Neutral Citation Number: [2022] EWHC 2905 (Admin)

Case No: CO/1608/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 November 2022

Before:

Sir Ross Cranston
(siting as a High Court Judge)

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Between:

R (on the application of) PATRICK HARDCASTLE	**Claimant**
- and -	
BUCKINGHAMSHIRE COUNCIL	**Defendant**
- and -	
BDW TRADING LIMITED (T/A DAVID WILSON HOMES SOUTH MIDLANDS)	**Interested Party**

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Richard Honey KC, Merrow Golden and Jonathan Welch (instructed by **Fortune Green Legal Practice**) for the **Claimant**
Alexander Booth KC and Charles Streeten (instructed by **Buckingham Council**) for the **Defendant**
Hashi Mohamed (instructed by **Dentons Solicitors**) for the **Interested Party**

Hearing dates: 2-3 November 2022

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Approved Judgment

Sir Ross Cranston:

INTRODUCTION

1. This is a challenge to the grant earlier this year of outline planning permission by the defendant, Buckinghamshire Council, for a residential development on a site abutting Maids Moreton in Buckinghamshire. Maids Moreton is a village which the 2011 census records as having 351 homes and 847 residents. The permission granted to the interested party, which I call "the developer" in this judgment, relates to "up to 170 dwellings, public open space and associated infrastructure." Last year a planning inspector had reported on the Vale of Aylesbury local plan, and that had been adopted on 15 September 2021. Site allocation D-MMO006 concerns the site, which it allocates for "at least" 170 dwellings at a density that takes account of the adjacent settlement character and identity and the edge of countryside location.

2. The claimant is a resident and parish councillor of Maids Moreton and a member of the Maids Moreton and Foscote Action Group, formed in 2019. He has objected to the development since its inception in 2015. Over several years both he and the action group have raised a number of objections to the development both orally and in writing. In this judicial review the claimant raises six grounds of challenge. When granting permission on 1 July 2022, Lang J observed that these raised arguable grounds which merited consideration at a full hearing. Mr Honey KC (with the assistance of Ms Golden and Mr Welch) advanced the grounds with typical skill and thoroughness, but for the reasons explained in the judgment I have concluded that the claim cannot succeed.

BACKGROUND

3. Buckinghamshire Council ("the council") become a unitary local authority and the planning authority for the county in April 2020. Until then these matters were considered by the former Aylesbury Vale District Council ("Aylesbury"), which became part of the new unitary authority. It was thus to Aylesbury that the developer applied for outline planning permission in 2015.

The 2015 screening opinion

4. Prior to the developer's application, Aylesbury had a screening opinion prepared under regulations 4-7 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the 2011 Regulations"). That led to its decision on 19 November 2015 that this was not an EIA development, and no environmental impact assessment was required.

5. The screening opinion stated at the outset that its rationale was to determine "the likelihood of significant effects on the environment and whether an Environmental Impact Assessment (EIA) is necessary." It then proceeded by examining the relevant criteria set out in schedule 3 of the 2011 Regulations.

6. In setting out the characteristics of the proposed development, the screening opinion stated (a) that its size was "7.95ha, up to 155 dwellings, public open space and play area, landscaping and flood mitigation." As regards (b), cumulation with other

development, it said that it related to an area of agricultural land and the proposal was not part of a larger scheme. Use of natural resources, (c), was stated as "greenfield site but none of substantive nature." Pollution and nuisance, (e), noted that following occupation the development would result in additional vehicle movements, but it was unlikely that this would be of a substantive nature.

7. Among aspects of location, the screening opinion stated at (a) that existing land use was "agricultural, countryside". Natural resources in area, (b) stated that the site "comprises open land in the countryside which would be lost as a result of the development, but any impacts would not be of more than local importance." At (c), absorption capacity of natural environment, the opinion stated that the proposal was "not considered to raise substantive issues relating to identified criteria, but this would be assessed during the consideration of any subsequent planning application."

8. As regards the characteristics of the potential impact, the screening opinion stated as regards its magnitude and complexity, (iii)(c) that it was "[u]nlikely to be substantive and would be localised impact, not anticipated to be complex." As regards the probability of impact of the proposed development, (iii)(d), the screening opinion stated that it was unlikely to be substantive. It added: "Possible visual impacts and potential for impact on highways, ecology, flood risk, drainage and archaeology, but would be a localised impact and therefore probability of impact is not considered substantial."

9. The conclusion and recommendation of the screening opinion were as follows: "It is considered in the light of available information that the proposal would not have a significant impact and as a result an EIA is not required."

Highways

10. In a letter dated 30 November 2018 to Aylesbury, Buckinghamshire County Council, then the highways authority, explained that in light of the planning application it was more appropriate to investigate deterring traffic resulting from the development from using College Farm Road (also known as Mill Lane) rather than improving the junction of the road with the A422. That would be by traffic calming measures. If these were successful the result would be additional traffic from the development travelling into Buckingham, which would require mitigation through the Buckingham traffic strategy.

Agricultural land quality

11. The developer had a report prepared by consultants about agricultural land classification relating to the site. Dated February 2019 the report stated that the proposed development would take approximately 8 ha of land affecting four relatively small fields used mainly for arable farming. Its overall impact locally was of only minor significance in terms of agricultural land quality. The land was mostly grade 3a which was identified as being BMV (best and more versatile). The report concluded that its loss did not represent a significant loss locally or regionally in terms of BMV.

12. The report concluded:

> "The loss of this site to development is therefore not significant to the supply of BMV agricultural land within the district and the Southeast as a whole with development on some BMV land in Aylesbury Vale being inevitable in most cases."

Permission deferred and delegated for approval, 2019

13. The developer's application for planning permission was considered by Aylesbury's strategic development management committee in early 2019. It resolved that permission be deferred and delegated for approval subject to the completion of a section 106 agreement and the conditions which officers considered appropriate.

14. In response to a letter in March 2019 from Mrs Kate Pryke of the Maids Moreton and Foscote Action Group, on 2 May 2019 Aylesbury replied, inter alia, that it would not refer the matter back to the planning committee. Officers would only do that, it explained, if there was a significant change in policy or circumstances that would influence the decision made and the committee would need to consider it – and that was not the position.

Contaminated land

15. The developer had a consultant prepare a report on contaminated land. The council's pollution control officer prepared comments in relation to the subject dated 9 November 2020. The report recorded that the ground investigation had identified that elevated levels of arsenic were present across the entire site. The consultant's report had stated that these occurred naturally. The report went on to say that this was not considered a significant risk to human health and was in line with the current guidance. However, the report recommended that further assessment be undertaken. The pollution control officer agreed with this recommendation, adding that it might be that based on the results remedial work may be necessary.

Anglian Water report

16. In early November 2020 there was a report in relation to the proposed development by Anglian Water. As to wastewater, there was not the capacity in the Buckingham centre to deal with it, but Anglian Water was obligated to accept the foul flows from the development if it had the benefit of planning consent and would therefore take the necessary steps to ensure that there was sufficient treatment capacity should the council grant it.

17. As to the used water network and unacceptable risk of flooding downstream, Anglian Water stated that it would need to work with the developer to ensure any infrastructure improvements, but a full assessment could not be made at that point due to a lack of information.

Natural England

18. Natural England had no overall objection to the development when it responded on 2 November 2020. It considered that without appropriate mitigation the application

would damage or destroy the interest features of the Foxcote Reservoir & Wood SSSI. To mitigate that Natural England advised an appropriate planning condition or that an obligation be attached to any planning permission to ensure implementation of the measures the developer's consultants had recommended in their 2016 ecological enhancement plan.

The 2020 officer's report

19. In November 2020 the application was referred back to committee, this time the strategic sites planning committee of the now unified Buckinghamshire Council ("the committee"). An officer's report was prepared for consideration by that committee.

20. The officer's report, dated 19 November 2020, stated that the proposal was an outline application with all matters reserved except access for up to 170 dwellings, public open space and associated infrastructure.

21. Part 1 of the report first explained that previously the matter had been before Aylesbury's planning committee, which had resolved that permission be deferred and delegated for approval, subject to the matters referred to earlier. Since then, the report continued, work had been progressing on the section 106 agreement. Importantly, work on the Vale of Aylesbury Local Plan (VALP) had also progressed such that a number of policies within that plan could be given greater weight in decision making. In addition, further representations had been received. In that context it was considered appropriate for the application to be returned to committee for determination and to update the position including the evolving policy framework.

22. The report then noted that the application was for up to 170 dwellings. At various points in the report the officer refers to 170 dwellings, but that this is shorthand for "up to 170 dwellings" is clear, not least when, at paragraph 5.7 the report states, when considering that the development would increase the population of Maids Moreton by approximately 50 percent, that it is "of 170 dwellings (noting that the development is for up to 170 dwellings) …"

23. The report at paragraph 1.5 noted that there would be harm to the character of the landscape and on the settlement character which would be of moderate negative weight. The development would also result in loss of BMV agricultural land which would be of limited negative weight.

