Neutral Citation Number: [2019] EWHC 1370 (Admin)

Claim No: CO/4430/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT AT LEEDS

Leeds Combined Court Centre,
The Courthouse,
1 Oxford Row,
Leeds, LS1 3BG.
Date: 11/06/2019

Before:
HIS HONOUR JUDGE KLEIN SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

THE QUEEN ON THE APPLICATION OF OXTON FARM	**Claimant**
- and -	
HARROGATE BOROUGH COUNCIL	**Defendant**
- and -	
D NOBLE LIMITED	**Interested Party**

- -
- -

Richard Wald (instructed by **Pinsent Masons LLP**) for the **Claimant**
John Hunter (instructed by **Regulatory Services, Legal and Governance, Harrogate Borough Council**) for the **Defendant**
Hearing dates: 21-22 May 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KLEIN

HH Judge Klein:

1. On 25 September 2018, the Defendant ("Harrogate") granted planning permission subject to conditions with all matters reserved ("the Decision"), in relation to an outline planning application, by the Interested Party, for "the erection of 21 dwellings off Turnpike Lane, [Bickerton, North Yorkshire] including 8 affordable homes and 1 village shop" ("the Application").[1] The Claimant ("Oxton Farm") seeks a judicial review of (in particular, an order quashing) the Decision on the following grounds:

    i) when making the Decision, Harrogate failed to take into account "the best and most up-to-date housing figures", that is, the number of years Housing Land Supply it had based in part on data published by the Office of National Statistics, on 20 September 2018, in its Household projections in England: 2016-based ("the ONS data"). The ONS data, and so the number of years Housing Land Supply calculated by reference to it, were material considerations to which Harrogate had to have regard when determining the Application under section 70(2) of the Town and Country Planning Act 1990. Based on the ONS data, at the time of the Decision Harrogate had 7.48 years Housing Land Supply ("Ground 1");

    ii) when making the Decision, Harrogate erred in proceeding on the basis that it did not have a 5 Year Housing Land Supply, when, in fact, it did (even if the ONS data and the years Housing Land Supply calculated by reference to it were left out of account) because its Officer's Report to the Planning Committee ("the Report"), made on 28 August 2018, "in effect [proceeded] on the basis of no [5 Year Housing Land Supply] even though there was more than the requisite 5 years as at the date the [Report] was produced" ("Ground 2");

    iii) Harrogate failed to give reasons for the Decision, although this is a case where it ought to have given reasons because the approval of the Application would have a "significant and lasting impact on the local community" and because the Decision "involves a substantial departure from policy related to the presumption in favour of sustainable development" ("Ground 3").[2]

2. Oxton Farm began its judicial review claim on 6 November 2018. HH Judge Mark Raeside QC gave permission to proceed with the claim, on all grounds, on 11 January 2019. This is the judgment following the trial of the claim.

Background

3. The Interested Party made the Application on 8 December 2017. As I have indicated, the officer reported on it on 28 August 2018.

4. In February 2009, Harrogate had adopted Core Strategy Policies SG1, SG2 and SG3. Those policies provide that:

[1] The Interested Party has not participated in the claim.
[2] This is not precisely how Oxton Farm articulated its grounds in its Statement of Fact and Grounds. Nor is this precisely how its grounds were articulated in the skeleton argument filed on its behalf for the trial. However, this accurately summarises how its case was put at trial.

> "[Policy SG1:] [Harrogate] will make provision for 390 new homes per annum (net annual average) in Harrogate District during the period 2004 to 2023. In doing so it will seek to ensure that (as an interim target) about 160 of this annual provision will be homes for local people at affordable prices and that 70% of these new homes are in new buildings or conversions on previously developed land…
>
> [Policy SG2:] Development or infill limits will be drawn around the settlements listed…to allow the sustainable growth and development of those settlements within the District that have the best access to jobs, shops and services…
>
> [Policy SG3:] Outside the development and infill limits of the settlements listed in policy SG2 of this Core Strategy, land will be classified as countryside and there will be strict control over new development in accordance with national and regional planning policy protecting the countryside and Green Belt…"

5. The explanatory notes to policy SG2 record that:

> "…Those settlements (villages and hamlets) not listed in this policy [including Bickerton] have very few services and facilities and often no defined built up area. In accordance with national and regional planning policy regarding the promotion of more sustainable patterns of growth, the settlements should not accommodate new market housing apart from the suitable conversion of existing buildings…"

6. In July 2018, Harrogate published its Housing Land Supply Update showing the land supply as at 30 June 2018. The Update recorded that (i) a Housing and Economic Development Needs Assessment had concluded that housing need for the Harrogate District was 669 dwellings per year, (ii) that need was the starting point for calculating Harrogate's 5 Year Housing Land Supply and that Harrogate had, as at 30 June 2018, 5.02 years Housing Land Supply.

7. As I have noted, the Report was made on 28 August 2018. The Report began with a summary, as follows:

> "…On balance, it is considered that there are no adverse impacts that would significantly and demonstrably outweigh the benefits of this scheme. [Harrogate] can only demonstrate a 5.02 year supply of housing and this is not sufficiently above the 5 year supply that paragraph 11 of the NPPF can be ignored. Given this position and the proximity of nearby service settlements, officers consider the scheme should be approved. Recommendation: Approve subject to conditions."

