R (on the application of Lady Hart of Chilton) v Babergh District Council [2014] EWHC 3261 (Admin)

Queen's Bench Division, Administrative Court (London)

Mr Justice Sales

14 October 2014

Town and country planning — Permission for development — Heritage assets — Defendant local planning authority granting planning permission despite harm to heritage assets — Claimant seeking judicial review — Whether defendant erring in granting planning permission — Local Government Act 1972, s 100B — Town and Country Planning Act 1990, s 106.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

MR JUSTICE SALES:

Introduction

1. This is an application for judicial review of a decision by Babergh District Council ("the Council") dated 31 January 2014 to grant planning permission for the "erection of two detached industrial buildings (Use Classes B1, B2 and B8) with service yards, car parking, landscaping and associated works" at a site on the outskirts of Sudbury, Suffolk ("the Site"). The application is made by the Claimant, who resides at Chilton Hall, next to the Site.

2. The planning permission is for the construction of two large warehouses and related office accommodation, service yards and car parking. It was granted on the application of the Interested Parties, Highbridge Properties plc ("Highbridge") and Promotional Logistics Ltd ("Prolog"). Highbridge is a property developer. Prolog hopes to be able to locate a substantial part of its business there, servicing email order businesses. Prolog's parent company, Caverswall Holdings Limited ("Caverswall"), owns the Site.

3. Prolog maintains that being able to build warehouses at the Site will mean that it can develop its business and support a substantial number of jobs in the local economy. It says it has looked

for other suitable sites in the area to locate the new warehouses it needs, but has found none. The claim that if planning permission were granted it would provide extensive benefit to the local economy was an important consideration taken into account by the Council in deciding to grant planning permission.

4. The Site is in close proximity to several listed heritage assets: (i) St Mary's Church, Chilton ("the Church"), a medieval Grade 1 listed building located approximately 130m from the edge of the Site; (ii) Chilton Hall, a Grade 2* listed building located in grounds next to the Site; (iii) the grounds of Chilton Hall, which are registered as a park and garden of special historic interest in the English Heritage National List and as a Grade 2 site in the Suffolk County Council Local List; and (iv) a walled garden within the grounds of Chilton Hall, the brick walls of which date to Tudor times and are separately listed as a Grade 2 listed building. English Heritage also regards the water filled moat which surrounds Chilton Hall as an Ancient Monument in its own right.

5. At the moment, the Church and Chilton Hall are located in open fields on the outskirts of Sudbury. They have uninterrupted views of each other across the fields. If the warehouses are built pursuant to the planning permission which has been granted, then there will be a major intrusion upon that openness of aspect of both historic buildings and the heritage assets associated with them.

6. In deciding to grant planning permission for the development of the Site, the Council recognised that the development would harm the setting of the designated heritage assets in its vicinity. The Council's assessment was that the development would cause "substantial harm" to the Church and churchyard and to the walled garden, and "harm" to Chilton Hall and to the registered park and garden.

7. Objections to the grant of planning permission were made by the Claimant and a range of others, including English Heritage. However, the Council decided that there would be substantial public benefits associated with the development, which would be sufficiently secured by means of a planning agreement made with Prolog, Highbridge and Caverswall ("the planning agreement") pursuant to section 106 of the Town and Country Planning Act 1990 ("the TCPA"). In the Council's assessment, these public benefits outweighed the harm to the heritage assets affected by the development.

8. The Claimant submits that the Council erred in law in its assessment, on a number of grounds. In particular, the Claimant says that the planning agreement had loopholes in it which meant that the Council could not be satisfied that the substantial public benefits it relied on as justification for granting planning permission would in fact be realised.

The Planning Context

9. According to guidance issued by English Heritage, "Grade I buildings are of exceptional interest, sometimes considered to be internationally important; only 2.5% of listed buildings are Grade I" and "Grade II* buildings are particularly important buildings of more than special interest; 5.5% of listed buildings are Grade II*."

10. Section 66(1) of the Planning (Listed Building and Conservation Areas) Act 1990 ("the Listed Buildings Act") provides in relevant part as follows:

> "In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority … shall have special regard to the desirability of preserving the building or its setting …"

11. The effect of this provision is that the desirability of preserving the setting of a listed building is required to be treated as a factor of "considerable importance and weight", giving rise to a strong presumption against granting planning permission for development which would harm that setting: see *R (Barnwell Manor Wind Energy Ltd) v East Northamptonshire DC* [2014] EWCA Civ 137, at [23]-[24], and *R (Garner) v Elmbridge BC* [2012] JPL 119.

12. A planning obligation contained in an agreement made under section 106 of the TCPA may overcome or mitigate a planning objection to a development, in which case it may constitute a material consideration under section 70(2) of the TCPA which may be taken into account by the relevant planning authority in its decision whether to grant planning permission. Regulation 122 of the Community Infrastructure Levy Regulations 2010 ("the CIL Regulations") limits the use of planning obligations under agreements made under section 106 as reasons for the grant of planning permission to situations in which the obligation is "(a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development."

13. Absent good reason to the contrary, a local planning authority is expected to comply with policy guidance given by the Secretary of State in the National Planning Policy Framework ("the NPPF"). Section 12 of the NPPF deals with "Conserving and enhancing the historic environment". Local planning authorities are required to take account of the desirability of sustaining and enhancing the significance of historic assets (para. 131). Paras. 132 to 136 of the NPPF provide, in relevant part, as follows:

> "132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
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> 133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss …
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> 134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.
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> 135. The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that

> affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset.
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> 136. Local planning authorities should not permit loss of the whole or part of a heritage asset without taking all reasonable steps to ensure the new development will proceed after the loss has occurred."

14. The NPPF creates a strong presumption against the grant of planning permission for development which will harm heritage assets, requiring particularly strong countervailing factors to be identified before it can be treated as overridden: see e.g. *R (Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin), [55].

15. The Council's case is that it has complied with the guidance in the NPPF when deciding to grant planning permission in this case. The correct interpretation of planning policy is a matter for the courts: *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13.

16. The NPPF has replaced PPS5, the previous policy guidance on listed buildings. However, the Government's Practice Guide *PPS5: Planning for the Historic Environment Practice Guide* ("the PPS5 Guide") remains valid and has been endorsed for use alongside the NPPF, as supplementary guidance. Paragraphs 78 and 91 of the PPS5 Guide provide as follows:

> "78. Local authorities are advised to take into account the likely longevity of any public benefits claimed for a proposed scheme. Speculative, ill-conceived or short-term projects will not compare so favourably when considering an irreversible harm to the significance of a heritage asset …
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> 91. Where substantial harm to, or total loss of, the asset's significance is proposed a case can be made on the grounds that it is necessary to allow a proposal that offers substantial public benefits. For the loss to be necessary there will be no other reasonable means of delivering similar public benefits, for example through different design or development of an appropriate alternative site."

