Neutral Citation Number: [2018] EWHC 238 (Admin)

Case No: CO/3051/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 February 2018

Before :

MRS JUSTICE LANG DBE

- -

Between :

THE QUEEN **on the application of**	**Claimant**
TIMOTHY STEER	
- and -	
SHEPWAY DISTRICT COUNCIL	**Defendant**
(1) DAVID WESTGARTH **(2) LUCY WESTGARTH**	**Interested Parties**

- -
- -

Marc Willers QC (instructed by **Richard Buxton**) for the **Claimant**
Daniel Stedman Jones (instructed by **LRS Solicitors & Planning Consultants**) for the **Defendant**
Megan Thomas (instructed under the **Direct Access Scheme**) for the **Interested Parties**

Hearing date: 25 January 2018

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Approved Judgment

Mrs Justice Lang :

1. The Claimant applies for judicial review of the decision by the Defendant ("the Council") on 18 May 2017 to grant planning permission to the Interested Parties ("the IPs") for a holiday park on their land at Little Densole Farm, Canterbury Road, Densole, Kent, CT18 7BJ ("the Site").

2. The Claimant lives near to the Site and objected to it in the planning application procedure.

3. The Site comprises about 13.5 acres (5.5 ha) of agricultural land. It is located in open countryside to the east of the village of Densole, within an area designated nationally as the Kent Downs Area of Outstanding Natural Beauty ("AONB") and locally designated as a Special Landscape Area ("SLA").

4. The application was validated on 10 June 2016. It was considered by the Council's Planning and Licensing Committee ("the Committee") on 28 February 2017. The Officer's Report ("OR") recommended that the application should be refused. However, the Committee resolved to grant the application. Planning permission was granted for 12 holiday lodges, a reception building, a store building, formation of a fishing lake, a car park, tennis courts, a children's play area and a putting green.

5. Wyn Williams J. granted permission to apply for judicial review on grounds 1, 2 and 3 only. He refused permission in respect of the challenge to Local Plan Policy TM4 and to the screening opinion under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011.

6. At the start of the hearing, I ruled that the witness statements from Mr Geering, Head of Planning, and Ms Claire Dethier, Development Management Team Leader, at the Council, were not admissible because they gave *ex post facto* reasons for the decision in an attempt to answer the Claimant's criticisms in the litigation. Applying the principles and authorities helpfully set out by Green J. in *Timmins v Gedling BC* [2014] EWHC 654 (Admin), at [109] – [114], I concluded that they were self-serving statements, intended to "plug the gap" in the Defendant's contemporaneous documentation, and so were inadmissible. Part of their evidence purported to give an account of what was said at the meeting which could, in principle, have been admissible. However, their accounts were inconsistent with each other, not supported by any contemporaneous notes, and also hotly contested by Councillors Lawes and Govett who were present at the meeting and opposed the development. In those circumstances, I could not treat any of their witness statements as a reliable record of the meeting. For the same reasons, I also ruled that Mr Westgarth's witness statement, giving his account of the meeting, was inadmissible *ex post facto* evidence and not a record which could be relied upon.

7. The Claimant and Defendant agreed that the Claimant's note of the Committee's meeting of 28 March 2017 was accurate and the IPs did not identify any inaccuracy. It was relevant and so I admitted it in evidence.

The Committee's decision

8. The only record of the Committee's decisions was in the minutes – there was no recording and no contemporaneous note taken.

9. The minutes of the Committee's meeting of 28 February 2017 stated:

> "**2. Y16/0623/SH: Little Densole Farm, Canterbury Road, Densole**
>
> Siting of 12 holiday lodges and erection of a reception building and a store building, together with formation of a fishing lake, a car park area, tennis courts, a children's play area, and a putting green, to create a tourism site.
>
> …..
>
> Mr Joseph Wright, a local resident, spoke in favour of the application. He said this development would boost the local economy and that although the site is in an AONB, trees and shrubs would be planted and this site would be an excellent opportunity to 'show off'' the AONB.
>
> Councillor Godfrey, the Ward member, spoke in favour of the application. He was encouraged by the fact that this development seems to be sensitive to its surroundings, is of high quality and will attract tourism.
>
> Mr Jonathan Moore Lambe, the agent for the applicants spoke on their behalf. Mr Moore Lambe explained this is an exclusive holiday facility aimed at wheelchair users. He mentioned it would be an excellent facility to be promoted to tourists visiting Kent.
>
> Councillors, having regards to the requirements of Development Plan policy and Government advice set out within the NPPF felt that, on balance, the development would conserve and preserve the scenic beauty of the AONB whilst also providing significant employment and tourism benefits and enhancing the North Downs and wider district. Councillors considered that the AONB location was suitable and that the application demonstrated that there would not be harm to the AONB, which is given the highest status of protection in the NPPF. Councillors considered the development therefore complied with policy and constituted sustainable development.
>
> Proposed by Councillor Dick Pascoe
> Seconded by Councillor Peter Simmons and
> **RESOLVED that planning permission be granted and the Head of Planning be granted delegated authority to**

