Neutral Citation Number: [2020] EWHC 1608 (Admin)

Case No: CO/4989/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23rd June 2020

Before :

Neil Cameron QC
sitting as a Deputy High Court Judge

Between :

THE QUEEN ON THE APPLICATION OF JOHN MILES	**Claimant**
- and -	
TONBRIDGE AND MALLING BOROUGH COUNCIL	**Defendant**
-and-	
(1) J MOORE	
(2) E BARTON	
	Interested Parties

- -
- -

Juan Lopez (instructed by **Charles Russell Speechlys LLP**) for the **Claimant**
Asitha Ranatunga (instructed by Kevin Toogood **Principal Solicitor (Litigation) at Tonbridge and Malling BC**) for the **Defendant**

Hearing dates: 9th and 10th June 2020

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 23rd June 2020.

The Deputy Judge (Neil Cameron QC):

Introduction

1. In this case John Miles, the Claimant, makes an application for judicial review of the decision made by Tonbridge and Malling Borough Council ("the Council"), and communicated by a decision notice dated 7th November 2019 to grant planning permission to develop land at Woodford, Old Lane, Ightham, Sevenoaks, Kent TN15 9AH ("the Site") by:

> "Section 73 application for the variation of conditions 1 (time limited and personal condition), 2 (restore site when temporary consent expires) and 4 (number of caravans) pursuant to planning permission TM/11/01444/FL (Variation of conditions 1 and 2 on TM /0 7/01238/FL: Change of use for stationing of two caravans for residential use, fencing and sheds for occupation by a single gypsy family)"

("the 2019 Planning Permission")

2. Permission to proceed with the application for judicial review was granted by Lang J on 25th February 2020.

3. The application for judicial review was heard using a video link.

Background Facts

4. The Site is located in the countryside outside the settlement of Ightham and is within the Metropolitan Green Belt.

5. I do not set out all the details of the Site's extensive planning history.

6. By a decision letter dated 17th July 2008 planning permission was granted on appeal for a change of use for the stationing of two caravans on the land for residential use with associated hardstanding, fencing and shed for occupation by a single gypsy family ("the 2008 Planning Permission"). Conditions were imposed on the grant of that planning permission which provided that the site could only be occupied by Mr Moore and Ms Barton and their resident dependents, and that permission be granted for a limited period of three years.

7. A further application was made by which planning permission was sought for change of use of the Site for stationing of two caravans for residential use with associated hardstanding, fencing and sheds for occupation by a single gypsy family without complying with the conditions which limited the 2008 Planning Permission to personal use and restricted it to a temporary period. By a decision letter dated 24th July 2015 ("the 2015 DL") an appeal was allowed and a further planning permission was granted ("the 2015 Planning Permission"). The following conditions were among those attached the 2015 Planning Permission:

> "(1) The use hereby permitted shall be carried on only by Mr J Moore and Ms E Barton and their resident dependants, and shall be for a limited period, being a period of 7 years from 17

> July 2011, or the period during which the land is occupied by them, whichever is the shorter.
>
> (2) When the land ceases to be occupied by those named in condition 1 above, or at the end of the 7 year period stated in condition 1 above, whichever shall first occur, the use hereby permitted shall cease. Within 3 months of the cessation of the use all caravans, buildings, structures, materials and equipment brought on to the land, or works undertaken to it in connection with the use, shall be removed and the land restored to its condition before the development took place.
>
> (4) No more than 2 caravans, as defined in the Caravan Sites and Control of Development Act 1960 and the Caravan Sites Act 1968 as amended (of which no more than 1 shall be a static caravan) shall be stationed on the site at any time."

8. On 1st June 2018 the Defendant validated a planning application made by the Interested Parties by which they sought planning permission to develop the Site by:

> "Section 73 application for the variation of conditions 1 (time limited and personal condition), 2 (restore site when temporary consent expires) and 4 (number of caravans) pursuant to planning permission TM/11 /01444/FL (Variation of conditions 1 and 2 on TM/07/01238/FL: Change of use for stationing of two caravans for residential use, fencing and sheds for occupation by a single gypsy family)"

("the 2018 Planning Application")

9. The 2018 Planning Application was made pursuant to section 73 of the Town and Country Planning Act 1990 ("TCPA 1990") being an application for planning permission for the development of land without complying with conditions subject to which a previous planning permission was granted. Conditions (1), (2), and (4) referred to in the 2018 Planning Application are conditions attached to the 2015 Planning Permission.

10. The 2018 Planning Application was reported to a meeting of the Defendant's Area 2 Planning Committee held on 3rd July 2019 supported by a report prepared by one of the Defendant's officers in which she recommended that a personal planning permission be granted ("OR 1"). OR 1 was supplemented by a further report which amended a recommended condition so as to limit the number of caravans to no more than three (as opposed to the four incorrectly set out in the conditions recommended in OR1) ("OR 1A"). At that meeting consideration of the application was deferred to allow for the Defendant's legal services officers to provide the committee with a report setting out the risks involved should the recommendation of officers to grant planning permission not be accepted.

11. The 2018 Planning Application was reported to a meeting of the Defendant's Area 2 Planning Committee held on 14th August 2019 supported by a further report ("OR 2"). OR 1 was appended to OR 2. In addition a decision letter dated 12th September 2018

relating to a planning application for the stationing of three touring caravans for residential use on a site in Wrotham Heath ("The Spinney" case) was appended to OR 2. At the meeting held on 14th August 2019 the members rejected the recommendation of officers and in accordance with the Council's constitutional arrangements the 2018 Planning Application was referred to the full council.

12. The 2018 Planning Application was considered by the full council at its meeting held on 29th October 2019. The officers prepared a further report ("OR 3"). OR1, OR1A and OR2 were attached to OR 3. The full council accepted the recommendation made by officers and planning permission was granted.

13. 8 conditions were attached to the 2019 Planning Permission. Those conditions included condition 1 which provided that the residential use permitted could only be carried out by certain named persons and their resident dependents; that condition made the permission personal to those named people. Condition 3 provided that no more than three caravans (of which no more than 1 shall be a static caravan) shall be stationed on the Site. The description of development set out in the decision notice (which refers to four caravans) was not amended to reflect the effect of condition 3.

14. The grounds of claim rely on detailed arguments relating to the wording used in the reports prepared by officers. For convenience, rather than setting out extensive quotations from the officer's reports in this section of the judgment, relevant extracts are quoted when addressing each ground of claim.

The Legal Framework

Officer's Reports

15. The well known principles which are applicable when considering challenges based upon the wording of officers' reports were set out by Judge LJ at page 1110H to 1111B in ***R v. Selby DC ex parte Oxton Farms*** [2017] PTSR 1103:

> "The report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles or to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of a statute or the directions provided by a judge when summing a case up to the jury.
>
> From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer's report. This reflects no more than the court's conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect

> of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken."

16. The ***Oxton Farms*** approach has been reiterated in more recent cases, including ***R (Watermead Parish Council) v. Aylesbury Vale DC*** [2017] EWCA Civ 152. At paragraph 22 Lindblom LJ stated:

> "22 The law that applies to planning officers' reports to committee is well established and clear. Such reports ought 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 JSC in ***R (Morge) v Hampshire County Council*** [2011] PTSR 337, para 36 and the judgment of Sullivan J in ***R v Mendip District Council, Ex p Fabre*** [2017] PTSR 1112, 1120. The question for the court will always be whether, on a fair reading of his report as a whole, the officer has significantly misled the members on a matter bearing upon their decision, and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way-for example, by failing to draw their attention to considerations material to their decision or bringing into account considerations that are immaterial, or misinforming them about relevant facts, or providing them with a false understanding of relevant planning policy-that the court will be able to conclude that their decision was rendered unlawful by the advice they were given. .."

