Case No: C1/2015/0091

Neutral Citation Number: [2015] EWCA Civ 537

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEENS BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE HOLGATE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 20th May 2015

Before :

LORD JUSTICE LONGMORE
LORD JUSTICE TOMLINSON
and
LORD JUSTICE SALES

- -

Between :

The Queen on the application of Luton Borough Council	**Appellant**
- and -	
Central Bedfordshire Council	**Respondent**
- and -	
(1) Houghton Regis Development Consortium	
(2) Lands Improvement Holdings Limited	
(3) Landmatch Limited	
(4) Friends Life Limited	
(5) St Albans Diocesan Property Company Limited	**Interested Parties**

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(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Peter Village QC & Mr Andrew Tabachnik (instructed by **Winckworth Sherwood LLP**) for the **Appellant**
Ms Saira Sheikh QC (instructed by **Central Bedfordshire Council**) for the **Respondent**
Mr Martin Kingston QC & Mr Hugh Richards (instructed by **King & Wood Mallesons LLP)** for the **Interested Parties**

Hearing date : 6 May 2015

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Judgment

Lord Justice Sales:

Introduction

1. This is an appeal in relation to a judgment of Holgate J – [2014] EWHC 4325 (Admin) ("the judgment") – in which he refused an application by the appellant ("Luton BC") for judicial review of a grant of planning permission by Central Bedfordshire Council ("CBC"). The planning permission was formally granted by CBC on 2 June 2014, pursuant to a decision made by its planning committee at a meeting on 4 September 2013.

2. The permission granted by CBC is for outline planning permission for a major development on 262 ha of open fields immediately to the north of the Luton/Dunstable/Houghton Regis conurbation, lying between the existing conurbation and a major road, the M1-A5 link road. The grant of planning permission was conditional on, and accompanied by, an agreement with the interested party developers under section 106 of the Town and Country Planning Act 1990 ("the section 106 agreement") in which the developers agreed, among other things, to make financial contributions to the infrastructure in respect of the development and to provide a degree of affordable housing within the development. It is because Luton BC is concerned that the amount of affordable housing agreed to be provided is too low that these judicial review proceedings have been brought.

3. The development site is known as the Houghton Regis North Site 1 ("HRN1"). HRN1 is an area which is currently designated as Green Belt in CBC's local development plan. The site is to be developed as a coherent whole. It is to be primarily residential, with some employment use at the sides and a degree of mixed and retail uses within the residential areas to create good local amenities within the development.

4. The claim came before Holgate J to be heard on a "rolled up" basis, to consider both whether to grant permission to apply for judicial review and, if granted, whether the claim was made out on the substantive merits. There were ten grounds of claim (or groups of grounds of claim) advanced before the judge. In a careful and thorough judgment, he held that four of the ten grounds of claim were unarguable, so that permission would have been refused in relation to them, and he found that none of the other grounds was made out on the substantive merits. He therefore dismissed the claim.

5. Luton BC and CBC had agreed that there should be no costs order made as between them, but no such agreement had been made with the interested parties. The judge awarded the interested parties the costs of preparation of their acknowledgement of service and summary grounds of resistance, in line with the guidance in *R (Mount Cook Land Ltd) v Westminster City Council* [2004] 2 P&CR 22, at [76], and *R (Kenyon) v Wakefield Council* [2013] EWHC 1269 (Admin). He summarily assessed the costs to be paid to the interested parties at £7,000.

6. Sir Robin Jacob granted Luton BC permission to appeal. On its appeal, Luton BC has confined itself to appealing in relation to (in the order the argument was presented) Grounds 1, 3, 5, 2 and 10 of the grounds advanced at first instance, and in relation to the costs order made in favour of the interested parties. Ground 2, as expanded before us, included some elements of what had been Ground 8 before the judge.

7. We were assisted in our consideration of the appeal by the clarity of Holgate J's judgment. After hearing a full opening of the appeal by Mr Village QC for Luton BC, we decided that the appeal should be dismissed. We announced that result and indicated that our reasons would follow in a written judgment. This is the judgment to set out our reasons for dismissing the appeal.

Factual background

8. A full account of the factual background appears from Holgate J's judgment and it is unnecessary to set it out in full detail here. For present purposes, the salient elements of the factual background are as follows.

9. For a considerable period, the site at HRN1 has been identified in policy terms as part of an area in which regeneration through development is a priority: see paras. [10]-[40] of the judgment.

10. Under the previous Regional Spatial Strategies planning regime, in 2011 Luton BC and CBC co-operated to produce a draft Joint Core Strategy for their combined areas ("the Joint Core Strategy"): see paras. [23]-[28] of the judgment. The Joint Core Strategy was developed by Luton BC and CBC to the stage where it was submitted to the Secretary of State for examination by an inspector. Under the Joint Core Strategy, HRN1 was to be allocated for residential and other development, with the boundary of the Green Belt to be altered to the outer edges of the site formed by the M1, the A5 and the A5-M1 link road. The idea was that these major roads would provide a natural boundary for the Green Belt and a barrier against further encroachment upon it.

11. Mr Village confirmed that the Joint Core Strategy included a proposed policy in respect of affordable housing on new residential developments brought forward in the areas of Luton BC and CBC to the effect that 30% of the proposed dwellings should be of affordable housing type, and that if less affordable housing than that were proposed by a developer, then the reduction would have to be justified by a financial viability statement (i.e. to explain why provision of affordable housing at that level would make the development commercially unviable), which would be reviewed by the relevant planning authority.

12. In September 2011, Luton BC withdrew its support for the Joint Core Strategy, which was then abandoned and not brought into effect. Luton BC's reasons for withdrawing its support for the Joint Core Strategy were not related to any disagreement regarding the designation of HRN1 as a site for residential and commercial development and the re-drawing of the boundary of the Green Belt to accommodate it: para. [28] of the judgment. It should be noted that if the Joint Core Strategy had been adopted and the designation of the Green Belt area changed in accordance with it, applications for planning permission in relation to HRN1 would not have been required to satisfy the very strict criteria to justify development on Green Belt land.

