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Case No: CO/3409/2019

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22/06/2020

Before :

**MR JUSTICE DOVE**

Between :

**THE QUEEN (on the application of Ms  
ELAINE MARTIN) Claimant**  
- and -  
**FOLKESTONE AND HYTHE DISTRICT  
COUNCIL Defendant**

Mr Andrew Parkinson (instructed by Richard Buxton) for the Claimant  
Mr Richard Harwood Q.C. and Miss Stephanie David (instructed by Attwells) for the  
Defendant

Hearing dates: 24th March 2020

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be listed on 22<sup>nd</sup> June 2020 at 1030.

**Approved Judgment**

**Mr Justice Dove :**

1. On 19 September 2017 the defendant validated an application for planning permission which was submitted on behalf of the defendant's Strategic Development Projects team for a project described in the following terms on a site owned by the defendant:

“Hybrid application accompanied by an Environmental Statement for the development of land at Princes Parade, comprising an outline application (with all matters reserved) for up to 150 residential dwellings (Use Class C3); up to 1270 m<sup>2</sup> of commercial uses including hotel use (Use Class C1), retail uses (Use Class A1) and/or restaurant/cafe uses (Use Class A3); hard and soft landscaped open surfaces, including children's play facilities; surface parking for vehicles and bicycles; alterations to existing vehicular and pedestrian access and highway layout; site levelling and ground works; and all necessary supporting infrastructure and services. Full application for a 2961 m<sup>2</sup> leisure centre (Use Class D2), including associated parking; open spaces; and children's play facility.”

2. As set out in the description of development the application was accompanied by an Environmental Statement. That document addressed a range of environmental concerns, including, in particular, questions associated with flood risk and drainage. A further document accompanying the application was a Flood Risk Assessment (“the FRA”) dated August 2017, examining a range of questions concerning both flood risk and hazard, and also the proposed strategy for handling surface water drainage. The FRA commenced by an examination of the approach to be taken at the site to the Sequential Test, described as a risk-based approach to proposals for development in areas at risk of flooding. The FRA noted that the starting point for this process was, generally, the Environment Agency's flood zone maps (“the EA flood zone map”). The EA flood zone map which was current at the time when the FRA was prepared showed that the development site was located in an area identified as Zone 3. The FRA concluded that the site was not within the functional floodplain or Zone 3b, but was identified on the EA flood zone map within zone 3a with the identified source of flooding being the sea, and noting that the site benefited from a 1 in 200 year standard of protection from existing flood defences. Having reached these conclusions, the FRA went on to observe as follows:

“The second level of appraisal is through the application of the more detailed and refined flood risk information contained within the Strategic Flood Risk Assessments (SFRA). Such a document has been prepared for the Shepway District Council (SDC) in 2015 and includes more detailed flood hazard mapping which, unlike the EA's Flood Zone mapping, considers the influence of the defence infrastructure in this location. This mapping provides a more accurate depiction of the variation in the risk of flooding across the district.

An extract of the flood hazard mapping is shown in Figure 2.3 below and represents the maximum impact as a result of either

waves overtopping the defence infrastructure or the failure of the defences in a number of locations along the coastline.

From figure 2.3 above it can be seen that the development site is located outside of any the mapped hazard extents (i.e. it has a very low hazard classification). Consequently, based on the above mapping it is concluded that the Sequential Test will be passed.”

3. Against the background of this analysis the FRA reached the following conclusions in relation to flood risk issues at the site:

“Section 2.3 of this report depicts the risk of flooding from the Environment Agency’s coarse flood zone maps, which is used as the starting point to establish whether further analysis is required. With reference to both the SDC SFRA(2015) and the findings of this report, it is evident that the risk of flooding is significantly lower than is depicted by this coarse flood zone mapping and consequently, if the Sequential Test is applied, it is assumed that the development will meet the requirements. Without having a comprehensive knowledge of the land that is available for development in the district it is not possible for this FRA to comment in detail on the Test, nevertheless, the evidence provided within this report can be used to support the application of the Sequential Test if required.

In addition to the Sequential Test it is also necessary to consider the type and nature of the development and whether the Exception Test is applicable. From table 2.3 it can be seen that the proposed development is situated within Flood Zone 3a and is a development site that is classified as being both “less vulnerable” and “more vulnerable”. Consequently, it has been necessary to apply the Exception Test to determine whether suitable and appropriate mitigation can be incorporated into the design of the scheme to ensure that it is sustainable in terms of flood risk.

The risk of flooding has therefore been considered across a wide range of sources and it is only the risk of flooding from wave overtopping that has been shown to have any bearing on the development. However, when this risk is examined in detail it has been demonstrated that with appropriate mitigation, the occupants of the proposed development will be safe and remain so throughout the lifetime of the development.

The mitigation measures to be incorporated into this development include the following:

- an increased promenade (increased width from 6 m to 12 m), with a cross fall towards the beach.

- The construction of a secondary wave return wall, located 11 m landward of the existing seawall and 1 m in height...

-All development will be located a total of 12 m (minimum) landward of the existing seawall.

-Land levels across the site will be raised and well sloped towards the coast.

-Finished floor levels should also be raised a minimum of 600 mm above the promenade level and set to a minimum of 6.45 m AOD N.

-Flood resistant and resilient construction technique should be used where possible as a precautionary measure.

-2 tidal outfalls will be constructed to reduce the volume of water entering the Royal Military Canal”

4. As set out above, the FRA made reference to the Shepway District Council Strategic Flood Risk Assessment (“the SFRA”) which was published in July 2015. In the Executive Summary the document is described as providing the building blocks upon which forward planning and development control decisions were to be made. Having reviewed the available data in respect of the study area, and having provided an overview of the various sources of flood risk (the sea, rivers, surface water run-off and overland flow etc) and having given consideration to climate change and flood risk management practices the SFRA provided an analysis in relation to residual flood risk. This analysis was introduced by an examination of potential areas where breach or overtopping of sea defences might occur in the following terms:

“One of the primary objectives of the SFRA is to refine the quality of flood risk information available to decision-makers so that planning decisions can be better informed. Without detailed analysis of flood risk, the only available information is the Environment Agency’s Flood Zone mapping; however, this is far too coarse and does not recognise the presence of the existing flood defences. Consequently, as part of the SFRA, detailed hydraulic modelling has been undertaken to analyse the risk of flooding and quantify the impacts of flood events that may occur as a result of a breach or overtopping of the sea defences.”