Material Considerations; appeal cost implications for local planning authorities

17. The immaterial consideration which, in Ground 4, the Claimant contends that the Defendant took into account in this case, was the risk that a decision to refuse planning permission would lead to an appeal at which the Defendant would be at risk of an award of costs being made against them, giving rise to adverse financial consequences and, as if such an award were to be made, it would (in accordance with the relevant policy) be made on the basis that the Council had behaved unreasonably, damage to their reputation.

18. In ***R. Kensington and Chelsea RLBC ex parte Stoop*** [1992] 1 PLR 58 at page 75 Otton J said:

> "The officers were advising the committee not to refuse the planning permission but to grant it. If the committee chose to go against the advice of their officers they were thereby making the local authority vulnerable as to costs. In my judgment, the officers were doing no more than giving sound and clear cut reasons for refusal and that to refuse would put the royal borough in a position whereby they were vulnerable as to costs.

> In my judgment, there was nothing wrong with this procedure or in the advice that was given or the consequences that flowed from the acceptance of that advice.
>
> The officers gave the advice prudently and reasonably and there was nothing improper in their doing so. …."

19. In ***R (on the application of East Bergholt Parish Council) v. Babergh District Council*** [2019] EWCA Civ 2200 the Court of Appeal considered a challenge to decisions to grant planning permission in which one ground advanced was a contention that the council had improperly taken into account the possible financial consequences for them of fighting appeals against refusal of planning permission. The point at issue in that case was whether the council's exercise of legitimate planning judgment was distorted by considerations relating to extraneous implications for their own resources (paragraph 74). Lindblom LJ concluded that considerations relating to expending money in resisting appeals or on paying an appellant's costs did not play a part in the officers' assessment of the proposals on their planning merits (paragraph 71). At paragraph 82 Lindblom LJ stated:

> "82. It need hardly be said that local planning authorities are not free to misread or misapply government policy because they fear the financial consequences for themselves if later faced with an appeal against a decision to refuse planning permission, or indeed, as in this case, proceedings for judicial review challenging a decision to grant. They must adhere, always, to a correct interpretation of relevant policy, apply such policy lawfully when assessing the proposals before them solely on the planning merits, and not allow the potential consequences of the decision for their own resources to influence their exercise of planning judgment. If authorities abide by that basic principle, they may still not avoid the expense of having to defend their decisions on appeal or resist claims for judicial review. That is beyond their control. But they will, at least, be acting in accordance with the law. And in this case, in my view, the district council did that."

20. Underhill LJ agreed with Lindblom LJ and added the following at paragraph 87:

> "No doubt the risk of those costs will encourage them to think carefully about any refusal decision, and that is fair enough – though of course in principle they should be doing so anyway. But that is not the same as allowing the risk of the costs associated with defending an adverse decision on appeal to influence them in the exercise of their planning judgment. That is not legitimate (Lord Carnwath's observations in the HSE case to which Lindblom LJ refers are directed to a different question)."

Reasons

21. The standard for reasons is that set out by Lord Brown of Eaton-under-Heywood at paragraph 36 in ***South Bucks v. Porter (No.2)*** [2004] 1 WLR 1953.

Whether policies can be considered to be out of date

22. In ***Peel Investments (North) Limited v. Secretary of State for Housing Communities and Local Government*** [2019] EWHC 2143 (Admin) at paragraphs 58 and 59 Dove J reached the following conclusions on the approach to be taken when considering whether policies were out of date:

> "58. In my view the starting point of the evaluation of these submissions must be an understanding that at the heart of this issue is a question of interpretation of planning policy, and in particular the planning policy contained in paragraph 11d and 213 of the 2018 Framework. That is because the notion of a policy being out-of-date is one which exists within the structure of the Framework and which exists for particular purposes, namely the question of whether or not the tilted balance should apply and the weight which should be attached to the policy in the decision-taking process. In my judgment it is critical to note that there is nothing in the relevant provisions of the Framework to suggest that the expiration of a plan period requires that its policies should be treated as out-of-date. Indeed, to the contrary, the provisions of paragraph 213 specifically contemplate that older policies which are consistent with the Framework should be afforded continuing weight. Furthermore, I would entirely accept and adopt the formulation of the approach to the question of whether a policy is out-of-date given by Lindblom J in Bloor Homes. It will be a question of fact or in some cases fact and judgment. The expiration of the end date of the plan may be relevant to that exercise but it is not dispositive of it, nor did Lindblom J suggest that was the case. In so far as reliance is placed by the Claimant on the observation of Lord Carnwath in paragraph 63 of Hopkins Homes, I accept the submissions made by the First and Second Defendants that it is an obiter remark which does not lay down any legal principle, or provide a gloss on Lindblom J's approach. It is important to note that Lord Carnwath had endorsed Lindblom J's views at an earlier part of the judgment and it would be inconsistent with that endorsement to read the sentence in paragraph 63 as a further gloss on Lindblom J's conclusions. In short, this sentence from the judgment is quite incapable of bearing the forensic weight which the Claimant seeks to ascribe to it. Lord Carnwath was not identifying a legal principle that when a plan's end date has been passed its policies are out-of-date in the terms of the policy of the Framework.

> 59. I am unable to accept the submission that the provisions of the 2012 Regulations also demand that once a plan period has expired the plan must be deemed out-of-date when applying the policy of the Framework. Firstly, the provisions of the 2012 Regulations are addressing the matters which need to be included when a local development document is being prepared and adopted or which defines a document as such. The Regulations are not designed, nor do they purport, to govern the application of the Framework's term out-of-date for the purposes of paragraph 11 of the Framework. Indeed, as I have already emphasised, that is a policy concept to be interpreted and applied within the context of the Framework and is not, therefore, to be defined by elements of the statutory framework which are not referred to by the Framework in this connection at all. Indeed, the statutory framework is consistent with the provisions of paragraph 213 of the Framework in that this statutory material does not, for instance, suggest that once the plan period for an element of the development plan has expired that plan ceases to be part of the development plan for the purposes of exercising the statutory discretion as to whether or not to grant planning permission, or should be treated differently in the decision-taking process. In short, therefore I have reached the conclusion that the Claimant's ground 2 is not made out."

The Grounds and Conclusions on each Ground

23. The Claimant challenges the decision to grant the 2019 Planning Permission on the assumption that members did so on the basis of the advice given in the officer's reports. That assumption is not in dispute and, and in this case, appears to be well founded (see ***Watermead*** at paragraph 22).

24. The Claimant relies on seven grounds of claim. In Ground 6 the Claimant contends that the Defendant acted irrationally in the approach they took when considering the application of national planning policy which indicates that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. In Ground 7 the Claimant contends that the Council failed to give adequate reasons. In making his submissions Mr Lopez considered irrationality and failure to give adequate reasons when addressing grounds 1 to 5. Mr Lopez said that grounds 6 and 7 did not add to the previous grounds and made no separate submissions on those grounds. In this judgment I take a similar approach. Insofar as Mr Lopez raises points founded on irrationality or lack of reasons, I address those points when considering grounds 1 to 5.