8. In the section of the Report on Housing Land Supply, the officer said:

> "9.8 [Harrogate's] Housing and Economic Development Needs Assessment provides information on objectively assessed housing need. This document concludes that there is a requirement for 669 dwellings per annum to meet the needs of the district.
>
> 9.9 NPPF requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of 5 years' worth of housing against their housing requirement with appropriate buffer. Where an authority cannot demonstrate a five year supply of housing land, policies relating to the supply of housing land are rendered out of date (NPPF, para.11(d), footnote 7). Instead, housing applications should be assessed under paragraph 11 of the NPPF and the presumption in favour of sustainable development, with permission granted unless policies of the NPPF provide a clear reason for refusing the development proposed or any adverse impacts would significantly and demonstrably outweigh the benefits.
>
> 9.10 The July 2018 update has been completed. This shows that [Harrogate] has a 5.02 year supply, meaning that paragraph 11 of the NPPF is not automatically triggered on that particular basis. However, the supply position is marginal and it will be important to take steps to maintain it.
>
> 9.11 In order to maintain supply position, greenfield land outside the existing development limits will continue to be needed. This means that development limits are considered out of date and can be given no more than limited weight. Only limited weight can be attached to Core Strategy policies SG1, SG2 and SG3 as these were based on a housing target that is out of date. By virtue of this paragraph 11 of the NPPF is once again engaged.
>
> 9.12 In light of the benefits that would come from the delivery of new homes in maintaining the 5 year supply, applications will therefore need to be determined on a case-by-case basis, only refusing them where the planning harm significantly and demonstrably outweighs the benefits."

9. In the section of the Report entitled "Planning Balance & Conclusion", the officer said:

> "…10.2 In the absence of a five year housing land supply, planning permission should be approved for the proposal unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits of the development.
>
> 10.3 The scheme will provide 21 new homes to the District. [Harrogate] can only demonstrate a 5.02 year supply of housing

> and this is not sufficiently above the 5 year supply that paragraph 11 of the NPPF can be ignored. The consideration therefore is whether the site's location is so unsustainable as to create significant harm…
>
> 10.5 The lack of sustainable transport choices in Bickerton is a negative aspect of allowing new houses here. However, the NPPF and High Court ruling state that in rural areas, approaches to transport modes should be flexible. It is therefore considered that the positive benefits of allowing the scheme outweigh the negative sustainability concerns..."

10. The references in the Report to the NPPF were references to the National Planning Policy Framework 2018 ("the NPPF 2018").[3] A provision of the NPPF 2018 which is central to this claim is paragraph 11 ("NPPF 11"); the provision which is the basis for the "tilted balance" in favour of approving certain planning applications, which provides:

> "Plans and decisions should apply a presumption in favour of sustainable development…
>
> For decision-taking this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[7], granting permission unless:
>
> …ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."[4]

11. Footnote 7 in NPPF 11 ("Footnote 7") provides:

> "This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73…"

12. There are two further provisions of the NPPF 2018 which are central to this claim, which it is convenient to set out here. The first is paragraph 60 of the NPPF 2018 ("NPPF 60"), which provides:

> "To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance – unless exceptional circumstances justify

[3] NPPF 2018 was superseded by a new Framework in February 2019.
[4] The Application did not fall within sub-paragraph (c) because it did not accord with policies SG2 or SG3.

> an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for."

The second is paragraph 214 of the NPPF 2018 ("NPPF 214"), which provides:

> "The policies in the previous Framework will apply for the purpose of examining plans, where those plans are submitted on or before 24 January 2019…"

The previous Framework referred to was the National Planning Policy Framework 2012 ("the NPPF 2012"), paragraphs 47 and 159 of which provided:

> "47. To boost significantly the supply of housing, local planning authorities should:
>
> - use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period
>
> - identify and update annually a supply of specific deliverable sites sufficient to provide 5 years' worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% (moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land…
>
> 159. Local planning authorities should have a clear understanding of housing needs in their area. They should:
>
> - prepare a Strategic Housing Market Assessment to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The Strategic Housing Market Assessment should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which:
>
> - meets household and population projections, taking account of migration and demographic change
>
> - addresses the need for all types of housing, including affordable housing and the needs of different groups in the

> community (such as, but not limited to, families with children, older people, people with disabilities, service families and people wishing to build their own homes)
>
> - caters for housing demand and the scale of housing supply necessary to meet this demand
>
> - prepare a Strategic Housing Land Availability Assessment to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period."[5]

13. Harrogate submitted its draft local plan for examination on 31 August 2018.

14. In due course, the Report was published and, on the same day or shortly thereafter, the ONS data became available.

15. Stuart Vendy, Oxton Farm's planning consultant,[6] prepared a speaking note for the meeting of Harrogate's Planning Committee at which the Decision was made ("the Meeting"). The speaking note said as follows:

> "1. Para.9.10 - 5 year land supply - advice of 5.02 years. Harrogate July 2018 Housing Plan Supply Update.
>
> a. not up-to-date - need advice on weight to be attached.
>
> b. also recently released (20 Sept 2018) ONS Population Projections.
>
> c. The Effect?...Equals 669 dpa to 383 understanding methodology.
>
> 2. 10.2 - Not only wrong on my analysis, even on the officer's own evidence. There is no "absence" of a 5 year land supply, either with [Harrogate's] last position, nor the more up-to-date ONS data.
>
> 3. Para 11 of NPPF not triggered - even if it was, there is no advice with regard weight (if any) to be attached to land supply position…

[5] Mr Hunter, who appeared at the trial for Harrogate, explained to me, I understood, that, under the NPPF 2012, unlike under the NPPF 2018, local planning authorities were required to determine objectively assessed housing need (the OAN), as paragraph 47 of the NPPF 2012 suggests, using data not including the ONS data, or, at least, adopting a methodology for determining housing need different to the methodology required by the NPPF 2018. Mr Wald, who appeared at the trial for Oxton Farm, did not suggest that Mr Hunter was incorrect; although, having received this judgment in draft, he told me that he did not intend to agree with the proposition that the determination of the OAN did not require the ONS data to be taken into account if that is what Mr Hunter had suggested.

[6] There is a dispute between the parties about whether Mr Vendy was engaged by Oxton Farm and whether, in fact, Oxton Farm objected to the Application. One of the issues between the parties is whether Oxton Farm has standing to bring its judicial review claim. For the purpose of this judgment, save on the issue of standing, I will proceed on the assumption that Mr Vendy was Oxton Farm's planning consultant.

> 5. Failures in the report lead to incomplete information and mis-advice."

16. Mr Vendy attended the Meeting. He said, in his first witness statement dated 6 November 2018:

> "I can confirm that I explained to members of the Planning Committee the importance of the weight that the officer had attached to the housing land supply situation in Harrogate Borough, DCLG's position with regard [to] the adoption of the standard methodology and the fact that there was no update from officers reflecting this and the newly released ONS data. I went on to explain that the application of the standard methodology and the up-to-date population data resulted in a reduction to the annual housing need for [Harrogate] from its current 669 dwellings per annum to approximately 383 dwellings per annum and that this was highly material to the consideration of the application…
>
> I explained that I considered the lack of advice officers on both of these matters…amounted to incomplete information and consequently mis-advice."

Mr Vendy said in a second witness statement, dated 14 December 2018:

> "…[F]rom my first-hand knowledge of the events that took place at [Harrogate's] Planning Committee meeting on 25 September 2018 I can make the following comments:
>
> Neither the planning officer nor anyone else provided any meaningful response to my point relating to the existence or effect of the publication of the 2016 ONS data and standard methodology. In fact the only response of any type given in relation to this matter was a tongue-in-cheek remark by one of the committee members to the effect that "it is refreshing to hear a planning consultant arguing that we have a larger than 5 year land supply"…
>
> The drop in minimum requirement from 669 dwellings per annum to 383 dwellings per annum which I explained to members of the Planning Committee…would clearly have a profound effect on the 5 year land supply situation…
>
> The difference in the minimum requirement figures alone would, to informed committee members and the attending planning officer, immediately indicate that the calculation of [the 5 Year Housing Land Supply] would be substantially altered…The effect of the application of the standard methodology and the 2016 ONS data is that [the 5 Year Housing Land Supply] would increase and therefore have an important effect on the consideration of the application…

> …Given that the only question I received related to existing bus services in the area I assumed that the matters I had raised were understood and would be taken into consideration in the committee's determination of the application before it. It is now apparent, however, that, for whatever reason, no such consideration was in fact given."

17. As I have noted, Harrogate (in fact, the Planning Committee) made the Decision at the meeting. Its decision notice was issued the next day.

The parties' cases

18. I have summarised the Oxton Farm's case at paragraphs 1(i)-(iii) above and, so, do not set out its case again here. However, I ought to explain, briefly, the basis for Oxton Farm's contention that the ONS data was a material consideration in determining the Application.

19. Oxton Farm contends that the ONS data was a material consideration, within the meaning of section 70(2) of the Town and Country Planning Act 1990, because, in September 2018, it was the basis (step 1) for the "standard method" for making the local housing need assessment contemplated by NPPF 60. The ONS data was material, it contends, not only in determining how many years Housing Land Supply Harrogate had in September 2018 (and, in particular, whether it had more than 5 years Housing Land Supply) but also in determining whether policy SG1 was out of date in speaking of Harrogate making provision for 390 new homes a year (because, Oxton Farm argues, the policy could not be out of date if Harrogate's minimum housing need was 383 homes a year).

20. Harrogate's defence is as follows, in summary.[7]

21. On a proper reading of the Report, the officer did not assert that Harrogate did not have a 5 Year Housing Land Supply or that the tilted balance was engaged for that reason. Rather, she advised that the tilted balance was engaged because the policies which were most important for determining the Application, policies SG1-3, were out of date and the adverse impacts of granting permission did not significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF 2018 taken as a whole.

22. Even if, on a proper reading of the Report, the officer did assert that the tilted balance was (or might be) engaged because of Footnote 7 (that is, because she asserted that the Planning Committee had to proceed on the hypothesis that Harrogate did not have a 5 Year Housing Land Supply), because she was correct to advise that the tilted balance was engaged because policies SG1-3 were out of date and the adverse impacts of the Application were not sufficiently weighty, it is highly likely that the Decision would have been made in any event, so that, because of section 31(2A) of the Senior Courts Act 1981, the court may not grant Oxton Farm relief.