5. The SFRA went on to examine the question of wave overtopping. This is a phenomenon which can arise during extreme storm events as a consequence of high water levels and large waves resulting in significant volumes of water overtopping seawalls. Hydraulic modelling included the effects of wave overtopping as part of the analysis. A matrix of combined events incorporating breaches of sea defences and overtopping events was established and hydraulic modelling undertaken, providing outputs for 3 individual time epochs: 2015 or the current day; 2075 and 2115. For each of the 25 m grid cells within the model, information on flood depth and velocity was recorded for every 10 second interval during the 56 hour model simulation.

Hazard maps were then produced providing a graphical representation of the hazards associated with flooding expressed as a function of depth and velocity. A formula was set out to provide a hazard rating, grading the degree of flood hazard arising as either low, moderate, significant or extreme. The hazard maps, which were presented to the court with increased resolution to those presented in the SFRA, show that the application site is not identified within an area with any degree of flood hazard.

6. It appears that subsequent to the publication of the FRA the EA flood zone maps were revised and updated in relation to the area of Princes Parade where the site is located. Plainly, the purpose of the preparation and publication of these revised flood zone maps was to provide a more up-to-date and accurate picture of the risk of flooding than those which were referenced in the FRA report. In evidence lodged on behalf of the defendant Mr Simon Maiden-Brooks, who was involved in the preparation of the SFRA, an overlay is produced which superimposes the most recent EA flood zone maps, which were current at the time of decision-taking in respect of this application, onto the proposed masterplan of the development. Shortly prior to the hearing it emerged that there were inaccuracies in the original exercise and a further plot of the masterplan was produced by Mr Maiden-Brooks in a second witness statement to correct the misalignment. The overlay demonstrates that some of the development, including both residential development and the leisure centre, are within areas identified as being within Flood Zone 3.
7. Prior to setting out the defendant's decision-making process, in my view it would be helpful at this stage to set out the planning policy background, which is key to the claimant's contentions in the two grounds upon which the claim is advanced. In brief, the claimant contends that the committee who made the decision in respect of this application were misled by the committee report with which they were presented in relation to planning policy: in relation to the site itself under ground one, and in respect of flood risk in relation to ground 2. The relevant policy is set out starting with national planning policy in the National Planning Policy Framework ("the Framework"), before moving to local development plan policy pertinent to the application.

#### Planning policy

8. The Framework provides policy in relation to decision-taking in respect of issues in relation to flood risk. The provisions are as follows:

“155 Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere.

...

158 The aim of the sequential test is to steer new development to areas with the lowest risk of flooding. Developments should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The Strategic Flood Risk Assessment

will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.

159 If it is not possible for development to be located in zones with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in national planning guidance.

160 The application of the exception test should be informed by a strategic or site-specific flood risk assessment, depending on whether it is being applied during planned production or at the application stage. For the exception test to be passed it should be demonstrated that:

(a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and

(b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.”

9. In addition to the Framework, at a national level further material in relation to the approach to planning policy in relation to flood risk is provided in the National Planning Practice Guidance (“the PPG”). In particular, the PPG provides the following in relation to the sequential test:

“What is the aim of the Sequential Test for the location of development?”

The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. The flood zones as refined in the Strategic Flood Risk Assessment for the area provide the basis for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their decision-making should take into account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability of river or sea flooding) be considered, taking into account the flood risk vulnerability of land uses and applying the Exception Test if required.”

10. Whilst the defendant prepared and adopted as part of the development plan the Shepway Core Strategy 2013 (“the Core Strategy”), alongside that process the defendant preserved policies from the earlier Shepway District Local Plan Review (2006) (“the Local Plan Review”) to form part of the development plan alongside the provisions of the Core Strategy. In the committee report it was noted that both policy LR9 in relation to public open space and policy TM8 in respect of the allocation of the site for recreation and community facilities from the Local Plan Review applied to the site. The text of these policies, which are set out below were recorded in full and verbatim in the committee report. The text of the policies are as follows:

“Policy LR9

The District Planning Authority will provide an adequate level of public open space for leisure, recreational and amenity purposes, by protecting existing and potential areas of open space and by facilitating new provision by means of negotiation and agreement.

Loss of open space

Areas of open space of recreation, leisure or amenity value or potential as identified on the Proposals Map will be safeguarded. Development proposals which would result in a net loss of such space will only be permitted if:

- (a) sufficient alternative open space exists
- (b) development does not result in an unacceptable loss in local environmental quality;
- (c) it is the best means of securing an improved or alternative recreational facility of at least equivalent community benefit having regard to any deficiencies in the locality.

...

Policy TM8

Planning permission will be granted for recreational/community facilities on land at Princes Parade, Hythe as shown on the Proposals Map subject to the following criteria:

- (a) the use should take advantage of, and enhance the appearance of, the Canal and the coastline
- (b) the majority of the site should remain open
- (c) Proposals should not adversely affect the character and setting of the Scheduled Ancient Monument

(d) Built development will only be permitted if justified as essential to the use, and should be small-scale, low-rise and of high quality design.”

11. In the context of flood risk, the claimant draws attention to the provisions of the Core Strategy contained in policy SS3, which addresses the Core Strategy’s place-shaping and sustainable settlements strategy, and provides in relation to flood risk (together with its preamble so far as relevant) as follows:

“4.71 Close attention will be paid to minimising hazards and flood risks in line with national policy. It is critical that, where possible, development needs to be sequentially steered away from those areas identified as facing greatest hazards in the Shepway SFRA should a tidal flooding event occur, allied with a high priority placed on upgrading flood defence infrastructure...