13. Under the revised planning regime which replaced the Regional Spatial Strategies regime in 2012, CBC did work to draw up a new draft Development Strategy for its area ("the Development Strategy"): see paras. [29]-[35] of the judgment. This work included a Sustainability Appraisal ("the Sustainability Appraisal") which accompanied the Development Strategy. The Development Strategy again allocated HRN1 for residential and commercial development and included a policy in respect of

affordable housing equivalent to that in the Joint Core Strategy. It was again proposed to re-draw the boundary of the Green Belt to take the HRN1 site out of the Green Belt area.

14. The Sustainability Appraisal included a comparative examination, by reference to a number of planning criteria (Constraints, Green Belt/Coalescence Issues, Deliverability, Suitability, Accessibility and Relationship to Housing Need), of 41 sites in CBC's area which were possible candidates for residential development to meet the projected housing requirements of the area for the years ahead. HRN1 was identified as site 18. The other relevant site for present purposes is site 8, an area to the west of Luton. HRN1 was found to score significantly better than site 8 in relation to all of the criteria save Relationship to Housing Need, in relation to which they scored the same. Overall, HRN1 was assessed as (light) green as a candidate for development (i.e. no significant concerns identified, with some positive impacts) whereas site 8 was assessed two levels below that, as amber (some concerns and/or constraints identified). Significantly, site 8 was assessed as having a red (i.e. the most highly negative) rating in relation to Green Belt/Coalescence Issues and Accessibility.

15. Luton BC has a complaint that CBC failed to comply with its duty to co-operate with Luton BC, under section 33A of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"), in respect of cross-boundary housing matters affected by CBC's Development Strategy, but that complaint was not a matter raised in these proceedings: see para. [35] of the judgment. Luton BC has pursued that complaint with the inspector appointed by the Secretary of State to review the Development Strategy under section 20 of the 2004 Act and we were shown a letter dated 16 February 2015 from the Inspector setting out his ruling that CBC had failed to comply with its duty under section 33A. We were also told that CBC had commenced judicial review proceedings against the inspector to challenge that ruling. It was, however, common ground that none of this had any direct bearing on the lawfulness of CBC's decision in question in these proceedings, which preceded these events by many months. Nonetheless, Mr Village said that the fact that the inspector had made this ruling illustrated the importance of the procedure for modification and adoption of development plan documents, involving as it does independent scrutiny by an inspector.

16. By representations dated 10 September 2012, Luton BC commented on CBC's draft Development Strategy, which had been put out for consultation. Luton BC said that it welcomed the Development Strategy, "which proposes a significant level of development to deliver sustainable new communities close to Luton" (i.e., in particular, by the development of HRN1 which was contemplated under the Development Strategy). Luton BC drew attention to its substantial housing requirements in the next 20 years and urged consideration "to be given to looking at all possibilities for extra growth near to Luton, including to the west, in order to help address Luton's housing need." It is clear that this was not being proposed as an alternative to development of HRN1, but as a request for CBC to bear in mind that Luton BC would have housing needs over and above those which could be met from development of HRN1 and would therefore want there to be residential development close to Luton which would be additional to that at HRN1. Luton BC objected to aspects of the Development Strategy, maintaining that it did not properly address Luton BC's legitimate concerns in various respects. It said that in light of this "the

emerging proposals adjacent to the conurbation [i.e. for development of HRN1] will no longer be able to demonstrate the exceptional circumstances required to justify the removal of the green belt designation."

17. CBC was not persuaded by Luton BC's representations. On 14 January 2013, CBC promulgated its Development Strategy as a pre-submission stage document for a further round of consultation prior to finalising it for submission to the Secretary of State.

18. Meanwhile, on 24 December 2012 the application for planning permission for HRN1 was submitted to CBC. The developers proposed an obligation under the section 106 agreement to provide an element of affordable housing of a minimum of 10% of the dwellings to be constructed, but potentially rising to up to 30% pursuant to a review mechanism based upon the sales figures actually achieved. Despite the review mechanism, Luton BC considers that the likely outcome will be provision of affordable housing at well below the 30% level. It is very worried by this, because it has an estimated requirement of affordable housing in the coming years well above what will be met from this and is subject to a highly constrained environment in planning terms in the vicinity of the Luton/Dunstable/Houghton Regis conurbation, which means that it is particularly important to it that the maximum amount of affordable housing should be extracted from the HRN1 site to meet that requirement.

19. The developers' interest is to seek to keep the affordable housing requirement element in the development at a low level. They submitted a viability statement in order to justify the amount of affordable housing which could be contributed in relation to the development, having regard to development and infrastructure costs which they would also be required to meet. The contribution the developers would be making to infrastructure in relation to the development included a contribution of £45 million in respect of improvements to the important A5-M1 link road at the northern boundary of HRN1. The viability statement submitted by them was subjected to review by expert consultants instructed by CBC: para. [36] of the judgment. On the basis of the material submitted by the developers and that review, CBC was satisfied that the developers had justified the comparatively low level of affordable housing which they proposed to undertake to provide in connection with the development. In CBC's view, there were other powerful public interest reasons related to the regeneration of its area and meeting future housing requirements for it to consider that planning permission should be granted for the scheme on a basis which would mean that it was commercially viable and hence likely to be implemented.

20. At first instance, Luton BC maintained as a ground of challenge to the grant of planning permission that CBC had unlawfully failed to make the materials in relation to the viability assessment available to Luton BC to enable it to make representations thereon (Ground 7). Given Luton BC's interest in the affordable housing to be provided as part of the HRN1 development, I can understand why Luton BC was concerned that it did not have that opportunity. However, the judge examined its complaint under Ground 7 and determined that it had not been made out: see paras. [170]-[196] of the judgment. Luton BC has not sought to pursue an appeal in relation to this part of the judgment.

