an application for a certificate of lawful use for the composting and maturation operations. In support of that application he submitted a lengthy statutory declaration dated 2 May 2017, which set out both a history of operations at Blackbirds Farm and his understanding of the 2009 Permission and the

conditions on it. In particular, he stated that he had always understood, and been led by the defendant's officers to understand, that the restriction on vehicle movements in condition 6 related solely to HGVs. The restriction, if applied to all vehicles, would (he said) be unworkable:

> "24. … [I]n an average day at any time over the last 10 years there could have been:
>
> - Up to 5 deliveries of green waste into Blackbirds farm yard;
>
> - 2 tractors with trailers regularly taking part processed material from the sileage pits to the maturation pad at School Field. A round trip takes 30 minutes so over an eight hour day each tractor and trailer could have made 16 trips. In practice the maximum due to the amount of space available on the maturation pad is probably about half that making about 32 movements;
>
> - The same 2 tractors and trailers moving finished product around the farm ready for spreading. This could be up to four loads each vehicle making 16 movements; and
>
> - A forklift going over to the maturation pad at School Field to push up the green waste creating 2 movements."

That gives a total of 60 movements in a day. The statutory declaration said that with staff movements the total could easily have risen to as much as 70 movements, though he considered the average number of movements to have been 50. He added: "Also, these vehicles have regularly left and entered the site at various times from as early as 5.30am through to 9.00pm although most movements have taken place during the core farm operating hours of 06.00 to 18.00 hours."

15. On 14 June 2017 the defendant refused to grant the certificate of lawful use, on the ground that there was insufficient evidence to show that the use had been carried out over a continuous period during the ten years prior to the date of the application.

16. On 28 June 2017 the defendant served on the interested party an enforcement notice in respect of Broad Field, another in substantially similar terms in respect of School Field, and a breach of condition notice in respect of the 2009 Permission. The enforcement notice in respect of Broad Field alleged the following breach of planning control: "without planning permission, the material change of use of the Land from agriculture to the importation of waste, composting and maturation of waste, storage of compost and use and storage of associated machinery". The stated reasons for issuing the enforcement notice included the following text:

> "The alleged breach of planning control can, without mitigation and management, be noisy and cause odour. The operations constituting the alleged breach are not limited in terms of hours of operation, size and height of stockpiles and can give rise to

> impacts including visual, noise and odour and the timing of these operations may increase the effect of these impacts …
>
> The Land is located within the Green Belt. …
>
> Very special circumstances that would clearly outweigh the harm to the Green Belt and any other harm are not considered to exist.
>
> …
>
> The operations constituting the alleged breach of planning control are not subject to planning permission, are therefore not restricted and can cause harm to amenity through odour, noise including from the operations of plant and machinery for loading, unloading and turning of compost and vehicles transporting material to and from the maturation areas in unrestricted numbers and at times which are likely to cause harm to residential amenity."

The breach of condition notice alleged breaches of conditions 2 and 6 in the 2009 Permission.

17. The interested party appealed against the enforcement notices.

18. The interested party also made the three planning applications that gave rise to the three decisions now under challenge: (1) an application for permission for the continued use of an existing maturation pad at Broad Field for the processing of green waste and its conversion into compost for use as a fertiliser on Blackbirds Farm; (2) an application to vary condition 2 on the 2009 Permission to change the hours of operation and to limit the operations to which they applied; (3) an application to vary conditions 6 and 7 on the 2009 Permission by restricting their operation to HGVs. Supporting Statements were submitted in respect of the application for permission for Broad Field and the application to vary conditions 6 and 7 on the 2009 Permission, but not in respect of the application to vary condition 2 on the 2009 Permission.

19. It can briefly be noted here that, after the interested party had submitted the planning applications, the defendant withdrew the breach of condition notice, and that it withdrew the enforcement notice in respect of Broad Field after it had made decisions on the planning applications. The enforcement notice in respect of the other site was subject of an appeal by the interested party, but it has recently been withdrawn by the defendant in order, as it says, that it may consider all the related planning matters, both those with which these proceedings are concerned and others concerning the composting process, "holistically". Evidence on this point has been adduced by all of the parties but seems to me to be irrelevant to the present case.

20. The defendant's Development Control Committee ("the Committee") considered the interested party's applications on 26 October 2017, when it resolved to approve them. The application in respect of Broad Field was, for technical reasons, reconsidered by the Committee on 8 December 2017; no separate reconsideration was given on that

occasion to the two other applications, but all were again formally approved. The formal permissions were issued on 13 December 2017.

21. The Committee received a separate Officers' Report for each of the three applications, all of them written by the same person. Each Officers' Report focused on matters of relevance to the particular application with which it was concerned, but there was much overlap and repetition among the three reports. The Committee rightly considered each application individually but not in isolation; all three applications were considered at the same meeting on 26 October 2017, and all three Officers' Reports were before the Committee. The minutes of the meeting of 26 October 2017 show that the Committee received oral representations from an objector to the application and from the interested party's planning agent. It is relevant to note that each Officers' Report contained the observation that "the site is part of a working farm, and the County Planning Authority are only responsible for consideration of issues relating to waste operations (green waste to compost) and not general agricultural activity."

The Decisions

22. The decision in respect of Broad Field granted permission for "continued use of an existing maturation pad for the processing of green waste and its conversion into compost for use as a fertilizer on land forming part of the farming operation undertaken at Blackbirds Farm". It was subject to seven conditions; I need only refer specifically to condition 7:

> "7. RESALE OF GREEN WASTE COMPOST
>
> The compost generated from the green waste composting hereby permitted shall be used wholly on land of the Blackbirds Farm enterprise and there shall be no resale of compost under any circumstances.
>
> Reason: The justification for this development in the Green Belt is that it is intrinsically linked to an agricultural operation at Blackbirds Farm. The sale of the compost from the site is not considered to be an appropriate use within the Green Belt."

The text of the condition itself is substantially similar to that of condition 5 on the 2009 Permission, save that instead of the words "on the land at Blackbirds Farm" there are the words "on land of the Blackbirds Farm enterprise".

23. The second and third decisions substituted a new schedule of conditions on the 2009 Permission. This involved renumbering the conditions as well as varying their text; in an attempt to avoid confusion, I shall refer to the conditions imposed in 2009 as Original Conditions and to the conditions substituted in 2017 as New Conditions.

24. Original Condition 2 was replaced by New Condition 1:

> "1. DELIVERY AND OPERATING HOURS

> Unless prior approval in writing by the Waste Planning Authority has been given, no deliveries shall take place at the site except during the following hours:
>
> 7.30am – 5.00pm Monday to Friday
>
> 8am – 12.30pm on Saturdays (no deliveries on Sundays or Public and Bank Holidays)
>
> Unless prior approval in writing by the Waste Planning Authority has been given, no processing of green waste including tipping, screening, shredding, and onward transmission to approved maturation pads within the Blackbirds Farm operation, shall be undertaken at the site except during the following hours:
>
> 7.30am – 5.00pm Monday to Friday
>
> 8am – 12.30pm on Saturdays (no operations on Sundays or Public and Bank Holidays)
>
> Reason: To minimise the adverse impact of deliveries and operations on the surrounding area in terms of noise, traffic generated and general disturbance."

