Case No: CO/2496/2014

Neutral Citation Number: [2015] EWHC 185 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2015

Before :

MR JUSTICE OUSELEY

- -

Between :

THE QUEEN (on the application of LEE VALLEY REGIONAL PARK AUTHORITY)	**Claimant**
- and -	
BROXBOURNE BOROUGH COUNCIL	**Defendant**
-and-	
BRITANNIA NURSERIES	**Interested Party**

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Gregory Jones QC and David Graham (instructed by **Lee Valley Regional Park Authority**) for the **Claimant**
Richard Harwood QC (instructed by **Broxbourne Borough Council**) for the **Defendant**
Jenny Wigley (instructed by **Attwaters Jameson Hill**) for the **Interested Party**

Hearing dates: 3rd and 4th December 2014

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Judgment

MR JUSTICE OUSELEY:

1. The Lee Valley Regional Park Authority, the claimant, is a statutory body established under the Lee Valley Regional Park Act 1966, for the purposes of improving and preserving the land adjoining the River Lee, passing through Essex, Hertfordshire and Greater London, as a regional park for the purposes of providing opportunities for recreation and leisure. The Lee Valley Regional Park Authority, LVA, has certain plan making functions and particular procedural rights in relation to development control, although it is not itself a development control authority. The nine district and two county councils whose areas include part of the Regional Park provide the members of the authority. One such district council is the defendant, Broxbourne Borough Council.

2. Broxbourne Borough Council granted planning permission on 22 April 2014 to Britannia Nurseries, the interested party, for the development of 4.4 ha. of land, within the Regional Park and within the Green Belt, for the demolition of existing former nursery buildings and structures, and redevelopment with 90 dwellings, public open space and public car parking spaces. The LVA had objected to this proposal because it was contrary to Green Belt policy and its own policies for the Regional Park.

3. The Council referred the application to the Secretary of State for Communities and Local Government who, on 24 July 2013, having considered the LVA objections, declined to call the application in for his own determination, not because of any consideration of the detailed merits of the application but because it did not raise issues of more than local importance. There is no challenge to that decision, but the Council was then entitled to and did proceed to grant planning permission, after the conclusion of an agreement with the developer under s106 of the Town and Country Planning Act 1990.

4. The planning application site was originally a horticultural nursery. It comprises a northern part which amounts to approximately half or a little more of the whole site, and which is open, grass scrub land. It appears that at one time there had been substantial nursery buildings on part of the northern area which were demolished to make way for mineral extraction, after which the land was to be restored for agricultural purposes with inert landfill, according to the conditions of that permission. This is consistent with its appearance as grass scrub land. The southern part of the site contains substantial former nursery buildings concentrated in the south-east part, including some which have collapsed after fire damage. There are other buildings and substantial areas of hard standing.

5. The site as a whole is in the south-west corner of the Regional Park in this section, the main body of which lies to the north and east of the site. To the south, and outside the Green Belt, is built development, as there is to its west beyond the north –south railway line.

6. The LVA challenges the grant of permission on the grounds that the Council misinterpreted Green Belt policy in the National Planning Policy Framework, NPPF, in an unlawful manner particularly with reference to the concepts of openness and

previously developed land. The officer's report failed to identify the harm done to the Green Belt, or to identify the breach of Green Belt policy or what very special circumstances were sufficient to outweigh the harm done. There are a number of other aspects of the report which were also said to be misleading and unlawful. The LVA also raised a particular and to some extent esoteric point, about the role of Lee Valley Regional Park plans and the statutory development plan system which involved some examination of the development of statutory plan making provisions since the Town and Country Planning Act 1962.

The Officer's Report

7. The officer's report for the committee on 21 May 2013 summarised the responses to consultation including that of the LVA. It set out the relevant policies from the Borough of Broxbourne Local Plan Second Review 2001-2011 adopted in December 2005. The policies listed as applicable include GBC2 dealing with Green Belt development and CLT4 dealing with the Lee Valley Regional Park. Subject to the issue over the role and status of the LVRP plans, the Second Review Plan 2001-2011 is the relevant statutory development plan. Section 5 of the report dealt with the location and described the site and its location much as I have set out already. It described the northern part of the site as being within a Landscape Character Area, a designation within the Development Plan. It also stated that the site "is split into two defined character areas", the southern half and the northern area as I have described them. An aerial view of the application site and photographs of it were included in the report. The majority of committee members also went on a site visit.

8. The proposed development is described in section 6. Mr Jones QC for the LVA pointed out that it was an outline planning application with all matters reserved which meant, as the report said, that the layout, house types and "road relocation" were all illustrative. The illustrative material provided would assist the committee in visualising the style of properties which could be built and arranged. "However, a future reserved matters application could look significantly different". There would be four different house types of a largely traditional nature ranging between 2-2½ stories. Typical upper limits of property heights would be 9.5 metres with lower limits of 7 metres. Dwellings widths would range between 4-11 metres and depths would range between 6-9 metres. The illustrative layout demonstrated a greater number of 2 storey detached dwellings on the eastern side of the development "in order to minimise visual impact from the Regional Park". It noted that design and appearance were not part of the application.

9. The planning history of the site was referred to briefly, noting the permission in 1984 for the extraction of minerals with restoration to agriculture with inert fill. In 1998 permission had been granted for cladding part of the glass houses and for the continued use of part of the site for trade in florist's sundries and cut flowers.

10. It is the appraisal section which matters for these purposes. The main issues to consider included first "the principle of redevelopment for residential use in the Metropolitan Green Belt and the Lee Valley Regional Park"; other main issues included the supply of housing land, layout and density and other development control matters. In dealing with the first main issue, which the report repeated, it first

set out policy GBC2 of the Local Plan, which states that planning permission will not be granted for development in the Green Belt other than for the purposes specified in the policy, none of which apply to residential development as proposed here. Paragraph 8.3 continued:

> "8.3 Development of this site for housing does not accord with this policy. However, the provisions of this policy in relation to this site are now to some extent superseded by the National Planning Policy Framework. Whilst the NPPF retains the previous stance of national guidance in that there is a presumption against inappropriate development within the Green Belt, it now allows for:
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> > "limited infilling or partial or complete redevelopment of previously developed sites (brown field land), whether redundant or in continuing use which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development".
>
> 8.4 This is a change in emphasis to provide a more flexible approach to derelict green belt sites provided that the openness of the green belt is not compromised."

11. The report then continued in paragraph 8.5: "In addition to the foregoing, the applicant also contends that there are 'very special circumstances' in support of this scheme and has put forward the following case as to why development is justifiable." There then followed eight points:

    - The development would be well contained within the boundaries;
    - The development would not result in coalescence settlements;
    - The site was not rural countryside due to former activities;
    - It was Local Plan Policy to promote the re-use of previously developed and derelict urban land;
    - Green Belt land had to be released in order to meet the Council's short and medium term housing requirements;
    - There was an overwhelming need for affordable housing which would not be provided within the urban area;

- There was a need for family housing with gardens which could not normally be provided within the urban area; and

- The site is a logical extension to the existing urban area."