4.72 Residential development within Flood Zones 2 and 3 will be necessary to support the sustainable growth of the district, subject to the principles of the spatial strategy, CSD5 and national policy. Developments at risk of flooding must consider alternative locations that may minimise risk (the sequential approach). If within the Romney Marsh, the Urban Area, or the North Downs Area, there are locations that are in Flood Zone of lesser risk and could provide a similar development, then the presumption should be that the development should be refused. If no suitable site outside of Flood Zone 2 or 3 is available, then consideration should be given to minimising hazards to life and property utilising Shepway’s SFRA. This identifies and grades large parts of the central and western Romney Marsh area where flood hazards exist, but the threat posed in a flooding event is less than extreme.

...

Policy S S3

Policy-Shaping and Sustainable Settlements Strategy

...

The principle of development is likely to be acceptable on previously developed land, within defined settlements, provided it is not of high environmental value. All development must also meet the following requirements:

a. the proposed use, scale and impact of development should be proportionate and consistent with the settlements status and its identified strategic role... Within the district.



b. Consideration of alternative options within the appropriate area should be evident, with a sequential approach taken as required for applicable uses set out in national policy, for example to inform decisions against clause c below on flood risk. In considering appropriate site options, proposals should identify locational alternatives with regard to addressing the need for sustainable growth applicable to the Romney Marsh Area or Urban Area or North Downs Area.

c. For development located within zones identified by the Environment Agency as being at risk from flooding, or at risk of wave over-topping in immediate proximity to the coastline (within 30 m of the crest of the seawall or equivalent), site-specific evidence will be required in the form of a detailed flood risk assessment. This will need to demonstrate that the proposal is safe and meets with the sequential approach within the applicable character area of Shepway of the three identified, and (if required) exception tests set out in national policy. It will utilise the Shepway Strategic Flood Risk Assessment (SFRA) and provide further information. But development should also meet the following criteria as applicable:

(i) no residential development, other than replacement dwellings, should take place within areas identified at “extreme risk” as shown on the SFRA 2015 climate change hazard maps; or

(ii) all applications for replacement dwellings, should, by detailed design and the incorporation of flood resilient construction measures, reduce the risk to life of occupants and seek provisions to improve flood risk management.

(iii) strategic scale development proposals should be sequentially justified against district-wide site alternatives.”

#### The defendant’s decision

12. The planning application was reported to the defendant’s Planning and Licensing Committee on 16 August 2018. In order to assist members in reaching a view on the merits of the application a committee report was prepared by officers in relation to the application. The committee report recommended that conditional planning permission should be granted subject to an agreement under section 106 of the Town and Country Planning Act 1990. In fact, members resolved to grant planning permission for the proposed development subject to the Environment Agency withdrawing its objection in relation to surface water drainage and amendments proposed to the scheme following discussions in that regard. It appears that in the light of further negotiations the Environment Agency’s objections to the surface water drainage strategy were withdrawn and, following the consideration of a delegated report to the defendant’s Development Manager recording this, planning permission was granted for the application on 18 July 2019.

13. The focus of the claimant's submissions are the contents of the committee report prepared for the meeting on 16 August 2018, and the basis of the members' conclusions in respect of policy relating to flood risk and also policies LR9 and TM8. The committee report set out the detail of the development proposed in the application, and then described the site proposed for development. In particular, the application was noted to be in a prominent position on the coast, immediately south of the Royal Military Canal ("the RMC") which is a Scheduled Ancient Monument and local wildlife site. Having set out the various consultation responses which had been received in relation to the application, the officers' appraisal was set out under a number of headings. Under the heading "Adopted Local Policy" the officers set out policies including the provisions of policy LR9 and TM8 of the Local Plan Review. The officers' conclusions in relation to the policy framework were that it was clear "that there are both competing and complementary aims within the policies for the site and the wider Hythe Strategy (CSD7) and that these must be balanced and assessed when making a decision on this application."
14. In respect of heritage, the officers noted that whilst there were no designated heritage assets located within the application site, the northern boundary of the development site abutted the RMC. The committee report summarised the history of the events at the site in relation to the RMC and the relationship of the development to the RMC in the following terms:

“8.77 The previous land-raising of the site, contamination and unmanaged vegetation growth compromises the ability to move around the site and appreciate the relationships between it and the surroundings, as well as impacting on views from all directions. There are footpaths at the western end and through the centre of the site that allow the site to be crossed, whilst there is a small park at the eastern end. However, the general lack of built development between the canal and the shoreline helps to retain a sense of openness, as well as an understanding how the RMC would have formed a substantial obstacle to the progress of an invading French army. Currently, interpretation boards explain the history and construction of the RMC, although not the relationship of the RMC with the wider area and other defences.

8.78 The development of the site would extend up to the southern boundary of the SM. As such the built form of the development and relocated highway would result in the loss of open space between the asset and the coast, diminishing its open setting and changing the qualities of the space. Whilst there are modern day features in the landscape which has been significantly altered, (including built development in close proximity to the terminus of the canal, land raising, landscape features, coastal defences and highway works) it is considered that the openness of the canal to the coast on its southern side, and the vistas offered to this, particularly from long-range views at the East at Hospital Hill and between the more built up

coastal areas of Sandgate/Seabrook and the High contribute strongly to the setting and interpretation of the heritage asset.”

15. Having noted the concerns raised in relation to the impact on the RMC by Historic England, the committee report addressed the question of the impact on the setting of the RMC in the following paragraphs:

“8.89 Whether a proposal causes substantial harm is a judgment for the decision taker, having regard to the circumstances of the case and the policy in the National Planning Policy Framework. In general terms, substantial harm is a high test, so it may not arise in many cases. It is the degree of harm to the asset’s significance, rather than the scale of the development, that is to be assessed. Works that are moderate or minor in scale are likely to cause less than substantial harm or no harm at all. However, even minor works have the potential to cause substantial harm. The harm may arise from works to the asset or from development within its setting.

8.90 Steps have been taken by the applicant to minimise conflict between the heritage assets and the proposal, through the proposed rerouting of the access road to maintain some separation from the heritage asset and the built development; positioning the buildings with lower heights at the northern side of the application site to reduce the impact of built form; enhanced planting to reinforce the existing planting and also provide ecological mitigation and enhancement. It is considered that reasonable measures have been taken within design and layout of the scheme to minimise impact on the SM given the quantum of development proposed.