Accordingly, the text of the original condition was varied in two respects. First, deliveries on Saturday were now permitted within restricted hours, whereas they had been prohibited in the original condition. (The claimant does not challenge that variation.) Second, in the second part of the condition the word "operations" was replaced by the words "processing of green waste including tipping, screening, shredding, and onward transmission to approved maturation pads within the Blackbirds Farm operation". One of the questions to which this gives rise is whether the variation has removed an existing restriction on vehicular departures from the 2009 Site.

25. Original Condition 5 was replaced by New Condition 4 (this was a variation not sought in the interested party's applications):

> "4. RE-SALE OF GREEN WASTE COMPOST
>
> The compost generated from the green waste composting hereby permitted shall be used wholly on the land at Blackbirds Farm enterprise and there shall be no re-sale of the compost under any circumstances.
>
> Reason: The justification for this development in the Green Belt is that it is intrinsically linked to an agricultural operation at Blackbirds Farm. The sale of the compost from the site is not considered to be an appropriate use within the Green Belt."

The relevant variation here is the insertion of the word "enterprise": the compost is required to be used not on land at Blackbirds Farm but on land at Blackbirds Farm enterprise. One question that arises is whether there is any material difference between

the two. The New Condition is substantially similar to condition 7 in the Broad Field Permission.

26. Original Conditions 6 and 7 were replaced by New Conditions 5 and 6:

> "5. VEHICLE MOVEMENTS
>
> There shall be no more than 10 HGV lorry movements (5 in, 5 out) per day from Mondays to Fridays, and no more than 6 HGV lorry movements (3 in, 3 out) at the site on Saturdays, an HGV being defined as a vehicle over 7.5 tonnes.
>
> Reason: In the interests of highway safety and so that there shall be no adverse effect upon the free and safe flow of traffic along highway in the vicinity of the site."

> "6. VEHICLE REGISTER
>
> A register shall be kept of all HGVs delivering green waste to the site. The register shall be maintained, continually updated and made available for inspection upon the request of officers of the Waste Planning Authority during normal working hours. The register shall include the vehicle registration number, the nature and quantity of the load (tonnage of green waste imported) and the date and time of arrival or departure from the site.
>
> Reason: In the interests of highway safety and to minimise adverse effects upon the free flow of traffic along the highways in the vicinity of the site and to assist the Waste Planning Authority in monitoring the site."

Accordingly, whereas Original Condition 6 had limited vehicle movements to 10 a day (6 on Saturday), *including* HGVs, New Condition 5 limited only HGV movements, as there defined, and did not restrict movements of other vehicles.

Summary of the Grounds

27. The claimant challenges the decisions on five grounds:

1) *Failure to have regard to impact from JCBs*: In deciding to vary Original Conditions 6 and 7 so that Original Condition 6 (New Condition 5) only limits "HGV lorry movements", the defendant failed to have regard to the amenity and highway impacts of tractors with trailers transporting compost for onward maturation.

2) *Failure to have regard to early-morning impact of HGVs*: In deciding to vary Original Condition 2 (New Condition 1), the defendant failed to have regard to the impact from HGVs departing from Blackbirds Farm early in the morning.

3) *Misapplication of Green Belt policy*: In approving the application for the maturation pad at Broad Field, the defendant misunderstood Green Belt policy and/or gave inadequate reasons as to why it considered Green Belt policy to be satisfied.

4) *Failure to consider impact of use of compost away from Blackbirds Farm*: In deciding both to vary Original Condition 5 (New Condition 4) and to impose condition 7 on the Broad Field Permission, the defendant failed to have regard to the need to ensure that the compost is intrinsically linked to the agricultural operation at Blackbirds Farm.

5) *Removal of operating-hours controls at Broad Field*: In approving the Broad Field application without any control on operating hours, the defendant acted irrationally and/or failed to have regard to material considerations.

Matters of Law

28. It is convenient here to refer to some points of law that are relevant to this case.

29. First, it is trite law that a planning decision is open to challenge in this court only on grounds of illegality, not of the planning merits of the decision.

30. Second, it is inappropriate for this court to be unduly legalistic in examining the planning decisions of elected councillors or the materials, such as in particular officers' reports, that may be taken to reflect the basis of those decisions. In *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, Lindblom LJ said:

> "41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. … Planning officers and inspectors are entitled … to expect – in every case – good sense and fairness in the court's review of a planning decision, not the hypercritical approach the court is often urged to adopt.
>
> 42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the

> committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

In the same case, the Chancellor of the High Court said:

> "63. Appeals should not, in future, be mounted on the basis of a legalistic analysis of the different formulations adopted in a planning officer's report. An appeal will only succeed, as Lindblom L.J. has said, if there is some distinct and material defect in the report. Such reports are not, and should not be, written for lawyers, but for councillors who are well-versed in local affairs and local factors. Planning committees approach such reports utilising that local knowledge and much common-sense. They should be allowed to make their judgments freely and fairly without undue interference by courts or judges who have picked apart the planning officer's advice on which they relied."

31. Third, there is no general duty on a planning authority, either by statute or at common law, to give reasons for the grant of planning permission: see *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71, [2017] 1 WLR 3765. However, a duty to give reasons may arise in the particular circumstances of a case; *Oakley* was an example of such a case. The courts have not sought to define precisely the circumstances that will give rise to such a duty. However, in *Dover District Council v Campaign for the Protection of Rural England Kent* [2017] UKSC 79, [2018] 1 WLR 108, Lord Carnwath, with whose judgment the other Justices agreed, considered the matter and said at [59]:

> "[I]t should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance …. Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out [in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153], they are likely to have lasting relevance for the application of policy in future cases."

Where a duty to give reasons does arise, the precise requirements of the duty will depend on the circumstances of the particular case. The basic principle, however, is that the reasons must be such as to leave no room for genuine doubt as to what the decision-maker has decided and why. See the *Dover District Council* case at [35]-[42],

referring among other things to the observations of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263, 271-272.

32. Fourth, the principles applicable to the interpretation of planning permissions were summarised by Keene J in *R v Ashford Borough Council, ex p. Shepway District Council* [1999] PLCR 12, 19-20:

> "(1) The general rule is that in construing a planning permission which is clear, unambiguous and valid on its face, regard may only be had to the planning permission itself, including the conditions (if any) on it and the express reasons for those conditions: see *Slough Borough Council v. Secretary of State for the Environment* (1995) J.P.L. 1128, and *Miller-Mead v. Minister of Housing and Local Government* [1963] 2 Q.B. 196.
>
> (2) This rule excludes reference to the planning application as well as to other extrinsic evidence, unless the planning permission incorporates the application by reference. In that situation the application is treated as having become part of the permission. The reason for normally not having regard to the application is that the public should be able to rely on a document which is plain on its face without having to consider whether there is any discrepancy between the permission and the application: see *Slough Borough Council v. Secretary of State (ante); Wilson v. West Sussex County Council* [1963] 2 Q.B. 764; and *Slough Estates Limited v. Slough Borough Council* [1971] A.C. 958.
>
> (3) For incorporation of the application in the permission to be achieved, more is required than a mere reference to the application on the face of the permission. While there is no magic formula, some words sufficient to inform a reasonable reader that the application forms part of the permission are needed, such as '… in accordance with the plans and application …' or '… on the terms of the application …', and in either case those words appearing in the operative part of the permission dealing with the development and the terms in which permission is granted. These words need to govern the description of the development permitted: see *Wilson (ante); Slough Borough Council v. Secretary of State for the Environment (ante).*
>
> (4) If there is an ambiguity in the wording of the permission, it is permissible to look at extrinsic material, including the application, to resolve that ambiguity: see *Staffordshire Moorlands District Council v. Cartwright* (1992) J.P.L. 138 at 139; *Slough Estates Limited v. Slough Borough Council (ante); Creighton Estates Limited v. London County Council*, *The Times,* March 20, 1958.
>
> (5) If a planning permission is challenged on the ground of absence of authority or mistake, it is permissible to look at

> extrinsic evidence to resolve that issue: see *Slough Borough Council v. Secretary of State (ante); Co-operative Retail Services v. Taff-Ely Borough Council* (1979) 39 P. & C.R. 223 affirmed (1981) 42 P. & C.R. 1."

33. These principles were confirmed in *Trump International Golf Club Scotland Ltd v The Scottish Ministers* [2015] UKSC 74, [2016] 1 WLR 85, where Lord Hodge, with whom the other Justices agreed, said:

> "34. When the court is concerned with the interpretation of words in a condition in a public document such as a section 36 consent, it asks itself what a reasonable reader would understand the words to mean when reading the condition in the context of the other conditions and of the consent as a whole. This is an objective exercise in which the court will have regard to the natural and ordinary meaning of the relevant words, the overall purpose of the consent, any other conditions which cast light on the purpose of the relevant words, and common sense. Whether the court may also look at other documents that are connected with the application for the consent or are referred to in the consent will depend on the circumstances of the case, in particular the wording of the document that it is interpreting. Other documents may be relevant if they are incorporated into the consent by reference … or there is an ambiguity in the consent, which can be resolved, for example, by considering the application for consent."

34. Fifth, a difficulty of interpretation will only exceptionally render a planning permission or condition void for uncertainty. The point was put clearly by Lord Denning in *Fawcett Properties Ltd v Buckingham County Council* [1961] AC 636, at 678:

> "I am of opinion that a planning condition is only void for uncertainty if it can be given no meaning or no sensible or ascertainable meaning, and not merely because it is ambiguous or leads to absurd results. It is the daily task of the courts to resolve ambiguities of language and to choose between them; and to construe words so as to avoid absurdities or put up with them. And this applies to conditions in planning permissions as well as to other documents."

35. Sixth, section 73 of the 1990 Act, under which two of the interested party's applications were made, provides so far as material:

> "(1) This section applies … to applications for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted.
>
> (2) On such an application the local planning authority shall consider only the question of the conditions subject to which planning permission should be granted and—

> (a) if they decide that planning permission should be granted subject to conditions differing from those subject to which the previous permission was granted, or that it should be granted unconditionally, they shall grant planning permission accordingly, and
>
> (b) if they decide that planning permission should be granted subject to the same conditions as those subject to which the previous permission was granted, they shall refuse the application."

36. In *R v Leicester City Council, ex p. Powergen UK Limited* (2001) 81 P & CR 5 the Court of Appeal considered section 73 and expressed agreement with an extended passage in the judgment of Sullivan J in *Pye v Secretary of State for the Environment* [1998] 3 PLR 72. The following extract from that passage is, I think, helpful in the present case:

> "An application made under section 73 is an application for planning permission (see section 73(1)). The local planning authority's duty in deciding planning applications is to have regard to both the development plan, which brings into play section 54A , and to any other material considerations (section 70(2)).
>
> …
>
> Whilst section 73 applications are commonly referred to as applications to 'amend' the conditions attached to a planning permission, a decision under section 73(2) leaves the original planning permission intact and unamended. That is so whether the decision is to grant planning permission unconditionally or subject to different conditions under paragraph (a), or to refuse the application under paragraph (b), because planning permission should be granted subject to the same conditions.
>
> In the former case the applicant may choose whether to implement the original planning permission or the new planning permission; in the latter case, he is still free to implement the original planning permission. Thus, it is not possible to 'go back on the original planning permission' under section 73. It remains as a baseline, whether the application under section 73 is approved or refused ….
>
> …
>
> Considering only the conditions subject to which planning permission should be granted will be a more limited exercise than the consideration of a 'normal' application for planning permission under section 70 , but … how much more limited will depend on the nature of the condition itself. If the condition relates to a narrow issue, such as hours of operation or the

> particular materials to be employed in the construction of the building, the local planning authority's consideration will be confined within a very narrow compass.
>
> Since the original planning permission will still be capable of implementation, the local planning authority looking at the practical consequences of imposing a different condition, as to hours or materials, will be considering the relative merit or harm of allowing the premises to remain open until, say, 10 o'clock rather than 8 o'clock in the evening, or to be tiled rather than slated."

Accordingly, references, in this judgment or elsewhere, to "amendment" or "variation" of conditions or "replacement" of existing conditions or "substitution" of new conditions must be understood in a loose sense; the conditions on the original planning permission retain their independent existence.

37. In the *Powergen* case, Schiemann LJ, with whose judgment Morritt and Potter LJJ agreed, said at [29]:

> "The question can arise whether, on an application which asks for a variation of one particular condition, the authority can grant a new permission subject to a number of conditions which were not the subject of the application to vary. Mr Taylor [counsel for the applicant] submitted that a proper reading of subsections (1) and (2) of s.73 led to the conclusion that only the condition the subject of the application was to be the subject of consideration by the authority. I disagree. Just as on an application for permission to carry out a development the authority can impose conditions on a permission for development which they would find objectionable unless such conditions were imposed, so on an application to carry out development without complying with one condition the authority can impose a different new condition or a number of new conditions and/or remove another condition subject to which the earlier permission was granted. An example given by Mr Ouseley Q.C., who appeared for the second respondent, was a situation where a retail operator wished to have deliveries for longer hours than was permitted under the original permission. In such circumstances the Authority might be content to grant this but only on condition that the warehouse was sited further away from nearby dwellings than had been regarded as acceptable at the time of the grant of the original permission."

38. Seventh, the court must have regard to section 31(2A) of the Senior Courts Act 1981:

> "The High Court—(a) must refuse to grant relief on an application for judicial review … if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."

The effect of section 31(2A) was explained by Singh LJ in *R (Wet Finishing Works Ltd) v Taunton Deane Borough Council* [2017] EWHC 1837 (Admin) at [74]:

> "Section 31(2A) alters the previous position (*Simplex GE (Holdings) v Secretary of State for the Environment* (1989) 57 P & CR 306) in three ways. First, the test is modified in that the court no longer needs to be satisfied that the outcome *would* have been the same, only that it is highly likely. Secondly, the outcome need not be exactly the same, provided it would not have been substantially different. Thirdly, the court does not have a discretion; where the conditions set out in the statutory provision are met, it is under a duty to refuse relief. This is subject to the power to disregard that requirement if the Court 'considers that it is appropriate to do so for reasons of exceptional public interest': section 31(2B)."