24. At paragraph 1.14 the report stated:

> "In considering the overall planning balance it is considered that the adverse impacts would not significantly and demonstrably outweigh the benefits of the proposal. It is therefore recommended that the application be approved subject to the completion of a s.106 legal agreement securing the matters outlined in section 6 below and subject to conditions as appropriate."

25. Part 2 of the report was a description of the proposed development.

26. Under the heading "Relevant planning history", part 3, the report stated "15/03562/SO - Screening Opinion for proposed development – Environmental Impact assessment not required."

27. The report at part 4 noted the significant number of representations received - set out in detail in Appendix A – "the key concerns" being development outside settlement boundaries, impact on landscape, impact on traffic and congestion, and impact on heritage assets, residential amenities and infrastructure.

28. Part 5 was the longest part of the report – "Policy considerations and evaluation" – and sub-divided.

29. After identifying relevant planning policy, under the sub-heading "Principle and location of development" the report noted that the site did not represent small scale development in that it was of 170 dwellings on a 8.649ha site.

30. Paragraph 5.5 of the report explained that:

> "the site is proposed to be allocated in the emerging VALP for development as part of MMO006 and this supports the development of the site for 170 dwellings subject to a number of criteria. MMO006 (as proposed to be modified) anticipated delivery of the following: a provision of at least 170 dwellings at a density that takes account of the adjacent settlement character and identity and the edge of countryside location."

31. Later paragraph 5.7 stated that the development, with its 170 dwellings "(noting that the development is for up to 170 dwellings)", would increase the population of Maids Moreton by approximately 50 percent.

32. When considering the sub-heading "Housing supply, affordable housing and housing mix", the report concluded that the development would make a significant contribution to these. On that basis, the report said at paragraph 5.18, that the development would accord with the development plan policy, the NPPF and emerging policies, including MMO006. As such, the paragraph added, significant weight should be given to the development in respect of the contribution to housing supply and affordable housing, and considerable weight to the economic benefits in this regard.

33. Under the sub-heading "Transport matters and parking", the report noted that it was evident that the impact of the development traffic on College Farm Road (also known as Mill Lane) and its junction with the A422 needed to be mitigated. A mitigation package had been secured regarding (1) improvements on the A422 in the vicinity of the junction with College Farm Road to improve safety at the junction and (2) traffic calming works to the north-western end of College Farm Road at its junction with Church Street, to make College Farm Road a less attractive route: para. 5.33. If the traffic calming had the desired effect of deterring traffic from using College Farm Road, mitigation to the junction with the A422 might not be required: para. 5.35. The report showed with illustrations the proposed traffic calming in principle: para. 5.39. If the traffic calming was successful that would result in additional traffic in Buckingham, which would need to be mitigated: para. 5.44. The report later returned

to the aim of making College Farm Road a less attractive route from the beginning and deterring development traffic from using it: para. 5.122.

34. Under the sub-heading "Visual impact", the report stated that there were "significant adverse visual impacts from the development" but added at paragraph 5.78 that "these will be in the immediate vicinity of the site and there is scope for the existing relationship between the settlement and the open countryside to be visually enhanced in line with the Landscape Character Assessment guidance."

35. Regarding agricultural land, paragraph 5.80 of the report noted that paragraph 170 of the NPPF advised that local planning authorities

> "…should take into account the economic and other benefits of the best and most versatile agricultural land and, where significant development of agricultural land was demonstrated to be necessary, local planning authorities should seek to use areas of poorer quality land in preference to that of a higher quality."

36. The report observed that there was no definition as to what comprised "significant development" but the threshold above which Natural England was required to be consulted was set at 20 hectares and the site fell below that threshold.

37. The report went on at paragraph 5.81 to note that development would result in the loss of best and most versatile (BMV) agricultural land. Consideration had been given to the development of this agricultural land as required by the NPPF. However, having regard to the size of the site and the extent of BMV land lost, it was not considered that this would represent a significant development in the Aylesbury Vale area. As such, in considering that there would be some loss of BMV, "it is considered that this matter should be afforded very limited negative weight in the planning balance." This conclusion was reiterated in the overall assessment on the report.

38. Nine paragraphs were devoted to the biodiversity net gain calculation. The report noted that the council's biodiversity officer raised no objections subject to a condition to secure the various objectives and management of the site: para. 5.100. Further enhancements had been identified directly adjacent to the existing features and would need to be established in the enhancement plan. The ecological enhancement plan would be critical to ensure the concerns raised were appropriately addressed: para 5.101. Consequently, and with the mitigation proposed, the proposal would accord with emerging policy NE1 of the VALP: para. 5.102.

39. Part 6 dealt with developer contributions.

40. Part 7 was the overall assessment, with the weighing and balancing of issues.

41. The report concluded with the officer's recommendation: "The officer recommendation is that the application be Deferred and Delegated to officers for approval subject to the satisfactory completion of a s.106 agreement to secure the requirements set out in the report, subject to securing a District Licence to address protected species and subject to any conditions considered appropriate or refuse if a

satisfactory S106 agreement cannot be completed for such reasons as officers considers appropriate."

42. A Corrigendum Report of the same date was produced incorporating further objections and comments from consultants.

November 2020 committee meeting and decision

43. The committee met on 19 November 2020. During its meeting, the committee heard a number of representations, including from both the claimant and the developer. There was then a motion to refuse the officer's recommendation, which was lost by one vote (with the chair casting a second, deciding, vote). Subsequently, by way of a split vote with the chairman casting the deciding vote, the committee resolved to accept the officer's recommendation, that permission be deferred and delegated for approval by officers, subject to (i) the satisfactory completion of the s.106 agreement, (ii) the securing of a district licence to address protected species, and (iii) conditions as considered appropriate. The resolution stated that if any of these "subject to" matters were not achieved, the application should be refused.

44. Later that month, on 30 November 2020, a draft s.106 agreement was published. The claimant lodged objections the following month.

45. The council delayed determining the application under delegated powers in the light of the inspector's decision to hold a further hearing in relation to the proposed allocation MMO006 and transportation. The background to this hearing is as follows.

The inspector's report on Vale of Aylesbury local plan, February 2018-September 2021

46. In February 2018 Aylesbury submitted the draft Vale of Aylesbury local plan (VALP) for examination by the inspector, Mr Paul Clark.

47. Aylesbury had proposed to delete the allocation in the draft plan of what in effect is the site for the development in the light of advice received from the former Buckinghamshire County Council, as the highways authority, concerning access to the site. Following further advice from the County Council, Aylesbury reviewed that decision shortly before the hearing session in July 2018 and the site was then allocated for housing.

48. In mid-2019 the Maids Moreton and Foscote Action Group had made representations to the inspector that the site was unsuitable for development.

49. In October 2019, the inspector issued his main modifications to the draft plan.

50. On 16 December 2020 he issued discussion document number 8, his initial consideration of representations on modifications. In it he explained his insertion of "at least" in front of proposed housing quantities. It introduced an element of uncertainty to a plan, he conceded, but the feasibility studies which provided the evidence for the figures did not demonstrate that more could not be achieved. Further, it was government policy to boost development, particularly the supply of housing. None of the representations indicated that the figures should be regarded as a maximum.

51. In the discussion document the inspector also announced that he intended to hold a further hearing session regarding what was the draft site allocation. That was because although he found the council's explanations and adjustments to modification acceptable, new transport evidence meant he would benefit from a further hearing session. As well the council's about-face, shortly before the 2018 July hearing session, meant that objectors about the site allocation did not receive notification in time to attend the hearing session at that point and they should now have the opportunity to be heard.

52. There was the further VALP hearing session as regards the site on 15 and 16 April 2021, which the inspector had foreshadowed. The claimant spoke at this session.

53. The inspector's final report was published on 2 September 2021.

The inspector's report

54. In his report the inspector at DL227 recorded that the 2015 HELAA (Housing and economic land availability assessment) regarded the site as unsuitable, but a later HELAA reversed that. In the 2017 sustainability appraisal it was the least suitable site in the village reflecting a lack of local employment (so leading to commuting but without adequate transport infrastructure), its status as a greenfield site (so leading to impacts on wildlife), its classification as best and most versatile (BMV) agricultural land, and an increase in flood risk.

55. The inspector noted that while residents of Maids Moreton clearly saw themselves as separate from Buckingham, to an independent observer the two settlements coalesced: DL229.

56. With respect to BMV agricultural land, the inspector noted that much land around Buckingham was of this classification, so that if growth at Buckingham was to be accommodated at all it was inevitable that some loss would occur. He had no reason to question the Council's advice that alternatives offered no advantage in terms of using poorer quality land: DL232.