12. Mr Harwood QC for the Council submitted that those eight points were no more than a summary of the applicant's case, and that it was the following paragraphs that contained the officer's appraisal of very special circumstances.

> "8.6 With regard to the points made by the applicant, the proposal would be a comprehensive redevelopment of this derelict and redundant site resulting in the removal of dilapidated buildings. It would remediate any contamination and also address a history of anti-social behaviour. In total, police have been called 14 times to the site as a result of theft, squatting, drinking and trespass.
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> 8.7 It is not considered that a residential development on this site would unacceptably extend the urban area into a high quality area of the Green Belt. It is noted that the scrub to the north of the site is formed from an area of landfill. Any development on this site would not result in the merging of urban areas and the 90 dwellings proposed would be sited appropriately after taking account of the sites constraints.
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> 8.8 Whilst the objections raised by the Lee Valley Regional Park Authority are noted, it is considered that this development would not be harmful to the character of the Park. On the contrary, it is considered that the clearance of a long derelict site and its replacement with high quality housing facing out across a new area of public space should be seen as a substantial improvement. In addition, the creation of a major new entrance to the Park will open it up to Waltham Cross and visitor numbers will be increased. Access to the Park for Waltham Cross residents currently requires an 800 metre walk down Eleanor Cross Road to the Lee Valley White Water Centre. This development will create an attractive new route for pedestrians and cyclists as well as providing 30 visitor parking spaces for Users of the Park.
>
> 8.10 Overall, it is considered that a high quality development could secure significant long term benefits to the openness and attractiveness of the Green Belt and Lee Valley Regional Park. It would replace a derelict site with a high quality and sustainable housing scheme within well landscaped surroundings."

13. Paragraph 8.9 was incomplete and members were advised to ignore it. The next issue dealt with in the report was the supply of housing land. Mr Jones criticised this paragraph because he said that it did not make clear whether there was or was not a 5 year housing supply, when in fact there was a 5 year housing supply even without this proposed development. Paragraph 8.11 reads as follows:

> "The Supply of Housing Land
>
> 8.11 The Council needs to take into account the provisions of the National Planning Policy Framework to boost significantly the supply of housing and should at all times retain a five year supply of housing land. This currently means that there must be sufficient land within the borough to enable 1,250 new homes to be built. In order to maintain this figure, a limited number of sites need to come forward before a more comprehensive review of the green belt takes place through the new Local Plan site [sic]. [allocation plan, I infer]. Permission for this site would make a significant contribution to the supply."

14. The report next turned to the layout and density of the development, pointing out that the application was in outline but illustrative plans had been submitted; the development would need to incorporate extensive landscape buffers to the north and to the east and the illustrative plan showed open space areas including the play area and drainage pond located to the east adjacent to the site entrance. There was potential for a central north-south boulevard with landscaping and a landscaped courtyard. Housing with the more urban feel was to the west of the site, and to the east it would appear more open and less dense "helping to diffuse the development into the more open area of the site proposed adjacent to the boundary with the LVRP". Mr Jones pointed out that the reference to the boundary with the LVRP was a misconception since the site itself was within the LVRP; the site was merely not land owned by the LVA.

15. In paragraph 8.19, the officer concluded that the density, illustrative housing mix and layout accorded with policy H8 on design. It added that if elements of the proposal differed significantly in the reserved matters application the "current positive elements of this scheme might be lost. In particular the spaciousness and openness of the development and its positive relationship with the LVRP are central to a positive recommendation and would need to be carried through to any reserved matters submission". The planning obligation would include the payment of £250,000 for improvements to the LVRP and recreation in the vicinity of the site.

16. The conclusion to the report said:

> "10.1 The application site is located within the Green Belt and the Lee Valley Regional Park. However, it is a long standing derelict site that in its current state is seriously detrimental to both. It is in private ownership and no realistic proposals have been made that would take the site into Park use. On balance, it

> is considered that a high quality sustainable housing development that opens up a major new entrance into the Park from Waltham Cross would be a major benefit to the Park. It is also considered that the development as set out would provide greater benefits to the green belt than the current dereliction. The development would be an extension of the existing urban area and would not extend excessively into the open countryside. It would provide much needed housing, help to retain a five year land supply within the borough and provide affordable housing."

17. The next paragraph dealt with what would be expected in the reserved matters application. It pointed out that more than 90 dwellings were highly unlikely to be permitted and that 90 was the upper limit which the site could accommodate. Even that number would need to be fully demonstrated through a detailed layout.

18. The LVA's Head of Planning addressed the Council's committee briefly, referring to the LVA's policies, to the support which the Development Plan gave to refusing permission, and to the "unacceptable precedent" which the grant of permission for this housing development in the Green Belt and in the Regional Park would create.

19. The reasons for the grant of permission produced in April 2014, after negotiations were concluded on the s106 agreement, were:

> "Reasons for Grant of Permission: Overall, it is considered that the proposal complies with Policies SUS10, SUS17, GBC2, H8, H13, T3, T9, T11 and IMP2 and all other relevant policies of the Borough of Broxbourne Local Plan Second Review 2001-2011 (December 2005) and the Supplementary Planning Guidance August 2004. Very special circumstances have been demonstrated in this case which allow for development in the green belt, there will not be a materially detrimental impact on the area generally, upon the local and strategic highway network nor upon the amenity and outlook of the adjoining properties. The development has secured community benefits for the area local to the site and the Lee Valley Regional Park."

20. The s106 agreement limits the number of houses to 90. Conditions require the provision of 30 car parking spaces for Park users, and that the reserved matters application conform to a Design Brief, the current draft of which supports the illustrative layout considered by the committee.

The Policy Framework

21. Relevant parts of the National Planning Policy Framework on Green Belts are:

> "79…The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green belts are their openness and their permanence.
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> 81. Once Green Belts have been defined, local planning authorities should plan positively to enhance the beneficial use of the Green Belt, such as looking for opportunities to provide access; to provide opportunities for outdoor sport and recreation; to retain and enhance landscapes, visual amenity and biodiversity; or to improve damaged and derelict land.
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> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. "Very special circumstances" will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations".