> **negotiate with the applicants the detail of the conditions to be imposed.**"

10. When the draft minutes were submitted to the Committee for approval, at their next meeting on 28 March 2017, Councillor Lawes objected to them on the grounds that "none of this paragraph 6 was actually said within the meeting, and things that were said aren't in the minutes …. Councillor Pascoe was asked by the Head of Planning what were his reasons to [sic] approving the application because it was recommended to be refused and Cllr Pascoe said he wanted to overturn everything that was recommended to be refused. No other comment was made than that….." Councillor Lawes was supported by Councillor Govett.

11. In reply, Councillor Pascoe said:

> "To clarify ……what I stated was, all the reasons for refusal of the application, were my reasons for approval. So all you have to do is to just turn the wording around and that was the words I used and I am seeing nods as well, that's what I actually asked for. That the reasons for approval, were it to be opposite of my reasons for approval and that is why this is staying as it is because this is exactly what I said and asked for …"

12. A discussion took place in which Councillor Hollingsbee (who was not at the meeting) gave her explanation for the wording of the minutes:

> "This isn't what the councillors … this isn't word for word what the councillors said, this is what Ben [Head of Planning] has read back as being the reasons that councillors felt it should be approved. And that would've been agreed, because that's what we do, what we always do, as an overturn."

13. The Committee then voted to approve the minutes unamended, by 7 votes to 2, with 2 abstentions.

Legal framework

(i) Judicial review of planning decisions

14. In a claim for judicial review, the Claimant must establish a public law error on the part of the decision-maker. This may be that the Council misdirected itself in law, or acted irrationally, or failed to have regard to relevant considerations or that there was some procedural impropriety.

15. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26. An application for judicial review is not an opportunity for a review of the planning merits: *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, per Sullivan J. at [6].

16. In *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] UKSC 37, Lord Carnwath said, at [26]:

> "26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the Tesco case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."

(ii) Decision-making

17. The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. Section 70(2) of the Town and Country Planning Act 1990 ("TCPA 1990") provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application.

18. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise."

19. National policy expressed in the National Planning Policy Framework ("NPPF") is a material consideration.

20. The duty under the equivalent Scottish provision was explained by Lord Clyde in *Edinburgh City Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at 1459:

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will be required to assess all of these and then decide whether in light of the whole plan the proposal

> does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

21. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] P.T.S.R. 983, in which it rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. Development plans should be interpreted objectively, in accordance with the language used, read in its proper context. They should be followed unless there is good reason to depart from them.

22. Lord Reed re-affirmed well-established principles on the requirement for the planning authority to make an exercise of judgment, particularly where planning policies are in conflict, saying at [19]:

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann)….."

(iii) Statutory and national planning policy protection of AONB

23. Section 85(1) of the Countryside and Rights of Way Act 2000 provides that:

> "In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty."

24. That duty is reflected in NPPF [115] and [116] which state:

> "115. Great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty. The conservation of wildlife and cultural heritage are important considerations in all these areas, and should be given great weight in National Parks and the Broads."

> "116. Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of:

> - the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
> - the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and
> - any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

Grounds for judicial review

25. The Claimant's grounds for judicial review were as follows:

    i) The Council failed to consider or apply NPPF [116] when deciding the application.

    ii) The Council reached an irrational conclusion that the proposed development would not harm the Kent North Downs AONB.

    iii) The Committee was under a common law duty to give reasons for its decision, as it was not following the OR's recommendation, and the application concerned a protected AONB. It failed to provide adequate and intelligible reasons for its decision to grant planning permission.

26. In response, the Defendant submitted that the Committee members had ample information before them to enable them to make an informed decision on the issues in

this application, and the Claimant's challenge was an impermissible challenge to the Committee's planning judgment. The Defendant accepted that it was under a common law duty to give reasons, but submitted that the reasons for its decision, set out in the Minutes, were both adequate and intelligible. The IPs supported the Defendant's response.

Conclusions

Ground 1

27. NPPF [115] applies to all development within an AONB whereas the more stringent requirements of NPPF [116] only apply to "major developments". The OR concluded that NPPF [116] could apply, though it might not. In my view, the Committee had to decide whether NPPF [116] did apply, and if so, it was a material consideration to take into account in making its decision.