57. At DL233 the inspector noted that any development of a greenfield site carried with it a risk of increased surface water flooding because of faster run-off from hard surfaces, but the risk was usually dealt with during consideration of a planning application. The submitted plan's policy for allocation MMO006 included criterion (e), which would require the submission of a surface water drainage scheme.

58. Turning to traffic matters, the inspector noted that discussions on access had been resolved to the satisfaction of the highway authority. There were "discontinuities", as he put it, in the transport advice given during the preparation of the plan and during concurrent consideration of the planning application: DL235. As regards the first, with housing allocations including MMO006, Milton Keynes to the east of Buckingham would be a main destination of traffic and routes avoiding the latter's town centre included the use of College Farm Road: DL239. The inspector observed that the current planning application to develop the MMO006 allocation gave the impression that traffic calming measures would be imposed on College Farm Road, which would

dissuade traffic from using roads so treated. The inspector continued: "Be that as it may, I was given explicit assurance by the Council's representative at the hearing session that my understanding was correct that the traffic calming measures were intended to make sure that the roads concerned would accommodate the traffic generated from the MMO006 allocation in a safe way": DL240.

59. The inspector concluded:

> "241…having examined the matter at considerable length and in considerable detail, I am convinced that, given the difficult decisions which the Council has had to face in determining Buckingham's future and taking all matters together in the round, this allocation is positively prepared and justified, although a modification is necessary [MM101] to make the allocation effective and consistent with government policy by reflecting the contribution which the allocation will need to make to the resolution of Buckingham's highway deficiencies, updating the site's expected time of delivery and to make it clear, in line with government policy, that the expected number of dwellings should be viewed as a minimum."

Vale of Aylesbury local plan, September 2021

60. The council adopted the VALP on 15 September 2021.

61. As to site MMO006, a size of 8.8ha, it was allocated for 170 homes, green infrastructure and surface water drainage. Site-specific requirements included the provision of "at least 170 dwellings at a density that takes account of the adjacent settlement character and identity and the edge of countryside location."

62. Plan T1 states that the council will seek to ensure that development proposals will deliver highway and transport improvements to ensure that new housing and employment development does not create a severe impact on the highway and public transportation network and encourages modal shift with greater use of more sustainable forms of transport. T4 states that new development will be permitted where there is evidence that there is sufficient capacity in the transport network to accommodate the increase in travel. As to T5, it provides that new development will only be permitted if the necessary mitigation is provided against unacceptable transport impacts.

Mr Elvin's opinion and emails relating to it, early 2021

63. While the inspector was considering the local plan, the council obtained a legal opinion from Mr David Elvin KC in early 2021 to examine what it considered were serious allegations made against council officers and what was said to be its unlawful handling of the planning application. Specifically, Mr Elvin was asked to advise on (i) whether officers misled members or wrongly advised them or made any other error in their role with the committee; and (ii) whether the council's constitution enabled the application to be considered by the strategic site committee rather than the area committee.

64. After detailed analysis of these issues Mr Elvin KC concluded that there was no error in the conduct of the officers and the matter was appropriately dealt with by the committee.

65. Under a final heading, "Issues for the council's further consideration", Mr Elvin referred to the inspector's 16 December 2020 decision to hold a further hearing, as explained earlier in the judgment. Mr Elvin said it would provide an opportunity for the soundness of the site allocation to be further tested. At paragraph 61, he said that the views of officers in the 2020 report and expressed to the committee had been overtaken by events. The view that no main modifications were required for MMO006 and therefore soundness was not in issue was no longer tenable, and the issue of moderate weight in it may require alteration. After referring to *Kides*, Mr Elvin went on to opine:

> "63. Since the weight and significance to be attached to the VALP was a matter of some significance in the [officer's report] and the [committee] meeting, for the resolution to proceed to the issue of permission without further consideration of the above would open it to a serious risk of challenge on *Kides* principles unless it is reported back to [committee].
> 64. Whether the application should be fully reported back to members for reconsideration in the near future, or on a briefer basis with a view to taking the matter back once the Inspector has heard and reported on the [site] objections is a matter for the Council to decide having regard to the current circumstances and the changes that have occurred since the meeting."

66. On 25 January 2021 the council's director for legal and constitutional services, Mr Nick Graham, emailed Ms Kate Pryke of the Maids Moreton and Foscote Action Group. In the course of the email he referred to Mr Elvin's opinion, in particular the reference to the inspector's intention to hold the additional hearing session and the opportunity it provided for the soundness of the proposed allocation of the site to be further considered. Mr Graham continued:

> "It is Mr Elvin's view, accepted by the Council, that this amounts to a material change in circumstances and which will now require at least some of the matters considered by the Committee to be considered further. That is not in any way to suggest that there was anything wrong with the original decision of the Committee, rather that the Inspector's further intervention since that decision warrants reconsideration. In the circumstances, it has been decided that a final decision on this application, will be deferred until the position of the VALP inspector is known. At the moment it is anticipated that a hearing to consider further representations about this site will take place in March/April and so we do not expect any referral back before that date. If there is any significant delay to this anticipated timetable this position may need to be revisited."

67. A month later, on 24 February 2021, Mr Graham wrote further to Ms Pryke in relation to some nine points she had raised in a letter of 16 February 2021. Regarding point 9 he said:

> "[A]ll members of the Strategic Sites Committee have received an explanation regarding the decision to refer the application back to committee."

Three-member call-in request, September 2021

68. Following the inspector's report, three local councillors requested that the planning application be called back to the committee.

69. The request was advanced on two bases. First, there was the change of circumstances because of the discontinuities between the transport advice given to the inspector and that placed before the committee. Secondly, there were defects in the section 106 agreement.

Maids Moreton and Foscote Action Group letter, January 2022

70. On 3 January 2022 the Maids Moreton and Foscote Action Group wrote a carefully constructed letter to the council, stating that the application should be remitted to the committee under the *Kides* principle, majoring on traffic as a new material consideration and on deficiencies in the s.106 agreement. Councillors were copied in.

Biodiversity net gain assessments

71. The developer commissioned a biodiversity net gain assessment (BNG) in 2015, to accompany its application for planning permission. That went through various iterations in the following years. The different versions were accompanied by drawings of the site, showing its different features and indications of where housing was to be. There was a version dated January 2022.

72. In response to the January 2022 version, the council's interim ecology team leader identified a number of errors that the developer had submitted.

73. As a result the developer submitted a further BNG assessment in February 2022, noting that to demonstrate that the proposals could provide a 10 percent net gain to biodiversity, the development area had been reduced. The precise design would be through the submission of a reserved matters application.

74. The council's interim ecology team leader observed that the plans now showed a reduction in the number of houses to accommodate the BNG.

Officer's report and delegated decision, March 2022

75. Following the inspector's report, the council decided that the planning application could be determined under delegated powers without a further referral back to committee.

76. This was recorded in a decision memorandum of 24 March 2022 signed by the service director, planning and environment. The memorandum explained the history of the application, and the delay in making a decision - following the committee's determination on 19 November 2020 - because of the inspector's additional hearing in

April 2021. Now the inspector had approved policy D-MMO006 and no modifications were required to be considered by the committee. There had been requests to have the matter returned to the committee, including a call-in request by local members, but the director for legal and democratic services had advised that since the application had already been heard at committee, the three-member call-in was not valid under the council's constitution.

77. The memorandum further explained that the determination process for the application had been made in consultation with the chair of the committee. The cabinet member for planning and regeneration had been notified. It had been concluded that the exercise of delegated powers in relation to this application was appropriate.

The 2022 officer's report

78. Following an introduction, part 2 of the officer's report of 24 March 2022 was entitled "Update".

79. The first update matter was the VALP. Paragraph 2.2 read, in part:

> "…at the time the planning application was reported to Committee on 19th November 2020, Policy D-MMO006 was worded as set out in full at paragraph 5.5 of the officer's report. The wording included the main and additional modifications as proposed at that time. The Inspector in his final report concluded that these modifications to the policy were required as set out in his Main Modification 101. The VALP Inspector found the allocation to be sound and the site is allocated in the adopted VALP for development as part of MMO006 and this supports the development of the site for at least 170 dwellings subject to a number of criteria as set out in that policy."

80. Paragraph 2.3 stated that the VALP had been adopted on 15 September 2021 and could now be given full weight. Paragraph 2.4 added that as now adopted it formed part of the development plan,

> "which further justifies the Council's resolution to grant permission for the development."

81. The update section then mentioned the adoption of NPPF 2021 and the Council's new 2021 five-year housing land supply: paras.2.5, 2.6 respectively.

82. Under the heading "Additional information", the update noted the revisions of the biodiversity net gain submission (BNG). The report's "response", paragraph 2.8 explained:

> "The quantum of the development proposed remains up to 170 dwellings, however it is acknowledged that the number of dwellings could be less than previously indicated given that there is a reduction in the developed area to achieve the required biodiversity net gain as shown on the amended landscape masterplan and feasibility plan. This would still be consistent with the description of development for which

> outline permission is sought and considered by committee. Regard has been had to the mitigation indicated, the impact on the landscape character area, on the settlement character and the visual impact of the development itself whilst recognising this is an outline application and the details of appearance, landscaping, layout and scale are matters reserved for subsequent approval."