39. Some other points of law may conveniently be dealt with in the context of the particular grounds that give rise to them. I turn therefore to consider in turn the grounds on which the claimant relies. For convenience, I shall repeat the summary of each ground before discussing it.

Ground 1

40. Ground 1 is that, in deciding to vary Original Conditions 6 and 7 so that New Condition 5 only limits "HGV lorry movements", the defendant failed to have regard to material considerations, namely the effects on residential amenity of the use of tractors with trailers to transport compost from the 2009 Site to maturation pads via the public highway.

41. An initial point of interpretation arises in respect of New Condition 5. The defendant tentatively proposes that the condition would restrict the movements of any vehicle, including a laden tractor and trailer, if its weight exceeded 7.5 tonnes. In this regard it relies on the concluding words of the condition: "an HGV being defined as a vehicle over 7.5 tonnes."

42. In agreement with the claimant and the interested party, I consider that the defendant's proposed construction of New Condition 5 is plainly wrong. This conclusion follows, in my judgment, from the clear and obvious meaning of the words used in the condition. If that were wrong and the condition were ambiguous, the same result would follow equally clearly from recourse to extraneous aids to construction.

43. So far as concerns the wording of the condition itself, it is important not to overlook the obvious point that the text refers to HGVs, not merely to vehicles over a certain weight. HGV is a recognised term for certain kinds of lorry, not for big vehicles generally. That the conventional meaning was intended is shown by the words "HGV lorry movements" in New Condition 5. Reference to "7.5 tonnes" is clearly not meant to negate the reference to "lorry" or give a Pickwickian meaning to HGV but rather to specify that lorries under a certain size are not be counted for the purpose of the condition. Further, 7.5 tonnes maximum gross weight is a recognised threshold for

larger categories of HGVs in the UK; below it comes the category of smaller 2-axle lorries with a maximum gross weight of 3.5 tonnes to 7.5 tonnes. It is natural to suppose that the intention of New Condition 5 was to exclude from the definition these smaller lorries. (I say something further about vehicle weights later in this judgment.)

44. Matters extraneous to the text of New Condition 5 are relevant not only to its proper construction, if (contrary to my view) it be thought to be ambiguous, but to the planning decision taken by the defendant in 2017, because they show what matters were raised in respect of the interested party's application for variation of Original Condition 6.

45. In support of his original application for planning permission in 2009, the interested party submitted a planning report from chartered planners. Vehicle movements were dealt with at section 6.5 of the report:

> "6.5.1 The current application is a reduced proposal from that submitted in 2005. Whereas in 2005 the intention was to handle in the region of 12,000 tonnes pa with a maximum traffic generation during the peak spring/summer period of 28 HGV movements per day (i.e. 14 HGVs in and 14 out), this proposal, which is for an overspill facility only, will be limited to a maximum of 8,000 tonnes pa being the capacity of the four sites on the farm for which The EA [Environment Agency] has already issued Exemption Licences. It is estimated that this quantity of material will generate a maximum of 10 movements per day (5 in and 5 out). As previously noted, the Highway Authority did not have any concern with the originally proposed level of traffic subject to improvements being undertaken to the junction of the farm access road and Kemprow, taking the junction further away from Blackbirds Lane. Those improvements have now been undertaken. Logically, therefore, this proposal should be acceptable to the Highway Authority in terms of traffic generation when assessed against Waste Local Plan policy 43.
>
> 6.5.2 I note that one of the material considerations in the application for the new composting facility recently approved at Redwell Wood Farm was the fact that up to 70% of the compost produced would be used on the farm. In this instance, 100% of the compost will be used on the farm meaning that none of the compost would not (scil. would) need to be transported off site again, thereby assisting in reducing associated vehicle movements."

46. That information was reflected in the Officers' Report dated 22 September 2009. Paragraph 4.5 stated:

> "It is proposed that there would be a maximum of 10 (5 in and 5 out) HGV lorry movements per day. The applicant has indicated that these lorries would be 6 axled (scil. 6-axled) articulated HGVs with a net weight of 27 tonnes. As the compost would be

> utilised on the farm itself, there would be no lorry movements involved in exporting any of the compost."

47. These passages do not refer to or indeed envisage movements by vehicles other than HGVs, for example in respect of moving waste material from the sileage pits to maturation pads on fields accessible only via the public highway or moving compost from Blackbirds Farm to other of the interested party's holdings similarly accessible. The impression that they created was a far cry from the state of affairs portrayed in the interested party's statutory declaration in support of his later application for a certificate of lawful use (see above), which involved only ten HGV movements each day (that is, five deliveries) but an average of a further 40 vehicle movements. Nevertheless, the passages do show that the only vehicles under consideration in 2009 were HGVs. Similarly, at paragraph 5.2 of the Officers' Report it was recorded that the defendant as Highway Authority "[did] not wish to restrict the grant of permission subject to one condition: There shall be no more than 10 HGV lorry movements (5 in and 5 out vehicles over 7.5 tonnes) at the site in any one working day." The recommendation in paragraph 7.3 of the Officers' Report was for the following condition: "Maximum of 10 (5 in and 5 out) HGV vehicles over 7.5 tonnes movements per day". This would clearly not have precluded other movements by vehicles other than HGVs. However, as noted above, Original Condition 6 as drawn introduced the word "including", with the result that it placed a limit of 10 on all vehicle movements, regardless of the size or nature of the vehicles. The reason given for the condition was highway safety and traffic flow, although no matters had been raised by the Highway Authority to justify such a wide-reaching condition on those grounds.

48. The interested party submitted a Statement in Support of his application to vary conditions 6 and 7. This summarised parts of the narrative set out more fully in the earlier statutory declaration and stated at paragraph 8:

> "The fact that the wording of condition no. 6 on the formal grant of planning permission differed from the wording in the Committee report in a crucial way, namely that the word 'including' had been imposed in front of 'HGV vehicles over 7.5 tonnes', thus changing fundamentally the limitation which had been discussed and agreed with the applicant, was unfortunately not noticed at the time or the applicant would have immediately challenged it on the basis that it would be totally unworkable and also that it was clearly not what the Highway Authority intended."

49. The claimant submitted an objection to the application to vary conditions 6 and 7. In his letter to the defendant dated 14 August 2017, he complained that a restriction of the condition to HGVs would be inadequate because, among other things, "this business has entailed as many as 60 movements of JCBs and trailers a day"; the JCBs "pull[ed] uncovered trailers full of compost, back and forth within 10 metres of our home."

50. That objection was accurately summarised in section 7 of the relevant Officers' Report that was before the Committee when it considered the application. Section 8 of the Report dealt with planning issues and section 9 with conclusions; the following passages are relevant:

"8.4 Policy 11 of the Hertfordshire Waste Core Strategy states that *inter alia* (iii) the proposed operation of the site would not adversely impact upon amenity and human health. [This sentence is poorly written. It clearly intends to summarise the terms of the policy, which reads: "Planning applications for proposals for waste management facilities will be granted provided that … (iii) the proposed operation of the site would not adversely impact upon amenity and human health".] In this context the operation of the site is considered to include deliveries.