28. The OR addressed the guidance in the NPPF at paragraph 8.18:

> "8.18 Overall, whilst the proposal has potential to provide a new tourism offer, and income and employment benefits to the local economy, it is not on balance in this instance not considered to outweigh the harm, of being a development in an unsustainable location which fails to conserve the landscape and scenic beauty of the AONB. It is considered there may be sites better suited to accommodate this type of development in the district, without the same level of harm, however, no examination of sequentially preferable sites has been provided in conflict with paragraph 118 of the NPPF which seeks to direct development to alternative sites with less harmful impacts. It has not been demonstrated that there would be no scope for the development outside of the AONB or on less sensitive sites. As such, whilst acknowledging there may be some wider economic benefits to the local economy; on balance in the light of the harm to AONB in conflict with paragraph 115 of the NPPF the proposal is unacceptable in planning terms. Further to this, officers have concerns that the proposal would not meet the requirement of paragraph 116 of the NPPF in terms of representing an exceptional circumstance for not refusing a major development in a designated area; or to be sufficiently demonstrated to be in the public interest given the level of local opposition; or failing to demonstrate the potential for other suitable sites being available within the district. Whilst the NPPF fails to define the phrase 'major development' in this regard, recent appeal decisions across the country have identified that developments of a scale of 20-30 homes within the AONB, in semi rural residential areas can fall foul of the presumption against major development in nationally designated landscapes as set out in paragraph 116. Whilst this proposal being considered is for a smaller quantum

> of development an inspector could reach the view that paragraph 116 of the NPPF applies to this site. On balance, in this instance officers consider that paragraph 116 of the NPPF could be considered to apply, however an Inspector could formulate a different view on this at appeal."

29. The OR provided the Defendant's Committee with the following summary of the reasons for recommending that the planning application be refused:

> "9.0 SUMMARY
>
> 9.1 Economic and tourism development is supported in principle as set out in local and national policies, and paragraph 28 of the NPPF seeks to support economic growth in rural areas in order to create jobs and prosperity. Whilst the application has demonstrated a generic demand for this kind of high end holiday facility, it is not robustly demonstrated that there is a specific need in this particular AONB countryside location, or that there are not better sites elsewhere in locations that are not designated. Given the rural location within the protected AONB, the impact of this major application on the wider environment is a significant consideration. The NPPF makes it clear that the planning system should carefully balance economic, social and environmental considerations in the decision making process, and this is discussed in detail throughout the report.
>
> 9.2 Paragraph 115 of the NPPF requires that great weight is given to conserving landscape and scenic beauty in the AONB, which has the highest status of protection, and Core Strategy CSD4 requires planning decisions to have close regard to the need for conserving and enhancement of natural beauty in the AONB, which will take priority over other planning considerations. On the basis of these key policy requirements and other local plan and national policy requirements set out in this report, and the significant harm to the landscape and scenic beauty of this nationally important landscape identified in this report, great weight should be attached to the statutory requirement to have regard to the purpose of conserving or enhancing the natural beauty of the AONB. The economic benefits do not in this instance amount to exceptional circumstances to warrant not refusing the application as required by paragraph 116 of the NPPF, and the application does not sufficiently justify an overriding need for this major development in this particular location, or why an exception to planning policies to protect the countryside and the AONB designation should be made in this instance. As such, on balance the officer assessment of this proposal, in accordance with national and local plan policy is required to give great weight for the protection of the designated AONB, which, in

> this instance, the harm to outweighs the clear economic/tourism benefits of the proposal.
>
> 9.3 In the light of the above, and the detailed case put forward in this report, it is considered the development does not comply with local plan policies or the NPPF, and therefore, in accordance with Section 38(6) of the Town and Country Planning Act 2004 the proposal is contrary to development plan policy and the planning application should therefore be refused."

30. The OR concluded with the recommendation that planning permission be refused for two reasons. The first reason identified the harm which the proposed development would cause to the AONB, contrary to the local development plan and NPPF [115]. The second reason was as follows:

> "The Site is located within the open countryside outside of the settlement hierarchy and within the AONB and Special Landscape Area which is awarded the highest status of national protection. In the absence of a convincing justification, the application fails to demonstrate a robust need for the development in this location and that it cannot be provided in or adjacent to an existing rural service centre elsewhere, or that it essentially requires an open countryside location within the designated AONB. It is therefore considered that there remains significant uncertainty that this major proposal can create a sustainable visitor destination and not result in unnecessary development in the countryside that would be harmful to the character of the landscape and surrounding environment. As such, it is considered that the development is contrary to saved policies ….. of the Shepway District Local Plan Review….the Shepway Core Strategy Local Plan, and the National Planning Policy Framework paragraphs 28, 109 and 115 and is considered to be contrary to policies ….. of the Kent Downs AONB Management Plan that advise that planning permission should be refused in these designated areas except in exceptional circumstances and where it can be demonstrated that they are in the public interest and essentially require an AONB countryside location." (emphasis added)

31. Mr Willers QC persuaded me that, although the second reason referred to NPPF [115], not NPPF [116], that must have been a typing error because the wording of the second reason closely followed the criteria in NPPF [116], as highlighted in the underlined passages above.

