Case No: CO/3184/2014

Neutral Citation Number: [2014] EWHC 4325 (Admin)

IN THE HIGH COURT OF JUSTICE

**QUEEN'S BENCH DIVISION**

**ADMINISTRATIVE COURT**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: Friday 19th December 2014

**Before** :

MR JUSTICE HOLGATE

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**Between :**

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| --- | --- | --- |
|  | **The Queen on the application of Luton Borough Council** | Claimant |
|  | **- and -** |  |
|  | **Central Bedfordshire Council**  **Houghton Regis Development Consortium** | Defendant  Interested Party |

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(Transcript of the Handed Down Judgment of

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**Peter Village QC and Andrew Tabachnik** (instructed by **Winckworth Sherwood LLP**) for the **Claimant**

**Saira Kabir Sheikh QC** (instructed by **Central Bedfordshire Council**) for the **Defendant**

**Robin Purchas QC and Hugh Richards** (instructed by **King and Wood Mallesons LLP**) for the **Interested Party**

Hearing dates: 2, 3 and 4 December 2014

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**Judgment**

**Mr Justice Holgate:**

1. On 2 June 2014 Central Bedfordshire Council (“CBC”) granted planning permission to the Houghton Regis Development Consortium, the First Interested Party for a substantial urban extension on 262 hectares of Green Belt land on the Houghton Regis North Site 1 (“HRN1”). The second to fifth interested parties are members of the consortium. In this judgment I will refer to the interested parties collectively as the “IP”.
2. The permission was granted in outline, with details of access, appearance, landscape, layout and scale reserved for subsequent approval. The outline consent authorises a large scale development which includes up to 5,150 dwellings and up to 202,500 sq m gross of development in the classes A1 to A3 (retail), A4 (public house), A5 (take away), B1, B2, B8 (offices, industrial and storage and distribution), C1 (Hotel), C2 (care home), D1 and D2 (community and leisure) and other uses. According to the schedule of development parameters, the scheme includes (in addition to 25,000 sq m of B2 and 125,000 sq m of B8) up to:-

* 5000 sq m of B1 offices
* 10,000 sq m for a main food store, 2,500 sq m of food retail, 12,500 sq m of comparison retail and 5,000 sq m of A2 to A5 uses
* A hotel of 3,000 sq m
* 40,000 sq m of D1 (non-residential institutions)
* 5,000 sq m of D2 space (including a cinema of up to 3,000 sq m)

1. The planning permission was accompanied by a section 106 obligation also dated 2 June 2014. Clause 5 and the fourth and ninth schedules imposed an obligation on those interested in the development site to provide a minimum of 10% of the total number of dwellings as “affordable housing dwellings”. But it is common ground that the obligation may require up to 30% of the total number of dwellings to be provided as affordable units, pursuant to a review mechanism based upon the sales figures actually achieved.
2. On 10 July 2014 Luton Borough Council (“LBC”), an adjoining local planning authority, filed a claim for judicial review. Singh J ordered that the application for permission be adjourned to an oral hearing. On 9 September 2014 Supperstone J gave directions for the application to be dealt with at a rolled up hearing, which took place before me on 2 to 4 December 2014.
3. CBC’s decision is of great importance to LBC. The Luton/Dunstable/Houghton Regis “conurbation” has been surrounded by a tight Green Belt boundary since 1980, which has constrained peripheral expansion. LBC is unable to find land within its own administrative area to meet all of its housing needs, a significant proportion of which is for affordable dwellings. LBC has therefore been co-operating with neighbouring authorities, including CBC, in order that some of its needs is met within other areas. Approximately 80% of LBC’s administrative boundary is shared with CBC on its northern, western and southern sides.
4. Although the grounds of challenge ranged over a number of subjects, Mr Peter Village QC, who appeared on behalf of LBC, confirmed that his client would not have challenged the permission, if it had secured a higher minimum level of affordable housing acceptable to that authority. In this context I also note that any earlier objections to LBC’s standing were not pursued at the hearing.

**Protective Costs Order**

1. In the Claim Form LBC sought to rely upon the Aarhus Convention, the protective costs regime in Section VII of CPR 45 and the related costs limits in the Practice Direction. In its Acknowledgement of Service CBC disputed that the Convention applied to this claim. This issue was to have been dealt with in the hearing before me. Shortly beforehand, the decision of the Court of Appeal in Secretary of State for Communities and Local Government (“SCLG”) and Venn [2014] EWCA Civ 1539 was handed down. As a result, Ms. Saira Kabir Sheikh QC, who appeared on behalf of CBC, accepted that most of the grounds raised by LBC fell within the scope of environmental matters. But there remained an issue as to whether the Convention or CPR 45.44 provides protection to planning authorities in the position of LBC.
2. However, on the second day of the hearing the LBC and CBC resolved this difference by agreeing that an order should be made imposing a cap of £0 on their respective costs. I will reflect that agreement in the formal order of the Court.
3. It is essential to consider the grounds of challenge in context and so I will first summarise matters under the following headings before going on to deal with the 10 grounds broadly in the sequence in which they were argued The cross-references are to the relevant sections of this judgment:-

* Evolution of planning policy (paras. 10-35)
* The 2012 planning application for HRN1 (para. 36)
* The A5/M1 link road and the Woodside link road (paras. 37-40)
* Overview of the 10 grounds of challenge (para. 41)
* LBC’s representations to CBC on Houghton Regis North (paras. 42-64)
* The Officers’ Reports on the planning application (paras. 66-89)
* Legal principles for reviewing decisions taken by a local planning authority (paras. 90-98)
* Ground 1 (paras. 100-111)
* Ground 4 (paras. 112-119)
* Ground 3 (paras. 120-136)
* Ground 5 (paras. 137-140)
* Ground 2 (paras. 141-161)
* Ground 6 (paras. 162-163)
* Ground 8 (paras. 164-169)
* Ground 7 (paras. 170-196)
* Ground 9 (paras. 197-207)
* Ground 10 (paras. 208-210)

**Evolution of planning policy**

1. In 1980 the HRN1 site was included in the Green Belt upon the approval by the Secretary of State of the Bedfordshire County Structure Plan.
2. The Bedfordshire and Luton Strategic Housing Market Assessment (“SHMA”) published in March 2010 assessed housing market needs for the period 2001–2021. It assessed the position in both Luton Borough and the southern part of Central Bedfordshire together and indicated that 7,700 social rented housing and 3,200 intermediate affordable housing units would be required out of a total of 21,600 dwellings.
3. The 2010 SHMA was updated in a document issued in June 2014 so as to cover the period 2011–2031. This was prepared in the context of the duty on both authorities to cooperate, imposed by S33A of the Planning and Compulsory Purchase Act 2004 (which had been inserted by the Localism Act 2011 – “the duty to cooperate”). Paragraph 32 explained that the authorities would focus the overall assessment of housing need upon the whole of their respective administrative areas. In summary, Luton Borough was assessed as having an overall housing requirement over the period 2011-2031 of 17,800 units, of which about 28.4% would need to be affordable dwellings. For Central Bedfordshire the SHMA stated that 25,600 dwellings should be provided over the period, of which 34.8% should be affordable dwellings. In addition, the Claimant states that the capacity assessments it has carried out for its own area show that only about 6000 new homes can be provided within Luton in the period to 2031, therefore leaving a very substantial proportion to be accommodated outside LBC’s area.

*Regional Planning Guidance for the South East (RPG 9) - 2001*

1. In tracing the evolution of planning policies, it is necessary to go back to March 2001 when the Regional Planning Guidance for the South East (“RPG9”) was issued. As paragraph 8 of the Claimant’s skeleton states, at that stage HRN1 lay within a broader area described as a Priority Area for Economic Regeneration (“PAER”). Paragraphs 4.15 to 4.17 of the document explained why the PAERs were needed. The criteria for designation included above average unemployment rates, high levels of social deprivation, low skill levels, dependence on declining industries and derelict urban fabric. Dedicated *regeneration* strategies were said to be needed in order to tackle the problems of each PAER and to maximise the contribution of each area to the social and economic wellbeing of the region. In the list of PAERs there was included Luton Dunstable and Houghton Regis.
2. As regards Green Belts, paragraph 6.5 stated the Government’s then view that there was not a *general* case for reviewing existing Green Belt boundaries, but added that where settlements are tightly constrained by the Green Belt, then local circumstances might indicate the need for a review after carrying out urban capacity studies.
3. Paragraphs 12.35 to 12.41 of RPG9 dealt specifically with Luton, Dunstable and Houghton Regis. Even at that stage it was recognised that although the area had good north south strategic routes, “east-west communications are poor and would benefit from enhancement” and “there is also severe congestion on the local road network”. Paragraph 12.38 pointed out the problems caused by the area’s dependence on its former manufacturing base and the need for major economic restructuring and regeneration in order to diversify the employment base. Paragraph 12.40 pointed out that the towns are amongst the most densely populated outside Greater London and are tightly constrained by the Green Belt. Paragraph 12.41 required joint working to (inter alia) develop complimentary strategies through development plans which, in particular, would encourage development proposals and land uses contributing to economic restructuring and sustainable urban regeneration.

*South Bedfordshire Local Plan Review - 2004*

1. On the 27th January 2004 CBC adopted the South Bedfordshire Local Plan Review (2004). Policies GB1 and GB2 applied traditional Green Belt restraint policies to the designated Green Belt, including HRN1.

*Milton Keynes and South Midlands Sub-Regional Strategy - 2005*

1. The approach set out in RPG9 was taken further in Milton Keynes and South Midlands Sub-Regional Strategy published in March 2005 (“the Sub-Regional Strategy”). This strategy was based upon a prior study which had assessed four options for distributing growth across the area. The study preferred an option which included the focussing growth on the Luton-Dunstable-Houghton Regis area. The sub-regional strategy’s objectives included a major increase in the number of new homes in the sub-region, meeting the need for affordable housing and a range of types and sizes of market housing, together with *a commensurate level of economic growth* and developing skills in the work force (paragraph 14).
2. For Luton, Dunstable and Houghton Regis the emphasis was to be on building the principal growth towns into vibrant communities with a major improvement in the local economy and skills base and capacity to meet housing need (paragraph 15). This was to be achieved through economic regeneration across the urban area. In addition the area or town known as Leighton Linslade was identified in order to provide a proportion of the growth attributable to this part of the conurbation in a complimentary manner.
3. Paragraph 79 et seq dealt with issues specific to Luton, Dunstable and Houghton Regis, pointing out that this area had coalesced into a single conurbation forming the largest urban area in Bedfordshire. Paragraph 81 referred to the substantial problems in the area regarding unemployment and the skills base with the consequent need to concentrate efforts on the continued regeneration of the economy, to achieve (inter alia) “urban renaissance”. Paragraph 82 made the important statement that “while some of these aims can be met within the present confines of the urban area, others cannot. The Green Belt forms a tight boundary all around the towns so that, in recent years, it has become increasingly difficult to meet locally-generated needs, especially for the housing of the relatively young population. Development has been diverting north of the Green Belt to other parts of Bedfordshire and beyond, sometimes to locations less inherently sustainable than Luton/Dunstable/Houghton Regis.” The Sub-Regional Strategy stated that although it would be essential to release development capacity within the towns, nonetheless that would be substantially less than was necessary even to meet local needs, quite apart from securing additional regeneration and investment. Consequently, paragraph 83 stated that “these exceptional circumstances require a review of the Green Belt around Luton/Dunstable/Houghton Regis to provide headroom for potential development needs to 2031 and specifically to accommodate sustainable mixed-use urban extensions which support the continued regeneration of the existing urban area.”
4. Policy 2(a) stated “the LDD should review Green Belt boundaries around the Luton/Dunstable/Houghton Regis conurbation and Leighton Linslade so that in combination sufficient land is made available the land use needs of the Sub-Regional Strategy to 2021. Subject to testing through LDDs, sufficient areas of safeguarded reserved land should also be excluded from the Green Belt to meet needs to 2031. In the case of Luton, Dunstable and Houghton Regis, the review *should focus on two areas of search* which would exclude the Chilterns AONB: *from west of Dunstable to the A6 in the north*…” (emphasis added). It is common ground that the HRN1 site, although not specifically identified or allocated in the Sub-Regional Strategy (which was not of course a site-specific document), nonetheless falls within that area of search.

*East Of England Plan - 2008*

1. In May 2008 the East of England Plan was published. In all material respects it incorporated and retained the relevant provisions of the Sub-Regional Strategy to which I have just referred.

*Revocation of Regional and Sub-Regional Plans - 2013*

1. On 3 January 2013 the East of England Plan and the Sub-Regional Strategy were revoked by the Secretary of State, as part of the revocation of regional plans generally, pursuant to powers conferred by the Localism Act 2011.

*The Luton and South Central Bedfordshire Joint Core Strategy – 2011*

1. In March 2011 the draft Luton and Southern Central Bedfordshire Joint Core Strategy (“Joint Core Strategy”) was submitted by LBC and CBC acting jointly to the Secretary of State for independent examination by an Inspector. The extracts from that document contained in the Core Bundle are from the pre-Submission version of the plan, but I am told that there were no material differences for the purposes of this case between that version of the plan and the subsequent Submission edition.
2. Paragraph 3.13 stated that in addition to new development opportunities within the urban areas, four urban extensions would be delivered in order to meet the quantity and rate of new housing, employment and infrastructure required. Two of those urban extensions were to be located to the north of the main conurbation, namely North of Houghton Regis and secondly North of Luton (para. 3.14). Two other extensions were proposed, including one to the east of Leighton Linslade. I am told that the whole of each of these extensions was located with the Green Belt and the area of CBC. They were said to have the potential to deliver 13,500 new homes (para. 3.29) distributed as follows: 2,500 homes at east of Leighton Linslade, 4,000 at North of Luton and 7,000 at North of Houghton Regis. Paragraph 3.30 explained that that would provide a potential oversupply of about 4,050 homes in relation to a plan period ending in 2026, but might nonetheless be released by then under a contingency plan.
3. Chapter 10 of the Joint Core Strategy dealt with the strategic site specific allocations. Paragraph 10.19 explained that for the 15 years covered by the plan period 2011-2026, North of Houghton Regis had been identified as a suitable site for the provision of 5,150 new homes, 30 hectares of new employment opportunities and associated infrastructure, plus a contingency of 1,850 additional homes and a further 10 hectares of employment land if required by future needs.
4. North Houghton Regis was proposed to be allocated as a Strategic Site Specific Allocation (“SSSA”), lying between the M1 and the A5. It was to be delivered as two sites (para. 10.20). Site 1 (in effect HRN1), the eastern part of the allocation, extended from the M1 on its eastern boundary to the A5120 on its western flank. Site 2, intended to be developed at a later stage, was bounded by the A5120 to the east and the A5 to the west. “The proposed A5-M1 link road provides the northern boundary for both sites and the Green Belt boundary will be revised to align with this.” Paragraph 10.21 made it plain that the existing urban area lying to the south of the allocation would form its southern boundary and that the Green Belt would be altered in this area so as to remove land lying within the allocated area. It added “the contingency there has been included within the area will remove the need for a further review should more development be required within or beyond the period to 2026.” The two sites would be “fully integrated with each other as well as with the urban area of Houghton Regis so as to provide truly sustainable development” (paragraph 10.22).
5. Policy CS 14 dealt specifically with the HRN1 site. It identified the area of the site and the proposal to revise the Green Belt boundaries so as to exclude from the Green Belt land up to the alignment of the A5-M1 link road. The Policy required a master plan to be prepared providing (inter alia) a mix of uses necessary to achieve a sustainable community including housing, employment land and supporting social, community and green infrastructure.
6. The Joint Core Strategy got as far as the examination stage in front of an independent inspector. But in September 2011 LBC withdrew its support from the plan and it was subsequently abandoned. However, it is important to note from paragraph 3.10(2) of the Officer’s Report to CBC’s Development Management Committee meeting held on 28 August 2013 in relation to the HRN1 planning application that “the abandoned Joint Core Strategy was *not abandoned due to any disagreement between the joint councils regarding this site*. *Its intended removal from the Green Belt and its allocation for residential and commercial development was supported by both councils at the Joint Planning Committee*” (emphasis added). Mr Village QC confirmed that LBC accepts the accuracy of that statement.

