Neutral Citation Number: [2017] EWHC 1492 (Admin)

Case No: CO/497/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/06/2017

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

DIGNITY FUNERALS LIMITED	**Claimant**
- and -	
BRECKLAND DISTRICT COUNCIL	**Defendant**
- and -	
THORNALLEY FUNERAL SERVICES LIMITED	**Interested Party**

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- -

James Strachan QC and Philippa Jackson (instructed by **Clyde & Co LLP**) for the **Claimant**
Christopher Lockhart-Mummery QC and Zack Simons (instructed by the **Solicitor to Breckland District Council**) for the **Defendant**

Hearing dates: 7th June 2017

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Approved Judgment

Mr Justice Holgate:

Introduction

1. The Claimant, Dignity Funerals Limited, challenges the decision of the local planning authority, Breckland District Council ("BDC"), dated 22 December 2016 to grant planning permission for the erection of a new crematorium, car park, gardens of remembrance, access roads and ancillary buildings on land at Norwich Road, Scoulton ("the site"). At its meeting held on the 17 October 2016 BDC's Planning Committee resolved to accept a recommendation by its Officers to grant permission.

2. The site is owned by the Interested Party, Thornalley Funeral Services Limited. The Claimant is the owner and operator of Norwich Earlham Crematorium and Norwich Saint Faith Crematorium. It is also promoting a new crematorium on a site located between Weeting and Brandon within Breckland District ("the Weeting site").

3. The Interested Party's planning application was originally submitted to BDC on 13 November 2014. The Claimant made an objection to the application. On 27 August 2015 BDC granted planning permission pursuant to a resolution of its Planning Committee. The Claimant then issued a claim for judicial review challenging BDC's decision on the grounds of a failure to interpret planning policy correctly. BDC stated that it would not contest the claim and the planning permission was quashed by the High Court by consent. Accordingly the planning application fell to be re-determined by BDC.

4. On 13 January 2016 BDC once again granted planning permission for the development following a resolution of its Committee. This decision was the subject of a second claim for judicial review, brought on this occasion by a local resident. In May 2016 BDC indicated that it would not contest the claim and the council's decision was again quashed by an order of this Court by consent. Accordingly, the planning application had to be determined by BDC for a third time.

5. It is submitted by Mr Strachan QC that the Court should take a cautious approach to the grounds of challenge in this third judicial review in view of the failure by BDC to reach lawful determinations of the planning application on two previous occasions, one of which involved misinterpreting a policy in the development plan. However, the parties have not thought it appropriate to show the court either of the two earlier quashing orders, because they agree that the grounds upon which the earlier decisions were quashed are irrelevant to the legal issues raised by the present claim.

6. On 17 June 2016 the Claimant submitted a further objection to the planning application. It raised concerns on such matters as the absence of any pedestrian access to the proposed development, the failure by the applicant to carry out any proper search for alternative sites closer to larger centres of population, and the existence of a number of potential areas in the vicinity of Thetford which would provide a more suitable and sustainable location for a new crematorium. However, at that stage the Claimant did not identify any alternative sites.

7. In September 2016 BDC's Planning Officer produced a lengthy and detailed report to the Planning Committee recommending that approval be granted. On 16 September 2016 consultants acting for the Claimant wrote to BDC elaborating upon their client's

objections. They contended (inter alia) that BDC was obliged to consider alternatives to the location proposed by the Interested Party and they put forward the Weeting site as an alternative. On this point the objection letter simply stated:-

> "Our client has agreed commercial terms for the acquisition of land between Weeting and Brandon. The land is a short distance to the north of Brandon station; it is screened by existing trees and hedgerow, it has access to public transport (bus and train services) and is close to the A11 corridor and accessible to Watton and Swaffham via A 1065. This site is a far more sustainable location for a crematorium compared to the application site at Scoulton. Our client will be preparing a planning application for consideration by the council over the coming weeks; pre-application discussions will be held with the Council Officers very shortly."

The objection also contended that the Interested Party's proposal conflicted with policies SS1, CP11, CP13, DC1, DC12 and DC16 of BDC's Core Strategy and Development Control Policies (adopted in 2009) and also that the proposal did not represent sustainable development within the National Planning Policy Framework ("the NPPF").

8. In October 2016 a revised version of the Officer's report together with an addendum was issued. At its meeting on 17 October 2016, the Committee again resolved to grant planning permission for the proposed development. Following that decision the application was referred to the Secretary of State to enable him to consider whether the application should be called in. He subsequently informed BDC that he would not recover the application for determination under section 77 of the Town and Country Planning Act 1990 ("TCPA 1990").

9. This judgment is set out under the following headings:

(i) Relevant planning policies
(ii) The Officer's report to the Planning Committee
(iii) The grounds of challenge
(iv) General legal principles
(v) Ground 1
(vi) Ground 2
(vii) Ground 3

Relevant Planning Policies

10. The Core Strategy contains three types of policy. Chapter 2 sets out the spatial strategy for the whole district and contains one policy SS1. This is followed by chapter 3 which contains fourteen core strategy policies or "CP" policies. Chapter 4 sets out the strategy's Development Control policies or "DC" policies of which there are twenty one.

11. Paragraph 2.33 of the Core Strategy states that the "Spatial Strategy identifies the different types of place within the District and how they will develop. It shows how

and where the growth in housing, employment and retailing will be accommodated and sets out priorities for areas that will be protected from development pressures. It explains how the different places of the District will be shaped over the period to 2026".

12. Policy SS1 sets out the spatial strategy at some length. The opening text states:-

> "Breckland comprises seven types of place:
>
> - The Key Centre for Development and Change; Thetford
> - The Market Town for Substantial Growth; Attleborough
> - The three market towns; Dereham, Swaffham and Watton
> - The Local Service Centre Villages
> - The Snetterton Heath Employment Area
> - The rural settlements; and,
> - The countryside"

The policy indicates in broad terms the level and distribution of development across the whole district as between these seven types of place.

13. Under the heading "the Countryside", policy SS1 states:-

> "In addition to the rural settlements, Breckland contains large areas of predominantly un-developed agricultural land. Sustainability Appraisal indicates that these areas do not represent a sustainable option for development.
>
> Minimal development predominantly comprising the diversification of rural enterprises will be accommodated in the countryside. Some other employment uses may be accommodated in the countryside where a rural location is necessary for the functioning of the business or it utilises a particular attribute and is a sustainable solution to an identified need."

14. Policy CP11 deals with the protection and enhancement of the landscape. It states (inter alia):-

> "The landscape of the District will be protected for the sake of its own intrinsic beauty and its benefit to the rural character and in the interests of biodiversity, geodiversity and historical conservation. Development should have particular regard to maintaining the aesthetic and biodiversity qualities of natural and man-made features within the landscape, including a consideration of individual or groups of natural features such as

> trees, hedges and woodland or rivers, streams or other typographical features.
>
> The release of land in Breckland will have regard to the findings of the Council's Landscape Character Assessment (LCA) and Settlement Fringe Landscape Assessment to ensure land is released, where appropriate, in areas where the impact on the landscape is at a minimum. Development should also be designed to be sympathetic to landscape character, and informed by the LCA.
>
> High protection will be given to the Brecks landscape, reflecting it's role as a regionally significant green infrastructure asset. Proposals within the Brecks Landscape Character Areas will not be permitted where these would result in harm to key visual features of the landscape type, other valued components of the landscape, or where proposals would result in a change in the landscape character."

As paragraph 24 of the Claimant's skeleton notes, the application site lies within the Wayland Plateau LCA.

15. Policy CP13 deals with accessibility. It provides (inter alia):-

> "New growth in Breckland will be delivered to promote accessibility improvements. This principle is promoted through the balanced distribution of housing and employment throughout the District, but will also be delivered through the following mechanisms set out below …
>
> In addition to education facilities, health, community, sports and recreation facilities (including public open space) will also need to be provided to meet the needs of the growing population. These developments should also be sited in areas that allow for ease of access by a variety of methods."