17. Decisions on applications for planning permission may in certain circumstances be referred to the Secretary of State so that he can consider whether to call an application in for decision by himself, in exercise of his powers under section 77 of the TCPA. The Town and Country Planning (Consultation) (England) Direction 2009 ("the 2009 Direction") sets out cases in which a reference to the Secretary of State is required, which include "development outside town centres." Paragraph 5(1) of the 2009 Directions defines this term to mean:

> "development which consists of or includes … office use, and which –
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> (a) is to be carried out on land which is … out-of-town; and
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> (b) is not in accordance with one or more provisions of the development plan in force in relation to the area in which the development is to be carried out; and

(c) consists of or includes the provision of a building or buildings where the floor space to be created by the development is:

(i) 5,000 sqm or more; or

(ii) Extensions or new development of 2,500 sqm or more which, when aggregated with the existing floor space, would exceed 5000 sqm."

18. At the date the Council granted planning permission (31 January 2014) it was obliged to give reasons for the imposition of conditions in respect of the permission: article 31(a) of the Town and Country Planning (Development Management Procedure) (England) Order 2010, as amended. The Council did this. In addition, regulation 21(1)(c)(ii) of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 imposed an obligation to publish a statement containing the main reasons and considerations on which the decision to grant planning permission was based.

19. Where a planning officer makes a recommendation which is followed by members of a local planning authority, the reasonable inference is that members did so for the reasons advanced by the officers, unless there is some indication to the contrary: *R (Richardson) v North Yorkshire CC* [2003] EWCA Civ 1860; [2004] 1 WLR 1920, [35].

Factual Background

20. The Site has been assessed by the Council for some considerable time to be suitable for employment use, including office, warehousing and associated facilities, and has been allocated for such use in past and current local plans. The Site is now allocated for general employment purposes by policy EM02 of the Babergh Local Plan. Policy EM08 of that Plan provides that proposals for warehousing, storage and distribution will be permitted on land allocated for general employment purposes, "subject to the acceptability of the location and characteristics of the site"; it also provides that "proposals that take up an excessive amount of land or are more appropriately located elsewhere, for example at or closer to trunk roads, will be refused."

21. Prolog is a significant employer in the Sudbury area. It has existing operations based at an industrial estate in the town of Sudbury, but in considerably smaller buildings than those which it is proposed would be erected at the Site.

22. In their application for planning permission, Prolog and Highbridge sought to make out a case that there was sufficient exceptional public benefit associated with their proposals for development of the Site as to outweigh the strong presumption against granting planning permission for a development which would have a substantial harmful effect on the settings of a number of protected heritage assets. They maintained that the development, if carried out in full (with both warehouses being constructed) would create a further 500 full time equivalent ("FTE") jobs in the area (about 319 in the larger Building A, and about 182 in Building B), with possibilities for training of staff, and consequential socio-economic benefits for Sudbury and the Council's area. The proposed new warehouses would be custom built with dimensions to allow for the efficient operation of Prolog's business, and would allow for office space for its headquarters to be based at the Site. It was also said that the development would safeguard Prolog's existing operations at the nearby industrial estate and the employment associated with them, whereas if Prolog could not proceed with the development it would have to look elsewhere

to meet its business needs associated with its growing business, which could result in job losses in Sudbury.

23. Prolog and Highbridge maintained that, after conducting searches, there was no other available site close to Sudbury large enough to accommodate modern premises for Prolog, and hence to secure the benefits for the Sudbury area which the development could provide. They also said that if permission were granted, Prolog would be in a position to progress promptly with the implementation of the development.

24. A panel of Council members inspected the Site on 23 March 2011 and 28 March 2012. This was a sensible approach in relation to an application for planning permission in such a sensitive location. Council members were well equipped to form a view about the practical impact of the proposed development on the historic assets in the vicinity of the Site.

25. The application was considered by the Council's Planning Committee on 16 May 2012. Members had the benefit of a very extensive planning officers' report running to 440 paragraphs, which analysed the background and the various planning considerations with care and in detail. It drew attention to, among other things, the objections to the application made by a range of persons, including English Heritage and the Council's own Historic Buildings Officer. The view of the Historic Buildings Officer, as set out in detail at paras. 120-126 of the report, was that the proposed development would lead to substantial harm to the significance of Chilton Hall as a heritage asset and that such harm was not outweighed by the public benefits associated with the development. The Claimant complains that the planning officers' report did not append or refer to another part of his advice, that the appropriate balance would be to permit development only on the part of the Site furthest from Chilton Hall and close to an adjacent road, while stating that “The retention of that part of the site nearest to the Hall in an undeveloped form is essential to sustaining the significance of the Hall, and also the Church.”

26. The planning officers' report reviewed Prolog's business, and drew attention to the existing staff employed by it in Sudbury (152 full time staff and 278 part time or casual staff; out of 1,550 employed by Prolog nationally). The report noted (para. 209) that Prolog had its main storage warehouses in the East Midlands and at Haydock, which were considerably larger and higher than its existing warehouses at the industrial estate in Sudbury (which were “not tall enough to allow for the efficient packing and storage required for modern logistical operations”). The report also noted and assessed Prolog's claim that no other suitable site for its business in the Sudbury area could be found (paras. 213-224).

27. The officers' report included an assessment of the contribution which the proposed development could make to economic growth, job creation, training opportunities and so forth in the Sudbury area (paras. 229-247). The position was summarised (para. 247) as follows:

> “The applicants are one of the major employers in Sudbury and it has been demonstrated that they employ a significant number of people nationally of whom nearly a third reside in Sudbury or the immediate area. The business accommodation currently occupied by the applicants is not suited to modern logistical operations and they wish to establish a new headquarters facility on the application site. Despite an extensive search for alternative land and premises within Sudbury and the surrounding area the applicants have been unable to find a site that is of a size suitable for their needs and readily available. The socio-economic consequences of the proposal have been set out and the retention of existing jobs and the opportunity to create up to 500 additional positions is a

> significant material planning consideration against the backdrop of rising unemployment figures."

28. The officers' report also set out a detailed assessment of the impact of the proposed development upon heritage assets in the vicinity of the Site (paras. 295-395). This section drew attention to section 66(1) of the Listed Buildings Act, the relevant parts of the NPPF and to the PPS5 Guide. The report contained a balanced and fair assessment of the impact of the proposed development on the various heritage assets. It concluded "that the proposed development would cause substantial harm to the setting of the Church and the appreciation and experience of the Church and churchyard", which could only be justified in a "wholly exceptional" case (para. 321). It also concluded that the proposed development "would have a harmful impact upon the setting of [Chilton Hall]" (para. 330); would "cause substantial harm" to the walled garden, by reason of its adverse impact upon its setting (para. 333); and "would harm" the registered park and gardens (para. 340). The position was summarised (at para. 359) as follows:

> "In summary the proposals would cause substantial harm to the setting of the Church and churchyard, and harm to the setting of Chilton Hall, the walled garden and registered park and garden within the meaning of paragraph 132 of the NPPF whether that harm is assessed on an individual or collective basis. As indicated in paragraph 132, '*As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification*'. The relevant tests are provided in paragraphs 133 and 134 and this matter is addressed in a separate section of this report."