*The draft Central Bedfordshire Development Strategy – 2013*

1. In January 2013 the pre-submission Central Bedfordshire Development Strategy (“DS”) was published. Policy 2 states that the DS plans for the delivery of a total of 28,700 new homes and 27,000 new jobs between 2011-2031. The policy envisages that some of that development will be located at North of Houghton Regis. Policy 3 proposes revisions to the Green Belt boundary so as to exclude urban extensions such as HRN. Chapter 13 of the plan deals with site specific policies.
2. Paragraphs 13.1 to 13.31 relate to the Houghton Regis North Strategic Allocation. Paragraph 13.2 indicates that a total of around 7,000 new homes can be accommodated in total: 5,500 homes on site 1 and 1,500 on site 2. About 40 hectares of employment land is provided for: 32 hectares on site 1and 8 hectares on site 2. Much of the text in paragraph 13.3 and elsewhere is similar to the draft Joint Core Strategy referred to above.
3. Policy 60 of the draft DS deals specifically with the Houghton Regis North Strategic Allocation. The court was told that the area covered by that allocation corresponds to the area of the proposed allocation in the former Joint Core Strategy.
4. I will refer only to that part of policy 60 which concerns site 1. That site again is located between the A5120 and the M1. The Policy provides for a mix of uses necessary to achieve a sustainable community, including about 5,500 private and affordable homes, 32 hectares of new employment land, commercial facilities including local centres, retail units, a food store and a public house and other related facilities. The Policy also states that Site 1 will provide opportunities to assist in “the regeneration of Houghton Regis through the timely delivery of supporting infrastructure…”. Policy 60 ends by stating that the Green Belt boundary will follow the alignment of the A5-M1 link road. The Infrastructure Schedule, referred to in paragraph 13.13, identified the new Junction 11A on the M1, the A5-M1 link and the Woodside Link as “critical”
5. The DS was accompanied by a Sustainability Appraisal (“SA”). Chapter 4 of the SA explains the strategic site assessment process. The SA set out the criteria which had been employed and the range of alternative sites considered. A total of 42 sites were taken forward for more detailed examination (para. 4.6). The last paragraph 4.17 on page 90 stated that a “further factor” was the relationship between development and infrastructure, including situations “where development can be used to bring about new, or improvements to existing, infrastructure. A number of the mixed use strategic sites are all of a size and in a location that can enable infrastructure improvements to be brought about that will benefit existing residents as well as the new development. *This is particularly the case for the land North of Houghton Regis proposal, which is facilitating the development of the A5/M1 link road and the Woodside connection. These pieces of new strategic infrastructure are critical to the future success of Dunstable and Houghton Regis and the fact that the development site will help their delivery weighs significantly in favour of the proposal*” (emphasis added).
6. Paragraph 20 of the Claimant’s skeleton refers to the inclusion of HRN1 in Table 6 of the SA as Site 18. It is submitted that two other sites are of particular note for the purposes of these proceedings, namely Site 8 - West of Luton and Site 27 - Marston Vale. However during the hearing, Mr Village QC confirmed that Site 27 is located to the east of Milton Keynes and, taking into account the SA's assessment of its relationship to the housing needs covered by the plan, was of no real relevance to addressing LBC’s housing requirements. As for Site 8, Table 6 noted that this site scored badly (and indeed worse than site 18) as regards Green Belt and coalescence issues. Not surprisingly, that aspect was not taken any further during the hearing.
7. Paragraph 21 of the Claimant’s skeleton went on to complain that CBC had failed to comply with its duty to cooperate with LBC, under Section 33A of the 2004 Act, in relation to cross-boundary housing matters. However, Mr Village QC confirmed on behalf of LBC that the Court is not being asked to decide in these proceedings whether the duty to cooperate has been complied with. He stated that that would be a matter for future consideration by the Inspector conducting the independent examination into the draft DS. The highest that Mr Village put this aspect was that LBC’s allegations concerning non-compliance with the duty should have been taken into account by CBC when assessing the weight to be given to the emerging draft DS.

**The 2012 Planning Application for HRN1**

1. On 24 December 2012 the HRN1 Planning Application was submitted to CBC. It was accompanied by an Environmental Statement (“ES”). The Non-Technical Summary of that ES expressly stated that the Applicant had made no assessment of any alternatives to development at HRN1 (para. 4.1). The Application was also accompanied by a Retail Assessment (“RA”). CBC commissioned an independent review of that Assessment by a specialist firm of consultants, Turley Associates (“Turleys”). The Applicant also provided a viability assessment, with a view to justifying the amount of affordable housing which could be contributed by the scheme, having regard to development and infrastructure costs. That viability appraisal was subjected to an independent review by the consultants EC Harris, instructed on behalf of CBC. Ground 7 complains about CBC’s failure to make that material available to the Claimant so as to enable it to make representations thereon.

**The A5-M1 link road and the Woodside link road**

1. As long ago as 2001 the poor east-west communications from which the conurbation suffers had already been recognised (see para. 12.36 of RPG9). The point was taken up again in 2005 in paragraph 86 of the Sub-Regional Strategy which stated that positive action across the conurbation by Local Authorities and others is required on a number of short and medium term priorities. It made clear that the initial focus would be on such matters as ensuring the early delivery of sustainable urban extensions to complement and support the continued regeneration of existing urban areas, mainly but not exclusively, after completion of the M1 widening and the northern bypasses.
2. One of the functions of the A5-M1 link road is to serve as a northern bypass of the conurbation. The road also serves nationally and regionally important functions. Its total cost is of the order of £172 million. The Government is willing to contribute £127 million of the total cost of the scheme. However, as recorded on page 11 of the August 2013 OR, the Secretary of State for Transport had indicated his intention to approve the road should planning permission be granted for HRN1 on the basis that that site would contribute £45 million. According to the assessment by CBC, the link road would serve no purpose at all and in particular could not facilitate the HRN1 development unless constructed in its entirety; the link road cannot be delivered without funding from the HRN1 development; and the HRN1 scheme cannot be fully developed unless the link road is in place (see for example the Officer’s report to CBC’s Committee meeting on 4 September 2013 – the September 2013 OR). The developers’ contribution of £45 million has been secured by an agreement with the Secretary of State under Section 278 of the Highways Act 1980 dated 16 September 2011 (see paragraph 6.4 of the third witness statement of Mr Moriarty). Mr Village made it clear on behalf of the Claimant that no legal challenge is made to the legal propriety of HRN1 having been required to make a contribution to the costs of the link road on that scale.
3. The Woodside link road is intended to provide a new route between the improved Junction 11a on the M1 forming part of the A5-M1 link road scheme and the Woodside industrial estate. The object of this second link is to provide traffic from the estate with an attractive alternative route in order to gain access to the national motorway network and avoid congestion, for example, in the centre of Dunstable. The cost of the Woodside link is something of the order of £42 million. The IP will provide necessary land at no cost, but make no direct financial contribution (see para. 7.1 of Mr Moriarty’s third witness statement).
4. All parties have thought it appropriate to refer to the decision of the Secretary of State for Transport dated 30September 2014 (and therefore postdating the decision the subject of the present challenge) in which the Minister made a Development Consent Order to enable the Woodside link road to be carried out. In paragraph 34 of his decision the Secretary of State accepted that there is a compelling case in the public interest for authorising the construction of the road. In part that was based upon his conclusions in paragraph 24, where he accepted (a) that the link would make economic sense by providing a greatly improved connection between the industrial estate and the motorway network, (b) the Woodside link is critical to the successful delivery of the HRN1 development and (c) in turn that development would make a significant financial contribution to the cost of the A5-M1 link road. Paragraph 11 of the decision records that LBC supported the Woodside link road on the basis that its social and economic benefits outweighed any negative environmental impacts.

**An overview of the Grounds of Challenge**

1. Mr Village QC helpfully grouped the 10 Grounds of Challenge under five headings. He described the first heading as misdirections which comprised:
   1. Ground 1 – failure on the part of CBC to take into account paragraph 83 of the National Planning Policy Framework (“NPPF”) to the effect that Green Belt boundaries should only be altered in exceptional circumstances and through the preparation or review of a local plan;
   2. Ground 3 – CBC erred in attributing “substantial weight” to its emerging DS;
   3. Ground 4 – the Officer’s Report to the Committee materially misstated the treatment of the HRN1 site in previous planning policy documents;
   4. Ground 5 – the Officer’s Report improperly treated the allocation of the HRN1 site in the DS as in effect inevitable.

The second heading concerns Ground 2 and involves an allegation that CBC wrongly failed to assess alternative sites or strategies. The third heading comprises Grounds 6 and 8 which allege legal errors in the identification of “very special circumstances” in order to override Green Belt protection. The fourth heading concerns Ground 7, an allegation that CBC failed to disclose the IP’s viability assessment and the appraisal of it by CBC’s consultant. The fifth heading covers Grounds 9 and 10 and the alleged legal errors with regard to the application of the sequential test in paragraph 24 of the NPPF.

**Representations by LBC to CBC on Houghton Regis North**

1. I have already recorded the common ground in these proceedings that when the draft Joint Core Strategy was abandoned owing to disagreement between the two Local Authorities, LBC did not withdraw from the process because of any disagreement over the proposed allocation of the HRN1 Site.
2. About a year after the withdrawal from the Joint Core Strategy, CBC published on 20 June 2012 their draft development strategy for Central Bedfordshire for consultation. On 10 September 2012 the Head of Planning and Transportation at LBC produced a report for its Executive setting out that Council’s Consultation Response to that draft. It stated that Luton is “likely to face an unmet need of between 5,000 to 12,000 dwellings over the next 20 years (given its estimated overall capacity within Luton of approximately 6,000 during that period)” (Summary of Comments III). LBC, recognising that the draft strategy proposed the same three urban extensions as had been previously advanced in the withdrawn Joint Core Strategy, stated that it “supports the proposed scale of urban extensions but seeks clarification of the proposed housing mix, size and tenure, and how this will address housing needs across the housing market areas…” (Summary of Comments IV).
3. LBC then added that it “urges consideration 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” (Summary of Comments V – emphasis added). I cannot accept LBC’s submission that this paragraph raised the possibility of an *alternative* location for growth as opposed to an *additional* location for growth, additional to the urban extensions proposed in the draft strategy (as CBC submitted). There can be no doubt about the matter, given the unequivocal statement in paragraph 15 that “in addition to the proposed urban extensions contained within the Development Strategy, Luton Borough Council urges that consideration 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.”
4. Moreover in a concluding paragraph 26, LBC stated “there is much in the proposed draft strategy to be welcomed…of critical importance will be the phasing and delivery of planned urban extensions with supporting strategic infrastructure (A5-M1 link; Junction 11a; Woodside link;…)”. Paragraph 8 plainly stated that “these urban extensions are to be delivered by broadly the same strategic infrastructure investment envisaged by the withdrawn Core Strategy”, i.e. the road links to which I have already referred.
5. On 7 December 2012 LBC sent a further letter to CBC enclosing the same consultation response of September that year. LBC alleged that CBC had failed to address specific issues raised by LBC, leading to a suggestion for the first time that CBC might no longer be able to demonstrate the exceptional circumstances required to justify removing land from the Green Belt.
6. Following the submission of the HRN1 planning application to CBC on 24 December 2012, meetings took place between officers of LBC and CBC in February and March 2013 at which that application was discussed. In his witness statement Mr Trevor Holden, the Chief Executive of LBC, states that he was present at meetings that took place on 6 February and 20 March 2013. He says that LBC’s concerns regarding cross-border housing provision and the HRN1 application were discussed at those meetings. LBC stated that it would require affordable housing to be delivered on the HRN1 site. CBC responded that there were viability issues within that proposal which would lead to a reduction in the amount of affordable housing that could be provided. Mr Holden states that “I recall at both meetings that I and LBC officers asked that LBC be provided with the viability evidence to support any reduced affordable housing provision on the HRN1 applications site.” He does not suggest that CBC agreed to that request in those terms. Mr Christopher Pagdin, Head of Planning and Transportation at LBC, was also present at those two meetings. He states that LBC asked to “be involved in the viability appraisal work.”
7. On 12 February 2013 Mr Pagdin sent a letter to CBC stating that a “key issue raised at the Leaders/Chief Executives meeting on 6 February was whether Luton residents would have equal access to any affordable housing brought forward as part of any development in close proximity to Luton, including the Houghton Regis and the North of Luton Urban Extensions.” There was no suggestion in that letter that LBC had requested sight of a detailed viability appraisal or had been promised access to such material.
8. Following the meeting, on 28 March 2013 CBC sent a letter to Mr Pagdin which referred expressly to the meeting which had taken place on 20 March. Attached to the letter was the “Areas of Agreement” between the two authorities. The second topic was headed “Access to Affordable Rent Housing”. Under point 1 it was agreed that CBC would provide the opportunity for Luton residents to access up to 50% of affordable rent housing provided on the two strategic allocations planned for HRN and land North of Luton.
9. The only agreement in relation to viability material upon which LBC relies is point 5 under the same heading, which stated:

“CBC officers will arrange for LBC officers to be involved at key points in the viability appraisal work and subsequently to meet with the developers of the north of Houghton Regis strategic allocation, to discuss key issues including the opportunities to improve delivery of affordable housing on that site.”

1. On 15 April 2013 a report was prepared by officers of LBC for the Council’s Executive to provide its formal response to CBC’s pre-submission DS and also to the planning application on HRN1. Paragraph iii of the Summary of Comments set out Luton’s main concern. The Council wanted to ensure that the significant amount of development to be located close to the conurbation should be sustainable. That was said to be necessary for several reasons. “Firstly it needs to address the social needs for affordable housing within the conurbation as a whole as set out in the jointly commissioned Strategic Housing Market Assessment. Secondly it is needed in order to demonstrate under the duty to cooperate how this development will help to address the principle element of unmet need within Luton i.e. that of affordable housing. Thirdly unless these developments address the wider needs of the conurbation including affordable housing it is considered that it will not meet the criteria for removal from the Green Belt.”
2. To help put the matter into context, paragraph 11 of the Report recorded that over the planned period 2011-2031 it was likely that Luton would have a potential unmet housing need of around 4800 dwellings, and so a large proportion of that need should be met within CBC’s area. LBC were also seeking contributions from other neighbouring planning authorities.
3. Paragraph v of the Summary expressed LBC’s concerns as to the quantum of both convenience and comparison floor space proposed within the HRN1 application and suggested that it was significantly larger than would be appropriate for a development of this scale. The concern related to the potential for adverse economic impact upon nearby town centres.
4. In paragraph iv of the Summary LBC repeated the suggestion made in September and December 2012 that CBC consider accommodating *additional* growth to the west of Luton, but there is nothing in the text to indicate that LBC was now suggesting that this should be in *substitution* for HRN.
5. Paragraph viii of the Summary set out LBC’s stance. It objected to the HRN1 application unless three requirements were satisfactorily met, the second of which is no longer relevant in these proceedings. The other requirements were (a) “ongoing negotiations over access to up to 50% of affordable housing delivered in the urban extensions of Houghton Regis and North of Luton are successful and delivering a significant quantum of affordable housing for Luton’s residents” and (c) “the quantum of retail floor space to be catered within the Houghton Regis urban extension is significantly reduced.”
6. On 10 June 2013 LBC wrote to CBC stating:-

“I think we have made considerable progress in relation to a range of issues covering for instance affordable housing and transport issues and I understand we are waiting further viability work in relation to Houghton Regis (HR1) application before the discussions around affordable housing will continue.”