16. Policy CP14 deals with "rural communities". Under the heading "Employment in the Countryside", the policy states:-

> "The diversification of existing rural enterprises and the development of new enterprises where a rural location is either environmentally or operationally justified will be supported, provided there are no significant detrimental environmental, landscape, conservation or highway impacts."

Paragraph 3.104 of the explanatory memorandum states:-

> "Also allied to the achievement of sustainable rural communities is the support for appropriately located economic development, including rural tourism. The promotion of economic development will need to be tempered against the

> necessity to protect the countryside and the environment, and promote sustainable modes of transport. Therefore economic development in the countryside will only be supported where the operation of the business necessitates the locations, represents a sustainable solution to an identified need and is in line with national policy. Specific criteria for economic development in the countryside and the diversification of farming enterprises is contained in the Development Control Policies."

17. Policy DC1 deals with the "protection of amenity". It provides that:-

> "For all new development consideration will need to be given to the impact upon amenity. Development will not be permitted where there are unacceptable effects on the amenities of the area or the residential amenity of neighbouring occupants, or future occupants of the development site. When considering the impact of the development in terms of the amenities of the area and residential amenity, regard will be had to the following issues; …
>
> f. Quality of the landscape or townscape."

18. Policy DC7 deals with "Employment Development Outside of General Employment Areas". It was common ground at the hearing that a crematorium does not fall within the definition of "employment development" used in the Core Strategy.

19. Policy DC12 deals with "Trees and Landscape". It provides (inter alia) that:-

> "Any development that would result in the loss of, or the deterioration in the quality of an important natural feature(s), including protected trees and hedgerows will not normally be permitted. In exceptional circumstances where the benefit of development is considered to outweigh the benefit of preserving natural features, development will be permitted subject to adequate compensatory provision being made. The retention of trees, hedgerows and other natural features *in situ* will always be preferable. Where the loss of such features is unavoidable, replacement provision should be of a commensurate value to that which is lost."

20. Policy DC16 deals with design principles. It provides (inter alia) that:-

> "All new development should achieve the highest standards of design. In assessing any proposed development consideration will be given to the following design principles:
>
> **Local Character:** All design proposals must preserve or enhance the existing character of an area. Particular regard should be given to reinforcing locally distinctive patterns of development, landscape and culture and complimenting

existing buildings. Additionally contemporary design, where it enhances sustainability will be encouraged in the District.

…

Form and Character: Development should compliment the natural landscape, natural features and built form that surround it. In considering development proposals consideration will be given to the shape and configuration of a building or buildings, and its or their style, design and arrangement. Regard will also be had to the distinctive features or qualities of a proposed building and its surroundings and the contribution new development makes to these features or qualities."

21. Paragraph 109 of the NPPF provides (inter alia) that:-

> "The planning system should contribute to and enhance the natural and local environment by:
>
> - protecting and enhancing valued landscapes, …"

22. Paragraph 118 of the NPPF provides (inter alia) that:-

> "When determining planning applications, local planning authorities should aim to conserve and enhance biodiversity by applying the following principles:
>
> - if significant harm resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;
>
> …
>
> - planning permission should be refused for development resulting in the loss or deterioration of irreplaceable habitats, including … the loss of aged or veteran trees found outside ancient woodland, unless the need for, and benefits of, the development in that location clearly outweigh the loss; …"

The Officer's Report to the Planning Committee

23. The report described the site and surrounding area as follows:-

> "12. The application site is situated within an area of open countryside, around ½ mile from the village of Scoulton and 1 ½ miles from the small town of Hingham. The site forms part of a larger field and is set within an agricultural landscape. The site adjoins the B1108 Norwich Road, but built development in the locality is sparse and dispersed. The nearest residential

> properties are located around 250-300 metres away. Scoulton Mere, a Site of Special Scientific Interest (SSSI), is located approximately 400 metres to the west.
>
> 13. The site extends to approximately 4.4 hectares, with a frontage of around 220 metres to Norwich Road. The site is under arable cultivation. The land is bounded by further farmland to the south and east, an area of woodland to the west, and by the Norwich Road to the north. The roadside boundary is delineated by an established hedgerow and trees, including two oak trees which are subject to a Tree Preservation Order (TPO)."

Under BDC's scheme of delegation, the application was referred to the Planning Committee because it constituted a "major development" and had generated significant community interest. However, the application was screened as not amounting to EIA development because it would not be likely to have significant effects on the environment, a decision which has not been challenged.

24. Paragraphs 14 to 50 of the report contained a detailed summary of the consultation responses which had been received by BDC.

25. The report dealt with the need for a crematorium between paragraphs 70 to 74 as follows:-

> "70. There are no crematoria in Breckland. Existing facilities in the wider area are located at Norwich (Earlham and Horsham St Faiths), King's Lynn and Bury St Edmunds. Permission was granted on appeal last year for a crematorium at Cromer. Travel distances to these facilities are such that large parts of Breckland fall outside the industry standard 30 minute drive-time to a crematorium at cortege speed. This standard is widely accepted as an appropriate guideline for assessing the adequacy of local provision, and has been referenced in a number of appeal decisions.
>
> 71. Taking into account death rates in Breckland, which has a higher than average number of elderly residents, and applying national average cremation rates, it is estimated that around 1,086 potential cremations per annum are likely to be generated within the District. The proposed crematorium would have the capacity to meet this need, and due to its relatively central location, would provide a convenient facility for many residents in Breckland. Whilst the proposal would be unlikely to handle all Breckland cremations, further cremations would be likely to arise from areas close by in South Norfolk.
>
> 72. Evidence has also been provided to demonstrate that existing local crematoria are operating at or over capacity, resulting in extended waiting times and short turn around times for funerals. The additional capacity secured by the proposal

> would provide a better and more convenient service for local residents, as well as reducing pressure on existing crematoria, thereby potentially improving the experience for mourners at those facilities.
>
> 73. Whilst the need for a crematorium in this location has been questioned by a number of those objecting to the application, no substantive evidence has been provided to contradict that provided by the applicant.
>
> 74. Taking these matters into account, it is concluded that there is currently an unmet need for additional crematorium facilities in the area which the proposal would help to address. This is a material consideration that weighs in favour of the proposal."

26. The report dealt with the principle of development in the countryside between paragraphs 56 and 69. Paragraph 56 stated:-

> "56. Policy SS1 of the Breckland Core Strategy & Development Control Policies DPD sets out the overall approach to development in the District, and indicates that the open countryside is not considered generally to represent a sustainable option for development. Accordingly, Policy SS1 makes provision only for minimal development in the countryside outside defined settlements, predominantly comprising the diversification of rural enterprises. Provision is also made for some other employment uses to be accommodated, where a rural location is necessary for the functioning of the business or it utilises a particular attribute and is a sustainable solution to the identified need."

The Claimant made no criticism of that summary of policy SS1.

27. Paragraph 58 of the report summarised the effect of paragraph 28 of the NPPF in so far as it was relevant to the determination of the application:-

> "58. The National Planning Policy Framework (NPPF) promotes economic growth in the countryside, stating in paragraph 28 that the sustainable growth and expansion of all types of business should be supported in rural areas. It is also a core principle of the NPPF to recognise the intrinsic character and beauty of the countryside. However, the support for rural economic development applies to development in the open countryside as well as rural settlements. Additionally, the NPPF states as a core principle that planning should deliver sufficient community and cultural facilities and services to meet local needs."

The Claimant made no criticism of that summary either.