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[7] In fairness to both parties, I should record that counsels' submissions were more detailed and more extensive than the summaries I have provided in this judgment. However, the summaries are sufficiently accurate and complete for the purpose of this judgment and, to be clear, I have considered all of counsels' submissions and the evidence to which I was taken with care.

23. At the time the Report was made, there was no error in the advice that the tilted balance was engaged because policies SG1-3 were out of date (and the adverse impacts of the Application were not sufficiently weighty). Mr Wald accepted that I should proceed on the basis that, at the time the Report was made, it was correct that policies SG1-3 were out of date, contending that I should focus instead on the effect on those policies of the later published ONS data. He explained the position thus, in his skeleton argument:

> "As to [Harrogate's] argument that the tilted balance is in any event engaged because Core Strategy policies SG1, SG2 and SG 3 are "based on a housing target that is out of date", not only is such reasoning completely absent from both the Summary and the Planning Balance & Conclusion sections of the [Report], but it is obviously erroneous given the correct figure for [Harrogate's] annual housing requirement (i.e. 383 dpa, rather than 669 dpa) at which level none of these 3 policies could possibly be considered to be out of date.
>
> This is because Policy SG1 requires provision for 390 new homes per annum and is predicated on land provision to this extent. Given that the actual level of housing need (based on the best and most up-to-date figures) is not more than 383, there is nothing at all to suggest that "in order to maintain the supply position, greenfield land outside the existing development limits will continue to be needed" or therefore that "this means that development limits are considered out of date…""

24. Harrogate argued, further, that, on the assumption that the Planning Committee did not take into account the ONS data at the Meeting, there was no error. The ONS data was not a material consideration for determining the Application; in particular, for determining whether policies SG1-3 were out of date. More importantly, assuming the Planning Committee did not take the ONS data into account, Oxton Farm can only challenge that if it can prove that it was irrational for the Planning Committee not to take the ONS data into account; in particular, in determining whether policies SG1-3 were out of date.

25. Mr Wald responded that Harrogate has accepted that the ONS data was a material consideration. He pointed to 3 instances in support of this contention.

26. First, Harrogate said, in its response to the Pre-claim letter:

> "The Council did not fail to have regard to any relevant material considerations, including the latest ONS figures…"

Secondly, Harrogate said, in its Summary Grounds of Resistance:

> "17. It is clear that D did take into account the 2016-based projections, not least because Mr [Vendy] himself made submissions on them at the meeting…"

Mr Wald argued that, if the ONS data was not material, Harrogate would not have taken it into account. It is right to note at this point that Harrogate continued, in its Summary Grounds of Resistance:

> "18. The reality, however, is simply that neither the officer nor the Committee were persuaded that the [ONS data] justified a different decision. This was a matter of planning judgment entirely for them, subject only to Wednesbury reasonableness. C has not suggested that it was irrational for D to grant permission in the circumstances and nor could it reasonably do so given that:
>
> (a) The [ONS data] made no difference to whether there was a [5 Year Housing Land Supply];
>
> (b) Nor did they alter the fact that policies SG1, SG2, and SG3 were based on a housing target that was out of date;
>
> (c) It follows that they also made no difference to the advice given regarding the application of NPPF 11, i.e. whilst the presumption in favour of sustainable development was not engaged on the basis of a shortfall in the [5 Year Housing Land Supply], it was engaged on the basis that the policies referred to above were out of date;
>
> (d) It follows further they also made no difference to the advice given on how the application should be determined, i.e. since the presumption was engaged, NPPF 11 required that permission should be approved unless D concluded that the harm it would cause were significantly outweigh the benefits…"

Thirdly, Harrogate said, in its Detailed Grounds of Resistance:

> "The fact that no reasons were given in relation to the [ONS data] does not mean that they were not taken into account. On the contrary, it is inconceivable they were not, given that Mr Vendy specifically addressed them in his submissions at the meeting.
>
> However,…it was unnecessary for anything more to be said about them because they made no material difference to the advice given in the Report."

27. Mr Wald fairly acknowledged, however, that, if Harrogate had previously conceded that the ONS data was a material consideration, it was not precluded from resiling from that concession at trial.

28. On Ground 3, Harrogate argued that the Application was a run-of-the-mill planning application and was not one which required reasons to be given for the Decision.

