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Case No: CO/407/2019

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

26 July 2019

B e f o r e:

MR M. RODGER QC, DEPUTY CHAMBER PRESIDENT OF THE UPPER TRIBUNAL (LANDS CHAMBER)
(SITTING AS A JUDGE OF THE HIGH COURT)

Between:

The Queen
(on the application of Clive Gare)

Claimant

- and -

Babergh District Council

Defendant

and

Lewis Morgan Limited

Interested Party

Jenny Wigley (instructed by Richard Buxton, Solicitors) for the Claimant
Ashley Bowes (instructed by Shared Legal Service) for the Defendant
The Interested Party did not appear and was not represented
Hearing dates: 17, 18 July 2019

HTML VERSION OF JUDGMENT

Mr Martin Rodger QC:

1. The village of Hartest is a small settlement about 7 miles south of Bury St Edmunds in Suffolk. On 20 December 2018 the Defendant planning authority, Babergh District Council ("the Council"), granted planning permission, against the advice of its officers, for the erection of six single storey two and three-bedroom houses on part of a paddock off Lawshall Road on the eastern side of the village ("the Site"). The Site comprises about 0.46ha and adjoins the rear garden of a house called The Paddocks. It is outside the built-up area boundary of the village but within the Hartest conservation area and is part of a special landscape area.

2. The only indication of the Council's reasons for its decision are contained in the minutes of the planning committee meeting at which it was taken.

3. The claimant, Mr Gare, lives at 9 Green View, which overlooks the Site from a slightly elevated position on the south side of Lawshall Road. On 21 March 2019, Lang J granted him permission to seek judicial review of the defendant's decision on five grounds. At the hearing of the application Ms Jenny Wigley, who appeared on behalf of the claimant, applied to add an additional closely connected ground. Mr Ashley Bowes formally objected to that request on behalf of the defendant but sensibly agreed that the better course would be for the Court to reach a conclusion on the additional ground after hearing all of the argument.

4. In summary, the claimant's grounds are as follows (the additional ground for which permission is sought being number 5):

> (1) Failure to give reasons for the decision to grant planning permission.
>
> (2) Failure to determine whether or not, and the extent to which, the proposal complied with the development plan.
>
> (3) Inconsistency in decision making and failure to explain a change in approach to the weight to be afforded to that part of the development plan, Policy CS2, concerning settlement pattern.
>
> (4) Misinterpretation of Policy CS2, failure to give adequate reasons, and error on the part of officers in advising that it had reduced weight and should not be determinative of the application.
>
> (5) A suggested misdirection by officers concerning the need for the defendant to determine whether relevant policies of the Core Strategy generally conform to the aims of the NPPF.
>
> (6) A misdirection by officers in relation to development plan policy CS11 concerning development in or adjacent to hinterland villages.

The relevant development plan policies

5. The Babergh Core Strategy 2014, together with the saved policies of the Babergh Local Plan (Alteration No.2) 2006 together comprise the statutory development plan.

6. Policy CS1 of the Core Strategy reflects the presumption in favour of sustainable development in paragraph 11 of the NPPF (2018 edition) and provides:

> "Where there are no policies relevant to the application or relevant policies are out of date at the time of making the decision then the Council will grant permission unless material considerations indicate otherwise – taking into account whether:
>
> i) any adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy Framework taken as a whole; or
>
> ii) specific policies in that Framework indicate that development should be restricted."

7. Policy CS2 of the Core Strategy is titled "Settlement Pattern Policy". It sets out a strategy for future growth which is intended to operate until 2031 and identifies a hierarchy with three categories of settlement – towns/urban areas, core villages and "hinterland villages" - to which most development will be directed sequentially. A fourth category, the countryside, is dealt with separately.

8. Hartest is identified in CS2 as a hinterland village, in relation to which the policy states:

> "Hinterland Villages will accommodate some development to help meet the needs within them. All proposals will be assessed against Policy CS11. Site allocations to meet housing and employment needs may be made in the Site Allocations document where circumstances suggest this approach may be necessary."

9. Policy CS2 includes the following statement in relation to the countryside:

> "In the countryside, outside the towns/urban areas, Core and Hinterland Villages defined above, development will only be permitted in exceptional circumstances subject to a proven justifiable need."

10. "Countryside" is not defined in CS2 but paragraph 2.1.5.1 of the explanatory notes states that everywhere beyond the built-up areas of the urban / regeneration areas and core and hinterland villages, as defined by settlement development boundaries, is to be treated as open countryside. Paragraph 2.7.5 records that built-up area boundaries defined by the 2006 local plan saved policies remain in effect. Reference is also made to reviewing settlement boundaries and, if necessary, defining them in further development plan documents where appropriate.

11. Confirmation of the continuing relevance of built-up area boundaries in the 2006 local plan is found in paragraph 2.8.7.5 of the core strategy, which prefaces

Policy CS11 concerning strategy for development for core and hinterland villages. The 2006 boundaries are there described as "a useful starting point" when considering the relationship between the existing pattern of settlement and proposed development and distinguishing between the built-up area and the countryside. Policy CS11 is then described as "intentionally provid[ing] greater flexibility for appropriate development beyond these i.e. [built-up area boundaries], for identified Core and Hinterland villages subject to specified criteria."