83. The report explained the updated BNG assessment dated February 2022, in particular the reduction in habitat units resulting in the 11.51 percent net gain becoming a 10.21 percent net gain. However, the report added at paragraph 2.11 that

> "this is not considered to be significant and would not require the application to be returned to committee for consideration by Members since it would not represent a material change to the original conclusions reached in this matter."

84. Turning to additional consultee responses, the officer reported at paragraph 2.12 on contaminated land, the naturally occurring arsenic which had been found in the soil. The report explained the position and noted that additional testing was being undertaken. It recommended a condition to planning permission to address any adverse results.

85. Part 3 of the officer's report dealt with representations and set out the officer's responses. (There was also a separate table with responses to the representations regarding the s.106 legal agreement.)

86. After considering the representations with respect to traffic mitigation measures on College Farm Road (sometimes called Mill Lane), the report's lengthy response was summarised at the end of paragraph 3.17:

> "[I]t is clear from the above that the proposals and advice put forward by the Council for both the planning application and during the VALP hearings result in the same conclusions that the Inspector reached in his report. It is the case that the development is likely to result in additional traffic using Mill Lane, there are measures in place in the form of traffic calming that aim to dissuade traffic from using the road and at the same time will allow the traffic that does want to use the road to be accommodated and facilitated in a safer manner, and ultimately, if there are capacity issues at the Mill Lane junction with the A422 junction there is a scheme agreed to mitigate those issues. It is also important to confirm that the assessments carried out as part of the TA [transport assessment] submitted in support of the application did assume that additional development traffic will use Mill Lane and none of assessments relied upon any traffic being reassigned away from using Mill Lane and instead routing through Buckingham for the application to be acceptable; traffic uses both routes. Having regard to the above it is not considered that inconsistent highways advice has been given in respect of Mill Lane (also

known as College Farm Road) and that the representations made do not raise any new material considerations on highways grounds to require the application to be returned to committee."

87. As to ecology, there had been further consideration and representations, with the background being the changes in the BNG assessment and the reduction in net gain (as explained earlier). The report's response at paragraph 3.31 was that this

> "is not considered to be significant and would not require the application to be returned to committee for consideration by Members since it would not represent a material change to the conclusions reached in this matter."

88. The response at paragraph 3.31 continued that changes had been made to the BNG metric and report to ensure that they reflected the baseline and indicative proposals. It was an outline scheme with all matters reserved except for access. Therefore it would only be when the final layout was known that these matters would be subject to further scrutiny through the detailed design process. The paragraph added that planning conditions were to be imposed which would require the submission and approval of ecological details, including updated biodiversity net gain calculations, mitigation for losses, and also surveys, to the council's satisfaction. The council's ecology officer was satisfied that conditions would secure the net gain to biodiversity mentioned.

89. In considering the planning balance in part 4, the report observed that the proposal accorded with the development plan and there were no material considerations that indicated a determination otherwise. It added that the adoption of the VALP strengthened the decision made by the committee and reaffirmed that the delivery of this housing allocation played an important role in delivering the required growth in the Vale of Aylesbury area.

90. In the conclusion, part 5, the report stated:

> "5.1. For these reasons the position remains as advised to members at Committee and as resolved upon by members. The additional representations made, and consultation responses received, since the application was considered by Committee do not give rise to any material change in circumstances and certainly none that might make a difference to the committee's conclusion that permission should be granted.
>
> 5.2. It is not considered necessary to refer this matter back to committee as there is no new material consideration that has arisen after the resolution to grant, which could affect or change the resolution reached by the Committee. It is concluded that were the application referred back to Committee the decision would be the same."

91. The conditions attached to the report included conditions 1 and 16, which provide that details of layout and housing mix were to be submitted and approved by the council, reflecting that this was for outline permission and the up-to-date position on housing need at the time of the submission of reserved matters.

92. Condition 20 is that the development shall be implemented in accordance with the objectives and management prescriptions detailed in the 2016 ecological enhancement plan, but that there were to be an updated ecological "walkover", and possibly further surveys prior to the commencement of development, to inform mitigation measures and site landscaping plans to maximise site biodiversity.

GROUND 1: FAILURE TO RETURN TO COMMITTEE AND/OR ERROR RE *KIDES* PRINCIPLE

93. The claimant contends that there are two errors of law under Ground 1, caused by the Council's failure to take the planning application back to the committee: (i) a breach of the Council's statutory duty in s.70(2) of the Town and Country Planning Act 1990 ("the 1990 Act") and the *Kides* principle; and (ii) an unlawful misunderstanding and misapplication of the *Kides* principle.

Legal principles

94. Section 70(2) of the 1990 Act provides that, in dealing with an application for planning permission, the planning authority shall have regard, inter alia, to (a) the provisions of the development plan, so far as material to the application and (c) any other material consideration.

95. In *R (Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370 the Court of Appeal held that an authority's duty to "have regard to" material considerations is not to be elevated into a formal requirement that with every new material consideration arising after the passing of a resolution (in principle) to grant planning permission, but before the issue of the decision notice, there has to be a specific referral back to committee. The duty is discharged if, as at the date at which the decision notice is issued, the authority has considered all material considerations affecting the application with the application in mind—albeit that the application was not specifically placed before it for reconsideration: [122]. The court added that, where a delegated officer is to issue a decision and becomes aware (or ought reasonably to have become aware) of a new material consideration, s.70(2) requires that the authority have regard to that consideration before finally determining the application: [125].

96. The Court of Appeal added that in practice, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a material consideration for the purposes of s.70(2), the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision: [126]. In passing I observe that (c) seems to go to materiality, rather than the "having regard to" aspect of s.70(2).

97. In *R (Dry) v West Oxfordshire DC* [2010] EWCA Civ 1143, Carnwath LJ observed that the guidance in paragraph [126] of *Kides* is only guidance as to what is advisable and must be applied with common sense, and with regard to the facts of the particular case: [16]. That dictum is not, however, a route to avoid the statutory requirements: *R (Hinds) v Blackpool BC* [2012] EWCA Civ 466, [35].

98. The separate legal issue of what is a material consideration in s.70(2) was identified in *Kides* as one which, when placed in the decisionmaker's scales, would tip the balance to some extent, one way or another: [121]. In *Wakil (t/a Orya Textiles) v Hammersmith and Fulham LBC* [2013] EWHC 2833 (Admin), Lindblom J reviewed *Kides*, *Dry*, and *Hinds* and said this:

> "When a grant of planning permission is challenged on the ground that the local planning authority, having resolved to approve the development proposed, ought to reconsider that decision, the court will have to consider whether the new factor relied upon in the challenge would have been capable of affecting the outcome. What is required therefore is not merely some obvious change in circumstances but a change that might have had a material effect on the authority's deliberations had it occurred before the decision was made. The crucial question for the court to consider is whether the new factor might have led the authority to reach a different decision."

99. In my view what is a material consideration must be determined in line with the contemporary jurisprudence on the subject (in as much as it differs from these authorities), namely, that this is a consideration which the rational decision-maker would regard as "so obviously material" that it must be taken into account: *R (on the application of Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52, [116]-[11], per Lords Hodge and Sales (with whom other members of the Supreme Court agreed) citing, inter alia, Lindblom LJ in *Baroness Cumberlege of Newick v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305, [20]-[26], with whom Moylan and Peter Jackson LJJ agreed. In this context it seems to me that a rational decision-maker would regard a new consideration as "so obviously material" if it was realistically capable of causing the authority to reach a different conclusion. Ultimately, this is a matter for the court, although what officers regard as material may be accepted by the court when conducting its own analysis: e.g., *R (Leckhampton Green Land Action Group Limited) v Tewkesbury* [2017] EWHC 198 (Admin), [94], [112], per Holgate J.

100. In summary, the *Kides* principle is that "having regard to" material considerations in s.70(2) is not a requirement that with every new material consideration arising after the grant of planning permission, but before the decision notice, there has to be a specific referral back to members. If at the date at which the decision notice is issued the authority has considered all material considerations with the application in mind there is no need to remit. As guidance, and in light of common sense and the circumstances of the particular case, this means that a delegated officer must be satisfied that the members are aware of the new consideration, and it has considered it with the application in mind.

101. For these purposes, a material consideration is one where the court takes the view that a rational decision-maker would regard it as "so obviously material" that it must be taken into account. In the real world not every new consideration which arises can be remitted to the authority. If no rational decision-maker would regard a consideration as

"so obviously material" that it must be taken into account, that is the end of the matter. Given the practicalities of decision-making, a delegated officer will need to take a view as to whether something is a material consideration. Ultimately it is an issue for the court to decide, but the court may find the officer's view persuasive.