21. It is not suggested that CBC failed to make a rational assessment of the effect of the viability statement, nor that it reached an irrational conclusion when it concluded that

it was persuaded that a proper justification had been made out for the developer to undertake to provide an element of affordable housing which could be below (and possibly substantially below) the 30% level. I observe that provision of affordable housing at a level less than 30%, if properly justified by a viability assessment (as CBC was rationally entitled to say had been done in this case), is something which is in line with the affordable housing policy which Luton BC and CBC had agreed was appropriate when the Joint Core Strategy was promulgated and which CBC had included in its draft Development Strategy.

22. In the consultation on the pre-submission draft of the Development Strategy, Luton BC continued to raise objections, particularly in respect of access to affordable housing and mitigation of transport impacts in relation to the HRN1 development. Luton BC did not object to the development as such, but maintained that unless its concerns were met, particularly in relation to provision of affordable housing in the development, then the proposed development would not meet the criteria for removal from the Green Belt. In parallel with its response to this consultation, Luton BC objected to the grant of planning permission for the development of HRN1 pursuant to the developers' application of 24 December 2012.

23. Luton BC's representations at this stage included representations dated 15 April 2013 in which, among other things, Luton BC said:

> "Luton's previous comments in September [i.e. its representations dated 10 September 2012] requested that [CBC] should look carefully at all options for accommodating additional growth to the west of Luton due to its proximity to areas of particular housing shortage within Luton. Luton is of the view that this exercise has not been undertaken in a meaningful way."

24. CBC remained unpersuaded by Luton BC's representations, both in relation to the Development Strategy and in relation to the application for planning permission.

25. CBC's view was that there were strong public interest reasons why the development of the HRN1 site should proceed. It considered that there were "exceptional circumstances" which justified changing the boundaries of the Green Belt, as proposed in the Development Strategy, to remove the HRN1 from the Green Belt (see para. 83 of the National Planning Policy Framework – "the NPPF" – set out below). CBC therefore proceeded formally to promulgate its Development Strategy and to submit it to the Secretary of State for examination by an inspector.

26. In parallel with this, CBC considered the application for planning permission. At this stage, HRN1 remained part of the Green Belt (since the Development Strategy had not emerged from the examination process under the 2004 Act and had not been adopted as the new development policy for CBC's area). CBC therefore considered whether "very special circumstances" existed such as would justify overriding the strong national policy in favour of preserving the integrity of the Green Belt (see paras. 87-88 of the NPPF, set out below). It concluded that "very special circumstances" did exist to justify the proposed development of HRN1, notwithstanding that it was part of the Green Belt. CBC therefore decided to grant the

planning permission for that development which is the subject of the present legal challenge.

27. The principal review document prepared for CBC's planning committee in relation to the application for planning permission was an officer's report dated 14 August 2013 ("the August 2013 OR") prepared for a committee meeting due to take place on 28 August 2013. The contents of the August 2013 OR are reviewed in detail at paras. [65]-[89] of the judgment. It is not necessary to set out extensive quotations from the August 2013 OR in this judgment. In summary, the August 2013 OR:

    i) referred to the long history of policy seeking to promote regeneration of the area through growth of the conurbation by development of HRN1, with relevant adjustment of the boundaries of the Green Belt to accommodate this;

    ii) drew attention to the fact that there had been very few objections to the principle of development of the HRN1 site;

    iii) recommended that limited weight should be given to the current adopted Development Plan for the area, due to its age, while advising that the development proposals complied with the NPPF and the emerging Development Strategy;

    iv) advised that there would be harm to the Green Belt caused by the development, but that there were "very special circumstances" that could properly be taken into account. It was emphasised that the committee should give careful consideration to whether it would be premature to grant permission for the development in advance of the completion of the procedure for examination of the Development Strategy and its formal adoption, so as to remove the site from the Green Belt designated in the relevant local plan: see, in particular, paras. 1.3 and 11.4;

    v) advised that the NPPF required CBC to consider carefully the commercial viability of the development proposals and that proper justification had been given by the developers in current economic conditions for an affordable housing obligation less than CBC would normally expect as part of a major new development; and

    vi) recommended that permission should be granted for the development, subject to making of the section 106 agreement.

28. The August 2013 OR set out comments from CBC's Strategic Planning and Housing Team Leader which emphasised that:

> "determining a planning application of this scale in advance of the plan-making process being completed should not be done lightly, if the integrity of the plan-led system is to remain. There would need to be significant benefits to the public interest to justify such a decision."

His comments went on to refer to the absence of significant objections to the principle of development at HRN1 and to the fact that "it appears to be highly suitable for

development, as set out in the Sustainability Appraisal", given "the size of the site, its location adjacent to an area of high housing demand, its ability to deliver key road infrastructure to the benefits of the wider area and the relative lack of constraints." He stated,

> "In my view, it is very difficult to envisage a strategy to meet housing needs that does not include, in some form, development of this site. This should be considered in relation to the question of prematurity."

29. Section 3 of the August 2013 OR was a review of the significance of the Green Belt in relation to the application. Paragraph 3.1 noted that there was a substantial body of evidence reviewed in the course of development of the emerging Development Strategy to the effect that it would be appropriate to remove the Green Belt designation to allow for the urban expansion proposed at HRN1, but stated that since the Development Strategy was not in place "it falls to the Council to determine whether 'very special circumstances' exist for this development to proceed."

30. Paragraph 3.10 identified matters which could be considered to constitute "very special circumstances" in favour of granting permission: a clear urgent need for development in the Green Belt to meet immediate housing and economic needs in the area, the policy history (including in the emerging Development Strategy) identifying HRN1 as a site suitable for removal from the Green Belt and for residential development, the contribution of £45 million that the developers would make to the construction of the M1-A5 link road (which had been identified as a key national infrastructure project), and:

> "(6) No formal Local Plan has been adopted since 2004, despite the clear continuing identification of the site in replacement planning policy documents. If subsequent Development Plan documents had reached adoption stage, then the application site would already have been allocated for residential development and removed formally from the Green Belt. Delaying a decision or refusing the planning application on Green Belt grounds until the adoption of the Development Strategy and the formal confirmation of the planning allocation in the Development Plan will serve no good purpose, other than to delay much needed housing and employment opportunities for the area, and set back the delivery of the M1-A5 link road and Junction 11a works to the M1 that is considered a nationally important infrastructure project."