29. The Claimant calls attention to the dissonance between this summary (referring only to "harm" to the walled garden; see also para. 397) and the assessment in para. 333 that there would be "substantial harm" to the walled garden.

30. At paras. 391-397 of the officers' report, the harm to heritage assets from the proposed development was balanced against the socio-economic benefits associated with it. It was concluded (para. 397) that there were "justifiable reasons for outweighing the substantial harm that would be caused to the setting of the Church and churchyard and the harm to the setting of Chilton Hall, the walled garden and registered park and garden".

31. The officers' report recommended (paras. 398-401) that a planning obligation under section 106 of the TCPA be required to be accepted by the applicants to control the future occupancy of the Site, along with the imposition of various planning conditions. Para. 400 stated as follows:

> "As has been demonstrated the proposed development would cause substantial harm to [the Church], and harm to Chilton Hall, the walled garden and the registered park and garden. As such national policy makes it clear that development which causes harm to designated heritage assets should be exceptional, or in the case of designated assets of the highest significance, wholly exceptional. The application is however allocated for employment purposes and the NPPF supports economic growth. Against this backdrop, the particular requirements of the applicant and the need for a development of the size and scale proposed, planning permission may be granted. Were it not for these wholly exceptional circumstances such harm should not be permitted to occur. In the event that the applicants' proposals do not materialise however or continue then the local planning authority should have the opportunity to reassess the planning permission. This can only be achieved by a Planning Obligation."

32. The report referred to the CIL Regulations (paras. 409-411).

33. In the Conclusion section of the report (paras. 432-439), the Council officers recommended approval of the application. This was on the basis of their view that “wholly exceptional reasons” existed by reference to the socio-economic benefits associated with the proposed development to justify the “substantial harm to designated heritage assets of the highest significance and value” (para. 438). They also advised that the proposed planning obligation in relation to restriction of occupancy of the development reflected the exceptional circumstances and was “a proportionate control having regard to the heritage implications” (para. 438). See also para. 440 of the report, which set out a draft text for “Reasons for Approval”.

34. At its meeting on 16 May 2012, the Council's Planning Committee accepted the recommendation in the officers' report and resolved to grant planning permission, subject to certain conditions and the making of an agreement under section 106 of the TCPA to create a planning obligation as set out in the report. The obligation was to include provision for the future occupation of the development, i.e. to seek to ensure that the socio-economic benefits associated with Prolog's business to be located at the Site which were assessed to provide the exceptional circumstances which justified the substantial harm and harm to the various heritage assets would indeed be realised. In its resolution, the Planning Committee stated that if the planning obligation was not secured, the Council's Chief Planning Control Officer would be authorised to refuse planning permission by reason, amongst other things, of the harm, including substantial harm, to designated heritage assets.

35. There followed a negotiation between the Council and Prolog regarding the terms of the planning obligations to be included in the section 106 agreement. The Council's initial position was to seek a robust form of planning obligation, which allowed for revocation of the permission without compensation if the construction of the first building to be constructed (Building B) had not commenced within two years and been completed within 12 months of commencement, and for partial revocation of the permission without compensation if there was thereafter a delay of three years before work commenced on construction of Building A. Prolog was not happy with the proposed terms and made counter-proposals to weaken the obligations upon it under the proposed planning agreement.

36. The principal issues of contention between the Council and Prolog concerned the minimum period for occupation of and trading from the Site by Prolog; measures to secure the creation of new jobs at the Site and the retention of jobs at Prolog's existing site in Sudbury; the ability of Prolog and Caverswall to effect a sale of their shares or change of control; and the ability of the Council to revisit the planning agreement and the terms of the planning permission.

37. Prolog sent the Council a draft planning agreement in May 2013. The Head of Legal Services for the Council responded to this by letter dated 4 June 2013, in which she stated “… we are not presently satisfied that the draft is in an acceptable form. We wish to give further consideration to our position and whether an acceptable Agreement is achievable.”

38. By letter dated 10 July 2012 from the Council's solicitors to the solicitors acting for Prolog, the Council emphasised the importance of prompt implementation of the development and stated that the Council would be seeking to ensure that Prolog's commitment to operate from each building should be for a period of at least 5 years from completion. It was stated that the applicants for permission should not be permitted simply to “side step the exceptional

circumstances that led to a positive recommendation by disposing of the development to another unknown occupier." Prolog continued to object to the stringency of the obligations upon it which the Council was proposing for the planning agreement, and negotiations continued.

39. On 17 October 2012, there was a meeting between the Council and Prolog at which Prolog set out its position, that the planning obligations then being proposed by the Council were inflexible in a way which prevented it from being able to secure the funding for the development necessary to make it commercially workable and deliverable. Prolog said that it would make proposals for a planning agreement containing obligations which would be commercially workable and thereby provide for delivery of the scheme.

40. On 23 October 2012, Prolog submitted a revised draft of the planning agreement, in a form which it regarded as acceptable. The principal relevant changes proposed were that the applicants should be allowed up to seven years to build one or both buildings; Prolog should only be obliged to occupy the buildings for 18 months following completion; it would not be required to provide an employment plan, and could make use of an internal training plan rather than one developed with Jobcentre Plus; and Prolog would have an obligation to use reasonable endeavours to maintain existing staffing levels in Sudbury and to increase the number of FTEs employed in the Sudbury area by 500, but having effect only during Prolog's occupation of both Buildings A and B. Prolog maintained that an obligation on it to occupy the development for a period of 18 months was sufficient to demonstrate its genuine commitment to carry through the development of the Site; that any longer period of obligation might jeopardise the ability of Prolog to secure funding for the development; and that there were therefore valid commercial reasons why a longer obligation period would be inappropriate.

41. On 3 May 2013, Prolog submitted a further revised draft of the planning agreement. This now provided, amongst other things, for commencement of the development within 36 months of the grant of permission, starting with Building B; completion of Building B within 12 months of commencement of the development; each of Buildings A and B were not to be occupied by anyone other than the current owner of the Site or Prolog for the period after it became capable of use; and provision was to be made for extension of the permission if it was not implemented within seven years. Prolog's position was that this version of the planning agreement was as far as it was willing to go in terms of accepting contractual obligations under a section 106 agreement.

