Neutral Citation Number: [2020] EWHC 3166 (Admin)

Case No: CO/1645/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2020

Before :

MRS JUSTICE ELISABETH LAING DBE

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Between :

THE QUEEN (on the application of KERRY WHITEHEAD on behalf of the COPTHORNE VILLAGE ASSOCIATION)	**Claimant**
- and -	
MID SUSSEX DISTRICT COUNCIL	**Defendant**
-and-	
GLEESON STRATEGIC LAND LIMITED	**Interested Party**

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Richard Turney (instructed by Kingsley Smith Solicitors LLP) **for the Claimant**
Paul Brown QC (instructed by Sharpe Pritchard LLP) **for the Defendant**
John Litton QC (instructed by James Smith (Planning Law Services) Limited) **for the Interested Party**

Hearing dates: 13 October 2020

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JUDGMENT

Mrs Justice Elisabeth Laing DBE

Introduction

1. This is an application for judicial review of a decision of Mid Sussex District Council ('D') on 16 March 2020 to grant outline planning permission ('the Permission') to the Interested Party ('the IP') for a residential development at land north of Clayton Mills, Ockley, Hassocks, West Sussex ('the Site').

2. Permission to apply for judicial review was granted on the papers by Lang J on 19 June 2020.

3. The Permission reserved all matters except for, among other things, access for up to 500 residential dwellings and land for a two-form entry primary school and community building, and associated infrastructure (which was described).

4. The Claimant ('C') is a representative of the Copthorne Village Association ('the CVA'). The CVA is an unincorporated association representing the village of Copthorne. The CVA opposes D's proposals to develop land at Copthorne as a permanent site for caravans and mobile homes and caravans for gypsies and travellers.

5. In 2018, D applied successfully for planning permission to develop a site at Copthorne for that purpose ('Permission A'). In 2019, the CVA applied for judicial review of Permission A.

6. The local Development Plan ('DP') provides that strategic development sites in D's area can be used to provide for pitches for gypsies and travellers, and new conventional housing. The CVA opposes proposals which do not make such provision, because if it is not made on strategic sites, D relies on the lack of such provision to justify the proposal that the Copthorne site should be used as a standalone site for gypsy and traveller pitches.

7. The Site is a strategic site, but the development authorised by the Permission does not include on-site provision for gypsy and traveller pitches. Instead, D has secured a financial contribution from the IP of £750,000 for such provision elsewhere. That aspect of the Permission is the focus of this application for judicial review.

8. As summarised by C in her skeleton argument, her challenge to the Permission has two limbs.

    i. The Officers' Report ('the OR') misdirected members of the planning committee ('the Committee') by using the constraints of the site to justify the provision of pitches at a different site. The OR was based on a misinterpretation of the development plan, did not draw members' attention to material considerations and did not comply with section 149 the Equality Act 2010 ('the 2010 Act').

    ii. The OR misdirected members by failing to draw their attention to constraints on the Copthorne site, by failing to consider whether the pitches could be delivered within an appropriate time, failed 'properly' to address constraints at existing gypsy and traveller sites and failed to consider whether there was a supply of other sites in accordance with national policy.

9. Paragraph 26e of D's skeleton argument for the hearing noted that the D's application for planning permission for pitches for Gypsies and Travellers at the Copthorne site was 'expected to be reported to Committee in October. Depending on the date on which the Court hands down judgment in this case, it is entirely possible that that permission will

have been granted'. Mr Brown told me at the hearing that the planning committee was due to consider D's application for planning permission for a Gypsy and Traveller site at Copthorne on Thursday 15 October 2020.

Events after the hearing

10. I reserved judgment after the hearing.

11. On 21 October I received an email from Mr Turney. This revealed that D's application for planning permission for a Gypsy and Traveller site at Copthorne was not considered by the Committee on 15 October 2020. The reason given by D's officers was that the landowner no longer wanted to be identified as an applicant. The application was withdrawn from the Committee to enable the appropriate statutory notices to be served. It is not clear when the application will be considered again. A potentially more fundamental problem then emerged, according to Mr Turney. It appeared that D's former control over the site had lapsed in December 2019, before the OR was prepared. At that stage, C did not know whether, when officers prepared the OR in February 2020, they knew that D no longer had control of the site, or whether D was aware of that.

12. I asked D to provide a witness statement giving an explanation as soon as possible. I indicated my provisional view that if the parties wished to make written submissions once that explanation had been given they should have an opportunity to do so.

13. D then lodged witness statements from Messrs Ashdown and Clark. It is convenient to summarise that evidence in the next section of this judgment. All the parties also then made further written submissions. Mr Turney asked to reply to the submissions from D and the IP, and I allowed him to.

D's knowledge of the ownership of the Copthorne site and of the progress of the application for planning permission for Gypsy and Traveller accommodation on that site

14. Mr Ashdown is a planning officer. He wrote the OR in this case. His evidence is that D has a strict policy of separation between its statutory functions in order to avoid conflicts of interest. This is particularly important when D is applying for planning permission for a site. It is not unusual for officers in D's property and estates department to know things which Mr Ashdown does not.

15. Mr Ashdown did not have any direct dealings with the application for the Copthorne site, but did ask the officer who was dealing with that application for updates. As a result, he knew about the application for Permission A, which was made in the joint names of Mrs Layla Heal, the owner of the Copthorne site, and Mr Peter Stuart (D's Head of Corporate Services). Mr Ashdown also knew that the officer dealing with that application only dealt with the appointed planning agent, and only on planning matters.