8.91 Notwithstanding the current situation where the coastal road, historic land-raising and neighbouring developments have already eroded the setting as it would have been at the time of the construction of the heritage asset, for the 1.05 km length of the Royal Military Canal running NNE from Seabrook Lodge Bridge to Seabrook Sluice, the proposed development is considered to further interrupt the historic relationship between the coastline and the Royal Military Canal, as well as views of the nearby associate heritage assets.

8.92 For these reasons it is concluded that the proposal will cause harm to the significance of the SM. In terms of the approach within the NPPF the development would not result in the destruction or partial destruction of the monument, nor the whole of its setting, as space and open views would still be present around it, with opportunity remaining to appreciate the relationship between the canal and coast for a significant component of the application site. For these reasons officers agree with Historic England and the applicant that the harm from the development would be less than substantial. However,

less than substantial harm does not mean less than substantial objection. In terms of the framework, such an assessment requires a balancing act to be undertaken and consequently, very substantial public benefits must be demonstrated to be delivered by proposed developments.”

16. The committee report went on to consider the question of whether or not public benefits existed. A number of public benefits had been identified in the course of the consideration of the application including better access and interpretation of the RMC incorporating a heritage trail, and the provision of a major new leisure centre along with recreational use of the remediated contaminated land involved in the application site.
17. The committee report noted that in relation to open space approximately half of the application site will be retained as accessible public open space. It identified that of the 7.8 ha open space of the application site (which in its present condition was largely overgrown and not freely or easily accessible to the public), 6.5 ha was covered by policy LR9 and 1 ha designated under policy TM8. The area of new open spaces being proposed was 3.89 ha (although in fact the accurate measurement is accepted in the evidence before the court to be 3.85 ha), representing a loss noted in the committee report of 3.91 ha. Of the new open space areas proposed 2.98 ha was to be designated open space, 0.88 ha covered by TM8 and a 0.16 ha as part of the canoe club. Against this background the officers’ conclusions were expressed as follows:

“8.111 In conclusion, in the context of local and national policy, sufficient alternative open space would remain in the Folkestone/Hythe urban area, which currently has a significant oversupply. The area to be provided will be of improved accessibility and environmental quality, meeting the requirements of the open space strategy which recognises a need for qualitative improvement. Child’s play space will be provided to meet the needs of the development and provide a significantly improved destination play space, reducing the deficit in the area, and the leisure centre would replace an existing facility of poor quality and coming to the end of its useful life, with one that would be of a higher quality and accessibility. It would also address the under-provision of water space in the district. It is considered that the provision of a new leisure centre facility, widened boardwalk, enhanced open space and increased play space are significant public benefits to the district, its residents and visitors. Therefore, it is considered that the applicant has provided evidence that the development proposal for Princes Parade meets the requirements of NPPF paragraph 74 and parts (a) and (c) of saved policy LR9. In relation to part (b) issues of environmental quality are addressed elsewhere in the report and balanced against the public benefits of the development.”

18. The committee report went on to consider landscape and views and the effects of the development both in the construction and operational phases of its life. At the construction phase the impact was measured as moderate, short-term and temporary;

at the operational phase it was measured as initially moderate to major in respect of certain receptors in relation to character and visual effects, decreasing following the establishment of landscape mitigation measures to moderate to minor in the longer term. Impacts on visual amenity and character were noted and these were balanced against the improvements brought about by the development in terms of open space and public realm. Ultimately it was concluded that there would be no conflict with landscape and green infrastructure policies. The committee report then considered the design and layout of the proposed development, noting the critique which had been provided by the D:SE review panel, which had led to changes to the masterplan and detailed design of the application. The overall conclusions in relation to this aspect of the proposals were as follows:

“8.155 Further it is considered that the leisure centre proposal would result in a high quality, contemporary design for the main structure. Its articulation and material palette would break up its overall mass, whilst the landscaping and public realm would create a high quality, robust setting that will fit in with the leisure centre and wider development master plan, creating a destination for a variety of activities both within the building and outdoors within an improved public realm. It will provide a much-needed facility for Hythe and the rest of the district and the detailed proposal incorporates links across the site, providing permeability and connections to public transport, cycle routes and catering for vehicular access. The building will also be accessible for a range of users.

8.156 It is considered that the layout and design parameters of the overall scheme would create a development of high visual value and local distinctiveness achieving a high-quality and inclusive design for all the proposed development, including individual buildings, public and private spaces and the wider area. It is also considered likely to function well and add to the overall quality of the area, establish a sense of place whilst accommodating the required development plus green and public space, facilities, connections between people and places, and transport networks. As such it is considered to be in accordance with paragraphs 57-61 of the National Planning Policy Framework, policies CSD4 and SS3 of the core strategy and saved policies SD1, BE12 and BE16 of the Shepway District Local Plan Review.”

19. After consideration was given to the transport effects of the proposal, the committee report turned to give consideration to matters associated with flooding. It is necessary for the purposes of this case to set out in detail this aspect of the committee report. It provided as follows:

“8.173 A Flood Risk Assessment (FRA) and Surface Water Management Strategy (SWMS) have been submitted with the proposal. When the application was submitted, the Environment Agency (EA) Flood Map located the whole of the application site within Flood Zone 3a, denoting a high

probability of flooding; 1 in 100 greater annual probability for river flooding and 1 in 200 greater annual probability for tidal flooding. However, the EA data has been updated and the maps now show the only area of the application site within zone 3 is the existing Princes Parade Road, with the remainder located within zone 1.

...

8.175 Coastal flooding is considered to be the primary source of flood risk and further analysis has taken place within the FRA. The open coastline at this location comprises a reinforced sea wall, fronted by a managed shingle beach to provide a 1 in 200 year standard of protection against coastal flooding. The Shepway District Council Strategic Flood Risk Assessment (SFRA) places the site outside of the flood hazard risk zone predicted 2115 sea levels.