22. Paragraph 89 affirms, as GBC2 does, that the construction of new buildings in the Green Belt is inappropriate, subject to exceptions of which I mention two. One is replacement buildings for the same use provided that the new is "not materially larger" than the old. That is not directly applicable here, save that it indicates why there would generally be no harm to the openness of the Green Belt. The other exception is fully quoted in paragraph 8.3 of the officer's report, and applies to the redevelopment of previously developed land which does not have a greater impact on the openness of the Green Belt and on the purposes of including land within the Green Belt than the existing development. The glossary defines "previously developed land", and is important:

> "**Previously developed land:**
>
> Land which is or was occupied by a permanent structure, including the curtilage of the developed land (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure. This excludes: land that is or has been occupied by agricultural or forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill purposes where provision for restoration has been made through development control procedures; land in built-up areas such as private residential gardens, parks, recreation grounds and allotments; and land that was previously-developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape in the process of time."

23. Other NPPF policies deal with the maintenance of a five year supply of housing, and in paragraph 47 with boosting significantly the supply of housing but not so as to breach specific NPPF policies such as the Green Belt. On 1 July 2013, a written Ministerial statement in Parliament on the Green Belt made it clear that "the single issue of unmet demand… for conventional housing, is unlikely to outweigh harm to the Green Belt and other harm to constitute the "very special circumstances" justifying inappropriate development in the Green Belt". The NPPF also requires high quality in the design of development whilst discouraging unduly prescriptive design policies on the imposition of particular styles or tastes: paragraphs 57, 59 and 60.

24. The supporting text to Local Plan policy GBC2 refers to the problem of derelict glasshouses in West Cheshunt, where the 1986 Structure Plan Review incorporated provision for a review of Green Belt boundaries, which was said to have achieved a good balance between development and retaining countryside.

25. The Local Plan policies place the northern two-thirds of the site, in a Landscape Character area where policy GBC16 seeks to include landscape enhancement measures, whenever development is permitted in the Green Belt countryside.

26. The Local Plan also contains retained policy CLT4 on the Lee Valley Regional Park. It provided that the Council supported the LVA in continuing development of the Park in the expectation that development would be predominantly recreational uses appropriate to a Regional Park, though some more intensive recreational uses might also be permitted.

27. Strategic Proposal LVRP1 of the Lee Valley Regional Park Plan, adopted in 2000, envisages the achievement of the Park's role in providing a range of recreation, leisure and nature conservation "experiences" through the protection of a "continuous corridor of connecting and interrelated open space, water and vegetation" and the definition and protection of the Park boundary through "the creation, enhancement and management of visually attractive, quality Park edges." The Park is recognised as a link in a Green Chain of regionally significant open spaces. The Park itself provides a network of open space reaching from London into the countryside. A key feature of the Park is its openness. Its role is reliant on the quality of agricultural and rural land in and adjoining the Park, although some agricultural activities have an adverse impact on it. Strategic Proposal LVRP3 seeks to make appropriate use of the Park's resources in a number of ways, including the "regeneration of areas of vacant and derelict land to provide a balanced range of sites for regional leisure, recreation and nature conservation".

28. The site lies within area 3.1 of this Plan, which is an area proposed "for informal recreation and nature conservation with an emphasis on quiet recreation within a wooded, grassland and water environment." Open space was to be protected, and acquired if necessary. Intrusive uses which were incompatible with the Park were to be removed or their adverse impact was to be mitigated. The explanatory text referred to pockets of housing, chalets and glasshouses in this context. The Plan makes it clear that housing development is not compatible with the leisure purposes for which the Park was established, and precludes the opportunity being taken to bring the land into uses compatible with the Park.

29. Policy L1.1 seeks to protect and enhance the openness of the Park by "ensuring no development in or adjacent to the Regional Park adversely affects the open character of the Park", and "avoiding built development which compromises the purpose of areas of Green Belt …" Other policies oppose development incompatible with Park purposes, L.2.1; and L.2.3 seeks to ensure that derelict and unused land is brought in to Park use. Development for purposes which are not those of the Regional Park should be located within "existing established areas", where they would have a negligible effect on the openness of the Park.

The Legal Framework

30. S38(6) of the Planning and Compulsory Purchase Act 2004 provides that, if s 70 requires regard to be had to the development plan in the determination of a planning application, "the determination must be made in accordance with the plan unless material considerations indicate otherwise."

31. Certain provisions of the Lee Valley Regional Park Act 1966, the 1966 Act, are relevant. S12 creates the duty of the LVA, among other tasks, to develop, improve, preserve and manage the Park as a place for leisure, recreation and sport and for the provision of nature reserves and for the enjoyment of any kind of entertainment. The LVA may do all such things as it thinks necessary to fulfil that duty.

32. S14 makes special provisions for planning. First, the LVA had to prepare a plan showing proposals for the use and development of the Park, about which it had to consult the local planning authorities in relation to whose areas those proposals relate; this plan is to be kept under review, in a similar fashion. By s14(2)(a):

> "The local planning authorities shall from time to time include in their development plans or in any proposals for any alterations …such part of the [LVA plan] or of any amendment to that plan as relates to their area."

Copies of this plan and amendments must be sent by the LVA to the local planning authorities and be kept available for public inspection. However, by s14(2)(b), the inclusion of a part of the LVA plan in a local planning authority's Development Plan:

> "shall not be treated as indicating the approval of the local planning authority to such plan…nor shall such inclusion prejudice any representation to the Minister which the local planning authority may think fit to make thereon."

33. Development control is dealt with in s14 (4). The local planning authority has to notify the LVA of any application which appears to the planning authority as likely to affect any part of the park, and then to consult it. S14(8) contains a special provision which empowers the LVA to require the local planning authority to refer its determination of the application to the Minister, who can require the application to be referred to him, for determination after the LVA has had an opportunity to be heard by an Inspector.

General

34. The approach of the two main parties to the issues was quite different. Mr Jones took issue with many aspects of the officer's report, contending that in a variety of ways, they showed errors of law. However at root, his complaint was that development had been permitted to spread to undeveloped areas of open Green Belt land with no appreciation of the harm which that did according to policy, and with no proper appraisal of the very special circumstances required to overcome such harm. Mr Harwood's over-arching defence was that one should stand back from the detail of the criticisms and, recognising that the committee would have some experience of Green Belt issues, see the bigger picture which the report painted. The report recognised that the development was in breach of Green Belt policy; it analysed the degree of harm, and it set out the very special circumstances which the committee was entitled to conclude clearly outweighed that harm. The site contained large and derelict buildings close to the edge of the open part of the Park; the appearance of this part of the Green Belt and of the Park would be improved by the removal of the dereliction and the new housing, located so as to create a greater area of open space at the boundary to the recreational area of the Park. There would also be a significantly more accessible new entrance to the Park for those in Waltham Cross. The housing itself would be an additional benefit.