1. As CBC and IP pointed out, no concern was expressed by LBC at that stage about any failure by CBC to comply with any alleged promise to provide a viability appraisal.
2. On 15 August 2013 CBC wrote to Councillor Timoney, the Portfolio Holder for Regeneration and the Deputy Leader of LBC. The author referred to a meeting earlier that week on 11 August and sought to confirm the issues that had been discussed and how the two authorities might continue to move forward. The summary of the main issues discussed between the parties included the following:

“We provided you with an update of the scheme [i.e. the HRN1 proposal], an understanding of viability issues you must consider as part of the development and the main points being raised by officers in the report to development management committee on 28 August”.

1. The letter went on to make it plain that the planning application would be considered by the committee on 28 August and that papers for the meeting (i.e. the Officers’ Report) would be available on CBC’s website as from 14 August. In response to LBC’s suggestion that it might make further representations, the letter confirmed that although any such comments would arrive too late to be dealt with in the officers’ report, they would be presented to the committee if they arrived with CBC before the meeting. The letter explicitly set out the position on development viability in very clear terms (see ground 7 below).
2. In addition a further meeting had taken place on 5 August to discuss retail matters raised by LBC. The minutes of that meeting reveal that there was discussion of the retail assessment carried out by Barton Willmore, the developer’s consultant. Paragraph 6 of the minutes also made it clear that there was an opportunity to discuss the independent report commissioned by CBC from Turleys on the developer’s material.
3. Accordingly, from about the middle of August 2013 it was possible for LBC to consider the detailed report from officers which had been prepared for the committee meeting programmed for 28 August. There was ample opportunity for LBC to raise with CBC any matters about which it was concerned, including any lack of information or failure to take into account significant planning considerations.
4. A letter was indeed sent on behalf of LBC on 27 August, the day before CBC’s committee meeting. It is noteworthy that the letter was drafted with the benefit of Counsel’s advice. In summary, the letter referred back to the points put to CBC in LBC’s April 2013 representations and then went on to set out LBC’s “current position”. It is reasonable to suppose that this letter would have set out all of those matters which LBC considered to be particularly significant at that stage. In that context I note that at the foot of the second page the author acknowledged that CBC had undertaken “extensive viability assessments and negotiations which had resulted in the HRN1 applicants offering that 10% of the houses can be delivered as affordable within the scheme, along with a potential uplift mechanism in future years should the viability of the scheme improve.”
5. Despite the fact that Luton say that the current proceedings have been brought because they consider the amount of affordable housing provided by HRN1 for LBC’s area to be inadequate, it is significant that no complaint was raised at all in the letter of 27 August 2013 that CBC had failed to provide LBC with viability information or to comply with the promises it had made in that respect. No explanation has been given for that omission.
6. Under the heading “Current Position” the letter of the 27 August 2013 did make other points. First, the letter stated that the amount of affordable housing which would be made available to LBC by the development was inadequate, secondly the letter argued that the development would be making a disproportionately large contribution towards the costs of the A5-M1 link and went on to suggest that if a lower sum were to be paid then more money would be available for increasing the amount of affordable housing. The letter went on to raise for the first time a prematurity objection. It argued that the proposed development would be of such a scale that the soundness of the proposed allocation in CBC’s draft DS should be determined through the examination in public of that plan so as to avoid prejudicing scrutiny of HRN1 as part of CBC’s wider strategy and the outcome of that process. Not surprisingly, when the committee met on the 28 August they resolved to defer consideration of the application so that they could be advised in more detail about the merits of the objections recently made by LBC. That resulted in the production of September 2013 OR which was considered by the Committee when they reconvened on 4 September 2013.

**The Officers’ Reports to Committee**

1. It is of course axiomatic that a report of this kind should be read as a whole. The main report was a carefully structured analysis of the issues relevant to the planning application as the officers saw them. It is important to bear in mind when looking at any particular paragraph challenged that it is frequently interrelated with material which either precedes or follows it.
2. In this part of the judgment I will set out some of the key paragraphs in the August 2013 OR. In the General Introduction (page 7) it was stated that:-

“The proposal, and those that will inevitably follow it, will change the physical, social and economic environment for the residents of the conurbation and beyond by providing or being associated with major new road infrastructure, significant amounts of new housing, new employment floorspace, open spaces, community facilities, shopping floorspace and public transportation.

For that reason, it is important that Members consider carefully the process by which it reaches a decision. This report is structured to assist the Committee in reaching a clear and lawful decision, taking into account all of the matters that it must.”

1. There then followed an Executive Summary.

“(ii) There has been a long history of promoting growth of the conurbation at Houghton Regis which originates with the principle of seeking growth points as sought by Government’s Sustainable Communities Plan in 2003, then specifically through the old Regional Spatial Strategy for the east of England, and the Milton Keynes South Midlands Sub Regional Strategy. This latter document of 2005 included the early recognition that there would be a need to consider the removal of the Green Belt to the north of Houghton Regis and Dunstable for this purpose. This included also the need for a strategic road to link the A5 to the M1 via a new Junction 11a. All subsequent local actions for delivering a local plan, including the publication of local planning documents and associated public consultation have been predicated on this history and has occurred after the publication of the current Development Plan for the area.

…

(iv) …It is worthy of notice that there have been very few objections to the principle of development.

…

(viii) There are a number of issues arising from the proposals that are key to a commercially viable development as proposed but are also of significant concern to the statutory consultees, Luton Borough Council or Council advisors. These issues are:

* The amount of affordable housing that can be afforded by the development.

…

* The relationship between the development, the A5 – M1 link road and the Woodside link.”

1. There then followed a section entitled “planning context and history” which included the following extracts.

“The application site has been identified as a site with the potential to accommodate sustainable mixed use development for a number of years. Regional Planning Guidance note 9 (2001) identified an area north of Luton/Dunstable/Houghton Regis, including the application site, as an area in which a mixed use urban extension should be brought forward as the most sustainable way of accommodating the bulk of housing development required in this area.”

1. Similarly the officer’s report referred to the sub regional strategy of 2005 “which proposed the *area* as a location for growth …” (emphasis added).

“The effect of the new RSS and the Milton South Midlands Sub Regional Strategy was to allocate the Houghton Regis Strategic Urban Extension (within which the application is located) for residential, employment and supporting community uses, in an area where the Green Belt was to be rolled back, albeit with the Local Development Strategy being asked to set the exact boundaries.

Towards that end, a Joint Planning Committee from Luton Borough Council, the former South Bedfordshire District Council and the former Bedfordshire County Council was formally created to deliver ‘The Luton and South Bedfordshire Joint Core Strategy’. This document reached Examination Stage in 2011 and included land to the north of Houghton Regis as an urban extension. Following the withdrawal of that document and the dissolving of the Joint Committee for unrelated reasons, the proposal is now included within the Development Strategy for Central Bedfordshire which will be submitted to the Secretary of State in the near future. That Development Strategy includes a specific policy for the allocation of the Houghton Regis SUE and for the removal of Green Belt to accommodate it.”

1. The next section of the report summarised in considerable detail representations made by consultees and others on the planning application. CBC’s Strategic Planning and Housing Team Leader made a number of pertinent points, including the following:

“The Joint Core Strategy for Luton and Southern Central Bedfordshire was endorsed for development management purposes by Central Bedfordshire Council’s Executive in August 2011 and still remains a material consideration. However, given the time that has elapsed since the endorsement and the progress now made on the Development Strategy, more weight should be given to the Development Strategy.”

“The circumstances that have led to this planning application being drawn up in advance of the plan-making process are understood. *However, 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.*

It is noticeable that there is no groundswell of public opinion against the proposal evident through the consultations on the Development Strategy and, indeed, this has been the case going back 7 or 8 years to previous Joint Committee consultations. *Even objections to this proposal from the development industry have been relatively limited, with new sites being proposed in addition to, rather than instead of, Houghton Regis North.*

The particular circumstances of this site mean it appears highly suitable for development, as set out in the Sustainability Appraisal report for the Development Strategy. Of particular note are 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. *In my view, it is 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*” (emphasis added).

1. The report then set out a list of “determining issues”, each of which was treated as a heading under which more detailed advice was given by officers to the Committee. The first subject was “compliance with the adopted development plan for the area”. Paragraph 1.3 set out gave advice which went to the very heart of the issues which the members had to determine:

“1.3 In respect of the Green Belt, policy GB2 confirms that the site lies within the Green Belt where no exception for major development is made. Significant weight should be given to this policy. Therefore the Committee will need to consider whether there are any very special circumstances for development of the site.

[The key issue of principle when considering the planning application is that as the proposed Houghton Regis North SUE allocation has not yet been formally confirmed in an adopted Development Plan, the application site has not yet been removed from the Green Belt. Therefore a key consideration in determining this application is whether the application is premature when read against policy GB2 in advance of the formal adoption of the replacement Development Plan. Then having considered that, whether there are very special circumstances that would support planning permission in advance of the adoption of the Development Strategy. It is a fact that the site lies in the Green Belt and so the planning application represents inappropriate development in the Green Belt. Therefore it should only be permitted if very special circumstances (VSCs) apply. This argument is presented in detail within Section 3 below.]”

1. The second subject was “Compliance with the National Planning Policy Framework”. After referring to the research carried out in the past in order to plan for the economic growth of the area (para.2.3), the report continued:

“2.4 The applicant has highlighted the economic advantages of the proposal within their Planning Statement submitted with the application. They point to the proposal providing 32 hectares of employment land, up to 130,500 sq m of commercial floorspace and additional jobs from retail, schools, leisure and recreation facilities and services. They expect in the region of 2,500 permanent jobs and a further 2,500 temporary construction jobs over the lifetime of the development.

2.5 Central Bedfordshire Council is proactively planning for the development needs for business by ensuring that sufficient land is allocated in the forthcoming Development Strategy for new employment use. This is being allocated on several new employment sites, but includes the express requirement that significant new employment provision is included within the Houghton Regis North proposed Urban Extension. This is balanced by the allocation of sufficient housing to not only reflect the anticipated growth in the area but also to offer new business and employment opportunities. The planning application provides for 32ha of new employment land as part of its proposals and therefore can be considered to comply with emerging Development Plan policy and the NPPF in this respect.

2.6 The significance of the investment that both local government, national government and from the applicants for this planning application are making to the delivery of the A5 to M1 Link Road and Junction 11a is substantial. This infrastructure is crucial to open up opportunities for business investment; not least within Dunstable where it will help to ameliorate the congestion in the town centre. The Woodside Link Road in turn will offer an alternative route for business traffic that is currently hampered by poor connections to the motorway network. Together, the A5-M1 Link Road and the Woodside Link Road, present the opportunity to encourage significant new business investment in the area.”

1. Paragraph 2.9 referred expressly to the advice which CBC had received from the independent retail consultant, Turleys, on the application of retail policy in NPPF. The attention of the members was specifically drawn to the following:

“3. There is concern about the robustness of the applicant’s sequential approach where the applicant has not justified why there is no assessment of the ability of alternative sites to cater for retail provision.”

“4. The council should balance the negative impacts of a retail development that diverts investment against the beneficial impacts of the overall development. Such benefits are a material consideration.”

1. Pages 59-61 of the officer’s report contained a careful assessment of the potential economic impact of the proposed retail floor space within the development. I record that no legal challenge is made to that part of the report.
2. Paragraph 2.18 of the report gave important advice to members. It reminded them that Green Belt policy is a fundamental policy within the NPPF. It pointed out that the proposal was for “inappropriate development” which is by definition harmful to the Green Belt and should not be approved except in very special circumstances. The policy from the NPPF was quoted:-

“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.”

1. The report then directed members that this was the “primary decision” that the Council would need to reach before considering other material considerations and for that reason the issue was dealt with separately in the following section 3 of the report. Paragraph 3.1 of the report stated:

“3.1 The site subject of this planning application lies wholly within the approved Green Belt for the area. The proposed policy of the emerging Development Strategy suggests that the Green Belt in the area to the north of Houghton Regis and south of the proposed new A5-M1 link road is removed to make way for the proposed urban expansion. There is a substantial body of evidence developed through that process which has concluded that it is appropriate to remove the Green Belt designation to allow for the urban expansion within which the application is set. However, this policy is not yet in place. Therefore it falls to the Council to determine whether “very special circumstances” exist for this development to proceed.”

1. Paragraphs 3.2 – 3.7 then analysed the extent to which the proposals would cause specific harm to any of the five purposes of Green Belt designation. In summary, it was concluded that the proposal would not cause harm as regards prevention of coalescence, preservation of special character or the regeneration of urban land. As to checking the unrestricted sprawl of large built up areas, the members were advised that plainly the proposal was of a substantial size, involving the development of 262 hectares. On the other hand “it is not unrestricted in the sense that there is a substantial physical boundary within which it will be clearly contained: i.e. the approved line of the A5-M1 strategic link road. Whilst the Green Belt is harmed by the proposal in this sense, it is recognised that this new road will form a strong physical boundary against further sprawl to the north of Houghton Regis by its nature.” The key element of harm to Green Belt purpose was identified in paragraph 3.5 of the report in the following terms, “the area affected is of a pleasant open rural and rural fringe character though the landscape analysis of the site concludes that the area does differ in quality across the site. However, the proposal by reason of its scale will encroach upon the countryside and will be harmful as a result.” Paragraph 3.8 then stated:

“3.8 On the basis that there will be harm to the Green Belt by reason of the proposal’s impact through extending an urban area into the countryside, then it is necessary to determine what “very special circumstances” may exist that clearly outweighs that harm.”

1. Paragraph 3.9 advised the members on the sort of factors which could be considered to amount to very special circumstances. No criticism is directed to that paragraph. It is relevant to note the following advice which it contained, “the important point to bear in mind is that the substantial benefits must arise from the unique circumstances of the proposal or otherwise it could be repeated too often, to the long term, cumulative harm of the Green Belt.” Paragraph 3.10-3.20 set out in detail the officer’s analysis to whether very special circumstances existed in this case. In particular, paragraph 3.10 stated:

“3.10 The following are considered very special circumstances in favour of the application proposal:

(1) *There is a clear urgent need for development of land in the Green Belt in order to meet immediate housing and economic need for the area identified now and over the next 20 years*;

(2) Successive emerging Development Plans since 2001 have identified the application site as being suitable for removal from the Green Belt and allocation as a residential-led mixed use development. *The abandoned Joint Core Strategy was not abandoned due to any disagreement between the joint Councils regarding this site. Its intended removal from the Green Belt and its allocation for residential and commercial development was supported by both councils at the Joint Planning Committee.*

(3) The emerging Central Bedfordshire Development Strategy re-affirms the Houghton Regis North allocation for removal from the Green Belt and development for an urban extension of Houghton Regis to meet urgent need.