42. English Heritage continued to emphasise in correspondence with the Council its objections to the proposed development and to reiterate its contention that the development would not be in accordance with the relevant policy in the NPPF - a point on which the Council simply disagreed with English Heritage. In addition, by a letter dated 19 November 2012 (and repeated in a further letter dated 30 May 2013), English Heritage said, "However, if your Council remains satisfied that there are substantial benefits which outweigh the substantial harm, clearly it is most important that these benefits are properly secured through the section 106 agreement, otherwise the harm would not be justified." This was a point of which the Council was well aware, as its correspondence with Prolog makes clear.

43. The matter was referred back to the Planning Committee at its meeting on 4 September 2013. A substantial supplementary officers' report was prepared for that meeting, reviewing the position that had been arrived at in the negotiations with Prolog and the changes in the draft

planning agreement proposed by Prolog by comparison with the original draft planning agreement proposed by the Council.

44. In relation to the provisions regarding the phasing of the development and the obligation on Prolog to occupy the Buildings, the supplementary officers' report stated that the Council's original proposals were commercially unworkable for Prolog and rendered the scheme unable to attract necessary funding. It continued: “The current position [i.e. in the latest draft of the planning agreement] affords that possibility and allows delivery of this multi million pound development scheme”, referring to the greater flexibility allowed to Prolog under its terms.

45. The supplementary officers' report again reminded members of the balancing exercise required under paragraphs 132-134 of the NPPF, and set out the text of those paragraphs (para. 31). It pointed out that Prolog's amendments to the draft planning agreement introduced flexibility “so as to allow commercial acceptability of the package” (i.e. to allow a reasonable prospect that it would in practice be carried into effect), but also noted that this had to be balanced against “weaker controls” than had originally been proposed by the Council; it was observed that “The ability to enforce is important. However, the realities of taking action against a company in breach of its Legal Obligations and any consequences that may arise following this must also be embraced” (para. 40).

46. At para. 42, the supplementary report stated:

> “In the light of the applicants' proposed revisions to the draft Planning Obligation the main issues to be determined by Members are whether they consider that the development is likely to delivery substantial public benefits, whether those benefits could reasonably be achieved in another less harmful way and whether the benefits likely to be achieved outweigh the substantial harm that would be caused to the significance of [the Church] and churchyard and the walled garden and the harm that would be caused to the significance of Chilton Hall and its registered garden. In considering these matters special regard must be had (in other words considerable weight given) to the desirability of preserving the settings of the listed buildings.”

47. The supplementary report acknowledged that the decision whether to grant planning permission had become more finely balanced than in May 2012 (para. 45: “Formulating a recommendation on this case is challenging …”; see also para. 56). It reviewed in detail the socio-economic benefits associated with allowing the development to proceed, even with the weakened form of planning obligations proposed by Prolog (paras. 46-56).

48. Within this section of the supplementary report, para. 53 stated as follows:

> “53. Taking all these factors into account it is considered that:-
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> * The applicant's proposal to develop the largest piece of undeveloped employment land in Sudbury is key
>
> * The proposed likely creation of up to 500 FTE jobs (notwithstanding the fact that there is no qualification employment plan) is compelling and would result in direct and indirect substantial public benefits as set out … through the development of employment land and the provision of a substantial amount of jobs and given the focused activity in the

> Sudbury Grant Strategy which seeks to target job creation in key market towns including Sudbury.
>
> * According to the NPPF, where a development proposal would lead to less than substantial harm to the significance of a designated heritage asset which is the case in respect of the walled garden and this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use. It was concluded that in addition to the public benefits outlined above, the proposed development is an appropriate response to the economic and employment objectives of the development plan and the NPPF as it seeks to develop employment land and to provide jobs for the local community.
>
> * Given the statutory requirements relating to consideration of proposals affecting listed buildings and their settings, the residual harm to the heritage assets carries substantial weight and is accorded such. However, the public benefits in this case would be of a wholly exceptional value, and it is considered that these outweigh the alleged harm and conflicts with policy that arise. On this basis, the judgment in planning terms is that the scheme should be supported. The challenge for the Council is how to secure all the necessary provisions in order to ensure that what is offered by the applicants is delivered."

49. The supplementary report then reviewed the planning obligations on offer from Prolog (paras. 54-55). The recommendation remained to approve the grant of permission, again on the basis that the scheme "offers the opportunity for substantial and exceptional public benefits which in this case would outweigh the harm to heritage assets …" as explained in the officers' report of May 2012 (para. 56).

50. Also available to members at the meeting on 4 September 2013 was an Addendum to the supplementary report, summarising the latest additional correspondence received in respect of the proposal. This included reference to a letter from the Sudbury Society which included a complaint that the Council's own Historic Buildings Officer had argued for a more restricted development of the Site which might have reduced the harm to heritage assets, but had been ignored, and which also made reference to the fact that Prolog had just laid off or relocated 28 call centre staff in the area. The minutes of the meeting show that members read this Addendum before proceeding to make a decision.

51. The decision made by the Planning Committee at the meeting on 4 September 2013 (by a majority of 12 to 2) was in line with the recommendation made in the supplementary report, that planning permission should be granted, subject to a requirement that Caverswall, Highbridge and Prolog enter into a section 106 planning agreement reflecting the terms then being proposed by Prolog.

52. In due course, such an agreement was entered into, dated 31 January 2014. The planning permission therefore came into effect.

53. The planning agreement included the following covenants given by Caverswall, Highbridge and Prolog within Schedule 2 to the agreement:

> "…

1.5 To commence the construction of Building B prior to the expiry of 36 months from the Date of the Planning Permission

1.6 To ensure that Building B is capable of being Operational prior to the expiry of 12 months from the date construction on Building B Commenced

1.7 For a period of 18 months from the date upon which Building A is capable of being Operational not to permit or allow or cause to permit the Occupation of Building A by any person or legal entity other than [Caverswall] or Prolog carrying out Occupancy Operations without the prior written consent of the Council

1.8 For a period of 18 months from the date upon which Building B is capable of being Operational not to permit or allow or cause to permit the Occupation of Building B by any person or legal entity other then [Caverswall] or Prolog carrying out Occupancy Operations without the prior written consent of the Council

1.9 Not to Occupy Building A and Building B other than in accordance with the Occupancy Operations

1.10 At all times during the Occupation of both Building A and Building B by Prolog to use reasonable endeavours (which for the avoidance of any doubt will not include any measures that risk the financial integrity of Prolog and its continued ability to trade) to:-

1.10.1 maintain the Existing Staffing Levels and

1.10.2 increase the number of [FTE] staff employed by Prolog in the Sudbury area by a further 500 [FTE] staff (in total within Buildings A and B) by the date that the Development is Operational

and for the avoidance of any doubt the provisions of this paragraph shall not bind any individual entity or organisation in Occupation of the Development other than Prolog."