8.5 With regard to highway safety and traffic generation issues, the Applicant is not seeking additional HGV movements to the site, but is seeking confirmation the rewording of conditions 6 and 7 to apply to HGV traffic only.

8.6 The Highways Authority make no objection to this proposal, with some minor re-wording to that proposed, although the intent of the condition and HGV movement vehicle numbers would remain as proposed. As no objection has been received from the Highways Authority, it is not considered that the rewording of the condition in line with Highways advice would be prejudicial to highway safety or impact upon human health.

8.7 The variation of condition 7 is also considered reasonable given that Highways HCC see no justification to limit general traffic movement to the site, other than HGVs and that therefore this is the only type of traffic to the site that requires logging in a register.

8.8 The variation of condition 6 and 7 is therefore considered acceptable in this context, albeit with some minor rewording to the proposed condition 6 as advised by Highways HCC.

…

9.2 The variation of conditions 6 and 7 have raised no objections from the Highways Authority HCC, and seek to restrict HGV traffic only to the site, as well as logging of HGV movements only. The variation would not intensify the operation or increase likely traffic impacts from the operation. The proposal is therefore considered acceptable and in accordance with policy 11 of the Core Strategy.

9.3 Taking all material considerations and relevant planning policy into account, it is recommended that the variation of conditions 6 and 7 is acceptable subject to slight re-wording to that proposed for condition 6 as advised by Highways (HCC)."

51. The minutes of the Committee's meeting on 26 October 2017 add nothing material on this point.

52. From these documents it is clear that the actual intention of the defendant in substituting New Condition 5 for Original Condition 6 was to make clear that only movements by HGVs were to be restricted. Accordingly, the interpretation of the condition that is indicated by reference to its text alone would be no different from that indicated by reference to extraneous aids to construction.

53. The claimant complains that, in making its decision, the defendant gave no consideration to the significant negative impact that tractor movements might have, particularly as regards odour and noise, on the amenity of residents, even though this was a matter that had been expressly raised by him and brought to the attention of the Committee. The matter was considered only in respect of highway safety and traffic flow and in terms of a contrast between HGV movements and "general traffic movement". The tractor and trailer movements generated by the operations at the 2009 Site were not properly to be considered as general traffic movement. Their impact on residential amenity had not been considered in 2009, because no such potential vehicle movements had been mentioned by the interested party. Anyway, Original Condition 6 had been sufficient to control them.

54. In my judgment the defendant and the interested party are right to contend that Ground 1 rests on an unduly legalistic approach to the planning decision and that it amounts to a disguised challenge on planning merits.

55. The following points are important. First, the amenity objection was brought to the attention of the Committee, which is properly to be taken to have considered it. Second, the Officers' Report expressly referred to the policy in the Hertfordshire Waste Core Strategy, which specifically mentions amenity. Third, the Officers' Report advised that the variation of the existing conditions would not intensify the operations or increase likely traffic impacts. That advice has to be read in context. As the Report said, the application was made in order to "regularize" the existing vehicle movements (paragraph 3.5) and to obtain "confirmation" that the conditions applied only to HGVs (paragraph 8.5). The variation of the conditions would not increase the scale of the composting operations at Blackbirds Farm, which was controlled by other conditions. It would authorise, but not itself alter, the existing vehicle movements associated with the compost operations. Those existing vehicle movements had been a matter of controversy for some considerable time. Operations and vehicle movements had been monitored, for different purposes, by the Environment Agency and the defendant's officers. No response to the application had been received from the Environment Agency, and the Environmental Health officer of the Borough Council had made no observations on it. Fourth, in those circumstances, the advice that is at least implicit in the Officers' Report is that, notwithstanding the complaints accurately summarised in the Report, those vehicle movements did not constitute or give rise to an adverse impact on amenity such as would justify refusal of the variation sought. Fifth, the reason given for Original Condition 6 concerned highways grounds. Neither in 2009 nor in 2017 was there a highways objection to the proposed condition or a requirement to control anything other than the movement of HGVs. Related to this point, sixth, Blackbirds Farm is a working farm. The movement of farm vehicles, such as tractors with trailers, for general agricultural purposes would not be subject of control. The composting operations would give rise to deliveries of waste by HGV; these were to be subject to

control. Deliveries of compost from one part of the farming operation to another via the public highway would give rise to no relevant considerations that would not arise if the compost had been bought in rather than matured on site. Movement of maturing waste from the 2009 Site to the maturation pads, if those were accessed by public highway, could in theory give rise to a highways objection; in fact, however, none was raised. Such movements could also, in theory, give rise to a planning objection on ground of amenity; but as already mentioned the Officers' Report, having mentioned the claimant's objections, did not support them.

56. A rather different way of putting Ground 1, based on a supposed vagueness or unenforceability of New Condition 6, was indicated at an earlier stage of proceedings though it was not maintained before me. I certainly do not think that the condition is even arguably void for uncertainty. I have already dealt with a crux of interpretation that was argued before me.

57. Another difficulty of interpretation was not raised before me, other than briefly in answer to some questions I put to Mr Turney, and does not fall for determination in these proceedings. It concerns the meaning of the 7.5 tonne threshold. Mr Turney, when put on the spot without warning, suggested that this referred to the weight of the vehicle when laden with waste. That might be right, but I respectfully doubt it. The laden weight of a vehicle is not necessarily irrelevant—it might have implications for the wear of the surface of the highway, for example—but it is less likely to be relevant for highways purposes than the nature of the vehicle. It makes little sense to suppose that the control of vehicle movements applies only if a vehicle is loaded to a weight in excess of 7.5 tonnes but that the movements of identical vehicles are not subject of control provided those vehicles are not loaded to capacity. Lorry weights are usually given by reference to maximum gross weights or, in the context of drivers' licences, maximum authorised mass, which refers to the weight of a vehicle including the maximum load that can be carried safely when it is being used on the road. It seems to me to be likely that New Condition 6 ought to be construed accordingly, by reference to vehicle category. As I say, this question does not fall for determination, but I offer these thoughts for consideration by those affected by the condition.

Ground 2

58. Ground 2 is that, in deciding to vary Original Condition 2 (New Condition 1), the defendant failed to have regard to the impact from HGVs departing from Blackbirds Farm early in the morning. The point relates to the substitution of the second part of New Condition 1 for the second part of Original Condition 2. More particularly, it concerns the effect of replacing the word "operations" by the words "processing of green waste including tipping, screening, shredding, and onward transmission to approved maturation pads within the Blackbirds Farm operation". The claimant says that, although New Condition 1 prevents early morning deliveries to the site, it does not address the question of early morning departures of vehicles from the site; by contrast, Original Condition 2 prohibited early morning operations at the site and thereby prohibited early morning vehicular departures from the site.

