



Neutral Citation Number: [2020] EWCA Civ 302

Case No: C1/2019/0148

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
PLANNING COURT (CO/424/17)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/03/2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE DAVID RICHARDS
and
LORD JUSTICE COULSON

Between:

James Kenyon

Appellant

- and -

**The Secretary of State for Housing Communities & Local
Government
Wakefield Council**

Hemsworth Town Council

Saul Construction Ltd

First
Respondent
Second
Respondent
Third
Respondent
Fourth
Respondent

**Marc Willers QC and Dr Paul Stookes (instructed by Richard Buxton Solicitors) for the
Appellant**

Carine Patry (instructed by The Government Legal Department) for the First Respondent
The 2nd, 3rd and 4th Respondents did not appear and were not represented.

Hearing date: 6th February 2020

Approved Judgment

LORD JUSTICE COULSON :

1. INTRODUCTION

1. This appeal concerns a development site on the outskirts of Hemsworth, near Pontefract in West Yorkshire (“Site A”). On 16 December 2016, the first respondent directed that the proposed development of Site A was not EIA development within the meaning of regulation 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (“the 2011 Regulations”) such that an environmental statement to assess the environmental effects of the development was not required. The appellant’s application for judicial review of that screening direction was refused by Mrs Justice Lang DBE (“the judge”) on 18 December 2018 ([2018] EWHC 3485 (Admin)). The appellant appeals against that decision with leave of Lindblom LJ.
2. The arguments on appeal ranged far and wide and included, somewhat surprisingly, a close review of the evidence before the first respondent and, subsequently, the judge. It was difficult to discern any substantial points of principle from any of this: speaking for myself, I wondered if the most important point to arise from the appeal hearing was the need to ensure that appeals in cases of this kind do not become another weary trot around a well-worn course.
3. Unusually, I start with the law (Section 2 below) because that informs the factual background and the relevant decisions (Sections 3 and 4) as well as the judge’s judgment (Section 5). Having set out the issues raised by the appellant in Section 6, I then go on to deal with each Ground of Appeal in Sections 7 - 11. There is a short summary of my conclusions at Section 12.

2. THE LAW

2.1 The Regulatory Framework

4. At the relevant time, the 2011 Regulations prescribed the procedures to be followed when planning permission was sought for what might be “EIA Development”. That is defined in Regulation 2(1) as being either “Schedule 1 development” or “Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location”. It is common ground that this was not Schedule 1 development. It is also common ground that this was Schedule 2 development because, although it was for 150 dwellings (and Schedule 2 only applies to developments in excess of that number), Site A was greater than 5 hectares. Despite the fact that the part of Site A which was being developed was less than 5 hectares (because of the retention of a belt of trees to the south), Schedule 2 still applied. These factors (namely the fact that the number of dwellings was just below the applicable minimum and the size of Site A was only just above the applicable minimum because of the land that was not being developed) explain the repeated references in the screening opinion and screening direction under review to the comparatively small scale of this proposed residential development compared to those which more usually arise under Schedule 2. In that regard, I also note that Schedule 2 is primarily concerned with the extraction, energy and chemical industries, and infrastructure projects such as shopping centres and car parks.

5. Regulation 3 provides a prohibition on granting planning permission without consideration of environmental information and Regulation 3(1)(a) provides that Regulation 3 applies “to every application for planning permission for EIA development received by” the planning authority. Regulation 3(4) provides:

“The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken environmental information into consideration, and they shall state in their decision that they have done so.”
6. Regulation 4 stipulates when development is to be treated as “EIA development”:

“(1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.

(2) The events referred to in paragraph (1) are—

(a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or

(b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development.

(3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development...

(6) Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.

(7) Where a local planning authority adopts a screening opinion under regulation 5(5), or the Secretary of State makes a screening direction under paragraph (3)—

(a) that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion; and

(b) the authority or the Secretary of State, as the case may be, shall send a copy of the opinion or direction and a copy of the written statement required by sub-paragraph (a) to the person who proposes to carry out, or who has carried out, the development in question.

(8) The Secretary of State may make a screening direction either—

(a) of the Secretary of State's own volition; or

(b) if requested to do so in writing by any person...”
7. Regulation 5 permits an applicant for planning permission to request the local planning authority to adopt a screening opinion. Regulation 5(7) permits an applicant to ask the first respondent to make a screening direction if the local planning authority does not adopt a screening opinion within the specified timescales, or if they determine that the proposed development is “EIA Development”. The procedure to be followed is set out in Regulation 6.
8. Schedule 3 to the 2011 Regulations identifies three selection criteria which must be considered for screening a Schedule 2 development:

- (i) Characteristics of development.
- (ii) Location of development, and
- (iii) Characteristics of the potential impact.

In relation to (i) above, paragraph 1 of Schedule 3 provides that “the characteristics of development must be considered having regard, in particular to ... e) pollution and nuisances”. As to (ii) above, paragraph 2 of Schedule 3 states that “the environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard in particular to (a) the existing land use; (b) the relative abundance, quality and regenerative capacity of natural resources in the area; (c) the absorption capacity of the natural environment... paying particular attention to the following areas... vi) areas in which the environmental quality standards laid down in EU legislation have already been exceeded; vii) densely populated areas...”. As to (iii) above, Paragraph 3 of Schedule 3 is concerned with the characteristics of the potential impact including “the extent of the impact, the trans frontier nature of the impact, the magnitude and complexity of the impact, the probability of the impact and the duration, frequency and reversibility of the impact.”

9. As set out in Regulation 2, the test to be applied in considering whether an Environmental Statement is required is whether the development is likely to have significant effects on the environment. In *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at paragraph 43, Pill LJ said:

“43. What emerges is that the test to be applied is: "Is this project likely to have significant effects on the environment?" That is clear from European and national authority, including the Commission Guidance at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (*Commission v UK*). The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker.”

Earlier at paragraphs 26 – 27 of his judgment, Pill LJ explained that “likely” meant “a real risk”.

10. The questions of whether there is sufficient information to issue a screening opinion/decision, and whether a proposed development was likely to have significant effects on the environment, are matters of judgment for the decision-maker: see *R (on the application of Birchall Gardens LLP) v Hertfordshire CC* [2106] EWHC 2794

(Admin) paragraphs 66 and 67, and *Evans v Secretary of State* [2013] EWCA Civ 115. In the latter case, Beatson LJ said:

“22. The assessment of the significance of an impact or impacts on the environment has been described as essentially a fact-finding exercise which requires the exercise of judgment on the issues of “likelihood” and “significance”: see *Bowen-West v Secretary of State* [2012] EWCA Civ 321 at [40] *per* Laws LJ, and *Jones v Mansfield* [2003] EWCA Civ 1408 at [17] and [61] *per* Dyson and Carnwath LJJ. Carnwath LJ stated that, because the word “significant” does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped.”