25. Ground 1, as set out at paragraph 26 of the Claimant's Skeleton Argument is made up of 11 separate arguments listed as (a) to (k).

26. The grounds relied upon as advanced by Mr Lopez in oral argument were grouped together as set out below. During the course of the hearing Mr Lopez confirmed that my re-formulation of each ground was an accurate overview summary of each ground relied upon by the Claimant.

27. Ground 1(a), (e) and (g) which I will refer to as Ground 1A: The Defendant misinterpreted or misunderstood and therefore failed to have regard to paragraph 24 of Planning Policy for Traveller Sites ("PPTS").

28. Ground 1 (b), (c), (d) and (f), which I will refer to as Ground 1B: The Defendant misinterpreted or misunderstood and therefore failed to have regard to policy LP38 in the draft Tonbridge and Malling Local Plan.

29. Ground 1(h), which I will refer to as Ground 1C: The Defendant took into account an immaterial consideration when they found that the proposal properly aligns with the broad principles adopted in drafting Local Plan policy LP38.

30. Ground 1(i) part (1), which I will refer to as Ground 1D: The Defendant failed to take into account harm to openness and encroachment into the countryside when carrying out the balancing exercise required in order ascertain whether there were very special circumstances.

31. Ground 1(i) part (2), which I will refer to as Ground 1E: The Defendant took into account an immaterial consideration or acted irrationally in proceeding on the basis that The Spinney appeal decision amounted to a fundamental change in the position concerning the existence of very special circumstances.

32. Ground 1 (i) part (3), and (j), which I will refer to as Ground 1F: The Defendant misinterpreted or misunderstood and therefore failed to have regard to the national Planning Practice Guidance ("PPG") relating to the imposition of conditions restricting planning permission to a temporary period.

33. Ground 1(k), which I will refer to as Ground 1G: The Defendant misinterpreted or misunderstood and therefore failed to have regard to paragraph 27 of PPTS.

34. Ground 2: This ground is a variation on ground 1F and I will consider it together with that ground: The Defendant misinterpreted or misunderstood and therefore failed to have regard to the PPG relating to the imposition of conditions restricting planning permission to a temporary period.

35. Ground 3: the Defendant misinterpreted or misunderstood and therefore failed to have regard to national Green Belt policy as set out in paragraph 144 of the National Planning Policy Framework ("NPPF").

36. Ground 4: The Defendant took into account immaterial considerations namely, the prospect that the applicant for planning permission may appeal giving rise to risk that a costs award might be made against them giving rise to expense and/or damage to their reputation.

37. Ground 5: The Defendant took into account an immaterial consideration namely that policy CP14 in the Tonbridge and Malling Core Strategy ("the Core Strategy") was out of date and should therefore be afforded limited weight.

Ground 1: general and Ground 1D

38. Mr Lopez introduced his submissions on Ground 1 by considering the approach taken in OR1 to the application of planning policy relating to Green Belt.

39. Mr Lopez drew attention to the following passages in the officer's reports:

i) Paragraph 6.11 of OR 1 notes that policy CP3 of the Core Strategy provides that national Green Belt policy will apply.

ii) Paragraph 6.12 of OR1 states:

> "Paragraph 143 inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. Paragraph 144 goes on to state that when considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

The references to paragraph 143 and 144 are to paragraphs contained in the NPPF.

iii) At OR 1 paragraph 6.16 the officer identified the harm arising from the proposed development:

> "I am of the view that the development still constitutes inappropriate development within the Green Belt, given that the structures in situ to some degree materially affect openness in both visual and spatial terms, and represent a form of physical encroachment into the countryside. As such, very special circumstances are still required which outweigh the degree of harm caused to the Green Belt."

iv) At OR 1 paragraph 6.17 the officer quoted from paragraphs 34 and 35 of the 2015 DL. That decision letter was concerned with a planning application for two caravans.

v) OR 1 paragraph 6.18 states:

> "Having established this, it is also necessary to consider whether the development causes any other harm, which includes any other harm to the Green Belt itself, along with any other harm that is relevant for planning purposes. In this respect, in terms of Green Belt impact, the structures on site are small in scale and extent and, whilst they have a presence within the Green Belt which in my view affects openness, this impact is very limited on the ground. This harm must as a matter of policy be given "great weight", but whilst this limited

> physical impact is not - as a matter of law - capable of amounting to a very special circumstance outweighing the definitional harm identified it does however limit the degree of harm arising on the whole."

vi) Very special circumstances are considered at paragraphs 6.41 to 6.43 of OR 1.

vii) Paragraph 6.48 of OR 1 states:

> "I therefore conclude that these factors combined along with the best interests of the children living on the site is sufficient to amount to a case of very special circumstances outweighing the harm to the Green Belt by reason of inappropriateness. Permanent permission within the terms as set out by the submission, allowing for the additional named occupants and additional touring caravans (subject to approval of their precise location) should be granted. Rather than removing condition 2 as previously imposed, this should be varied to set out that in the event that residential occupation does cease for some reason in the future, the land would be restored to its former condition."

40. Mr Lopez also relies on paragraph 3.2 of OR 2 which states:

> "Discussion took place at the July committee meeting concerning whether or not it could be concluded that very special circumstances had been found in this case sufficient to outweigh the identified harm (which is limited to harm by virtue of inappropriateness rather than any other Green Belt or wider planning harm). That is, rightly, a matter of planning judgment but that judgment must be made within the context of all relevant material considerations."

41. Mr Lopez submitted:

i) That having identified three categories of harm at OR 1 paragraph 6.16 (inappropriate development, impact on openness in visual and spatial terms, and physical encroachment into the countryside) it was incumbent on the officer to take account of those three categories of harm when applying the policy relating to very special circumstances set out in paragraphs 143 and 144 of the NPPF.

ii) That the officer's advice in OR1 paragraph 6.18 that ".. this impact is very limited on the ground." could only have referred to visual impact not spatial impact.

iii) That OR 1 paragraph 6.48 and paragraph 3.2 of OR 2 only took account of one category of harm, namely harm by reason of inappropriateness.

iv) That the members of the Council were significantly or seriously misled by the officer reports.

42. Mr Ranatunga submits that on a fair reading of OR 1, and reading it with reasonable benevolence, paragraph 6.48 must, as a conclusion, be read together with paragraphs 6.16, 6.17 and 6.18 which take account of all the categories of harm. He further submits that, whilst OR 2 does repeat the partial summary at 6.48 of OR 1, it refers back to and relies upon OR 1. He submits that OR 3 'defers to' OR 1 and OR 2.

43. In my judgment paragraph 6.48 of OR 1 and paragraph 3.2 of OR 2 read on their own are erroneous in that they indicate that the harm under consideration is limited to harm by way of inappropriateness. The issue to be considered is whether on a fair reading of the reports as a whole the overall effect of the reports is to significantly mislead the full council about material matters (***Oxton Farms*** at page 1111 B). It is only if the advice is such as to misdirect members in a serious way that the court will be able to conclude that the Council's decision was rendered unlawful by the advice they were given (***Watermead*** at paragraph 22).