32. Although disputed by the IPs in their skeleton argument, I consider that it is clear that the OR did treat NPPF [116] as applicable to the proposed development, at paragraphs 8.18, 9.2 and in the Recommendations, whilst properly advising the Committee that an inspector might take a different view on appeal. The IPs were also incorrect to state in their skeleton argument that neither the Kent Downs AONB Unit, nor the

Council for the Protection of Rural England Kent Branch, relied upon NPPF [116] in their objections to the proposed development.

33. The Defendant and IPs relied upon the reports lodged in support of the IPs application, which presented a different view to the OR. The IPs' application was supported by a 'Design and Access Planning Statement' ("Planning Statement") and a 'Landscape and Visual Impact Assessment' ("LVIA").

34. On my reading, these documents considered the impact of the proposed development on the AONB, but did not expressly refer to the application of NPPF [115] or [116] to the proposed development.

35. The Planning Statement described the development as a "small-scale" holiday park, which, as the Defendant and IPs submitted, was clearly relevant to the question whether it was a "major development" falling within NPPF [116].

36. The Planning Statement referred on a number of occasions to the Site's location with the AONB, and the need to avoid any detrimental impact upon the AONB. At paragraph 1.03, it advised:

> "The site is therefore exceptionally well screened with virtually no views into the site from without - with the additional planting proposed, this would ensure that there would be no detrimental impact upon visual amenity or the AONB."

37. In the section headed "Policy Context, Appraisal and General Supporting Information", the Planning Statement considered the Local Plan policies, and concluded that the proposal accorded with Policy CSD4. Regrettably, in the Appendix setting out CSD4, it omitted some key words from the policy, which are underlined below:

> "e Planning decisions will have close regard to the need for conservation and the enhancement of natural beauty in the AONB and its setting, <u>which will take priority over other planning considerations</u> …"

38. The Planning Statement went on to say:

> "20.10 As the development would not be highly prominent in the landscape and as it is set against the backdrop of the woodland, the development will have limited visual impact and accordingly, the proposal also accords with the NPPF.
>
> 20.11 Furthermore, given the limited harm to the countryside and AONB, in this special and unique instance, the wider economic benefits to employment and the local economy would represent and result in additional revenue streams which would outweigh any limited harm. As such, given the support in local policy CSD3 and national planning guidance for sustainable rural tourism, it is considered that the limited harm would be outweighed by the economic benefits in policy terms.

> Therefore, whilst accepting the weight given to protecting the AONB landscape, it is considered that in this instance for the reasons set out above, the proposal does not warrant refusal on the grounds of the impact on the AONB – and that any impact of the development can be mitigated by the nature of the landscaping and appearances of the Lodges proposed. These factors can all be controlled by appropriate Conditions on any approval."

39. The scope of the LVIA was to assess the potential landscape effect and visual impact of the proposed holiday park on the landscape and visual resources of the area (paragraph 1.3). As the Claimant rightly submitted, the LVIA did not carry out a full assessment of the impact that the proposed development would have upon the existing character of the Site, given its location in the AONB. In a detailed analysis the LVIA concluded that the development had negligible landscape effects and slight to negligible visual impact impacts. Although the LVIA provided recommendations to conserve and protect the AONB, it did not expressly refer to, or apply, NPPF [115] or [116].

40. In my view, the detailed OR and the reports provided by the IPs gave the Committee sufficient material to enable it to decide whether NPPF [116] applied, and if so, to what effect. There is no definition in legislation or the NPPF of the term "major development" for these purposes. In *Aston v Secretary of State for Communities and Local Government* [2013] EWHC 1936 (Admin), Wyn Williams J. said, at [93], that "[t]he word major has a natural meaning in the English language albeit not one that is precise". In *R (The Forge Field Society) v Sevenoaks District Council* [2014] EWHC 1895 (Admin), Lindblom J. held, at [69], that the meaning of "major development" was a matter of planning judgment. In my view, the question as to whether or not this particular proposal was a "major development" could have been decided either way, on the evidence. On the one hand, there would only be twelve lodges, but on the other hand, this was a sizeable holiday park, with construction of a reception building, a store, a fishing lake, a car park, tennis courts, a children's play area and a putting green, on what was agricultural land, located next to a wood classified as Ancient Woodland. In the light of the OR, and the numerous objections, it needed express consideration by the Committee.