The Grounds of Challenge: Discussion

Ground 1: The planning agreement was in a form which failed to secure the necessary relevant public benefits

54. Central to the assessment of the Council's planning officers in their reports and the Planning Committee that there were sufficient public benefits associated with the proposed development so as to make the case "wholly exceptional" and one in which it was appropriate to grant planning permission in compliance with the relevant legal regime and the guidance in paras. 132-133 in the NPPF, was that it allowed for the retention of existing Prolog jobs in Sudbury and the creation of up to 500 additional FTE jobs. The planning agreement was necessary as a foundation for the grant of planning permission, as it sought to ensure that these public benefits would indeed be realised.

55. Mr Jones QC, for the Claimant, submits that the planning agreement eventually put in place failed to secure the public benefits which the Council hoped would be associated with the proposed development, and therefore that the grant of permission was unlawful as being, in particular, incompatible with the guidance in the NPPF.

56. Mr Jones points out that there is no obligation under the planning agreement, nor condition in the planning permission, for the applicants or anyone else to construct Building A; nor requiring either building actually to be operated by Prolog; nor preventing either building from being occupied by another party, unrelated to Prolog, after 18 months; and there is no obligation to use reasonable endeavours to maintain existing staffing levels in Sudbury and increase employment numbers by 500 FTE jobs until Prolog constructs and occupies both Buildings A and B. He also submits that paragraph 1.10 of Schedule 2 to the planning agreement is in a form materially different from that which the members of the Planning Committee were told in the supplementary officers' report would be put in place (at para. 17: “the applicants will seek maintenance of existing staffing levels and to use reasonable endeavours to increase full time staffing levels to 500 FTE …”); and further that it is not enforceable.

57. In my judgment, this ground of challenge, in all its aspects, fails. There had been an extensive negotiation between Prolog (and associated companies) and the Council to explore the extent of the obligations which Prolog might accept in a planning agreement. The Council had pressed for stringent obligations on Prolog, but for commercial reasons Prolog had been resistant to agreeing to the full scope of those obligations. There was no reason to doubt that Prolog's commercial objections to accepting the more stringent conditions proposed by the Council were genuine. Prolog risked losing receiving the planning permission it was seeking should the terms it was offering for the planning agreement prove to be unacceptable to the Council (as the Council had emphasised in its correspondence with Prolog), so it had an incentive to offer the best terms it reasonably could which presented a reasonable opportunity for it to raise finance to proceed with the scheme in a commercially viable way.

58. The Council could properly and rationally conclude, as a matter of planning judgment, that a planning agreement as negotiated with Prolog represented the best terms available which were consistent with implementation of the development scheme in practice, so as actually to have a good prospect of securing the very substantial socio-economic benefits for the Council's area which were considered to justify granting planning permission. It remained Prolog's intention to implement the development scheme in full, even though for commercial reasons it did not feel able to accept more extensive binding contractual obligations in that regard. Prolog is a successful business with a strong interest in expanding its operations in the Sudbury area. Prolog provided the Council with detailed information about its business, financial strength and commitment to carrying forward the full scheme development, in particular by way of a document entitled “Socio-Economic Impacts Addendum” dated March 2012. The Council could rationally make the assessment on the material before it that there was a sufficient prospect of implementation of the development scheme by Prolog as to support its conclusion that the socio-economic benefits associated with the development would indeed be so extensive as to be in the wholly exceptional category of case, thereby allowing the Council to grant planning permission in compliance with the legislative regime and the guidance in the NPPF.

59. In my view, the Council's assessment was not vitiated by any misapprehension concerning the content of paragraph 1.10 of Schedule 2 to the planning agreement, nor by any error of law

regarding the enforceability of that provision. There was no material change in the form of obligation regarding employment as contemplated in the supplementary officers' report and as finalised in paragraph 1.10. The reference in paragraph 1.10 to the obligation on Prolog being limited so as not to include “any measures that risk the financial integrity of Prolog and its continued ability to trade” did not change in any significant way the basic nature of the obligation on Prolog, which remained (as explained in the report) an obligation to use reasonable endeavours. The inclusion of the additional phrase in paragraph 1.10 was accurately described in the provision as being “for the avoidance of any doubt.” Even without the addition of the phrase, a reasonable endeavours obligation on Prolog would not have required it to take action which would jeopardise its financial integrity and ability to trade.

60. I also reject Mr Jones's submission that paragraph 1.10 is unenforceable. He relied in particular on *Jet2.com v Blackpool Airport Ltd* [2012] EWCA Civ 417, and the test laid down by Longmore LJ at [69]. However, I do not think that there is any difficulty about regarding paragraph 1.10 as an enforceable obligation, according to usual contractual standards. The use of a “reasonable endeavours” formulation is very familiar in contract law. In any given factual situation which might arise, a court would be able to determine on the particular facts whether Prolog had or had not used reasonable endeavours to do the things set out in paragraph 1.10.

61. Nor do I accept Mr Jones's further submission that the express qualifications under the reasonable endeavours provision in paragraph 1.10 make it unenforceable. I do not agree that the meaning of “financial integrity” is, as Mr Jones suggested, “entirely unclear”: perfectly sensible meaning can be given to that concept, as referring to insolvency in a company context. He also said that any commercial transaction would give rise to some form of financial risk, however small. But it cannot be said that any and every commercial transaction would create a significant risk to the solvency of Prolog, which is what the express qualifications on which Mr Jones fastens are concerned with. Hence it cannot be said that those qualifications deprive the reasonable endeavours obligation in paragraph 1.10 of substantive determinate content.

62. Mr Jones also drew my attention to planning guidance which advises that local planning authorities should not grant personal permissions to companies (para. 93 of Planning Conditions Circular 11/95), and contended that the rationale for this (that it is difficult to enforce such conditions: *R (Sienkiewcz v South Somerset DC* [2014] JPL 620) should be taken to apply by analogy to personal planning obligations in section 106 agreements. However, I do not consider that the analogy is a valid one for present purposes. The guidance regarding planning conditions does not show that the planning agreement in this case is unenforceable. Contractual obligations contained in a section 106 agreement can be enforced in the usual way, as provided for by the general law of contract.

63. As a general comment on Ground 1, I agree with the submission of Mr Green for the Council that the Claimant's real objection is not so much to the enforceability of paragraph 1.10 of Schedule 2 to the planning agreement, but as to the worth or value of the planning agreement. That, however, was a matter for members to assess, in the context of all the circumstances of the case, in the exercise of their planning judgment. They were properly directed in the officers' report and the supplementary officers' report as to the relevant tests to apply.