16. The ownership of the land was not material to the application. This meant that neither Mr Ashdown nor the officer dealing with that application knew who owned the relevant land. The design and access statement ('DAS') for that application said 'Landowner willing to allow land to be used for traveller accommodation through private use and sale to the Council for public use. No overriding legal constraint known'. Mr Ashdown did not see the DAS but it was consistent with what he knew about that application. This information gave no reason to think that the site would not be available.

17. Mr Ashdown did not know anything after the quashing of Permission A which changed this. When he finished the OR, on 11 February 2020, planning agents acting for D's Corporate Estates had made a pre-application request about an alternative scheme for the

Copthorne site. The agents had met the relevant planning officer. This, says Mr Ashdown, was reflected in the OR.

18. He also knew that a public consultation about the proposals for the Copthorne site had started on 18 February 2020, two days before the Committee met to consider the application for planning permission for the Site. The consultation information said that D and the site owner had prepared a new scheme for 'public and private Gypsy and Traveller accommodation on land' at Copthorne. There was nothing, he says, to indicate that the application for the new scheme would not go ahead, or that, 'unlike the primary application, it would not be a joint application'.

19. Mr Ashdown contends that there was no reason to change the planning advice, which was that the Copthorne site was available, suitable and achievable.

20. Although this is not relevant, as it happened after the Committee met and decided to grant the Permission, an application for a revised scheme was in fact made on 11 May 2020 by Mrs Heal and Mr Stuart. The statement I have described in paragraph 16, above, was repeated in paragraph 4.20 of the DAS for this second application for the Copthorne site.

21. On 14 October 2020, the day before the Committee was due to consider the second application for the Copthorne site, Mrs Heal sent an email (to D, I infer) saying that she no longer wished to be a joint applicant for planning permission. D decided to withdraw the application from the Committee in order to consider the implications of Mrs Heal's change of heart. D has not withdrawn, so that application is still live. Soon after that email, C's solicitors emailed D in its capacity as local planning authority ('LPA'), Mr Tom Clark, D's Head of Regulatory Services, and the solicitor who had been advising D's Estates Department on the application, and Mr Stuart. The second email went further than Mrs Heal's, by suggesting that they 'believe[d] that she will not agree to the site's being developed as envisaged by the application'. The second email did not explain how C's solicitors knew that.

22. Mr Ashdown did not know when he wrote the OR that the contract between D and Mrs Heal ('the Agreement') might have expired in December 2019. He now knows more about the Agreement (which is described in Mr Clark's witness statement; see the next paragraph), but does not consider that, if he had known more, it would have caused him to change the advice in the OR.

23. Mr Clark is the Solicitor to D. Part of his job is to oversee the legal work 'related to Estates'. A colleague of his, Mr Chris Coppens, had worked on the Agreement. The Agreement was made on 16 December 2016. It is exhibited to Mr Clark's witness statement. It was a conditional contract. The period of the condition was three years, and the condition was that planning permission be obtained for the Copthorne site. The end of the condition period did not bring the Agreement to an end; rather, either party could then terminate the Agreement by giving notice in writing.

24. D appointed agents for the application for the Copthorne site. They were jointly instructed by D and by Mrs Heal. Mrs Heal had her own solicitor. They worked with her, her partner, and D to submit an application for planning permission. The intention was that there should be four pitches for Mrs Heal and up to 12 for D. After the quashing of Permission A, the parties prepared a revised application for planning permission for a smaller number of pitches. The parties discussed the revised number of pitches: three for Mrs Heal, and five for the Council. They started to negotiate the terms of a second agreement to replace the Agreement, which was still in force, as neither party had served notice to terminate it.

25. Mr Clark took no part in advising the planning department on the application for the Copthorne site, in order to avoid a conflict of interest. He did not consider that there was a conflict of interest in relation to the application for the Site. He was therefore present at the Committee meeting in February 2020, in order to advise, not on planning matters, but on any legal questions which might arise. There were no questions about the Copthorne.

26. In his view, the Agreement was still in force, a second agreement was being actively negotiated, and D and Mrs Heal were working on a revised application for the Copthorne site. He had no reason to think that Mrs Heal's enthusiasm for the development had abated in any way. The negotiations continued during 2020. The first indication that Mrs Heal had had a change of heart was in a letter dated 21 October 2020 which was emailed to him, which gave notice to terminate the Agreement.

The policy background

27. Policy DP11 of the DP makes a strategic allocation of land to the north of Clayton Mills for 'approximately' 500 new homes, and a new primary school. That allocation also includes

> *'Provision of permanent pitches for Gypsies and Travellers to contribute towards the additional total identified need within the District commensurable with the overall scale of residential development proposed by the strategic development; or the provision of an equivalent financial contribution towards the off-site provision of pitches towards the additional total identified within the District (or part thereof if some on-site provision is made) commensurate with the overall scale of residential development proposed by the strategic development. The financial contribution will only be acceptable if it can be demonstrated that a suitable, available and achievable site (or sites) can be provided and made operational within an appropriate timescale unless alternative requirements are confirmed within a Traveller Sites Allocations Development Plan Document or such other evidence base as is available at the time'.*

28. Policy DP33 of the DP is headed 'Gypsies, Travellers and Travelling Showpeople'. It says that the relevant assessment does not identify any need for permanent pitches and plots for Gypsies, Travellers and Travelling Showpeople who still travel for the period up to 2031. That assessment identifies a need to accommodate 23 households of settled Gypsies and Travellers for the period up to 2031 but no need for sites for Travelling Showpeople who no longer travel. In order to ensure enough 'permanent culturally suitable housing' for settled Gypsies and Travellers and Travelling Showpeople 'within an appropriate timescale', the Council has provided for the allocation of pitches in the strategic allocation to the north and north west of Burgess Hill, to the east of Pease Pottage, and to the north of Clayton Mills, Hassocks; 'or the provision of equivalent financial contribution towards the off-site provision of pitches if it can be demonstrated that a suitable, available and achievable site (or sites) can be provided and made operational within an appropriate timescale'. The three relevant policies are DP9, DP10 and DP11. The Council has also made 'provision for such pitches on strategic sites (Policy DP30: Housing Mix refers). The Council is progressing a Traveller Sites Allocations Development Plan Document to allocate further sites over the Plan period as required'.