The paramount importance of the judgment of the decision-maker is also stressed by Beatson LJ at paragraphs 26 – 27 of his judgment in *Evans*, when he rejected the contention that the mere fact that there were differing views as to the likely environmental effect meant that the screening direction had to be positive. He said:

“26. Mr Wolfe submitted that in the light of the views of English Heritage, the Suffolk Preservation Society, and the Council this [the absence of doubt] could not be the case. That, however, comes very close to suggesting that once there are differing views on a question, there must be a full EIA. It is also very similar to the submission made unsuccessfully in *Loader*’s case that a full EIA process is required in all cases where the effect would influence the development consent decision. As Pill LJ stated (at [46]), accepting that submission would devalue the entire EIA concept, which involves a formal and substantial procedure often involving considerable time and resources. It is also clear from both the national and the EU indicative guidance that the full EIA process will only be required in a very small proportion of the total number of Schedule 2 developments.

27. To require the EIA process where there are differing views would also largely make the Secretary of State’s role redundant. As to the *Waddenzee* case, that was concerned with the Habitats Directive. The reference to a reasonable doubt is to a reasonable doubt in the mind of the primary decision-maker. There is no support in that case for the view that, where somebody else has taken a different view to the primary decision-maker, it is not possible to demonstrate that there is no reasonable doubt. It is not suggested in this case that the Secretary of State or his officer had any such doubt.”

11. Reference was also made in argument to *R (Champion) v North Norfolk District Council and Another* [2015] UKSC 52 where, at paragraph 51, Lord Carnwath said that “application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA”. That observation was in the context of the interaction between the likely effects of the proposed development, on the one hand, and mitigating measures at the screening stage, on the other.
12. A decision as to whether a proposed development is or is not likely to have significant effects on the environment can only be struck down on *Wednesbury* grounds: see paragraph 31 of the judgment of Pill LJ in *Loader*.

2.2 The Courts' Review of Screening Opinions / Directions

13. The limited nature and scope of a screening opinion was emphasised by Moore-Bick LJ in *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157. He said at paragraph 20:

“20. Having dealt with those points I can return to the substance of the argument, which is that the planning officer failed to demonstrate that she had considered the likely effect of the development in relation to traffic movements, the landscape and noise or, if she had, to explain why an EIA was not required in this case. When considering a submission of this kind I think it important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term "screening opinion".”

In the same case, Mummery LJ said:

“40. In my judgment, the decision not to have an EIA is a significantly different kind of decision from a refusal or grant of planning permission. The reasons for a preliminary administrative decision whether or not to have an EIA do not have to satisfy the same standards of information and reasoning as would apply to a substantive decision on a planning application. The degree of "grappling" is different, more provisional and less exacting...”

14. *Bateman* was a case in which the Court of Appeal concluded (by a majority) that the reasons given for the negative screening opinion (which amounted to 1½ sentences) were inadequate. However, as has been pointed out in subsequent cases, this was unsurprising on the facts, given that there was no explanation for why the expansion of a grain storage facility from 90,000 tonnes to 300,000 tonnes, and from 12 to 60 large silos, was not likely to have a significant effect on the environment.
15. As to the practical limits of any screening decision, Lindblom J (as he then was) said in *Hockley v Essex County Council & Anr* [2013] EWHC 4051 (Admin):

“102. There has to be a sensible limit to what a screening decision-maker is expected to do. This view is supported in the cases to which I have referred, notably, for example, in *Bateman* (see paragraph 24 above). Conjecture about future development on other sites that might or might not act with the development in question to produce indirect, secondary or cumulative effects is not in the screening decision-maker's remit. I do not think the precautionary approach extends to that. And when it is suggested in a claim for judicial review that a screening decision was deficient because some potential cumulative effect was left out, it is not enough for a claimant simply to point to other developments

in the locality that have been or might be approved, and to leave it to the court to work out whether any aggregate effects were unlikely to be significant. Unless it is obvious that relevant and potentially significant effects on the environment have been overlooked, the court will need some objective evidence to show this was so. It will need to be satisfied that the authority responsible for the screening decision was aware, or ought to have been, of the potential cumulative effects; that the screening opinion could not reasonably have been negative if those potential effects had been considered; and that this was, or should have been, apparent to the authority at the time.”

16. Other authorities have demonstrated that a screening direction is a preliminary assessment rather than an examination paper expected to contain a record of each and every issue and each and every conclusion: see *Mackman v SSCLG* [2013] EWHC 3396, at paragraph 65 – 72. In the same case in the Court of Appeal ([2015] EWCA Civ 716, Sullivan LJ said:

“18. The majority of the Court of Appeal in *Bateman* concluded that the reasons given for the negative screening opinion in that case were inadequate. Mr. Mackenzie submitted that the reasons given in *Bateman* were less inadequate than the reasons given in the screening opinion as the present case. As in *Bateman*, there was no clear statement of Mrs. Denmark's reasons for her conclusion that the proposed development was not likely to have significant environmental effects. The "reasons" amounted to no more than a bare conclusion.

19. While there is some force in this submission, the circumstances of this case are very different from those in *Bateman*. In *Bateman* the screening opinion had concluded (unsurprisingly) that the main impacts of a proposal to expand a grain storage facility with a capacity of 90,000 tons in 12 silos to a capacity of 300,000 tons in 60 additional silos each about 18 metres high and 23 metres in diameter, were likely to be "increase in traffic movements, landscape impact and noise disturbance to local residents" (see paragraph 6 of the judgment of Moore-Bick LJ). In those circumstances, an explanation as to why those impacts on the environment were not likely to be significant was called for, and was not contained in the screening opinion.

20. In paragraph 78 of her judgment Lang J correctly said that the level of detail in a screening opinion would depend upon the complexity of the issues to be considered in the particular case, so that the test was whether the reasons were adequate for this particular application. She accepted that the reasons were brief, but concluded that they were not inadequate "in the circumstances of this particular case which was not complex or borderline."

In *Mackman*, the challenge to the screening opinion was dismissed. I note in passing that Sullivan LJ said at paragraph 9 that it had been rightly accepted in that case “that the mere fact that cumulative impact had not been expressly referred to in the screening opinion did not mean that it had not been taken into account.”