29. Harrogate also argued that, in any event, Oxton Farm does not have standing to bring its judicial review claim.

Discussion

30. In *R (Watermead Parish Council) v. Aylesbury Vale District Council* [2018] PTSR 43, Lindbolm LJ explained how officers' reports should be read, at [22]:

> "The law that applies to planning officers' reports to committee is well established and clear. Such reports ought not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge: see the judgment of Baroness Hale of Richmond JSC in *R (Morge) v. Hampshire County Council* [2011] PTSR 337, para.36 and the judgment of Sullivan J in *R v. Mendip District Council, Ex p Fabre* [2017] PTSR 1112, 1120. The question for the court will always be whether, on a fair reading of his report as a whole, the officer has significantly misled the members on a matter bearing upon their decision, and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way - for example, by failing to draw their attention to considerations material to their decision or bringing into account considerations that are immaterial, or misinforming them about relevant facts, or providing them with a false understanding of relevant planning policy - that the court will be able to conclude that their decision was rendered unlawful by the advice they were given: see the judgment of Sullivan LJ in *R (Siraj) v. Kirklees Metropolitan Council* [2011] JPL 571, para.19, citing the familiar passage in the judgment of Judge LJ in *R v. Selby District Council, Ex p Oxton Farms* [2017] PTSR 1103. Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave: see the judgment of Lewison LJ in *R (Palmer) v. Herefordshire Council* [2017] 1 WLR 411, para.7."

31. Following this approach, I have to consider what, on a fair (not unduly rigorous but reasonably benevolent) reading of the Report as a whole, the officer advised the Planning Committee in this case. I agree with Mr Wald that, in fairly reading the Report, I ought not to read into it advice which is not there and I should not speculate about what the officer might have advised had she turned her mind to matters not addressed in the Report.

32. On a fair reading of the Report as a whole (in particular, paragraphs 9.9-9.11), I have concluded that the officer advised that:

    i) at the date of the Report, Harrogate had 5.02 years Housing Land Supply, so that Harrogate's Housing Land Supply marginally exceeded the minimum 5

years Housing Land Supply below which the tilted balance might be engaged under Footnote 7;

ii) so the tilted balance was not engaged in this Application because of Harrogate's Housing Land Supply, or, to put it another way, Footnote 7 did not apply to the Application;

iii) at the date of the Report, the tilted balance was engaged because policies SG1-3 were out of date and because the adverse impacts of the Application did not significantly and demonstrably outweigh its benefits, when assessed against the policies in the NPPF 2018 taken as a whole;

iv) at the date of the Report, policies SG1-3 were out of date effectively because they contemplated a housing target of 390 new homes a year and Harrogate's housing target was then 669 new homes a year.

33. Mr Wald carried out a detailed textual analysis of the Report, criticising certain sentences in particular. That approach is not the one which the court ought to adopt as Lindblom LJ explained in *Watermead*, and risks distorting the officer's advice.

34. By way of example, Mr Wald emphasised the final sentence of paragraph 9.11 of the Report, which reads: "By virtue of this [(being a reference to the previous sentence which refers to policies SG1-3)] paragraph 11 of the NPPF is <u>once again</u> engaged" (emphasis added). Mr Wald contended that the officer was advising, in this sentence, that the tilted balance might be engaged for a second time because policies SG1-3 were out of date, from which starting point he argued that it must follow that she had advised, in the Report, that the tilted balance might be engaged, for the first time, because Harrogate only had 5.02 years Housing Land Supply (so, notionally treating marginally more than 5 years Housing Land Supply as less than a 5 Year Housing Land Supply). I am satisfied that, when the officer spoke of the tilted balance "once again" being engaged, she did not mean that it was (or might be) engaged for a second time or on a second basis. Rather, once the final sentence of paragraph 9.11 of the Report is read with the whole of paragraph 9.9, it is tolerably clear that what the officer meant by the final sentence of paragraph 9.11 was that, although the tilted balance might have been engaged if Harrogate did not have 5 years Housing Land Supply, it was not engaged on that basis, but it was (or might be) engaged (effectively, re-engaged) because policies SG1-3 were out of date.

35. By way of further example, in support of Ground 2 Mr Wald also emphasised the sentence in the Report's summary, which also appears in paragraph 10.2:

> "[Harrogate] can only demonstrate a 5.02 year supply of housing and this is not sufficiently above the 5 year supply that paragraph 11 of the NPPF can be ignored."

The officer did not assert in terms, in this sentence, that Harrogate should be treated as having less than 5 years Housing Land Supply (even though it had, or apparently had, 5.02 years Housing Land Supply at the date of the Report) or that the tilted balance might be engaged for that reason, and, as I have indicated, more importantly, reading the Report as a whole (and, in particular, paragraphs 9.9-9.11), that is not advice she gave.

36. It follows, therefore, that Ground 2 fails.

37. In any event, in the light of the other conclusions I have reached and which I set out below in relation to Ground 1, I agree with Mr Hunter that, even if Ground 2 is made out, it is highly likely that the Decision would have been made in any event. It was not suggested that this is a case of exceptional public interest. In such circumstances, I would have had to refuse to grant Oxton Farm relief on Ground 2, because of section 31(2A) of the Senior Courts Act 1981.