31. Section 4 of the August 2013 OR dealt with the Joint Core Strategy which had previously been agreed between Luton BC and CBC and advised that the planning committee could reasonably give some weight to the fact that the proposed development complied with the policies which had been set out in that draft plan document, which were also repeated in the emerging Development Strategy.

32. Section 5 of the August 2013 OR dealt with the Development Strategy and explained that the proposed development was in compliance with the policies set out in it. Paragraph 5.35 stated as follows:

> "Taking all of the above policy analysis in previous sections into account, the Committee is advised to give substantial weight to the pre-submission Development Strategy …. The reason is that the Development Strategy has been written to be in accordance with national planning policy as set out in [the NPPF]."

33. Section 7 of the August 2013 OR comprised a discussion of various parameters in relation to the application, including the amount of space for office use, retail use and leisure and facilities use. Section 8 included a discussion of the issues of affordable housing and the retail proposals and their impact on other centres. Paragraphs 8.35 to 8.37 referred to the fact that the developers had submitted a retail assessment with their application which showed that the amount of retail use exceeded what would be required simply in respect of the additional population who would live in the new housing to be built on HRN1, but which explained that there would be various benefits associated with such retail development and that there was no clear evidence of any significant detrimental impact on town centres. Paragraph 8.46 also referred to detrimental impacts upon the viability of the development if the amount of retail and other non-residential use of HRN1 were limited below what the developers proposed, and recommended that no such limitation should be imposed.

34. Section 9 of the August 2013 OR comprised a discussion of the need for a section 106 agreement, including a viability appraisal in relation to what could reasonably be expected to be provided by the developers by way of an obligation to make affordable housing and infrastructure contributions.

35. Section 11 of the August 2013 OR was the conclusion section. It pointed out that the development proposal was a critical part of a larger strategy to provide growth in CBC's area and accommodate the needs of the Luton/Dunstable/Houghton Regis conurbation; referred to the need to balance a range of competing considerations (including commercial viability, loss of Green Belt and the need for housing and economic growth); again referred to the assessment that the scheme was insufficiently commercially viable to be able to support a full 30% requirement for affordable housing; and included the following at para. 11.4:

> "The Committee will wish to take into account that the planning application has been submitted in advance of the adoption of the Development Plan, in which the site is an allocated strategic development site proposed for removal from the Green Belt. However, it should also be recognised that the now revoked Regional Spatial Strategy for the East of England and the withdrawn Joint Core Strategy both identified the site as being suitable for removal from the Green Belt in order to help meet housing and employment need. The evidence base shows there is nowhere else more suitable for the growth to go. In considering the very special circumstances in relation to development in the Green Belt, it is concluded that the tests have been met. It assists in delivering the A5-M1 link road. It is recognised that the planning application is critical locally, regionally and nationally in helping to boost much needed housing, infrastructure provision and economic investment."

36. Though not expressly referred to in para. 11.4, the evidence base referred to was primarily that in the Sustainability Appraisal. Mr Village submitted that it could not be assumed that members of the planning committee were aware of the Sustainability Appraisal. He submitted that the August 2013 OR (in particular, para. 11.4) did not provide them with proper assistance in understanding what the evidence base was.

37. I do not accept these submissions. It is well established that officers' reports in relation to planning matters are taken to be directed to an informed readership, in the form of the planning committee of a planning authority: see, e.g., *R (Siraj) v Kirklees MBC* [2010] EWCA Civ 1286, at [19] per Sullivan LJ. There is an obvious inference to be drawn that the planning committee of CBC were well aware of the Sustainability Appraisal, since CBC was in the course of seeking to have the related Development Strategy approved and adopted in parallel with its consideration of the application for permission to develop HRN1. There can have been few, if any, matters of greater prominence and importance for planning committee members at this time. There is nothing to displace the usual presumption that planning committee members are familiar with significant matters affecting planning policy and planning decisions in their area. In fact, CBC's Strategic Planning and Housing Team Leader had referred in terms to the Sustainability Appraisal in his comments as set out in the August 2013 OR, and planning committee members would have known to look at the Sustainability Appraisal if they needed to check in relation to the evidence base referred to in para. 11.4 of that report.

38. Just before the August 2013 OR and the application for planning permission were considered by CBC's planning committee at its meeting scheduled for 28 August 2013, Luton BC sent a letter dated 27 August setting out objections to the grant of planning permission. These included objections by reference to the limited proposed obligation to provide affordable housing and on the basis that to grant permission would be premature and would improperly prejudice the consideration of the soundness of the Development Strategy through the development plan review process under section 20 of the 2004 Act. Luton BC maintained that because there were substantial unresolved objections which it had made to the emerging Development Strategy, which had not yet been ruled upon by the inspector who was to conduct an independent examination of the Development Strategy, the policies in the Strategy should be accorded little weight. In support of that contention, Luton BC referred to paragraphs 17-19 of the Planning System General Principles (ODPM 2005) and para. 216 of the NPPF (all set out below).

39. The meeting of CBC's planning committee was postponed until 4 September 2013 and CBC's officers prepared further advice for the committee, including a document entitled "DMC Briefing Note" (termed the September 2013 OR in the judgment) which commented on the issues raised by Luton BC in its letter of 27 August.

40. Section 6 of the September 2013 OR set out the response by officers to Luton BC's contention that the development on Green Belt land was not justified and their advice that there were matters amounting to "very special circumstances" such as to justify the grant of planning permission for HRN1, even though it was within the designated Green Belt. In this section, officers included the following as a relevant consideration:

> "The fact that this area of land is identified for development within the emerging Development Strategy (the significance

> that can be attributed to this … consideration must be limited by reason of the fact that there are currently objections to the identification of the site in the Development Strategy – in particular from [Luton BC]).”