41. Although the Planning Statement and LVIA did not address NPPF [115] and [116] directly, and misstated Policy CSD4, I consider it unlikely that these defects misled the Committee. The OR provided detailed and reliable advice on the relevant policies. Moreover, Planning Committee members are an informed readership and can be expected to have knowledge of local and national planning policies (*R v. Mendip DC ex p. Fabre* (2000) 80 P & CR 500, per Sullivan J. at 509) and the statutory tests (*Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* 18 April 1997, per Pill LJ).

42. The minutes of the meeting referred to "Government advice set out within the NPPF". I do not consider that the absence of an express reference to NPPF [116] necessarily meant that the members did not consider it. However, the absence of any reference to the criteria for the application of NPPF [116], in particular, whether or not the proposed development was a "major development", raises a real doubt in my mind as to whether the members did give proper consideration as to whether it applied, and if

so, to what effect. Moreover, when the draft minutes were considered, in some detail, at the next meeting on 28 March 2017, no one suggested that consideration of NPPF [116] had taken place but had been omitted from the minutes.

43. However, because of the lack of any reliable record of the meeting, I cannot be satisfied, on the balance of probabilities, that the Committee did not consider NPPF [116], and since the burden of proof rests upon the Claimant, his challenge under Ground 1 does not succeed.

Ground 2

44. The Claimant submitted that the Committee's conclusion, in the Minutes, that "the application demonstrated that there would not be harm to the AONB", was irrational, in the light of the OR and the assessment in the LVIA.

45. The OR noted the Kent Downs AONB Unit's objection to the proposed development on the grounds that it would fail to conserve and enhance the local character, qualities and distinctiveness of the AONB:

> "It is considered by the AONB Unit that the introduction of the proposed facilities in this open countryside location would result in the introduction of incongruous features in this open rural landscape that would negatively impact on the open rural landscape character of this part of the Kent Downs AONB. The development would also introduce activity including evening and night time use which necessitates the introduction of lighting in an area that is currently unlit. Taking these factors into account, the findings of the LVIA and conclusions of the Design and Access Statement submitted in support of the application are not agreed with it and it is considered that the proposal would fail to conserve and enhance the local character, qualities and distinctiveness of the AONB. It is not considered that the impacts could be satisfactorily mitigated by landscaping."

46. The OR noted that the Defendant's Landscape and Urban Design Officer had also objected, stating that:

> "… The design for the facility has been carefully considered. In itself the low density of buildings, suggested landscaping and choice of native species would provide for a pleasant environment. However the location of the facility is an issue in terms of the impact the development would have on the existing character. The site is part of a strip of open land that acts as a band running between Densole and Reinden Woods, the value of which should not be underestimated. This is especially important in the context of the AONB. If permission were granted this development would introduce a different element to the landscape, which would fragment the landscape through the introduction of solid form; mainly the landscaping.

> The scale of the site in the context of its surroundings in conjunction with the relatively geometric nature of the site boundary will make it stand out within the area despite the use of native species. This being the case the suggested location might not be the best in terms of protecting the character of the AONB. Another issue that is a product of the choice of the location is the relatively long entrance drive, which is shown as an avenue. The avenue would also fragment the open nature of the general area. The construction and operation of the site is also something that needs to be considered. The construction period will be temporary and will cause disturbance but the operation of the site will be the most significant issue. The introduction of vehicular traffic will impact on the site, as there is currently no vehicular traffic any increase will be significant. The movement and noise generated by this traffic even at low levels will have a detrimental impact on the area / AONB. The length of the drive that is proposed will exacerbate this. One of the intrinsic qualities of this landscape is its tranquillity which is compatible with its scenic qualities.
>
> [The] benefits of this development need to be considered against its impact on the area / AONB."

47. Section 8 of the OR gave detailed consideration to the potential harm to the AONB. In the Summary at paragraph 9.2 (quoted above), the OR referred to "the significant harm to the landscape and scenic beauty of this nationally important landscape identified in this report", contrary to local and national policies. In its Recommendation, at paragraph 1, the OR stated:

> "….the proposed development would be harmful to the unspoilt character of this exceptional landscape setting, failing to conserve its landscape and scenic beauty. In addition activity associated with the use would be likely to lead to further erosion of the area's special character of tranquillity and dark skies. Installation of lodges not of a design informed by the local vernacular, a lake, car parking and recreational facilities would detrimentally weaken the characteristics and qualities of the natural beauty and landscape character, disregarding the primary purpose of the AONB designation, namely the conservation and enhancement of its natural beauty. …."

48. As set out under Ground 1 above, the Applicant's Planning Statement concluded that there would not be any detrimental impact upon the AONB and there would only be "limited harm" to the countryside and the AONB.