(4) CBC has shown its continued commitment to the development of Houghton Regis through the production of the Houghton Regis North Framework Plan 2012, adopted for Development Control purposes in advance of the adoption of the emerging Development Strategy.

(5) *The planning application will directly fund a £45m contribution towards the costs of the M1-A5 link road, which is identified in the Chancellor’s Autumn Statement 2012 as a key infrastructure project for the nation.* *The funding contribution enabled by this development and delivery of the A5-M1 Link will generate a substantial amount of economic benefit to the wider area.*

(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 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 concerned a nationally important infrastructure project*” (emphasis added).

1. In paragraph 3.11 members were reminded that in October 2012 the Secretary of State for Transport had published an interim decision letter confirming that he was minded to approve proposed A5-M1 link road. The Secretary of State had made it clear, however, that the final decision would be issued as and when a planning permission for the proposed development at HRN1 was issued so as to secure the remainder of the funding required to deliver the link road. Paragraph 3.12 adopted the reasoning of the Inspector at the link road inquiry as to why there were very special circumstances to justify that scheme. The officer then advised on the implications of the link road for the merits of the HRN1 application:

“3.13 This strategic link road adjoining the development is a unique feature. The benefits of the new strategic road have been recognised through a separate process of formal application, Public Inquiry and decision making at a national level. The achievement of those benefits is directly linked to the delivery of this application. It is considered that this is a very special circumstance which outweighs the identified harm to the Green Belt.”

1. Paragraphs 3.14 - 3.16 explained why the scheme’s promotion of economic growth should also be treated as forming part of very special circumstances:

“3.14 The scale of the development proposal offers an opportunity for economic growth on a variety of fronts. Economic growth is a national objective, a priority of the Government and is an important material consideration set out in the National Planning Policy Framework. The proposal includes the provision of a substantial amount of new employment land and in particular the opportunity for firms to take advantage of the infrastructure assets unique to its location: new and fast access to the motorway network, new bus links via the Guided Busway project which is to be completed in September 2013, fast links to an international airport and on a scale that offers new opportunities to boost the local economy through the substantial new growth in spending as new families and businesses locate in the area.

3.15 This anticipated economic growth on this scale of development proposed is not unique in a national context, but neither are such large scale development proposals common. The proposal will certainly have a regional significance boosting construction, new opportunities for business expansion and creation, new national distribution opportunities and creating new consumer demand. In respect of the local economy, there will be more opportunities for employment in an area in which there is a particular need.

3.16 It is considered that the potential for this development to assist in providing economic growth opportunities on a large scale is itself a very special circumstance. It is further considered that the scale of the proposal offers sufficient benefits to substantially outweigh the harm caused to the Green Belt in this location.”

1. Paragraphs 3.17-3.18 of the report explained why the proposal’s contribution to meeting housing needs in the area, including needs arising within Luton Borough, also contributed to very special circumstances:

“3.17 The evidence underlying the proposed Central Bedfordshire Development Strategy (and the planning history beforehand) underlines the clear need for a substantial growth in housing in this area and is referred to elsewhere in this report. That need is identified as 28,700 homes over a plan period up to 2031. It is a need of a scale that has resulted in proposals for three major urban extensions totalling some 13,500 dwellings in addition to that sought from other sources. This development proposal forms a significant part (5150 dwellings) of that proposed provision.

3.18 In the face of this substantial need, which arises not only from within the Central Bedfordshire area but also from its neighbour, Luton Borough, it is appropriate for the Committee to decide that the ability of the application to deliver a substantial portion of the required housing and its accompanying requirement for infrastructure is a very special circumstance. Bearing in mind that the evidence underlying the Council’s proposed Development Strategy concludes that a release of Green Belt land is appropriate then it is also appropriate to take the view that the ability to address an identified need by means of the application proposals substantially outweighs the harm caused to the Green Belt.”

1. Paragraph 3.19 then dealt with other proposed uses within the development including community buildings, public open space, and leisure facilities. It was clearly stated that those elements should not be considered as providing benefits sufficiently substantial as to amount to a very special circumstance.
2. The overall conclusion to section 3 of the report read:

“3.20 In conclusion, whilst it is acknowledged that the proposals could be considered to be harmful to the Green Belt by encroaching upon the countryside, it is also considered that the historic strategic planning policy context, the delivery of the A5-M1 strategic road, the significant economic growth potential for the area and the well evidenced and substantial housing need are all sufficient, “very special circumstances” to outweigh any harm caused.”

1. Section 4 of the officer’s report dealt with the Luton and South-Central Bedfordshire Joint Core Strategy. The report recognised the circumstances in which this plan had been withdrawn in 2011 and advised that although that strategy together with the regional planning policies had fallen by the wayside, the underlying evidence base continued to support a growth agenda for Luton, Dunstable and the Houghton Regis area. Thus, on 23 August 2011 CBC endorsed the former Joint Core Strategy for development/management purposes and had incorporated the majority of the work already undertaken on within the emerging Central Bedfordshire DS. Paragraph 4.4 of the report is of some importance when considering criticisms made by the Claimant:

“4.4 The Committee could reasonably give some weight to the fact that the current proposal complies with the policies contained in the L&SCB JCS document in that it proposed the allocation of land at Houghton Regis North for Urban Extension and is based upon a history of policy development to that end. It is within *that area* that this planning application lies” (emphasis added).

1. Section 5 of the officer’s report advised members on how they should approach the pre-submission version of CBC’s DS. Paragraph 5.1 reads:

“5.1 The Central Bedfordshire Development Strategy document is at a stage of production where it is ready to be submitted for Examination. At this stage, the weight given to the document is significant and greater than the L&SCB Joint Core Strategy. Once submitted, it would supersede that document. However, until it is formally adopted, the National Planning Policy Framework should carry greater weight.”

1. Paragraph 5.32 summarised the application of policy 60 of the DS to the planning application. It stated that the application had been designed to align closely to the details of the policy so that it was “broadly compliant with it”. Paragraph 5.33 then advised that greater weight should be given to the policies of the draft DS than the adopted South Bedfordshire Local Plan Review 2004. A major reason for that conclusion was that, self-evidently, the 2004 plan substantially pre-dated the NPPF, whereas the DS had been prepared so as to accord with the NPPF.

“5.34 The planning application conforms closely to the policy direction that the Council wishes to go and explicitly delivers a major part of the urban extensions at Houghton Regis that the Council considers to be a key part of its Development Strategy.

5.35 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 for Central Bedfordshire with the exception of retail policy 12 and parking policy 27 (which will need correcting). The reason is that the Development Strategy has been written to be in accordance with national planning policy set out in the National Planning Policy Framework 2012.

5.36 The Committee will recognise that this “weighting” appears not to give the Development Plan primacy when making a decision on a planning application. However, this is because in the Case Officer’s opinion, the current adopted Development Plan is not up-to-date sufficiently to deal with the planning application as submitted or to comply with the NPPF.”

1. Section 8 of the officer’s report addressed issues arising from the Environmental Impact Assessment. Paragraphs 8.14-8.23 dealt with the subject of Affordable Housing. Paragraph 8.17 of the report stated that from the outset that the developer had been clear that because of challenging economic conditions and exceptional costs applicable to the development, its viability had been affected “to the extent that the full expectations for affordable housing cannot be delivered.” The accuracy of paragraphs 8.19 and 8.20 has not been challenged in these proceedings:

“8.19 However, as part of the original Luton and South Bedfordshire Joint Committee, both LBC and CBC will have been aware that the delivery of the substantial growth sought by both Councils was dependent on the delivery of a substantial amount of costly infrastructure. Both will also have been aware of the “Infrastructure Delivery Plan and Funding Study commissioned by both Councils and undertaken by AECOM which was completed on October 2010. The study determined that given the overall scale and spatial allocation of infrastructure required across Luton and southern Central Bedfordshire that there was going to be a significant infrastructure deficit and an understanding that his was likely to cause viability issues for whichever large scale urban extension was being considered around the Luton/Dunstable/Houghton Regis conurbation.

8.20 CBC, through its individual efforts and with the co-operation of the developer and the Department of Transport, has sought to secure one of the most significant and necessarily expensive infrastructure projects, the A5-M1 link. This adds to the understanding that there will be an impact on the likely amount of affordable housing that can be obtained from this particular development.”

1. The assessment of the amount of affordable housing that could be provided both as a minimum and as part of the uplift mechanism was dependent upon the viability appraisal work undertaken by the developer and reviewed by the CBC’s independent consultants, E C Harris. The planning application submitted on the 24 December 2012 had been accompanied by a Viability Statement (para. 9.9). The financial information underpinning the conclusions of the viability appraisal work was commercially confidential, for the reasons explained in a letter dated 5March 2013 sent to CBC by the Applicant’s legal advisor. The officer’s report made it plain that that letter had been publically available on the Defendant’s planning application file (para. 9.8). I return to this part of the report when considering Ground 7 of the challenge.
2. The conclusions of the report were set out in section 11:

“11.1 The application proposal is for the larger part of the Houghton Regis Urban Extension which is in turn part of the larger strategy for providing significant urban extensions to accommodate much needed additional housing and employment growth in the area. Much of that growth is being planned for in urban extensions not just here, but also at Leighton – Linslade and to the North of Luton. The application proposal is therefore a critical part of a larger strategy to provide not only significant growth within Central Bedfordshire but to accommodate the needs of a growing conurbation including Luton, Dunstable and Houghton Regis.

11.2 The balance to be struck in considering this application, involves the competing demands of commercial viability, loss of Green Belt, need for housing, the clear national priority for economic growth, landscape and ecological protection, urban regeneration, providing community facilities for a healthy population and meeting the Council’s stated priority of delivering a major new strategic road of national significance. All in a context of reducing public services and public financial support.

11.3 It is considered that the scheme is insufficiently financially viable at present to afford the full requirements for affordable housing and the full package of mitigation. However, the mitigation package suggested above is still extremely significant and has been shaped by reference to identified local priorities. The work undertaken with the applicant’s representatives has been conducted in an informed and conscious way to achieve the mitigation package and review/uplift mechanism which both parties believe best reflects local priorities. For example, the approach to the provision of green infrastructure, the forward funding (£45m) of the A5-M1 link road and new M1 junction before significant development is achieved all reflects local priorities. The application has been the subject of extensive consultation with a significant majority or responses not objecting in principle or positively supporting the proposals.

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.”

**Legal Principles for reviewing decisions taken by a local planning authority**

1. A great many of LBC’s grounds involve criticisms of the officers’ reports to CBC’s committee. Accordingly, it is necessary to refer to the legal principles which govern challenges of this kind. I gratefully adopt the summary given by Mr Justice Hickinbottom in the case of The Queen (Zurich Assurance Ltd trading as Threadneedle Property Investments) -v- North Lincolnshire Council [2012] EWHC 3708 (Admin) at paragraphs 15-16.

“15. Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:

(i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.

(ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:

"[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).

(iii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (Oxton Farms, per Pill LJ).

16. The principles relevant to the proper approach to national and local planning policy are equally uncontroversial:

(i) The interpretation of policy is a matter of law, not of planning judgment (Tesco Stores Ltd v Dundee City Council [2012] UKSC 13).

(ii) National planning policy, and any relevant local plan or strategy, are material considerations; but local authorities need not follow such guidance or plan, if other material considerations outweigh them.

(iii) Whereas what amounts to a material consideration is a matter of law, the weight to be given to such considerations is a question of planning judgment: the part any particular material consideration should play in the decision-making process, if any, is a matter entirely for the planning committee (Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 at page 780 per Lord Hoffman).”

1. I would also draw together some further citations:

“[The purpose of an officer’s report] is not to decide the issue, but to inform the members of the relevant considerations relating to the application. It is not addressed to the world at large but to council members, who, by virtue of that membership, may be expected to have substantial local and background knowledge. There would be no point in a planning officer’s report setting out in great detail background material, for example in respect of local topography, development plan policies or matters of planning history if the members were only too familiar with that material. Part of a planning officer’s expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail.” (per Sullivan J in *R v Mendip DC ex p Fabre* (2000) 80 P&CR 500 at 509).

1. In *R (Siraj) v Kirkless MBC* [2010] EWCA Civ 1286 Sullivan LJ stated at para. 19:

“It has been repeatedly emphasised that officers' reports such as this should not be construed as though they were enactments. They should be read as a whole and in a common sense manner, bearing in mind the fact that they are addressed to an informed readership, in this case the respondent's planning subcommittee”

1. In *R (Maxwell) -v- Wiltshire Council* [2011] EWHC 1840 (Admin) at paragraph 43 Sales J (as he then was) stated:

“The Court should focus on the substance of a report of officers given in the present sort of context, to see whether it has sufficiently drawn councillors’ attention to the proper approach required by the law and material considerations, rather than to insist upon an elaborate citation of underlying background materials. Otherwise, there will be a danger that officers will draft reports with excessive defensiveness, lengthening them and over-burdening them with quotations of material, which may have a tendency to undermine the willingness and ability of busy council members to read and digest them effectively.”

1. In *Morge v Hants CC* [2011] UKSC 2; [2011] PTSR 337 at [36] Baroness Hale of Richmond said:

“ … in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in [R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=16&crumb-action=replace&docguid=I79A6F2E0E42811DA8FC2A0F0355337E9) , para 69: “In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them.” Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved.”

1. In *R (Bishops Stortford Federation) v East Herts DC* [2014] PTSR 1035 Cranston J held at paragraph 40:

“The courts have cautioned against undue judicial intervention in policy judgments by expert tribunals within their areas of special competence (see AH (Sudan) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening) [2008] AC 678 , para 30, per Baroness Hale of Richmond), and this reticence has been applied to considering the decisions of planning inspectors on issues of planning judgment: see [Wychavon District Council v Secretary of State for Committees and Local Government [2009] PTSR 19](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=20&crumb-action=replace&docguid=I81D90A7041AF11DDBA6DEC4A5C606B86) , para 43, per Carnwath LJ. Arguably, the same applies to experienced planning committees with their training and codes of conduct.”

1. A number of the issues raised by LBC in these proceedings were not mentioned in its representations to CBC (e.g. the application of the sequential test). However, LBC correctly makes the point that that does not alter LBC’s standing or entitlement to bring a claim for judicial review to quash the planning permission relying on such matters (see Kides v South Cambridgeshire D.C. [2003] 1 P & CR 19 at para 132-134). LBC has a genuine interest in obtaining the relief sought.
2. However, the principle in Kides does not detract from the principle laid down in Fabre, Oxton and related authorities as to the approach to be taken to a judicial review of a local authority’s decision to grant planning permission on the basis of an officer’s report to committee. It is primarily the function of the officers to judge which issues to address in the report and which to omit, as well as the depth to which any issue included in the report is explored and the amount of information supplied. Quite apart from the Kides issue of standing, there is a separate and crucial question for the Court to determine, namely whether the officer’s report can be said to have been defective because it was significantly misleading, applying the tests in Oxton and Fabre. On that aspect a failure by parties to raise an issue in their representations to the local planning authority may be highly material, if not determinative, unless that issue was one which the legislation required the authority to take into account in any event (e.g. the statutory development plan - see section 70(2) of the Town and County Planning Act 1990 and R (St James’s Homes Ltd) v Secretary of State [2001] EWHC Admin 30; [2001] PLCR 27)).
3. I should also refer to the decision of the Court of Appeal in R v Secretary of State for the Environment ex parte Powis [1989] IWLR 584 in which the Court of Appeal held that in general judicial review is to be conducted by reference to the material which was before the decision-maker at the time of his or her decision and without regard to fresh evidence. That principle is subject to exceptions, including evidence on whether or not a procedural error has been committed, such as a breach of a legitimate expectation.