59. The application for variation of this condition was not accompanied by a Statement in Support. However, in a planning statement submitted in support of another application,

with which this case is not concerned, the interested party's planning agent made clear that the substitution of the new text in place of "operations" was specifically intended to remove uncertainty as to whether the early-morning departure of empty HGVs from the 2009 Site was an operation and to make it clear that such departure was not prohibited. Paragraph 4.1.4 explained the rationale in more detail:

> "The ability for empty HGVs to leave the farm for the purpose of collecting green waste prior to 7.30am (8am on Saturdays) is very important since it is essential to join the road network before peak hour traffic builds up. The impact of an empty HGV leaving the farm to collect green waste is no different from an empty HGV leaving to collect a load of fertiliser or any other agricultural product, such movements regularly occurring before 7.30am (or 8am). Since the farm entrance used by HGVs is some distance from any residential properties, once on the public highway the HGVs from Blackbirds Farm are no different from any other HGVs travelling along the public highway, for example to and from the scrap yard, the sewage works and the commercial yard adjacent to the scrap yard. There is no restriction on the departure time of any of those vehicles and, as evidenced by several traffic surveys, HGVs regularly depart very early in the morning. Thus, any attempt to seek to impose any restriction on these movements, which will only rarely exceed 2 per day since only two HGVs are regularly available to transport green waste, would be both unreasonable and strongly resisted."

60. The claimant submitted a written objection to the application:

> "As to the definition of 'operations'—this is wholly unreasonable as well. The legal opinion we submitted in 2016 explained that operations as currently outlined in the permission includes departures of HGVs from the site—which the farmer currently undertakes long before the 7.30am start time. On many days, he has HGVs departing before 5 in the morning. This is unreasonable and disruptive. Under the proposed definition, these departures would fall outside the definition of operations, thereby exempting them from the hours restrictions—which is obviously one of the goals of the waiver. This should be rejected."

61. The Officers' Report in respect of this application fairly summarised the objections received against it and identified the principal planning issues for determination of the application for variation of Original Condition 2 as traffic and highways impact and residential amenity. The following further parts of the Officers' Report are relevant (the emphasis is mine):

> "8.9 With regard to the second part of Condition 2, the applicant proposes the word 'operations' be replaced with a detailed description which better describes the activities undertaken at the site.

> 8.10 The Environmental Health Officer (EHO) of Hertsmere Borough Council, who has previously monitored the site, has not objected to the proposal to vary condition 2. Full consideration of residential amenity issues were (sic) given at the time of the grant of the initial application, and it is not considered that any impact upon residential amenity would intensify as a result of the re-wording of the condition, which the applicant seeks to more precisely define and clarify their operations at the site. The proposal is that operations may take place on a Saturday morning, this follows practice elsewhere for minerals and waste sites. *A further objection is that vehicles leave before 5:00 in the morning. The planning condition relates to vehicles leaving the application site and this is an issue for enforcement of the condition*.
>
> 8.11 The site is monitored by the District Environmental Health Officer as well as the Environment Agency. Odour and Dust Suppression management schemes are in place to mitigate the potential for impact upon the wider environment.
>
> 8.12 It is considered that, as the changes to the wording of condition 2 will not intensify the existing operation or lead to any additional impact upon residential amenity such as odour or noise, then the proposal to vary the condition is acceptable and in general accordance with planning policy."

62. The defendant and the interested party both accept that the final sentence of paragraph 8.10 of the Officers' Report, shown in italics above, was wrong—there is, I think, a question about just how wrong it was—but they submit that the mistake was immaterial. This issue turns in part, though not entirely, on the question whether Original Condition 2 prohibited early-morning departures of HGVs from the 2009 Site.

63. The claimant contends that Original Condition 2 did prohibit early-morning departures: as a matter of normal English, "operations" is capable of applying to such departures; further, the Officers' Report in 2009 stated in respect of the proposed time-restrictions (paragraph 6.14): "It is not considered acceptable that vehicle movements should start before 7.30am due to their impact upon the amenity of residents", thereby showing that vehicle movements were intended to be included within the scope of "operations"; and paragraph 8.4 of the Officers' Report in 2017 also stated, to similar effect: "In this context [viz. policy 11 in the Hertfordshire Waste Core Strategy] the operation of the site is considered to include deliveries."

64. In agreement with the defendant, I reject the claimant's interpretation of Original Condition 2. In my judgment, the departure of empty HGV vehicles from the 2009 Site does not fall within the scope of "operations" in the condition. First, I do not consider that the wording of the condition gives rise to an ambiguity that requires or justifies reference to extraneous materials as an aid to construction. The correct approach is simply to construe an ordinary word in the context of the permission as a whole. Second, it seems to me that, as Mr Turney submits, the word "operations" more naturally refers to the composting operations for which planning permission was obtained than to vehicle movements. It is true, of course, that the reason for the

condition refers to "traffic generated". But the restriction on deliveries would itself affect the generation of traffic, as would the commencement of operations (see above); it is unnecessary to take the reason for the condition as indicating that the condition precludes mere departure of vehicles. Third, Original Condition 2 is in two parts, dealing respectively with deliveries and operations. This naturally suggests that deliveries were distinguished from operations. The second part of the condition could easily have said "no other operations", or words to similar effect, to distinguish one kind of operation (i.e. deliveries) from all other kinds. That it did not do so confirms that deliveries and operations are two different things for the purposes of the condition. Fourth, if deliveries were made to the site by means of HGVs that were stored or garaged off-site (and there is no reason I can see why they could not be), the preliminary movements of those HGVs from their depot to collect waste would, at least as regards the composting, not be subject of planning control and not be "operations". Fifth, as the interested party's planning agent had observed, the movement of HGVs would not generally be subject to time-restrictions, and it is unclear why such a restriction should be inferred in this instance. If an HGV, having made a delivery, were present overnight at the 2009 Site and left early in the morning to go on general farm business, unrelated to the composting, it would in my view be hard to see how its departure could be said to be in breach of the planning condition. If that is so, it is difficult to see what could be the justification for restricting the mere departure of the vehicle for a different purpose. This indicates that the condition ought not to be construed as the claimant construes it. Sixth, if (contrary to my view) extraneous material is admissible as an aid to construction, it must be limited to the 2009 Officers' Report; the 2017 Officers' Report cannot be relevant to the construction of a 2009 planning permission. Paragraph 6.14 of the 2009 Report would not, as it seems to me, justify extending the meaning of "operations" more widely than the inclusion of deliveries, which (subject to what is said above) at least might arguably be included on the basis that they involve the importation into the site of the waste material whose processing is the very subject-matter of the permission. It would not follow that the unqualified reference to vehicle movements ought to be construed as an attempt to limit movements that would not generally require any special permission.

65. Accordingly, New Condition 1 had the effect of clarifying the effect of Original Condition 2 and defining more precisely what was prohibited. It did not permit the operation of the composting provision free of an existing prohibition on early-morning vehicle movements.

66. For the claimant, Mr Westaway submits that the mistake in paragraph 8.10 of the 2017 Officers' Report was nevertheless material, because the matter of early-morning vehicle movements was squarely before the Committee and it was open to the Committee to impose a new restriction; see the dictum of Schiemann LJ in the *Powergen* case, set out above. The effect of the error in the Officers' Report was to lead the Committee not to consider the matter. It cannot be said to be highly likely that the outcome would not have been substantially different if the error had not been made.