41. Section 7 of the September 2013 OR set out the response by officers to Luton BC’s contention that it would be premature for CBC to grant planning permission for the development of HRN1, including by reference to para. 216 of the NPPF and national planning guidance. Officers advised that, in view of the pressing need for housing and infrastructure development, the delay likely to arise in respect of consideration and adoption of the new Development Strategy and Luton BC’s longstanding support for development at HRN1, it would not be premature to grant planning permission. They referred to the planning guidance set out by Luton BC in its letter, and observed that this required a balanced judgment to be made whether determination of the planning application would unacceptably prejudice the emerging development plan: their advice was that it would not.

42. At their meeting on 4 September 2013, CBC’s planning committee resolved to grant planning permission conditional upon the making of an appropriate section 106 agreement.

43. By letter dated 7 October 2013, Luton BC wrote to the Secretary of State to invite him to consider exercising his powers under section 77 of the Town and Country Planning Act 1990 to call in the application for planning permission and to determine it himself. Luton BC referred to, amongst other things, the Green Belt issues which existed and argued that there was a prematurity objection to determination of the application in advance of the conclusion of the examination of the Development Strategy under the 2004 Act. In that context, in support of its prematurity objection, Luton BC referred for the first time to para. 83 of the NPPF and submitted that a decision by CBC to grant planning permission would be in conflict with that provision of the NPPF. The letter was copied to CBC.

44. In January 2014 the Secretary of State declined to call in the application for decision by him. The decision letter stated:

> “[The Secretary of State] considers that in the particular circumstances of this case, that the proposals have been included in emerging strategies, frameworks and plans over the last 10 years, the area’s housing and economic needs and given the support for the development locally, he is persuaded that the application should be determined at the local level.”

45. On 2 June 2014, the section 106 agreement was entered into and CBC granted planning permission for the development of HRN1.

Relevant planning policy and guidance

46. Section 9 of the NPPF is entitled “Protecting Green Belt land” and sets out national planning policy on that subject. This includes paragraphs 83 and 87-88, as follows:

> "83. Local planning authorities with Green Belts in their area should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy. Once established, Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review of the Local Plan. At that time, authorities should consider the Green Belt boundaries having regard to their intended permanence in the long term, so that they should be capable of enduring beyond the plan period.
>
> …
>
> 87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

47. Paragraph 216 of the NPPF provides:

> "216. From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:
>
> ● the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
>
> ● the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
>
> ● the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

48. Paragraphs 17-19 of the Planning System General Principles (ODPM 2005), under the heading "Prematurity", provided as follows:

> "17. In some circumstances, it may be justifiable to refuse planning permission on grounds of prematurity where a DPD is being prepared or is under review, but it has not yet been adopted. This may be appropriate where a proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by predetermining decisions about the scale,

location or phasing of new development which are being addressed in the policy in the DPD. A proposal for development which has an impact on only a small area would rarely come into this category. Where there is a phasing policy, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have effect.

18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications should continue to be considered in the light of current policies. However, account can also be taken of policies in emerging DPDs. The weight to be attached to such policies depends upon the stage of preparation or review, increasing as successive stages are reached. For example:

• Where a DPD is at the consultation stage, with no early prospect of submission for examination, then refusal on prematurity grounds would seldom be justified because of the delay which this would impose in determining the future use of the land in question.

• Where a DPD has been submitted for examination but no representations have been made in respect of relevant policies, then considerable weight may be attached to those policies because of the strong possibility that they will be adopted. The converse may apply if there have been representations which oppose the policy. However, much will depend on the nature of those representations and whether there are representations in support of particular policies.

19. Where planning permission is refused on grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process."

49. This was the relevant guidance at the time of the meeting of CBC's planning committee on 4 September 2013, as set out in Luton BC's letter of 27 August 2013. This guidance has since been replaced by "The Planning System: General Principles", which was the guidance in place when the planning permission for development of HRN1 was granted in June 2014. But there has been no material change in the guidance on the question of prematurity in deciding applications for planning permission.

50. It was common ground that a planning authority may refer to emerging development plans as material considerations relevant to determination of applications for planning permission, within the meaning of section 38(6) of the 2004 Act.

Discussion

Ground 1: paragraph 83 of the NPPF

51. By Ground 1, Luton BC submits that CBC failed properly to take into account para. 83 of the NPPF when deciding to proceed to grant planning permission and in rejecting Luton BC's contention that it was premature for it to do so. The judge rejected this ground of challenge at paras. [100]-[110] of the judgment. In my view, he was right to do so.

52. Mr Village submitted that the judge erred, because he failed to give proper weight to what he described as "the injunction" in para. 83 of the NPPF that Green Belt boundaries should only be altered in exceptional circumstances, through the preparation or review of the Local Plan. According to Mr Village, para. 83 gives clear priority to the process for development and adoption of local plans when issues of changing Green Belt boundaries arise; the practical effect of a grant of planning permission in this case was to change the boundary of the Green Belt; and so it was premature for CBC to grant planning permission before the designation of the Green Belt in the relevant local plan had been changed (if that ever happened) through the adoption of the Development Strategy to amend the local plan. Or, at the very least, if the planning committee wished to depart from the guidance in para. 83 it should have considered that paragraph directly and identified good reasons for doing so. But the August 2013 OR did not advise committee members of the injunction in para. 83, and did not identify any good reason for departing from it. Mr Village says that CBC's officers should have drawn the attention of committee members to para. 83 even though at the time of the meeting on 4 September 2013 no-one, including Luton BC, had referred to it in representations made in relation to CBC's consideration of the application; alternatively, once CBC's officers saw para. 83 referred to in support of Luton BC's prematurity argument in its letter dated 7 October 2013 to the Secretary of State, they had a duty to draw the attention of the planning committee to it before planning permission was formally granted on 2 June 2014 (and in that regard he relied upon *Kides v South Cambridgeshire DC* [2002] EWCA Civ 1370; [2003] 1 P&CR 19).

53. In my judgment, Mr Village's submission confuses two different processes and seeks to attach greater weight to para. 83 than it can bear in the present context.