49. The LVIA's assessment of harm was summarised in its conclusions, at page 46 – 49, as follows:

> "**6.1 LANDSCAPE EFFECTS AND VISUAL IMPACTS**
>
> …

- The effects of land cover and relatively flat topography of the site and gently undulating adjacent landscape, on the visual envelope mean that there would be no long distance views (more than 1 Km) of the proposed Holiday Park with fishing lake, in year 1.

- There would be views to the western and north western half of the site from one footpath (FP HE 190.)Also, north and central part of the site from FP HE 187 as well as from various farm track ways. However, as most close range viewers are workers or recreationalists who will be on FP HE 190 angles of views will be sometimes away from the site during their walking, depending on their destination, so they are judged to have a lower sensitivity to change in views as a result.

- The enclosed nature of the site, within a moderately well woodland landscape and the restricted views in to this part of the East Kent Downs, mean that the landscape effects will be generally deemed to be negligible on the Area of Outstanding Natural Beauty (AONB) and wider countryside at year 1.

- The proposed development at Little Densole Farm is well enclosed so that it would have low to negligible landscape effects on this site.

- Landscape capacity to accommodate change as well as its capacity to accommodate enhancements in landscape condition in this part of the North Kent Downs NCA and of the East Kent Downs LCA; Elham to Alkhan, is deemed to be moderate.

- New trees in the boundary hedgerows will be planted to gap up as the land will be brought back into management. This will strengthen and enhance the landscape character, linking the site's existing hedgerows and trees to land beyond and thus enhancing the landscape setting.

- Any slight adverse landscape effects in year 1 will be mitigated by effects of planting. The mitigation planting proposed will reflect the local landscape character and species indigenous to the area. This is a moderately well wooded landscape of hedgerows and shaws, and ancient woodland with mixed farming on the plateau in this part of the LCA. By enhancing and strengthening of the present vegetation and land cover on and near the site the landscape character of the whole area will be enhanced. This planting and hedgerow management will thus also be in keeping with Alkham Dry Valleys

LCA landscape character and will further help to strengthen local landscape character of the area.

- Over time, the landscape planting and management of trees and hedgerows will enhance the landscape character of the site and its surroundings within the East Kent Downs, strengthening its capacity to accommodate change and enhancing its landscape structure.

- The mitigation planting and management will mean that the new Holiday Park with fishing lake will have negligible to slight positive landscape effects, over time to year 15. (See Table 2, in Appendix.)

6.1.1 Visual Impacts.

- The visual magnitude of change will be slight adverse for footpath FP HE 190 on Day 1. Some enhancement planting of new hedgerows and trees will mean that this will decrease to negligible or slight position by year 15.

- Enhancements in planting and management will be used to strengthen landscape condition of the adjacent land and thus will improve the views from the nearest farm track ways over time.

- In the short term, the new Holiday Park with fishing lake will have a slight adverse visual impact on some close range views from FP HE 190 and further off the footpath HE 187 and from the farm track way from the west. (See Appendix 3 – Summary of Visual impacts.) However, generally, this will decrease with mitigation planting and the visual impacts will decrease over time. These will vary depending on extent of land cover from certain viewpoints. These are largely confined to views within the farmed plateau. The main receptors of these were deemed to be farm workers who have a low sensitivity to changes in view; or dog walkers, joggers and other recreationalists who have a moderate to high sensitivity to changes in view. This is lowered to moderate/low by the oblique angle, small portion of the view experienced and small magnitude of change in the views due to the nature of those views. (See Appendix for details.)

…

- High levels of use of one of the nearest footpaths (FP HE 192 Reinden walk and bridleway were recorded during the survey, though this path is very well screened from the site along most of its length. The landscape is

> an AONB. It is thus perceived to be a valued landscape and it does have moderate to high levels of use by receptors, so perceived moderate visual sensitivity in some parts of the landscape as a result, depending on levels of use and nature of the views. Inherent sensitivity of the landscape is low, and landscape quality (or condition) is thus considered to be generally moderate to low.
>
> …
>
> - The enhancements and the use of the site for a Holiday Park with fishing lake would be a form of diversification and would be in keeping with the NPPF and some Core Policies of Shepway District Council Local Plan.
>
> - The mitigation planting will be designed to strengthen landscape character, by planting and by management, using enhancements to increase biodiversity, BY adding features which are characteristic of the North downs AONB, to add to the landscape character and will also be in keeping with the NPPF.
>
> - The tourism income and employment opportunities generated would be in keeping with the NPPF."

50. The Claimant submitted that the LVIA could not be relied upon in support of the Committee's conclusion that the proposal would not harm the AONB because it did identify some degree of harm, particularly in the early years before the growth of new hedges and trees planted as screening.