67. I do not think that it is a sufficient answer to Mr Westaway's submission to say, as does Mr Turney, that the imposition of a new restriction would have been redundant because the existing 2009 Permission contained no such restriction and constituted a subsisting baseline of which the interested party could have taken advantage. Mr Turney points to the fact that the applications for variation of the conditions were made separately;

this seems to have been deliberately for the purpose of limiting the adverse effects of rejection of any part of what was being asked for. However, as it was entitled to do, the Committee dealt with the section 73 applications together and in each case granted planning permission subject to an entire suite of conditions. Thus, for example, the interested party could not take the benefit of the variation of Original Condition 6 without accepting the burdens of any new restriction by way of variation of Original Condition 2. In other words, it would in principle have been open to the Committee to approve a relaxation on the number of vehicle movements only as part of a package that included a new restriction on the times of vehicle movements. The interested party would not have been obliged to take advantage of the former, but if he did he would have had to become subject to the latter.

68. Nevertheless, I reject Ground 2. Although it is no doubt correct to say that the final sentence of paragraph 8.10 of the Officers' Report is literally incorrect, it seems to me that, if the Report and the ensuing decision are considered together and in a sensible manner, it is impossible to say that there was a material error of law.

69. The terms of the condition being proposed by the interested party were very clear; indeed, the whole point of the application was in order to be very clear about what was and what was not included in the restriction. The Committee looked closely at the terms of the condition: this is known, because the minutes of the meeting on 26 October 2017 shows that there was "discussion of Application 2 regarding the proposed more precise condition" and that a resolution was passed that approved wording slightly different from that applied for. The condition applied for by the interested party contained the words "onward transmission to maturation pads", but the Committee added the word "approved" before "maturation" and the words "within the Blackbirds Farm operation" after "pads". The purpose of that alteration was presumably to ensure that, if the approved maturation pads were within the agricultural operation, even if not within Blackbirds Farm *stricto sensu*, onward transmission would not be permitted outside specified hours. In this sense the condition as approved, and even I think as proposed, did control early-morning vehicle movements. It did not control early-morning movements of HGVs. That, however, was entirely obvious from the text of the condition and I do not think that it can be right or fair to suppose that the Committee misunderstood this point. Further, there is nothing irrational in restricting movements concerned with the transmission of the compost from the silage pits to the maturation pads while leaving unrestricted the departure of the empty HGVs; an obvious rationale is set out in the passage quoted at paragraph 59 above.

70. Accordingly, I do not accept that the defendant made any material error in dealing with the interested party's application for a variation of Original Condition 2.

71. If I had thought that a material error had been made, I would nevertheless have refused relief on the ground that it was highly likely that the outcome would not have been substantially different if the mistake had not been made. Very shortly the reasons for this conclusion would have been: first, the limited nature of the mistake; second, the close attention paid to the wording of the condition; third, the fact that no existing restriction on early-morning vehicle movements was being removed; fourth, the absence of objections from the Highways Authority and the borough council's Environmental Health officers to the application; fifth, the fact that the condition and other conditions made provision for control of output, noise emission, total HGV

movements, and early-morning movement of compost to maturation beds; and sixth, the merit of the argument raised by the interested party (see above).

Ground 3

72. Ground 3 is that, in approving the application for the maturation pad at Broad Field, the defendant misunderstood Green Belt policy and/or gave inadequate reasons as to why it considered Green Belt policy to be satisfied.

73. In its Summary Grounds of Defence the defendant accepted the validity of Ground 3 and that the Broad Field permission should be quashed as a result: "Members were wrongly advised that the proposal should be treated as not being 'inappropriate development' in the Green Belt for the purposes of the National Planning Policy Framework. This was a misdirection which was capable of being material to the outcome of the case. Accordingly, the defendant proposes that the Broad Field Permission be quashed by consent." The interested party, too, in his Summary Grounds of Resistance dated 15 February 2018, consented to the quashing of the Broad Field Permission, though only on this ground. The parties were unable to agree the terms of a consent order, however, because the claimant sought to have the Broad Field permission quashed also on Grounds 4 and 5, which I deal with below.

Ground 4

74. Ground 4 is that, in deciding both to vary Original Condition 5 (New Condition 4) in the 2009 Permission and to impose condition 7 on the Broad Field Permission, so that the compost was to be used on the land of the Blackbirds Farm "enterprise" rather than at Blackbirds Farm itself, the defendant failed to have regard to the need to ensure that the compost was intrinsically linked to the agricultural operation at Blackbirds Farm.

75. The use of the word "enterprise" was not sought by the interested party in either the application for variation of the conditions on the 2009 Permission or the application for the Broad Field Permission. The minutes of the Development Control Committee's meeting on 26 October 2017 record that members "were advised the wording should refer to Blackbirds Farm enterprise" rather than Blackbirds Farm.

76. The claimant complains that the effect of the variation is to ignore the purpose of original condition 5, namely to ensure that the composting operation was justified in scale and nature and proportionate to the farm on which it took place. The reason for the imposition of the condition was stated to be "the interests of the amenity of nearby residential properties". The claimant says that the use of the word "enterprise" enables the interested party to transport compost to sites further afield if he can merely show a financial connection to the business carried on at Blackbirds Farm. (Garston is a good example of land that might fall within the new condition but would not fall within the original condition.) He submits that the insertion of the word was unlawful because it came about without any prior consultation, without explanation, reasons or proffered justification, and without any apparent consideration of the implications that the

transportation of compost off Blackbirds Farm would have for the amenity of local residents.

77. The defendant submits that the purpose of Original Condition 5 was to ensure sustainability of the composting operations rather than to control vehicular movements. The use of the word "enterprise" simply adds clarity and makes clear that the interested party can use compost within his own farm holding but cannot sell it. The interested party advances a substantially similar case.

78. I agree with the claimant that the use of the word "enterprise" does extend the scope of the land on which the compost can be used. The interested party points to the fact that, when he applied for the 2009 Permission, the acreage of Blackbirds Farm as set out in the supporting statement submitted by his planning agent was achieved only by counting the land at Garston. I do not see that this fact, if correct, can determine the meaning of "Blackbirds Farm" in the 2009 Permission. The use of that description is apt to have regard to a geographical entity rather than to the extent of a business carried on over what may be widely separated and ever-changing sites. In my view the name "Blackbirds Farm" referred to the contiguous area of land readily identifiable by that name and indeed so designated on all the plans I have seen regarding the planning applications in 2009 and 2017.

79. However, there is in my judgment nothing irrational or improper in the variation that was made. The production of compost was limited by another condition (Original Condition 3, New Condition 2) and remained unaltered. Vehicle movements and noise were dealt with by other conditions. The stated reason for the imposition of Original Condition 5 was "the amenity of nearby residential properties", but regard must be had to the other controls provided by the 2009 Permission as a whole. The justification for the re-written condition was squarely and properly stated in terms of the appropriate use of agricultural land in the Green Belt. The farmer is permitted to produce compost for use on his own agricultural land in the Green Belt, but he is not permitted to produce it as an independent commercial venture. It may also be noted that the movement of bought-in compost from Blackbirds Farm to Garston by the interested party as proprietor of both holdings would be outwith the proper scope of planning control.