12. Policy CS11 itself then sets out criteria to be addressed when considering development for core and hinterland villages. It acknowledges that not all will be relevant in every case, depending on the scale and location of the proposal. The criteria identified as applicable to development for core villages include the landscape, environmental and heritage characteristics of the village; the locational context of the village and the proposed development; the site location and the sequential approach to site selection; and locally identified needs, such as for affordable housing. The same considerations are to be applied to hinterland villages, which additionally are expected to demonstrate "a close functional relationship to the existing settlement".

13. In *R (East Bergholt Parish Council) v Babergh District Council & Agett* [2016] EWHC 3400, Mitting J considered the meaning and relationship of Policies CS2 and CS11. He described the policies as "far from clear", but rejected a submission by counsel then appearing for the defendant that they were in conflict and that CS11, which is intended to give greater flexibility, should prevail over CS2. At paragraph 18 Mitting J explained how the policies were to be reconciled:

> "It is common ground that the Local Plan, must, if possible, be construed as a whole. A construction of Policies CS2 and 11 which combines both is possible. Development can take place outside the built-up area boundaries in the 2006 Local Plan or those to be shown in the Site Allocations document, if they fulfil the requirements of CS11 and if the Local Planning Authority are satisfied that the circumstances are exceptional and are subject to a proven justifiable need. Fulfilment of the requirements of policy CS11 may more readily permit the Local Planning Authority to be satisfied about both of the requirements for development in the countryside, as defined in paragraph 2.1.5.1, hence the greater flexibility, but they do not remove the need to address both. Only if satisfied that both requirements are met should planning permission be granted for a development outside the built-up area boundary of a Core Village."

Although the focus in that case was there on core villages, there is no reason to take a different approach to the relationship between the two policies so far as they apply to hinterland villages.

The relevant facts

14. A previous application for outline permission to construct six two-storey dwellings on the Site was refused by the Council on 28 April 2016. Amongst the reasons given for refusal was that the proposal was contrary to Policies CS2 and CS11 as it would not be well related to the pattern of development in the settlement.

15. The current application was made in August 2017 at a time when the Council could not demonstrate a five-year housing land supply. Officers recommended refusal. Their reasons for doing so included the inconsistency of the proposal with the requirement of Policy CS11 that development should be in or adjacent to hinterland villages, and well related to the existing settlement; secondly, no exceptional circumstances had been identified justifying development in the countryside contrary to Policy CS2; thirdly, the proposal did not engage any of the special circumstances in paragraph 55 of the NPPF which may provide reasons for permitting new isolated homes in in the countryside.

16. The application was determined by the planning committee (at the request of a councillor) on 7 February 2018 when it was resolved to grant planning permission against officers' advice. The only reasons given for the decision were those recorded in the minutes of the meeting, namely that "the proposal represented sustainable development which would support existing services and that there would be benefits to this hinterland village because of the type and scale of housing proposed, particularly for those wishing to downsize."

17. The original permission was challenged by the Claimant in a previous application for judicial review on grounds which included a failure to give proper, intelligible and adequate reasons and misdirection in relation to policy CS11. After permission to proceed with the claim was given on 14 May 2018 the decision to grant permission was quashed by the High Court by a consent order made on 15 June 2018 on the basis of the Defendant's concession on the face of the order that it had failed to supply adequate reasons.

18. The planning application was reported to Committee for redetermination on 12 December 2018. The officer's report for that meeting was substantially based on the report provided for the meeting in February but included a number of significant changes. Officers continued to recommend that planning permission be refused.

19. Two changes of importance should be noted. Officers reported that the Council could now demonstrate a five-year housing land supply, which it had been unable to do in February. As a result, the tilted balance in favour of granting planning permission required by paragraph 11(d) of the NPPF was no longer engaged, and officers advised there was no requirement for the Council to determine what weight to attach to all the relevant development plan policies.

20. The second important change in the advice given to the Committee between February and December concerned Policy CS2. The Site is outside the settlement boundary and therefore in the countryside. In the first report a conflict with CS2 was identified as a reason for refusal, but in the report prepared for the meeting in

December 2018 the committee was advised that the weight to be attached to Policy CS2 was reduced and it was "not a determinative factor upon which the application turns". I will return to the officers' reasons for that advice shortly.

21. The position taken by officers in the revised report was in contrast to advice given and accepted by the Committee on 16 May 2018, when it refused an application for the development of two new dwellings in a different location, an infill site in the countryside adjacent to Well House, Round Maple. Officers recommended refusal, relying on Policy CS2, without suggesting there was any need to afford it limited weight.

22. The officer's report of 12 December 2018 identified two key reasons for recommending refusal of the scheme, summarised at paragraphs 10.1 – 10.10 and reflected in the two recommended reasons for refusal set out at the end of the report. The principal reasons for refusal were said to relate to landscape harm and accessibility.

23. As to landscape harm it was pointed out that the Site was in open countryside and conflicted with Policy CS2. For reasons which had already been explained in greater detail, officers advised that that policy carried less weight because of the age of the settlement boundaries (they had last been reviewed in 2006) and because the policy adopted a "blanket approach" to all land outside the settlement boundary which was said to be inconsistent with a more "balanced approach" favoured by the NPPF. It should therefore be afforded "reduced statutory weight". Assessing the proposal against other policies which should be afforded "full statutory weight", namely CS1 (the presumption in favour of sustainable development), CS11 hinterland villages) and CS15 (sustainable development), officers advised the proposal would have "a significant effect on the landscape setting of the village and on the character of the SLA" contrary to CS11 and CS15.