Ground 2: Failure to consider the longevity and deliverability of Prolog's scheme

64. The Claimant contends that the Council failed properly to consider the issue of deliverability

and longevity of the development scheme's socio-economic benefits, and that this vitiated its assessment that granting planning permission would carry sufficient benefits to outweigh the substantial harm to heritage assets so as to be compatible with para.133 of the NPPF. In this regard, Mr Jones complains that members did not have their attention drawn specifically to para. 78 of the PPS5 Guide (albeit their attention was drawn to the Guide itself in the officers' report).

65. I reject this ground of challenge as well.

66. It is clear from a comparison of the planning officers' report in May 2012 and the supplementary officers' report in September 2013 that a significant question-mark had been raised against the issue of the longevity and deliverability of the benefits associated with the development scheme. In particular, the reduction in the planning obligations to be assumed by Prolog made this an acute issue. This point was made forcefully by objectors to the development scheme in the course of the process of its consideration by the Council. There is no credible basis on which it can be said that the Council failed to consider the issues of longevity and deliverability of the benefits associated with the development scheme when it decided to grant planning permission. Indeed, on a fair reading of the supplementary officers' report, these were matters for anxious consideration by the Council. In this context, members did not need to be reminded of the precise terms of para. 78 of the PPS5 Guide in order to understand that these matters were central to the decision that they had to make. The Council was lawfully entitled, on the material before it, to conclude that there were sufficient grounds to consider that the development scheme would be implemented and that the associated substantial socio-economic benefits associated with it would be realised: see the discussion of Ground 1, above.

Ground 3: Lack of adequate reasons

67. The Claimant contends that the Defendant failed to give adequate reasons why it considered it appropriate to grant planning permission.

68. In my judgment, this ground of challenge also fails. The Council's Planning Committee adopted the recommendation and reasoning in the supplementary officers' report, which modified that in the original officers' report. The reasoning in the supplementary report explains adequately the basis for the decision to grant planning permission, according to the usual standards (see *South Buckinghamshire District Council v Porter (No. 2)* [2004] UKHL 33 at [36]). It is clear to any reader of the supplementary report that, put shortly, the reason for granting planning permission was that the socio-economic benefits for the Council's area of the development scheme were so substantial and exceptional as to justify the grant of permission, in compliance with the guidance in the NPPF and the relevant legislative framework.

69. Mr Jones made particular complaint that the Council did not give reasons to explain why it considered that the weaker form of obligations to be included in the planning agreement under consideration in September 2013 would be acceptable, in circumstances where the Defendants' legal advisers had previously said that such obligations would not be acceptable, in correspondence with those acting for Prolog (see the letters dated 10 July 2012 and 4 June 2013, referred to in paras. [37]-[38] above).

70. However, in my view, there was no requirement for the Council to give reasons to explain why it had not adhered to the position adopted in that correspondence. The correspondence had

been sent in order to put the greatest pressure the Council felt able to place on Prolog to undertake the more stringent planning obligations which the Council would ideally have liked to see. The letters did not set out final and binding legal advice, nor did they set out the Council's reasoning to explain any planning decision. As was explained in the supplementary officers' report, the planning obligations ultimately accepted by the Council were the most extensive which Prolog was willing to undertake, for reasons relating to the commercial viability of the development scheme. The supplementary report included a discussion to explain why it was considered that the lesser planning obligations offered by Prolog nonetheless remained acceptable in planning terms. This was sufficient reasoning to explain why the Council had taken the decision it did. There was no further obligation to give reasons (and, in particular, no obligation under the Environmental Impact Assessment Regulations) to explain why the Council had not adhered to positions it had adopted in the course of what was, in effect, a commercial negotiation with Prolog regarding the content of the planning agreement.

71. The supplementary report made it clear that it was the full socio-economic benefits associated with the development which made it appropriate to grant planning permission, without violating the guidance in the NPPF. The Council's assessment, as appears from the report, was that it was likely that such benefits would be realised. The Council could rationally make this assessment, on the basis of the material before it and the circumstances which applied at the time of its decision: see the discussion of Ground 1 above.

Ground 4: Irrationality and misinterpretation of the "wholly exceptional" test

72. Mr Jones submits that the Council's assessment that the development would satisfy the "wholly exceptional" test, on its proper interpretation, was irrational and therefore unlawful. I reject this submission.

73. The Council was plainly entitled to come to the view that a development scheme which would have the effect of preserving a substantial number of existing jobs in the Sudbury area and of creating as many as 500 additional FTE jobs offered such major socio-economic benefits for its area as to come within the "wholly exceptional" category for the purposes of the NPPF. The Council was rationally and lawfully entitled to take the view that the development scheme would be likely to be carried forward with full effect (i.e. would not just be limited to construction of Building B), even without the imposition of the more stringent planning obligations which it originally sought. Indeed, it was entitled to take the view that it was only by accepting the more limited planning obligations which Prolog was prepared to offer that there would be a reasonable prospect of securing those major socio-economic benefits for the Council's area.

Ground 5: Failure to refer the application for planning permission to the Secretary of State, in breach of the 2009 Direction

74. The object of the 2009 Direction is for notice to be given to the Secretary of State of particular proposed developments, so that he can consider whether to exercise his power under section 77 of the TCPA to call in the relevant decision whether to grant planning permission to make the decision himself.

75. For the Defendant, Mr Green accepts that the Site qualifies as land out of town for the purposes of paragraph 5(1) of the 2009 Direction. However, he submits that although the proposed development is for erection of buildings with total floor space considerably in excess of

5,000 sq m overall, it does not come within paragraph 5(1) because, albeit the development includes an element of B1 office space, the floor space for B1 office use is considerably less than 5000 sq m.. Most of the floor space of the proposed development is for warehouse use, which is not caught by the terms of the 2009 Direction. Mr Green contends that, on proper construction of paragraph 5(1), it is only where the office element of a development would exceed 5,000 sq m that an obligation can arise to refer the matter to the Secretary of State.

76. I do not accept the Defendant's submission on this point. It may well be that Mr Green is correct to say that the main relevant thrust or rationale of paragraph 5(1) of the 2009 Direction is to ensure that significant out of town office developments are referred to the Secretary of State for him to consider whether they should be called in. However, I consider that paragraph 5(1) of the 2009 Direction is clear in its meaning. An out of town development is caught if it has floor space in excess of 5,000 sq m and “includes” an element of B1 office space (at least, where the office space cannot be regarded as *de minimis* or immaterial in the context of the development as a whole). On this interpretation of paragraph 5(1), the proposed development in this case falls within the terms of that provision.

77. I can see no proper basis on which paragraph 5(1) could be given a more restrictive meaning, by reference to its supposed underlying objective or previous versions of the direction. Interpretation of the paragraph in accordance with the natural meaning of the words used in it is not nonsensical or absurd. So construed, it may catch a wider class of case than the Secretary of State would ordinarily ultimately wish to call in, but the Secretary of State should be able to review such cases relatively speedily and reject for call in those which in his view do not warrant such treatment.