51. There was a gulf between the assessment of wide-ranging harm in the OR and the assessment of no or limited harm in the Planning Statement and low to negligible, slight adverse, harm in the LVIA. The Committee was entitled, in the exercise of its planning judgment, to prefer the assessment in the IPs' supporting reports. The minutes do not explain why members concluded that there was no harm when the OR and the objectors (some of whom had specialist expertise) identified wide-ranging harm and even the IPs' supporting reports identified some harm. The Committee also ought to have explained why it departed from the OR assessment that the development would fail to conserve and enhance the landscape and natural beauty of the area, with regard to matters not fully addressed in the Planning Statement or the LVIA. For example, the traffic, noise, lighting and activity generated by the holiday park which would erode the area's special character of tranquillity and dark skies; the impact on the adjacent Ancient Woodland; the cluttered, residential appearance of a holiday park, extending development beyond the settlement boundaries into an area of open countryside; and the loss of the openness between the woodland and the existing settlement. However, these points primarily go to support Ground 3 – the reasons challenge. As I do not know what the Committee's reasons were, I am unable to judge whether or not the Committee was acting irrationally. There is a high threshold to surmount before a finding of irrationality can properly be made. The burden of

proof rests upon the Claimant, and I consider he has failed to establish irrationality. For these reasons, Ground 2 does not succeed.

Ground 3

52. A local planning authority's statutory duty to give reasons for its decisions on applications for planning permission is set out in article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015/595) ("the 2015 Order"), which provides, so far as is material:

> "35. Written notice of decision or determination relating to a planning application
>
> (1) When the local planning authority give notice of a decision or determination on an application for planning permission or for approval of reserved matters—
>
> (a) where planning permission is granted subject to conditions, the notice must state clearly and precisely their full reasons—
>
> (i) for each condition imposed; and
>
> (ii) in the case of each pre-commencement condition, for the condition being a pre-commencement condition;
>
> (b) where planning permission is refused, the notice must state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the development plan which are relevant to the decision;
>
> ……"

53. In 2013, the Secretary of State, pursuant to his duties under the TCPA 1990, removed the duty on local planning authorities to give "summary reasons" for the grant of planning permission (Town and Country Planning (Development Management and Procedure)(England)(Amendment) Order 2013 (SI 2013/1238)).

54. However, even in cases where there is no statutory duty to give reasons, and a public body has not volunteered reasons, at common law a duty to give reasons may be implied in order to meet the requirements of fairness. As the Defendant conceded, a common law duty to give reasons arose in this case because the Committee was departing from the OR's recommendation and the application was controversial as it concerned a protected AONB.

55. The Supreme Court, in *Dover District Council v CPRE Kent* [2017] UKSC 79 has re-cast the nature of the common law duty in the following terms, per Lord Carnwath at [59] – [60]:

> "59 … However it 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 as the "specific policies" identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases.
>
> 60 Finally, with regard to Sales LJ's concerns about the burden on members, it is important to recognise that the debate is not about the necessity for a planning authority to make its decision on rational grounds, but about when it is required to disclose the reasons for those decisions, going beyond the documentation that already exists as part of the decision-making process. Members are of course entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny. There is nothing novel or unduly burdensome about this. The Lawyers in Local Government Model Council Planning Code and Protocol (2013 update) gives the following useful advice, under the heading "Decision-making":
>
> > "Do make sure that if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the planning reasons leading to this conclusion / decision. These reasons must be given prior to the vote and be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge." (their emphasis)"

56. Lord Carnwath set out the legal principles to be applied in respect of the standard of reasons at [35] to [37] and [42]:

> "35. A "broad summary" of the relevant authorities governing reasons challenges was given by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, para 36:
>
> > "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required

> depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

36. In the course of his review of the authorities he had referred with approval to the "felicitous" observation of Sir Thomas Bingham MR in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263, 271-272, identifying the central issue in the case as:

> "… whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

37. There has been some debate about whether Lord Brown's words are applicable to a decision by a local planning authority, rather than the Secretary of State or an inspector. It is true that the case concerned a statutory challenge to the decision of the Secretary of State on a planning appeal. However, the authorities reviewed by Lord Brown were not confined to such cases. They included, for example, the decision of the House of Lords upholding the short reasons given by Westminster City Council explaining the office policies in its development plan (*Westminster City Council v Great Portland Estates plc* [1985] AC 661, 671-673). Lord Scarman adopted the guidance of earlier cases at first instance, not limited to planning cases (eg