**Grounds 1, 3, 4 and 5**

1. Mr Village QC grouped these four grounds under one heading as misdirections by CBC.

**Ground 1**

1. In summary, LBC submits that CBC failed to take into account paragraph 83 of the NPPF, or to apply that paragraph when dealing with the issue of whether the grant of planning permission would be premature prior to the completion of the examination of the draft DS (the “prematurity” issue). In effect the officers’ report acknowledged that a permission for HRN1 would result in the site being removed from the Green Belt in any future review of Green Belt boundaries (paras 3.1 and 11.4) LBC also relies upon paragraph 12 of the Secretary of State’s decision letter dated 30 September 2014, adopting paragraph 4.111 of the Examining Authority’s report.
2. In so far as is material paragraph 83 of the NPPF provides:-

“…Once established Green Belt boundaries should only be altered in exceptional circumstances through the preparation or review of a local plan.”

1. LBC submits that paragraph 83 requires the removal of a site from the Green Belt to be dealt with solely through the local plan process so that the relevant issues can be examined by an independent Inspector. It is however important to note that Mr Village very fairly accepted that he was relying upon a policy principle, rather than a legal rule. He nevertheless submitted that paragraph 83 contains an “injunction” to local planning authorities to deal with the matter through the preparation and adoption of a local plan and criticised the officer’s report, in particular paragraph 3.10(6), for failing to draw the attention of members to that “injunction” (or more accurately policy requirement). He added that the effect of CBC’s decision had been improperly to circumvent its duty to co-operate with LBC under section 33A of the 2004 Act in relation to strategic development proposals. He said that the report had therefore “significantly misled” the Committee, applying the Oxton test.
2. CBC and the IP submit that there was before the local planning authority a planning application which it was statutorily obliged to determine. Paragraph 83 of the NPPF could not override that duty. It relates to the authority’s plan-making function, rather than to its development management role. In the latter situation, paragraphs 87 and 88 of the NPPF are apposite: “inappropriate development” should not be permitted in the Green Belt unless “very special circumstances” are demonstrated which clearly outweigh any harm. The IP submits that those paragraphs are not disapplied simply because a proposal involves large scale development. The duty to co-operate applied to CBC’s plan-making function and does not require development management decisions to be put on hold whilst the plan-making process is completed.

**Discussion**

1. In my judgment there can be no doubt that CBC was under a duty to determine the HRN1 application according to paragraphs 87 to 88 of the NPPF. Paragraph 83 is directed to the review of Green Belt boundaries through the local plan process and therefore was not directly in play.
2. However, it does not follow that paragraph 83 is incapable of being relevant in the determination of a planning application. It may be material where the decision-maker is considering whether the proposal should be refused on the grounds of prematurity. All parties agreed that at the time of the decision the relevant material policy on prematurity was contained in the Planning Practice Guidance (“PPG”) (which is broadly to the same effect as earlier guidance). The PPG suggests that prematurity is unlikely to constitute a reason for refusal of planning permission unless (inter alia):-

“the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or planning of new development that are central to an emerging Local Plan.”

1. In applying that guidance, paragraph 83 of the NPPF may be a material consideration. In the circumstances of a particular case, a planning authority *might* judge that the release of a site from the Green Belt by the grant of planning permission would be premature because it would pre-empt decisions which ought to be taken through a review of Green Belt boundaries, in order to prevent the plan-making process from being undermined.
2. In the present case the real issue is, applying Oxton and Fabre, to what extent was it necessary as a matter of law for the officers’ reports to refer to the policy principle in paragraph 83 of the NPPF. For that purpose it is very relevant to consider the way in which the issues were presented to CBC by LBC and others. Even in its last minute representations of 27 August 2013, LBC made no reference to the principle in paragraph 83, even though at that stage it raised a prematurity objection for the first time (and the letter was “endorsed” by Counsel). The “paragraph 83” point was not raised by LBC until after LBC had decided to grant planning permission, namely in its letter dated 7 October 2013 requesting the Secretary of State to call in the application for his own determination. Even then, prematurity was only raised in a generalised manner, without any real attempt to explain specifically why a release of the site should only be dealt with through the plan-making process (see also the Secretary of State’s reply dated 30 January 2014 refusing to call in the decision). The suggestion in the Claimant’s Skeleton that the application of paragraph 83 of the NPPF was linked to compliance with CBC’s duty to co-operate under section 33A was not raised at that stage.
3. LBC has not suggested that “paragraph 83” arguments were raised by other parties to any substantial extent, or even at all.
4. When seen in this context, I am satisfied that the officer’s report (and consequently CBC’s decision) cannot be faulted as a matter of law under ground 1. First, the reports did address the prematurity issue in sufficient depth. The importance of the issue was explained in the comments of the Strategic Planning and Housing Team Leader at page 49 and in para. 1.3 of the August 2013 OR. The September 2013 OR for the adjourned Committee meeting on 4 September 2013 specifically addressed the prematurity points raised in LBC’s letter of 27 August 2013. The contrary is not suggested. The officer referred to the “pressing need” for the proposed housing and infrastructure and the previous support of LBC for development in this location. The members were advised on the policy guidance relied upon by LBC and they concluded that the grant of permission would not unacceptably prejudice the emerging development plan and that it would be inappropriate to delay approval to the scheme. Those were properly matters of judgment for CBC.
5. Second, paragraphs 3.1, 3.10(6), and 11.4 show that, in any event, CBC had well in mind the policy principle that ordinarily a Green Belt boundary is only reviewed through the local plan process. Given the context I have already summarised, as well as the principles laid down in Oxton and Fabre, there was no requirement for CBC to go further into the application of paragraph 83 of the NPPF. There was nothing misleading about the reports to Committee in this respect. Accordingly, I reject ground 1.
6. I think it would be helpful to consider ground 4 next.

**Ground 4**

**Submissions**

1. LBC complains that paragraphs 3.10(2) and 11.4 “materially over-stated HRN1’s planning pedigree” by stating that:-

“… successive emerging development plans since 2001 have indentified the application site as being suitable for removal from the Green Belt and suitable for allocation as a residential-led mixed use development,

* the revoked regional strategy identified the site as being suitable for removal from the Green Belt in order to help meet housing and employment need.”

LBC says that this was “significantly misleading” applying the Oxton test, because although the withdrawn Joint Core Strategy and CBC’s draft DS do identify the HRN1 *site* as being suitable for release from the Green Belt as an expansion of the urban area, the earlier policy documents did not do so, given that they were strategic plans and therefore not site-specific. However, Mr Village QC accepted that Policy 2(iii) of the Sub-Regional Strategy (2005) and the draft East of England Plan (2008) (which incorporated the former), identified an “area of search” for a sustainable urban extension, and that HRN1 fell within that area of search.

1. Secondly, LBC, relying upon Hunston Properties Ltd v Secretary of State [2013] EWHC 2678 (Admin), criticises paragraph 4.4 of the August 2013 OR for giving “some weight” to the Joint Core Strategy. It is said that in view of the fact that that plan had been withdrawn, the Committee could only have been advised to give “no weight” to the plan.
2. I note, however, that neither of these points was mentioned in LBC’s letter to CBC of 27 August 2013.

**Discussion**

1. As regards the first contention, the paragraphs criticised by LBC need to be read in the context of the officers’ report as a whole. Pages 10 and 11 made it clear that the earlier strategic plans had merely identified an *area* to the north of Luton/Dunstable/Houghton Regis within which a mixed use urban extension should be brought forward. Read in context, the summarising sentences in paragraphs 3.10(2) and 11.4 cannot be treated as “significantly misleading”. Moreover, the policy background would have been well-known to members of the Committee.
2. There is no merit either in the second contention which would have the absolute effect of preventing any weight being given to any policy or plan which had been withdrawn simply because of the bare fact of withdrawal. I reject that argument. First, paragraph 13 of the first instance judgment in Hunston only recorded a matter of common ground between the parties in that case (and no doubt in the context of the circumstances of that case). The point was neither argued nor decided and so Hunston could not be an authority for this purpose.
3. Second, in my judgment a plan which has been withdrawn *may* form part of the relevant planning history for the determination of a planning application, depending upon the circumstances in which that plan was drawn up and, more particularly, withdrawn. The present case illustrates the point. LBC has overlooked paragraphs 3.10(2), and 4.1 to 4.5 of the August 2013 OR.
4. Paragraph 3.10(2) (the accuracy of which is not challenged by LBC) records that the Joint Core Strategy was not abandoned because of any disagreement by LBC regarding the HRN1 site; its intended removal from the Green Belt and allocation for residential and commercial development was promoted by both councils (i.e. LBC and CBC). In section 4 of the report officers made the following points:-

“(i) In August 2011 CBC had endorsed the evidence base underlying the East of England Regional Plan and the Joint Core Strategy and had incorporated the majority of that work in its own draft Development Strategy;

(ii) It was a matter for the Committee to decide how much weight to be given to the Joint Core Strategy;

(iii) The Committee could give “some weight” to the Joint Core Strategy in that its allocation of land at Houghton Regis North for an urban extension was based upon a history of policy development to that end.”

1. Accordingly, I reject ground 4 of the challenge.

**Ground 3**

**Submissions**

1. LBC challenges the conclusion in paragraph 5.35 of the August 2013 OR that “substantial weight” be given to CBC’s pre-submission draft DS. A decision on the weight to be given to a consideration is quintessentially a matter of judgment and not a subject for judicial review. So, the Claimant puts its case in two ways. First, it is said that the CBC failed to take into account and apply the whole of paragraph 216 of the NPPF, which 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).”

LBC argues that although CBC applied the third intention (consistency of the emerging plan with the NPPF) it failed to apply the first two criteria (the stage reached by the emerging plan and the extent to which there are unresolved objections to relevant policies). Secondly, it is contended that CBC’s judgment that “substantial weight” be given to the draft DS is irrational.

1. CBC and the IP submit that CBC’s decision was not irrational given the context especially the history of the policies dealing with the extension of the conurbation. CBC and the IP also argue that none of the criteria in paragraph 216 of NPPF had primacy and that, in any event, the assessment of the weight to be attached to the emerging strategy is the light of objections thereto.

**Discussion**

1. I deal firstly with the application of paragraph 216 of NPPF. In his reply, Mr Village submitted that the essential point was that the first criterion had not been applied by CBC. I cannot accept that contention. The August 2013 OR plainly assessed the weight to be given to the emerging strategy by reference to the stage it had reached. For example, at page 49 of the report the Strategic Planning and Housing team leader advised the Committee that a decision to grant planning permission for development on this scale before completion of the plan-making process should not be undertaken 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 any such decision. He then added that there had been no groundswell of public opinion against the proposal, going back over 7 to 8 years, and that objections from the development industry had been relatively limited, proposing new sites in *addition* to, rather than in *substitution* for, Houghton Regis North.
2. Furthermore, CBC’s evaluation of the weight to be given to the proposal in the draft DS to allocate the HRN1 site would have been influenced by the analysis in the officers’ report of the evaluation of the policy strategy for sustainable urban extensions to the conurbation (see below).
3. As to the second criterion, Mr Village QC acknowledged in his reply that the September 2013 OR had addressed objections to the allocation of the site in the draft DS and had advised members that:

“the significance that can be attributed to [the allocation] must be *limited* by reason of the fact that there are currently objections to the identification of the site on Development Strategy – in particular from Luton Borough Council” (emphasis added)

Mr Village suggested that this conflicted with the advice in the main report to give “substantial weight” to the strategy, or was otherwise confusing. But I see no such difficulty. As I explain under ground 3 below, the decision to give “substantial weight” overall to the draft strategy properly took into account a range of factors. Here, the officers were merely stating, as they were entitled to do, that that weight, albeit substantial, was to some degree limited by the outstanding objections (i.e. it was less than it would otherwise have been).