78. Therefore, in my judgment, the Council was obliged under the 2009 Direction to refer the application for planning permission to the Secretary of State.

79. As appears from the rest of this judgment, this is the one ground of challenge which succeeds in this claim. I consider below what relief is appropriate to respond to this legal error by the Council.

Ground 6: Failure to consider whether substantial harm to the Grade 1 listed heritage asset was “necessary”

80. Mr Jones submits that the Council erred in law by failing to consider whether the substantial harm to the Church was “necessary”, and whether the benefits associated with the development “could be achieved in another less harmful way”, such as through a different design or development of an alternative site. He relied, in particular, on para. 91 of the PPS5 Guide. He also emphasised the part of the Council's Historic Buildings Officer's advice referred to in para. [25] above, which had not been set out in the planning officers' report in May 2012.

81. In my view, this ground of challenge cannot be sustained. The Council had regard to the fact that Prolog had tried to find other suitable sites for a development of this scale in Sudbury, without success. It was entitled to assess that there was no viable alternative site.

82. The Council also had regard to the stated business requirements of Prolog for a development of this scale and size of building in order to realise the commercial benefits for Prolog's business which would mean that the development scheme would be likely to be carried

forward. The Council was entitled to assess that it would only be development of the scale proposed which would attract Prolog to invest further in its area and which would achieve the level of socio-economic benefits which, in the Council's view, made this an exceptional case in which the grant of planning permission was justified.

83. The members of the Council's Planning Committee were informed by the officers' report of May 2012 that the Historic Building Officer was opposed to the development. They were not bound by his view, but were entitled (indeed obliged) to make their own judgment whether the development was justified and in compliance with the NPPF, having regard to his view.

84. In the part of his advice which was not distinctly set out or referred to in that report (see para. [25] above), he did not suggest that there was any concrete alternative development layout which would meet Prolog's commercial requirements and hence attract its investment in the Sudbury area. There is no evidence that there was ever any real prospect that some form of half-way house proposal might satisfy Prolog and persuade it to invest further in the area. Prolog wanted planning permission to proceed with a major flagship development which would satisfy its business needs and allow for consolidation of its operations, not to proceed with piecemeal developments. In those circumstances, there was no requirement for the Planning Committee to be told that the Historic Building Officer would have preferred a smaller development. There was no material misrepresentation of his views or omission in the way they were presented to the Planning Committee.

85. In any event, the Planning Committee was told about the omitted part of his advice by an objector (Mr Simon Cairns from the Suffolk Preservation Society) at its meeting on 16 May 2012. It was also informed about it in the summary of correspondence in the Addendum to the supplementary officers' report. The Planning Committee thus had notice of that advice by the time it took its decision to grant planning permission and took it into account.

Ground 7: Unlawful approach to the Council's assessment of the harm to the Chilton Hall walled garden

86. For this ground of challenge, Mr Jones focuses on the internal contradiction in the officers' report of May 2012 regarding the level of harm to the walled garden, in which at one point it was said that the harm to its setting would be substantial (paras. 332-333) while in the summary of the position it was indicated that it was not substantial (paras. 359 and 400): see paras. [28]-[29] above. There was a similar internal contradiction in the supplementary officers' report (see paras. 32 and 42 – “substantial harm” – and para. 53 – “less than substantial harm”). Mr Jones submits that the Council applied the wrong policy test under the NPPF in relation to whether the harm to the walled garden was sufficiently outweighed by the benefits of the development scheme, such that the decision to grant planning permission is legally flawed.

87. In my view, despite the confusion in the way in which the officers' reports characterised the degree of harm to the walled garden, this ground of challenge fails.

88. The Planning Committee were properly informed that the proposed development would involve substantial harm to a still more important heritage asset than the walled garden, namely the Grade I listed Church. The members were properly advised that permission for the development should only be granted if there were especially substantial public benefits, such as would take the application into the “wholly exceptional” category. They had their attention drawn

to the terms of paras. 132-134 of the NPPF. It was only because they were satisfied that the socio-economic benefits associated with the development were so extensive as to justify the grant of permission in compliance with the test in the NPPF that the decision was made to grant permission.

89. In these circumstances, the confusion in the reports regarding the characterisation of the harm to the walled garden was not material. The Council applied the proper test for the purposes of the NPPF. There is also no doubt that the Council had special regard to the desirability of preserving all the heritage assets affected by the proposal, in compliance with its duty under section 66 of the Listed Buildings Act. Members had visited the Site, had read the May 2012 officers' report, which (apart from issues of how such impact should be characterised) gave a detailed description of the impact of the development on all the heritage assets and were well placed to make the assessment which they did.

Ground 8: Failure to take account of the reduction in existing Prolog staffing numbers

90. Mr Jones submits that members of the Council's Planning Committee were not properly informed about a reduction in the existing jobs maintained by Prolog in the Sudbury area between the original officers' report in May 2012 and the supplementary report in September 2013. In June 2012, the local paper reported that about 60 Prolog employees faced redundancy (the reason, according to a statement by Prolog, being delay in the planning process). The supplementary report still stated the numbers of existing employees at the same level as in May 2012, which was inaccurate.

91. However, the Claimant informed the Council of the press report by a letter dated 2 July 2012 and also drew the attention of the Council to the fact that redundancies were being declared by Prolog by a letter dated 15 November 2012. The Sudbury Society also made representations to the Council in opposition to the development, in which it drew attention to the fact that Prolog had declared redundancies. The Sudbury Society also referred to lay-offs by Prolog in correspondence summarised in the Addendum to the supplementary officers' report for the Council's Planning Committee meeting on 4 September 2013.

92. At the meeting of the Council's Planning Committee on 4 September 2013 to consider the supplementary officers' report, objectors again referred to the press report and said “it is well known … that Prolog have been making redundancies” and that there had been lay-offs.

93. Members of a local authority can be taken to have a reasonable knowledge of their area (see *R v Mendip DC, ex p. Fabre* (2000) 80 P&CR 500, 509), and will be likely to be well aware of significant trends in relation to local employment, especially when forcefully reminded of the position as happened here. It is clear that, notwithstanding the repetition of previous current local employment figures for Prolog in the supplementary report, members of the Planning Committee were aware that there had been a deterioration in the position since May 2012.