29. The reasoned justification for the provision for Gypsies and Travellers is that the relevant assessment provides information about the number of pitches needed for permanent accommodation for Gypsies and Travellers in the district. Sites to meet that identified need are 'being delivered through a Traveller Sites Allocations Document' ('a TSAD') (Policy DP33 is referred to). 'Work on the Allocations Document has highlighted the difficulties in the delivery of permanent Gypsy and Traveller sites and underlined that there could be a shortage of suitable sites, should the identified need for such sites increase unexpectedly over the plan period and underlines that the primary provision of permanent Gypsy and Traveller sites is best undertaken in a way that can be master planned into future, currently unplanned strategic sites. Policy provision for such an approach is already supported in this [DP] through Policy DP9…Policy DP10…and Policy DP11…and within the emerging [TSAD]'.

30. The Council has not yet made a TSAD. The latest assessment of needs is dated July 2016. That identifies a need for 14 pitches between 2016 and 2021. The rest of the pitches are to be provided in the remaining part of the plan period (to 2031).

The Copthorne site

31. In 2017, D applied for planning permission for land in Copthorne for the provision of 16 pitches for Gypsies and Travellers and associated infrastructure. D withdrew that application. D and Mrs Heal made a further application in August 2018 for the provision of 13 pitches at the same site. The CVA objected. D granted Permission A on 26 February 2019. By an order dated 17 May 2019, John Howell QC, sitting as a Deputy High Court Judge, gave permission to apply for judicial review of Permission A on the papers on one ground only; whether an environmental statement was arguably required. He refused permission on the other grounds. The application for judicial review was listed for a hearing, with a renewed application for permission on the grounds for which permission had been refused by Mr Howell. D then consented to judgment on the one ground on which permission had been granted. Permission A was then quashed by consent. There was correspondence between the CVA and D. The relevant landowner, Mrs Heal, and D then applied jointly for planning permission for a smaller site. The CVA objected to that application on various grounds.

Clayton Mills

32. The CVA does not object to the development of the Site, but wants to ensure that the pitches for Gypsies and Travellers are provided on the Site. The CVA's view is that the strategic sites are better able to accommodate pitches than other sites, and that they should be preferred to Copthorne, consistently with DP33.

33. No such provision was proposed in the application for planning permission in this case. The Planning Statement in support of the application referred to and summarised DP33. It referred to the need for accommodation identified in the DP up until 2031. It estimated that the development proposed for the Site would attract a requirement for five pitches. The design team considered whether it could be provided on-site, but rejected that idea because the site was not big enough to accommodate five pitches and the rest of the proposed development. The IP did not control another site in the district which would be suitable and proposed to offer a financial contribution to another site elsewhere. Where that site would be was to be discussed with D.

34. The CVA objected to the proposals for Clayton Mills to the extent that they did not provide for pitches for Gypsies and Travellers. The CVA argued that it had not been demonstrated that there was a 'suitable available and achievable' site, which could be made operational in an appropriate period.

The OR

35. The passage in the OR which considers 'Gypsy and Traveller Provision' is quoted in full in C's skeleton argument (paragraph 16). It referred to DP11. It said that scale of the development on the Site generated a need for five Gypsy and Traveller pitches. The OR referred to an objection made on the ground that the absence of provision on-site for Gypsy and Traveller pitches would cause 'pressure to approve unsuitable sites in other locations'. The objection argued that it had not been demonstrated that 'suitable available and achievable site (or sites)' could be made operational within an appropriate timescale so that it would be appropriate to accept a financial contribution as per DP33. The representation also argued that there was room for the pitches and for the development.

36. The OR then set out the IP's position about the objection. The IP's design team had considered at an early stage whether the provision could be made on-site and had concluded that it could not, because of the constraints of the site (including a railway line, flood plain, existing houses and a single access point for vehicles). As the IP did not control another suitable site in the area, it proposed to offer a financial contribution to provision away from the site, in accordance with policy.

37. The IP noted that the off-site provision of three pitches had already been accepted in relation to a development of part of the strategic site near Burgess Hill. Officers agreed with the applicant's assessment that there were other constraints on the site (impact on heritage assets, and a legal requirement to provide buffer areas to minimise the impact on their settings).

38. The OR then dealt with a suggestion in the representations that the number of dwellings could be reduced to ensure space on the Site for provision for Gypsies and Travellers. The OR said that the Council was obliged to deal with the application before it. The OR quoted DP11. The OR said that it was clear that DP11 did not require Gypsy and Traveller provision on site, and as long as there were other sites which could be delivered in an appropriate timescale, and a contribution was taken towards them, officers were content that the policy was satisfied. '…a revised application is being prepared and a pre-application meeting has been held for development of a Gypsy and Traveller site at Copthorne'. The OR reminded members that D had consented to the quashing of the previous planning permission for reasons relating to its decision not to require an environmental statement. Even if an environmental statement had been required, that did not mean that the application would have been refused. The revised application was likely to be for a smaller area, 'with the result that an Environmental Statement should not be required'. D was also 'exploring the possibility of expanding existing sites in the District'.