1. For completeness I deal with LBC’s submission recorded at the end of paragraph 35 above. It has to be remembered that CBC was deciding the weight to be attached to the draft DS for the purposes of determining the IP’s application, not for all purposes. It had to do so in the context of the representations it received on the application. It is significant that in its representations to CBC, LBC raised non-compliance with the duty to cooperate only briefly and without linking that point to the weight to be attached *in this case* to the draft DS, notwithstanding that it had ample opportunity to comment on the August 2013 OR. Applying the tests in Oxton and Fabre, I do not see how CBC’s decision can be criticised on this ground. The essential point is that CBC did address all of the substantial points raised by LBC.
2. Mr Village QC accepted in his reply that the third criterion in paragraph 216 had been taken into account by CBC. Paragraphs 64 and 67.3 of the Claimant’s Skeleton argue that the last sentence of paragraph 5.35 of the main report is circular and self-serving. Although the sentence appears to give “the [i.e. sole] reason” for according substantial weight to the draft strategy, it is clear from a fair reading of both of the officers’ reports that CBC did take into account and apply the whole of paragraph 216 of the NPPF. In any event, I do not follow LBC’s criticism. The sentence complained of was merely an evaluation in accordance with the third criteria in paragraph 216.
3. I turn to consider the irrationality argument. I would make the preliminary observation that expressions such as “substantial weight”, or for that matter “limited weight”, do not have some uniform meaning, or even carry some numerical evaluation. Their significance depends upon the particular context in which they have been used. They often represent no more than a summary expressing how the decision-maker has pulled together a number of judgmental factors. It is difficult to see how in the present type of case a rationality challenge could succeed merely on the basis that a decision-maker has decided to give “substantial weight” to a policy. Instead, the challenge ought to be directed to the process of reasoning which has been adopted.
4. This is in fact acknowledged by the Claimant in paragraph 63 of its skeleton, in which it is asserted that “in all circumstances” the judgment was irrational, but unfortunately without identifying any circumstances which would support that argument. I raised this question with Mr Village, who answered by saying that “no authority properly applying paragraph 216 of the NPPF could properly give substantial weight in the light of the factual circumstances.” Given the conclusions I have set out on paragraph 216, the irrationality argument as advanced during the hearing before me appears to add nothing further.
5. I will, however, summarise how I understand the reasoning set out in the report. That reasoning must be understood as a whole.
6. First, in relation to the statutory development plan, the South Bedfordshire Local Plan Review 2004, is not up to date in terms of compliance with the NPPF (paragraph 5.36). The draft DS has been designed so as to accord with the NPPF and its policies on housing, employment, retail, infrastructure and delivery and therefore should be given greater when compared with the 2004 plan (paragraph 5.33). That conclusion is directly relevant to the last sentence of paragraph 5.35 criticised by LBC. Second, paragraphs 4.1 to 4.4 of the report explained why “some weight” should be given to the withdrawn Joint Core Strategy. That conclusion must have had some regard also to paragraph 3.10(2) of the report (that the reasons for withdrawal did not impinge on the merit of HRN) and to the evidence base upon which that strategy had been based (see e.g. paragraphs 4.1, 4.2 and 11.4). Page 49 of the report explained that greater weight should be given to the draft DS given the time which had elapsed since the Joint Core Strategy and the progress made (see also paragraph 2.1). Third, CBC’s judgment was influenced by the carrying forward of the draft allocation from the Joint Core Strategy to CBC’s draft DS. Fourth, the report carefully considered relevant policies of the NPPF and decided that greater weight should be given to the NPPF than to the draft DS.
7. I can see nothing irrational in that series of evaluations made by CBC, and indeed no specific submission to the contrary was made. Accordingly, I reject the contention that the judgment made in the officer’s reports to give substantial weight to the draft DS was irrational.
8. There remains one further point which was raised in an email to the Court from LBC’s Counsel on 8 December 2014, after the hearing had been concluded. Attached to the email was a letter dated 3 December 2014 to CBC from the Inspector conducting the examination into the submitted version of CBC’s draft DS. The hearings have yet to begin, but, following a common procedure, the Inspector has set out his “initial views” on whether the strategy is legally compliant and sound and on whether CBC has complied with the duty to co-operate. The last matter is important because if the Inspector should reach a *final* conclusion that the duty has not been satisfied, then under the Planning and Compulsory Purchase Act 2004 it will not be possible for the strategy to be adopted. Although the Inspector has stated that he has “significant concerns”, he has also made it plain that he has “yet to hear your full response” and, of course, the issues he has raised have yet to be examined at the public hearing.
9. In paragraph 26 of his letter the Inspector has also raised an issue as to the amount of affordable housing which the strategy may deliver in order to meet LBC’s unmet needs, given that the policy requirement for up to 30% affordable homes is subject to viability testing and that the strategic mixed-use allocations (not just HRN) are associated with infrastructure requirements. Whereas the duty to co-operate and “objectively assessed housing need” are to be dealt with in the initial hearing sessions (paragraph 3), other issues (including those raised in paragraph 26) would be covered in any subsequent hearings. I also note that the Inspector’s initial view is that most matters going to the issue of the “soundness” of the plan “seem capable of being resolved” through the “Main Modification” procedure.
10. I have read the Inspector’s letter as a whole along with the email submissions from all Counsel, for which I am grateful. By definition, the letter constitutes material which post-dates the decision which LBC is challenging, and was not before CBC at the material time. According to R v Secretary of State ex parte Powis [1984] IWLR 584 it is inadmissible in these proceedings. The email from LBC’s Counsel of 9 December at 9:17am does not really address that principle. It is said that the Court is not being asked to endorse the Inspector’s concerns or to speculate on the likely outcome of the examination; that is a matter for the Inspector. Plainly that is correct. Instead, it is suggested that the letter confirms an “entirely predictable consequence” of LBC’s objections to the draft DS as at the date of CBC’s decision to grant planning permission. It is submitted that the legal consequence for these proceedings (and the only consequence identified) is to provide the “clearest confirmation” that CBC’s decision to accord “substantial weight” to the DS was perverse.
11. I do not accept LBC’s submissions for several, independent reasons. First it has not been explained how, in the face of ex parte Powis, this new material could support the rationality challenge. Second, as I have said the merits of that challenge depend critically upon a proper understanding of what “CBC” meant by “substantial weight”. I have summarised CBC’s reasoning on the matter and I do not see how the new material undermines the rationality of that reasoning. Third, although not raised in the recent emails, I have also considered the new ex post facto material in the context of the first and second criteria of paragraph 216 of the NPPF. I have explained why, on a fair reading of the reports to Committee, I consider that CBC properly took those criteria into account in a manner which cannot be impugned. One reason why the Committee was advised that permission for HRN1 should not be granted unless there were “significant benefits to the public interest” (p. 49 of the August 2013 OR) was because of the need to respect “the integrity of the plan-led system” … when determining the HRN1 application at this stage of the plan-making process. CBC had well in mind possible outcomes of that process. Fourth, although in its letter of 27 August 2013 LBC expressed the view that only “little weight” should be given to policies in the emerging plan relating to Houghton Regis, and although the letter was written with the benefit of legal advice and warned that a judicial review would be brought if planning permission were to be granted, it was not suggested that CBC could not give “substantial weight” to its strategy, on the basis explained in the August 2013 OR (and as clarified by the September 2013 OR).
12. I reach the firm conclusion that the issues raised under ground 3 were all matters for the planning judgment of CBC and are not open to legal criticism. That view is not altered by the recent letter from the Inspector dated 3 December 2014. I should add that I do not accept the forensic submission in the email of 9 December 2014 that the planning system would be brought into disrepute if the draft strategy should subsequently be “thrown out (or withdrawn)” on grounds which were before CBC at the time of its decisions. It is plain from the officer’s report that CBC judged that planning permission should be granted for HRN1 because of a combination of very important benefits which clearly outweighed the disbenefits, and having regard also to the history of plans for the release of sustainable urban extensions from the Green Belt including HRN.

**Ground 5**

**Submissions**

1. LBC criticises the statement in paragraph 3.10 (6) of the August 2013 OR:-

“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…”

It is said that this implied that the future adoption of “relevant parts” of the draft Strategy was “inevitable” or expressed a “degree of total certainty” (sic). The “relevant parts” are a reference to the proposal in the strategy to allocate this particular site, rather than to the strategy as a whole. LBC argues that the implicit view that allocation was inevitable or certain was irrational. That is the sole basis of the challenge under ground 5.

**Discussion**

1. I do not accept the construction which LBC places upon paragraph 3.10(6) of the August 2013 OR. The complaint also reveals the danger of reading such a passage in isolation and not by reference to the report as a whole.
2. First, this paragraph appears in the section of the report dealing with “very special circumstances” (paragraphs 3.9 to 3.20), which concluded that the scheme would deliver very substantial benefits in the public interest. Second, CBC had well in mind the “substantial body of evidence” from work on previous plans and the overall draft strategy pointing to the need to release the site from the Green Belt for the expansion of the urban area (e.g. paragraphs 3.1, 3.10 (2), 4.1, 4.2 and 11.4). Third, the members were entitled to take into account the limited opposition to the proposal and advice that “it is very difficult to envisage a strategy to meet housing needs that does not include, in some form, development of this site” (p. 49 of the August 2013 OR). The tone of the report was not to suggest that the allocation of the site was, as Mr Village put it, a “foregone conclusion”, but nevertheless something which was highly likely, given the needs requiring to be met, the planning history and the representations made. Fourth, the true focus of the sentence criticised by LBC is the prejudice which would be caused by *delaying* a decision on the proposals to develop the site. These were all matters for the judgment of CBC.
3. I find no basis at all for impugning this part of the report, whether on the grounds of irrationality or otherwise, and I therefore reject ground 5.

**Ground 2**

**Submissions**

1. LBC argues that the decision to grant planning permission was unlawful because CBC failed to consider (a) alternative sites for the development of necessary housing (and the related uses) or (b) alternative strategies for the development of HRN1. Submission (b) assumes that the site *is* released for development, but in that event LBC contends that the amount of housing provided, and therefore affordable housing, should have been increased. Only two alternative strategies were put forward before the court. First, it was said that the size of the contribution from the development to the Department for Transport to the cost of the A5-M1 link road should have been reduced below £45m, so that additional funding would have been available for more affordable housing. Second, it was said that the amount of land devoted to retail development should have been reduced, and that would have enabled more housing development to be carried out.
2. In summary, Mr Village QC submitted that CBC’s decision should be quashed because
   1. CBC had been obliged as a matter of law to consider alternative sites and had failed to do so; or
   2. It had failed to consider whether, as a matter of discretion it should address alternative sites; or
   3. In paragraph 11.4 of the August 2013 OR CBC did embark upon a consideration of alternative sites but carried out the exercise inadequately; or
   4. CBC failed to consider either of the alterative Strategies for the HRN1 site identified above.

Under (iii) LBC referred to the non-technical Summary of the Environment Statement (paragraph 4.1), from which it is clear the developer did not consider alternative sites.

1. CBC and the IP submitted:-
   1. LBC did not raise alternative sites as an issue to be addressed by CBC before the decision to grant planning permission was taken;
   2. This case did not fall into the exceptional category in which the planning authority was obliged as a matter of law to consider alternative sites;
   3. There was no separate obligation to consider *whether* to address alternative sites;
   4. The references in the officer’s report to the “evidence base” did not involve any acceptance by CBC that it should consider alternative sites and, in any event, there was nothing inadequate about the assessment made in the officer’s reports;
   5. CBC did not make any error of law in relation to alternative strategies.

**Discussion**

1. Before coming to the case law on alternative sites, I begin by examining the extent to which LBC raised the matter in its representations to CBC on the planning application.
2. In paragraph 15 of its representations dated 15 September 2012 on a consultation draft of CBC’s DS, LBC urged CBC to consider all possibilities for “*extra* growth” near to Luton, including to the west “*in addition* to the proposed urban extensions contained within the Development Strategy” (including HRN). That statement was unequivocal. LBC did not ask for sites to be considered as alternatives, or substitutes, for HRN. Instead, it was seeking more sites in addition to those proposed by CBC for allocation. Paragraphs III to V of the “Summary of Comments” in the same document can only be read in the same way, having regard to paragraph 15.
3. On 15 April 2013 LBC sent representations to CBC both on the pre-submission version of the latter’s draft Strategy and on the HRN1 planning application. Paragraph vi of the Summary of Comments relied upon LBC’s earlier comments in September 2012 and repeated its request that sites for accommodating “additional growth to the west of Luton” be considered. There was no suggestion in those representations that CBC should examine the sites as alternatives to HRN. LBC did state that it would oppose the release of HRN1 unless three requirements were met, including the provision of more housing and a reduction in retail floorspace (on retail impact grounds), but plainly its objective was to secure a change in the package of land uses within the site. That had nothing to do with the issue of alternative sites at all.
4. Even LBC’s last minute letter of 27 August 2013 chose not to raise the issue of alternative sites. Instead, having acknowledged that the A5 – M1 link road “may well be needed for this development to go ahead”, LBC merely argued that the scheme should contribute less than £45m to the costs of that road (without identifying any figure) so that the amount of affordable housing could be increased. That simply represented an alternative *strategy*, on the assumption that the site would be released as an urban extension. It was not suggested during the hearing that any other party raised the issue of alternative sites.
5. There has been no suggestion that the officers reports misled the Committee as regards LBC’s stance on alternative sites. But more importantly, it is highly significant that a neighbouring planning authority which had worked with CBC for several years on the identification of land to meet housing and other needs did not think it appropriate to suggest that substitutes for HRN1 should be considered, let alone preferred. That accords with the advice of one of CBC’s officers that “it is very difficult to envisage a strategy to meet housing needs that does not include, in some form, development of this site” (p.19 of the August 2013 OR). It is much to be regretted that a challenge of this nature should be raised as an afterthought in a claim for judicial review.
6. The first issue is whether in the circumstances of this case, CBC was under a duty to assess alternative sites. Contrary to the submission in paragraph 50.7 of the Claimant’s skeleton this is not a case in which “the existence of an alternative site” has been raised, as explained above (see para.36 of South Cambridgeshire District Council v Secretary of State [2008] J.P.L 519).
7. As a general principle an examination of alternative sites is only capable of being a material consideration in exceptional circumstances. It does not fall into the category of considerations which the 1990 Act *mandates* the decision-maker to take into account. Instead, it falls within the category of considerations where it is for the decision-maker to decide for himself what he will take into account, subject to review on Wednesbury principles (paragraphs 20 and 30 of R (Jones) v North Warwickshire Borough Council [2001] PLCR 31; and see also CREEDNZ v Governor-General [1981] 1 NZLR 172 and Re Findlay [1985] AC 319).
8. Those principles were elucidated by Carnwath LJ in Derbyshire Dales District Council v Secretary of State [2010] 1 P&CR 19; [2009] EWCH 1729 (Admin), where he held:-

“(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, Findlay 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).

1. Turning to the present case, my firm conclusion is that alternative sites were not “obviously material” and that CBC did not act irrationally by failing to assess alternative sites, for a combination of reasons:-
   1. It was confirmed in oral submissions on behalf of LBC that housing needs cannot be met unless substantial releases of land are made from the Green Belt;
   2. 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;
   3. 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;
   4. 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;
   5. 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);
   6. 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);
   7. 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;
   8. 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.
2. I also reject LBC’s second submission that CBC’s decision should be quashed because of a failure to consider *whether* to examine alternative sites. Mr Village QC sought to support this submission by referring to the body of case law summarised in paragraph 39.2.2 of the Judicial Review Handbook (6th Edition) by Michael Fordham QC dealing with circumstances in which a statutory body has a duty to consider whether or not to exercise a statutory power (see also Stovin v Wise [1996] AC 923, 949). But he accepted that the relevant power here is the power to grant or refuse the application for planning permission. Thus, the submission is, with respect, misconceived because it elevates the ability of a planning authority to treat alternative sites as a potentially relevant consideration into the status of a statutory power.
3. LBC’s argument could not be restricted simply to alternative sites. Logically, it would also apply to *any* consideration material to the determination of a planning application. The argument cannot be right. It is contradicted by the analysis in, for example, North Warwickshire Borough Council and Derbyshire Dales District Council which distinguishes between considerations which a decision- maker is *obliged* by the legislation to take into account and those which he *may* take into account. The latter category is not the subject of any “duty to consider”.
4. In any event, for the reasons I have already given in relation to the first issue, I do not consider that CBC was under any obligation in the circumstances of the present case to consider whether or not to address alternative sites.
5. Turning to the third issue, I do not accept that in paragraph 11.4 of the August 2013 OR CBC embarked upon a consideration of alternative sites, which it then carried out inadequately. As I have previously explained, the phrase “evidence base” embraces the body of evidence accumulated during the preparation of successive plans supporting the release of land at HRN as an urban extension (see paragraphs 3.1, 4.1 and 4.2 of the report), which would include, but is not limited to, table 6 in the Sustainability Appraisal. I reject LBC’s submission, based upon paragraphs 88 to 90 of the judgment of Lindblom J in R (Forge Field Society v Sevenoaks District council [2014] EWHC 1895 (Admin), that the approach taken by CBC in the present case was legally inadequate. In Forge Field Society not only was it common ground that there was an obligation to consider alternative sites (paragraph 85), the planning authority failed to deal with an alternative that it was expressly asked to consider. In the present case, LBC did not raise the issue of alternative sites or identify any alternative site for consideration by CBC.
6. The fourth issue concerns whether CBC failed to address two alternative “strategies”. The first strategy relied upon by Mr Village QC was the suggested reduction in the contribution of £45m to the cost of the A5-M1 link road. That was raised in the LBC’s letter of 27 August 2013. However, this matter was expressly dealt with in section 4 of the September 2013 OR. The report addressed the criticisms (a) that the contribution was disproportionate having regard to the extent of the anticipated usage of the link road by traffic related to the HRN1 site and (b) that the latter should not fund the entirety of the funding gap for the link road. The response stated (*inter alia*):-
   * + 1. The A5-M1 link, although nationally significant infrastructure, could not come forward without the HRN1 development;
       2. The HRN1 development could not come forward without the A5-M1 link;
       3. The link could not facilitate the HRN1 development unless delivered in its entirety;
       4. If the current viability situation should change then the section 106 obligation contained a mechanism for applying the uplift in value (i.e. to affordable housing);
       5. Monies secured from other developments, which come forward in the light of the construction of the link, could be used to fund additional infrastructure, such as affordable housing.
7. Points (iv) and (v) were also explained at pages 97 and 98 of the August 2013 OR. In addition, 8.55 of that report plainly stated that the HRN1 project was dependent upon (*inter alia*) the A5-M1 link and that link had been given “an indication of funding by the Secretary of State for Transport, but only on this basis that there will be a contribution from this development of £45 million…” (see also paragraph 3.11 of the August 2013 OR).
8. Accordingly, CBC proceeded on the basis that without the contribution of £45m towards the A5-M1 link road, HRN1 would not go ahead. Plainly CBC appreciated that that contribution had the effect of reducing the affordable housing contribution from this particular site. CBC decided that that consequence should be accepted when they weighed the merits of the proposal overall and, in particular, the other benefits that the scheme would achieve (including transportation, employment and economic growth in the conurbation). That was quintessentially a matter of planning judgment for CBC with which this Court cannot interfere. The short answer is that CBC disagreed with LBC on this aspect, as they were entitled to do.
9. As to the alternative submission that CBC failed to consider requiring a reduction in retail development so that affordable housing could be increased, there is no evidence that that was ever raised as an alternative strategy for CBC to consider. LBC raised concerns as to the scale of the retail element in an entirely different context, namely impact on town centres, as to which no legal challenge is brought. CBC were under no legal obligation to assess this alternative strategy. I also note from paragraph 19 of the written statement of Jennie Selley that the need for the scale of retail floor space proposed to contribute to the viability of the scheme was explained at the Briefing Meeting for the Committee on 15 August 2013.
10. For the above reasons I reject all aspects of ground 2.