8.176 The primary source of flooding risk relates to overtopping under storm surge and high tide conditions, with the closest properties considered at some risk, although insufficient to pose a safety risk to future residents. The existing primary seawall will protect the site from the direct impact of wave overtopping stop further protection will be provided by the enlarged 11 metre promenade and a requirement to setback development 12 metre from the primary seawall, in conjunction with a secondary seawall at the rear of the promenade (a 1 metre high and 1 metre deep “splash” wall). This is considered suitable mitigation to protect the scheme and is supported by the EA and can be achieved and maintained by conditions/S106 on land within the District Council control.

8.177 with respect of finished floor levels, the site has been designed to ensure all habitable accommodation is located significantly above the extreme sea level of 5.87 AODN, with a request from the EA that finished floor levels (FFL) of the development will be set no lower than 7.45 AODN, which can be secured by condition. This will be the same for the other buildings.

8.178 in accordance with the NPPF, due to the residential uses of the proposed development being considered a “more vulnerable” use, the sequential and exceptions test should normally be applied based on the Strategic Flood Risk Assessment (SFRA) and the Environment Agency flood risk zones. However, as the centre of the site where the housing is proposed to be located is now within Flood zone 1 this is no longer necessary. This supports the conclusions of the councils SFRA which identifies that the site is at no hazard risk in 2115, taking into account sea level rise projected for climate change.

8.179 As the development can be made safe from flood risk for its lifetime as advised by the FRA with recommendations of flood resilience and resistance proposed to be incorporated into the development that will also ensure flood risk is not increased elsewhere, the development is considered acceptable in this regard.”

20. The committee report also addressed the interests of nature conservation, assessing the impacts both at the construction and operational stages of the development. The committee report noted that the findings of the Environmental Statement supporting the application were that there were impacts upon habitats and species during both the construction and operational phases of the development which would require ecological mitigation measures to be taken. The conclusions of the Environmental Statement were that at the construction stage residual effects would be negligible save for impacts on breeding reed bunting and loss of on-site grassland and invertebrate habitat. The Environmental Statement concluded that in relation to residual long-term effects during the operational phase there would be a minor adverse effect upon reptiles (and major adverse effect upon common toad in particular) with all other residual long-term effects becoming negligible.
21. As flagged in earlier sections of the committee report the officers went on to weigh the public benefits of the development against the less than substantial harm to the RMC. Their conclusions in that regard were set out as follows:

“8.261 The main purpose of the development is to provide a substantial and much-needed public benefit in the form of a new leisure centre to serve the residents of the district. The application demonstrates that the existing facility is in a poor state of repair with limited life expectancy and that there is already a deficit in water space within the district. The proposed leisure centre will not only replace this but provide an enhanced facility that is accessible to all members of the community. In addition to the leisure centre, the application would deliver the following public benefits over and above what the normal policy requirement would have been for the development were it not impacting on the setting of an SM:

- a substantial area of strategic open space of significantly improved quality and accessibility than the site currently provides;
- remediation of the contaminated open space area which will facilitate improved accessibility to it;
- an enhanced seafront promenade provided an enhanced visual environment and car free space with improved connectivity between the public open space and the seafront, achieved by repositioning of Princes Parade Road to behind development;

In respect of the NPPF requirement for development within the setting of heritage assets to enhance or better reveal their significance the following public benefits are proposed:

- provide means to consolidate and repair neglected but key parts of the site through vegetation clearance and stonework repair;
  - provide better public access and interpretation of the RMC and wider area, emphasising connections between the canal and the sea, delineating lines of fire and maintaining openness;
- Heritage Trail between the RMC, Shorncliffe battery and Martello Towers, interpretation boards and artwork, building on the findings of an archaeological study;
- Environmental improvement scheme at the eastern end to mark the site of the former drawbridge and canal arm leading to it

8.262 Weighing the less than significant impact of the setting of the SM that will be caused by the development against the public benefits that will arise from it, and taking into account that these include improvements to the SM and better access to and interpretation of it, it is considered that these benefits outweigh the impact on the SM and that subject to conditions relating to the phasing of the development to ensure that the housing is not delivered without the leisure centre such that the balance falls in favour of granting planning permission.”

22. The officers went on, finally, to draw the threads of their assessment together in a set of concluding paragraphs. The conclusions noted that in respect of a range of considerations the impacts of the development could be appropriately mitigated. The conclusions also noted the significant public benefits comprised in the provision of housing as part of parcel of the proposals along with other economic benefits in terms of jobs within the leisure centre hotel and restaurant uses which would also contribute to the tourist economy. The conclusions then continued as follows:

“9.5 The main purpose of the development is to provide a substantial and needed public benefit in the form of a new leisure centre to serve the residents of the district. The application demonstrates that the existing facility is in a poor state of repair with limited life expectancy and that there is already a deficit in water space within the district. Alongside the leisure centre, the application proposes the delivery of a substantial area of strategic open and play space, occupying almost 50% of the application site and maintaining and enhancing the visual connection between the sea and canal.

9.6 In this case the harm caused to the setting of the SM relates to the understanding of the monument and the role it was built



to play in the coastal defences against Napoleon. The NPPF is clear that great weight should be given to a designated Heritage Asset's conservation, and that the more important the asset the greater the weight should be. The SM is of national importance and the harm caused to its setting therefore carries significant weight in decision-making. Whilst the site currently provides a gap between the canal and the sea, it has been subject to significant alteration, including the raising of land within its former use as a public waste tip. The vegetation that has grown across the site, together with the change in levels means that the relationship between the canal and the sea cannot currently be easily appreciated. However, it is considered that the development will result in less than substantial harm to the Heritage Asset and this harm has to be weighed against any public benefits that would arise from the development.

9.7 The public benefits of the proposal are summarised above and set out within the report and it is considered that the development will result in significant social, economic and environmental benefits to the district. The issue for the Council as Local Planning Authority decision maker is whether the changes to the setting of the RMC Scheduled Ancient Monument, the loss of the open views across the site, the impacts on the existing ecological habitat, the rerouting of Prince Parade and change its character and appearance of the site are outweighed by the benefits to residents and visitors of a new purpose-built leisure centre, quality usable open space, an enhanced pedestrian seafront promenade, additional housing, including 45 affordable dwellings, to meet the district's current and future housing need and the cleaning up and bringing back into use a contaminated underused site.