44. When reading the reports as a whole:

    i) Attention is drawn to the policy relating to very special circumstances set out in the NPPF (OR 1 paragraph 6.12).

    ii) Attention is drawn to the purposes of Green Belt (OR1 paragraph 6.14).

    iii) The harm arising in this case is identified at OR 1 paragraph 6.16.

    iv) OR 1 paragraph 6.18 emphasises that it is necessary to consider whether the development causes any other harm ".. which includes any other harm to the Green Belt itself, along with any other harm that is relevant for planning purposes."

    v) OR 1 paragraph 6.41 is found under the heading 'very special circumstances' and refers to the 'identified harm'. That, in my judgment, must be a reference to the harm which is referred to earlier in OR 1.

    vi) OR 1 paragraph 6.48 is found under the heading 'Conclusion'. In my judgment, it was not necessary in paragraph 6.48 to repeat the reasoning contained in the previous paragraphs.

    vii) OR 2 paragraph 3.2 refers to discussion at the July 2019 committee meeting and then states, inaccurately, when referring to the identified harm "which is limited to harm by virtue of inappropriateness rather than any other Green Belt or wider planning harm".

45. In my judgment, OR 1 paragraph 6.48 and OR 2 paragraph 3.2 when read on their own may be said to be misleading. However, it is not appropriate to pick on individual paragraphs in an officer's report; the reports must be read as a whole. On a fair reading of the reports as a whole, and given that OR 1 at paragraph 6.16 identifies the different categories of harm caused, in my judgment the members were not significantly misled, or misled in a serious way. For those reasons I reject this ground of claim.

Ground 1A

46. The Claimant contends that the officer's reports provided members with a false understanding of the meaning and effect of paragraph 24 of the PPTS.

47. Paragraph 16 of the PPTS, which forms part of Policy E, states:

> "16. Inappropriate development is harmful to the Green Belt and should not be approved, except in very special circumstances. Traveller sites (temporary or permanent) in the Green Belt are inappropriate development. Subject to the best interests of the child, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances."

48. The last sentence in paragraph 24 of the PPTS states:

> "However, as paragraph 16 makes clear, subject to the best interests of the child, personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances."

49. In making his case in relation to this ground the Claimant places particular reliance on the following paragraphs in OR 1:

i) Paragraph 6.15:

> "Policy E of the PPTS states that Traveller sites (temporary or permanent) in the Green Belt are inappropriate development; such development is harmful to the Green Belt and should not be approved except in very special circumstances. In July 2013, in a Ministerial Statement, the Secretary of State made clear he considered that the single issue of unmet need, whether for Traveller sites or for conventional housing, is unlikely to outweigh harm to the Green Belt, and other harm, such as to constitute the very special circumstances justifying inappropriate development in the Green Belt. A further written Ministerial Statement in January 2014 re-emphasised this point. Policy CP20 of the TMBCS also states that there is a presumption against Traveller sites in the Green Belt unless there are very special circumstances, although this now is broadly out of date given the conflict that exists with the NPPF."

ii) Paragraph 6.35:

> "With these factors collectively in mind and given that this site contributes towards meeting an identified need for such accommodation within the Borough, this is capable of amounting to a very special circumstance outweighing the harm identified. Furthermore, whilst only limited weight can be

> attributed to draft policy LP37, it is worth noting that allowing for the limited expansion of this site to accommodate the family in fact properly aligns with the broad principles adopted in drafting that policy as a way of addressing the needs of the Borough."

iii) Paragraph 6.43, which follows a reference to The Spinney appeal decision in paragraph 6.42, states:

> "This is important for us because the PPTS sets out that whilst matters of unmet need and personal circumstances are unlikely to outweigh harm to the Green Belt as to establish very special circumstances, there are cases where this will be the case. Indeed, in the absence of a policy which seeks to address unmet need, inspectors in every instance have concluded that the lack of available suitable alternative sites amounts to very special circumstances. The rationale behind this in every case being that the grant of temporary permissions would afford us time to satisfactorily meet our need through the local plan coming forward. The draft plan does not do this in a manner perhaps anticipated by those inspectors, notwithstanding the fact that there is a justification for this approach which will be for the examining inspector to address in due course. There remains an identified need (albeit relatively small) through our own evidence base and alternatives are not coming forward through the local plan process."

50. Mr Lopez submitted that OR 1 paragraph 6.15 did not 'encapsulate' the last sentence of paragraph 24 of the PPTS and does not grapple with the policy in paragraph 16 of the PPTS. Mr Lopez submitted that OR 1 paragraph 6.35 was based on a misunderstanding of the policy set out in paragraphs 16 and 24 of the PPTS, in particular he argues that there is no recognition that personal circumstances and unmet need are unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances. Mr Lopez submitted that the second sentence in OR 1 paragraph 6.43 was not correct. He further submitted that no relevant appeal decisions, other than The Spinney were before the members, and that the decision letter in that case did not indicate that lack of available alternative sites amount to very special circumstances.

51. Mr Ranatunga submitted that the position reached at OR 1 paragraph 6.35 is that with the factors set out earlier in the report in mind and given that development of the Site would contribute to meeting an identified need, those matters are 'capable' of amounting to very special circumstances. He submitted that the report then went on to consider personal circumstances . He submitted that the analysis in the officer's reports recognised the PPTS policy that personal circumstances and unmet need were unlikely to clearly outweigh harm to the Green Belt and any other harm so as to establish very special circumstances. He submitted that The Spinney decision letter was attached to OR2 and that the relevant extracts from the decision letter in that case were set out at OR1 paragraph 6.29. Accordingly, he submitted, members were not misled as to the approach taken to paragraph 24 of the PPTS in The Spinney case.

52. The reports must be read as a whole.

i) When considering the advice given by the officer to members, paragraphs 6.15 and 6.43 must be considered as part of the whole report.

ii) Paragraph 6.15 refers to ministerial statements. At paragraph 6.43 of OR 1 the officer gave specific advice in relation to the PPTS namely that it "sets out that whilst matters of unmet need and personal circumstances are *unlikely* to outweigh harm to the Green Belt as to establish very special circumstances, there are cases where this will be the case". In my judgment that statement did not mislead members. The statement set out the advice in the PPTS that those matters were unlikely to outweigh harm to the Green Belt so as to establish very special circumstances.

iii) OR 1 paragraph 6.35 is to be found in the section headed 'meeting need' and does not purport to provide a conclusion on whether very special circumstances have been established; it says no more than, with the factors collectively in mind and given that the site contributes to meeting an identified need for traveller accommodation within the borough, contributing to meeting an identified need is 'capable' of amounting to very special circumstances outweighing the harm identified. Very special circumstances are considered again at OR1 paragraphs 6.41 to 6.43. The reference to the fact that the site 'contributes' to meeting a need was no more than a recognition that there were existing caravans on the Site.

iv) The reference to The Spinney decision letter in paragraph 6.42 of OR 1 is a summary of the effect of that decision. The members were provided with a complete copy of that decision letter as an annexe to OR2. The indication given in paragraph 6.42 of OR 1 that the permission was granted for a traveller site within the Green Belt with the very special circumstances being unmet need and personal circumstances did not materially mislead members; the inspector in The Spinney decision letter (at paragraph 31) did identify unmet need as being a consideration of significant weight, and did rely on personal circumstances including personal need, health and the best interests of children.

v) In my judgment that approach discloses no misunderstanding of the policy set out in paragraphs 16 and 24 of the PPTS and, for those reasons, I reject this ground of challenge.