24. Access to the Site is along a narrow single-track land with no footpath or verge leading from the south-eastern end of the village for a distance of 105 metres. Officers advised that pedestrian access to the village centre was "not safe", that connectivity to local services was not favourable and that travel by car would not be minimised. The benefits of the scheme in supplying a local need for smaller dwellings identified in the emerging Neighbourhood Plan was balanced by conflicts with that plan. On the whole, officers advised "the benefits are outweighed by the identified harm associated with the conflict with development plan policies that carry full statutory weight".

25. The officers' formal recommendation was that the application should be refused for two reasons, as follows:

> "1. The proposed development, by virtue of its location, scale, density and layout, would be inconsistent with the open countryside and edge-of-settlement character, harmful to the character of the Special Landscape Area and setting of the Hartest village, contrary to Policy CS11 and CS15 of the

Babergh Core Strategy (2014) and paragraph 170 of the National Planning Policy Framework.

2. The proposed development, by virtue its location and poor pedestrian connectivity, would be car dependent, would not constitute sustainable development nor improve the social and environmental conditions in the district, contrary to Policies CS1 and CS15 of the Babergh Core Strategy (2014) and paragraph 17 of the National Planning Policy Framework."

26. Notwithstanding this recommendation, the Planning Committee resolved to approve the application. A decision notice granting permission but containing no reasons was issued on 20 December 2018.

27. On 16 January 2019 the Claimant's solicitors sent a pre-action protocol letter to the Council setting out proposed grounds of challenge to the decision, including a failure to provide reasons. This prompted a response on 23 January, providing draft minutes of the meeting on 12 December 2018. The minutes record the members' discussion but were clearly not drafted as a full statement of reasons for the decision.

28. The minutes themselves occupy 16 paragraphs most of which either record advice from officers or identify matters which were debated without providing details of the debate. Three concluding paragraphs are particularly relied on by the Council:

"76.13 Councillor Simon Barrett proposed that the application be approved against the Officer Recommendation on the grounds that, as before, the proposal represented sustainable development which would support existing services and that there would be benefits to this hinterland village because of the type and scale of housing proposed, particularly those wishing to downsize. Councillor Barrett relied on paragraphs 78, 77, 117 and 124 of the NPPF (2018) to say that greater weight should be afforded to CS11 and less weight to CS2 and that the issue concerning CS2, which was the subject of the Judge's permission decision, was now of less relevance because of the advice of officers (which he accepted) to afford limited weight to a conflict with CS2 for the reasons set out in the officer's report.

76.14 [The Case Officer] advised the Committee that members needed to look at the officer's recommendation to refuse permission and decide whether (i) they disagree with the judgments on landscape and character and connectivity or (ii), if they agreed with them, whether those conflicts carried less weight than the benefits of the scheme.

76.15 In response, Councillor Barrett explained he disagreed with the officer's judgment that there was harm to the relationship of the site with Green View, and suggested that the single storey nature of the proposal, the layout and the farm-type design of the development meant there was no harm. Upon being prompted to consider the second suggested reason for refusal, Councillor Barrett pointed out that expectations of sustainability differ in a rural as opposed to an urban context. It followed that the planning balance fell in

favour of delivering 3-4 bedroom housing identified as being needed in Hartest."

29. No member of the committee is recorded as having spoken against Councillor Barrett's proposal, or to have differed from his suggested justification for the Committee to take a different view from officers.

Ground 1 - Failure to give reasons for the decision to grant the permission

30. It is not suggested that there was any statutory obligation on the Council to give reasons for its decision. Ms Wigley nevertheless submitted that this is plainly a case where the common law duty to provide reasons arose.

31. It was common ground that there is no general duty to provide reasons for planning decisions. Where a decision maker's reasons cannot be inferred from publicly available materials, such as the reports of professional officers, fairness and good administration may nevertheless require that reasons be given. Circumstances in which the duty to give reason will be engaged were discussed by the Court of Appeal in *Oakley v. South Cambridgeshire DC* [2017] 1 WLR 3765 (approved by the Supreme Court in *Dover DC v. CPRE Kent* ([2017] UKSC 79).

32. In *Oakley*, Sales LJ suggested (at [76]) that a court should be cautious about imposing a general duty to give reasons and should do so only "where there is a sufficient accumulation of reasons of particular force and weight in relation to the particular circumstances of individual cases".

33. In *CPRE* Lord Carnwath SCJ, at [59], said that it should not be difficult for councils and their officers to identify cases which call for a "formulated statement of reasons":

> "Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance (such as the "specific policies" identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases."

34. On behalf of the Council Mr Bowes argued that this was not a case in which the common law duty to supply reasons arose because the Council' reasons could adequately be inferred from the officers' report and the minutes of the planning committee meeting. The decision had turned on a single issue of planning judgment, namely, whether the adverse consequences of the proposed development, arising from harm to the landscape and poor connectivity to services and facilities, outweighed the benefits of new housing. The officers had taken one view and it was clear why members had taken a different view.