**Ground 6**

**Submissions**

1. Ground 6 complains that the officers’ reports failed to advise the Committee of a Ministerial Statement dated 1st July 2013 that unmet housing need was unlikely to constitute very special circumstances outweighing harm to the Green Belt. In fact the statement simply states that the “single issue” of unmet housing demand “is unlikely to outweigh harm to the Green Belt and other harm”. So the submission was put on the basis that the report had to draw specific attention to that policy statement, in order to avoid misleading members and to avoid the risk of members thinking otherwise.

**Discussion**

1. This ground is wholly misconceived. It is plain from paragraphs 3.9 to 3.20 of the August 2013 OR that the advice to members was that the very special circumstances comprised a number of substantial planning benefits, including, but not limited to, the meeting of housing need. There is no evidence that any member of the Committee thought otherwise, or even any risk of any member thinking otherwise. The well-established principle referred to in paragraph 15(i) of the Zurich Assurance case ([2012] EWHC 3708 (Admin)) is applicable. This ground is utterly unarguable.

**Ground 8**

**Submissions**

1. LBC submit that because the 30,000 sq m of retail floorspace proposed was more substantial than would be required if only the residents in the HRN1 scheme were to be taken into account (paragraph 8.35 of the August 2013 OR). CBC erred in law by failing to consider whether “that element” was justified by very special circumstances. It is also said that in the absence of a need case for the entirety of the retail provision, and absent any good reason for not substituting additional affordable housing, it was impossible for CBC to conclude that very special circumstances existed in relation to that element.
2. Ms. Kabir Sheikh QC for CBC relied upon the decision of the Court of Appeal in Wychavon District Council v Secretary of State [2009] PTSR 19; [2008] EWCA Civ 692 for the following principles on the interpretation of the then national Green Belt policy (which was not materially different to the relevant parts of the NPPF): -

“(i) “Very special circumstances” connotes a qualitative rather than quantitative test. Rarity may contribute to the special quality of a factor, but is not essential (paragraph 21);

(ii) The policy neither excludes nor restricts the consideration of any potentially relevant factors. The policy limits itself to stating that the balance of such factors must be such as clearly to outweigh harm to the Green Belt and other harm (paragraph 23);

(iii) Consideration of that balance is a matter for the judgment of the decision–maker on the circumstances of the individual case (paragraphs 23 – 24).”

1. She then submitted that in so far as any part of the proposed retail floorspace is not justified by a retail need case, that would have been reflected in CBC’s assessment of harm. In this case, as in others, the Council was entitled to assess the *overall* *harm* resulting from the development and to compare that harm with the *overall* *benefits* of the proposal constituting very special circumstances and then to judge whether the latter clearly outweighed the former. In other words, CBC was entitled to strike that planning balance by considering the proposed development in its totality, or holistically. Mr Purchas QC and Mr Richards for the IP made submissions to like effect.

**Discussion**

1. I accept the submissions for CBC and the IP. There was no effective reply by LBC to those points, which I consider to be correct. The NPPF does not require the planning authority to chop up a mixed use proposal into separate components and to apply the very special circumstances test separately in relation to each such component. No authority was cited to support that interpretation and I do not think that it is justifiable on the language used in paragraph 88 of the NPPF.
2. LBC’s alternative argument in paragraph 94 of its skeleton suggests in effect that the proposal actually before CBC should have been rejected by them because of a preference for reducing retail development in favour of a greater amount of affordable housing. That is simply a variant of the “alternative strategy” argument that I have already rejected under ground 2. CBC was not under any obligation to commit that alternative.
3. For the above reasons I reject ground 8 as being wholly unarguable.

**Ground 7**

**Submission**

1. It is submitted by LBC that CBC had erred in law because of a failure to disclose to LBC the developer’s viability report and the appraisal of that report by CBC’s independent consultant E C Harris. The reduced amount of affordable housing in the HRN1 scheme (a minimum of 10%) was the central issue for LBC who wished to test the viability information upon which that level of provision had been accepted. Ultimately by the end of the hearing this ground rested upon two propositions:-
   1. Paragraph 5 of the Statement of Agreement enclosed with the letter from CBC to LBC dated 28 March 2013 amounted to a legitimate expectation giving LBC the right to be consulted on the viability reports received by CBC;
   2. Even if LBC had no such legitimate expectation, CBC’s failure to disclose the viability material to LBC so as to enable the latter to make representation thereon amounted to procedural unfairness which materially prejudiced LBC. That formulation was based upon paragraph 49 of the decision of the Court of Appeal in Secretary of State for Communities and Local Government v Hopkins Development Ltd [2014] EWCA Civ 470, in substitution for the former “fair crack of the whip” test in Fairmount Developments Limited v Secretary of State for the Environment [1976] 1 WLR 1255.
2. In summary CBC and the IP submitted that:-
   1. The Statement of Agreement had not given rise to any legitimate expectation;
   2. The requirement of procedural fairness did not entitle LBC to be given copies of the viability material, even taking into account the position of LBC as an adjoining planning authority, part of whose housing needs fell to be met within CBC’s area, or the statutory duty upon both authorities to co-operate;
3. In any event LBC’s own conduct demonstrates that it had not been caused material prejudice by the conduct of CBC.

**Discussion**

1. In earlier sections of this judgment I have already set out relevant communications between LBC and CBC. I now summarise what occurred.
2. As far back as 24 December 2012 when the planning application was made, the developer submitted a Viability Statement. A key point made in the planning application submission documents was that the development would not be viable at an affordable housing requirement of 30%. That required a viability appraisal to be conducted as between the developer and CBC so as to satisfy the latter on the level of affordable housing provision at which planning permission could be granted. The financial information supplied to CBC by the DP is commercially confidential as explained in a letter dated 5 March 2013 from its legal adviser and included in the planning application file (paragraphs 9.8 to 9.10 of the August 2013 OR).
3. On 6 February and 20 March 2013 meetings took place between officers of LBC and CBC at which LBC “asked that LBC be provided with the viability evidence to support any reduced affordable housing permission on the HRN1 application site. (Holder WS paragraph 6; Chick WS 2 paragraph 9; Pagodin WS 1 paragraph 11). The only statement or agreement on the part of CBC upon which the Claimant relies pursuant to these requests is that set out in point 5 under “Access to Affordable Rent Housing” in the CBC/LBC Statement of Agreement enclosed with CBC’s letter of 28 March 2013:-

“CBC officers will arrange for LBC officers to be involved at key points in the viability appraisal work and subsequently to meet with the developers of the north of Houghton Regis strategic allocation, to discuss key issues including the opportunities to improve delivery of affordable housing on that site”

1. It is not suggested by LBC that that agreement involved any discussion with the developer, who had already claimed confidentiality for the viability appraisal, or that there was any discussion between the authorities as to how that confidentiality could be appropriately protected if that material were to be disclosed to LBC so that it could make representations to CBC, which the latter could take into account when determining the planning application. There is no evidence that either authority addressed or discussed those relevant considerations before the decision to grant planning permission was taken.
2. Although the Claimant’s evidence asserts that subsequently “continual requests by LBC” were made (Chick WS 2 para.9), Mr Davie on behalf of CBC says in paragraph 11 of his witness statement that he is not aware of any such requests. Moreover, the contemporaneous material in the bundles before the court do not bear out the assertion. The matter was not raised in LBC’s consultation response objecting to HRN1 dated 15 April 2013. The letter to CBC from Councillor Timoney dated 10 June 2013 merely stated “we are awaiting further viability work in relation to the Houghton Regis (HR1) application before the discussions around affordable housing will continue, having noted that “considerable progress” had already been made.
3. On 15 August 2013 Councillor Young wrote on behalf of CBC to Councillor Timoney to confirm the issues that had been discussed at their meeting on 11 August 2013 and how the parties might continue to move forward on these matters. At that meeting CBC provided LBC with an “understanding of the viability issues we must consider as part of the development”. LBC was notified that the officer’s report to Committee was available on CBC’s website from 14 August, that the matter would be dealt with at a meeting to be held on 28 August and that any further representations from LBC would be presented to the Committee if submitted beforehand. The letter contained the following unequivocal passage:-

“The viability of the development has been rigorously tested by our own viability consultants who have concluded that the S106 and affordable housing package which can be derived from the scheme represents ‘a commercial offer’ from the promoters which is likely to undercut the profits which they might normally be expected to make. Clearly, viability is impacted by the agreement between the developer and the DfT for the developer to pay a significant contribution towards the A5-M1 link. However, it is also a fact that the market conditions are currently having a significant adverse impact upon the extent of the S106 package which can reasonably be delivered from this application. My officers are therefore recommending that any permission given on this site must be subject to an ‘uplift mechanism’ which enables the community to share in that uplift, should development values rise significantly in future.”

1. From the tenor of that letter and from the officer’s report (paragraphs 9.11 to 9.20) it must have been obvious to LBC that CBC was proposing to accept the advice it had received from E C Harris and that the minimum amount of affordable housing should be set at 10% (but subject to a proposed “uplift mechanism”). If LBC had thought that it had been given a promise or expectation that it would receive confidential viability information and E C Harris’s report, and then have an opportunity to make representations on that material, it would have protested straight away that it had been treated unfairly or improperly, asked for that material to be disclosed forthwith and for the Committee meeting to be deferred so that it could make representations in good time. But none of that happened. A reply was sent by Councillor Timoney on 27 August 2013 but it did not raise the non-disclosure of viability information.
2. Indeed, it does not appear from the documentation that that issue was pursued by LBC until a request was made under the Freedom of Information Act 2000 on 4 July 2014, that is to say just over a month after the formal decision notice granting planning permission and only 6 days before the Claim Form in the present proceedings was filed. I note that at that stage the FOI request was made in the knowledge that the planning permission had been granted; it could not have been made in order to enable LBC to make representations to CBC on the planning application.
3. In paragraph 90 of its skeleton argument LBC correctly acknowledges that the disclosure of information which is commercially confidential to the developer would be damaging to that party’s interest, but it was submitted initially that there is no reason why disclosure could not have taken place at least to the extent ordered by the First Tier Tribunal of the Regulatory Chamber in London Borough of Southwark v The Information Commissioner and Land Lease (Elephant and Castle) Limited EA/2013/0162.
4. But this line of argument does not assist the Claimant in the present case, as Mr Village QC did acknowledge. First, that case was concerned with the obligation to disclose information under the Environmental Information Regulations 2004. It is accepted that disclosure under that legislation would be to the general public and not just to LBC (see e.g. Regulations 4 and 5). Consequently, the exception in Regulation 12(5)(e) relating to commercially confidential information is very much in play, as is evident from the Tribunal’s decision. Secondly, the Tribunal refused to order disclosure of material of the kind which LBC now says it would have wished to review (see paragraphs 55 to 56 of the decision).
5. It is well-established that (a) material of this kind is to be treated as confidential in the process for determining a planning application, (b) the Court is most unlikely to order disclosure of such material in a judicial review and (c) non-disclosure does not afford a ground for challenging a grant of planning permission, whether because of procedural unfairness, irrationality, or otherwise (see e.g. R (Bedford) v Islington LBC [2002] EWHC 2044 (Admin) (paragraphs 99 to 102); R (English) v East Staffordshire Borough Council [2010] JPL 586; R (Perry) v Hackney LBC [2014] JPL 1329 (paragraphs 23 to 36); R (Perry) v Hackney LBC [2014] EWHC 3499 (Admin) (paragraphs 48 to 51, 64 to 65 and 86 to 100). No submissions were made in this case to challenge the correctness of these decisions or the principles they lay down.
6. In the light of the above, Mr Village QC confirmed that ground 7 depends upon LBC’s arguments relating to (a) legitimate expectation and (b) procedural unfairness because of LBC’s “special position”.
7. Mr Village QC submitted that point 5 in the Statement of Agreement sent by CBC on 28 March 2013 amounted to a promise of consultation on the confidential viability information before the application was determined (i.e. category (b) in paragraph 57 of R v North and East Devon health Authority ex parte Coughlan [2001] QB 213). That should involve an examination of the precise terms of the statement relied upon, the circumstances in which the promise was made and the nature of the statutory or other discretion (paragraph 56). It is also relevant that the expectation relied upon is said to have been owed to LBC alone (paragraph 59). Consequently there is no dispute that the expectation relied upon had to be sufficiently certain in relation to the disclosure of *confidential* material.
8. The terms of the Statement of Agreement must be considered in context. In the circumstances, LBC ought to have been aware that the material the subject of ground 7 was confidential and that that confidentiality belonged to the IP. The Agreement followed the letter of 5 March 2013 from the IP’s legal advisor which was available on the planning application file. In any event, LBC ought to have been aware of the approach taken to confidentiality in cases such as Bedford and English. Indeed, it would be most surprising if LBC had not encountered this issue before in its dealings with developers in carrying out its own development management functions. The Professional Guidance Notice: Financial Viability in Planning, paragraph 4.3.1 of which was relied upon in paragraph 9.1 of Mr Moriarty’s second witness statement, was issued by the RICS in August 2012.
9. Against that background two things should have been plain to LBC when discussing with CBC the terms of the Statement of Agreement. First, those terms needed to state expressly that LBC would have access to *confidential* information of a kind which ordinarily would not be disclosed by CBC to other parties. Second, unless the IP was involved in the process, it might object to the release of that information to LBC. Alternatively, any willingness on the part of the IP to share information with LBC is highly likely to have been dependent upon agreeing procedures for determining what material would be disclosed to LBC, how the confidentiality of that material and representations thereon by LBC would remain protected and how any such representations would be taken into account by the Committee. From the evidence before the Court none of those matters was addressed at any stage before the agreement was made, or before CBC’s decisions were taken.
10. Accordingly, in my judgment the terms of the Statement of Agreement, when read in the context set out above, was inadequate to create a legitimate expectation that LBC would be entitled to receive and make representations on confidential viability information. The text only promised to “involve” LBC “at *key points* in the viability appraisal work and subsequently to meet with the developers…” to discuss “*key issues* including the opportunities to improve delivery of affordable housing on that site.” “Key points” simply referred to stages in the handling of the planning application. The phrase “to discuss key issues” was plainly insufficient to create a promise or expectation that commercially confidential information would be disclosed.
11. Although it is unnecessary to my conclusion on this point, I am reinforced in my view by the subsequent conduct of LBC. At no stage before the decision to grant planning permission was made did LBC give any indication that in its view (putting legal analysis to one side) CBC had broken a promise.
12. There remains the second question of whether what occurred amounted to procedural unfairness causing material prejudice to LBC. As I have previously explained, this argument is put forward solely on the basis of LBC’s special position, namely that the satisfaction of Luton’s housing needs was dependant in part upon securing provision, particularly of affordable housing, in Central Bedfordshire, which was supported by the statutory duty to co-operate in preparing development plans.
13. Certain matters are not in dispute. First, CBC did obtain viability information from the IP and subjected that material to independent scrutiny. That course accords with paragraph 65 of the judgment of Patterson J in the second Perry case. CBC followed good practice. Second, the relevant factors affecting the viability appraisal were summarised in the publicly available part of the August 2013 OR; commercially sensitive material and the report by EC Harris was provided to the members of the Committee in the confidential section of the report. Those matters were taken into account by the decision-maker. Third, it was understood between the two authorities that the affordable housing provision on the HRN1 site would be split 50/50 between their two respective areas. Consequently, CBC itself had a significant interest in testing the viability information supplied to it by the IP in order to maximise affordable housing towards meeting the needs of its own area.
14. Accordingly, the real nature of LBC’s complaint is that it did not have the opportunity to examine the viability appraisal itself, not merely so that it could make its own assessment of that material in parallel with that of CBC, but also so that it could make representations to CBC which would be taken into account in the decision on the planning application. Mr. Village QC accepted that in order to protect confidentiality such representations would have had to be put to the Committee in the confidential part of their papers. That underscores the point that the obligation of fairness claimed by LBC would apply to it alone. No other participants in the process, apart from the IP, would have been entitled to see those representations.
15. In assessing this argument I have regard to paragraphs 99-100 of the judgment of Ouseley J in the Bedford case and to paragraph 91 of the judgment of Patterson J in the second Perry case, from which the following principles are plain:-
    1. Fairness in the planning process is not confined to considering the interests of objectors, or just LBC. Fairness also has to respect the position of the applicant as regards the confidentiality of commercially sensitive information which he supplies to the decision-maker;
    2. The decision-maker needs to be able to examine such matters with applicants in a confidential manner and if independent consultants are instructed any disclosure to them of the material should be made in confidence;
    3. If such confidentiality is not respected then the decision-maker will be hindered in its negotiations with developers over the content of publicly beneficial packages such as the extent of affordable housing. The public interest would be harmed.
16. Given these principles, the special position upon which LBC relies could not have been sufficient by itself to impose an obligation of disclosure upon CBC and to receive confidential representations from LBC. Nor did such an obligation arise merely because in February and March 2013 LBC made requests to be supplied with “the viability evidence to support any reduced affordable housing.” Requests of that general nature did not engage with the imperative principles set out in the Bedford case. One way of dealing with the situation would have been to discuss and agree a protocol on disclosure involving the IP. That was not done. There is no evidence of LBC pursuing that approach with CBC or even seeking confirmation from CBC that commercially confidential would be made available to it, or to define the information it would receive.
17. It is a truism that the requirements of fairness are highly fact sensitive. In the circumstances of this case, I do not consider that it can be said that the procedure followed by CBC was unfair to LBC.
18. Moreover, I do not think that LBC can legitimately claim to have suffered unfairness causing them material prejudice. In George v Secretary of State [1979] 77 LGR 689, 695 Lord Denning MR stated that “there is no such thing as a technical breach of natural justice… You should not find a breach of natural justice unless there has been substantial prejudice to the applicant as a result of the mistake or error which has been made.” In the present case, LBC took no steps whatsoever to raise the non-disclosure of viability information in August 2013 when the officer’s report became available, or indeed subsequently until the FOI request was made in July 2014, after CBC’s grant of permission. No real evidence has been put before the Court to explain why that is so. The matter ought to have been raised by August 2013 at the very latest, bearing in mind that the procedure followed by CBC had to be fair to the IP as well as other participants. I can see no justification for the delay in the point being raised, with all the potential that has had to cause prejudice to the IP, least of all when the Claimant is itself a planning authority.
19. For all these reasons I reject ground 7.