39. That meant that there was more than one way in which the identified need could be met. There was no planning permission for any of the options, but that was not a requirement of the policy. 'Officers are satisfied that there is no overriding reason why one or more of these schemes should not be permitted, and that these sites can be made operational within an appropriate timescale'. Officers were satisfied that there were enough options for provision off-site, and that there were 'other suitable, available and achievable sites within the District, which could be delivered within an appropriate timescale'. An off-site contribution (which would be secured by a section 106 agreement) was an appropriate mechanism to deal with the material development requirements.

40. Officers therefore considered that that application was in accordance with policies DP11, DP30 and DP33 of the DP.

The law

41. The parties agree on the principles which apply to the interpretation of an OR. They are summarised by Lindblom LJ in *R (Mansell) v Tonbridge and Malling Borough Council* [2017] EWCA (Civ) 1314; [2019] PTSR 1452 at paragraph 42. An OR is not be read too strictly, but in a reasonably benevolent way. An OR is written for members who know about their local area. Unless there is evidence otherwise, it should be assumed that members followed the advice in the OR. The question is whether, on a fair reading of the OR as a whole, members have been materially misled. Minor or unimportant mistakes can be ignored.

42. The parties also agree that how DP policies should be interpreted is a question of law for the court. But policies are not to be construed with the strictness that a court would apply to the interpretation of a statute or a contract. A court must try and give a policy a sensible meaning in its context. That context includes the objectives of the policy, other relevant policies in the plan, and any relevant supporting text. The making of a DP policy is not an end in itself, but a way of achieving 'coherent and reasonably predictable decision-making in the public interest' (per Lindblom LJ in *Canterbury County Council v Secretary of State for Housing and Local Government* [2019] PTSR 1714 at paragraph 22).

43. Section 149 of the 2010 Act requires a public authority, in the exercise of all its functions, to have 'due regard' to the equality needs which are listed in section 149(1). The status of gypsy or traveller is a protected characteristic for the purposes of section 149(7) ('race').

44. It is well established that the regard which is due when a function is exercised will vary from context to context, and as between functions. In some contexts, where there is a close relationship between the function which is being exercised and a specific protected characteristic, or a listed equality need, a decision maker may have the regard which is due even if he does not refer in terms to section 149. See, for example, *R (Baker) v Secretary of State for Communities and Local Government* [2008] EWCA (Civ) 141; [2009] PTSR 809 (in the planning context); *R (McDonald) v Kensington ad Chelsea Royal London Borough Council* [2011] UKSC 33; [2011] PTSR 1266; and *Hotak v Southwark London Borough Council* [2015] UKSC 30; [2016] AC 811. D and the IP rely on the judgment of Elias J (as he then was) *Isaacs v Secretary of State for Communities and Local Government* [2009] EWHC (Admin) 557, which is to similar effect, and makes the further point that in a planning case, the LPA will generally be able to show that it has had the regard which is due to the listed equality needs if it has complied with a policy which specifically aims to take the needs of a group with a protected characteristic (such as Gypsies and Travellers) into account.

45. C relies on the judgment of McCombe LJ in *Bracking v Secretary of State for Work and Pensions* [2013] EWCA (Civ) 1345. It is clear from that judgment that the relevant legal principles were not in dispute in that case. McCombe LJ revisited section 149 in paragraph 44 of a later decision of the Court of Appeal, *Powell v Dacorum Borough Council* [2019] EWCA (Civ) 23. He said that the previous decisions about section 149 have to be taken in their contexts. The way in which section 149 will apply will be different in each case, depending on what function is being exercised, and on the facts. The authorities about section 149, including the judgment in *Bracking*, must not be read as if they were statutes. He referred, with approval, to a similar statement by Briggs LJ (as he then was) in paragraph 41 of *Haque v Hackney London Borough Council* [2017] EWCA (Civ) 4. See also, more recently, and in the context of the exercise of a different function, *McMahon v Watford Borough Council* [2020] EWCA (Civ) 597, at paragraphs 68 and 89, per Lewison LJ. Section 149 does not impose a duty to achieve a particular result (see the *Baker* case). The question whether a decision maker has had due regard to the listed equality needs is a question of substance, not form. The duty applies even if the

parties have not raised the question (see *Gathercole v Suffolk County Council* [2020] EWCA (Civ) 1179 at paragraph 30).

Discussion

46. Ground 1 raises three issues.

    i. Did the OR mislead members by relying on a misinterpretation of the DP11?

    ii. Did the OR fail to draw members' attention to a relevant consideration (that the amount of conventional housing could be reduced)?

    iii. Did D fail to have due regard to the listed equality needs when granting the Permission?

Ground 1(i): were members materially misled by the interpretation of DP11 put forward in the OR?

47. The key question of construction raised by this case in relation to DP11 (and DP9 and DP10) is whether, properly understood, its words give any priority to the on-site provision of pitches for Gypsies and Travellers, or whether (other things being equal) the requirements of the policy may equally be satisfied by (1) provision on-site, or (2) an equivalent financial contribution to towards off-site provision (which also meets the criteria stated in DP11).

48. That question is to be answered by reading the relevant words of policy DP11 in their context. This is a short question of construction. It is not susceptible of much elaboration. In my judgment, there is nothing in the relevant passage of DP11 which shows that the policy gives priority to either of the two methods of provision to which it refers. D is simply required to consider both. I accept D's submission that D could decide the application in accordance with the DP either by accepting provision on-site, or by accepting a financial offer made. DP11 did not require D only to accept off-site provision if there was an acceptable reason for an absence of on-site provision.