> In *re Poyser and Mills'* Arbitration [1964] 2 QB 467, 478), that the reasons must be "proper, adequate and intelligible" and can be "briefly stated" (p 673E-G). Similarly local planning authorities are able to give relatively short reasons for refusals of planning permission without any suggestion that they are inadequate."
>
> …..
>
> "42. There is of course the important difference that, as Sullivan J pointed out in Siraj, the decision-letter of the Secretary of State or a planning inspector is designed as a stand-alone document setting out all the relevant background material and policies, before reaching a reasoned conclusion. In the case of a decision of the local planning authority that function will normally be performed by the planning officers' report. If their recommendation is accepted by the members, no further reasons may be needed. Even if it is not accepted, it may normally be enough for the committee's statement of reasons to be limited to the points of difference. However the essence of the duty remains the same, as does the issue for the court: that is, in the words of Sir Thomas Bingham MR, whether the information so provided by the authority leaves room for "genuine doubt … as to what (it) has decided and why."

57. The Claimant relied particularly upon *R (Mevagissey PC) v Cornwall CC* [2013] EWHC 3684 (Admin) but in my view it has been overtaken by *CPRE (Kent).*

58. The formal 'Notification of Grant of Planning Permission to Develop Land' issued by the Council on 18 May 2017 met the requirements in article 35(1)(a) to "state clearly and precisely their full reasons for each condition imposed and in the case of each pre-commencement condition, for the condition being a pre-commencement condition". Consistently with Article 35, the Council did not give any reasons for granting planning permission.

59. The Council's Planning Committee was obliged to record minutes of proceedings at its meetings, pursuant to paragraph 41 of schedule 12 to the Local Government Act 1972, and present them for approval and signature at the next meeting of the committee. Those minutes had to be made available for inspection by the public pursuant to section 100(C) Local Government Act 1972. In this case, the minutes of the meeting of 28 February 2017 were approved at the meeting of 28 March 2017.

60. The minutes of the meeting of 28 February 2017 were, in effect, the sole reasons for the Committee's decision. It cannot rely upon the OR, since it did not follow its reasoning or recommendations. According to Councillor Pascoe, members rejected the OR in its entirety (see the minutes of the meeting of 28 March 2017 above).

61. In my judgment, the minutes failed to meet the requirements in Lord Brown's formulation in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, para 36, which is set out above in the judgment of Lord Carnwath. The

minutes did not "enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved" in respect of (1) the application of NPPF [116] (see my conclusions at paragraph 42 above), and (2) the assessment of harm to the AONB (see my conclusions at paragraph 51 above). The assessment of harm to the AONB was relevant to section 85(1) of the Countryside and Rights of Way Act 2000, NPPF [115] and [116], as well as the policies in the local development plan.

62. As I have found under Grounds 1 and 2, the Committee's reasoning did "give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds". This has prejudiced the Claimant in this claim for judicial review, since he has been unable to establish his case under Grounds 1 and 2. Therefore, I conclude that the reasons were inadequate and Ground 3 succeeds.

63. In *CPRE (Kent)*, Lord Carnwath concluded, at [68], that the Planning Committee's failure to explain the reasons for its decision, and its departure from the Planning Officer's recommendations:

> "… raises a "substantial doubt" (in Lord Brown's words) as to whether they had properly understood the key issues or reached "a rational conclusion on them on relevant grounds". This is a case where the defect in reasons goes to the heart of the justification for the permission, and undermines its validity. The only appropriate remedy is to quash the permission."

64. I have reached the same conclusion in this case. The defect in reasons goes to the heart of the justification for the planning permission and undermines its validity. I am unable to conclude, under section 31(2A) of the Senior Courts Act 1981, that it is highly likely that the outcome would not have been substantially different if the Committee had addressed its mind properly to the reasons for rejecting the matters raised in the OR and by the objectors, and to the application of the NPPF [116]. In my judgment, the decision must be quashed.

65. Costs ordinarily follow the event, and the Claimant has succeeded in his claim for judicial review and obtained a quashing order. The Defendant submits that its liability for costs ought to be reduced to 33% of the costs limit of £35,000 because (1) the Claimant was refused permission on four grounds at permission stage, and (2) the Claimant was ultimately unsuccessful on Grounds 1 and 2. The first point is well made, though of course the Defendant could only claim the relatively modest amount of costs incurred for preparation of the Acknowledgment of Service in respect of the four grounds for which permission was refused. On the second point, I consider that the Claimant is correct to submit that, even if Grounds 1 and 2 had not been pleaded as separate grounds, the issues raised under those heads would still have required detailed consideration under Ground 3, as they were the basis for the submission that the reasons were inadequate. Taking a broad approach, I consider that the Defendant's liability for costs ought to be reduced to 65% of the costs limit of £35,000. I do not consider that the Claimant's post-permission attempt to persuade the Defendant to settle the claim with no order for costs affects the costs award.