54. The second sentence of para. 83 of the NPPF provides guidance regarding the approach to be adopted if there is a proposal to alter the boundaries of the Green Belt in a local plan: exceptional circumstances have to be shown to justify such a course. But paras. 87-88 of the NPPF provide guidance regarding the approach to be adopted if there is a proposal for development of an area within the Green Belt set out in a local plan: "very special circumstances" have to be shown. This is a stricter test than that in para. 83 in respect of changing the boundaries of the Green Belt in the local plan.

55. Paragraph 83 does not lay down a presumption or create a requirement that the boundaries of the Green Belt must first be altered via the process for changing a local plan before development may take place on the area in question. Paragraphs 87-88 plainly contemplate that development may be permitted on land within the Green

Belt, without the need to change its boundaries in the local plan, provided "very special circumstances" exist.

56. Nor does para. 83 somehow create a presumption that the boundaries of the Green Belt must first be altered by changes to the local plan (effected through the local plan development process, which includes independent examination by an inspector) before permission for development can be given, in a case where (as here) there is a parallel proposal to alter the boundaries of the Green Belt set out in the local plan. Whilst it may be easier to proceed in stages, by changing the local plan to take a site out of the Green Belt (according to the less demanding "exceptional circumstances" test) and then granting permission for development without having to satisfy the more demanding "very special circumstances" test, there is nothing in para. 83 (read in the context of the entirety of section 9 of the NPPF) to prevent a planning authority from proceeding to consider and grant permission for development on the land in question while it remains within the designated Green Belt, provided the stringent "very special circumstances" test is satisfied.

57. The August 2013 OR properly emphasised to members of the planning committee that they could only grant planning permission for development of HRN1 if they were satisfied that the "very special circumstances" test was satisfied. There was no misdirection or material error as a result of the omission of a reference to para. 83 of the NPPF in the officer's report. In the particular circumstances of this case, there was a proper basis on which the planning committee could lawfully and rationally conclude that "very special circumstances" existed to the requisite standard to justify the grant of planning permission for development of HRN1.

58. There was, of course, an issue regarding the interaction of the local plan development process and the application for planning permission which required consideration, namely whether it would be premature to grant planning permission in respect of the development of HRN1 in a manner which might well in practice pre-empt (by development on the ground) the decision to be taken in the context of the development of the local plan through review of the Development Strategy proposals to alter the boundary of the Green Belt so as to remove HRN1 from it. However, this issue was properly drawn to the attention of the committee and discussed in the August 2013 OR and the September 2013 OR. Their attention was drawn to the relevant policy guidance in paras. 17-19 of the "Planning System General Principles" and para. 216 of the NPPF. As the judge correctly held, the prematurity issue was addressed in sufficient depth in the reports before them: paras. [109]-[110] of the judgment. The planning committee were lawfully and rationally entitled to decide, in the particular circumstances of the case, that there was no sound prematurity objection to the grant of planning permission.

Ground 3: challenge to paragraph 5.35 of the August 2013 OR and the weight given to CBC's pre-submission draft Development Strategy

59. Under this Ground, Mr Village argues that CBC's planning committee failed to take into account and apply para. 216 of the NPPF, set out above. In particular, he says that the August 2013 OR failed to draw attention to the fact that there were significant unresolved objections by Luton BC to the draft Development Strategy which remained for examination through the independent review process pursuant to section 20 of the 2004 Act. The committee were misled into attaching too much weight to the

draft Development Strategy and/or reached an irrational view as to the weight to be attached to it.

60. The judge dismissed this ground of challenge at paras. [120]-[136]. In my view, he was right to do so.

61. The planning committee had their attention specifically drawn to para. 216 of the NPPF by Luton BC's letter of 27 August 2013 and the September 2013 OR. The August 2013 OR assessed the weight to be given to the emerging strategy by reference to the stage it had reached: paras. [122]-[123] of the judgment. Accordingly, the first criterion in para. 216 was both identified and properly addressed.

62. Similarly, the second criterion in para. 216 was identified and properly addressed in the officers' reports. Luton BC's letter of 27 August 2013 referred to Luton BC's unresolved objections to the draft Development Strategy and was commented on in the September 2013 OR, which expressly explained that the significance that could be attributed to the allocation of HRN1 in the Development Strategy should be treated as limited by reason of the unresolved objections to it which remained to be determined. But the planning committee were still lawfully entitled to attach substantial weight to the draft Development Strategy, as invited to do in para. 5.35 of the August 2013 OR, as the judge correctly held at para. [124] of the judgment.

63. The planning committee did not act irrationally in accepting that advice. It was a matter for their planning judgment, and there were proper grounds on which they could lawfully consider that the allocation in the draft Development Strategy of HRN1 for development was a matter which merited being given substantial weight. These included Luton BC's previous acceptance of the principle of development of the site in the Joint Core Strategy, the continuity of the Development Strategy with previous policy, the absence of strong objections to the principle of development of the site and the work which CBC had undertaken in the course of drafting and consulting on the draft Development Statement to get it to the stage where it was ready to be submitted to the Secretary of State for examination (see para. 5.1 of the August 2013 OR).

64. Mr Village argued that it was irrational for CBC to give weight to the draft Development Strategy, reflecting CBC's own preparation work and reasoning in drawing it up, because in substance CBC was "marking itself", i.e. was deciding to treat its own work as valid, at a stage before it had been subject to independent review by an inspector under section 20 of the 2004 Act.

65. I do not agree that this feature of the case discloses any irrationality or unlawfulness of approach on the part of CBC. Having done background work sufficient to prepare what it regarded as a valid and sustainable Development Strategy fit for submission to the Secretary of State and review by an inspector, there was nothing irrational in CBC attaching weight to the Development Strategy to reflect that work (among other things), in the context of the decision which CBC (not an inspector) had to take in respect of the application for planning permission. CBC was entitled to give the weight it did to the Development Strategy in the exercise of its planning judgment in considering whether "very special circumstances" existed which were sufficient to justify the grant of planning permission for development of HRN1.