35. Nonetheless, in order to deal with the issues it is necessary to look at the detail of the criticism. But I say at the outset, that there are significant problems with the structure and reasoning in the report, and indeed in ascertaining with what point it was dealing at various stages. Mr Harwood's detailed submissions showed rather more awareness of the pitfalls facing this particular proposal in this location than did the report, so his analysis and the report did not always chime. I have not dealt separately with Ms Wigley's submissions on behalf of Britannia Nurseries, save as to discretion, since they essentially echoed Mr Harwood's.

Ground 1: The lawfulness of the approach in the Officer's Report to the Green Belt: (a) the site as previously developed land

36. Mr Jones contended that the report treated the whole site as previously developed land, to which the new approach in the NPPF applied. That was wrong in law since no part of the site was previously developed land: the northern part was simply not previously developed; the southern part was excluded from "previously developed land" because it was land "that is or has been occupied by agricultural or forestry buildings". On that, he made two points. First, although the agricultural use had ceased in the buildings on the southern part, that use had not been replaced by a non-agricultural use; and second, even if it had been, the land would still be land which is or has been occupied by agricultural buildings. Mr Harwood accepted that the northern part was not previously developed land, but denied that the report had treated the northern part, or the site as a whole, as previously developed land. Its approach had been that the southern part was indeed previously developed land, and that that was a factor which contributed to the very special circumstances which could justify a breach of Green Belt policy through permitting inappropriate development on the site as a whole. The definition of previously developed land did not require the whole of any application site to have been previously developed land for the new provision to have some application. Mr Jones' submissions were wrong on both aspects of whether the southern part was excluded from being previously developed land.

37. I take first of all the question of whether the southern part of the site was previously developed land. There was no issue but that the southern part was "previously developed land" subject only to the scope of the exception. I accept Mr Harwood's analysis of the planning history: the glasshouses had been agricultural buildings but their agricultural use did not just cease; it had been replaced by a non-agricultural use or by a mixed agricultural and non-agricultural use. Although plants were still grown there, a retail component was introduced when the plants, along with florist's sundries, were sold from the glasshouses. This use was permitted on appeal in 1999; the use had already commenced. So, the agricultural buildings occupying the land were last used for non-agricultural purposes, and now were not used at all. So, the buildings were not last lawfully used for agricultural purposes, but for a mixed use including agricultural and non-agricultural components.

38. But did that mean that they had ceased to be "agricultural buildings" for the purposes of the NPPF? This is an issue of some nicety not addressed specifically in the report. The report must have assumed that the permitted change of use to include a related non-agricultural component meant that they were no longer agricultural buildings. No statutory definition of "agriculture", or "agricultural" in s55(2)(c) or s336 of the Town and Country Planning Act 1990, or in Schedule 2 Part 6 of the Town and Country Planning (General Permitted Development) Order 1995 SI NO.418 offers any assistance beyond the reference to permitted development rights for agricultural buildings applying only to buildings designed for the purposes of agriculture. They had been designed as horticulture, so they had in part last been used for the purposes of agriculture. The mere cessation of an agricultural use would not cause them to cease being agricultural buildings. An unlawful change of use which would still be enforced against, would not change the use of the building in this context. But I conclude that the implied approach of the report is correct. The words "agricultural building" in the NPPF, as in the legislation, in my view mean a building used for the purposes of agriculture alone and do not include one which was used for the purposes of agriculture alone and do not include one which was used for agricultural purposes but which, lawfully, is now used for another purpose, mixed with agriculture or not. These buildings were in fact no longer used for agricultural purposes alone. A barn now converted to a dwelling was once used for agricultural purposes, it was an agricultural building, but it is now a dwelling house and not an agricultural building.

39. The second aspect of this issue is whether nonetheless, as Mr Jones contended, the previous agricultural use of the buildings meant that the land was still excluded from "previously developed land" as it remains land which "is or has been occupied by agricultural buildings". The language of the exclusion was quite straightforward. Mr Harwood contended that the exclusion could not apply where the agricultural use of the buildings had ceased and had been replaced by another use, whether a permitted use, or one which had become a lawful use. The position would be even more obvious if the buildings had been demolished and lawfully replaced with other buildings for use for non-agricultural purposes, but which logically on Mr Jones' submission would still mean that the land "has been occupied" by agricultural buildings.

40. In my judgment, those words must be read in the context of the words defining previously developed land. That is land which "is or was occupied by a permanent structure". The exception uses the words "is or has been occupied by agricultural buildings". The policy first looks at the present position and asks what buildings

occupy the site, to which the answer is: buildings lawfully not used for agricultural purposes. The present tense deals with the position as it is. The policy then looks at whether the land "was" or "has been" occupied by permanent structures or certain buildings. The past tense deals with the position where the buildings which once occupied the land no longer do so, having been demolished, or fallen down. Their removal does not in general prevent land being previously developed land, and in the case of agricultural buildings, their removal does not end the exception. The past tense is not used to deal with former agricultural buildings which continue occupy the land but which are no longer agricultural buildings. That is covered by what "agricultural building" means.

41. The problem with Mr Jones' approach is three fold, although I can see that his interpretation is a possible one. First, it does not seem to me the most natural reading of the language of the policy. The policy would have to cover the position where buildings still occupy on the site, and where they once occupied the site but have since been demolished or have fallen down. That is what the two tenses deal with. The use of the past tense to cover both sites no longer occupied by any buildings, and sites still occupied by buildings but which have changed from a use within the exception to one outside it, rather strains the scope of quite simple language. Second, the policy justification for his suggested interpretation is not strong enough to overcome that reading. The aim of the agricultural building exception is to avoid a necessary exception to normal policies, agricultural buildings in the countryside and the Green Belt, often permitted development not requiring specific planning permission, becoming the vehicle, through this new policy, for allowing built development which would otherwise be inappropriate in the Green Belt, or not normally allowed in the countryside. Were the lawful change of use of an agricultural building to become the vehicle for a new non-agricultural building, the aim of the policy could be to some degree undermined though it would still cover the erection of new non-agricultural buildings. I do not think that that makes a sufficient dent in the rationale for the policy to overcome the simple reading of straightforward language. Third, it would introduce some very odd consequences which I cannot accept are intended. If agricultural buildings had once occupied a site, whether they had changed their use long ago, or had been demolished and replaced with non-agricultural buildings with permission, the site could not be previously developed land. If the whole of the southern site is redeveloped for housing, it would still be within the exception to previously developed land when any further redevelopment took place. Accordingly, I conclude that the southern part of the site was correctly treated as previously developed land.

42. Mr Jones contended next that, even if the southern part as a whole had been previously developed land, the report failed to consider the very material differences between the policies and their effect as applied to the northern and southern parts of the site. Applying the definition of previously developed land, as Mr Harwood said is should be applied, would have required the two parts to be treated separately, because the northern part of the site was not previously developed land, whereas the southern part was. Instead, the report had run the two parts together, and treated the site as a whole.