35. In agreement with Ms Wigley, I consider that the combination of circumstances in this case clearly required that the Council provide reasons for its decision. This was the third occasion in two and a half years on which a decision had been taken in relation to the Site, and the Council was again taking a different view from that which it had originally formed in April 2016. Moreover, the view now taken by officers on the weight to be given to Policy CS2 had changed, not only since 2016, but since February 2018. Conflict with CS2 had been a key reason for the 2016 refusal, and a key part of the officers' reasons for recommending refusal in February, but was afforded very little significance in the December report. Without proper explanation of the rejection of the officers' recommendation the public would be left in real doubt about the approach which would be taken to CS2 in other cases (particularly in light of the full weight apparently given to the policy in the refusal of planning permission at Well House in May 2018).

36. The Council's disagreement with the advice of its officers is an important additional feature. As Elias LJ said in *Oakley*, at [50]: "if reasons are required when a committee changes its mind, there is a powerful case for asserting that they should also be required when the committee disagrees with the planning officer".

37. The fact that the decision was a redetermination following the quashing of the planning permission granted in February is also of significance. The Council's concession that it had failed to give adequate reasons for its previous decision to grant permission for the same proposal was inconsistent with a suggestion that it was not obliged to do so. The Claimant and other members of the public were entitled to expect that the same error would not be made again and that the Council would explain its thinking on the redetermination. The application was clearly controversial, with eight objections and five supporting submissions received from a village of fewer than 500 inhabitants. It was opposed by the Parish Council and was reported to be contrary to the emerging Hartest neighbourhood plan.

38. As presented by Mr Bowes, the Council's case was not in any event a bald denial of a duty to provide reasons, but rather was that sufficient reasons could be inferred from the publicly available material. Whether that is so is a question which overlaps substantially with the claimant's other grounds of challenge and it is more convenient to consider it together with them. Before considering the specific grounds, there is one general point of some importance to which I should refer.

39. The only indication of the Committee's position is found in the minutes of the meeting. While the minutes record the discussion and resolution, they make no attempt systematically to record the reasons of any individual councillor, or those of the Committee as a whole. There is no formulated statement of reasons such as appears to have been envisaged by Lord Carnwath in *CPRE* at [59] (see above) or earlier at [42] when he said that that where an officers' recommendation was not accepted "it may normally be enough for the committee's statement of reasons to be limited to the points of difference". An example of such a statement can be seen in *R (Beckman) v East*

Hertfordshire DC (1998) 76 P&CR 333, 334, where the views of the committee as a whole were specifically recorded. There is no such document in this case.

40. I was invited by Mr Bowes to infer that the Committee agreed with the officer's advice except where the minutes recorded disagreement. How readily that can be done obviously depends on the content of the documents themselves, but Ms Wigley invited me to distinguish between a statement of reasons prepared with the intention of addressing the points of difference between a planning committee and its officers, and specifically endorsed by the committee, and a minute of a discussion which, at most, records only the contributions of those who spoke and the outcome of the vote.

41. In this regard there was some debate over the standard of reasons to be expected of the committee. I accept Ms Wigley's submission that where reliance is placed on the officer's report and minutes as providing, by inference, the reasons for a committee's decision, the report should be subjected to the standard of scrutiny appropriate to reasons, rather than being assessed for its sufficiency simply as advice. The relevant standard is well known and was explained by Lord Brown in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, at [36]: the reasons relied on must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved and giving rise to no substantial doubt as to whether the decision-maker erred in law. The application of the same standard (and not a lesser standard which might suffice for a report) seems to me to be necessary as a matter of principle where the report is said to stand as reasons. It was also the view taken by Lang J in *R (Rogers) v. Wycombe DC* ([2017] EWHC 3317 (Admin), at [56]. To the extent that Andrews J may have taken a different view in the very recent case of *Pagham Parish Council v Arun District Council* [2019] EWHC 1721 (Admin) at [35] I prefer the views of Lang J, to which it does not appear she was referred.

42. Meeting the required standard of clarity is likely to be more difficult where the reasons relied on are not contained in a single document but have to be pieced together from two sources which do not agree with each other in the outcome. In *Oakley* Sales LJ saw no difficulty in using the officer's report as a point of reference from which the Committee could easily "indicate which aspects of that report it accepts and which it disagrees with, and why" (at [53]). But the Committee's disagreement with its officers' recommendation meant that it could not refer to the report to show it had discharged the duty to give reasons (at [80]). Nor would he permit the officers' report to be supplemented by a letter written to the Secretary of State who was considering whether to call in the decision (at [81]); the other members of the Court of Appeal appear to have taken the same approach to the letter (Elias LJ at [65], Patten LJ agreeing) and all agreed on the failure to discharge the duty to give reasons. Explaining why he did not accept that the letter could be relied on to show why there had been a departure from the development plan Sales LJ said this, at [82]:

> "Further, if there is an onus of justification which generates a duty to give reasons in this case, I do not consider that it is satisfied by resort to the kind of paperchase which this argument requires. Members of the public are entitled to expect the duty to give reasons to be satisfied in a reasonably clear fashion, and in the absence of some statement of reasons specifically adopted by the local planning authority will naturally look to the relevant officer's report to find out what the reasons for a particular decision were. I do not think that they can reasonably be expected to cast around to look for other documents in the planning file to try to piece together the reasoning of the planning authority."