28. Paragraphs 60 to 61 of the report assessed the need for the development to be in an open countryside location:-

> "60. As far as the need for a countryside location is concerned, the requirements of the Cremation Act 1902 are directly relevant insofar as they stipulate that a crematorium should be at least 200 yards (around 183 metres) from any dwelling and at least 50 yards (43 metres) from a public highway. Published Government guidance entitled 'The Siting and Planning of Crematoria' (DoE, 1978) is also of relevance. This says that sufficient land should be available to provide an appropriate setting for a crematorium, adequate internal access roads, car parking and space for the disposal of ashes. Reference is made to sites of 2 to 4 hectares in size and larger, although no minimum is stated. The reasonable expectation of mourners and visitors to gardens of remembrance for a place of quiet contemplation is also an important consideration in relation to site selection.
>
> 61. Given these particular site selection and locational requirements detailed above, it is considered to be most unlikely that suitable land of sufficient size would be found within a defined settlement boundary. This is due to the more or less continuously built up nature of towns and villages in the District. Larger sites that are remote from housing are perhaps more likely to be found within existing and allocated employment areas, but such sites can be discounted due to the busy commercial nature of such areas and the likelihood of conflicting activities. It can reasonably be concluded therefore that a rural location outside a defined settlement is likely to be required for the development of a crematorium."

29. Paragraph 62 expressed the Officer's overall conclusion on the application of policy SS1 and paragraph 28 of the NPPF:-

> "On this basis, it is considered that the proposal would not conflict with Policy SS1 … as it has been demonstrated that the proposal would represent a sustainable solution to an identified need. This is considered further below. The proposal would also be fully consistent with the NPPF's support for the sustainable growth of rural businesses as set out in paragraph 28."

This conclusion drew upon both the assessment of the sustainability of the proposed development contained in the following paragraphs of the report as well as upon the preceding paragraphs.

30. The report dealt with the effect of the proposal on the character and appearance of the area between paragraphs 76 to 83. The Officer's conclusion in paragraph 83 was:-

> "For these reasons, it is also considered that whilst the proposal would cause some harm to the rural character and appearance of the area and loss of protected trees in conflict with Core Strategy Policies CP11 and DC12, this effect would be localised and would be mitigated to an extent by sensitive building design and extensive planting. Nevertheless, landscape impact considerations, in part, weight against the proposal. "

31. The impact of the proposal on the landscape had been described at paragraphs 78 to 79 of the report:-

> "78. The proposal would introduce built development into an area of largely undeveloped open countryside. The proposed buildings, together with associated access, parking, servicing areas, pedestrian islands and signage would inevitably result in a loss of openness and increase activity, and would thus have an urbanising effect. This would be harmful to the character and appearance of the area. The removal of existing roadside hedging and trees (including up to two oak trees subject to a TPO) to facilitate access improvements would also cause some harm in itself, as well as opening up short distance views into the site and thereby increasing the visual impact of the proposed development.
>
> 79. However, in medium distance views the proposed development would be well screened by adjacent dense woodland when approaching from the west and roadside and field boundary hedging would filter views of the development when approaching from the east. Close to the site, the development would be clearly visible from the Norwich Road, but would be set well back from the road and would in large part be seen set against a wooded backdrop."

32. On the other hand paragraph 82 of the report advised that:-

> "82. Consequently, and for the above reasons, it is considered that the proposal would comply with Policy DC16 in accordance with the design principles detailed therein which seeks, amongst other things, to ensure that new development is built to a high standard of design."

This conclusion was based upon paragraphs 80 and 81 of the report which commented favourably and in some detail on the design principles of the proposed landscaping and the proposed buildings.

33. Paragraphs 84 to 93 of the Officer's report addressed transport, highway safety and accessibility and concluded that if CP13 were to be treated as applicable to the proposed development, the policy was complied with.

34. Paragraphs 94 to 97 of the report dealt with the effect of the development on residential amenity. In paragraph 97 the following conclusions were drawn:-

> "97. Consequently, it is considered that the proposal would not result in any material harm to the amenities of local residents taking into above the above factors and issues. In terms of effect on the quality of the landscape, such considerations are detailed at paragraphs 76 to 83 above. Whilst it is considered that the proposals may result in some localised harm to the quality of the landscape which weighs against the proposal, it is considered that the scheme complies with Core Strategy Policy DC1 in all other respects."

35. Paragraphs 98 to 103 considered the effect of the proposed development on trees and landscaping. Paragraphs 99 to 101 stated:-

> "99. The proposal would result in the loss of some existing trees and hedging at the site frontage, including two oak trees to the east and west of the site frontage that are subject to a TPO. This loss of trees and vegetation is necessary to provide suitable visibility splays in accordance with the recommendation of the Highway Authority.
>
> 100. To compensate for the loss of trees and hedging, replacement planting is proposed together with a comprehensive landscaping scheme. The replacement planting would comprise of a new native hedgerow and 18 trees, including 6 beech trees, 6 oak trees and 6 field maple trees. The proposed landscaping scheme would introduce additional planting by way of tree belts to the site frontage and to the north eastern corner of the site. The tree belts would consist of a variety of species, including field maple, silver birch, hazel, beech, crab apple, native white cherry, English oak, and small leaved lime. …. The Tree Consultant does not support the removal of the TPO trees, but recommends that any new planting should be predominantly of native species to more appropriately respond to the existing landscape character of the locality.
>
> 101. As already noted, the loss of the TPO trees and the remainder of the planting to the site frontage would cause harm to the character and appearance of the landscape. However, it is considered that this particular landscape impact would be ameliorated by the substantial planting proposed by the landscaping scheme. The number and location of the trees, on balance, would be of more than commensurate value, providing an appropriate replacement and additional planting. The proposed landscaping would also mitigate to an extent against the visual impact of the built form on the wider landscape."

36. As a result in paragraph 103 of his report, the Officer concluded that:-

> "103. Taking these matters into account, it is considered that the proposal would result in some harm due to the loss of roadside hedging and trees in conflict with Core Strategy Policy DC12. However, such loss of trees and hedging is unavoidable due to access requirements and to achieve the development proposed. Moreover, the harm caused would be localised and mainly short-term, and could be mitigated satisfactorily by a comprehensive scheme of new planting. It is considered that the public benefits of the development as summarised in this report would outweigh this limited harm, and, due to the compensatory provision, it is considered that these amount to exceptional circumstances under this policy."

37. Paragraphs 104 to 114 addressed ecological issues. The Officer summarised the information and reports which had been received from the developer and other parties. He stated that there had been no signs of any protected species on the site. Paragraphs 105 and 112 expressed the opinion that the proposal provided opportunities for enhancing biodiversity. Paragraph 114 concluded:-

> "114. Accordingly it is considered that the proposal is acceptable in ecological terms and would not conflict with Core Strategy Policy CP10 or the guidance set out in paragraph 118 of the NPPF."

38. Paragraphs 115 to 118 of the report dealt with the effect of the proposal on the historic environment. Paragraph 118 concluded:-

> "118. Consequently the proposal is considered to be acceptable in heritage terms and would not conflict with Core Strategy Policy DC17 or the guidance set out in section 12 of the NPPF."

39. Paragraphs 119 to 121 explained why there were no objections to the proposal as regards loss of agricultural land, drainage and ground conditions.

40. The report dealt with the overall planning balance between paragraphs 122 and 126:-

> "122. The paragraphs above have assessed the individual policies of the development plan. It is considered that Polices SS1, CP10, CP13 (if it applied) DC1 (save for landscape considerations), DC7 (if it applied), DC16 and DC17 are complied with in full. Whilst for the reasons explained above, it is considered that there is some degree of conflict with Policy DC1 and CP11 in terms of landscape impact, the effects of the proposal would be localised and would be mitigated to an extent by sensitive building design and extensive landscaping, as noted in paragraphs 76 to 83. Some harm would also arise due to the loss of trees and hedging, but Policy DC12 is complied with as it allows for the loss of natural features in 'exceptional circumstances', such as is the case here where the loss cannot be avoided and compensatory measures are

provided, as explained in paragraphs 98 to 103 above. It is therefore considered that the proposals comply with the development plan as a whole.