1: Alleged breach of s70(2) duty and the Kides principle

102. The claimant contends that new material considerations arose in the period between 19 November 2020 when the committee made its decision and 24 March 2022, when planning permission was granted, which were not considered by the committee. Each of these would tip the balance of the decision-maker's scales to some extent one way or the other. In the claimant's submission the changes were threefold.

(a) *Reduction of developable area resulting from new BNG proposals*

103. The claimant began with the developable area which the committee considered in November 2020 - to accommodate "up to" 170 dwellings and the adopted VALP for the site, which required it to deliver "at least" 170 dwellings. The officer's report 2022 stated that the revised biodiversity net gain (BNG) proposals led to a reduction in the amount of development and noted that updated plans showed a further reduction in the number of houses to accommodate it. That reduced amount of development was confirmed by the council's ecologist, first as a result of the fourth BNG proposal, and then in the fifth BNG proposal.

104. On the claimant's case this reduction was shown in the plans, which I was taken to at the hearing. Compared with the October 2015 feasibility plan and the September 2016 illustrative landscape masterplan there was a reduction in the number of dwellings shown in the plans accompanying the fourth BNG proposals (the January 2022 illustrative landscape masterplan and the January 2022 feasibility plan) and a yet further reduction in the plans accompanying the fifth BNG proposals (the February 2022 proposed habitats plan and the February 2022 urban street planting plan). In all it was submitted that there was a reduction of 11 buildings from the planned 170 dwellings.

105. This reduction, the claimant submitted, was important. VALP policy MMO006 required the site to be developed for at least 170 dwellings, and if that was not achieved there would be non-compliance with the development plan. Further, the number of homes to be delivered by the site was important as the contribution to housing delivery - a key benefit that had been relied on in permitting the development. Finally, there was national policy in the NPPF, that planning decisions support development that makes efficient use of land and optimal use of the potential of each site. All this needed to be considered and returned to the committee.

106. These submissions need to be considered against the background that this was an outline application which approved the principle of development but where layout and scale are reserved. The configuration of housing is yet to come; the plans available are simply illustrative of how this might be brought forward. The reality is that the developer will be keen, in line with planning policy, to maximise the number of dwellings on the site. A further background factor is that the BNG calculations were part of an ongoing assessment process, a process which will continue until the reserved

matters stage. Thirdly, the inspector's fixing on "at least" 170 dwellings was in the context, as he explained at paragraph 241, quoted earlier, that consistent with government policy the council had to increase the supply of housing.

107. The reduction in the habitat unit figure from 11.51 percent as advised to the committee in the 2020 report, to 10.21 percent at the time of the decision to grant planning permission, is not in my view one that a rational decision-maker would regard as so obviously material that the committee might have reached a different conclusion on the grant of permission if they had known. That was the conclusion in the 2022 officer's report, and in my view she was right. As to the change in developable area and the number of dwellings, the committee was told in the 2020 officer's report that the development would be "up to 170" dwellings. The committee also knew that the draft allocation policy in the VALP identified the 170 dwellings figure as a minimum. As we have seen the committee considered that the application complied with the emerging VALP, and also the NPPF. The grant of outline planning permission for 170 dwellings must be seen in that light and also in light of the reality that at that outline stage the layout and hence the exact number of dwellings were yet to be determined. As with the change in the BNG figures I agree with the 2022 officer's report that this would not represent a material change.

(b) *VALP inspector re College Farm Road (Mill Lane) traffic mitigation measures*

108. The impact of the development's traffic locally was a critical issue in the determination of the application, in particular on College Farm Road (Mill Lane). The claimant explains in his witness statement how controversial traffic was. The 2020 officer's report at paragraph 4.1 also noted that the impact on traffic and congestion was a key concern. The VALP inspector dealt with it, as we have seen. The three-member call-in request in September 2021 specifically referred to this issue as one of the reasons for requesting the matter to be called-in.

109. The claimant's case is that there was a change in the stance of the council regarding traffic, which as a new material consideration should have been returned to the committee. The advice in the 2020 officer's report was that the aim of the mitigation measures was to "deter" the development's traffic from using College Farm Road. However, the claimant submits, the Council's evidence before the VALP inspector was different, and on analysis the inspector concluded that rather than deter (or "dissuade") traffic from using College Farm Road, the aim of the mitigation measures was to accommodate development traffic: see DL240. (As we have seen, the inspector referred to "discontinuities" between the two sets of advice.) In the claimant's submission, it was wrong for the officer to seek to reconcile the two sets of advice in her 2022 report. The matter should have gone back to committee. Even if the correct position was that the works would both deter and accommodate development traffic, that position would still be different from the advice given to the committee in November 2020.

110. In my judgment there is not the degree of contradiction that the claimant presents. The context of the "deter" and "accommodate" advice was different. The "deter" advice to members in the 2020 officer's report was the concern which had been raised, including from the claimant and the Maids Moreton and Foscote Action Group, about the traffic which the development would generate, in particular the impact on College Farm Road

and the need to deter traffic because of the junction of that road with the A422: see paras. 5.33, 5.35. By contrast the context of the advice to the inspector was his concern with plan making, taking account of this and other allocated sites, and whether this allocation was sound in terms, inter alia, of accommodating the inevitable increase in traffic associated with any development. That is evident in his comments at DL239-241, referred to earlier.

111. As described earlier in the judgment, the 2022 officer's report grappled in detail with the issue of what the inspector later characterised as the discontinuities of advice. That report concluded that the proposal and the advice put forward by the council for both the planning application and during the VALP hearings resulted in the same conclusions, those the inspector reached in his report. In my view, the officer was correct when she said that there was no material change in the circumstances to justify a referral back to the committee. This is not surprising since there was never any suggestion in the 2020 officer's report that all development traffic would be deterred from College Farm Lane; obviously not. Members would appreciate that additional traffic from the development would be generated, and that was why the traffic calming measures were needed, to moderate (deter) it and also to accommodate it safely, as at the junction of College Farm Road and the A422.

112. The 2020 officer's report advised that as regards traffic, if highways improvements were secured the proposal would be compliant with the emerging VALP (with modifications). The VALP was then adopted. In as much as policies T1-T3 require additional traffic from developments to be accommodated, it is unrealistic to suggest that the inspector did not appreciate that as a result of the traffic measures (which might be added to), traffic would be accommodated on College Farm Road to an extent by being deterred from using it. Overall, there was a consistency between what the committee found to be necessary in 2020 and the now adopted policies of the VALP.

(c) *Adoption of VALP*

113. Here the claimant contends that section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act") required the planning authority to reach a conclusion about the compliance of the amended proposed development with the new statutory development plan as a whole, as part of the statutory presumption in its favour. For these purposes the 2020 officer's report did not reach any conclusion on the development's compliance with the VALP taken as a whole. Moreover, the 2020 report decided the application using the "tilted balance" test in paragraph 11(d) of the NPPF. Regardless of whether the content of these policies had changed, their status and how they featured in the decision-making process set out in statute had changed radically.

114. In my view this submission has an air of unreality. Certainly section 38(6) of the 2004 Act requires that, if relevant, a determination must be made in accordance with the development plan unless material considerations indicate otherwise. But the reality is that this is what occurred. The VALP was at an advanced stage when considered by the committee. It details (as modified) were set out at paragraph 5.5 of the 2020 officer's report. Members in approving the officer's recommendation to grant planning permission in November 2020 were therefore deciding that the application was in

accordance with the then emerging VALP, in particular the principle of development and that there was compliance with relevant policies. The VALP was then adopted without change.

115. For the reasons given earlier there were no materially different circumstances when permission was granted in 2022. The claimant has not identified any way in which the application before the committee in 2020 conflicts with the adopted VALP. On various occasions the 2020 officer's report explained expressly that the development was consistent with the VALP. Examples referred to earlier in the judgment were in paragraphs 5.5 (principles of development), 5.69 (transport), and 5.102 (ecology). It is clear to me that in accepting the recommendations in the 2020 officer's report members regarded the application as in accordance with the policies in the emerging VALP (as modified), which became the adopted plan. There is therefore only the issue of weight, which goes nowhere when the VALP was adopted and in fact reinforced the committee's conclusion that permission should be granted. All this was what the officer's report of 2022 rightly concluded.

(d) The overall position

116. The claimant contends that matters (a)-(c) if they did not qualify as a material consideration by themselves did so cumulatively. In my view this adds nothing. Looking at the position overall, the committee had resolved to grant planning permission in 2020, subject to the three conditions in the resolution. What the officer had to do was to ensure those conditions were met, in particular the completion of the legal agreement. She had also to consider, applying the principle in *Kides*, whether the application should be taken back to the committee. That was what she did in the 2022 report. In my view her conclusion was correct that there was no basis to revert to the committee taking the matters (a)-(c) either individually or cumulatively.