66. Mr Village submitted that para. 5.35 of the August 2013 OR misdirected the planning committee, because it just referred to the third criterion in para. 216 (consistency of policies in the Development Strategy with the NPPF) and did not invite consideration of factors relevant to the first two criteria in para. 216. However, this is not a tenable reading of para. 5.35. In fact, the paragraph said in terms that the "substantial weight" to be given to the Development Strategy took into account all the policy advice in the previous sections of the August 2013 OR. As already observed, the September 2013 OR explicitly drew attention to para. 216 of the NPPF.

Ground 5: alleged misdirection in paragraph 3.10(6) of the August 2013 OR

67. Under this Ground, Mr Village submits that the planning committee were misdirected by this sub-paragraph in the August 2013 OR (set out above) that the adoption of the relevant parts of the Development Strategy allocating HRN1 for development was inevitable, whereas it had in fact been put in issue by Luton BC in the procedure for review by the inspector pursuant to section 20 of the 2004 Act and could not be regarded as inevitable. It can be seen that this Ground is closely linked to Ground 3, above.

68. The judge dismissed the challenge under Ground 5 at paras. [137]-[140] of the judgment. He held that, on a fair reading of the August 2013 OR as a whole, the construction placed by Luton BC on para. 3.10(6) was not correct. Again, I agree with him.

69. It is clear from the August 2013 OR as a whole that approval of the Development Strategy was not treated as a completely foregone conclusion. Rather, there was careful consideration of a number of factors, including the importance of the housing and regeneration needs to be met, the continuity of the Development Strategy with previous policy and the absence of significant objections to the principle of development on HRN1, which made it very likely that the allocation of HRN1 for development as set out in the Development Strategy would eventually be endorsed. Read in its proper context, para. 3.10(6) of the August 2013 OR did not misdirect the planning committee. The report properly invited them to weigh up the possible harm to the public interest which might arise from delay in considering the grant of planning permission (until after the process of consideration of the draft Development Strategy had been completed) against the benefits which might accrue from waiting until that process had finished and a new Development Strategy was formally adopted. It was a matter for their planning judgment how to weigh up these competing considerations.

Ground 2 (with Ground 8): failure to consider alternative sites and alternative strategies

70. Under this heading, Mr Village submitted that CBC failed to give proper consideration to whether alternative sites might be better for development to meet local planning needs than HRN1. He also submitted that CBC failed to give proper consideration to whether an alternative strategy for distribution of development within HRN1 (by reducing the amount of retail development in order to increase the residential element on the site) might be a better way of meeting local needs. The judge dismissed the challenge based on Ground 2 at paras. [141]-[161] and that based on Ground 8 at paras. [164]-[169].

71. There was no significant difference between the parties regarding the legal principles relevant to this part of the case. They are helpfully set out by Carnwath LJ (as he then was) sitting at first instance in *Derbyshire Dales DC v Secretary of State* [2000] EWCH 1729 (Admin); [2010] 1 P&CR 19 and were (as Mr Village accepted) accurately summarised by Holgate J at para. [151] of the judgment, as follows:

> "(i) There is an important distinction between (1) cases where a possible alternative site is *potentially* relevant so that a decision-maker does not err in law if he has regard to it and (2) cases where an alternative is *necessarily* relevant so that he errs in law by failing to have regard to it (paragraph 17);
>
> (ii) Following [*CREEDNZ v Governor-General* [1981] 1 NZLR 172], [*Re Findlay* [1985] AC 319] and *R (National Association of Health Stores) v Secretary of State for Health* [2005] EWCA Civ 154, in the second category of cases the issue depends upon *statutory construction* or whether it can be shown that the decision-maker acted *irrationally* by failing to take alternative sites into account. As to the first point, it is necessary to show that planning legislation either expressly requires alternative sites to be taken into account, or impliedly does so because that is "so obviously material" to a decision on a particular project that a failure to consider alternative sites directly would not accord with the intention of the legislation (paragraphs 25-28);
>
> (iii) Planning legislation does not expressly require alternative sites to be taken into account (paragraph 36), but a legal obligation to consider alternatives may arise from the requirements of national or local policy (paragraph 37);
>
> (iv) Otherwise the matter is one for the planning judgment of the decision-maker (paragraph 36). In assessing whether it was irrational for the decision-maker not to have had regard to alternative sites, a relevant factor is whether alternative sites have been identified and were before the decision-maker (paragraphs 21, 22 and 35 and see *Secretary of State v Edwards* [1995] 68 P&CR 607 where that factor was treated as having "crucial" importance in the circumstances of that case)."

72. At para. [152] of the judgment, Holgate J held that alternative sites were not "obviously material" and that CBC did not act irrationally in failing to assess alternative sites. His ruling is based on a combination of factors, as follows:

> "i) It was confirmed in oral submissions on behalf of LBC [Luton BC] that housing needs cannot be met unless substantial releases of land are made from the Green Belt;
>
> ii) At no stage before CBC's decision did LBC identify alternative sites or suggest that consideration be given by CBC

to looking for substitute sites. Instead, LBC contended that more housing land needed to be released in addition to that proposed in the DS. It has not been suggested that any other party raised alternative sites as an issue;

iii) The Sustainability Appraisal (Table 6) in respect of the draft Core Strategy was available to LBC, but it was not suggested to CBC before the decision that that document indicated that any other site should be preferred to HRN1;

iv) In LBC's skeleton (paragraph 20) it is suggested, post-decision, that sites 8 and 27 in the Sustainability Appraisal should have been considered. But no legal criticism has been made of CBC's appraisal of those sites. Site 8 would have a greater impact on the Green Belt than HRN1 and scores less well overall. Site 27 scores badly in terms of "relationship to housing need". Indeed, it is located to the east of Milton Keynes and Mr Village accepted that it would not assist in meeting housing needs arising in Luton. No satisfactory explanation was given for putting forward site 27 in support of this ground of challenge;

v) The expert view of CBC's officers was that it is highly likely that HRN1 would need to be released in any event (page 49 of the August 2013 OR);

vi) CBC's judgment (paragraph 11.4 of the August 2013 OR) was that the evidence base relating to earlier plans and the Joint Core Strategy "shows there is nowhere else *more suitable* for the growth to go" (emphasis added and see paragraphs 3.1, 4.1 and 4.2);

vii) The withdrawal of LBC from the Joint Core Strategy did not alter the position that it had supported the allocation of HRN in that strategy, which itself had been the subject of a Sustainability Appraisal and Strategic Environmental Assessment;

viii) LBC's two outstanding objections to the HRN1 application focused on increasing the amount of affordable housing that would be delivered from that site for Luton and on reducing the amount of retail floorspace. It was not suggested by LBC that an examination of alternative sites should be conducted in order to address these issues. In effect, those matters were left to be dealt with by CBC on the merits of the HRN1 site itself."