43. The documents relied on in this case are not as remote from the decision itself as the letter to the Secretary of State in *Oakley*. The minutes were proffered by the Council in response to the complaint that no reasons had been given. To that extent less casting around may be required in this case (at least by the claimant), but the claimant can still fairly say that the exercise of comparing and contrasting the report and the minutes in an effort to discern the Committee's reasons is not straightforward and, at the very least, makes it difficult for the Council to say it has satisfied the duty to give reasons in a reasonably clear fashion.

Ground (2) - Failure to determine whether or not, and the extent to which, the development proposal complies with the development plan

44. The claimant's second ground of challenge asserted that it was impossible to tell from the minutes of the meeting what view the Committee had taken on the consistency of the proposal with the development plan, or on the extent to which there was a conflict with the development plan as a whole. It was not clear whether the Committee appreciated the primacy afforded to the statutory development plan by s.38(6) Planning and Compulsory Purchase Act 2004 and s.70 Town and Country Planning Act 1990 and the need for material considerations to outweigh any departure from it.

45. Ms Wigley submitted that the s.38(6) duty could only be properly performed if the decision-maker first established whether or not the proposal accords with the development plan as a whole. The relevant legal principles were reviewed by Lindblom LJ in *SSCLG v. BDW* [2016] EWCA Civ 493, at [21]-[23], referring to the statement by Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] 2 P. & C. R. at [22] that "it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations". Section 38(6) requires planning applications to be determined in accordance with the development plan, unless material considerations indicate otherwise. There is therefore a statutory presumption in favour of the development plan, whose policies ensure consistency in decision-making. The decision-maker must identify and understand the relevant policies and establish whether the proposal accords with the plan, read as a whole. The proper interpretation of the policies is a matter of law and a failure to understand them is liable to be fatal to

the decision but, as long as the decision-maker understood them, their application is a matter of planning judgement.

46. Ms Wigley suggested that a reasonable reader of the minutes would be likely to conclude that the Committee has not concerned itself with the breach of the development plan at all and has instead simply balanced some (but not all) considerations, without appreciating the importance of the statutory duty. Equally, a reasonable reader could conclude that policy CS2 has been set to one side. The Councillor who spoke referred to certain parts of the Core Strategy, and did not agree with the officer's report on the conflicts with its policies. That made it very difficult to know what view the Councillor, or the Committee as a whole, took on the extent to which the proposal accorded with the development plan as a whole in order then to assess the sufficiency of the other matters relied on as outweighing it.

47. For the Council, Mr Bowes submitted that the officer's report provided a detailed and careful analysis of the harms and benefits of the application assessed against the development plan and other material considerations. On many issues there was plainly no disagreement between the reasoning set out in the officer's report and that of the Committee. The Committee had engaged with the two recommended reasons for refusal. It disagreed with the planning judgments as to landscape harm and the weight to be given to concerns over connectivity because this was a rural location where "expectations … differ".

48. It should be inferred, Mr Bowes submitted, that to the extent that members had not identified any part of the report as a matter on which they differed from officers, the proper inference was that they agreed with it. He suggested that the absence of disagreement with the officer's conclusion on the extent to which the scheme was in conflict with the development plan, and the agreement with the officers' conclusion that there was a breach of policy CS2, plainly meant that the Committee agreed that the scheme conflicted with the development plan in that respect. The minute should be understood, Mr Bowes submitted, as recording a lawful planning judgment by members that material considerations indicated that the scheme should nevertheless be granted.

49. I have considered the minutes at rather more length than a member of the public seeking to understand the reasons for the Council's decision might be expected to do. It was necessary to do so in order to try to make sense of them, but in the end I have found them less coherent than Mr Bowes submitted they were.

50. I agree that certain inferences can be drawn as to the views of Councillor Barrett, who proposed rejection of the officers' recommendation and who is the only member whose contribution to the discussion is expressly recorded. He plainly accepted that there was a breach of policy CS2, as recorded in paragraph 76.13 of the minute. It is not necessary to resort to inference to discern his view of the officers' assessment that the proposal also "ran counter to … policies CS11 and CS15". The first of the questions formulated by the case officer and recorded in paragraph 76.14 of the minute invited the Committee to decide whether it disagreed with the officers'

judgments on landscape and character and on connectivity. Councillor Barrett specifically disagreed with those judgments and considered that no harm would result from the development. Since the advice of officers had been that "the identified harm runs counter to … Policies CS11 and CS15" the Councillor's conclusion that "there was no harm" can only be understood as a rejection of that advice.

51. I have more difficulty in understanding the Councillor's conclusion on the issue of connectivity and whether, as a result of poor access to the facilities in the centre of the village, the development was in conflict with the Policies CS1 and CS15 on sustainability. The observation that "expectations of sustainability differ in a rural as opposed to an urban context" may be read in a number of different ways. At first sight it appears to record a judgment that less weight should be given to the issue of connectivity because of the rural context, rather than a wholesale rejection of the advice that the proposal is in conflict with the identified policies. That impression is strengthened by the following sentence which may be taken to be an answer to the case officer's second question, which needed to be answered only if the Committee agreed with officers' assessment of conflict, and which records a conclusion that "the planning balance fell in favour of delivering 3-4 bedroom housing identified as being in need". On the other hand, earlier in the minute paragraph 76.13 had recorded the view of the same Councillor that "as before the proposal represented sustainable development", which would indicate disagreement with the officers' view. When read together with paragraph 76.13, the observation that "expectations of sustainability differ" may therefore signify a rejection of the suggested conflict with policy on connectivity, answering the first question posed in paragraph 76.14 in the negative and making it unnecessary to address the second question. I do not consider that the balance struck in the final sentence of paragraph 76.15 points clearly towards one conclusion or the other being correct. Earlier the Councillor had agreed that only "limited weight" should be given to the acknowledged conflict with Policy CS2. Even if it had been concluded that there was no conflict with CS1, CS11 or CS15, there would still have been a need to find sufficient benefits in the proposal to outweigh the departure from CS2. The final balancing exercise therefore cannot help in identifying whether the Councillor's view involved a complete or only partial rejection of the officers' advice on conflict with the development plan as a whole.