9.8 It is considered by officers that, with the mitigation proposed in the required conditions and legal agreement, the benefits do outweigh the harm to the setting of the Scheduled Monument and that the balance is in favour of granting planning permission. In accordance with the NPPF it is considered that the proposed development constitutes Sustainable Development and that planning permission should be granted."

23. Following these conclusions and consideration of local finance considerations, the committee report in a short section on human rights noted as follows:

"9.13 This application is reported to Committee as it is a significant departure from the development plan."

24. In the light of the conclusions set out in the committee report officers recommended that planning permission should be granted subject to conditions and the completion of a section 106 legal agreement. As set out above, the members of the defendant's Planning and Licensing Committee accepted the recommendation and resolved to

delegate the decision to grant planning permission subject to the withdrawal of objections in relation to surface water drainage by the Environment Agency. As already noted, those objections were resolved, and the conclusion of the section 106 agreement led to the grant of planning permission on 18 July 2019.

#### The law

25. An application for planning permission is to be determined in accordance with section 70(2) of the 1990 Act having regard to the provisions of the development plan, so far as material to the application, and any other material considerations. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that if regard is to be had to the development plan for the purpose of any determination, the determination must be made in accordance with it unless material considerations indicate otherwise. In the application of the development plan to the proposal it is sufficient for the proposal to accord with the development plan as a whole: it does not need to have to accord with each and every policy in the development plan considered individually (see *R v Rochdale Metropolitan Borough Council ex p Milne (No2)* [2001] Env LR 406, at paragraphs 49 and 50). The question of the interpretation of planning policy, as opposed to its application to the proposal at hand, is a question of law for the court to resolve following the case of *Tesco Stores Ltd v Dundee City Council* [2012] PTSTR 983.
26. In terms of the application of section 38(6) of the 2004 Act the effect of the relevant authorities was summarised by Richards LJ in the case of *R( on the application of Hampton Bishop Parish Council) v Herefordshire Council* [2015] 1 WLR 2367 as follows:

“33... It will be clear from what I have said above that in my view compliance with the duty under section 38(6) does as a general rule require decision-makers to decide whether a proposed development is or is not in accordance with the development plan, since without reaching a decision on the issue they are not in a position to give the development plan what Lord Clyde described as its statutory priority. To use the language of Lord Read JSC in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983..., They need to understand the nature and extent of any departure from the development plan in order to consider on a proper basis whether such a departure is justified by other material considerations.”
27. The legal principles in relation to judge whether or not the members of the planning committee have been materially misled by the contents of a committee report prepared to assist them in reaching their decision are now well settled. They were recently distilled by Lindblom LJ in the case of *Mansell v Tonbridge and Malling Borough Council and others* [2017] EWCA Civ 1314 in the following terms:

“42. The principles on which the court will act when criticism is made of a planning officer’s report to committee are well settled. To summarize the law as it stands:

- (1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).
  
- (2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.
  
- (3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the

possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

#### Submissions and conclusions

28. In presenting his case to the court, Mr Andrew Parkinson who appears on behalf of the claimant, made his submissions in relation to ground 2 prior to those on ground 1. I propose to deal with matters reflecting the order of his presentation. In support of ground 2 Mr Parkinson submitted that the defendant had failed to approach the question of flood risk correctly in reaching the conclusion set out in the committee report, and adopted by the members of the committee, that there was no objection to the development based upon flood risk and the sequential test. The particular focus of Mr Parkinson's submissions was his contention that the defendant had failed to properly consider and apply policy SS3 from the Core Strategy. He contended that in accordance with policy SS3c the development proposed in the present case was subject to two identified risks of flooding, in the form of the EA flood zone maps and also the risk of wave overtopping in the vicinity of the site. He submitted that the proper application of policy SS3c required in those circumstances that there should be a detailed flood risk assessment and a need to demonstrate that the proposal was safe, and in particular that it met the sequential approach.
29. He submitted that this interpretation of the policy was supported by paragraphs 4.71 and 4.72 of the explanatory text to the policy which again focused upon development within flood zones 2 and 3 being subject to the application of the sequential test. He contended that the defendant had failed to apply the sequential test, and had not sought to identify sites at a lower risk of flooding in order to avoid the risks identified on the EA flood zone maps and in relation to wave overtopping. He submitted that the reliance by the defendant upon hazard rating maps contained in the SFRA was misconceived, on the basis that this confused the risk of flooding identified from the EA flood maps with the assessment of hazard which is undertaken in the SFRA. He submitted that what the policy and its explanatory text required was an examination of whether or not there were any suitable site alternatives applying the sequential test on the basis that the site was located within an area at risk of flooding identified in the EA flood zone maps, and only if there were no suitable site as an alternative would it be appropriate to go to the hazard maps in the SFRA.