Ground 1B

53. Mr Lopez took two main points in relation to policy LP38 (in an earlier version of the plan the number given to the policy was LP37) in the draft Tonbridge and Malling Local Plan, namely:

i) In paragraph 6.35 of OR 1, when advising members that only limited weight can be attributed to draft policy LP38 (referred to as LP37) , the officers imposed an artificial ceiling on the weight to be attributed to the policy;

ii) The officers failed to advise members on the effect of LP38(3).

iii) The reference to the Aylesford Lakes (otherwise known as "The Cabins") decision letter misled members as it was not concerned with policy LP37/38 relating to travellers and travelling showpeople.

54. Policy LP 38(3) provides:

> "Proposals for the development of Traveller or Travelling Showpeople sites providing for accommodation and associated facilities and infrastructure that are not safeguarded by this policy will only be permitted where they accord with the relevant policies in the Local Plan and where all of the following criteria are met:"

The criteria referred to in LP38(3) are set out at (a) to (g).

55. Mr Lopez submitted:

i) OR 1 at paragraph 6.42 fails to point out that the previous appeal decisions referred to were for temporary planning permission whereas the 2019 Planning Permission was a permanent planning permission (albeit personal).

ii) OR 1 at paragraph 6.31, in referring to the Aylesford Lakes (or Cabins) appeal decision was not concerned with traveller development and was not concerned with policy LP37/38.

iii) The advice given at OR 6.32 and 6.34 was based upon the alleged flaws referred to above and was also irrational for being incompatible with PPTS at paragraph 24.

iv) Nowhere in the officer's reports is there a recognition of conflict with relevant policies in the local plan (as referred to in LP38(3)) in particular conflict with countryside policy.

56. Mr Ranatunga submitted:

i) There was no material difference between LP37 as considered in The Spinney decision letter and LP38 as considered in this case. The Defendant was entitled to rely, as directed at OR 1 paragraph 6.30, on The Spinney inspector's decision that LP38 attracted limited weight as the local plan had not been subject to examination.

ii) At OR 1 paragraph 6.35 the officer came to her own judgment that limited weight could be attributed to draft policy LP37.

iii) The policy (in LP38(3)) that proposals for development of traveller sites will only be permitted when they accord with relevant policies of the local plan is a reference to the Tonbridge and Malling Local Plan not to the development plan as a whole.

iv) In the alternative, the court should exercise the discretion conferred upon it by Section 31(2A) of the Senior Courts Act 1981 and refuse to grant relief as it is highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred.

57. Subject to irrationality or other legal error the weight to be given to a material consideration, such as the draft local plan, is a matter for the decision maker.

i) In OR1 paragraph 6.30 the officer reported that the inspector in The Spinney appeal decision had concluded that limited weight should be attached to the emerging policy on traveller sites (at that stage policy LP37) on the basis that it had not yet been examined.

ii) At OR 1 paragraph 6.31 the officer referred to the Aylesford Lakes appeal decision, and reported that the inspector had noted that the emerging plan was still (following submission to the Secretary of State) insufficiently advanced to be afforded more than limited weight. The officer did not indicate that the Aylesford Lakes decision was concerned with the policy on traveller sites. In OR 1 paragraph 6.31 the officer referred to the plan not to a specific policy. There was no misdirection, let alone a significant one.

iii) At OR 1 paragraph 6.35 the officer expressed her own view as to the weight that could be afforded to the draft policy. The officer's explanation as to why she concluded that only limited weight can be attributed to the draft policy discloses no irrationality. In my judgment it would be an unduly rigorous reading of an officer report to alight on the word 'can' in OR 1 paragraph 6.35 and to then conclude that an artificial ceiling had been placed on the weight that could be given to an emerging policy.

iv) There is no specific reference to LP38(3), however compliance with other relevant policies were considered, albeit by reference to policies in the adopted development plan. Compliance with countryside policies was considered at OR1 paragraphs 6.19 to 6.26.

v) The officer's advice to members on the weight to be afforded to local plan policy LP38 was not undermined by any irrationality or deficient reasoning. Indeed, the advice, at OR1 paragraph 6.35, that limited weight could be given to policy LP38, was consistent with the finding made by the inspector in The Spinney decision letter. The Spinney inspector's finding on this issue was reported to members at OR1 paragraph 6.30.

vi) I reject this ground of claim.

Ground 1C

58. Mr Lopez submitted that the advice given in OR 1 paragraph 6.35 that "… allowing for limited expansion of this site to accommodate the family in fact properly aligns with the broad principles adopted in drafting that policy as a way of addressing the needs of the Borough" was incorrect and/or irrational.

59. Mr Ranatunga submitted that the officer's advice was consistent with paragraph 5.4.4 of the reasoned justification to policy LP38 which states:

> "The Council is seeking some of the immediate needs through grant of individual permanent planning permissions where it is appropriate to do so."

60. Policy LP38 seeks to safeguard existing sites which provide accommodation for travellers and to allow upgrading, enhancement, or intensification of those sites where they accord with the relevant policies in the plan. It is right to say that the Site is not one of the sites identified in policy LP38(1), and that as a result the policy which allows for intensification does not apply to it. However, the 2019 Planning Permission granted an individual planning permission as referred to in paragraph 5.4.4 of the reasoned justification.

61. In my judgment the officer's statement that the proposal accords with the broad principles adopted in drafting policy LP38 was a conclusion open to her, and it cannot be said that the advice significantly misled members.

62. I reject this ground of claim.

Ground 1E

63. This ground is based upon a contention that, in relying on the advice given in paragraph 3.3 of OR2, the Defendant acted irrationally.

64. At paragraph 3.3 of OR 2 the officer advised:

> "3.3 A fundamental change in the position concerning the existence of very special circumstances now when compared to that available to previous inspectors determining applications on this site is the most recent appeal decision in this Authority for traveller accommodation in the Green Belt. The inspector in that case expressly set out that unmet need within the Borough should be considered as a very special circumstance when appreciating that the emerging local plan does not propose to allocate any private sites to address that need."

65. Mr Lopez submitted that the advice given in paragraph 3.3 of OR2 caused the Defendant to act irrationally as there was no fundamental change in position.

66. Mr Ranatunga submitted that the reasons for the advice given in the first sentence of paragraph 3.3 of OR2 were set out in the remainder of the paragraph. Further he submitted that the full decision letter in The Spinney appeal was provided to members and so they were in a position to form their own view. Mr Ranatunga described the use of the words 'fundamental change' as being a 'high' way of putting the point.

67. The officer's reports must be read as whole. Although others may not have described the change in position indicated in The Spinney decision letter as being 'fundamental' in my judgment that description was open to the officer. In paragraph 3.3 of OR 2 the officer explains her reasoning, and refers to the fact that the inspector who determined

The Spinney appeal relied upon unmet need as a very special circumstance whilst noting that the emerging local plan does not propose to allocate any private sites to address that need. The Spinney appeal inspector, at paragraph 36 of the decision letter, had relied upon unmet need as one factor supporting the conclusion that very special circumstances were made out. Further The Spinney appeal inspector had referred to and recognised the ambit of emerging policy (at that time numbered LP37) and had described the effect of the policy at paragraph 8 of the decision letter, where reference is made to the fact that the policy lists:

> "sites that are to be safeguarded for the provision of accommodation for travellers that meet the definition in Planning Policy for Traveller Sites, of which one, Orchard Place is agreed to be within the Green Belt, and redevelopment or expansion of those listed sites will only be permitted if all of 7 criteria are met."