123. In addition, *and in any event*, the proposed development would provide a crematorium facility in the District for which there is a need. The qualitative improvement to service provision provided by the proposal in reduced waiting times for funerals and, in many cases, reduced travelling distances represents a significant public benefit which weighs in favour of the proposal. The proposal would also create some rural employment and would support indirectly other associated business activities in the area. Safe access to the development could also be achieved. The economic and social roles of sustainable development, as defined in the NPPF, would thus be supported.

124. Although the proposal would not be close to any main centre of population, it would nonetheless be relatively conveniently located for many residents in mid-Norfolk who currently have to travel further afield to access cremation facilities. The proposal would be served by public transport, and whilst most visitors would be likely to arrive by car, travel distances for many local residents would be less than they are currently. Any harm arising in terms of transport sustainability would be small therefore.

125. In relation to environmental considerations, as detailed above, some harm to the character and appearance of the area would result, but the effects would be localised and would be mitigated by the layout and design of the scheme and proposed landscaping, which would also mitigate fully against the loss of protected trees. The proposal would not result in any significant adverse effects on the amenity of local residents, ecological interests or the historic environment. The proposed development is appropriate in a countryside location due to the nature of the use and the requirements of legislation and Government guidance.

126. In summary therefore, it is concluded on balance that the proposal complies with the development plan as a whole and would represent sustainable development as defined in the NPPF. In addition, *and in any event*, there are also a number of other material considerations that support the proposal including meeting the need for a crematorium and other community and economic benefits. It is recommended that the application should be approved therefore." (emphasis added)

The grounds of challenge

41. On 2 May 2017 Ouseley J granted permission to apply for judicial review restricted to three grounds, which had been "summarised" by the Claimant as follows (see paragraph 8 of its skeleton):-

> "(1) In advising the Committee that the Development was capable of being acceptable in principle in this location and in accordance with the Development Plan ("DP") for the purposes of s38(6) Planning and Compulsory Purchase Act 2004 ("the 2004 Act") the OR fundamentally misdirected Members in three main respects:
>
> (i) Firstly, the Officer erred in the correct legal interpretation of policies SS1 and DC07 of the Council's own Core Strategy, which establish the spatial strategy for development in the area. On a proper interpretation of those policies, and of the DP as a whole, the Officer was bound to advise Members that the Development was in conflict with those policies of the DP, and consequently with the DP as a whole, so that the statutory presumption in s38(6) did not apply. These were fundamental errors of approach, which vitiated Members' subsequent decision to grant the PP.
>
> (ii) Secondly, the Officer necessarily erred in his direction as to the weight to be given to policy SS1, because he directed that the weight it could carry was reduced due to an alleged inconsistency with paragraph 28 of the NPPF. On a proper legal construction of paragraph 28 of the NPPF and policy SS1, paragraph 28 of the NPPF is entirely consistent with policy SS1. By the same token, it clearly cannot be said that the Committee's decision would have been "highly likely" to be the same, had it not been misdirected concerning the proper interpretation of policy SS1 and paragraph 28 of the NPPF.
>
> (iii) Thirdly, whatever the position in respect of the Officer's advice concerning policy SS1, the Officer also seriously misled Members as to the conformity of the Development with the DP as a whole. Given that the Officer was unable to identify any policies which provided any positive support for the Development, to be balanced against the policies which clearly militated against the grant of permission, he could only lawfully and/or rationally have advised Members that the Development conflicted with the DP as a whole and so did not benefit from the statutory presumption under s38(6) of the 2004 Act ("**Ground 1**").
>
> (2) As a matter of law, the Council was required to have regard to the merits of the Weeting Site as one which would overcome, or at least mitigate, the clear planning objections to

> locating major development in the open countryside and outside any development boundary, while satisfying an identified, district-wide need for a crematorium: see *Derbyshire Dales DC v. Secretary of State* [2009] EWHC 1729 (Admin) and *R. (on the application of Bovale Ltd) v Secretary of State for Communities and Local Government* [2008] EWHC 2538 (Admin). However, despite being urged to consider the Weeting Site, as an identified and available alternative being promoted by a rival commercial operator, Members were unlawfully directed to ignore this alternative location and to determine the application solely on its own merits ("**Ground 2**").
>
> (3) The Officer also fundamentally erred and/or reached inconsistent conclusions, concerning the proper interpretation of other relevant DP policies, specifically policies DC16 and CP11, as well as CP13 and DC12 of the Core Strategy, and/or failed to take into account, properly or at all, paragraphs 109 and 118 of the NPPF. These errors undermined still further the Committee's conclusion that the development complied with the DP and benefitted from the statutory presumption in section 38(6). They also compound the seriousness of the failure to consider the Weeting Site as a potential alternative, in order to avoid or reduce the harmful impacts of this important development. ("**Ground 3**")."

General legal principles

42. Section 70(2) of TCPA 1990 provides that in dealing with a planning application the authority must have regard to (inter alia) "(a) the provisions of the development plan, so far as material to the application, … and (c) any other material considerations." Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") further provides that:-

> "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

It is well established that, in order to comply with these provisions, the decision-maker must proceed upon a proper interpretation of the relevant policies in the development plan (City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1459).

43. In Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 Lord Reed JSC, with whom the other members of the Supreme Court agreed, stated in paragraph 18 that:-

> "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It

> is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context."

Thus, the Court held that as a matter of principle statements of planning policy should be interpreted objectively according to the language used, but *always* reading that language *in its proper context*. He continued in paragraph 19:-

> "That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of fact requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

44. This subject was revisited by the Supreme Court in Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] 1 WLR 1865. Lord Carnwath JSC, with whom the other members of the Court agreed, stated at paragraph 24:-

> "In the first place, it is important that the role of the court is not overstated. Lord Reed JSC's application of the principles in the particular case (para 18) needs to be read in the context of the relatively specific policy there under consideration. Policy 45 of the local plan provided that new retail developments outside locations already identified in the plan would only be acceptable in accordance with five defined criteria, one of which depended on the absence of any "suitable site" within or linked to the existing centres (para 5). The short point was the meaning of the word "suitable" (para 13): suitable for the

> development proposed by the applicant, or for meeting the retail deficiencies in the area? It was that question which Lord Reed JSC identified as one of textual interpretation, "logically prior" to the exercise of planning judgment (para 21). As he recognised (para 19), some policies in the development plan may be expressed *in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis*." (emphasis added)

He continued in paragraphs 25 and 26:-

> "25.It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. …
>
> 26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matter of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgment in the application of that policy; and not to elide the two."

45. Lord Gill (with whom Lord Newburger PSC and Lord Clark and Lord Hodge JJSC agreed) added that "the proper context" for the interpretation of a planning policy "is provided by the overriding objectives of the development plan and the specific objectives to which the policy statement in question is directed" (see paragraph 72).

46. Mr Strachan QC urged caution in the present case in the application of one part of paragraph 25 of Lord Carnwath's judgment in Hopkins where he stated that the Courts should respect the expertise of the specialist planning inspectors and start at least from the presumption that they will have understood the policy framework correctly. He asserted that that presumption should not be taken to apply to decision-making by local planning authorities, but that would appear to conflict with the earlier statement of the Court of Appeal in R (Lensbury Limited) v Richmond upon Thames LBC [2016] EWCA Civ 814 at paragraph 8. At all events, I have not found it necessary to rely upon this presumption in order to resolve the issues raised by the grounds of challenge.