30. Mr Parkinson also focused on the assessment contained within the committee report in relation to flood risk. He submitted that paragraph 8.173 of the committee report was incorrect, since in fact the revised EA flood risk maps showed an area of flood zone 3 going beyond Princes Parade Road, contrary to what was recorded in the committee report. He further contended that paragraph 8.178 and 8.179 were seriously misleading in material respects. The committee report made no reference to Core Strategy policy SS3 and its provisions in relation to flood risk, and it was wrong for the officers to suggest that the sequential test and the exception test were not needed: the sequential test was required the basis of part of the site being in flood zone 3 on the EA flood zone maps and given the risk of wave overtopping.
31. In response to these submissions Mr Richard Harwood QC, who appears on behalf of the defendant, submits, firstly, that the EA flood zone maps are coarse and have limitations in the way in which they can be used. Relying upon evidence lodged by the defendant, he notes that the mapping is intended to provide an indicative picture at low resolution for the risk of flooding from rivers and the sea and does not include any allowance for flood defences in the depiction of flood risk. Mr Harwood drew attention to the contents of the FRA which are set out above and which identify, based on the SFRA, that the site is located outside of the extent of any mapped hazard, such hazards having been assessed on the basis of either wave overtopping or the failure of coastal defences. On the basis of this material the FRA concluded that “the Sequential Test will be passed”, and the defendant was entitled to rely upon this conclusion. Since the site was at the lowest risk of possible flooding it passed the sequential test and there was no need for the defendant to look elsewhere or for alternative sites. If the site is not at risk, it could not be refused on the basis of seeking to find a better site elsewhere. Whilst Mr Harwood accepted that there might be substance in the contention that flood zone 3 on the EA flood zone maps extends across Princes Parade Road, he submitted that this was a matter which was of no moment in the consideration of the application. On the basis that the site was assessed as being not at risk of flooding the requirements of the policies were satisfied in substance.
32. Turning to the relevant policies Mr Harwood noted that paragraph 158 of the Framework did not require the question of flood risk and the sequential test to be measured against the EA flood zone maps, but instead provided that the “Strategic Flood Risk Assessment will provide the basis for applying this test”. The PPG reinforced the centrality of the SFRA in the process of risk assessment for the purposes of considering flood risk in the development control context. Applying the PPG, the flood zones as refined in the SFRA for the area, which is said to provide the basis for applying the sequential test, identified the development as being in an area which was not at risk of flooding and therefore, an area to which new development should be steered. Finally, in relation to policy SS3 Mr Harwood submitted that the approach taken in that policy at SS3c was to examine the EA flood risk maps which would then trigger a detailed FRA. This had been undertaken in relation to this development, utilising the Shepway SFRA, and demonstrating that the site proposed for development was not within an area identified as one where there was a hazard in relation to flood risk. On the basis of these submissions Mr Harwood concluded that the requirements of both national and local flood risk policy had been properly applied in the present case.

33. In my view, the terms of the committee report, in particular at paragraph 8.178, could have been more crisply and clearly expressed. However, as set out above, it is clear on the authorities that a committee report should not be read overly forensically or with undue rigour. Allowance needs to be made for the fact that these documents are presented to the committee as an aid to understanding of the issues and to assist with decision-making and they should be read with that in mind. Taking this approach, I am satisfied that Mr Harwood's description of the defendant's analysis is properly set out in the committee report. Officers explained that the EA flood zone maps had been updated and that, as a consequence, only a part of the site was now located within flood zone 3. It is correct that there turns out to have been a minor error in the extent of that area, but that was not material bearing in mind the remainder of the officers' analysis. Officers went on to consider the risks in relation to wave overtopping and the mitigation proposed in that connection. The committee report, having considered the question of finished floor levels, then concluded, based on the findings of the SFRA, that the parts of the site proposed for residential development were at no flood risk in 2115 taking account of climate change, and as such the proposals complied with flood risk policy including the sequential test.
34. The question which then arises is as to whether or not the analysis set out above was consistent with the proper interpretation of the relevant policies in relation to flood risk. Again, I am satisfied that Mr Harwood's submissions are correct. So far as national policy is concerned it is clear that paragraph 158 (giving effect to the principal identified in paragraph 155) identifies that the sequential test, steering new development to areas with the lowest risk of flooding, will be applied on the basis of the findings of the SFRA. The use of the SFRA, identifying the refined flood zones for the application of the sequential test, is reinforced in the further material contained in the PPG. The approach contained in the committee report, which looked to the SFRA and identified that the proposed development was within an area not prone to flood risk hazard, was consistent with a proper understanding of the relevant national planning policy and guidance.
35. Mr Parkinson is correct in observing that policy SS3c is not directly referenced in the committee report. I do not accept that the failure to mention it alone could amount to any error of law on its own. I am also unable to accept the thrust of Mr Parkinson's complaint that the proper interpretation of policy SS3c required the decision-taker, on the basis that it was identified as being at risk of flooding on the EA flood risk maps and at risk from wave overtopping, to seek alternative sites pursuant to the application of the sequential test prior to considering the contents of the SFRA. In my view the provisions of policy SS3c provide that where a location for proposed development is identified by the EA flood risk maps as being at risk of flooding or at risk of wave overtopping, then what is required pursuant to the policy is the preparation and submission of a detailed FRA, utilising the materials in the Shepway SFRA. This is what occurred in the present case, and the FRA submitted demonstrated that the proposal would pass the sequential test on the basis that, utilising the Shepway SFRA, the site was not identified as being in an area where flooding was an issue. Given that the conclusions of the SFRA were that the site was in an area with the lowest probability of flooding, the question of searching for other areas at lower risk of flooding for the purposes of the sequential test did not arise.

36. For all of these reasons I am satisfied that the claimant's ground 2 is not made out and must be dismissed.
37. Turning to the submissions made in relation to ground 1, on behalf of the claimant Mr Parkinson submitted that members of the committee were misled in relation to the question of whether or not there was a breach of particular elements of policy TM8 and policy LR9, and, in particular, the committee report failed to reach a judgment in relation to the extent of compliance or non-compliance with particular elements of those policies as part of the development plan. It was essential for those matters to be dealt with, and the extent of any breach of development plan policy to be identified in order for the committee to discharge their duty under section 38(6) of the 2004 Act, and reach a lawful decision in relation to the application.
38. In detail, in relation to policy TM8, Mr Parkinson placed reliance on elements (b), (c) and (d), namely the issues of retaining the majority of the site as open, the proposal adversely affecting the character and setting of the RMC, and the built development being "small-scale, low-rise and of high quality design." In relation to this latter element of the policy, Mr Parkinson submitted that the material in the committee report only provided a description of the proposal, and in passages related to the design of the building failed to engage with the question of whether or not building was small-scale and low-rise. Whilst the committee report dealt with the quantity of open space contained within the proposals there was no adequate or proper assessment of the impact upon the open character of the site. In relation to the RMC, whilst the committee report mentioned harm to its setting, the nature of the breach of the policy was not adequately identified.
39. Turning to policy LR9 Mr Parkinson contends that the committee report failed to properly address criteria (b) of that policy, in relation to whether or not there would be an unacceptable loss of environmental quality. Whilst the committee report made reference to various environmental factors, such as landscape impact and nature conservation issues, nowhere in the committee report is there any judgment dealing directly with the question of whether or not the impact on environmental quality was acceptable. The simple reference in the committee report to the conclusion that the proposals were contrary to the development plan was insufficient to address the content of the legal duty. Members needed to be given specific assessments in relation to these key elements of the development plan policy bearing upon the site, and in the absence of them the decision which was reached was unlawful as members were misled and there was no evidence of assessment of the extent of breach of the development plan policies.
40. In response to these submissions Mr Harwood commences his argument by observing that the committee report specifically identified that the proposals were a significant departure from the development plan. He points out that the overall balance to be struck in relation to these elements of development plan policy is clearly identified at paragraph 9.7 of the committee report within the conclusions, founded upon earlier analysis within the topics discussed by the committee report. In respect of the detail relied upon by the claimant, he submits that members were properly advised in the committee report that the majority of the site would remain open (thereby addressing the issues comprised in policy TM 8 (b)), that the impact on the RMC was addressed at length within the committee report, and it was noted that this criteria was obviously breached by the development proposals. So far as TM8(d) is concerned the elements