52. In summary, I find that the minutes do not clearly identify the views of Councillor Barrett on the extent of the conflict with the development plan, or on the extent of the benefit required to outweigh it, at least as far as the issue of connectivity is concerned. To the extent that those recorded views can be regarded as the reasons of the Committee, they are not sufficiently clear to demonstrate that the s.38(6) duty has been complied with.

53. In any event, because of the way in which the minutes are structured, recording a dialogue between the case officer and a single councillor, they are entirely silent on the reasons of other councillors for supporting the resolution to grant planning permission. An assessment of their views, and thus the reasons of the Committee as a

whole, depends entirely on inference. Had members been presented with only one route to a favourable decision it would, I accept, be possible to infer from their affirmative answer that they agreed not only with Councillor Barrett's resolution but also with his reasons (to the extent that those reasons were clear). Unfortunately, that was not the choice presented to them. Members were advised by the case officer that there were two routes by which they could arrive at a decision to grant planning permission. The alternatives involved fundamentally different approaches to the question of consistency with the development plan. It is not possible to know by what route any of those on the Committee arrived at their conclusion.

54. I accept Mr Bowes' submissions that the committee was not required to express its view on whether or not the proposal was in accordance with the development plan using any particular form of words or to adopt any particular mantra, that it was not bound to agree with the officer's assessments, and that it was free to depart from the development plan if material considerations indicated otherwise. But it was necessary, for the reasons explained by Lord Reed in *Tesco Stores* at [22], for it first to understand the nature and extent of the departure from the development plan; unless it did that it could not consider on a proper basis whether a departure was justified by such other material considerations as it took into account. In my judgment the documents relied on in this case do not clearly identify the Committee's approach and are insufficient to discharge the common law duty to provide reasons which it was subject to.

55. Because it is not possible to know by what route the Council arrived at its decision it is also impossible to conclude that it is highly likely it would have resolved to grant planning permission if it had properly directed itself. There may or may not have been a majority for a single approach. I therefore do not accept Mr Bowes' final submission on grounds 1 and 2 that the Court should withhold relief in accordance with s.31(2A) Senior Courts Act 1981. In my judgment the relief to which the claimant is entitled under grounds 1 and 2 is that the decision should be quashed.

56. In view of this conclusion I can consider the other grounds of challenge at less length.

Ground (3) Suggested inconsistency in decision making and failure to explain the Council's change of approach to Policy CS2

57. Ms Wigley relied on the general principle that consistency in decision-making is important in maintaining public confidence in the operation of the development control system. Policies issued to guide the exercise of administrative discretion are an essential means of securing consistency in decision-making, and that such policies should be consistently applied. Whilst it is open to a decision maker to depart from the reasoning in a previous decision, reasons for the departure ought to be given. The principle applies in the sphere of land use planning, as Lindblom LJ confirmed in *DLA Delivery Ltd v. Baronness Cumberlege of Newick and SSCLG* [2018] EWCA CIV 1305, at [28]. The circumstances in which a previous inconsistent decision may be a

material consideration to which a decision maker is required to have regard were considered at [34]. These may include the fact that an earlier decision related to the same site, or to the same or a similar form of development, or to the interpretation or application of a particular policy common to both cases.

58. The inconsistency on which the claimant relies for this ground of challenge concerns the treatment by officers of Policy CS2, which required special circumstances to justify permission for development in the countryside. The original officers' report of February 2018 treated the conflict with Policy CS2 as a reason for refusal, whereas in December the Committee was advised that "the statutory weight to be attached to Policy CS2 is reduced." For this purpose, the claimant assumes that the Committee's reasons for its decision adopted the officer's views as expressed in the later report but suggests that neither the report, nor the Committee discussion recorded in the minutes, give any reasons for the departure from its own recent inconsistent approach to Policy CS2.

59. Ms Wigley submitted that the Council's duty was not simply to explain its current view. Such reasons as were given in the report did that, but they did not explain what had changed between February and May 2018, when full weight was being accorded to CS2, and December 2018. Nothing of significance had changed. If anything, the fact that in December the Council could demonstrate a five-year housing land supply, whereas in February 2018 it could not, was a reason for giving even greater weight to countryside protection policy. In any event, the Council has now apparently reverted to its previous approach of according full, determinative weight to Policy CS2 as demonstrated by a refusal notice for Land at Cross Green, issued in January 2019. In all these circumstances the failure to provide any reasons for the change in approach was, Ms Wigley submitted, an error of law.