3. THE FACTUAL BACKGROUND

17. Site A was used as a brickworks quarry for the first seventy years of the last century. Subsequently, there was some infilling with waste, but there were no records of the materials used or any possible contamination risks. At one stage, the previous industrial use and the infilling gave rise to potential issues relating to contaminated land, and this was part of the appellant's original application for judicial review. However, that aspect of the challenge had fallen away by the time of the hearing before the judge.
18. Between 1970 and 2007, Site A was a recreation ground and there was a small sports stadium there, known as the Hemsworth Sports Complex. In January 2008, the fourth respondent applied to the second respondent council for outline planning permission for 150 homes. That planning permission was granted on 24 November 2010 but quashed by consent on 14 February 2012.
19. On 5 September 2013, the second respondent again resolved to grant permission in respect of Site A and such permission was issued on 31 March 2016. That permission too was subsequently quashed by consent on 1 July 2016.
20. On 5 September 2016, the appellant requested an EIA screening direction from the first respondent, setting out why he said that an EIA was necessary. On 21 November 2016, the second respondent provided a screening opinion which stated that the proposal was not EIA Development and that therefore no environmental statement assessing the environmental effects of the development was required. That screening opinion was subsequently referred to in the first respondent's decision under review, so it is appropriate to set it out in some detail:

"Characteristics of development

.....

The cumulation with other development

3.6 The site forms a housing allocation within the Council's adopted Site Specific Policies Local Plan and has an indicative capacity of 179 dwellings on an area of approximately 6ha. It is noted that new housing has recently been constructed to the boundaries of the site. Application no: 09/00883/FUL was for 25 houses located adjacent to Kirkby Road, to the north east of the application site. A further development of 14 dwellings providing social housing has been completed to the north of the site (application no: 09/01522/FUL). There is a housing allocation in the Council's Site Specific Policies Local Plan (HS53, Kirkbygate, Hemsworth) located to the southern boundary of the application site off Kirkbygate which has an indicative capacity of 25 dwellings. The Council is currently considering an application on this site for 24 dwellings (15/01592/FUL).

3.7 Slightly further afield, there is a housing allocation located off Grove Lane to the north east of the application site which has full planning permission for 25 dwellings and work on site have commenced. A further permission for 7no. dwellings (13/0153/OUT and 16/01932/REM) on land at Broad Oaks has also been granted permission.

3.8 There are 2 further housing allocations within the Site Specific Policies Local Plan within Hemsworth but these are not in the immediate vicinity of the application site. There is an allocation to the west of the site off Ashfield Road (HS54) which has an indicative capacity of 74 houses and a site to the north west of the town centre at West End (HS55) which has an indicative capacity of 160 dwellings.

3.9 Applications for a new Community Building at Bullenshaw Road, Hemsworth (08/00007/FUL) and new Sports Facilities (comprising a flood lit all weather multi use pitch, and a full sized grass football pitch), changing rooms and car park at Sandygate, Hemsworth (08/00872/FUL) have been approved, the developments have been completed and are in use.

3.10 Given the scale of the current proposal, which is an allocated housing site within the Local Development Plan, together with the above mentioned development and possible future development within the vicinity of the site, it is considered that in the context of the wider settlement, there would not be likely to be any significant cumulative environmental impacts.

.....

Pollution and nuisances

3.13 Issues of noise, odour, emissions, dust, land contamination and air quality are assessed in the 'characteristics of potential impact' section at paragraphs 3.20 – 3.27 but these are considered to not be likely to have significant effects on the environment.

....

Characteristics of potential impact

3.20 The application site has been fenced off and has not been used for sport and recreation for a number of years. The proposed residential development of the site will result in additional traffic and there will be an impact in respect of traffic generation, access, servicing, parking and highway safety issues associated with the development (in both its construction phase and once completed). It is noted that, should the proposal for residential development not come forward, bringing the site back into use as a sports facility would have an impact in terms of additional traffic associated with the use of the site. It is considered, given the scale of development proposed, that the impacts from the complete development would not be likely to have significant effects on the environment. The construction phase will result in additional traffic from construction workers and particularly from large construction vehicles associated with deliveries and removal of any wastes and/or contaminated materials from the site. Although the current proposal would result in additional traffic movements and other associated impacts, it is considered, given the limited site area and scale of development, that the traffic and other associated issues will not be likely to have a significant impact on the environment.

....

3.23 The site has not been used for some time but could be brought back into use and there would be a degree of traffic associated with this use. The site is not located in an Air Quality Management Area (AQMA) although it is noted that there is an AQMA at the road junction at Cross Hill, Hemsworth and traffic from the development, both during construction and once completed, is likely to add to standing traffic at this junction. The vehicle emissions include nitrogen dioxide and carbon dioxide which can have an adverse impact on the environment. However, in view of the scale and location of the proposal, it is considered that the impact on air quality would not be likely to have any significant effects on the environment.

3.24 The proposed housing would not result in significant increases in odour and emissions. Emissions relating to associated traffic have been discussed above. The housing will result in additional noise both during construction and once completed and there will also be additional light emissions when compared

to the previous use of the site for sport and recreation. The site is located in a predominantly residential area within the settlement boundary and, given the scale and location of the development, and it is considered that any noise and light emissions would not result in a significant environmental impact...

3.28 There are considered to be no significant, potential effects of the development when assessed against the criteria within Schedule 3, Part 3 sections (a) to (e) of the 2011 Regulations, which includes: (i) the extent of the impact (geographical area and size of population), (ii) the transfrontier nature of the impact, (iii) the magnitude and complexity of the impact, (iv) the probability of the impact, (v) the duration frequency and reversibility of the impact.

4.0 Conclusions

4.1 Having regard to Schedule 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and the advice in Circular 02/99, the following conclusions are drawn in relation to the proposals:-

i) Taking account of the nature and scale of the development, it is considered that its impacts would not be likely to give rise to significant environmental effects.

ii) It is considered that the locality is not sensitive or vulnerable to the extent that the proposed development would be likely to have significant environmental effects; and

iii) The development is considered to not be one with particular complex and hazardous effects.

5.0 Opinion

5.1 On the basis of the above, and in accordance with regulations 7 and 5(4), (5) of the 2011 Regulations, it is considered that the proposals **do not** constitute EIA development."

21. In a letter dated 16 December 2016, the first respondent informed the appellant of his decision that, although he considered that the proposed development fell within Schedule 2 of the 2011 Regulations, "having taken into account the selection criteria in Schedule 3 to the 2011 Regulations, [the first respondent] does not consider that the proposal is likely to have significant effects on the environment, see the attached written statement which gives the reasons for direction as required by Regulation 4(7)..." ("the screening direction").
22. The written statement attached to the screening direction took its structure and headings directly from Schedule 3 of the 2011 Regulations (paragraph 8 above). It referred expressly to the second respondent's screening opinion set out in paragraph 20 above. It was in the following terms:

"1 (a) – (f) regarding characteristics of development

The proposal is for residential development of 150 homes (outline with means of access only).

2 (a)-(c) (i) – (viii) regarding location of development

The application site of the proposal is a 6.01 hectares brownfield site. It is set within an urban environment immediately surrounded by other housing/commercial property, and beyond is further housing/commercial properties and community facilities.