38. I turn, then, to consider Ground 1.

39. In *Bolton MBC v. Secretary of State for the Environment* (1991) 61 P & CR 343, Glidewell LJ said, at pages 352-353:

> "…I venture to suggest that from the authorities generally, and particularly those to which I have referred, one can deduce the following principles:
>
> (1) The expressions used in the authorities that the decision-maker has failed to take into account a matter which is relevant…or that he has failed to take into consideration matters which he ought to take into account…have the same meaning.
>
> (2) The decision-maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision-making process. By the verb "might", I mean where there is a real possibility that he would reach a different conclusion if he did take that consideration into account.
>
> (3) If a matter is trivial or of small importance in relation to the particular decision, then it follows that if it were taken into account there would be a real possibility that it would make no difference to the decision and thus it is not a matter which the decision-maker ought to take into account.
>
> (4) …[T]here is clearly a distinction between matters which a decision-maker is obliged by statute to take into account and those where the obligation to take into account is to be implied from the nature of the decision and of the matter in question…
>
> (5) If the validity of the decision is challenged on the ground that the decision-maker failed to take into account a matter in the second category, it is for the judge to decide whether it was a matter which the decision-maker should have taken into account.
>
> (6) <u>If the judge concludes that the matter was "fundamental to the decision", or that it is clear that there is a real possibility</u>

> that the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision was not validly made. But if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid.
>
> (7) …Even if the judge has concluded that he could hold that the decision is invalid, in exceptional circumstances he is entitled nevertheless, in the exercise of his discretion, not to grant any relief" (emphasis added).

40. More recently, in *DLA Delivery Ltd. v. Baroness Cumberlege* [2018] PTSR 2063, Lindblom LJ said, at [20]-[26]:

> "Issue (1): The relevant test for material considerations
>
> Before us, this issue was not controversial. The parties were agreed on the approach the court should take, which is already the subject of ample authority.
>
> Prominent in the case law is the decision of House of Lords in *In re Findlay* [1985] AC 318, 333, 334. In that case there was no express statutory requirement for consultation, and it was impossible to imply any such requirement into the statute. But the "Wednesbury principle"…was invoked in support of a submission that no reasonable Home Secretary could have reasonably omitted to consult the Parole Board on the new policy in question. In his speech, at pp.333f-334b, Lord Scarman referred to two passages in the judgment of Cooke J in *CREEDNZ Inc. v. Governor General* [1981] 1 NZLR 172, 183. The first passage was:
>
> > "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."
>
> But it was the second passage that Lord Scarman found decisive. As he said:
>
> > "[Cooke J] in a later passage [also on p.183], did recognise that in certain circumstances, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of

> direct consideration of them by the ministers…would not be in accordance with the intention of the Act'."

Those two passages of Cooke J's judgment in the *CREEDNZ Inc.* case were, in Lord Scarman's view, "a correct statement of principle".

In this case, the judge undertook a careful review of the relevant authorities. Having done so, he concluded…that "on analysis it seems…the matter is "so obviously material" in such circumstances when no reasonable person would have failed to take it into account", and…that it was "simpler and less likely to mislead or produce an incorrect result to ask…only whether the matter is one that no reasonable decision-maker would have failed to take into account in the circumstances".

Both Ms Heather Sargent, on behalf of Baroness Cumberlege and her husband, and Mr Christopher Young QC, for DLA Delivery, were content for us to adopt that approach in considering whether the Secretary of State ought to have taken into account his own previous decision in the Ringmer appeal. They both acknowledged that he was obliged to do that if, in the circumstances, no reasonable Secretary of State would have failed to do so.

I agree. In this sense, the two "tests" are, it seems to me, effectively one and the same. As well as Lord Scarman's speech in *In re Findlay*…, endorsing as "a correct statement of principle" the two passages to which he referred in Cooke J's judgment in the *CREEDNZ Inc.* case…, I have in mind the speech of Lord Brown of Eaton-under-Heywood in *R (Hurst) v. London Northern District Coroner* [2007] 2 AC 189, in which, at para.57, he cited the same two passages of Cooke J's judgment and went on to say, in paras.58 and 59:

> "…it seems to me quite impossible to say that the unincorporated international obligation on the United Kingdom here was "so obviously material" to the coroner's decision whether or not to resume this inquest that he was required to give it "direct consideration"…
>
> "Even, therefore, had the coroner recognised and felt able to satisfy the international law obligation upon the United Kingdom by reopening the inquest, I for my part would not hold his refusal to do so irrational or otherwise unlawful."

In the context of planning law, one can point to the judgment of Carnwath LJ in *Derbyshire Dales District Council v. Secretary of State for Communities and Local Government* [2010] 1 P & CR 19 which, as the judge acknowledged (in note 7 to his judgment), was "consistent with the interpretation of *In re*

> *Findlay* as imposing a Wednesbury test". Carnwath LJ referred (in para.25 of his judgment) to Cooke J's "important statement of principle" in the *CREEDNZ Inc.* case, which "had been adopted by the House of Lords in *In re Findlay*", and by the Court of Appeal in *R (National Association of Health Stores) v. Secretary of State for Health*...He noted (in para.26) that Cooke J "took as a starting point" the observation of Lord Greene MR in the *Wednesbury* case [1948] 1 KB 223, 228, that:
>
> > "If, in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."
>
> He quoted the two passages of Cooke J's judgment in the *CREEDNZ Inc.* case approved by Lord Scarman in *In re Findlay*…As he put it, in para.28, recalling what Cooke J had said:
>
> > "It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") requires to be taken into account "as a matter of legal obligation"."
>
> I see no need for any further discussion of the relevant jurisprudence, nor any need to add to it. The essential principles are already sufficiently clear in the authorities…" (emphasis added).[8]

41. Bearing in mind that Harrogate had more than 5 years Housing Land Supply, even discounting the ONS data, and bearing in mind too the conclusions I have reached in relation to Ground 2, the ONS data was not a material consideration for the Planning Committee on the question of whether the tilted balance might be engaged because of the number of years Housing Land Supply Harrogate had at the date of the Meeting. Put another way, as I have found, the Report advised that Footnote 7 was not engaged in any event. The fact that the ONS data might have confirmed that was not a material consideration for determining the Application.