68. At OR 2 paragraph 3.3 the officer states that the change in position is between the approach taken in The Spinney appeal decision letter and "… previous inspectors determining applications on this site…". Among the previous inspectors determining applications on the Site was the inspector who wrote the 2015 DL. That inspector found that there were no very special circumstances justifying the grant of a permanent planning permission, but (paragraph 96 of the decision letter) "The criterion for a temporary permission is met, albeit the initial timescale identified was optimistic." The timescale referred to was that for the preparation of the local plan. The inspector had stated earlier in paragraph 96 of the decision letter that the preparation of the local plan would be an opportunity "… to deliver additional pitches and to assess whether or not the need is able to be accommodated within the constraints similar to those posed by the existing criteria based policies." The officer did not err when, in OR 2 paragraph 3.3, she advised members that the emerging local plan does not propose to allocate any private sites to meet unmet need arising in the borough.

69. In my judgment the Defendant did not act irrationally on relying upon the officer's advice that the approach taken to unmet need in The Spinney decision letter amounted to a fundamental change when compared to the circumstances considered by previous inspectors determining applications on the Site.

Ground 1F and Ground 2

70. Ground 1F and Ground 2 are based upon a contention that the Defendant misinterpreted or misunderstood and therefore failed to have regard to the PPG relating to the imposition of conditions restricting planning permission to a temporary period.

71. The relevant PPG guidance is set out at paragraph 14 of the section on Use of Planning Conditions:

"**When can conditions be used to grant planning permission for a use for a temporary period only?**

Under section 72 of the Town and Country Planning Act 1990 the local planning authority may grant planning permission for a specified temporary period only.

Circumstances where a temporary permission may be appropriate include where a trial run is needed in order to assess the effect of the development on the area or where it is expected that the planning circumstances will change in a particular way at the end of that period.

A temporary planning permission may also be appropriate to enable the temporary use of vacant land or buildings prior to any longer-term proposals coming forward (a 'meanwhile use').

It will rarely be justifiable to grant a second temporary permission (except in cases where changing circumstances provide a clear rationale, such as temporary classrooms and other school facilities). Further permissions can normally be granted permanently or refused if there is clear justification for doing so. There is no presumption that a temporary grant of planning permission will then be granted permanently."

72. Paragraphs 6.45 to 6.47 of OR 1 state:

"6.45 Guidance states that a temporary planning permission may be appropriate where it is expected that planning circumstances will change in a particular way at the end of the period. More specifically, PPTS emphasises the importance of positive planning to manage development and sets clear objectives to increase the number of authorised Traveller sites in appropriate locations to address under-provision and maintain an appropriate level of supply.

6.46 The planning practice guidance sets out that under section 72 of the Town and Country Planning Act 1990 the local planning authority may grant planning permission for a specified temporary period only. Circumstances where a temporary permission may be appropriate include where a trial run is needed in order to assess the effect of the development on the area or where it is expected that the planning circumstances will change in a particular way at the end of that period. The guidance makes clear that it will rarely be justifiable to grant a second temporary permission - further permissions should normally be granted permanently or refused if there is clear justification for doing so.

6.47 In light of this guidance, and the preceding assessment that has taken place, I do not consider that it would be necessary or

> indeed justified to grant a further temporary planning permission in this instance. There are very special circumstances present which are supported by very recent and consistent approaches by the Planning Inspectorate that indicate a permanent permission should be granted here."

73. Paragraph 3.7 of OR 2 states:

> "3.7 A condition limiting use to a temporary period only where the proposed development complies with the development plan, or where material considerations indicate otherwise that planning permission should be granted, will rarely pass the test of necessity. It will rarely be justifiable to grant a second temporary permission - further permissions should normally be granted permanently or refused if there is clear justification for doing so."

74. Paragraph 1.2.5 of OR 3 quotes from paragraph 14 of the PPG on Use of Conditions.

75. Mr Lopez submitted:

i) The advice given in OR1 paragraph 6.46 fails to acknowledge that the policy preference in the PPG is unsupportive of granting permanent permission for inappropriate development in the Green Belt. To treat the PPG as providing positive support for a permanent consent was a misconstruction of the policy.

ii) OR 1 wrongly advised that the PPG displaced or undermined the policy requirement that permanent approval for development in the Green Belt must be justified by very special circumstances.

iii) There was no consideration of the fact that the proposal put forward in the 2018 Planning Application (for up to three caravans of which no more than one shall be a static caravan) was different from the development for which planning permission was granted by the 2015 DL, namely permission for no more than two caravans of which no more than one shall be a static caravan.

iv) There is no discussion of the merits of granting a further temporary planning permission.

76. Mr Ranatunga submitted that:

i) The reference in OR 1 paragraph 6.47 to the 'preceding assessment' referred back to the discussion of the emerging local plan, and in particular to OR1 paragraph 6.42 which notes that the plan does not allocate new sites to meet identified need.

ii) The advice in OR 1 paragraph 6.47 is not limited to advice on whether a condition should be applied restricting the permission to a temporary period. The second sentence in paragraph 6.47 refers to very special circumstances.

iii) Paragraph 3.7 of OR 2 explained that a condition limiting use to a temporary period only where the proposed development complies with the development

plan or where other material considerations indicate that the planning permissions should be otherwise than in accordance with the indication given by the development plan, would rarely pass the test of necessity.

iv) Paragraph 1.2.5 of OR 3 provided members with the wording of the PPG guidance.

77. OR 1 paragraphs 6.44-6.47 drew the attention of members to the advice given in paragraph 14 of the PPG on the Use of Conditions. At paragraph 1.2.5 of OR 3 members were provided with the wording from paragraph 14 of the PPG (albeit not in its entirety).

i) In my judgment the advice given to members in OR1 paragraph 6.46 did not misdirect members as to the meaning of the PPG. The PPG does state that it will rarely be justifiable to grant a second temporary permission except where changing circumstances provide a clear rationale. The change in circumstances in this case, namely the increase in the number of caravans, did not provide such a rationale. The failure to refer to that change in this part of OR 1 reveals no error. It was clear from paragraph 1.6 of OR 1, and suggested condition number 3 set out in OR 3, that the 2018 Planning Application proposed the stationing of no more than three caravans (of which no more than one shall be a static caravan) on the Site, whereas the 2015 Planning Permission had granted permission for no more than two caravans of which no more than one shall be a static caravan. Further that was not a change of circumstances of the category or type referred to in paragraph 14 of the PPG as it did not provide a rationale for a further temporary permission.

ii) The Claimant's submissions on this issue are based upon the premise that the effect of the advice given by the planning officer was that the fact that the policy indicated that a further temporary permission was not appropriate was relied upon as a positive factor in favour of granting planning permission. In my judgment, in the reports the officer did not treat the policy indication that temporary planning permission should not be granted as a positive factor in favour of granting a permanent planning permission. The officer's conclusion on the issue of whether a temporary planning permission should be granted is set out in the first sentence of OR 1 paragraph 6.47. The second sentence of OR 1 paragraph 6.47 deals with the separate issue of whether permanent planning permission should be granted. In that second sentence the officer refers to very special circumstances being present. The issue of very special circumstances had been considered at OR 1 paragraphs 6.41 to 6.43.

iii) For those reasons I reject this ground of challenge.

Ground 1G

78. The Claimant contends that the Defendant misunderstood and therefore failed to have regard to paragraph 27 of the PPTS.