3 (a) – (e) regarding characteristics of potential impact

The proposed development exceeds the criterion/threshold of 5 hectares for Schedule 2, Category 10 (b) development. The Council considers the proposed development, including in terms of issues of noise, odour, emissions, dust, land contamination and air quality, is not likely to result in significant effects, and therefore that the proposal is not EIA development. More specifically in relation to land contamination resulting from past land use, the Council is of the view that issues can be controlled through condition. The Council has also considered cumulative impact, and is of the view that given the nature of the proposal i.e. residential dwellings in the wider environmental context of an urban area, the application is not likely to result in significant effects.

The Secretary of State notes the Council's recent screening opinion for the proposed development, and for the information supplied with the application, and has had due regard to Planning Practice Guidance on assessing environmental impacts. Whilst there are land contamination issues on the application site, this has been investigated and measures/mitigations are within supporting information to the proposal, and the Council has referred to conditions should the proposal receive permission. In view of this, the Secretary of State considers this issue does not result in significant effect, over and above that which is normally present at an existing developed site.

The application will also result in impact from an increase in traffic in the locality, and from noise/dust/odour, from both the construction and operational phases but the Secretary of State notes the application site is not in any designated area nor is it an AQMA. In respect of these issues, the Secretary of State has considered the evidence before him, and is of the view that the proposal will not result in a likely significant effect, above that which any urban development proposal on an existing developed site would normally present. Overall, he is of the view there are no likely significant impacts resulting from the proposed development and EIA is not required."

23. In response to a request from the appellant, the respondent subsequently disclosed his "screening analysis", which was the basis for the screening direction of 16 December 2016. This was set out in detail in the judge's judgment at [17]. The relevant parts seem to me to be:

"Waste and pollution

6 Will the Project release pollutants or any hazardous, toxic or noxious substances to air?

Consideration: During clearance of the site and construction, there is potential for pollutants to be released in to the air however this would be managed through standard legislation/regulation. See also Q4 regarding contaminated land. It is not considered the operational stage will release hazardous substances in to the air beyond those associated with a standard urban development of housing.

...

8 Are there any areas on or around the location which are already subject to pollution or environmental damage (e.g. contamination, or where existing legal environmental standards at any level are exceeded such as AQMAs etc) which could be affected by the project?

Consideration: The site is not evidenced as within any Air Quality Management Area (AQMA). However, there is an AQMA at a junction of Cross Hill, and traffic for the development is likely to add to existing traffic using this junction. However given the scale of the proposed development, is not considered to have likely significant effects.

...

Social

14 Is the project in a location where it is likely to be highly visible to many people?

Consideration: At its southern boundary, the application site is not visible to individuals due to an area of trees which screens the site from neighbouring houses. To the west, north and east there is housing, and some commercial property, and the application site will be visible to residents and business users through the gaps which exist between buildings. It is not considered that there will be any likely significant effects.

...

17 Are there existing, land uses on or around the location e.g. homes, gardens, other private property, industry, commerce, recreation, public open space (including parks), community facilities, agriculture, forestry, tourism, mining or quarrying, hospitals, schools, places of worship, community facilities which could be affected by the project?

Consideration: see Q14. Beyond the roads (which included residential and commercial buildings) that surround the application site are churches, community facilities and schools. During the construction phase, these may be impacted from pollution/particle emission and emissions from plant and machinery. During the operation phase, there may also be some impact from urban emissions (vehicles) but this would not be over and above what would be expected in a normal urban area and it is not considered that there will be any likely significant effects.

18 Are there any areas on or around the location which are densely populated or built-up, which could be affected by the project?

Consideration: see Q14 and Q17. It is considered the local area is not as densely populated or built up as in inner-cities, and while there may be some impact from construction and operational phases, this would not be over above what would be expected in a normal urban area and it is not considered that there will be any likely significant effects.

Transport

19 Are there any transport routes on or around the location which are susceptible to congestion which could be affected by the project?

Consideration: see Q15 above. Surrounding roads are B roads. There are no major roads (motorways) in close proximity to the application site. Although patterns of local road use will be affected, by an increased number of residents, the proposal is not likely to be a significant generator or new trips onto the network.

...

Cumulative Impact

21. Are there any existing or future land uses on or around the location or beyond (e.g. trans-frontier) which could be affected by the project (eg including because of cumulative impact)?

Consideration: See Q8, 14, 17 & 18. Beyond this proposal at this application site, there has been new housing of 25 and 14 dwellings constructed on the boundaries of the site to the north/north east respectively. It is also noted that there is currently a proposal for 24 houses to the southern boundary with the Council which is presently at the consultation stage. The Secretary of State has considered these applications in terms of their size and scale and the context of the local area. The local area is urban – residential with some commercial and given this together with the size and scale of the development completed/proposed, the Secretary of State considers that while there may be some cumulative impact, this would not be to the extent that it would be likely to result in significant cumulative impact."

24. On receipt of the screening direction and screening analysis, the appellant commenced judicial review proceedings on 24 January 2017. Three grounds of challenge to the direction were identified:
- a) Ground 1: A failure to consider the cumulative effects of the proposal;
 - b) Ground 2: Unlawful reliance upon conditions to remedy adverse environmental harm (a point in respect of the potentially contaminated nature of the land); and
 - c) Ground 3: Failure to consider other relevant environmental consequences.
25. On 15 August 2018, Sir Ross Cranston, sitting as a High Court Judge, granted permission for judicial review on Ground 1 only. Moreover, he limited that permission to the issue of air quality. It is important to stress that both Ground 1 as drafted, and Sir Ross's detailed observations upon it, were based on the appellant's argument about the *cumulative* effects of the proposed development of this and five other sites in the same area (known as Sites B, C, D, E and F) on air quality generally. Although the original application and Sir Ross's observations refer to the proximity of the Hemsworth Air Quality Management Area ("AQMA"), that was only in the context of the cumulative effects of this site, together with the other five sites, on air quality.
26. The appellant did not challenge the decision limiting Ground 1 to the cumulative effect on air quality, but made a renewed application for permission on Grounds 2 and 3. At the hearing before the judge, the appellant abandoned Ground 3. The judge dealt with Ground 2 on a rolled-up basis but, having considered it, she refused permission to commence judicial review proceedings in respect of Ground 2. That decision is not challenged on appeal. Thus, the hearing below, and this appeal, should have been concerned only with the issue of cumulative effects of the six sites (including Site A), in so far as they related to air quality.