42. The more difficult question relates to the materiality of the ONS data in relation to the officer's advice that policies SG1-3 were out of date, so that the tilted balance might be engaged on that basis.

[8] Counsel took me to a number of other authorities on Ground 2, all of which I have considered; in particular, *R (Watson) v. LB of Richmond-upon-Thames* [2013] EWCA Civ 513 and *R (CBRE Lionbrook General Partners Ltd.) v. Rugby BC* [2014] EWHC 646 (Admin).

43. On the assumption that the Planning Committee did not take into account the ONS data when making the Decision (as Oxton Farm contends), to succeed on Ground 1 Oxton Farm would have to satisfy me that the ONS data was fundamental to whether policies SG1-3 continued to be out of date (proceeding, as I do, on the basis that those policies were out of date when the Report was made)[9], or that it is clear (or certain) that there is a real possibility that a consideration of the ONS data would have resulted in the Planning Committee concluding that the policies were not out of date, or that it was irrational for the Planning Committee not to take into account the ONS data when determining the Application.

44. In this case, the ONS data can only have been a material consideration, both parties agree, under section 70(2)(c) of the Town and Country Planning Act 1990 (which requires a local planning authority to take into account "any other material consideration"). It is Oxton Farm's case that the ONS data was a material consideration because of NPPF 60, as I have explained. However, Harrogate had submitted its draft local plan for examination on 31 August 2018, just after the Report was made and shortly before the Meeting. NPPF 214 provided that the draft local plan would be examined against the NPPF 2012 policies not the NPPF 2018 policies. As I have noted, to determine Harrogate's housing need for the purposes of the NPPF 2012 required different calculations to those required by the NPPF 2018, and, in particular, to those contemplated by NPPF 60 (or, to put it another way, Harrogate's housing need for the purposes of the NPPF 2012 was determined using a different methodology to that contemplated by the NPPF 2018). In these circumstances, I am not satisfied that it was irrational for the Planning Committee not to take into account the ONS data when determining the Application (assuming it did not do so). Nor can I say that the ONS data was fundamental to whether policies SG1-3 continued to be out of date. Nor is it clear (nor am I certain) that there is a real possibility that a consideration of the ONS data would have resulted in the Planning Committee concluding that the policies were not out of date.

45. Oxton Farm has a high hurdle to overcome to succeed on Ground 1. For the reasons I have set out, it has not overcome that hurdle and Ground 1 fails.

46. I turn, then, to consider Ground 3.

47. In *R (CPRE Kent) v. Dover CC* [2018] 1 WLR 108, Lord Carnwath explained, at [51]-[60]:

> "Public authorities are under no general common law duty to give reasons for their decisions; but it is well-established that fairness may in some circumstances require it, even in a statutory context in which no express duty is imposed (see *R v. Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531…). [In] *Doody*…a principal justification for imposing the duty was seen as the need to reveal any such error as would entitle the court to intervene, and so make effective the right to challenge the decision by judicial review.

[9] See paragraph 23 above.

Similarly, in the planning context, the Court of Appeal has held that a local planning authority generally is under no common law duty to give reasons for the grant of planning permission (*R v. Aylesbury Vale District Council, Ex p Chaplin* (1997) 76 P & CR 207, 211–212, per Pill LJ). Although this general principle was reaffirmed recently in *R (Oakley) v. South Cambridgeshire District Council* [2017] 1 WLR 3765, the court held that a duty did arise in the particular circumstances of that case: where the development would have a "significant and lasting impact on the local community", and involved a substantial departure from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. Of the last point, Elias LJ (giving the leading judgment, with which Patten LJ agreed) said, at para.61:

> "The significance of that fact is not simply that it will often leave the reasoning obscure. In addition, the fact that the committee is disagreeing with a careful and clear recommendation from a highly experienced officer on a matter of such potential significance to very many people suggests that some explanation is required…the dictates of good administration and the need for transparency are particularly strong here, and they reinforce the justification for imposing the common law duty."

…Mr Cameron QC (for the Council) submitted that this decision should be "treated with care", against the background of the Government's decision in 2013 to abrogate the statutory duty to give reasons for grant of permission, planning law being a creature of statute…The factors identified by Elias LJ could arise in many cases, and lead to the common law duty becoming a general rule. He asked us to prefer the view of Lang J (*R (Hawksworth Securities plc) v. Peterborough City Council* [2016] EWHC 1870 (Admin) at [81]) that a common law duty to give reasons would arise only "exceptionally" and that "generally, the requirements of fairness will be met by public access to the material available to the decision-maker". The present case, he submitted, was not exceptional in that sense, either in principle or on its own facts.

In my view *Oakley* was rightly decided, and consistent with the general law as established by the House of Lords in Doody. Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. *Doody* itself involved such an application of the common law principle of "fairness" in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative

decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.