73. I agree with the judge and with the reasons he gives. Striking features of this case are (a) that CBC had done considerable work in connection with the Sustainability Appraisal to assess possible alternative sites which might be better suited to meet local planning needs (especially in relation to future housing requirements), and none had been identified that was better than HRN1 (in particular, site 8 to the west of

Luton was assessed to be clearly worse than HRN1) and (b) Luton BC did not suggest that there was any better site than HRN1. When, in commenting on the Development Strategy, Luton BC referred to consideration of allocation of land to the west of Luton for housing development (i.e. site 8), it did so on the footing that this would be "additional" or "extra" development, not that it was a viable alternative to development on HRN1. There was no potential viable alternative site which was obviously material to CBC's consideration of whether to grant planning permission for HRN1, and none which Luton BC or anyone else drew to CBC's attention.

74. Mr Village submitted that the judge failed to appreciate that Luton BC, in its representations of 15 April 2013, had in fact argued that CBC should have considered sites alternative to HRN1. I do not accept this contention. The relevant passage from the representations of 15 April 2013 is set out above: it refers back to and repeats the representations made by Luton BC dated 10 September 2012. As I have explained, the representations of 10 September 2012 did not say that development to the west of Luton should be regarded as a viable alternative to development of HRN1: the point being made was that CBC should consider allocating land to the west of Luton for residential development *in addition to* HRN1, not as an alternative to it. The same point was being made in the representations of 15 April 2013. The judge made no error in his appreciation of the facts.

75. Mr Village was critical of para. 11.4 of the August 2013 OR, which stated, "The evidence base shows there is nowhere else more suitable for the growth to go", but did not identify or discuss that evidence base. However, the August 2013 OR was written for an informed audience of members of CBC's planning committee, and they would have been well aware that it was the Sustainability Appraisal, in particular, which was being referred to: see para. [156] of the judgment.

76. Mr Village's further submission in respect of an alleged failure to consider an alternative strategy (a reduction in the retail element of the development in order to increase the residential element which might be used for affordable housing) fails for similar reasons. Again, it was common ground that it is the principles identified in *Derbyshire Dales DC* which govern.

77. The August 2013 OR identified economic viability and other reasons why the retail element of the scheme was said to be justified (in particular, at paras. 8.37 and 8.46) and it was far from obvious that the development mix put forward by the developers and said by them to be necessary to secure the economic viability of the scheme was unacceptable or incorrect. The developers' viability statement was properly reviewed and assessed by CBC and its expert advisers. Neither Luton BC nor anyone else suggested that a reduction in retail development should be considered as a means to increasing the affordable housing element: see para. [160] of the judgment. That simply was not a proposal raised with CBC in such a way as to make it an "obviously material" matter which had to be taken into account, according to the guidance in *Derbyshire Dales DC*. (There was a distinct issue in relation to the retail element of the scheme, namely whether it might have an excessive impact on other retail centres; but that was expressly addressed by CBC and is not the subject of complaint under this Ground).

Ground 10: alleged failure to apply sequential impact tests in respect of proposed main town centre uses

78. Under this Ground, Luton BC submits that CBC failed to apply sequential impact tests in respect of proposed main town centre uses (as defined in the NPPF), in particular in relation to 5000 m^2 of office space, 3000 m^2 of hotel space and 3000 m^2 of cinema space. In relation to this Ground, the judge properly directed himself by reference to the relevant principles explained in *Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby DC*, unrep. 18 April 1997 and *R v Mendip DC, ex p. Fabre* (2000) 80 P&CR 500, as summarised in *R (Zurich Assurance Ltd) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), [15]. The judge rejected this Ground of complaint as "quite unarguable" (paras. [209]-[210] of the judgment), i.e. he refused permission to apply for judicial review in respect of it.

79. I agree with the judge that this Ground has no merit. This was not a matter raised by Luton BC or anyone else prior to the grant of planning permission: para. [208] of the judgment. The matter was not one of such significance that CBC's officers were required to give it any greater prominence in their reports for members. The land uses in question were a small part of the 262 ha sustainable urban expansion which was under consideration and CBC approached the lack of robustness in the sequential testing of the greater element of *retail* floorspace (30,000 m^2) – which was the main planning concern - as a matter to be put in the overall planning balance, and found that the substantial benefits of the scheme clearly outweighed any harm. In this context, as the judge correctly held, it was unnecessary for the officers' reports to include express distinct discussion of these other (lesser) matters in relation to the sequential test.

The appeal on costs

80. Finally, Luton BC appeals in relation to the costs order made against it in favour of the interested parties, in respect of their costs of preparing their acknowledgement of service. In my judgment, the appeal against the costs order is wholly unsustainable.

81. Luton BC's claim qualified as an Aarhus Convention claim for the purposes of the special costs regime for such claims set out in the Civil Procedure Rules (CPR Part 45.43 and the associated Practice Direction). Luton BC and CBC made an agreement that any costs order to be made as between them should be for a nil amount. However, the interested parties were not a party to that agreement and were in no way bound by it. The judge was fully entitled to award the interested parties their costs of preparing the acknowledgement of service, in line with ordinary principles as identified by him. The costs awarded were at a level well below the maximum costs award permissible in respect of an Aarhus Convention claim under the Rules.

Conclusion

82. For the reasons given above, I would dismiss the appeal on all grounds.

Lord Justice Tomlinson:

83. I agree.

Lord Justice Longmore:

84. I also agree.

85.