4. SUBSEQUENT AND UNREFERENCED INFORMATION

27. Both before the judge, and again on appeal, there were references to other documents which were not available to (and therefore did not inform) the first respondent's screening direction of 16 December 2016. These include the Air Quality Assessment produced by REC on behalf of the fourth respondent which (although dated November

2016) was not submitted to the second respondent until January 2017; and the second respondent's 2018 and 2019 Air Quality Annual Status Reports (which dealt with, amongst other things, the Hemsworth AQMA). The 2019 report was not created until June 2019, and so had not been before the judge either.

28. In judicial review proceedings it is generally inappropriate for parties to seek to rely on documents (and to advance arguments based on those documents) which were not available to the decision-maker. Taken at its highest, such an approach undermines the entire process of judicial review. It runs the risk that the court will be asked to conduct a kind of rolling review, in which nothing is ever finalised or settled, and it does not matter what information was available at the time the decision was taken. This serves only to encourage the all-too-prevalent attitude that, in judicial review applications, it is always possible to 'have another go'. The parties' references to the Reports noted in the preceding paragraph were designed to do exactly that, with each side seeking to rely on particular paragraphs in support of their submissions about the rationality (or otherwise) of a decision made without sight of any of them.
29. The only exception to this general principle arises in debates about the appropriate remedy, should the challenge prove to be well-founded. This most often occurs when a respondent argues that, even if there was a technicality which rendered the original decision unlawful, it should not be quashed or set aside because subsequent events have shown it to be the right decision on the merits. It was on that basis, for example, that the first respondent originally sought to rely on the REC report. In my view, this process needs to be tightly controlled; otherwise the sort of risks identified in the previous paragraph will eventuate (because the parties so often try and rely on such material for any purpose, even if strictly the evidence goes to a fall-back argument only). Moreover, for the reasons explained below, I consider that it is unnecessary to consider any fall-back argument in this case.
30. For these reasons, therefore, I have not had any regard to the documents that were not in existence or available at the time of the screening direction of 16 December 2016. In addition, I have also discounted an earlier document, namely the Officer's Report to the Council's Planning Committee dated 5 September 2013, despite the fact that the judge herself set out some of this Report at [35] of her judgment. The reason for discounting it is because there was no reference to this Report (whether express or implied) in either the second respondent's screening opinion, or the first respondent's subsequent screening decision. Whilst Ms Patry may be right to say that the second respondent could be assumed to be aware of the contents of this Report, there was no evidence that it played any part in the particular decision-making process under review. It is therefore not appropriate to have any regard to the Report when considering the rationality of the screening direction.

5. THE JUDGMENT

31. Having set out the legal framework at [7] – [14] and the documents containing and relevant to the screening direction at [15] – [18], the judge then identified the nature of the complaint in relation to air quality at [19] – [23]. She set out the law at [27] – [32].
32. Her overall conclusion was at [34]. She said:

“34. In my judgment, the Claimant's submissions that the Defendant failed properly to consider pollution and air quality and, failed adequately to assess cumulative effect, were based on an unduly forensic and nit-picking reading of the assessments. It is well-established that planning decision letters should be read fairly and in good faith, and as a whole, in a straightforward manner, without excessive legalism or criticism (see *Clarke Homes v. Secretary of State for the Environment* (1993) 66 P & CR 263, per Lord Bingham at 271; *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83, per Lord Hoffmann LJ at 84). In my view, screening assessments should be read in the same manner.”

The detailed reasons for that view were then set out in the following paragraphs of the judgment.

33. Having set out various extracts from the documentation, the judge said at [41]:

“41. Thus, the Defendant was expressing his considered judgment, on the evidence, that there would not be significant cumulative impact on, *inter alia*, air quality. This was a careful and detailed assessment. It is reasonable to assume that the Defendant and his advisers were well aware of the causes and effects of air pollution and the need to address it.”

34. Thereafter, dealing with the limits of a screening opinion and direction, the judge said:

“44. Obviously, a screening opinion or direction can only be based upon the information known to the assessor at the relevant time, and that may be incomplete. In this case, the Defendant received a substantial amount of information from Dr Stookes of Richard Buxton in September 2016, and from the Council, whose screening opinion was dated 21 November 2016. Unsurprisingly, the application for planning permission for a nursing home about 500 metres from the Site (referred to as Site G) was not included, since the application was made as late as 18 November 2016. Planning permission was granted on 18 April 2017, which post-dated the Council's screening opinion and the Defendant's screening direction. I do not consider that the Defendant can be fairly criticised for not referring to it, and absent any unlawfulness, the screening direction must stand. Generally, in cases where an unforeseen subsequent development proposal may alter the assessment of cumulative environmental effects, the solution is for there to be a further screening and/or for the cumulative environmental effects to be considered in the course of the application for planning permission for the subsequent development proposal...

46. The Defendant's written statement summarised the Defendant's assessment and conclusions, expressly referring to air quality, traffic, and cumulative impact. He concluded, in the final paragraph, that there would be an impact from an increase in traffic in the locality. He took into account, as he was entitled to do, that the Site was not in a designated area nor was it an AQMA. He concluded that the impact from the increase in traffic would not have significant environmental effects. In reaching that key conclusion, which the Claimant overlooked, he took into account that this was an urban development proposal on an existing developed site, which he was entitled to do. In my view, any such assessment can properly have regard to both the location of the site and the

existing development on site (if any), when considering the environmental impact of a new development. For example, the outcome of the assessment could be affected if the proposal was for development on a previously undeveloped site situated in open countryside. It follows that I disagree with the Claimant's submission that the Defendant concluded that assessment was not required because the increase was not significant for an urban area. That is a misreading of the decision, in my view.”

6. ISSUES ON APPEAL

35. It appears that, although the principal ground that was argued before the judge concerned the cumulative effect of this and the other five sites (Sites B-F), the submissions ranged rather more widely during the hearing before her. In particular, the appellant’s skeleton argument below advanced a new case on the basis that, leaving aside the other five sites, the effect of increased traffic from Site A alone on the nearby AQMA meant that it was likely that the development would have a significant effect on the environment. It appears that no point was taken before the judge that the appellant did not have permission to raise that challenge. This argument was not about cumulative effect at all: it was solely about the proximity of Site A to the AQMA.
36. This ‘challenge-creep’ continued on appeal. The appellant’s Grounds of Appeal raise no less than five separate arguments, only one of which (Ground 3) can be linked back to the sole ground for which permission was originally granted. In this court, the appellant contended that the judge erred in the following respects:
 - (a) Ground 1: There was an insufficient evidential basis for her finding that the first respondent could reach the conclusion that the proposed development would have “no likely significant effects on the environment” such that an EIA was not required;
 - (b) Ground 2: The judge failed to acknowledge that a precautionary approach to EIA decision-making was required in circumstances where it was accepted that the proposal would lead to an increase in traffic and air pollution within the nearby AQMA;
 - (c) Ground 3: The judge erred in concluding that the first respondent had considered cumulative effects, in circumstances where “he had failed to provide any material evidence”;
 - (d) Ground 4: The judge failed to have regard to the fact that the first respondent relied upon the proposal being in an urban area to reach a conclusion that increasing air pollution in that locality, including in an AQMA, would not potentially have a “significant effect on the environment” and therefore require an EIA to be undertaken;
 - (e) Ground 5: The judge erred in regarding the Site as an existing development site when, as a matter of local and national policy, and as a matter of fact for the purposes of air quality, it was regarded as a greenfield site.
37. Grounds 1 and 3 raise evidential matters, to the effect that there was no or no sufficient evidence before the first respondent to enable him to come to the conclusion that an EIA was not required because the proposed development of Site A was not likely to have a significant effect on the environment. Those two Grounds therefore raise directly