47. In certain parts of the Claimant's case it is asserted that BDC acted irrationally. It is well-established that a complaint of irrationality does not give a Claimant an opportunity to revisit the planning merits of the application or of the local planning authority's decision. "[The] Court must be astute to ensure that such challenges are not used as a cloak for … a rerun of the arguments on the planning merits"; see R (Newsmith Stainless Ltd) v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 74 at paragraph 6. In planning cases the threshold for *Wednesbury* unreasonableness (see Associated Provincial Picture Houses Ltd v

Wednesbury Cooperation [1948] 1 KB 223) is a high and difficult hurdle for a Claimant to surmount. This is greatly increased in most planning cases because the decision-maker is not simply determining questions of fact, it is also concerned with making a planning judgment or a series of planning judgments. Because a substantial degree of judgment is involved, there will usually be scope for a broad range of possible views by different decision-makers presented with the same materials, none of which could be categorised as unreasonable in the *Wednesbury* sense; see the Newsmith Stainless Ltd case, at paragraph 7. Against this background, a Claimant alleging that a decision-maker has reached an irrational or perverse conclusion on matters of planning judgment "faces a particularly daunting task"; see the Newsmith Stainless Ltd case, at paragraph 8. However, irrationality challenges are not confined to the relatively rare example of a "decision which simply defies comprehension". They also include a decision which proceeds from flawed logic: see R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at paragraph 65.

48. The principles to be applied to the review of decisions by local planning authorities and to criticisms of the content of reports by officers to planning committees have been summarised in a number of cases (see for example R (Luton Borough Council) v Central Bedfordshire Council [2014] EWHC 4325 (Admin) paragraphs 90 to 95; [2015] EWCA Civ 537 paragraph 78; R (Plant) v Lambeth LBC [2017] PTSR 453 paragraphs 66 to 69).

Ground 1

49. This ground falls into three parts. In the first part, the Claimant submits that the Officer's report misinterpreted policy SS1 of the Core Strategy. It is common ground that the decision of the Committee was based upon the reasoning and advice given by the Officer in that report. According to paragraph 36 of the Claimant's skeleton, policy SS1 contains an express restriction on development within the countryside subject to only two limited exceptions. These are said to be firstly, the diversification of rural enterprises and secondly, "some other employment uses" where a rural location is necessary for the functioning of the business or it utilises a particular attribute and is a sustainable solution to an identified need. The Claimant submits that even if a proposal falls within those two exceptions, policy SS1 only permits a proposal which itself represents a "minimal" level of development.

50. The Claimant submits that, on this interpretation of policy SS1, because the Officer's report considered the extent of the need for the development, BDC must have treated the proposal as an "employment use" within the second so-called exception. But at paragraph 63 of the Officer's report, the Committee was advised that the proposal is not an employment use for the purposes of policy DC7 and therefore BDC has misinterpreted policy SS1 by treating its second "exception" as extending to a non-employment use, namely a crematorium. It is also suggested that the term "minimal development" could not apply to the level of development involved in a crematorium.

51. Mr Lockhart-Mummery QC accepted on behalf of BDC that, according to the definition in footnote 3 to policy DC6 of the Core Strategy, the Interested Party's planning application did not relate to "employment development". But he nonetheless submitted that the Claimant's interpretation of policy SS1 is misconceived. I agree.

52. Policy SS1 sets out in broad terms the authority's spatial strategy for the whole of its district, or "the overall approach to development in the district" (see the undisputed summary in the Officer's report quoted in paragraph 26 above). It is not, for example, a detailed development control policy containing very specific criteria for the assessment of individual proposals. As I have already noted, according to paragraph 2.33 of the Core Strategy, the spatial strategy in policy SS1 identifies "different types of place" or areas within the District and how they will develop. It shows where growth will be accommodated and sets out priorities for areas to be protected from development pressures over the period up to 2026. The seven "areas of place", arranged as a descending hierarchy, are Thetford, followed by Attleborough, then three market towns, the local service centre villages, the Snatterton Heath Employment Area, the rural settlements and, lastly, "the countryside". The broad strategy for each of the seven different "areas of place" is then described one by one in policy SS1. It indicates the overall level of development that is distributed to each settlement or type of area as a whole. Read properly in context, policy SS1 does not set out to describe the level of development that could be acceptable on individual application sites.

53. So in relation to, for example, the penultimate tier in the hierarchy, SS1 states that the "rural settlements" do not represent a sustainable option for "significant expansion". As with the other tiers, that text describes, albeit using negative language, a level of expansion which would be appropriate for a rural settlement in *overall* terms. It is difficult to see how a question as to what would or would not amount to "significant expansion", where that question truly does arise, could be a suitable issue for judicial interpretation or analysis (applying paragraphs 24 and 26 of Hopkins). Instead the scope of that term depends upon *the use of judgment by the planning authority* in the *application* of that language to the circumstances of a settlement. That judgment could not be challenged by judicial review unless shown to be irrational, which is a particularly difficult hurdle to overcome. Much the same considerations apply to the expression "minimal development".

54. When dealing with "the countryside", SS1 begins by referring to the Sustainability Appraisal for the Core Strategy, which had explained that these large areas of predominantly undeveloped agricultural land are not a sustainable option for development. That, of course, is a conclusion expressed at a strategic, rather than a site-specific, level. It is in that context, that SS1 goes on to state that "minimal development" will take place in the countryside. Once again, that language is a description of the *overall* level of development distributed by the plan to the area of "the countryside" over the plan period. That minimal level of development which the countryside will accommodate will "predominantly" comprise the diversification of rural enterprises, but plainly is not limited to such activities. Read properly, that type of development does not represent an "exception" to a policy restriction, but forms part of the broad description of the level and type, *or purpose*, of development distributed by the spatial strategy to "the countryside".

55. SS1 also indicates that the minimal level of development that will be accommodated in the countryside may also include employment uses for which a rural location is necessary for the functioning of a business or a business which (inter alia) involves "a sustainable solution to an identified need". Here SS1 relies upon the concept of sustainable development as, once again, part of a broad description of the level and

purpose of development distributed by the spatial strategy to the countryside, and not as part of a restrictive "exception" as Mr Strachan QC would have it. This *purpose* or *objective* is also to be found in several of the more detailed policies in the Core Strategy.

56. Mr Lockhart-Mummery QC accepted that this part of policy SS1 also operates as a general policy for the protection of the countryside. There is no other policy of that nature in the Core Strategy, for example one containing a specific list of criteria against which individual proposals may be assessed. Instead, this protective *purpose* of SS1 has been expressed in much broader terms, in the spirit of a policy which explains the overall level and objectives of development which may be accommodated in the countryside.

57. Thus, the language used in policy SS1 has to be understood in the context of its purposes and spirit. The legalistic construction of SS1 advocated on behalf of the Claimant does not accord with the approach to interpretation of policy laid down by the Supreme Court in Tesco and Hopkins, especially for a broad, strategic policy of this kind. It is plain from the judgments in Hopkins that arguments of the kind put forward in the present case are firmly discouraged.

58. In my judgment, the advice given to the Committee in the Officer's report reflected a proper understanding of the strategic, countryside policy in SS1. That area is not a sustainable location for development in general. The report advised that there are large parts of the district which do not have adequate access within a reasonable distance to a crematorium, existing facilities are operating at or above capacity, there is an unmet need for an additional facility and the relatively central location proposed in this case would be convenient "for many residents of the district" (paragraphs 70 to 74). Given the site requirements for a facility of this kind, and the characteristics of Breckland District, a new crematorium would be likely to need a rural location outside a defined settlement (paragraphs 60 to 61). The proposal was assessed to be sustainable in a number of respects (see eg. paragraphs 62, 84 - 85, 93, 97, and 122 - 126). These conclusions all involved *judgment* in the *application* of the policy *objectives* of SS1. It has not been suggested, nor could it be, that any one of those planning judgments was "irrational" in the public law sense.

59. For these reasons I reject the first part of ground 1.

60. The second part of ground 1 criticises paragraph 59 of the Officer's report which stated that policy SS1 should carry less weight because, applying paragraph 215 of the NPPF, it adopted a more restrictive approach to rural development than paragraph 28 of the NPPF, by requiring the need for proposed development to be shown. Mr Strachan QC submits that the legality of this approach depends upon whether both paragraph 28 of the NPPF and policy SS1 have been correctly interpreted when they were compared in the Officer's report, and that properly understood, the two policies are entirely consistent as a matter of substance. They differ only as to form.