94. It was a matter for their judgment what significance to attach to this part of the picture, and whether it was something in relation to which they should call for more information about the current position before reaching a decision: cf *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014, 1065B; *Cotswold DC v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin), [57]-[61]; *ex p. Fabre* (2000) 80 P&CR 500, 514; and *R (Khatun) v Newham LBC* [2004] EWCA Civ 55; [2005] QB 37, [34]-[35]. In my view,

there was no irrationality or unlawfulness on their part in making the assessment that it was possible to reach a sensible decision without further exploration of the precise current employment position beyond what they already knew (i.e. that the current employment figures had deteriorated). Further delay in reaching a decision could undermine Prolog's willingness to commit to the Sudbury area for its business development, jeopardising both existing employment in the area and the hopes for expanded future employment. The figures for employment were always likely to fluctuate to some degree depending on Prolog's business needs and the extent to which it thought it commercially desirable to seek to meet them in the Sudbury area rather than elsewhere in the country, so complete precision from time to time was unlikely to be particularly helpful information. The basic picture was clear enough: Prolog remained a significant current provider of employment in the Sudbury area, and the Council was entitled to assess that giving permission for the development scheme would be likely to stabilise and reinforce the existing pattern of significant employment by Prolog as well as promote a substantial increase in local employment opportunities. The Council had sufficient information available to it to make that assessment without having to seek yet more information.

Ground 9: Breach of section 100B of the Local Government Act 1972

95. Section 100B(1) and (3) of the Local Government Act 1972 provides that copies of any report for a council meeting shall be open to inspection by members of the public at least five clear days before the meeting, but it is stated that nothing in subsection (3) requires copies of any report to be open to inspection by the public until copies are available to members of the council.

96. Mr Jones submits that there was a legal error by the Council, affecting the validity of the decision to grant planning permission, because the Addendum and an appendix to the supplementary officers' report “were only presented to members and the public very shortly before members were due to consider the planning application on 4 September 2013”. The argument focused on the Addendum. From the minutes of the Planning Committee meeting (and there is no good reason to doubt their accuracy), it appears that the Addendum was available at the meeting from about 11.50 am, when members broke from other business of the Committee to read it over the lunch break in preparation for resumption of the meeting to consider Prolog's application at 2 pm. Mr Jones submits that this did not accord with the statutory timeframe and did not allow members and the public sufficient time to consider the representations in the Addendum properly. He says that the proper course would have been for the Council to adjourn the meeting to allow for consideration of the additional documents.

97. The various aspects of this ground of challenge must be dismissed. The timing of release of the Addendum to the public required by section 100B(3) was satisfied: it was released to them shortly before the relevant part of the meeting, at the same time as copies were made available to Committee members. Section 100B does not impose any greater obligation than this.

98. As to the suggestion that the Council should have postponed consideration of Prolog's application for planning permission because of the timing of circulation of the Addendum, this also is unsustainable. The Addendum is very short and simply provides updating material in relation to arguments which had already been well rehearsed and were well understood by everyone present. There was no difficulty whatever about Committee members and members of the public digesting its contents over the extended lunch break in preparation for the meeting at 2 pm. Moreover, it does not appear that anyone, including the Claimant, complained at the

meeting that it had not been possible to digest what was in the Addendum and appendix. Nor did anyone suggest that an adjournment was required because of the timing of presentation of the Addendum and appendix. In these circumstances, it cannot be said that the Council acted unlawfully in proceeding to consider Prolog's application when the meeting resumed at 2 pm.

Ground 10: Breach of the Environmental Impact Assessment Directive and Regulations

99. At the hearing, Mr Jones sought to add this as a further ground of challenge to those for which permission had previously been granted. He said next to nothing about this proposed additional ground by way of oral submission, leaving his submission as two short paragraphs in his skeleton argument (repeated in a speaking note he handed up at the hearing). I was not taken to the relevant legislative provisions. Mr Jones argues that the grant of planning permission under the revised planning agreement permits a range of different development scenarios, including the construction of just Building B or both Buildings A and B, with each being occupied by Prolog or an entirely different operator; however, the environmental statement (to which he did not bother to take me in the course of argument) “is based entirely on the assumption that the buildings will be occupied by Prolog.” He submits that the development could have involved a more intensive type of operation in terms of transportation than that contemplated by use by Prolog, and that there was insufficient environmental impact assessment of that possibility.

100. I refuse permission for this additional ground of challenge. For the reasons given by Mr Green, I do not consider that is properly arguable. The Council's assessment was that it is likely that Prolog will develop and occupy the Site: see the discussion of Ground 1 above. The matters now raised by Mr Jones are pure speculation, and moreover speculation which no-one making objections to the Council in writing or at its meetings thought would warrant making objection on environmental impact grounds. There is nothing in the materials provided to me to indicate that the environmental statement provided by the applicants and the assessment by the Council were anything other than adequate and appropriate for the purposes of assessment under the Directive and Regulations.

101. The question whether the environmental statement was adequate was for the Council to determine, subject to review on usual *Wednesbury* rationality grounds: see e.g. *Bowen-West v Secretary of State for Communities and Local Government* [2012] Env LR 22. The Directive and Regulations recognise that an environmental statement may sometimes be deficient, and so make provision through the relevant publicity and consultation processes for any deficiencies to be identified so that the resulting environmental information provides the local planning authority with as full a picture as possible: see *R (Blewett) v Derbyshire CC* [2004] Env LR 29, at [41] per Sullivan J, endorsed in *R (Edwards) v Environment Agency* [2008] 1 WLR 1587, at [38] and [61].

102. There is nothing in the materials I was referred to that suggests that the environmental assessment process required by the Directive and Regulations was defective in any way, or that provides grounds for an argument that the Council acted unlawfully in concluding that the requirements of the Directive and Regulations had been satisfied. As Mr Green submits, the Claimant's evidence falls far short of demonstrating the likely occurrence of environmental effects that have not thus far been considered. Contrary to Mr Jones's submission, there was no fundamental change in the nature of the application or the assessment of the likely

consequences of it, simply because of the change in the obligations contained in the planning agreement.

Conclusion

103. For the reasons set out above, all apart from one of the grounds of challenge to the grant of planning permission fail.

104. Ground 5 succeeds, in that I am satisfied that the Council had an obligation under the 2009 Direction to inform the Secretary of State about the planning application so that he could decide whether to call it in for his own decision, pursuant to section 77 of the TCPA. However, it does not seem that the proposed development is of a kind that the Secretary of State would usually wish to call in for his own decision. It may well prove to be the case that, once informed of the application, he will decide not to call it in; but I cannot conclude that this will inevitably be the case.

105. If the Secretary of State indicates that he does not wish to call the application in for his own decision, it provisionally appears to me (subject to any submissions which may be made by the parties) that the correct course would be to refuse to quash the Council's decision to grant planning permission. On the other hand, if he does wish to call the application in for his decision, the Council's decision should be quashed to enable that to happen. I think that the appropriate way forward, then, is likely to be to postpone making any final order until after the Secretary of State has had a reasonable period of time to consider whether he would wish to call the application in for decision by him.