43. Mr Harwood first submitted that the report had treated the northern part as not previously developed land, for the development of which for housing very special circumstances were required, but had treated the southern part as previously

developed land, for which on its own, no very special circumstances were required for development for housing.

44. I reject Mr Harwood's first submission. At no stage does the report draw any distinction between the northern and southern parts of the site in this context, and certainly not in the context of which parts were previously developed land. That is important in view of the way in which the new flexibility is introduced in the report as offsetting or diminishing the significance of the breach of GBC2. Paragraphs 8.3 and 8.6-8.10 of the report treat the application site as one: it is derelict, redundant, with dilapidated buildings and anti-social behaviour; development of the whole would not affect the Green Belt; the long derelict site would be cleared and replaced with high quality housing. The effect of the reference to the new policy exception for previously developed land in paragraph 8.3, in the context of the reference to the need for very special circumstances, is to treat the policy exception as constituting or as being part of very special circumstances for the whole site, and to avoid the committee grappling with the clear effect of the admitted breach of Green Belt policy over at least the northern part of the site. It was, I note, never suggested that the development of the northern part was necessary to enable clearance and redevelopment of the southern part. I appreciate that the majority of committee members had seen the site, but the report does not draw the distinction which their visit would have suggested, and so would have diminished rather than affirmed any distinction which they ought to have appreciated in the application of policy as between the southern and northern parts.

45. The report, taking the whole site as derelict land needing clearance and improvement by quality housing, treated the site as all previously developed land, and therefore treated the whole development as not now being inappropriate under the new Green Belt policy. Paragraph 8.3 sets out the Local Plan policy which the development breached, but it then referred to the new NPPF policy, introducing flexibility and in part superseding it, with no suggestion that it only applied to part of the site. GBC2 and the NPPF are treated as applying to the site as a whole, the former superseding the latter. That conclusion is not displaced by the subsequent reference to very special circumstances in paragraph 8.5. Although such a reference implies a breach of Green Belt policy, paragraph 8.5 commences "In addition", that is it introduces additional points in favour of the proposal, rather than as factors required to outweigh harm through inappropriateness and specific harm. Indeed Mr Harwood submitted that paragraph 8.5 was merely listing the applicant's arguments, and not setting out the planning officer's appraisal. The officer thereafter makes no comment at all as to what he sees as the very special circumstances. I do not read paragraphs 8.6-8,10 as being his appraisal of very special circumstances, outweighing unidentified harm: the concept is not mentioned in the report after paragraph 8.5. Rather it is a commentary on the applicant's points, regardless of whether they are or are not capable of being very special circumstances. 1 also point out that the reason for the grant of permission states that there was no breach of GBC2; GBC2 would be breached of course even if very special circumstances were found to outweigh the harm. In reality, for there to have been no breach of GBC2, it had to have been read as now subject to the new policy in the NPPF.

46. Some of the factors in paragraphs 8.6 and 8.7 are distinctly odd as very special circumstances anyway, which is why I do not accept that that is what those paragraphs refer to. On paragraph 8.6, I find it hard to square the fact that most of the site is not previously developed land, with the description of the site as a whole as derelict, in the absence of specific reasoning. Restored land is excluded from the

definition of previously developed land; and its restored state therefore would not usually be a basis for treating development of it for housing as a very special circumstance. No connection was suggested between the removal of dereliction, notably of derelict buildings and hardstanding where it exists on the south, and the extent of housing development on the north, so it is difficult to see why that was treated as a very special circumstance -if it was- justifying development to the north.

47. That is then compounded in paragraphs 8.7 and 8.10. If these are very special circumstances, they all ignore the harm done by reason of the very inappropriateness of this development in the Green Belt. It is also difficult to see how the absence of some more severe harm to the Green Belt could be a very special circumstance permitting harm by reason of inappropriateness, unless perhaps the development must take place in the Green Belt and the question is which is the least harmful location for it, which was not the issue here. The lower quality of an area of Green Belt land does not reduce the harm done by inappropriate development, and though it may or may not affect any particular specific harm, the way in which the lesser quality of the surface area of the Green Belt might reduce harm to openness would require careful explanation. It may also be right that the development would not result in the actual merging of urban areas; were it in fact to do so, that would be a very strong form of harm. But the absence of such a form of severe harm cannot reduce the harm by reason of inappropriateness or the harm actually done to the openness of the Green Belt. The assertion that the urban area would not "extend excessively into the open countryside" or "unacceptably into high quality Green Belt" in reality is an unrecognised but real assertion of harm by inappropriateness, and of specific but not great harm to openness. That cannot be a very special circumstance at all. Those passages merely set out as positive points a degree of the harm, not very special circumstances clearly outweighing it.

48. The next question is whether that absence of distinction matters in law. Mr Harwood's second submission was that the absence of greater differentiation did not matter. In effect, the committee was told it could be satisfied that there were very special circumstances, needed because the development did not comply with Green Belt policy, and the existence of previously developed and derelict land within the site which would be cleared and improved was one of those very special circumstances.

49. I cannot accept Mr Harwood's submission as to how the report informed the committee the facts and analysed the issues for it. I have already set out my reading of the report. The committee had to be advised that part only of the site was previously developed land and as to the significance in Green Belt policy terms of that fact. This would be done by treating the site as two parts: the southern part which was for these purposes accepted as previously developed land to which the new flexibility could apply, subject to the issue of openness; and the northern part, the development of which for housing would be a clear breach of GBC2 and of the NPPF, which should be refused in the absence of sufficient very special circumstances. If the site were treated as a whole, how was the committee to approach compliance with Green Belt policy as a whole, when there was a breach on part and not the other? How was it to analyse whether very special circumstances existed, and whether that outweighed the harm done? And how could the gain from developing the southern part, reflected in the very fact that the policy was now more flexible, count towards the very special circumstances on the northern part? I do not know how that could have been done, but it most certainly was not done.

50. Drawing the distinction, by whatever means, would have enabled the proper identification of the relevant harm, notably the impact on openness of the inappropriate development on the northern part, would have required identification of the degree of very special circumstances required, and what the relevant very special circumstances actually were. The northern part was neither previously developed land nor in need of the clearance of dereliction or at least not dereliction remotely of the same order as on the southern part. The removal of dereliction in the southern part, the most important of the very special circumstances, could not have been used to support housing development in the northern part, whether as previously developed land or as very special circumstances, at least not without some very careful reasoning the nature of which I cannot at present envisage, given that it was not said that the development of the north was necessary to achieve removal of dereliction from the south. I have already dealt with some of the other factors which Mr Harwood said were very special circumstances.