61. The effect of paragraph 215 of the NPPF was that "due weight" should be given to policy SS1 according to the degree of its consistency with the NPPF, that weight increasing as that consistency increases. Here a comparison was made between two policies expressed in very broad, purposive terms. Mr Lockhart-Mummery QC submits, and I accept, that paragraph 28 of the NPPF distinctly encourages "a positive

approach to sustainable new development" in "rural areas" (and does not require need to be shown) in contrast with the more cautiously worded objectives of policy SS1.

62. A comparison of two policies of this nature, expressed in very broad terms, is not primarily an exercise in linguistic analysis. Planning judgment is involved as to how the policies *apply* in practice. Even a comparison of the language used may be a matter of impression.

63. Although paragraph 59 of the Officer's report could have been more felicitously expressed, an application for judicial review does not involve the marking of an examination paper. The thrust of paragraph 59 is that, as a matter of judgment and degree, the terms of policy SS1 are more restrictive than the more pro-active objectives of paragraph 28 of the NPPF. I do not consider that that assessment is open to judicial criticism. However even if I were to be wrong on this point, Mr Strachan QC very fairly accepted that if the challenge under the first part of ground 1 (misinterpretation of policy SS1) were to fail, success under the second part of ground 1 could not justify the quashing of the planning permission, because the commission of this assumed error has only had the effect of reducing, and not increasing, the weight to be given in BDC's decision to the proposal's compliance with policy SS1.

64. The third part of ground 1 challenges the conclusion in paragraph 122 of the Officer's report that the proposal accorded with the development plan as a whole when applying section 38(6) of PCPA 2004..

65. In the City of Edinburgh case, Lord Clyde stated (at page 1459E):-

> "He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it."

This question involves an exercise of judgment by the decision-maker (R v Rochdale MBC ex parte Milne (No. 2) [2001] 1 Env LR 22 at paragraph 48). Where policies pull in different directions the decision-maker is entitled to give greater weight to some rather than others (R (Laura Cummins) v Camden LBC [2001] EWHC 1116 (Admin)).

66. However, Mr Strachan QC submitted that because BDC found that the proposal conflicted with policies DC1 and CP11 as regards its impact upon the landscape, a negative factor, it was *legally impossible* for the authority to conclude that the proposal accorded with the development plan as a whole, unless it identified compliance with one or more policies providing *positive support* for the type of development proposed, and therefore capable of outweighing the *negative* effect of the conflict with policies DC1 and CP11 (paragraph 51 of the Claimant's skeleton). He submitted that BDC was only able to point to compliance with policies which had a neutral effect for the purposes of section 38(6) of PCPA 2004, being policies which simply require that a proposed development should avoid causing harm to the interests they are designed to protect.

67. Initially, Mr Strachan QC accepted that he was unable to point to any authority to support his argument. Subsequently, he sought to rely upon a dictum of Lord Clyde in City of Edinburgh at page 1459E, but the issue raised by Mr Strachan in his submissions did not arise for decision in that case. The passage cited was simply making the point that the question under section 38(6), whether a proposal accords with the development plan, has to be assessed by reference to the plan as a whole, recognising that in some cases there may be certain points in the plan which support the proposal and other points in the plan which tell against the proposal. So, for example, it cannot be said that a proposal does not accord with the development plan simply because it conflicts with one of the relevant policies in the plan (see also paras 49 – 50 of Sullivan J in ex parte Milne (no. 2). No part of the reasoning expressed by the House of Lords in the City of Edinburgh case can be taken to support Mr Strachan's novel gloss on the language of section 38(6).

68. For my part I am unable to accept the Claimant's approach. It is too mathematical or mechanistic. Conflict with one particular policy may be treated as having an adverse impact and yet of relatively little weight. At the same time, the decision-maker may consider that compliance with other policies designed to secure that development in general takes place without causing significant harm to a range of environmental factors, does involve a greater degree of compliance with the development plan than the non-compliance. The decision-maker is entitled to regard compliance with those policy considerations (even in the sense of simply avoiding harm) as having a greater priority or importance than the non-compliance with a policy designed to protect one other aspect, such as the landscape. As Sullivan J pointed out in the Rochdale case at paragraph 48 (approved in paragraph 21 of SSCLG v BDW Trading Limited [2016] EWCA Civ 493) :

> "The local planning authority has to make a judgment bearing in mind such factors as the *importance* of the polices which are complied with or infringed, and the *extent* of compliance or breach." (emphasis added)

The Claimant's argument is inconsistent with that principle, not least because it fails to allow any proper room for the decision-maker to assess the importance or weight to be attached to any compliance or non-compliance with a particular policy or policies. The above reasons are sufficient to dispose of the third part of ground 1 of the claim.

69. I would add that the above analysis is even clearer in the case of development plans, such as BDC's Adopted Core Strategy, prepared in accordance with PCPA 2004 and which are designed to promote sustainable development overall. Section 39(2) of PCPA 2004 requires an authority exercising its plan-making functions to do so with the objective of contributing to the achievement of sustainable development. The authority is also required to carry out a "sustainability appraisal" of the proposals in any development plan they prepare (section 19(5) of PCPA 2004). Generally, sustainable development is referred to as development which meets the needs of the present, without compromising the ability of future generations to meet their own needs. Sustainability has a pervasive effect on most of the development control policies of a modern development plan. It is not limited to those policies which seek to meet the need for specific types of development or to allocate sites for those specific purposes. The Claimant's insistence that compliance with policies in a post 2004 Act plan designed to promote sustainability by avoiding environmental harm

can only be treated, as a matter of law, as having a merely neutral, rather than positive or beneficial, effect, has no legal foundation in the legislation or case law and is unprincipled.

70. I should also mention that it is incorrect for the Claimant to say that all of the policies with which the proposal was judged to comply simply had a neutral outcome. For example, BDC determined that the development would provide bio-diversity enhancement (see paragraphs 114 and 112 of the Officer's report and policy CP10). But quite apart from that, I see nothing illogical or irrational in the approach taken by BDC to the application of section 38(6) of PCPA 2004.

71. For these reasons I reject the third part of ground 1. It follows that the claim cannot succeed under ground 1.

Ground 2

Introduction

72. In his oral submissions Mr Strachan QC confirmed that the Claimant's complaint that BDC failed to comply with an obligation to consider alternative sites is solely concerned with the Claimant's Weeting site. It is submitted that as a matter of law BDC was required to have regard to the merits of the Weeting site as one which would overcome, or at least mitigate, the clear planning objections to locating the crematorium development in the open countryside and outside any development boundary, whilst satisfying an identified, district-wide need for a crematorium. He accepted that no complaint is made by the Claimant about BDC's decision to accept the existence of this need or the fact that no other alternative sites were considered.

73. Mr Strachan QC also accepted that the Claimant has to show that BDC was legally obliged to take the Weeting site into account and that no such obligation could have arisen simply because the Weeting site had been identified or because the authority was asked by the Claimant to take that location into account. Mr Strachan accepted that in order to succeed under ground 2 the Claimant has to establish (i) that either an obligation to take an alternative site into account arose from a requirement of national or local policy, or that it was an "obviously material" factor in this case and therefore irrational for the council not to have taken it into account and (ii) the Committee did not take the Weeting site into account because they were directed not to do so (see paragraphs 8, 16-17, 56 and 62 of the Claimant's skeleton). It is convenient to review the relevant case law before going on to deal with point (ii).