49. This is clear as a matter of language. There is no relevant ambiguity. This is not an absurd result. On the contrary, it is a sensible result, as it gives the local planning authority the flexibility to respond to the different factors which may be brought into play on the strategic sites by any of the potentially wide range of different applications for planning permission for those sites. If the relevant policies (which all use the same language) had been intended to establish that the first method of provision had any priority, it would have been easy to achieve that outcome by using different words from the words which have been used in DP11.

50. If there had been any relevant ambiguity (which there is not), the reasoned justification in DP33 might have been relevant as an aid to the construction of DP11: cf *R (Cherkley Campaign Limited v Mole Valley District Council* [2014] EWCA (Civ) 567 paragraph 16 per Richards LJ (with whom the other members of the Court agreed)). But even if there had been any ambiguity, I do not consider that that justification would have helped to resolve it.

51. The justification does not inform the construction of DP9-11 and DP33. Instead, it explains how the plan making for such sites would best be done if the estimated requirement for pitches were to increase in the future. It does not say that it explains how the each of DP9 etc is to be interpreted. Rather what it does is to explain the best way of making a further DP if it turns out, during the life of the current DP, that the existing

allocation is not enough; that is, by making a further allocation when, in future, D identifies further ('as yet unplanned') strategic sites.

52. If I am right about the correct interpretation of DP11, officers were not required to assess whether or not there was a good reason for not requiring provision on-site. If I assume for a moment that that approach is wrong, then, at most, DP11 requires sequential consideration of the two types of provision, and permits off-site provision if, in the exercise of their judgment, officers consider that there is a good reason whether provision cannot be made on-site. If that approach is the right approach, it follows that it was open to officers to accept, as the OR records that they did, (in answer to the CVA's objection) that the site's constraints meant that it was not possible to accommodate the proposed development and five pitches. It also follows that it then was open to officers, having accepted that on-site provision was not possible, to go on to consider whether a financial contribution to off-site provision was acceptable, consistently with policy DP11.

53. I should deal here with Mr Turney's submission that the constraints of the site were irrelevant, as a matter of law, because the effect of DP11 is to decide that all the development for which the land is allocated is (simultaneously) regarded as acceptable. This interpretation of DP11 is very close to a reading which would require D only to grant permission for an application which proposed to provide all the features listed in the allocation. If I have understood it correctly, I reject that submission. First, it is inconsistent with the construction which I have given to DP11. Second, and in any event, if it is right, it makes it difficult to make sense of, or give weight to, the long list of additional requirements in DP11. I consider that, on its proper construction, the effect of DP11 is that, depending on the characteristics of a particular application, the constraints of the site might well be a material consideration. The allocation of the land for the listed purposes does not pre-determine the question whether any particular proposal is acceptable.

Ground 1 (ii): did the OR fail to draw material considerations to the attention of members?

54. Mr Turney accepted in his reply that the premise of this aspect of ground 1 is that C's interpretation of the DP11 and DP33 is correct. C argues that the OR was materially misleading because it failed to alert members to the option of reducing the amount of conventional housing. C submits that policy DP11 does not give precedence to conventional housing, and the policy did not require (or, perhaps, even, permit) D to set the provision of pitches aside and keep the amount of conventional housing proposed in the application. C contends that such an approach would be 'indirectly discriminatory and contrary to [D's] duty under section 19 of [the 2010 Act] and [sic] fail to advance equality of opportunity and foster good relations in breach of section 149 [of the 2010 Act]'.

55. C argues that the possibility of reducing the amount of conventional housing was 'obviously material' because it was put in issue by DP11. This contention is elaborated in paragraph 30 of C's skeleton argument. D submitted that, if its interpretation of DP11 and DP33 is correct, the OR cannot be impeached on this ground. Mr Brown relied on the summary of the reasoning of the Court of Appeal in *R (Mount Cook Land Limited) v Westminster City Council* [2003] EWCA (Civ) 1346 in paragraphs 15 and 34 to 39 of the judgment of Lindblom LJ in *Lisle-Mainwaring v Carroll* [2017] EWCA (Civ) 1315. It is only in exceptional circumstances that alternative sites, or alternative uses, to those proposed in an application for planning permission are capable of being a material consideration.

56. I reject this part of C's argument. As I have recorded, Mr Turney accepted that its premise is that DP11 requires some sort of priority to be given to on-site provision of pitches. But

I have held that the construction of DP11 is incorrect. In any event, as D points out, the OR did refer expressly to this possibility.

Ground 1(iii): did D fail to have due regard to the listed equality needs when it granted the Permission?

57. C submits that by failing to consider whether the constraints of the site could be addressed by reducing the amount of conventional housing and making on-site provision, D failed to have due regard to the listed equality needs. I consider that the premise of this argument is also that DP11 must be construed as requiring priority to be given to on-site provision. I have decided that that is not what DP11 means. If DP11 means what I have decided it means, D was not required to go further than considering (as officers did) whether the application which was made by IP was in conformity with either limb of DP11.

58. In any event, section 149 did not oblige D to achieve a particular result (see, for example, the *Baker* case). Its effect was not to require D to stipulate that the IP should provide pitches rather than conventional housing on the site. Section 149 required D, when considering whether to grant the Permission, to have due regard to the listed equality needs. I accept C's submission that it is not enough, in principle, that D complied with section 149 in adopting the relevant policies. But that factor is not immaterial. It is an important foundation of the regard which was due to the listed equality needs when D considered whether or not to grant planning permission. I accept D's and the IP's submissions that compliance with the interlocking policies about the provision of sites for Gypsies and Travellers is the regard which was due, in this factual and policy context, to the listed equality needs when D considered whether or not to grant planning permission (see *Isaacs*, in particular paragraph 53 of the judgment of Elias J (as he then was)).