51. This is not a case in which the previously developed land is so large a proportion of the whole site as to make the distinction one which could reasonably be ignored. While I accept Mr Harwood's point, that the flexibility in the NPPF for previously developed land may not require every part of the application site to have been previously developed land, the presence of some previously developed land within an application site does not make the whole site previously developed land either, applying the definition in the NPPF. The NPPF itself draws a limit on whether a site is previously developed land by reference to the curtilage of the buildings.

52. I have come to the conclusion that the report and the committee took into account irrelevant considerations in dealing with the whole site either as if previously developed land or as if at least some of the same very special circumstances applied to it as a whole. They ignored important policy based distinctions going to whether there had been a breach of policy, as to the harm done, as to the extent of very special circumstances required, and in their identification. The relevant analysis simply did not happen at all. I would quash the decision on ground 1(a). This failure also affected the approach to openness to which I now come.

Ground 1 (b): the meaning of "openness"

53. This ground, which Mr Jones put first, contended that the report to committee had misinterpreted the concept of 'openness" or reached an irrational conclusion about it in paragraph 8.10. It was legally flawed, whether it was an analysis as to why the exclusion from the exception for previously developed land in the NPPF did not apply, (the proposed development having no greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development), or an analysis of the absence of harm which the proposed development would do to the Green Belt (by reason of its lack of greater impact on openness), or an analysis of very special circumstances. The application of the NPPF policy on previously developed land required an assessment of whether the development of that land had a greater effect on openness than did the existing development on it. It did not contemplate an analysis of the effect of development on that land plus land which was not previously developed land.

54. Paragraph 8.10 had treated the effect of a housing development on both northern and southern parts of the site as having no greater an effect on openness than the existing development, and indeed as having a "significant long term beneficial effects" for

openness. Yet the housing would cover a very much greater area than the existing buildings which lay to the south-east of the southern part of the site, albeit that they were taller, bulkier and closer together than the proposed housing would be. Even if that approach might have been adequate for the southern part, it could not rationally apply to the whole site. Although paragraph 8.4 was not objectionable in itself, it did not suggest that openness would in any way be compromised by the proposal. Visual impact was not to be confused with "openness", which simply meant an absence of any buildings or development"; *Timmins v Gedling BC* [2014] EWHC 654 (Admin). Nor did the report refer to the fact that inappropriate development was by definition harmful to the Green Belt, in addition to any specific harm which it might do to openness; paragraph 88 of the NPPF.

55. Mr Harwood submitted that members of the committee would have been very familiar with Green Belt policy. They were entitled to take the view as a matter of planning judgment that the housing on the whole site would lead to no greater a reduction in openness than had been created by the large buildings in the southern part which would be removed: spreading the area of built development in return for reducing the height of development was said to be a conventional way of maintaining or improving openness and visual amenity in what was not an open site. Reduced density and greater space between buildings was relevant to the judgment on openness. The housing would also be further away from the recreational area of the Park, beyond the site boundary; the south-east part would become open and the north-east part would remain open. The northern part was also required to provide for the northern vehicular access to the allotments to the north and Park parking. The visual improvement of the site brought about by the removal of the derelict buildings, and its development with high quality housing and landscaping had been taken into account as very special circumstances, not as going to openness.

56. I cannot accept Mr Harwood's submissions. They presented a rather more sophisticated analysis of how a tenable decision might have been arrived at than the report provided. The report simply did not deal with the extent of built development on the site as a whole and compare it with the proposed development by foot print, whether by reference to the footprint of buildings alone or to the area occupied by man-made development. No such exercise was done, nor was it suggested that the basis of the comparison which should be undertaken. Nor does the report suggest that if the built area of the existing buildings were compared to the footprint of the proposed houses alone and found to be greater, that the effect of an openness of dispersal of the smaller footprint of the housing over a much wider area, with its accompanying enclosed gardens, ancillary buildings, roads, paved areas and so on, could be traded off against the reduction in height.

57. There is support for a comparison of built footprints being relevant to openness and to a trade-off between height reduction and an increase in footprint being permissible in the formula PPG2 on Green Belts in Annex C, "The Future of Major Developed Sites in the Green Belt". Paragraph C9d0 says that new development should "not occupy a larger area of the site than the existing buildings (unless this would achieve a reduction in height which would benefit visual amenity)". For these purposes, the footprint was the ground floor area of the existing buildings, excluding for example hard standing. But C6 warned that the "character and dispersal of proposed redevelopment will need to be considered as well as its footprint. For example, many

houses may together have a much smaller footprint than a few huge buildings, but may be unacceptable because their dispersal over a large part of the site and enclosed gardens may have an adverse impact on the character of the Green Belt compared with the current development."

58. If such an approach is being adopted, and even if the data on heights and areas of spread and footprints could be left to the impressions of a site visit or photographs and to an illustrative layout, the question of how the two sides of the comparison played out in their effects on openness should have been presented as the key question. Some analysis of the key points would have been required, especially in view of the way in which housing development would spread to such a large extent beyond the area of existing built development, and over the bulk of the open northern part. It is obvious that the report and committee had to address how the impact on openness could be no greater, even if no greater on the southern part alone, given that the open northern part would be largely developed for housing.

59. I would accept that the effect of development on openness may involve questions of degree. and that there may be scope for some reduction in height and bulk offsetting some greater extent or spread of built area, and, if so, that how far the offset goes before the impact on openness increases can be a matter of impression. A conclusion on the degree of impact on openness is essential to reliance on the new flexibility for "previous developed land" in the first place, as noted in paragraph 8.3 of the report, and to the analysis of harm. There might be a benefit to openness on the southern part of the site but to treat that as benefiting the whole site would require explanation that that is the approach being adopted and how it could rationally lead to the answers here.

60. The spread of urban housing development over the northern site is such an obvious and extensive increase in the developed area and in the area of openness lost, that I do not see, in the absence of clear analysis and explanation, how the report rationally could have avoided saying that there was a significant loss of openness- most of the currently open northern part was to be developed- and that was a breach of the NPPF as well as of GBC2. The conclusion in paragraph 8.10 was irrational on the information and analysis available to the committee, and might well be irrational however presented.

61. I accept that this planning committee had training and experience in dealing with Green Belt issues, and that can make up for some apparent deficiencies or short cuts in an officer's report. But these are very significant. This decision also was significantly affected by the role of the new flexibility given to previously developed land, on which proper analysis was required.

62. Accordingly, the grant of permission is quashed on this ground too.

Ground 1 (c): misunderstanding of the need to give "substantial weight" to harm to the Green Belt

63. This concerns the approach in the officer's report to paragraph 88 of the NPPF, set out above. This required, on Mr Jones' submission that "substantial weight" be given to the harm done to openness by the extension of development on to the open land in the north of the site. He submitted that the report contained no such advice, and such

harm as was identified was to be given no greater weight than that of any other harm. Nor did it contain any reference to the harmful precedent which this development would set to the advantage of those who left Green Belt sites derelict, albeit after a serious fire, for a few years.