60. Mr Bowes submitted that there was no duty to explain the suggested inconsistency in this case. The February 2018 decision had been quashed and the Council was not under a duty to have regard to the reasons given for it. The officers' advice to give less weight to a conflict with Policy CS2 was clearly explained, in terms which had not been considered at all in the earlier report and were not a critical aspect of the earlier decision. Nobody who commented on the application had referred to Well House decision, and nothing which occurred after December 2018 (including the Cross Green decision) could be relevant to the legality of the decision now under consideration. Any inconsistency with those decisions was therefore not a material consideration.

61. In agreement with Mr Bowes, I do not accept that the Council was under a duty to provide any greater explanation than was contained in the December officers' report which sufficiently explained the Council's current thinking on the weight to be given to Policy CS2. A failure to take into account a previously quashed decision will be unlawful if no reasonable authority could have failed to take it into account (the standard applied to the treatment of inconsistent decisions of the Secretary of State in *DLA Delivery Ltd*). Where a previous decision has been quashed for an admitted failure

to give comprehensible reasons it could not be said to an unreasonable to conclude that the maintenance of public confidence in the development control system does not require that a post mortem of that decision be conducted. The officer's report which was before members in February 2018 was, as Mr Bowes put it, of no enduring relevance.

62. The absence of an explanation for the change in approach to Policy CS2 since the Well House decision is more difficult to understand. Although the decision concerned a different site in a different village, the Council's officers ought to have been aware of it. However, in view of the relatively modest scale of both developments, the fact that the Well House decision was not referred to by any objector, the sufficient explanation given for the Council's current view, and the relationship between CS2 and CS15, which was fully considered, I have concluded that the omission of any explanation for its change of heart on Policy CS2 was not unlawful. I do not think the more recent reversion to the former view in the Council's Cross Green decision can disturb that conclusion; not only was the decision after the event, the Cross Green proposal was adjudged to be contrary to Policies CS2 and CS15 and no question of the relative weight to be given to the different policies arose.

63. I therefore do not accept the claimant's challenge on ground 3.

Grounds (4) and (5): Misinterpretation of Policy CS2

64. The interpretation of planning policies is a matter of law. When reliance is placed on a suggested misinterpretation of policy in a planning officer's report, the question for the court is whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made (*Mansell v. Tonbridge and Malling BC* [2017] EWCA Civ 1314, at [42], *per* Lindblom LJ).

65. As Holgate J explained in *Trustees of the Barker Mill Estate v Test Valley Borough Council* [2017] PTSR 408 at [83], there is an important difference between a challenge to the meaning of policy and its application. In the latter case the grounds of challenge are more restrictive:

> "Assuming that the LPA has had regard to relevant NPPF policies, where that material does not reveal any *misinterpretation* of the NPPF, the only challenge that could be pursued would be to the LPA's judgment when *applying* that national policy. Such a challenge may only be made on grounds of irrationality: see the *Tesco Stores Ltd case* [2012] PTSR 983. Because of the critical difference between these two types of challenge as to the juridical basis upon which a court may intervene, a claimant must not dress up what is in reality a criticism of the *application* of policy as if it were a *misinterpretation* of policy."

66. The officers' report gave two reasons for giving less weight to the conflict with Policy CS2. The first was the delay in undertaking a review of settlement boundaries, which determine whether a site is in the countryside and therefore subject

to the requirement that development will only be permitted in exceptional circumstances. There is no suggestion that the officer's explanation was inaccurate. The need for a review had been identified in the explanatory text accompanying Policy CS2, the current boundaries having been defined in 2006 and the need for a review having been identified in 2012. The consequence of continued reliance on unreviewed boundaries was a matter of planning judgment and involved no question of interpretation of the policy. It cannot be said that it was irrational for officers to advise that the weight to be given to a conflict with Policy CS2 was influenced by the delay, especially in relation to a site so close to the existing boundary.

67. The other basis on which the claimant suggests the Committee was misled on Policy CS2 is in the officers' advice that it adopts a 'blanket approach' that is 'not consistent with the NPPF, which favours a more balanced approach to decision-making.' This was said to be a misinterpretation of the Policy CS2, which did not apply a 'blanket approach' but allowed for exceptions to meet a 'proven justifiable need'.

68. I am far from satisfied that Policy CS2 can properly be said to adopt a blanket approach. It can be contrasted with the policy considered by Lang J held in *Telford & Wrekin BC v SSCLG* [2016] EWHC 3073 (Admin) at [45]-[47], on which Mr Bowes relied, which provided that development within the countryside "will be strictly controlled". Additionally, unlike that policy, CS2 post-dated the NPPF and its consistency with it had been considered as part of the independent examination conducted under section 20, Planning and Compulsory Purchase Act 2004. There had been no material change in the relevant parts of the NPPF since the policy was adopted in 2014 (although they had been re-arranged within the document). In particular the distinction between valued landscapes (to be protected and enhanced), and other parts of the countryside (whose character and beauty is to be recognised) was already clear in the 2012 NPPF.