2: Alleged misunderstanding/misapplication of Kides principle

117. The claimant contends that the 2022 officer's report fundamentally misunderstood and misapplied the *Kides* test. In considering whether there was a material change to the conclusions reached in a matter in 2020, indeed in one case (at paragraph 5.2) asking whether a new material consideration could, in the officer's view, change the outcome of the committee's decision, the 2022 officer's report was incorrectly applying the test in *Kides* by invoking a much higher hurdle.

118. As ever it is necessary with this officer's report to eschew an unduly legalistic or unduly critical approach but rather to engage in a reasonably benevolent and fair reading, taking it as a whole: *Mansell v Tonbridge and Malling BC* [2017] EWCA Civ 1314, [42], per Lindblom LJ; *R (Lee Valley Regional Park Authority) v Epping Forest DC* [2016] EWCA Civ 404, [31], per Lindblom LJ. In my view, on a fair, objective assessment of the 2022 Report (see especially paragraphs 2.11, 3.31, 5.1 and 5.2 referred to earlier in the judgment), the officer adopted an approach applying the *Kides* principle. Ultimately it is for the court when, as in this case, her decision is challenged. As I have explained, I have reached the same conclusions as she did.

GROUND 2: ALLEGED UNLAWFUL CONSIDERATION OF NEW BNG

119. The claimant accepted that although this is a separate ground there is some overlap with ground 1 on the facts. In summary this ground is that the 2022 officer's report did not consider the extent of the reduction in the developable area proposed; whether dwellings would be lost as a result; and whether the development might fall below the "at least 170" policy requirement in MMO006. This followed from the revisions to the BNG proposals and the reduction in the developable area proposed. As a matter of law, the claimant submitted, the officers failed to grapple with this issue, contrary to the *Tameside* duty (*Secretary of State for Education v Tameside MBC* [1977] 1 AC 1014); left relevant material considerations out of account, in particular compliance or otherwise with the VALP; and failed to give reasons about the issue. Even with an application for outline planning permission, a developer had to provide sufficient information to enable the local planning authority to form a proper judgment of what is proposed; *Crystal Property* (*London) Ltd v Secretary of State for Communities and Local Governme*nt [2016] EWCA Civ 1265, [5], [34], per Lindblom LJ.

120. In my view none of this goes anywhere. The *Tameside* duty sets a high threshold, and that applies in the planning context as elsewhere: see *R (Hough) v Secretary of State for the Home Department* [2022] EWHC 1635 (Admin), [92], per Lieven J. The issue is whether the inquiry made by a planning authority is so inadequate that no reasonable planning authority could suppose it had sufficient material available to grant planning permission. That cannot be said in this case, where after the revision of the BNG in 2022 the council's ecologist was satisfied that the 10 percent BNG could still be achieved, but the exact layout and location of habitat and biodiversity sites would be subject to the detailed planning stage. It is not clear to me what relevant considerations the council did not take into account, but if it is the number of houses that has been addressed already, especially in the context of an outline planning application. *Crystal Property* was a different case involving one building and details in the application were specific by comparison. The issue of compliance with the VALP has been addressed earlier.

121. The claimant also challenges the standard of reasons on this matter. It is horn book law that officers' reports need not refer to every matter, and reasons need only be briefly stated. Only if there is a genuine as opposed to a forensic doubt as to what was decided and why will a reasons challenge succeed. Here paragraph 3.31 of the 2022 officer's report, referred to above, set out how the officers, including the council's ecology officer, were satisfied that the conditions imposed on the permission were sufficient to ensure a net gain to biodiversity. I accept the council's submission that this was a rational and clearly expressed conclusion.

GROUND 3: BREACH OF A LEGITIMATE EXPECTATION

122. The claimant contends that the council had, through its express statements and past practice, made a commitment to local residents that the developer's planning application would be returned to the committee for reconsideration and the council should abide by that. There was the email of 25 January 2021 from the council's director for legal and democratic services to Ms Kate Pryke (acting on behalf of the Maids Moreton and Foscote Action Group), quoted earlier in the judgment, referring to Mr Elvin KC's legal advice stating that it was his view, accepted by the council, that some of the matters needed to be reconsidered. There was also the 24 February 2021 letter to Ms Pryke referring to the decision to refer the application back to committee.

As to past practice the claimant refers to the application having been taken back to the committee in November 2020, and to the 2 May 2019 letter to Ms Pryke, that an application would be referred back to committee if there was a significant change in policy or circumstances that would influence the decision made which the committee would need to consider.

123. To ground a legitimate expectation there needs to be a clear and unambiguous undertaking, and the authority giving the undertaking will not be allowed to depart from it unless it is fair to do so: *Re Finucane's application for judicial review* [2019] UKSC 7, [62]. The council sought to argue that none of this amounted to a clear and unambiguous undertaking to remit matters to the committee. All these statements were in some way qualified. The statements of 25 January 2021 and 24 February 2021 were on the back of Mr Elvin's legal advice, not addressed to the public, and in any event unsolicited advice not germane to the issues he had been asked to address. It was the council's intention to take the matter back to committee, but that did not constitute a promise to do so. There was no past practice.

124. The first part of the email of 25 January 2021 does not, contrary to the claimant's opinion, contain a promise to remit the matter to members, only that further consideration would be given to the implications of the inspector's intention to have a further hearing. The second part of the email refers to "any reference" back, which is somewhat equivocal. However, the letter from the council's director for legal and democratic services to Ms Kate Pryke of 24 February 2021 referred expressly to the decision to take the application back to committee. That, to my mind, is a clear and unambiguous statement that the matter will be remitted to the committee. For completeness I should add that there is, in my judgment, nothing constituting a past practice to the effect that the matter would be remitted.

125. The issue then becomes whether the council could resile from its statement to remit matters to the committee. The claimant's case is that it was unfair for the council to do so and it could not be justified. In his witness statement the claimant states that he held back from making representations both as an individual and parish councillor on the basis that he would be able to do so to the committee in person. There was no time, he adds, to make representations on the 2022 officer's report since it appeared at the same time as the grant of planning consent. For the claimant it is submitted that there were very good reasons to return to the committee given how matters such as traffic and biodiversity had moved on in the 18 months since the 2020 decision. That was quite apart from the opportunity it would afford objectors in making oral representations directly to members.

126. Where a legitimate expectation is frustrated, it is for the authority to identify any overriding interest on which it relies to justify this, and it is then a matter for the court to weigh the requirements of fairness against that interest: *Paponette v Attorney General of Trinidad and Tobago* [2010] UKPC 32, [37]. The court will ask whether that frustration was objectively justified as a proportionate measure in the circumstances: [38] (citing with approval Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, [68]). The burden is on the authority to prove that its failure or refusal to honour its promises is justified in the public interest.

127. In my view not remitting the matter to the committee was a proportionate response to a legitimate aim pursued in the public interest. The intention to refer the application back to the committee expressed in the communications with Ms Pryke was in the context of the council's expectation that the position as regards the allocation of the application site in the VALP could change, following the further hearing the inspector had scheduled. The allocation was adopted without amendment. The premise that the application would need to be remitted in light of an adverse finding on the inspector's part was removed. Given that, coupled with my findings that no material considerations had arisen in the eighteen months since the committee's decision in November 2020, there was no good reason for remission to occur.

128. Moreover, there was no unfairness to the claimant and to others such as the Maids Moreton and Foscote Action Group. It is no criticism, but the fact is that they have not missed an opportunity to make representations. The 2020 officer's report has in its appendix many pages of representations. Objectors to the application, including the claimant, made oral representations at the November 2020 meeting of the committee. The 2022 officer's report is replete with responses to representations, as well as consultant's reports, and the s.106 agreement attracted many representations as well. There was the three-member call-in request in September 2021 and the Maids Moreton and Foscote Action Group letter in early January 2022. In relation to the VALP, the inspector had convened the further hearing to which the claimant and others made representations. Finally, given that no new material considerations had arisen, it is difficult to see how further representations could have made a difference.

GROUND 4: **DELEGATED AUTHORITY EXCEEDED**

129. The claimant raises an issue of *vires*, that the decision of the officers to grant planning permission in 2022 exceeded their delegation.

130. On his case the committee's 2020 resolution confined the officers' authority to approving the planning application subject to (i) the satisfactory completion of a legal agreement to secure various matters; (ii) the securing of a district licence to address protected species; and (iii) conditions as considered appropriate by officers; or, if any of these requirements were not achieved, the application was to be refused. In other words, the claimant submitted, the resolution meant that officers could only consider whether (i) to (iii) had been met and, if so, to approve, if not, to refuse the application.

131. Instead, the claimant continued, the 2022 officer's report showed that the officers had gone well beyond their delegated authority, indeed, had reassessed the proposal's planning merits. They had assessed compliance with the new statutory development plan following the adoption of the VALP and considered the 2021 NPPF. As well they had considered alterations to the scheme, for example, those resulting from the BNG revisions, and the basis of the inspector's conclusions relating to the College Farm Road traffic mitigation. They had also considered further consultee reports and representations, for example on BNG. Yet all these powers of dealing with the application had been retained by the committee.