79. Paragraph 27 of the PPTS, so far as relevant, provides:

> "27. If a local planning authority cannot demonstrate an up-to-date 5 year supply of deliverable sites, this should be a significant material consideration in any subsequent planning decision when considering applications for the grant of temporary planning permission [9]. The exception is where the proposal is on land designated as Green Belt; ……."

Footnote 9 states:

> "There is no presumption that a temporary grant of planning permission should be granted permanently. For further guidance please see: http://planningguidance.planningportal.qov.uk/blog/guidance/use-of-planning-conditions/whatapproach-should-be-taken-to-imposinq-conditions/ (paragraph 14)"

80. Mr Lopez submitted that:

i) Paragraph 27 of the PPTS advises that when a proposal is put forward on Green Belt land an exception to the policy set out in the first sentence of the paragraph applies.

ii) In advising members that making a contribution towards meeting an identified need was a factor which clearly outweighed harm to the Green Belt by way of inappropriateness and any other harm, the officer overlooked the inevitable corollary of paragraph 27 PPTS, that the exception for proposals on Green Belt sites should also apply when considering proposals for permanent development.

81. Mr Ranatunga submitted:

i) Paragraph 27 of the PPTS addresses applications for temporary planning permission. The Defendant was considering whether to grant permanent planning permission.

ii) Paragraph 27 does not affect the correct approach to be taken in accordance with the policy set out in paragraphs 16 and 24 of the PPTS.

82. Paragraph 27 of the PPTS provides advice on the approach to be taken when considering applications for temporary planning permission. The advice relevant to the proposal put forward in the 2018 Planning Application was that set out in paragraph 16 and 24 of the PPTS. At paragraph 6.15 of OR 1 the attention of members was drawn to Policy E in the PPTS. At paragraph 6.29 of OR 1 the officer referred to and quoted from the decision letter in The Spinney where reference is made to paragraph 24 of the PPTS.

83. In my judgment there was no requirement to make reference to paragraph 27 of the PPTS in the officer reports given that paragraph 27 addresses applications for temporary planning permission, and given that the officer drew the attention of members to those parts of the PPTS which gave relevant advice on the consideration of applications for permanent planning permission in the Green Belt.

84. For those reasons I reject this ground of claim.

Ground 3

85. The Claimant contends that the Defendant erred in applying the policy in paragraph 144 of the NPPF relating to development in the Green Belt.

86. Paragraph 144 of the NPPF states:

> "144. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

87. The Claimant contends that the Defendant failed to apply that policy or to provide reasons for not doing so.

88. Mr Lopez places particular emphasis on the following points:

i) In paragraph 6.16 of OR 1 the officer stated "As such, very special circumstances are still required which outweigh the degree of harm caused to the Green Belt." In that sentence the officer omitted the word 'clearly'.

ii) In paragraph 6.18 of OR 1 the officer stated: "This harm must as a matter of policy be given "great weight", but whilst this limited physical impact is not - as a matter of law - capable of amounting to a very special circumstance outweighing the definitional harm identified it does however limit the degree of harm arising on the whole." Mr Lopez submitted that the use of 'great weight' was erroneous as the words used in the policy are 'substantial weight'.

89. Mr Ranatunga submitted:

i) The officer referred to paragraphs 143 and 144 of the NPPF at paragraph 6.12 of OR 1 (as set out at paragraph [39(ii)] of this judgment) stating that the policy is that "'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

ii) To require officer reports to identify each part of national policy and expressly and mechanistically apply each part within the same section of a report is to subject officer reports to undue rigour and not to read them benevolently or with realism.

iii) Use of the words 'great weight' did not significantly mislead members.

90. The officer reports must be read as a whole. At paragraph 6.12 of OR 1 the attention of members was drawn to the policy set out in paragraphs 143 and 144 of the NPPF. In providing that advice the officer made clear that the policy approach is that local planning authorities should give 'substantial weight' to any harm to the Green Belt. It

was also made clear that the policy in paragraph 144 of the NPPF is that very special circumstances will not exist unless the potential harm to the Green Belt by reason of inappropriateness and any other harm resulting from the proposal is clearly outweighed by other considerations. The advice given in paragraph 6.12 of OR 1 was accurate.

91. OR 1 paragraph 6.41 again referred to the policy that for very special circumstances will not exist the potential harm to the Green Belt my reason of inappropriateness and any other harm is *clearly* outweighed by other considerations. The officer then stated "This requirement sets a very high threshold."

92. It is right to say that, in paragraphs 6.16 and 6.48 of OR 1 the word 'clearly' is omitted. However, the reports must be read as a whole. The members had received clear advice on the policy contained in paragraphs 143 and 144 of the NPPF. Given that such clear advice had been given, in my judgment it cannot be said that members were significantly misled by the omission of the word 'clearly' in OR 1 paragraphs 6.16 and 6.48.

93. The use of the word 'great' as opposed to 'substantial' in OR 1 paragraph 6.18 cannot be said to have significantly misled members. In OR 1 paragraph 6.12 the attention of members was drawn to the word the use of the word 'substantial' in paragraph 144 of the NPPF. Further it is difficult to see how the use of the word 'great' in this context can be said to have carried such a different meaning to 'substantial' as to mislead in a significant way.

94. For those reasons I reject this ground of claim.

Ground 4

95. This ground, as developed by Mr Lopez in oral argument, has two limbs:

i) That the Defendant took into account an immaterial consideration, namely the prospect that the applicant for planning permission may appeal giving rise to a risk that a costs award might be made against them.

ii) That the Defendant took into account an immaterial consideration namely the reputational damage which might be caused to them in the event that an award of costs were to be made against them.

96. Mr Lopez placed particular emphasis on OR3 paragraphs 1.3 (which is headed "Financial and Value for Money Considerations") and 1.4 (which is headed "Risk Assessment"). He submitted that that these two paragraphs form part of the analysis of the planning merits, as they are to be found before OR 3 paragraph 1.5 (headed "Equality Impact Assessment") which forms part of the assessment of the merits.

97. Mr Ranatunga accepts that the risk of an award of costs or risk of reputational damage to the Defendant would not be material planning considerations. However, he submits that the references to the risk of an award of costs and reputational risk did not in fact form part of the planning analysis.

98. It is clear from ***Stoop*** that there is 'nothing wrong' with officers giving members advice that in the event of an appeal being made against a decision to refuse to grant planning permission there is a risk that an award of costs would be made against the Council. As made plain by Underhill LJ at paragraph 87 in ***East Bergholt*** what is illegitimate is for the decision maker to allow the risk of costs associated with defending an adverse decision on appeal to influence them in the exercise of their planning judgment. I would add that it would also be illegitimate for a decision maker to allow potential reputational risk to influence them in the exercise of their planning judgment.

99. In this case the determining issues were identified in section 6 of OR1. The Claimant places particular reliance on OR1 paragraph 6.20 in which reference is made to recent appeal decisions in which the countryside policy, CP14 in the Core Strategy, was considered. OR1 paragraph 6.20 does not refer to the issue of costs. The determining issues set out in section 6 of OR1 did not include reference to the risk of an award of costs or the risk of reputational damage. At the July 2019 committee meeting consideration of the 2018 Planning Application was deferred. OR2 refers at paragraph 1.2 to the Council's Constitution. The quotation from the Council's Constitution set out at paragraph 1.2 included the following:

> "If the Director of Central Services & Monitoring Officer's report indicates that there is likely to be a significant risk of costs being awarded against the Borough Council and the Committee resolves to refuse the application that decision will be a recommendation only and the matter shall be submitted to Council for resolution."