64. Mr Harwood again referred to the experience which the committee would have of Green Belt policy, and submitted that it was not necessary, in order for the decision to be lawful, for the report explicitly to refer to the need to give substantial weight to harm to the Green Belt. It had referred to the harm and to the need for very special circumstances. This case turned on its particular facts, and could not be a precedent for other cases. The site became derelict after a serious fire destroyed half the buildings and the business ceased to trade; it was not just left to go derelict.

65. There is no substance in the precedent point. However, if it is inappropriate development, which is what Mr Harwood contended was indeed the case on the northern part, the harm by reason of inappropriateness needed to be set out, together with any specific harm, and then the very special circumstances needed to be set out, which had to be sufficient clearly to outweigh the harm. The report reads as though it involves a straightforward balancing exercise. I am conscious of the need to avoid creating an error of law out of a failure in the precise repetition of a hallowed or perhaps hackneyed planning phrase. That might not suffice to show that an experienced committee misunderstood its task, if it stood alone. But it reinforces my earlier views about the unlawful way in which the Green Belt issues were approached.

Ground 1(d): the treatment of housing need

66. Mr Jones submitted that the report relied upon housing need as part of the justification for the development, as part of the very special circumstances. That required the committee to be told whether or not here was a shortfall in the five year housing land supply, its extent, and what steps other than granting permission for the use of Green belt land, in advance of a review of its boundaries, could be taken. A shortfall in housing land supply was not normally a very special circumstance, since Green Belt boundaries were marked by their permanence, and Green Belts were only to be built on exceptionally. The NPPF, paragraphs 14, with footnote 9, and 47, required the full and objectively assessed housing needs to be met, but only where that was consistent with NPPF policies, which include Green Belt policy. If there were no shortfall, it would be irrational to treat the reducing surplus over five years as a very special circumstance. The committee ought also to have been asked to reconsider its decision after the written Ministerial statement of June 2013, which made it clear before the grant of permission that the "single issue of unmet housing demand" was unlikely to outweigh Green Belt objections.

67. Mr Harwood contended in his written submissions that the report should not be read as if housing need had been a very special circumstance; but it was another benefit. As I understood his oral argument, he contended that housing need could be a very special circumstance. The very special circumstances here were the quality of design, openness and attractiveness of the redevelopment and its removal of dereliction. Housing was a factor, but only in the context of the committee being told that Green Belt sites would have to be released before the general review of the Green Belt in order to maintain a five year supply of housing land. In September 2012, there had been a 5.24 year's supply, on a 252 dwellings requirement a year, and the 90

dwellings on this site enabled a supply at 5.4 years to be maintained. The Ministerial statement made no change to policy, and the Committee had not taken unmet housing demand on any view as the sole basis for finding very special circumstances.

68. Mr Harwood is on the stronger ground here. A shortfall in housing land supply can, as a matter of policy, be a very special circumstance, although the occasions when it is likely to suffice by itself to warrant the grant of permission for housing development in the Green Belt are expected to be few and far between. That is in effect what the NPPF and the Ministerial statement say. So there is nothing unlawful in the committee treating it as one of a number of very special circumstances. I do not accept Mr Harwood's submission that the committee considered it as another material consideration rather than as a very special circumstance. But, if so, it does not help the claimant. Once the issue is whether or not inappropriate development should be permitted in the Green Belt, all factors which tell in favour of the grant go to making up very special circumstances, which may or may not suffice. It is not necessary to go through the process of considering whether a factor is not a very special circumstance but nonetheless falls to be taken into account in favour of the development as another relevant material consideration. See *Secretary of State for Communities and Local Government v Redhill Aerodrome Ltd* [2014] EWCA Civ 1386.

69. It is surprising that the committee was not told that there was in fact a five year supply of housing land. It may have known that that was the position anyway. But what is said in paragraph 8.11 does not significantly mislead the committee anyway. It was not said that there was now a shortfall, which is what I would have expected to be said if there had been such a shortfall. The comment in paragraph 8.11 that to maintain the five year supply , "a limited number of sites need to come forward before a more comprehensive review of the green belt takes place through the new Local Plan site " accords with the facts, and 90 dwellings would make a significant contribution to a year's supply. It indicates that the supply position is very tight. This ground of challenge is rejected.

Ground 1(e): attractiveness of development as a very special circumstance

70. This challenge was first to the potential relevance of the attractiveness of the housing development as a very special circumstance and then to the certainty attached to its attainment. The former was at issue because all development was required by the NPPF, paragraphs 57-59, and various other development control policies in the Local Plan to be of good quality. So there could be nothing special about this development being of an especial quality. The latter was at issue because the plans relied on were merely illustrative, and not part of the outline application.

71. I have set out the way in which the design of the housing and its layout would be controlled by condition and s106 agreement to conform to the illustrative layout and to what was said about design. There is nothing in the second point raised by Mr Jones. The first point is more troubling. I accept that there may be features of a design which can amount to very special circumstances. But that has to go beyond satisfaction of the normal quality of design required by development control policies. The housing may be more attractive than the buildings it replaces; it may even be more attractive to some eyes than the open grass and scrubland. But no feature of the design of the houses themselves is identified, beyond that they would be traditional, to suggest that something more than compliance with normal development control

policies, just as would be required on non Green Belt land, is to be attained. So it is difficult to see, absent specific reasoning, how that could constitute a very special circumstance. The layout however may be more spacious, with greater open space, a boulevard, courtyard and new entrance to the recreational area of the Park. If the layout were treated as part of the very special circumstances, I cannot conclude that that would not be lawful. Paragraph 8.8 focuses on those layout points. I reject this aspect of the challenge.

Ground 1(f): ignoring the need for the development to address concerns about dereliction

72. This ground alleges that the committee had to have far more information about the inefficacy of ways of dealing with those problems, other than by inappropriate development in the Green Belt, before it could give weight to the removal of dereliction and anti-social behaviour as a very special circumstance. For example, suggested Mr Jones, the committee should have had information about the extent, nature and cost of removal of the contamination, the possible use of other powers to secure the removal of dilapidated buildings as in ss102 and 215 of the 1990 Act, or the use of CCTV to deter anti-social behaviour. As Mr Harwood pointed out, whatever their merits as suggestions, the LVA had not raised them in its objection to the application for planning permission. The committee were told that there was no prospect of the problems being solved by the LVA, bringing the site into Park recreational use. The application had been accompanied by a preliminary contamination assessment identifying the risks from contamination as "low to moderate", as reported to the committee. This was not put forward as a very special circumstance, but merely as the answer to what could otherwise have been a separate development control problem for housing use.