of the committee report dealing with design provided not only a careful description of the built form of the development, but also an evaluation of its quality. The fact that the words small-scale and low-rise were not used did not amount to an error of law.

41. Turning to policy LR9 Mr Harwood submitted that the question of the loss in environmental quality was an overall judgment, the ingredients for which were clearly set out in the committee report. The committee report dealt with elements of harm not only in relation to the RMC but also in respect of landscape effects in the construction and operational phases of the development, ecological impacts and questions related to open space. These ingredients informed the overall balance in the conclusions, and particularly paragraph 9.7, in relation to whether or not the effects on environmental quality were unacceptable.
42. The key consideration in respect of this ground is the question of whether or not members were materially misled in relation the requirements of the development plan, and the need to form a judgment in relation the extent of any conflict with it. The first observation is that there was a clear conclusion in the report that the development amounted to a significant departure from the development plan. That observation did not arise in a vacuum, but rather at the end of a very lengthy and detailed committee report, in which each of the issues related to the elements of policies TM8 and LR9 were considered. In my view, it was not necessary for the officers to mechanically engage with each limb of the policy specifically, in particular when the issues concerned had been canvassed and dealt with in the discussions within the committee report. In my view, on a proper reading of the committee report, the issues were addressed and members were properly equipped to exercise their own independent judgement in relation to the requirements of the development plan. The officers provided an evaluation of the matters relevant to the policies, including conclusions when harm arose as to the nature and extent of that harm, for example in relation to the RMC, the landscape and ecology. Reading the committee report in the manner required by the authorities leads me to the conclusion that there was no error of law in relation to the contents of the committee report.
43. To start with, as set out above, members were provided in the committee report with the full text of each of these policies and the issues which they identified. In relation to the question of retaining the site as open space members had information dealing with the extent to which the proposals would retain open space. Within paragraph 8.111 of the committee report a discussion in relation to the quality of the existing and proposed open space was set out, which whilst linked to policy LR9 was, so far as necessary, an examination of the issues in relation to the quality of the open space against the backdrop of the earlier discussion related to the quantity of open space. In my view it is beyond argument that there was careful and detailed consideration within the committee report of the impact upon the RMC of the proposals. Members were fully cognizant of the issues arising in that connection and there was no necessary legal requirement in order for them to be more specifically linked to policy TM8(c) when the precise terms of that policy were fully set out in the committee report. In respect of the issues raised by TM8(d) I accept the submissions made by Mr Harwood that members were fully advised in relation to both the nature of the design proposal and also its qualities, including its massing, which addressed the relevant issues and equipped them to make their judgment in respect of this aspect of the development plan. The duty under s38(6) of the 2004 Act was engaged with and



discharged in the substance of the advice and evaluation contained in the committee report.

44. In assessing the submissions made on behalf of the claimant it needs to be recalled that what is required is an assessment of compliance with the policies of the development plan taken as a whole. As Sullivan J observed in *ex p Milne* at paragraphs 49 and 50, the policies of the development plan seek to reconcile numerous interests and it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. To be in accordance with the development plan it suffices for the proposal to accord with development plan considered as a whole: it does not have to accord with each and every policy. In evaluating a proposal against the development plan not every policy will have precisely the same weight and some will have greater significance to the determination of whether the proposal accords with the plan than others. This is a reality which will be reflected in the approach taken by officers in preparing their committee report, focussing on the more central policies, and taking a lighter touch with others that are less directly engaged or of less moment in the decision at hand, without the need to take a “tick-box” approach to the consideration of the development plan’s policies. These are issues of planning judgment, and it is clear reading the committee report as a whole that this approach is reflected in the officers’ analysis and that they applied the approach required by section 38(6) in substance in the advice which they gave to the members of the committee and which the members accepted.
45. Similar considerations arise in relation to policy LR9. The question of environmental quality was dealt with, sensibly, on a thematic basis within the committee report. Each pertinent environmental issue was examined, and judgments were reached in respect of them, including in relation to those where there was a finding that harm would arise an evaluation as to the nature or extent of that harm. The overarching question of whether or not the impact on environmental quality was acceptable was addressed in the officers’ conclusions, which need to be read as a whole. Clearly, there was environmental harm in various respects, but in particular in respect of the RMC. It is clear that members were advised that this harm was the source of the judgment that the development was a significant departure from the development plan. Members were therefore fully equipped to exercise their independent judgement in relation to the extent of that harm and the departure from the development plan as part of striking the overall balance in relation to whether or not planning permission should be granted. Members accepted the conclusions in relation to these matters and were not misled by the material which was contained in the committee report which properly addressed the elements necessary to discharge the duty under section 38(6) of the 2004 Act. I am therefore unable to conclude that members were misled by the committee report or that there was any legal failing in the material that was provided to them for the purpose of reaching that decision.
46. It follows from the foregoing that I do not consider that the claimant has made out either of the grounds of challenge presented in this case and therefore, this application for judicial review must be dismissed.