the question of what approach this court should take to the judge's judgment, given that these evidential challenges had been raised before and rejected by the judge. Although Mr Willers QC submitted that he was not asking this court to "start from scratch" in relation to these matters, that disavowal was negated by the fact that, throughout his submissions, he made copious references to the screening opinion and decision, but never once referred to the judge's judgment, much less indicate where or how it was that the judge erred in law.

38. The best that Mr Willers could do, in answer to a question from the court, was to say that, because her conclusion was wrong, the judge must have had regard to evidence that was irrelevant, alternatively failed to have regard to evidence that was relevant. But he did not identify the evidence wrongly missed or wrongly relied on. Beyond expressly disavowing the notion that the judge's conclusions were perverse, he did not further address the judge's careful evaluative judgment, as summarised at paragraphs 31 - 34 above.
39. In my view, this relaxed attitude to the judge's rejection of the judicial review challenge, and her reasons for that decision, was unsatisfactory. In this case an experienced planning judge has considered the application for judicial review, evaluated the relevant material, and ruled that there was sufficient evidence for the decision made. On an appeal, it is incumbent upon an appellant to demonstrate that the judge erred in law in reaching such a conclusion. That requires considerably more than an attempt to reargue the case from the documents all over again. In my view, that point alone is enough to justify dismissing Grounds 1 and 3, with Ground 1 suffering from the additional difficulty that it was not a judicial review challenge for which permission had originally been sought or granted.
40. As to the other Grounds, Ground 2 was not argued before the judge, which might again be thought to justify its immediate rejection. Ground 4 was the subject of the judge's conclusion at [46], that the submission on which it relied was based on a misreading of the screening direction. It would again appear that, in order to challenge that conclusion, the appellant would need to show that this view of the direction was not open to the judge or somehow amounted to an error of law. I am not at all sure that this was how Mr Willers could or did put the point. He did not press Ground 5 in any event, accepting that whether or not Site A could be described as 'previously developed land' made no difference to air quality considerations.
41. Since I have formed a clear view on the merits of these five Grounds, I propose to address them in detail, notwithstanding the myriad difficulties of principle to which I have referred in the preceding paragraphs. However, in another case, those observations might be thought to be sufficient to dismiss this appeal outright.
42. I deal with Grounds 1 and 3 first because it seems to me that, rightly or wrongly, they lie at the heart of the appeal. I then go on to deal more briefly with the other Grounds.

7. GROUND 1: NO EVIDENTIAL BASIS FOR A FINDING OF "NO LIKELY SIGNIFICANT EFFECTS"

43. An appellant seeking to argue that the decision-maker (and, by extension, the judge) reached a conclusion for which there was no evidential basis invariably faces an uphill task. Such a task is made even more difficult in a situation like the present case, given

that the screening direction is a preliminary, broad-based assessment of environmental impacts, undertaken by those with relevant training and planning expertise.

44. The judge concluded that there was a proper evidential basis for the screening decision. Was she wrong in law so to do? In my view, the answer to that is in the negative: the judge was quite entitled to reach that conclusion, and nothing has been identified on appeal to demonstrate that she was even arguably in error.
45. As a starting point, I note that in her judgment at [34], the judge described the appellant's approach on Ground 1 as "unduly forensic and nit-picking". Despite the habitual skill and charm of Mr Willers' advocacy, I consider that the same description could be applied to his submissions on appeal. He spent a good deal of time identifying particular paragraphs in particular documents and seeking to point out the potential gaps and omissions within them. Some of this came down to an alleged failure to cross-reference properly. In my judgment, that is not a proper approach to a judicial review application of this sort, let alone an appeal. Furthermore, I consider that the sections of the relevant documents which I have set out in paragraphs 20 – 23 above make plain that, contrary to the appellant's submissions, there was an evidential basis for concluding that there was no likely significant effect on the environment.
46. Mr Willers' principal submission on Ground 1 came to this. Site A was close to the AQMA. It was inevitable that, if Site A was developed, there would be more traffic entering the AQMA. In those circumstances, the proximity to the AQMA was a particular characteristic of Site A which made it irrational to conclude that the development was not likely to have a significant effect on the environment, without at least obtaining further information. As he put it at one stage of his oral submissions, "it is all about the AQMA".
47. I cannot accept that submission for a variety of reasons. Many of those reasons are articulated in the judgment below and set out in the passages I have cited in paragraphs 31 - 34 above.
48. The first point to note is that this was, on any view, a routine development of residential houses. There was nothing unusual about the proposed development. Indeed, as I have said, the starting point must be that, because this was not a development for more than 150 dwellings, and the actual amount of land being developed was 4.6 hectares, the proposed development of Site A was only just big enough to be within Schedule 2 in any event. I consider that this was an important element of the screening direction, which was repeatedly encapsulated by both the first and second respondents in the shorthand phrase "the limited site area and scale of development".
49. Secondly, I agree with Ms Patry that the screening direction adopted the approach required by the 2011 Regulations. It addressed each of the headings required by Schedule 3. It took into account all relevant matters. There was nothing missing. The first respondent explained, step by step, how he had reached his conclusion.
50. Thirdly, the first and second respondents were well aware of the AQMA. Although Site A was not within the AQMA, the screening opinion and direction both contain references to the AQMA centred on Hemsworth. It cannot be said that the AQMA somehow slipped the minds of the first and second respondents when addressing the issue of likely environmental effects.