80. For the claimant, Mr Westaway submitted that the decision to introduce the word "enterprise" without consultation was a breach of procedural justice and prejudiced the claimant by denying him the opportunity to explain his concerns on the matter. He relied on the judgment of Mr John Howell Q.C., sitting as a deputy High Court judge, in *R (Holborn Studios Limited) v The Council of the London Borough of Hackney* [2017] EWHC 2823 (Admin), where the conflation of what the deputy judge described as the substantive and procedural constraints on the powers of local planning authorities to grant permission in terms differing from those applied for was disapproved. The deputy judge said:

> "79. In considering whether it is unfair not to re-consult, in my judgment it is necessary to consider whether not doing so deprives those who were entitled to be consulted on the application of the opportunity to make any representations that, given the nature and extent of the changes proposed, they may have wanted to make on the application as amended.

> 80. I do not accept that the test for whether re-consultation is required if an amendment is proposed to an application for planning permission is whether it involves a 'fundamental change' and involves a 'substantial difference' to the application or whether it results in a development that is in substance different from that applied for. These are three potentially different tests that have been suggested as stating the substantial constraint on what changes are impermissible. Depending on how each is interpreted, it is possible that the test would indicate re-consultation was not required when fairness would require it. As I have explained, even if the proposed amendment was not of any these types, a person may still have representations that he or she may want to make about the changes, given their nature and extent, if given the opportunity. In my judgment it is preferable to ask what fairness requires in the circumstances.
>
> 81. Although a local planning authority has a discretion whether to accept an amendment to a planning application and a discretion whether or not to grant planning permission for only part of what the application was for or subject to any condition, in my judgment what fairness may require of them in the circumstances is a question which it is ultimately for the court itself to determine. It is not the function of the court merely to review the reasonableness of a decision-maker's judgment of what fairness required: see eg *R (Osborne) v Parole Board* [2013] UKSC 61, [2014] AC 1115, per Lord Reed JSC at [65]."

81. When considering whether fairness requires re-consultation, a public body will have particular regard to the manner in and extent to which what is now proposed differs from what was originally consulted on. In *Keep Wythenshawe Special v NHS Central Manchester CGC* [2016] EWHC 17 (Admin), Dove J said at [75]:

> "The requirements of fairness in considering whether or not to re-consult must start from an understanding of any differences between the proposal and material consulted upon and the decision that the public body in fact intends to proceed to make. This is because there will have already been consultation. The issue is, then, whether it is fair to proceed to make the decision without consultation on the differences, which will therefore be heavily influenced in this particular context by the nature and extent of the differences."

82. In my judgment, the defendant was not required to re-consult before deciding to include the word "enterprise" in the relevant conditions. No alteration was being made as to the extent of the land that the interested party farmed and to which he was entitled to travel to and fro. No alteration was being made as to the permitted output of compost. Vehicular movements and residential amenity were squarely raised by the claimant, who had made his complaints known, and gave rise to no complicated issues. The contention that there was unfairness in failing to give an opportunity for substantially the same points to be raised again by reference to a modification of wording represents an over-elaborate legalism.

Ground 5

83. Ground 5 is that, in approving the Broad Field application without any control on operating hours, the defendant acted irrationally and/or failed to have regard to material considerations.

84. The Officers' Report had recommended that no processing of green waste at the maturation pad should take place outside specified hours. The reason for the proposed condition was: "To minimise any adverse impact of operations on the surrounding area in terms of noise and general disturbance." The Report summarised the objections to the proposed development, including the comment that: "The proposal that the farmer should be able to operate at any hour of day or night and not be restricted by condition is absurd."

85. However, the supporting statement submitted by the interested party's planning agent objected to a condition on operating hours:

> "4.5.1 Because operations cannot commence in the former silage pits before 7.30am (in accordance with condition no. 2 of 0/1097-09) it is not possible to transfer material from the reception centre to the Broad Field maturation pad earlier than 7.30am.
>
> 4.5.2 As stated in the Notice, there is no time limitation on the hours during which material can be turned, screened etc whilst on the pad. Because the composting activity is essentially ancillary to agricultural operations, work on the pads generally has to be fitted in around normal farming activities. In the winter this will be limited to relatively short, daylight hours but in the summer months, and especially during the busy harvesting period, work on the pad may occur well into the evening. However, it is not possible to readily discern a difference between any turning activity on the pad and many other agricultural activities which can legitimately take place. Moreover, once the material on the pad is fully matured and has reached PAS 100 standard, it becomes an agricultural product and hence cannot be subject to controls.
>
> 4.5.3 It is thus apparent that it is not necessary to seek to control activity at the pad by way of a condition and nor would any such condition be enforceable because of the impossibility of being able to detect a contravention due to the inability to differentiate between material that has / has not reached PAS 100 standard. Hence all of the tests set out in paragraph 206 of the NPPF could not be met. Furthermore, a condition is not necessary to make use of the pad acceptable in planning terms."

86. The Committee rejected the officers' advice to impose a condition on operating hours. The relevant part of the minutes of the meeting of 26 October 2017 reads:

> "The Committee discussed the possible removal of Condition 7 of the Maturation pad application … as Members were concerned that operations at the maturation pad, particularly turning, would be constrained by hours of operation, which could have a more significant affect upon the impact from odour. Following a vote by show of hands, the motion was CARRIED (For: 5; Against: 4)."

87. In agreement with the submissions of Mr Turney and Mr Streeten, I see no basis for interfering with the decision of the Committee, with whom the decision lay. It heard representations from an objector and from the applicant's agent and took an intelligible conclusion, which was open to it. It is impossible to say that the decision to reject the officers' advice was so unreasonable that no reasonable planning authority could have made it. In reality, Ground 5 is a challenge on the planning merits. I reject it.

Conclusion

88. For the reasons set out above, I reject the challenges on Grounds 1, 2, 4 and 5. It is common ground that Ground 3 is made out.

89. Therefore, the challenges to the two decisions under section 73 fail.

90. As for the decision under section 73A to grant the Broad Field Permission, the defendant and the interested party had previously expressed their consent to an order quashing the decision: see paragraph 73 above. However, at the hearing before me Mr Turney and Mr Streeten submitted that I ought to reserve the question of remedy, in view of the anticipated revisions of the National Planning Policy Framework, which were expected to effect a change of policy such that, if the erroneous advice given by the officers to the Committee in October 2017 were to be repeated now, it would be correct. It was submitted that in those circumstances a quashing order ought to be refused in the exercise of the court's discretion.

91. In my judgment, the convenient course is to quash the Broad Field permission on Ground 3. First, the decision was required to be taken on the basis of the law and policies applicable at the time of the decision. Second, the Committee did not consider any revised policy or any factors affecting the operation of such a revised policy. Third, there are other matters before the Committee regarding the composting operations at Blackbirds Farm. The defendant has expressed a desire to consider matters "holistically" and ought to take the opportunity to reconsider the application in respect of Broad Field properly in the light of the policy applicable to it.

92. This judgment is handed down in the absence of the parties. As the parties have not been able to agree what consequential orders ought to be made, I shall give directions for the filing of written submissions with a view to determining any outstanding matters on the papers.