69. Whether it is appropriate to describe a policy as "blanket" is not a matter of interpretation of the policy. The important questions are whether the policy is consistent with the NPPF and, if not, what consequences follow. Those are issues concerning the application of the policy and involve planning judgments on which different views may be taken. It is not necessary to reach a firm conclusion on whether the view taken by officers was irrational because I have no doubt that the Committee would have come to the same conclusion had it been directed in uncontroversial terms. The relationship between Policies CS2 and CS11 had been explained by Mitting J in *R (East Bergholt Parish Council) v Babergh District Council & Agett* [2016] EWHC 3400 (see paragraph 13 above). Fulfilment of the requirements of CS11, which officers had advised was the case, may more readily permit the conclusion that exceptional circumstances exist and allow permission to be granted in favour of a development meeting a proven justifiable need. Had the Committee been so advised, as well as being told that less weight could properly be given to CS2 because of the need for a review of boundaries, there is no doubt they would have taken the view that the need

for smaller dwellings identified in the emerging Neighbourhood Plan justified the departure from policy.

70. It follows that inconsistency with Policy CS2 would not have weighed against the scheme in any event and the outcome is highly likely to have been the same. Had the decision not been fatally flawed by the failure to record coherent reasons, and if I had been satisfied that this ground of challenge had been made out, I would therefore have refused to quash the decision in accordance with s.31(2A) Senior Courts Act 1981.

71. I would also refuse permission on the claimant's fifth ground of challenge which was based on a statement which introduced the discussion of Policy CS2. Officers advised that, although the Council could demonstrate a five-year housing land supply, there was no need to determine what weight to attach to development plan policies in the context of the tilted balance test but that there was a need to determine whether relevant policies of the Core Strategy "generally conform to the aims of the NPPF" and to give them less weight if they did not. The only example in the report of a policy being given less weight because of a suggested inconsistency with the NPPF is in relation to Policy CS2. As I have found that the advice of officers concerning the inconsistency itself made no difference to the Committee's conclusion, the same must be true of the introductory statement.

Ground (6) Suggested misdirection in relation to development plan policy CS11

72. Policy CS11 requires that the Council adopt a "sequential approach to site selection" when considering proposals for development for core and hinterland villages. The sequential approach is explained in a supplementary planning document to which I was referred. In considering the suitability of sites for development under Policy CS11 the Council is advised first to consider whether there are other available, suitable and deliverable sites within the built-up area of the village; if there are none they should then to look to sites "which adjoin the built-up area of the village"; finally they should consider "sites that do not adjoin the existing built-up area of the village" but only if there is some special justification. There is no requirement for sites within the same category to be considered sequentially.

73. It is obvious from the officers' report, without recourse to subsequent explanations, that the Site was treated as being in the second category, i.e. as adjoining the built-up area. Paragraph 4.29 explains that to be acceptable under Policy CS11 proposals should adjoin and be well related to the built-up area boundary, and notes that some sites may adjoin the boundary and yet not be well related to the built-up area. Consideration is then given to how well related the Site is, with the conclusion that it is not a logical extension". The advice given to the Committee on the sequential approach is nevertheless that there is no conflict with Policy CS11 in that respect because there are no sequentially preferable sites within Hartest, and because there is no requirement to look at alternative sites adjoining the built-up boundary "as sequentially they are within the same tier". Neither the treatment of the relationship between the Site and the

built up area, nor the advice on the sequential test makes any sense if the author is assumed to regard the Site as one which does not adjoining the boundary.

74. Ms Wigley nevertheless submitted not only that the Site is outside, and does not adjoin, the existing built-up area of the village, but that the same view was taken by officers. That submission was based on paragraph 4.30 of the report in which the site was described as "close to but not strictly speaking adjacent to the settlement boundary as there is a gap of around 35 metres comprising the rear garden of The Paddocks." But that observation dealt with only one boundary, on the south-west side of the Site. On the adjoining south-eastern side the Site is bounded by Lawshall Road, a country lane with no verges, three metres wide and lightly trafficked. The settlement boundary runs along the opposite side of the lane and extends for the whole length of the Site and beyond on that side. Objectors had relied on the proximity of the Site to the houses on Green View which adjoin that boundary, and the impact development would have on the outlook from them, as reasons for refusal. Officers specifically acknowledged that fact but drew distinctions between the land on either side of the lane.

75. Ms Wigley submitted that because the Site did not touch the settlement boundary at any point it could not be said to adjoin the built-up area. Officers had therefore misinterpreted or misapplied policy by failing to advise that the Site was in the third category for the purpose of the sequential approach to site selection. The Committee had been misled into thinking that it was not necessary to consider whether there were alternative sites that did adjoin the built-up area boundary of the village.

76. I do not accept these submissions. Whether, when taking into account the advice in the supplementary planning document, it was appropriate to regard the Site as adjoining the boundary or not was a pure matter of judgment. No interpretation of the development plan was required (the SPD is not part of the plan), but more importantly, the report itself contains a careful assessment of the relationship between the Site and the built-up area, rather than simply an estimate of the distance to the boundary. The minutes of the Committee meeting record discussion of the built-up area boundary and advice from officers given in the course of the meeting that the precise distance was not a determinative factor, as well as noting that members have seen the relationship for themselves on site. The relationship between the Site and Green View was specifically referred to by Councillor Barrett in his contribution. The suggestions that the members were significantly misled about the application of the sequential test, or that it was irrational to regard the Site as adjoining the boundary, are both equally unsustainable.

77. I would therefore dismiss ground 6, but for the reasons given in relation to grounds 1 and 2 above I nevertheless quash the decision of 20 December 2018 to grant planning permission.