51. Fourthly, the first and second respondents were also aware that the increased traffic from the completed development of Site A would have an effect on the AQMA. This can be seen in a number of places, but perhaps most obviously in paragraph 3.23 of the screening opinion, and the consideration of Question 8 in the screening analysis, where there are express references to the development leading to an increase in traffic at the junction of Cross Hill in the centre of Hemsworth, where the AQMA was located. But there is no evidence that this increased traffic would be likely to have a significant effect on the environment: on the contrary, paragraph 3.20 of the screening opinion states that it would not.
52. Given all of those factors, it is idle to suggest that in some way the first and second respondents, as experienced and knowledgeable planning officials, were not well aware of the likely impact of the traffic from Site A (following its development) on the AQMA. In the exercise of their planning judgment, they concluded that notwithstanding this information, this was not likely to have a significant effect on the environment. In my view, that was a matter for their planning judgment and therefore a matter for them. Contrary to Mr Willers' submission, this was not a case that was remotely close to the extreme facts in *Bateman*: see paragraph 14 above.
53. Mr Willers' related submission was to ask rhetorically: if the first respondent had decided that there would be a likely effect, but that it was not significant, where was the evidence on which he relied in arriving at that conclusion? This shaded into a suggestion that the reasons for the screening direction were inadequate, because in explaining why any effect was not likely to be significant, the direction (as he put it) "does not go far enough."
54. I disagree. The authorities to which I have referred make clear that the first and second respondents were not required to set out in detail all the information and statistics, of which they would have been well aware, and which might be relevant to the question of air pollution. I am thinking in particular of the published data as to trip frequency, standard emissions and exceedances, and the like. The first and second respondents must be taken to be familiar with all such information. Armed with that knowledge, they concluded that, in this case, the increase in traffic was not likely to have a significant effect on the environment. This was because of the comparatively modest scale of the development. That was a matter for them, and not something that had to be justified by reference to lengthy written reasons in respect of concepts, formulae and other matters which were very familiar to them.
55. Having regard to Mr Willers' rhetorical question, it is not unreasonable to turn it back on the appellant and ask what the evidence was that might suggest that this comparatively modest residential development was likely to have a significant effect on the environment. Mr Willers appeared to accept that there was no such evidence, but suggested that there did not need to be any. He submitted that there was an automatic assumption to that effect, given the proximity of Site A to the AQMA. Indeed, he went so far as to say that, in respect of any development of over 5 hectares close to an AQMA, it was irrational to conclude that it was not likely to have a significant effect.
56. In my view, that simply does not follow. The effect on the environment, and whether it is likely to be significant or not, must depend on the facts of each case, and in particular the nature, scale and size of the development, its proximity to the AQMA and the like. It is a sliding scale, or spectrum. It cannot be right that, as a matter of principle, every

development close to an AQMA should automatically be regarded as likely to have a significant effect on the environment, without any specific evidence to point to that conclusion. In my judgment, proximity to an AQMA is not some sort of trump card which will always give rise to the need for an EIA.

57. On this issue, the judge's conclusion was in these terms:

“47. It was legitimate for the authors of the screening analysis and the written statement to address the issues by reference to the lists of categories and factors in schedule 3 to the 2011 Regulations. On a fair reading, all aspects of air quality and cumulative impact were considered and taken into account in reaching the overall conclusion that there were no likely significant effects on the environment arising from the proposed development, and so an EIA was not required.”

For the reasons that I have given, I respectfully agree with her.

58. Accordingly, I would reject Ground 1 of the appeal. There was a sufficient evidential basis for the conclusion that - notwithstanding the proximity of the AQMA - the proposed development was not likely to have a significant effect on the environment and there was no error of law on the part of the judge in reaching that same conclusion.

8. GROUND 3: NO ASSESSMENT OF CUMULATIVE EFFECTS

59. The thrust of this complaint concerns the five other potential development sites in the area. In my view, these were properly taken into account. Thus:

(a) The second respondent's screening opinion expressly considered all the consented developments, and sites allocated for housing development, in the local development framework, at paragraphs 3.6 – 3.10 (see paragraph 20 above).

(b) Site B is directly adjacent to this site. Planning permission for 25 dwellings was granted as long ago as September 2009. That development had been completed by the time the screening direction was issued. Site B was considered at paragraph 3.6 of the screening opinion.

(c) Site C is a small site adjacent to the southern boundary of the site. It was allocated for residential development in the adopted local development framework and planning permission was granted for 24 homes on 16 February 2017. Site C was considered at paragraph 3.7 of the screening opinion.

(d) Site D is to the north of this site. Planning permission was granted in October 2009. The development of 14 houses was complete by the date of the screening direction. Site D was considered at paragraph 3.7 of the screening opinion.

(e) Site E is a site some distance to the north of this site, allocated for residential development in the local development framework. Site E was addressed at paragraph 3.8 of the screening opinion.

(f) Site F is a site some distance to the west of this site, allocated for residential development in the local development framework. Site F was addressed at paragraph 3.8 of the screening opinion.

(g) At paragraph 3.10 of the screening opinion, taking all these five sites into account, along with Site A, the second respondent concluded that “there would not be likely to be any significant cumulative environmental impacts”.

60. In addition, the consented housing developments on sites B and D and the application for housing in respect of site C, were also considered by the first respondent in the screening analysis under the heading Q21 ‘cumulative impact’ (paragraph 23 above). The same conclusion resulted.
61. Accordingly, I consider that it is beyond argument that the first and second respondents reached their conclusions, that there were no likely significant effects arising from the proposed development of Site A, taking into account all relevant considerations, including the nature, location, and scale of the proposed development and the other developments in the area (both planned and actual), such that an EIA was not required. There was a plain evidential basis for that conclusion. It is equally clear that, in accordance with the approach in *Loader*, that was a conclusion which was open to the first and second respondents as a matter of planning judgment.
62. Accordingly, I would reject Ground 3 of the appeal.

9. GROUND 2: THE PRECAUTIONARY PRINCIPLE

63. The source of the appellant’s argument can be found in the EU Directive (2011/92/EU of 13 December 2011) concerned with the assessment of the effects of public and private projects on the environment. At Recital (2), it states:

“Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principle that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluters should pay...”

The precautionary principle is also referred to in the passage from the judgment of Pill LJ in *Loader* set out in paragraph 9 above.

64. The appellant’s submission was that, because there was what he describes as “inevitable uncertainty” about the air pollution created by the proposed development, the decision-maker, and the judge, failed to have proper regard to the precautionary principle.
65. I consider that this argument to be misconceived. In addition, as I have said, it is an unfair criticism of the judge, since I can find no evidence that this point was ever raised below, and certainly not in the terms in which it was advanced before us.
66. The precautionary principle will only apply if there is “a reasonable doubt in the mind of the primary decision-maker” (see Beatson LJ in *Evans*). It is contrary to the principle outlined there to argue that, merely because somebody else has taken a different view to that of the primary decision-maker, it cannot be said that there was no reasonable doubt.
67. In the present case, neither the first nor the second respondent had any doubt that the proposed development was not likely to lead to significant effects. In circumstances where there was no doubt in the mind of the relevant decision-maker, there is no room

for the precautionary principle to operate. The argument therefore fails at the first hurdle.