Doody concerned fairness as between the state and an individual citizen. The same principle is relevant also to planning decisions, the legality of which may be of legitimate interest to a much wider range of parties, private and public…Here a further common law principle is in play. Lord Bridge saw the statutory duty to give reasons as the analogue of the common law principle that "justice should not only be done, but also be seen to be done"…That principle of open justice or transparency extends as much to statutory inquiries and procedures as it does to the courts…In the application of the principle to planning decisions, I see no reason to distinguish between a ministerial inquiry, and the less formal, but equally public, decision-making process of a local planning authority such as in this case.

The existence of a common law duty to disclose the reasons for a decision, supplementing the statutory rules, is not inconsistent with the abrogation in 2013 of the specific duty imposed by the former rules to give reasons for the grant of permission. As the explanatory memorandum made clear, that was not intended to detract from the general principle of transparency (which was affirmed), but was a practical acknowledgement of the different ways in which that objective could normally be attained without adding unnecessarily to the administrative burden. In circumstances where the objective is not achieved by other means, there should be no objection to the common law filling the gap.

Thus in *Oakley* the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision.

This endorsement of the Court of Appeal's approach may be open to the criticism that it leaves some uncertainty about what particular factors are sufficient to trigger the common law duty, and indeed as to the justification for limiting the duty at all…The answer to the latter must lie in the relationship of the common law and the statutory framework. The court should respect the exercise of ministerial discretion, in designating

> certain categories of decision for a formal statement of reasons. But it may also take account of the fact that the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong.
>
> As to the charge of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects which involve major departures from the development plan, or from other policies of recognised importance…Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para.45 above), they are likely to have lasting relevance for the application of policy in future cases.
>
> …Members are of course entitled to depart from their officers' recommendation for good reasons, but their reasons for doing so need to be capable of articulation, and open to public scrutiny. There is nothing novel or unduly burdensome about this. The Lawyers in Local Government Model Council Planning Code and Protocol (2013 update) gives the following useful advice, under the heading "Decision-making":
>
> > "Do make sure that if you are proposing, seconding or supporting a decision contrary to officer recommendations or the development plan that you clearly identify and understand the planning reasons leading to this conclusion/decision. These reasons must be given prior to the vote and be recorded. Be aware that you may have to justify the resulting decision by giving evidence in the event of any challenge."…" (emphasis added).

Lord Carnwath had begun his judgment by saying, at [1]:

> "When a local planning authority against the advice of its own professional advisers grants permission for a controversial development, what legal duty, if any, does it have to state the reasons for its decision, and in how much detail?..."

48. In *R (Palmer) v. Herefordshire CC* [2017] 1 WLR 411, Lewison LJ said, at [7]:

> "…In examining the reasons given by a local planning authority for a decision, it is a reasonable inference that, in the

> absence of contrary evidence, they accepted the reasoning of an officer's report, at all events where they follow the officer's recommendation: *R v. Mendip District Council, Ex p Fabre* (2000) 80 P & CR 500, 511 *and R (Zurich Assurance Ltd. (trading as Threadneedle Property Investments)) v. North Lincolnshire Council* [2012] EWHC 3708 at [15]."

49. Mr Wald contended that the Decision was made for the reasons set out in the Report. In the light of what Lewison LJ said in *Palmer*, I proceed on the basis that that is what happened. In any event, on the available evidence, that is a reasonable inference to make. On that basis, the reasons for the Decision are known and are available to interested parties. Indeed, the very basis for Oxton Farm's challenges to the Decision on Ground 1 and Ground 2 was that the reasons for the Decision were those which were given in the Report for the officer's recommendation. This is not a case where the Planning Committee departed from the officer's recommendation. I was taken to no evidence that established that the Application would have a "significant and lasting impact on the local community" (as Oxton Farm had suggested). There is no evidence that there was widespread public controversy about the Application. The Application did not relate to a major development (a football stadium) on greenbelt land as in *Oakley* or to a major development in an area of outstanding natural beauty as in *CPRE Kent*. The Decision could be accurately described as a run-of-the-mill planning decision.

50. In the circumstances, I have concluded that there are no special circumstances in this case which required Harrogate to give reasons for the Decision and that Ground 3 fails.

51. Counsel made submissions on Oxton Farm's standing, having made submissions on its substantive grounds for claiming relief. As they did, I have considered the claim on the hypothesis that Oxton Farm does have standing and have left for consideration until last whether Oxton Farm does have standing. Counsels' approach was correct because, at trial, a claimant's standing is linked to the merits of its case. In the light of the conclusions I have already reached, I do not need to finally determine the issue of Oxton Farm's standing. Nevertheless, I will add briefly that, had I concluded that any of Oxton Farm's Grounds were made out, bearing in mind (i) that, on the evidence, I am satisfied that Mr Vendy was engaged to represent its interests in relation to the Application, (ii) that Mr Vendy spoke at the Meeting, apparently without any objection that his client did not have a sufficient interest in the outcome of the Application, (iii) that Oxton Farm farms in Bickerton which is, apparently a small settlement and (iv) the development proposed by the Interested Party, I would not have been inclined to refuse Oxton Farm relief on this ground.

Disposal

52. It follows that the claim is dismissed.