Case law

74. Mr Strachan placed a good deal of reliance upon the decision of Mr Justice Sullivan (as he then was) in R (on the application of Bovale Ltd) v SSCLG [2008] EWHC 2538 (Admin). But in that case the challenge was made by an unsuccessful appellant against a refusal of planning permission in which a planning Inspector had decided to take alternative sites into account. Accordingly, the issue for the Court in that case was whether the decision-maker had been *permitted* to take that consideration into account, and not whether he had been *obliged* to do so. The Inspector found that the proposal for a "total care village" conflicted with development plan policies for the retention of the site for employment purposes and also by failing to provide affordable housing. Accordingly, by section 38(6) of PCPA 2004 the appeal fell to be dismissed

unless material considerations indicated otherwise. The developer had contended that these considerations included the need to provide such a facility within the Hereford area. The court held that it had been relevant and *permissible* for the Inspector to take into account the availability of alternative sites to meet that need, in order to assess how much weight to give to the developer's claim that the appeal site needed to be released for that purpose. Sullivan J also made it plain that he was not purporting to lay down any general principle to that effect, as each case would turn on its own facts, a point which has been endorsed in several decisions of the courts.

75. In Derbyshire Dales District Council v SSCLG [2010] 1P&CR 19 Carnwath LJ (as he then was but sitting in the High Court) considered Bovale in the context of a review of the more important cases on alternative sites. He held that in terms of legal analysis there is a clear distinction between challenges to a decision to have regard to alternative sites, as opposed to a challenge to a failure or a refusal to take alternative sites into account. Bovale fell into the former category. A further point of distinction was that in Bovale the local planning authority had identified alternative sites to meet a need for a particular facility within a defined area, whereas in Derbyshire Dales no alternative sites had been identified. But it is plain nevertheless that the fundamental distinction is between circumstances where a decision-maker is simply permitted to take alternative sites into account as opposed to those where he is obliged to do so.

76. In R (Luton Borough Council) v Central Bedfordshire Council [2015] 2 P&CR 19 (at paragraph 71) the Court of Appeal endorsed the analysis by Carnwath LJ as summarised below:-

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

> irrational for the decision-maker not to have had regard to alternative sites, a relevant factor is whether alternative sites have been identified and were before the decision-maker (paragraphs 21, 22 and 35 and see *Secretary of State v Edwards* (1995) 68 P&CR 607 where that factor was treated as having 'crucial' importance in the circumstances of that case)."

Mr Strachan QC accepted that these principles are binding upon the High Court, but he reserved the Claimant's position to argue in the Supreme Court that, by virtue of section 70(2) of TCPA 1990, the Findlay principle does not apply, agreeing with the stance taken by Mr Robert McCracken QC in R (Lucas on behalf of Save Diggle Action Group) v Oldham MBC [2017] EWHC 349 (Admin) at paragraph 86.

77. It is helpful to consider point (iv) of the passage in Luton in more detail. In paragraph 19 of Derbyshire Dales Carnwath LJ pointed out that the only case in which a decision had been quashed because of a failure to comply with an obligation to have regard to alternative sites was Secretary of State for the Environment v Edwards [1995] 68 P&CR 607, which he said illustrated the special circumstances needed to support such an argument. There, a motor service station needed to be provided on either side of a trunk road. Planning applications had been made in respect of seven competing sites, four of which were the subject of appeals to the Secretary of State. The Claimant, Mr Edwards, was the appellant in respect of one of the appeal sites. He asked the Secretary of State to hold a joint public inquiry into all of the outstanding planning appeals. The Secretary of State was minded to agree with that request but, following strong objections from one of the other appellants, decided not to pursue that course. Eventually the Secretary of State decided to grant planning permission in respect of the appeal promoted by that party and Mr Edwards successfully applied to the High Court to quash that decision.

78. The Court of Appeal upheld the decision of the High Court. Applying four criteria derived from the judgment of Oliver LJ in Greater London Council v Secretary of State for the Environment [1986] 52 P&CR 158, the Court decided that because (i) of the need for the facility, (ii) the adverse effects of each proposal on open countryside, (iii) the existence of alternative sites with potentially lesser effects, (iv) a situation in which only one or a very limited number of planning permissions could be granted, the relative merits of alternative sites had been a material consideration which the Secretary of State had been obliged to take into account.

79. Under point (iii), Roch LJ relied upon representations made by the successful developer to the Secretary of State that it had fully addressed the alternative sites in its evidence and that the Inspector would have received sufficient material to enable him to determine its appeal, having "full regard" to the existence of the alternative sites (pp 609-610). In the same vein Roch LJ stated that it was crucial to his conclusion that the other sites had been the subject of planning applications and in several cases planning appeals before the Secretary of State (pages 615-6). This point was specifically highlighted by Carnwath LJ in the Derbyhire Dales case at paragraph 22. Luton confirms that this factor was "crucial" *in the circumstances of* the Edwards case. It was crucial for two reasons. First, in Edwards the decision-maker had adequate material to be able to compare the alternative sites identified; neither the Secretary of State nor anyone else suggested the contrary. It was not a case where the decision-maker considered that the information available on alternative sites was

insufficient to enable a comparison to be made. Second, the Secretary of State had already reached a provisional decision to hold a joint inquiry into the competing sites so that he could make that comparison. Mr Edwards complained that he had been treated unfairly because the Secretary of State changed his mind on this point and effectively decided not to compare the alternatives, which had the effect of pre-empting the determination of Mr Edward's appeal (pp 611-2). This explains why Kerr J in Save Diggle Action Group said (at paragraph 82) that "there was a whiff of procedural unfairness" (or as Carnwath LJ put it in paragraph 22 of Derbyshire Dales, irrationality) about the Edwards case. By contrast no allegation of procedural unfairness has been advanced by the Claimant in the present case at all.

What decisions did the Defendant in fact reach and can they be impugned?

80. Mr Lockhart-Mummery QC submits that ground 2 fails in any event on the facts of this case. The starting point is the letter of 16 September 2016 from the Claimant's planning consultants to which I have already referred (see paragraph 7 above). This was in part a response to the report which the Officer had originally prepared for the planning committee meeting in September 2016. It is not suggested that any further information about the Weeting site was provided at that stage. On 6 October 2016 the planning officer prepared a revised report for the committee meeting which in due course took place on 17 October 2016. At paragraph 67 he advised members:-

> "In addition, it is noted from [the] letter of 16 September 2016 (on behalf of Dignity Funerals) that Dignity has identified a site it intends to develop as a crematorium facility between Weeting and Brandon. However, in the absence of sufficient further details, assessment or formal proposals, it is premature to consider this any further at this juncture, and it remains for the current application to be assessed for its suitability."

On the same date, the Claimant submitted through its consultants a formal request for pre-application advice from BDC in respect of its Weeting site. It also submitted a site plan and an initial sketch design.

81. On 13 October 2016 the Claimant's solicitor sent an email to BDC's solicitor responding to paragraph 67 of the Officer's report. He sent again a copy of the location plan for the Weeting site together with a site layout plan. He stated that it was "important that the *existence* of an alternative site is properly and accurately dealt with by the Officer …". The council's solicitor responded on 14 October 2016. He stated that as requested he would ensure that members would be informed at the meeting of the committee on 17 October that BDC had received further details of the Claimant's proposed site at Weeting, including an indicative site layout and site plan. It is not suggested that BDC's solicitor failed to comply with this assurance. He added that members would also be told that these details had not yet been informally assessed by planning officers. He stated that members would be formally advised that in the absence of any formal proposals or a planning application, officers were not legally required to assess the proposals as regards their suitability in planning terms and that they therefore had not done so. Consequently the Committee would be advised that only limited weight could be attached to the proposals for the Weeting site "at this early stage".

82. It is not suggested that the Claimant or its representatives ever asked that the Planning Committee's consideration of the planning application by the Interested Party should be deferred to enable further information to be obtained on the proposals for the Weeting site.

83. The meeting of the planning committee did in fact take place on 17 October 2016. According to the minutes of the meeting, BDC's solicitor advised members that officers had recently received information on the Weeting site. He continued:-

> "these details had not been either formally or informally assessed. Mr Horn further advised that officers were not required to assess this proposal and therefore, had not done so. Accordingly, limited weight should be attached to this proposal, and the current proposal before committee should be assessed on its own planning merits".