59. The two cases on which Mr Turney relied, *R (Harris) v Haringey London Borough Council* [2010] EWCA (Civ) 703; [2011] PTSR 931 and *R (Buckley) v Bath and North East Somerset Council* [2018] EWHC 1551 (Admin); [2019] PTSR 335 are not in point. They were both cases in which the policies, compliance with which was relied on (unsuccessfully) as a proxy for compliance with section 149, were general planning policies which were not aimed at meeting the equality needs of a specific group with a protected characteristic (cf DP11 which is a specific measure aimed at meeting the need for the settled members of the Gypsy and Traveller community for culturally appropriate housing).

60. I have considered carefully the attractive point made by Mr Turney in his reply, which was that in this context, section 149 required D to consider the material difference for the Gypsy and Traveller community between the provision of pitches at Clayton Mills contemplated by the first limb of DP11. Such provision, he submitted, would more assured if made at Clayton Mills, and much less certain if, instead, a financial contribution to provision off-site was made. There are two answers to this argument. The first is the *Lisle Mainwaring* decision. This is not an exceptional case in which D was required by section 38(6) of the Planning and Compulsory Purchase Act 2004 Act to consider an application which was not made. The function which, for the purposes of section 149, D was discharging, was the function of considering the application for planning permission which the IP had made, not some other application which had not been made. The second answer is connected with the first. The relevant policies were the subject of an equality impact analysis (which I was shown). They are aimed precisely at meeting the equality needs of the settled members of the Gypsy and Traveller community for culturally appropriate housing. The policies (as I have decided that they should be construed) treat the two types of provision as equivalent ways of meeting that need. It was

open to D to adopt such an approach in formulating the DP. The adoption in principle of such an approach is not a breach of section 149. Nor is the application of that approach to the decision whether to refuse or to grant planning permission in this case.

61. I reject the submission (if made) that D did not comply with section 149 because the OR does not refer to section 149 expressly. To be fair to him, Mr Turney accepted that the mere fact that section 149 was not expressly referred to in the OR could not be decisive. He was right to make that concession. Any such submission would be inconsistent with the authorities in which a failure to mention section 149 expressly was in issue (even if that submission is consistent with many obiter statements in authorities in which, either, a failure to refer to section 149 was not in issue, or the effects of such a failure were not in issue).

62. I also reject the related submission that members were materially misled because they were not referred to paragraph 13 of a national policy, the Planning Policy for Traveller Sites ('PPTS'), which provides that local planning authorities should 'promote peaceful and integrated co-existence between the site and the local community'.

63. Paragraph 2 of the PPTS requires LPAs to take the PPTS into account when preparing their development plans. It also says that the PPTS is a material consideration in planning decisions. That statement must be qualified, in my judgment, by a criterion of relevance. Mr Turney did not submit, rightly, that every paragraph of the PPTS is a material consideration in every planning decision. That contention is obviously absurd. The extent to which any one provision of the PPTS will actually be a material consideration in a particular planning decision will depend on at least two factors: what that provision of the PPTS requires, and what is at issue in the particular planning decision.

64. Paragraph 13 is in a section of the PPTS which is headed 'Plan-making'. The second sentence of paragraph 13, which introduces the passage on which C relies, begins by saying that LPAs 'should, therefore, ensure that their *policie*s…' [emphasis supplied]. It is clearly directed at LPAs when they make plans, not at LPAs when they consider applications for planning permission. It follows that this paragraph of the PPTS was not a material consideration at all. At best, and I think that Mr Turney accepted this in oral argument, provisions of the PPTS might be a relevant aid to construction if the relevant DP policy was ambiguous, because the DP should be consistent with the PPTS. I have held, however, that the relevant DP policies are not ambiguous.

65. I reject the separate submission that in the Permission D applied a policy criterion or practice ('PCP') which indirectly discriminated against Gypsies and Travellers by 'accepting constraints' on the provision of pitches for Gypsies and Travellers but not imposing any constraints on the provision of a much greater number of units of conventional housing. There was no application by any Gypsies and Travellers for any pitches. The only application which D was considering was an application for planning permission by the IP for conventional housing on the site. D did not impose a PCP on any Gypsy and Traveller applicant for planning permission.

Were members materially misled by the approach of the OR to off-site provision?

66. I will summarise, first, C's submissions before and at the hearing. Those submissions were given further content and impetus by the events after the hearing, and by the witness statements of Messrs Ashdown and Clark, which I have described above. I will describe C's further written submissions at paragraphs 70-72 and 81-82, below, and those of D and of the IP at paragraphs 73-80.

67. C submitted, originally, that members were materially misled in three different ways.

i. DP11/33 required D to consider whether the Copthorne site was suitable. The OR did not consider this at all. The OR should have considered factors such as constraints on that site, and the objections to its development. The OR did not consider the grounds on which the earlier application for judicial review had been brought, other than the ground on which permission to apply for judicial review had been granted. This meant that D failed to have regard to a material consideration.

ii. DP11/33 required D to consider whether off-site provision was achievable. The OR failed to deal with this question. It only considered whether an environmental statement would be needed, but failed to consider the other grounds on which the development at Copthorne might be opposed.

iii. The OR failed to consider what an appropriate timescale would be and whether Copthorne could be made operational in that time. What is 'appropriate' may be a matter of planning judgment, but is to be judged against a background in which the provision likely to be needed by 2021 (see the 2016 assessment), and when no application for planning permission at Copthorne had even been made. By the time of the hearing in this case, Mr Turney acknowledged, an application had been made, and was due to be considered very soon by the Planning Committee.