132. The law as to delegation was addressed by the Court of Appeal in *R (on the application of Flynn) v Southwark LBC* [2021] EWCA Civ 827. Sir Keith Lindblom SPT (with whom Baker and Lewis LJJ agreed) said that that there was nothing unusual in a local planning authority to proceed by delegating development control functions to

planning officers: [40]. An objective and realistic approach had to be taken to understanding a planning committee's decision in this regard: [41]. He added:

> "41…The court will look for the members' intention as it appears from the words of the resolution. To grasp the meaning and effect of a committee's resolution to grant planning permission, one must read it in a straightforward way, keeping in mind the relevant context. Part of the context may be an officer's report recommending the grant of planning permission, and it can generally be assumed that if the members have accepted such a recommendation they will have done so following the officer's advice."

133. He considered what was implicit in the resolution in that case: [48]. However, he added, the delegation rested in the resolution itself: [49].

134. In my view an objective and realistic approach to understanding the planning committee's delegation was that when the officers were later considering whether they should grant permission pursuant to that delegated authority, they were entitled to assess whether circumstances had changed in such a way as to require that the application be referred back to the committee. That is the relevant context. What occurred was that the officers in the present case gave careful and genuine consideration to whether the range of new material – including the many representations and consultation responses - meant that they should remit the matter. In doing this they were not engaged in matters outside the delegation but acting consistently with it through the exercise of their lawful discussion. To put it another way, they were doing what was implicit in the 2020 resolution. They cannot be said to be reassessing the planning merits.

GROUND 5: EIA SCREENING

135. The claimant advanced two broad errors in relation to the November 2015 screening opinion, the first, that there were fundamental errors in the opinion in breach of the 2011 regulations; the second, that there was an unlawful failure to review the screening decision when circumstances had changed, and new information emerged. Accordingly, the planning permission is unlawful as it was granted in breach of the 2011 Regulations.

The relevant legal principles

136. In *R (on the application of Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157, Moore-Bick LJ approved earlier authority that the decision taken on a screening opinion must be carefully and conscientiously considered and based on sufficient and accurate information. The opinion need not be elaborate but must demonstrate that the issues have been understood and considered: [11]. The limited nature and scope of a screening opinion was emphasised. Moore-Bick LJ said that it was

> "[20]…important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an

> assessment of environmental factors, among others. Nor does it involve a full assessment of any environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. [It is] important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which development is likely to have significant effects on the environment".

137. This passage was approved in *Kenyon v Secretary of State for Housing Communities & Local Government* [2020] EWCA Civ 302, [13], per Coulson LJ (with whom David Richards and Lewison LJJ agreed) emphasising the limited nature and scope of a screening opinion.

138. Moore-Bick LJ went on the say that when adopting a screening opinion, the planning authority must provide sufficient information to enable anyone interested in the decision to see that proper consideration has been given to the possible environmental effects of the development and to understand the reasons for the decision: [21]. Reasons for a decision of this nature need not be extensive, provided that they are clear: [23].

139. In this respect *Keynon* also approved the following passage in Mummery LJ's judgment in *Bateman*:

> "40. In my judgment, the decision not to have an EIA is a significantly
>
> different kind of decision from a refusal or grant of planning permission. The reasons for a preliminary administrative decision whether or not to have an EIA do not have to satisfy the same standards of information and reasoning as would apply to a substantive decision on a planning application. The degree of 'grappling' is different, more provisional and less exacting..."

(1) ***Errors in the screening opinion***

140. The claimant identified what it contended were five separate errors of law and approach in the screening opinion, so that the decision based on it was in its submission unlawful, whether the errors were taken individually or cumulatively.

(a) *Actual development not screened*

141. The claimant contended firstly that what was screened was approximately 10 percent less than the actual development proposed, in terms of both site area and the number of dwellings – the screening was 7.95ha, up to 155 dwellings, whereas the permission covered 170 dwellings with a size of 8.7ha. The scale and therefore likely impact of the proposed development was under-estimated.

142. In *R (on the application of CBRE Lionbrook (General Partners) Ltd) v Rugby BC* [2014] EWHC 646 (Admin) Lindblom J said that the concept of a development having been the subject of a screening opinion was broad enough to include a previous screening process for an earlier version of the proposal, so long as the nature and extent of any subsequent changes to the proposal did not give rise to a realistic prospect of a different outcome if another formal screening process were to be gone through: [47].

143. In my view the claimant has not demonstrated that there is such a prospect. Given what a screening opinion is designed to do, the claimant has not persuaded me that the change in the size of the proposal would make a difference to the outcome of the screening opinion. This was the situation envisaged by Lindblom J in *Lionbrook*, where there was no legal error found in relying on a screening decision relating to an earlier and different version of the proposal.

(b) *Cumulative effects*

144. Here the claimant contends that the screening opinion applied the wrong legal test for cumulative effects in that it only considered whether the development was part of a larger scheme, whereas it should have considered the possible cumulative effects with other existing, approved, or planned developments: 2011 EIA Regulations, reg,4(6), Sch.3, para.1. Quite apart from matters such as the inadequacy of Anglian Water's Buckingham centre to cope with wastewater, the inspector had noted the merging of Maids Moreton with Buckingham, and also the traffic, water, and sewerage issues which were similar in other housing allocation sites around Buckingham and had the potential for cumulative effects (in particular the Moreton Road scheme near Maids Moreton for 130 dwellings).

145. To my mind the answer to this submission is contained in what Lindblom J said in *Hockley v Essex County Council* [2013] EWHC 4051 (Admin), which was approved in *Kenyon v Secretary of State for Housing Communities & Local Government* [2020] EWCA Civ 302, [15]. In that passage Lindblom J said:

> "102. There has to be a sensible limit to what a screening decision-maker is expected to do…Conjecture about future development on other sites that might or might not act with the development in question to produce indirect, secondary or cumulative effects is not in the screening decision-maker's remit. I do not think the precautionary approach extends to that. And when it is suggested in a claim for judicial review that a screening decision was deficient because some potential cumulative effect was left out, it is not enough for a claimant simply to point to other developments in the locality that have been or might be approved, and to leave it to the court to work out whether any aggregate effects were unlikely to be significant. Unless it is obvious that relevant and potentially significant effects on the environment have been overlooked, the court will need some objective evidence to show this was so. It will need to be satisfied that the authority responsible for the screening decision was aware, or ought to have been, of the

> potential cumulative effects; that the screening opinion could not reasonably have been negative if those potential effects had been considered; and that this was, or should have been, apparent to the authority at the time."

146. Here the claimant has not provided objective evidence to show that the screening opinion would not reasonably have been negative if these potential cumulative effects had been considered. As regards any cumulative effects with sewerage and wastewater, I note in passing that Anglian Water in its 5 November 2020 report had said that it was obligated and would take the necessary steps to deal with this, and also that the highways authority in November 2018 had indicated that it would mitigate additional traffic travelling into (and through) Buckingham in the Buckingham traffic strategy.

(c) *Wrong test – substantial, not significant effects*

147. The claimant submits that the wrong legal test was applied because of references to "substantial" and "substantive" effects in the wording of the screening opinion. I agree with the council and developer that this is the kind of legalism and forensic analysis of language which was to be deprecated. In any event at the outset the screening opinion stated that it was determining "the likelihood of significant effects" and it concluded that the proposal "would not have a significant impact". In other words, the screening opinion applied the correct legal test.

(d) *Absorption capacity wrongly deferred*

148. Here the claimant submits that the wrong approach was adopted as regards issue (ii)(c) of the screening opinion, by saying in relation to absorption capacity that the impact would be assessed during consideration of the subsequent planning application. There was no careful and conscientious consideration of this issue, and the absence of sufficient information about the impact of the project to make an informed judgement meant the doubt should have been resolved in favour of requiring an EIA.

149. In my view the clause beginning "but" was an aside, not a qualification, recognising the reality that that the absorption capacity would need to be assessed during the consideration of any planning application. In the first part of that sentence the council stated a definite conclusion, that "the proposal is not considered to raise substantive issues relating to the identified criteria" in the 2011 Regulations. I accept the council's submission that the claimant's approach is a misreading of issue (ii)(c).

(e) *Inadequate reasons*

150. The claimant's last point was that the screening opinion did not contain adequate reasons explaining clearly and precisely the full reasons for its conclusion regarding whether the development was likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

151. The claimant accepts, as indeed he must, that there were comments on each of the individual criteria in Schedule 3. In my view, albeit crisp, they were adequate, in accord with their purpose (as Mummery LJ explained at paragraph [40] of his

judgment in *Bateman*). As to the claimant's point that there were no reasons given for the overall conclusion there is, in short, no need for reasons for reasons.