73. Mr Harwood provided to my mind compelling arguments why the particular statutory powers to which Mr Jones had referred for dealing with dereliction had not been expressly discussed as answers to the problems which the committee was dealing with, and why CCTV would not be much of a deterrent to anti-social behaviour, because of the screening provided by large buildings on site. There is nothing in this aspect of the challenge.

74. Nonetheless, the LVA has succeeded on many aspects of ground 1 of its challenge, and the decision falls to be quashed.

Ground 2: the Development Plan

75. The statutory question is whether the development was in accord with the development plan. Non-compliance with one policy does not necessarily mean that the proposal is not in accordance with the Development Plan viewed as a whole. Different policies may pull in different directions. But here, the policy which dealt with the principle of the development, GBC2, was not complied with. All the other policies referred to deal with the sort of development control issues which arise whether or not development of the sort proposed is objectionable in principle in the location proposed. There was no policy dealing with the principle of development for housing in this location which pulled in a different direction from GBC2, though other policies may have been relevant to the existence of very special circumstances. Indeed, neither the Green Belt conclusions in paragraph 8.10 nor the overall

conclusions in paragraph 10.1 express any view at all that the development accords with the Development Plan, though I have explained that the report reads as though the development complies with the Plan, read as subject to the NPPF. The report does not approach this important issue by identifying the position in relation to the Development Plan, and then the other material considerations, in effect here the very special circumstances.

76. In reality, non-compliance with GBC2 meant that this development did not accord with the Development Plan. But this does not provide a further ground of challenge; rather it covers the same territory as the legally defective treatment of the Green Belt and very special circumstances, albeit in a different guise.

Ground 3: the Regional Park Plan and the development plan

77. Mr Jones submitted that the Park Plan had been incorporated into the Development Plan by virtue of s14 (2)(a) of the 1996 Act. This is a rather different point. He sought a mandatory order compelling the Council to adopt the Plan as part of the Development Plan. His initial submissions treated this point as a glimpse of the obvious.

78. Mr Harwood submitted that the issue of how the Park Plan related to the Development Plan was beyond the scope of these proceedings. The simple fact was that the statutory provisions for development plans had changed on a number of occasions since the 1962 Act, it was not easy to see how the 1966 Act could fit the development plan regime, or how it could have done so back in 2005. The Park Plan had not in fact been incorporated into the Plan adopted in 2005. Besides, the 1966 Act did not require the Park Plan to be incorporated in the adopted Plan; it provided a vehicle for including the Park Plan in the Local Plan as submitted to the Minister for approval, where it might or might not survive scrutiny. The committee had also considered the relevant Park Plan policies.

79. I was concerned that the Park Plan had been adopted in 2000, the Development Plan in 2005, and yet it was only now that the issue was raised, although it must have been abundantly clear that the Development Plan had not incorporated the Park Plan, if that was what was required. I could not readily see how s14 (2) could fit readily with the various plan-making regimes which have succeeded that in the 1962 Act, with differing roles for the involvement of the Ministers or his Inspectors. I asked for short further submissions.

80. Whether properly raised in the grounds or not, and I am inclined to agree with Mr Harwood, I do not consider that I can resolve the issue of how the Park Plan relates to, nor how it should be dealt with during the course of preparation of, current Development Plan documents on the basis of the submissions which I have received. It is a very difficult topic, and not one to be handled without notice to other affected authorities, or on the basis of the short and not fully considered submissions I received.

81. The only question which arises here is whether or not the Park Plan is part of the Development Plan. It is not: it has not been incorporated in it, and s14 (2) of the 1966 Act does not make incorporation in the adopted plan automatic. Nor is this a mere

failure in formality, since the 1966 Act contemplates that the merits of the policies would be considered before incorporation.

82. If there were a procedural failing before 2005 in the preparation of the Development Plan, it is too late now for issue to be taken with it. It seems to me that Mr Jones has to contend either that the Development Plan is invalid because it omitted the Park Plan at the preparation stage, or that there was a procedural failing at that stage. He denied that this was questioning the validity of the Plan, such that it fell foul of the ouster provision in s284 of the 1990 Act, or that he was contending that it fell outside the powers of Part II of the 1990 Act, or that any requirement of that Part or of any regulations made under it had not been complied with; s287. He may be right, but if so, he is still many years out of time for questioning its validity by a form of judicial review, and to the extent necessary I refuse to extend time for such a challenge.

83. Mr Jones sought to avoid that by saying that he raised no challenge to the validity of the Development Plan at all, all he was submitting was that the Park Plan was entitled to be given the same weight as the Development Plan, even if s38 (6) of the 2004 Act did not strictly apply to it, as it could not do. This is ingenious, but not correct. S38(6) applies only to the development plan, giving it a unique statutory role. To require, on pain of error of law, that the Council or any other decision-maker, treat the Park Plan as part of the Development Plan when in fact it is not, would be to achieve by the back door an illicit result, shut out by the front door. It would not be consistent with s38(6). Yet the only justification for this argument is that the Park Plan ought to have been part of the Development Plan as a matter of law. The Park Plan in law now can only be another source of planning policy to which regard is to be had, as it was in this case. Moreover, Mr Jones' submission would achieve more than the 1966 Act necessarily requires, since it is impossible to tell how the Park Plan would have fared if subjected to whatever statutory process is to be read as the replacement for the 1962 Act. In 1962, it would not necessarily have survived, as now written, into the Development Plan. There is no reason to treat it as having undergone such a test when it has not, and the LVA did not require it to do so through a legal challenge at the time when it says that the Council failed to do what it should have done. I reject this ground of challenge.

84. Mr Jones' alternative submission was that policy CLT4 of the adopted Development Plan should be interpreted as the incorporation of the Park Plan into the Development Plan. I disagree: if a policy is to have such a significant effect, it would have said so. It does not. It simply means what it says.

Conclusion

85. For the reasons which I have given this decision is unlawful, and save for any issue of discretion should be quashed. Ms Wigley contended that the LVA had failed to follow the pre-action protocol, and in consequence her clients had expended tens of thousands of pounds on necessary pre-development work which would be wasted; and so the decision should not be quashed. That is untenable. If there were such a failure, nonetheless the proceedings were commenced without delay. The expenditure was undertaken at a time when it was at the risk of Britannia Nurseries. The public interest in lawful planning decisions, and especially so of this scale, prevents that early expenditure of money being a sound basis for the exercise of a discretion not to quash the decision. Besides, if the decision is quashed, the planning application remains

undetermined. There may be very special circumstances, but they have to be addressed properly, even if they apply only to enable part of the site to be developed. But it does not mean that all or perhaps any of the expenditure will have been wasted. The decision is quashed.