100. Given the reference to the risk of an award of costs being made against the Council in the passage from the Council's Constitution quoted at paragraph 1.2 of OR2, it was entirely appropriate that members of the Council should be given advice on the risk of an award of costs. It cannot be assumed that because paragraph 1.5 of OR3 considered matters which were material to the planning analysis that paragraphs 1.3 and 1.4 also formed part of the planning analysis. The advice given on costs was not part of the planning analysis or exercise of planning judgment. In my judgment, as a matter of fact, the risk of an adverse costs award and the reputational risk were not taken into account as material considerations in the planning analysis or in the exercise of planning judgment.

101. I reject this ground of claim.

Ground 5

102. The Claimant contends that the Defendant erred in their approach to policy CP14 in the Core Strategy.

103. Policy CP14 provides:

> "POLICY CP14 In the countryside development will be restricted to:

> (a) extensions to existing settlements in accordance with Policies CP11 or CP12; or,
>
> (b) the one-for-one replacement, or appropriate extension, of an existing dwelling, or conversion of an existing building for residential use; or
>
> (c) development that is necessary for the purposes of agriculture or forestry, including essential housing for farm or forestry workers; or
>
> (d) development required for the limited expansion of an existing authorised employment use; or
>
> (e) development that secures the viability of a farm, provided it forms part of a comprehensive farm diversification scheme supported by a business case; or
>
> (f) redevelopment of the defined Major Developed Sites in the Green Belt which improves visual appearance, enhances openness and improves sustainability, or
>
> (g) affordable housing which is justified as an exception under Policy CP19; or
>
> (h) predominantly open recreation uses together with associated essential built infrastructure; or
>
> (i) any other development for which a rural location is essential.
>
> Within the Green Belt, inappropriate development which is otherwise acceptable within the terms of this policy will still be need to be justified by very special circumstances."

104. Paragraphs 6.19 and 6.20 of OR 1 state:

> "6.19 Policy CP14 of the TMBCS restricts development within the countryside to certain types. In the broadest of terms, the continued residential occupation of this site would not fall within any of the exceptions sited and as a result there is conflict with policy CP14.
>
> 6.20 Elsewhere across the Borough, with the restrictions set out in CP14 in mind, developments within the countryside (irrespective of whether they also lie within the Green Belt) have met with refusal of planning permission on grounds of principle i.e. they do not meet one of the types of development set out in the policy in the same way as identified in this application. However, I am mindful that recent appeal decisions

> indicate that Planning Inspectors are allowing appeals for development within the countryside on wider considerations involving locational characteristics, regardless of those restrictions. These appeal decisions are important material planning considerations and regard must be had to them in the assessment of this case. This means that we must carefully consider the site specific characteristics of any such schemes rather than immediately concluding that CP14 does not allow for such development to take place and issuing a blanket embargo against anything that does not strictly adhere to the restrictions contained
>
> within it. Effectively, for determining this planning application, policy CP14 must be considered to be out of date."

105. In the 2015 DL the inspector (at paragraph 26) came to the following conclusion in relation to the weight to be afforded to policy CP 14:

> "Policy CP14 is not sufficiently consistent with national policy to be accorded full weight and in respect of these appeals the policy is not up to date."

106. This ground is put in a number of different ways. Mr Lopez argues that:

i) The officer proceeded on the incorrect basis that little or no weight must be given to policy CP14 meaning that that both the policy and the conflict with it were treated as immaterial.

ii) The inference to be drawn from the advice given in the last sentence of OR 1 paragraph 6.20 that policy CP14 must be considered to be out of date is that the policy must be treated as having no significance and therefore no weight.

iii) The unreferenced appeals referred to in OR 1 paragraph 6.20 would have been fact specific and could not have supported any in principle dismissal of a CP14 policy conflict for the purposes of section 38(6) of the Planning and Compulsory Purchase Act 2004.

iv) It was not appropriate, in OR 1 paragraph 6.20 to simply follow the conclusion reached in The Spinney appeal decision that policy CP14 was out of date.

v) The officer failed to consider the NPPF and the objectives of CP14 and in doing so failed to give adequate reasons for the conclusion that CP14 was out of date.

107. Mr Ranatunga submitted:

i) The weight to be attached to CP14 was a matter for the decision maker. The import of the officer reports, in particular paragraphs 6.19 and 6.20 of OR 1 was that reduced weight should be given to the first part of policy CP14, and such a view was rational.

ii) CP14 is in two parts. It was the second part which was of direct relevance the application. Compliance with this aspect of the policy was considered at OR 1 paragraphs 6.41 to 6.43 and a conclusion reached that very special circumstances had been established.

iii) The officer referred to previous appeal decisions to justify the advice given in relation to weight to be afforded to policy CP14; that approach was rational.

108. The issue of whether a policy is to be considered to be out of date is a matter of fact or a matter of fact and judgment (***Peel*** at paragraph 58, and ***Bloor Homes Ltd. v. Secretary of State for Communities and Local Government*** [2017] PTSR 1283 at paragraph 45).

109. At OR 1 paragraph 6.19 the officer gave clear advice that the proposed development was in conflict with policy CP14.

110. At OR 1 paragraph 6.20 the officer considered whether policy CP14 could be considered to be up to date. It should be noted that the purpose of the assessment was not, as in ***Peel***, to determine whether the policy in paragraph 11(d) of the NPPF should apply. Assessment of whether policy CP14 was up to date was a matter of fact and judgment. The officer relied upon previous appeal decisions. In the 2015 DL on the same site the inspector had found that policy CP14 was not up to date. The officer's assessment was consistent with that inspector's approach. The officer did not err in relying on previous appeal decisions to inform her judgment on the question of whether policy CP14 was out of date. Further, as in the 2015 DL, on which reliance was placed, consistency of CP14 with national policy was considered, and it was not necessary for the officer to repeat that analysis in the report.

111. Mr Lopez argues that there was no explanation as to why CP14 'must' (as stated in the last sentence of paragraph 6.20 of OR 1) be considered to be out of date. The use of the word 'must' should be considered in context. The officer was setting out the conclusion to her analysis. The use of the word 'must' does not indicate a slavish adherence to the approach taken by inspectors, but the conclusion of an analysis based upon consideration of the facts and exercise of judgment.

112. In my judgment the Claimant's argument that the Defendant treated policy CP14 as immaterial is without substance. At paragraph 6.19 of OR 1 the officer makes a clear reference to CP14. The officer does not state that CP14 is to be left out of account. At paragraph 6.20 of OR 1 the officer assessed the weight to be given to policy CP14. There would have been no purpose in assessing the weight to be given to policy CP14 if the officer had advised that the policy was not a material consideration.

113. Whether the proposal complied with policy CP14 and the weight to be given to the policy were principal controversial issues. The reasons given in OR 1 paragraph 6.19 and 6.20 addressed both those issues, The reasons disclose no misunderstanding of the policy or other matter. The grounds upon which a decision was reached that policy CP14 was out of date, in particular by reference to the approach taken in previous appeal decisions, is set out in OR 1 paragraph 6.20. In my judgment the Claimant was not prejudiced by a failure to provide an adequately reasoned decision.

114. For those reasons ground 5 is not made out.

115. The claim is dismissed.