(2) ***Unlawful failure to review the screening decision***

152. The first issue to consider under this head is the council's assertion at paragraph 57 of its summary grounds of defence, that it had considered whether any changes since 2015 necessitated a further screening process and concluded in 2020 that they did not. The claimant challenges the truth of that assertion. Despite the claimant having raised the matter in its Reply and subsequent correspondence, his case was that there was no evidence to support the council's assertion, either disclosure of any document under the duty of candour or a witness statement. The contemporaneous evidence, the 2020 officer's report, referred only to the 2015 screening, not to any reconsideration.

153. This is a troubling issue and it is better for me to proceed on the assumption that there was no consideration in 2020 whether the conclusion in the negative screening opinion of 2015 still held. However, I cannot accept that a solicitor, knowing her duties to this court, would sign the statement of truth to the summary grounds without having been assured about the assertion at paragraph 57.

Legal principles

154. In *Swire v Ashford BC* [2021] EWHC 702 (Admin) Sir Duncan Ouseley J held, in general terms, that for an issue under regulation 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 to arise – prohibiting the grant of permission for EIA development without an EIA - there has to be a change in circumstances after a negative screening opinion and that change has to be rationally capable of leading to a change in the view that the development was not an EIA development: [79]-[84]. In coming to that conclusion, he drew on Dove J's judgment in *R (Milton (Peterborough) Estates Co) v Ryedale DC* [2015] 1948 (Admin), [40]-[43]. Specifically, where there has been no reconsideration of changes since a negative screening opinion, Ouseley J said:

> "82…the grant will still be lawful and not in breach of Reg.3, if no reasonable planning officer, having reached the screening opinion that it did, would have thought that the changes could make the development EIA development, that is one likely to have significant environmental effects. If a reasonable planning officer could have so concluded, the grant of permission will be unlawful. What would be tested is not the rationality of a conclusion or planning judgment by the officer, because there is none, but the lawfulness of the grant, in the absence of a conclusion that it was not EIA development."

The claimant's changed circumstances

155. In this case the claimant contends that a reasonable planning officer could not have concluded that notwithstanding the changes since 2015 this development was not an EIA development. The changes which the claimant contends might have led to a real prospect of a different screening outcome were eightfold, two concerning issues already addressed, the increase from 155 to 170 in the number of dwellings and the

increase in traffic. As to these it will be clear from what was said earlier that the claimant did not persuade me that the change in the size of the proposal would make a difference to the outcome of the screening opinion. As to traffic, the screening opinion had said that additional vehicle movements were unlikely to be of a substantive nature.

156. The other six changes were, on the claimant's case:

(i) The site's status as best and most versatile (BMV) land was identified in the agricultural land classification report in February 2019.

However, Natural England's high-level mapping in 2010, which the claimant accepts the Council relied on, indicated that the area was grade 3, good to moderate, and the Council's sustainability appraisal for the VALP classified it as 3a. More importantly, the classification report of 2019 concluded that loss of the land did not represent a significant loss locally or regionally in terms of BMV land. In my view none of this meant, as the claimant contends, a wholly different and incompatible conclusion was to be drawn from what the screening opinion had stated at paragraphs (i)(c) and (ii)(b).

(ii) The 2020 officer's report recognised "significant adverse visual impacts from the development".

But this of itself is misleading, since the 2020 officer's report at paragraph 5.78 went on to say that this would be in the immediate vicinity of the site – which is what the screening opinion had said at (iii)(d). Indeed, the officer's report had added that there was scope for the existing relationship between the settlement and the open countryside to be visually enhanced.

(iii) The screening opinion omitted to mention the nearby Foscote Reservoir & Wood Site SSSI, and in its report of 2020 Natural England said that without suggested mitigation the development would damage or destroy the interest features for which the SSSI had been notified.

It is hard to conceive that Aylesbury would not have been aware of such an important matter as the SSSI when preparing the screening opinion. In any event, Natural England was not objecting to the development: with appropriate mitigation it took the view, as seen earlier, that the SSSI could be protected, and advised that this might be achieved through an appropriate planning condition.

(iv) Contaminated land, omitted from the screening opinion, but contained in the report of the pollution control officer, who stated high levels of arsenic had been found.

However, the council's pollution control officer, in commenting on the consultant's report, underlined that the arsenic was naturally occurring, and while recognising that further work might be undertaken made clear that it was not considered a significant risk to human health and the levels were in line with the current guidance.

(v) Anglian Water stated on 5 November 2020 that its treatment centre did not have capacity to deal with the development, and that the development would lead to an unacceptable risk of flooding.

Again, this is only half the story. Anglian Water said it was obliged to deal with the foul flows from the development and would work with the developer to ensure any infrastructure improvements to address flooding risk.

(vi) Cumulative effects from other developments in the area, for which planning permission had been granted, particularly on traffic impacts.

In my view the objective evidence which as regards cumulative effects Lindblom J referred to in *Hockley v Essex County Council* [2013] EWHC 4051 (Admin) is not available, even as regards traffic impacts.

157. The upshot in my view is that a reasonable planning officer would not have thought these changes, such as they were, could change the outcome of the 2015 screening individually or cumulatively. In other words, a further screening would have produced the same conclusion as the 2015 screening that the development would not have significant effects on the environment.

Ground 6: Misinterpretation/misdirection on NPPF re BMV

158. Paragraphs 170 and 171 of the 2019 NPPF provided, as relevant:
"171. Planning policies and decisions should contribute to and enhance the natural and local environment by…
(b) recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of the best and most versatile agricultural land...
171. Plans should: distinguish between the hierarchy of international, national and locally designated sites; allocate land with the least environmental or amenity value, where consistent with other policies in this Framework…"
Footnote 53 to the paragraph 171 read: "Where significant development of agricultural land is demonstrated to be necessary, areas of poorer quality land should be preferred to those of a higher quality."

159. Paragraph 170(b) applied to both planning policies and decisions, whereas paragraph 171 applied to plans only.

160. The claimant contends that the 2020 officer's report at paragraphs 5.80-5.81, referred to earlier in the judgment, confused paragraphs 170(b) and 171, footnote 53, applying the significant development criterion – which the report said was greater than 20 hectares from paragraph 171 – although it had no place in relation to paragraph 170(b). In the claimant's submission the officer's report had consequently misinterpreted and misrepresented the NPPF policy and materially misled the committee. Members should have been advised that NPPF policy on BMV decisions should contribute to and enhance the natural and local environment by recognising its economic and other benefits. Instead, they were advised that the loss of BMV land was not a weighty material consideration in terms of NPPF policy as the development was less than 20 hectares and therefore not significant development. Overall this decision regarding planning permission was finely balanced, evident in the split vote in the committee. BMV was not a peripheral issue.

161. In considering these submissions, it is necessary to recall the well-known law regarding officer's reports and advice to members: first, planning officers' reports must be read not in an unduly critical way, but fairly and as a whole; and secondly, the question for the court is whether the officer has failed to guide the members sufficiently, or has significantly misled them on a material matter: *R (Lee Valley Regional Park Authority) v Epping Forest DC* [2016] EWCA Civ 404, [31], per Lindblom LJ (with whom Underhill and Treacy LJJ agreed); *R (on the application of The Co-Operative Group Ltd) v West Lancashire BC* [2021] EWHC 507 (Admin), [13], per Holgate J.

162. In this case members were told that loss of the site, 8ha of agricultural land, would be of limited weight. In two paragraphs, 5.80-5.81, they were advised that most of the site

was BMV. They were also expressly advised that they needed to consider the role of what was then paragraph 170 of the NPPF, and that paragraph 170b meant that they should take into account the economic and other benefits of BMV. So far, so good. Footnote 53 to paragraph 171 was then quoted in the text of the report, without informing them that that it was a footnote, or that it related only to plan making. They were then referred to the threshold for consulting Natural England regarding significance and that this site was under it – both points correct.

163. The result was that members were not told the full story about the guidance proffered in the NPPF. But it is important that the inaccuracy was not as to a relevant fact (or facts), or as to a statutory requirement. Further, while the loss of agricultural land was not a peripheral issue, which at one point the council seemed to suggest, the reality was that it was overshadowed by other issues such as housing supply and biodiversity, in particular by transport and traffic matters which featured over many pages and many paragraphs of the report. The reality also was that the conclusion in the 2019 consultant's report assessing the land was that the loss of the site to agriculture did not represent a significant loss locally or regionally in terms of BMV and was almost inevitable with any development in the area. In my view the report cannot be said to have contained material errors, failed to guide the members sufficiently, or significantly mislead them on a matter material to their decision.

CONCLUSION

164. For the reasons given I dismiss the claim. There is no need for me to consider the alternative way the council and developer put their case, that pursuant to section 31(2A) of the Senior Courts Act 1981 relief should be refused on the basis that it is highly likely that the outcome would not have been substantially different absent the alleged errors.