68. In discussions between my Lord, Lord Justice Lewison, and Mr Willers, a point arose as to the difference between a situation where, as here, the first respondent had no doubt that there was no likely significant effect, and the situation where it might be argued that he should have had such a doubt. That latter proposition was at the forefront of Mr Willers' submission: he candidly accepted that "I cannot say there was material doubt. But I can say that there ought to have been a material doubt."
69. It seems to me that the answer to that issue is this. A decision-maker in this situation has three options: they can decide that an EIA is necessary; they can decide that an EIA is not necessary; and finally, they may not know whether an EIA is necessary or not. It is in that third situation that the precautionary principle applies. It is difficult to see how it could apply to the second option, save perhaps for the rare case where, although the decision-maker had no doubt, the absence of any such doubt was irrational on *Wednesbury* principles. But that would just bring the debate back to the lawfulness or otherwise of the underlying decision and, for the reasons I have given, I do not doubt the lawfulness of the screening decision in this case.
70. Accordingly, I would reject Ground 2 of the appeal.

10. GROUND 5: THE ALLEGED MISCHARACTERIZATION OF THE SITE

71. I deal with this before Ground 4 because, logically, it raises a prior issue.
72. Underlying Ground 5 is the complaint that the first respondent (and the judge) erred in law by characterising the proposed development of Site A as a proposal relating to "an existing developed site" whereas, in truth, it should have been regarded as a greenfield site. I do not consider that to be correct, and to be fair to Mr Willers, although he did not formally abandon it, he did not press it either.
73. It seems to me to be contrary to common sense to suggest that Site A should somehow be designated or treated in the same way as a greenfield site. It was formerly a brickworks quarry which was subsequently used for landfill with no restoration procedures. At one point the recreation ground had a small athletics track and associated buildings on it. Site A therefore fell within the NPPF 2012 definition of previously developed land ("PDL") and, since none of the exclusions from the definition of PDL could apply to Site A, it was rightly considered to be an existing developed site.
74. Moreover, I consider this to be the obvious conclusion, in the light of the other points raised in the appellant's original judicial review application. As noted in paragraph 24 above, the challenge originally raised questions about the contaminated nature of the land. That arose directly out of the landfilling operations and the previous use(s) of Site A. To suggest that Site A is somehow both contaminated and a greenfield site is a logical impossibility.
75. Finally, I do not accept that the description of Site A as "an existing developed site" had any impact on the first respondent's screening direction or the judge's judgment. The screening direction would have been the same, whether Site A was so designated or not. Site A was still the same distance away from the AQMA. It was still not in the

open countryside away from all forms of traffic. Accordingly, its designation was irrelevant to the screening direction of 16 December 2016, an argument from which Mr Willers did not demur. I would therefore reject Ground 5.

11. GROUND 4: URBAN AREA

76. That characterisation of Site A then informs the approach to Ground 4, which is the relevance or otherwise of the fact that Site A, an existing developed site, was in an urban area. The appellant argues that the screening direction was unlawful because the first respondent treated the fact that Site A was in an urban area as requiring a different, lower test to be applied in respect of the likely effect on the environment.

77. The two separate passages in the screening direction which are relied on by the appellant in support of Ground 5 are as follows:

“... In view of this, the Secretary of State considers this issue does not result in significant effect, over and above that which is normally present as an existing developed site... In respect of these issues, the Secretary of State has considered the evidence before him, and is of the view that the proposal will not result in a likely significant effect, above that which any urban development proposal on an existing developed site would normally present.”

78. The appellant’s broad suggestion (based on these two sentences, taken in isolation) is that the first respondent was prepared to allow pollution in and around Site A because it was located in an urban area, which he would not have countenanced had Site A been within a rural area. The argument, encapsulated at paragraph 51 of the appellant’s skeleton argument, was that, because the accepted increase in air pollution caused by the proposed development will occur in an urban area, there should be greater concern about the effects of that increase, not less.

79. The judge squarely addressed and rejected that submission at [46]: see paragraph 34 above. She said that, ultimately, the argument was based on a misreading of the first respondent’s screening direction.

80. I respectfully agree with that conclusion. Nowhere in the screening direction, or in the other documents which I have set out above, is there any sustainable suggestion that, in some way, the potential air pollution from the completed development of Site A was treated in a different way because it would occur in an urban environment, as opposed to a rural location. What the screening direction was doing was making plain that the pre-existing urban environment was part of the context in which the development was going to take place, and was therefore a relevant factor to be taken into account when considering whether the effect was likely to be significant or not. That was self-evidently the right approach. To put the point another way: Site A would not be generating traffic for the first time, and there were existing and future urban developments around it which also continued to generate traffic. It was in that context that the likelihood of significant environmental effects was considered and rejected.

81. In the context of Ground 5, I had wondered whether there was a slightly different point available to the appellant, to the effect that, because of the reference to the likelihood of effects “above that which any urban development proposal on an existing development site would normally present,” the first respondent was applying the wrong

test; that he was suggesting that the applicable test was whether the likely effect of the development would be *more* significant than that which would normally be expected of an urban development on an existing development site. But Mr Willers did not wholeheartedly embrace that argument, and I have concluded that there is nothing in the point. It is not a fair reading of the screening decision and the other documentation, when taken as a whole. The reference to “over and above that which any urban development on an existing development site would normally present” was a matter of background/context. It was not seeking to change the test or to apply a test to an urban area that would not be applicable to a proposed development in a non-urban area or of an existing undeveloped site.

82. Finally, in relation to both the potential arguments about these two sentences raised under Ground 5 and discussed above, I am mindful of the clear guidance given to judges considering judicial review cases against over-analysing decisions and applying too strict an interpretation to individual words and phrases, and the need to approach the decision as a whole: see for example Lord Bingham in *Clarke Holmes v Secretary of State for the Environment* [1993] 66 P & CR 263 at 271 and Hoffmann LJ in *South Somerset District Council v Secretary of State for the Environment* [1993] 66 P & CR 83 at 84. This might be regarded as a classic example of taking individual sentences out of context and overlaying them with a significance which they were never intended to have. I consider that, in the round, the screening direction confirmed that there was likely to be an impact as a result of the completed development, but that such an impact was not likely to be significant.

83. I would therefore reject Ground 5 of the appeal.

12. CONCLUSIONS

84. This was, within the context of Schedule 2, a relatively modest proposal to develop a site in an urban area which had had various uses over the years. The conclusion that the development was not likely to have a significant effect on the environment has not been shown to be in any way irrational. The judge was right to reject the judicial review challenge and, if my Lords agree, I would dismiss the appeal against her decision.

LORD JUSTICE DAVID RICHARDS:

85. I agree.

LORD JUSTICE LEWISON:

86. I also agree.