68. Mr Turney also relied on DP12, which deals with development in the open countryside (defined as 'the area outside of built-up area boundaries on the Policies Map'). Development such as pitches for Gypsies and Travellers will not be permitted unless 'it is supported by a specific policy reference either elsewhere in the Plan, a Development Plan Document or relevant Neighbourhood Plan'.

69. He argued, further, that

i. there was no evidence before members about 'the possibility of expanding existing sites within the District' to enable them to decide whether or not such provision met the criteria in DP11, and

ii. D did not have regard to paragraph 10 of the PPTS, which was a material consideration. That paragraph, again, is under the heading 'Plan-making'. It says that LPAs, in producing their local plan, 'identify and update annually, a supply of specific deliverable sites sufficient to provide 5 years' worth of sites against their locally set targets'. Footnote 4 explains what is meant by 'deliverable'. The site must 'be available now, offer a suitable location for development, and be achievable with a realistic prospect that the development will be delivered on the site within five years. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years…'

70. In his further written submissions, Mr Turney argued that Mr Clark's view that the end of the condition period did not bring the Agreement to an end was wrong in law. He argued that after 16 December 2019, D could no longer rely on the Agreement to require Mrs Heal to transfer the land on the Copthorne site to it for the purpose of providing pitches for Gypsies and Travellers. No second agreement had been negotiated by the date of the Committee's meeting in February 2020. That meant that D could no longer secure the provision of any pitches on the Copthorne site.

71. He contended that the fact that D did not have an interest in the Copthorne site was a material consideration. It was not an answer to say that Mr Ashdown did not know the true facts. D was under a duty to take reasonable steps to find out what the position was in order to give the Committee the information it needed to answer the question whether the site met the criteria in the policy or not. D was in a materially worse position to provide any pitches on the Copthorne site than it had been in 2018 or 2019. It could not secure the provision of the pitches since it no longer had a legal right to buy the necessary land.

72. Mr Turney asked for permission to amend his claim so as to rely on the new material, and that the formal requirement to amend the pleadings be dispensed with.

73. D reminded me that whether or not the grant of the Permission was lawful depended on the position at the date of the decision to grant the Permission. Mr Brown submitted that C's real criticism that the fact that the long-stop date in the Agreement had passed was not reported to the Committee.

74. He made four main points about that.

    i. The advice in the OR that the criteria in the policy were met did not depend on a detailed knowledge of contractual position but on a practical understanding that D and Mrs Heal had been joint applicants in the first application, and that they were still working together on a revised application for which Mrs Heal would be a joint applicant and on which there had been pre-application discussions and a public consultation.

    ii. The long-stop date had passed, but neither party to the Agreement had served notice to terminate it.

    iii. Both parties recognised that a second agreement would be needed, because the development which was the subject of Permission A could no longer go ahead.

    iv. They were negotiating a second agreement, and had agreed that Mrs Heal would have three pitches, and D, five.

75. In short, although the long-stop date had passed, the parties were still actively promoting a development similar to the development which was the subject of Permission A. D was not told anything to the contrary until 21 October 2020, after the hearing in this case, and long after the meeting of the Committee.

76. Mr Clark, who was present at the meeting of the Committee had thought about the topic (although he said nothing to the Committee). His view that there was no reason to think that Mrs Heal would not negotiate a second agreement with D was rational.

77. It was not necessary for D to develop the Copthorne site in order to satisfy the criteria in Policy D11. Even if Mrs Heal had applied for planning permission as sole applicant, it would still have been open to D to decide that the criteria in policy DP11 were met.

78. D did not accept the suggestion that it has breached its duty of candour. D appeared in these proceedings in its capacity as LPA. In that capacity, D did not know the precise terms of its arrangements with Mrs Heal. If D did not know the terms in that capacity, it did not breach the duty of candour in not telling the court about them.

79. The IP did not accept that just because the long-stop date had passed, D could no longer be confident that the criteria in DP11 were still met. Mrs Heal's change of heart in October 2020 was not relevant because it post-dated the meeting on 20 February 2020. The issue, rather, was whether, as a matter of judgment, D could say, as at 20 February

2020, that the criteria were met. In common with D, the IP submits that, on the basis of what Mr Ashdown knew when he wrote the OR, it was open to him to say that the criteria were met. The exact terms of the Agreement would not have changed his practical assessment that they were met. The criteria in DP11 do not stipulate that they can only be met if D owns the relevant land.

80. The IP submits that the Committee were not misled. There was still every reason to believe that Mrs Heal intended to go ahead with a second application for the Copthorne site.

81. Mr Turney's riposte was that this broad submission showed that there was no 'proper inquiry' about the position at Copthorne and that the officer was, in any event, mistaken. There was, in February 2020, no evidence that Mrs Heal was willing to make her land available to D. The Agreement was, by then, no longer relevant. There was no active communication between D and Mrs Heal. The last meeting was on 9 October 2019. There was no evidence of any relevant correspondence between D and Mrs Heal until she indicated, in October 2020, that she no longer wanted to be involved. There was, on 20 February 2020, no evidence of support by Mrs Heal for the second application for the Copthorne site since, while her name was on the application, it was not made until after that date. Later events showed that the Copthorne site could not be delivered consistently with the criteria in DP11 precisely because D did not secure the Copthorne site with a contractual obligation.

82. The failure to mention D's lack of control over the site in the OR, which is a material consideration, was a further reason to quash the Permission.