**Ground 9**

**Submissions**

1. LBC complains that CBC failed to apply lawfully the sequential test in paragraph 24 of the NPPF in relation to the retail element of the proposed development. In essence the test requires that main town centre uses should be located in town centres, then in edge of centre locations and only if suitable sites are not available should out of centre sites be considered. Paragraph 27 states that where an application fails to satisfy the sequential test, “it should be refused”.
2. Having said that, it is plain, and not disputed by LBC, that a failure to comply with the sequential test does not have to result in a refusal of permission. As a matter of law the planning authority is entitled to decide that there are other factors in support of granting permission to which they may attach more weight than the breach of the sequential test.
3. The IP supplied a Retail Assessment, section 6 of which dealt with the sequential test. LBC relies upon a review of that assessment in section 3 of a report prepared in June 2013 by CBC’s independent consultants, Turleys. Those consultants agreed that the appropriate centres to be included in “the sequential search” were Houghton Regis and Dunstable (paragraph 3.11). Turleys pointed out that the proposed retail floorspace was likely to meet the needs not only of the local resident population but also “a much wider area than just Houghton Regis (paragraph 3.10). Turleys made a number of criticisms of the IP’s assessment, including “the approach adopted… in assessing alternative sites demonstrates limited flexibility in applying the sequential approach and does not provide a robust assessment…” (see also paras. 3.16 and 3.17). Turleys identified a site in Dunstable, the Quadrant, which should be considered further (paragraphs 3.30-3.32). The consultants’ overall conclusion to section 3 (paragraph 3.37) suggested that the applicant might provide further material to justify its approach. But Mr Village QC stated that that was not done and I proceed on that basis.
4. Paragraph 8.40 of the August 2013 OR quoted the entirety of Turley’s concluding chapter 5, entitled “Principal Findings and Recommendations” (paragraphs 5.1 to 5.11). Paragraph 5.4 summarises the gist of paragraphs 3.16, 3.17 and 3.37. In opening LBC’s case, Mr Village confirmed that there is no suggestion that the officer’s report was significantly misleading in reporting the views of the Council’s independent consultant applying the test in Oxton. In my judgment that must be correct.
5. Instead, LBC’s criticism is that given the statement in the “Reasons” for the grant of permission in the decision notice of 2 June 2014 that the proposal “complies with the National Planning Policy Framework”, it is impossible to discern in the face of Turley in the NPPF had been passed (paragraphs 101-102 of LBC’s skeleton).
6. CBC submits that in paragraphs 5.5 and 5.6 of Turleys’ report, set out in full of the August 2013 OR, the consultants recommended that the Members reach a decision on the application by striking an overall balance between positive and negative impacts. They stressed the importance of balancing adverse and *beneficial impacts* in reaching a judgment as to whether there are considerations which would outweigh any adverse impacts of the proposals. Members were directed to the summary of the benefits of the scheme in the IP’s submission documents. Read in context (e.g. the phrase “positive impacts”) it is plain that by “impacts” Turleys meant “effects”; so that “adverse impacts” was not limited to the retail impact test in paragraph 26 of the NPPF. Finally, in section 3 of the September 2013 OR, members were specifically directed to consider extracts attached from Turleys’ report, including paragraphs 3.35 to 3.37 and 5.1 to 5.11. The officers’ reports were not misleading.

**Discussion**

1. In essence I accept the submissions for CBC.
2. To put the matter into context, I note that LBC did raise objections to the proposal under the retail impact test, that Turleys advised that the proposal was unlikely to cause significantly adverse retail impact and that the officer’s report and the Committee proceeded on that basis. However, LBC did not raise any objections under the sequential test, not even in their letter to CBC of 27 August 2013 following the publication of the August 2013 OR with its express references to the Turleys report. Although the owners of the Quadrant Centre in Dunstable did object on the basis that insufficient “sequential testing” had been carried out, it is not suggested that the report was significantly misleading in the way that that objection was put to the Committee. No further detail was provided to the Court on that aspect.
3. LBC’s argument is based upon interpreting a single sentence in the “Reasons” section of the decision notice as indicating that the Committee were satisfied that the sequential test had been satisfied. That argument is misconceived. First, when the former obligation to give reasons applied, the requirement was only to give “summary reasons”. Second, the position is not substantially different from when a decision-maker decides that a proposal accords or complies with the statutory development plan (for the purposes of section 38(6) of the Planning and Compulsory Purchase Act 2004). That is a judgment which should look at the plan as a whole; some policies may support a proposal and others may point to a refusal (City of Edinburgh v Secretary of State for Scotland [1997] 1 WLR 1447). The analysis is no different when a decision-maker states that a proposal complies with the NPPF. That may well be a judgment, as here, that the proposal accords with the NPPF as a whole, or taken overall. It cannot be inferred without more that the decision-maker has necessarily formed the view that the proposal complies with each and every policy in the NPPF.
4. Instead, the correct legal approach is to assume (as in paragraph 15(i) of the Zurich Assurance case [2012] EWHC 3708 (Admin)) that the Committee followed or adopted the reasoning of the report. There is no evidence to suggest otherwise. On that basis it is plain that the members were invited to proceed on the basis of Turleys’ views as set out in section 5 of their report and as quoted in paragraph 8.40 of the August 2013 OR. In other words, they struck a balance between the overall benefits and disbenefits of the scheme, including the failure to satisfy the sequential test completely. It is to be noted that paragraph 5.5 of Turleys’ Report was underlined in the officer’s report. The point could hardly be clearer; but in any event it is also confirmed by paragraph 23 of the witness statement of Jennie Selley.
5. Ground 9 is wholly unarguable. In the light of the reasons given above I do not think it is necessary, nor would it be appropriate for me to deal with the submissions made on whether paragraph 24 of the NPPF does or does not allow for “disaggregation”. Further argument on the point would have been necessary.

**Ground 10**

**Submissions**

1. LBC submits that CBC failed to apply sequential and retail impact tests in respect of I proposed main town centre uses, notably 5000 m2 of office space, a 3000 m2 hotel, and a 3000 m2 cinema. LBC accepts that it did not raise these points at any stage before the decision to grant planning permission, but relies once again on the decision in Kides. LBC does not suggest that any other party raised these points.

**Discussion**

1. I accept the submissions of CBC and the IP that this ground is quite unarguable.
2. As I have explained previously, the Kides decision is concerned with standing, but that is not the issue here. The true issue is whether the planning permission should be struck down simply because the officer’s report did not mention these particular matters. The relevant principles for that purpose are contained in Oxton and Fabre. It was a matter for the judgment of the officers as to whether to include issues of this nature in their report. Applying a measure of common sense, these land uses formed a relatively small part of a 262 hectare sustainable urban expansion which would be expected to contain a sustainable mix of uses in any event (see e.g. paragraph 93 of the IP’s skeleton). CBC approached the lack of robustness in the sequential testing of *retail* floorspace as a matter to be put in the overall planning balance. It is perfectly plain from their report that officers, and likewise members, considered that the very substantial benefits of the scheme clearly outweighed any harm. The non-inclusion in the officers’ report of sequential and impact tests in relation to non-retail main town centre uses, where no particular issues had been raised on these matters, cannot be faulted in law. I reject ground 10.

**Conclusion**

1. Although I have rejected grounds 6, 8, 9 and 10 as wholly unarguable, I consider that the other grounds crossed the threshold of arguability. In order to avoid unnecessary procedural complications in the event of this matter going any further, I will grant permission to apply for judicial review in relation to the claim as a whole. However, for the reasons set out above that claim is dismissed.

**Addendum to judgment**

1. I now deal with:-
   1. The Claimant’s application for permission to appeal;
   2. The Claimant’s application for an extension of time within which to appeal, or to seek leave to appeal from the Court of Appeal and the IP’s opposing application to abridge time;
   3. The IP’s application for an order that the costs of Acknowledgment of Service be paid by the Claimant limited to £10,000.

The Defendant and the IP oppose ii). The IP opposes ii) and the Claimant opposes iii). I am grateful for the written submissions of the parties.

**Permission to appeal**

1. I refuse permission to appeal to the Court of Appeal. I do not consider an appeal would have a real prospect of success. The grounds of challenge have been fully argued during a hearing which lasted 2.5 days. I have found that grounds 6, 8, 9 and 10 were wholly unarguable. I have sought in the judgment to deal with each of the various arguments raised by the Claimant in some detail. The application for permission does not identify any omission or error in the judgment which the Claimant would seek to argue in the Court of Appeal. It badly seeks permission to appeal “across the board” relying upon “the arguments put forward in support of the application”.
2. I do not consider that any other compelling reason as to why the appeal should be heard has been given. The fact that the planning permission is for a very substantial development on a very large area of Green Belt is not a “compelling reason” to justify an appeal from a decision on judicial review. The same applies to the Claimant’s objective of securing as much affordable housing as possible. These matters go to planning merits, a matter for the decision-maker.
3. I do not consider that this case raises important questions of planning law and practice which, in the public interest, should be considered by the Court of Appeal. Most of the challenge depended upon a detailed review of lengthy reports by officers to Committee, in the light of the representations made to the Defendant on the merits of the planning application, particularly those made by the Claimant itself. The challenge did not involve the Court ruling on the *construction* of the NPPF as opposed to the *application* of that document (see e.g. paras 122 to 128, 163, 167-8, 203-7 and 209-10).
4. I cannot see any basis for granting permission to appeal on only some of the grounds of appeal (as suggested at the end of paragraph 2 of the application).

**Time limit for appealing**

1. It is most unfortunate that this project, which will deliver much needed development and nationally important infrastructure, has been delayed by a challenge lacking in legal merit.
2. I acknowledge that judgment is being handed down on Friday 19 December 2014 shortly before a substantial holiday period which may affect not only the availability of counsel, but also of solicitors and the Claimant’s officers and members. On the other hand the Claimant’s team had the benefit of the draft judgment sent out at 2:37pm on Monday 15 December.
3. In contrast to the Claimant’s request to extend the 21 day time limit in CPR 52.4(2)(b) to 28 days, the IP asks the Court to reduce it to 14 days, so as to expire on 2 January 2015. But for the intervening holiday period I would have been very sympathetic to the IP’s application.
4. In the circumstances, I think the appropriate balance to strike is that the normal 21 day time limit shall apply. I have asked my clerk to communicate that decision to the parties during the morning of 18 December 2014.

**The costs of the IP’s Acknowledgement of Service**

1. The general principle in Bolton against multiple sets of costs does not apply to costs of preparing an Acknowledgment of Service (para. 76 of R (Mount Cook Land Ltd) v Westminster City Council [2004] 2 P&CR. 22 and per Walker J in R(Kenyon) v Wakefield Council [2013] EWHC 1269 (Admin)).
2. I have decided that four of the ten grounds were unarguable. If they alone had been pursued permission would have been refused. The IP needed to prepare an Acknowledgement of Service in any event. I do not see why the Claimant should be able to avoid the IP’s “Mount Cook” costs in relation to those four grounds, simply because I granted permission on all grounds for the practical procedural reason given in paragraph 211 of the judgment.
3. The agreement on cost capping was between the Claimant and the Defendant. In any event, the application made by the IP respects CPR 45.43.
4. Although with the benefit of substantial oral argument I was able to reject grounds 6, 8, 9 and 10 fairly briefly, at the stage of preparing an Acknowledgment of Service the IP would have had to consider a substantial amount of the supporting material relied upon by the Claimant.
5. Taking into account the Claimant’s submissions on the amount of costs, I consider that the proportionate amount which should be paid by the Claimant to the IP in respect of the relevant part of the costs of the Acknowledgment of Service is £7,000.
6. Paragraph 4 of the Claimant’s submissions seeks permission to appeal also in respect of the costs order. I refuse permission because neither of the tests in CPR 52.3(6) is satisfied. The exercise of my discretion lies well within the scope of established principles.