83. D did not oppose the grant of leave to amend the claim. I have described the evidence about what happened after the hearing, and the submissions generated by that evidence. They raise an arguable issue which, to put it no higher at this stage, is potentially relevant to my decision on this claim. I will have to consider it. C could not have raised it sooner, because she did not know about it. Neither D nor the IP would be prejudiced by the grant of leave to amend, as both have had an opportunity to respond to the new ground. In those circumstances, I give C leave to amend her claim to raise this issue, and do not require her to amend her pleadings.

Discussion

84. I consider, first, the argument I have described in paragraph 68, above. For what it is worth, such development is, in my judgment, expressly supported by the fifth bullet point on page 87 of the DP. That bullet point contemplates (with an express proviso) that there may be such development in the countryside (as defined in DP12) because the phrase 'in rural and semi-rural areas' overlaps with (but is not co-extensive with) 'the countryside' as defined in DP12. So I am not persuaded (on the basis of what I have heard and read in this case) that DP12 is a complete answer to the Copthorne application.

85. The real issue, though (which, in somewhat different ways, is raised by the points I describe in paragraph 67, above, and by the material which emerged after the hearing), is whether the OR should have gone further than it did.

86. The amount of detail in an OR is a matter of judgment for its author (subject to *Wednesbury*). I consider, first, the approach in the OR to planning permission for the Copthorne site. The clear message from the OR is that there had been an earlier application for judicial review of a decision by D to grant permission for pitches at Copthorne, and that the expert assessment of officers was nothing had emerged from that application which they considered would be an obstacle to the grant of planning

permission for a smaller number of pitches. I consider that the way in which this point was considered in the OR is adequate and did not materially mislead members of the Committee. No more was required. In particular, the OR was not required to set out the material which was the basis of officers' view in order to enable members to make an assessment for themselves of the planning merits of a further application for planning permission at the Copthorne site for a smaller number of pitches.

87. C also submits, in effect, that the OR does not give adequate reasons for its conclusion that the Copthorne site was 'suitable, available and achievable' and could be made operational within an appropriate timescale. Only three of the twelve members who voted to grant the Permission had considered the Copthorne application, and that had been a year previously.

88. I have to decide whether there was enough detail in the OR on this point. Again (and subject to *Wednesbury*) the amount of detail which was appropriate in the OR was a matter for its author. A reader of the OR would gather that in the exercise of their professional judgment, officers considered that the Copthorne site was 'suitable, available and achievable'.

89. Was the failure to say that the Council could no longer oblige Mrs Heal to sell D the relevant part of the Copthorne site a material omission which misled the Committee? Whether it was a material omission depends on whether a reasonable officer, with full knowledge of the legal and factual position, should have mentioned it in the OR. I do not consider that a reasonable officer was required to investigate, or to tell the Committee about, the details of the arrangement for securing the Copthorne site, such as the terms of the contract between D and Mrs Heal. A reasonable officer was required to find out in general terms why Permission A had been quashed, and whether a further application which could deliver some pitches would be made. Although he had not seen the DAS for the first application, Mr Ashdown did know that Mrs Heal, the landowner, had been a joint applicant in the first application and that she was willing to allow the land to be used for traveller accommodation through private use and through sale to D for public use. He also knew, and told the Committee, that a further revised application was being prepared, and that that there had been a pre-application meeting. It was reasonable to assume, on the basis of that information, that the fact that D did not own the land would not be a barrier to the provision of the pitches if a further application for planning permission were made, and that a further application was being prepared. The very recently published consultation information supported the view that a second application was being prepared with the co-operation of the landowner.

90. Again, no more was required. The OR was not required to set out the material which was the basis for officers' view in order in order to enable members to judge for themselves whether those three criteria were met. In particular, the OR was not required to explain the detailed legal position by reference to the terms of the Agreement, or, it follows, to tell the Committee that the long-stop date had passed. It is true that the passing of that date meant that D could no longer require Mrs Heal to sell it any land on the Copthorne site, but there was no reason for officers reasonably to judge, or to tell the Committee, that D was no longer confident that the project would deliver some pitches, and that the DP11 criteria would be met.

91. I therefore accept the submissions by D that (1) the question whether the criteria in DP11 were met was a question of planning judgment for the relevant officers (a point, which, in any event, is, at least partly, conceded by C) and (2) the criteria were properly addressed

in the OR and, it follows, (3) the OR gave adequate reasons for its conclusions that the criteria were met.

92. C also argues that there was no evidence before members about 'the possibility of expanding existing sites within the District' to enable them to decide whether or not such provision met the criteria in DP11. This point is similar to the points I have just considered. In my judgment, the answer to it is the same, mutatis mutandis.

93. I turn to the contention that D did not have regard to paragraph 10 of the PPTS. I reject that submission. The reasoning I applied to the argument based on paragraph 13 of the PPTS applies with equal force to this argument. Paragraph 10, like paragraph 13, is directed at plan making. A complaint that paragraph 10 has ignored, or has not been complied with, is a complaint about the lawfulness of the relevant plan, not a justiciable complaint about a decision based on the terms of the existing DP.

Conclusion

94. For those reasons, I dismiss this claim for judicial review.

Section 31A of the Senior Courts Act 1981

95. That conclusion means that I do not have to consider the impact of section 31 of the Senior Courts Act 1981. If I had had to, I would unhesitatingly have accepted C's contention that (if she had been right about the proper construction of DP11) this is not a case in which it would have been right to refuse relief on the grounds that it was highly likely that the decision would have been the same, if the error had not been made. The same applies to C's arguments based on the criteria in the policy. C's arguments about relief are self-evidently right.