A local resident spoke on behalf of herself and a number of neighbours living in the vicinity of the proposed development. She also referred to the Weeting proposal and she urged the planning committee to refuse or to defer their consideration of the Interested Party's application so that the other proposal could be "fully explored". It is apparent from the resolution passed by the members to approve the planning application that they did not consider that it would be appropriate to further defer their decision on the application.

84. Following the meeting of the committee, but before BDC issued the planning permission in respect of the application site, pre-application discussions on the Weeting site took place between the Claimant and the authority's officers.

85. The planning permission was not issued until 22 December 2016. In the meantime, on 8 November 2016 the Claimant's solicitor sent an email to BDC's solicitor. He noted that the planning application had not yet been determined by the local authority because it had been referred to the Secretary of State for consideration of a possible call-in. He referred once again to paragraph 67 of the Officer's report to the meeting of the planning committee on 17 October 2016 and in particular to the absence of sufficient details of the Weeting scheme. It is plain from that email that the meeting to discuss pre-application advice on the Weeting site had yet to be scheduled at that stage. The Claimant's solicitor suggested that because of this extant pre-application request, it was incumbent on BDC to properly consider the comparative merits of the proposals by the two developers. It was argued that this could only reasonably be achieved by referring the Interested Party's application back to the Planning Committee for further consideration, applying the decision of the Court of Appeal in R (Kides) v South Cambridgeshire District Council [2003] 1 P&CR 19. The Claimant's solicitor made a formal request that that be done.

86. On 21 December 2016, the day before the planning permission the subject of these proceeding was issued, BDC's solicitor responded to the email of 8 November 2016. By this stage it had become known that the Secretary of State had decided not to call-in the planning application for his own determination. BDC's solicitor maintained that the advice given in the Officer's report at paragraph 67 remained correct. He continued:-

> "As at the committee date, the only details received by the Council in respect of your Client's request for pre-application advice were a location plan and an indicative plan of your Client's proposal. For this reason – and taking into account that at the time, the proposal had not been either informally or formally assessed – I believe that both I and the Officer's report were entirely correct to state that limited weight should be attached to the existence of your Client's proposal.
>
> In the intervening period between the Committee date and today, your Client has not made a formal application to the Council for planning permission. The only advancement in this matter so far as your Client's proposal is concerned is that the Council has now completed the pre-application advice process. And having done so, the Council has now informed your Client that its proposal has a number of constraints that make it impossible for Officers at this stage to give an informed view (whether informally or formally) as to whether or not your Client's proposal would be likely to receive Officer support.
>
> This being the case, I conclude that nothing has happened in the intervening period between the Committee date and today which might rationally be regarded as a "material consideration" for the purposes of section 70(2). Accordingly, as I do not consider that there are any new factors that might rationally be regarded as a "material consideration", I do not consider that there is any reason whatsoever now to refer this application back to Planning Committee."

The email concluded by stating that BDC intended to grant planning permission in respect of the Interested Party's application shortly.

87. Mr Strachan QC confirmed that the Claimant brings no challenge to the grant of planning permission in this case on the grounds that the application should have been referred back to Committee applying the Kides principle. Like Edwards, Kides was based upon the application of "principle 2" in the judgment of Glidewell LJ in Bolton MBC v Secretary of State for the Environment (1991) 61 P&CR 343, 352.

88. Instead, in its pre-action protocol letter to BDC dated 12 January 2017 the Claimant contended at paragraph 8.14 that the authority had failed to assess whether the proposal for the Weeting site firstly, would represent a more sustainable location to meet the need for a new crematorium, secondly, would not suffer from the site-specific disadvantages of the permitted development such as the loss of two protected oak trees and harm to a valued landscape, and thirdly, would accord with the Core Strategy as a whole including the spatial strategy set out in policy SS1.

89. On that third point, I note that the Weeting site is also located in open countryside and beyond any defined development boundary for a settlement. No explanation has been given by the Claimant as to how its site, but not the application site, could be considered to be in accordance with policy SS1. Furthermore, paragraph 32 of BDC's Detailed Grounds of Defence, which explained the constraints affecting the Weeting

site (to which its solicitor referred in his email of 21 December 2016) has not been contradicted by the Claimant. In addition to lying within open countryside, the Weeting site is located partly within an area of high flood risk and is only 400 metres from the Breckland Forest SSSI and the Breckland SPA. The SPA is concerned with the protection of the Stone Curlew, a rare and protected species. As Mr Lockhart-Mummery QC pointed out by reference to the Key Diagram for the Core Strategy, the Weeting site lies within an area comprising land within 1500 metres of the SPA and where development constraints apply.

90. BDC submits that, unless and until the Claimant provides the suite of materials necessary to inform a full application for planning permission on the Weeting site, including a design and access statement, a traffic impact assessment, a flood risk assessment, and Habitats Regulations assessment and detailed plans, the council was entitled to form the judgment that the site could not be the subject of any useful assessment.

91. It is plain from paragraph 67 of the Officer's report to Committee that the members were advised that the local planning authority had received insufficient information on the Weeting site for that proposal to be assessed "*any further*" at that stage. Thus, it was taken into account. Unlike the Diggle case, there was no direction to members to treat the Weeting site as an irrelevant consideration. The effect of the advice given to the Committee, which it accepted, was that because of the inadequacy of the information on the Weeting site, there was no sufficient basis for BDC to compare the merits of the application it had to determine and the Weeting site as an alternative. That was a matter of judgment for the local planning authority. Given the paucity of the information contained in the letter from the Claimant's planning consultants dated 16 September 2016, I see no basis upon which that judgment could be impugned as irrational.

92. The information subsequently supplied with the email of 6 October 2016 was still very limited. The site was identified and a "sketch scheme" provided. No assessment was provided of the various aspects of that location or the "scheme" which would go to the issues of sustainable development, environmental impacts and compliance with policy.

93. The email from the Claimant's solicitor sent on 13 October 2016 simply referred to that same information and asked that the "*existence*" of the Weeting site as an alternative be properly dealt with. At that stage the Claimant's team must have read the Officer' report and known that the Planning Committee would consider the Interested Party's planning application on 17 October. Although they knew that the Officers were preparing to advise the Committee that there was insufficient information for the Weeting site to be "considered further" as an alternative, the email did not suggest that that judgment was incorrect or that the sparse information supplied by the Claimant towards the beginning of October 2016 meant that that opinion was no longer tenable. The email did not suggest that the Committee should defer consideration of the application so that further information could be supplied on the Weeting site. It gave no indication that further information would be supplied, the nature of any such information or when it would be provided. Instead, the email focused on the "existence" of the Weeting site as an alternative. At that point in time the Claimant had simply requested pre-application discussions on the Weeting site.

94. It is necessary for the response from BDC's solicitor of 14 October 2016 to be read in this context. In effect, he agreed to make sure that members of the Committee were made aware of the "existence" of the proposed site at Weeting including confirmation that an indicative site plan and layout had been received. The thrust of his proposed advice was that only limited weight could be given to the Weeting proposal at that stage. Once again, he did not suggest that it was legally irrelevant. His reasons for taking that stance are to be found in his response read in conjunction with the Officer's report. It would be misleading to read the email in isolation. Plainly, the Officer's report had taken the view that there was insufficient information for the Weeting site to be considered further as an alternative. The response in the email added that the indicative sketch layout had not been assessed and that in the absence of formal proposals *or* an application there would be no obligation to make an assessment. Read fairly and in context, Officers took the view that they did not expect the lack of information on the Weeting site to enable a sensible assessment to be made until the Claimant provided substantially more detailed information, typically the level of information that would accompany formal proposals or a planning application.

95. The addendum to the Officer's report, contained in the minutes for the Committee meeting on 17 October 2016, was to the same effect. It is clear that the email dated 8 November 2016 from the Claimant's solicitor focused on paragraph 67 of the Officer's report, rather than the email from BDC's Solicitor dated 14 October 2016 (which formed the basis for the addendum to the Officer's report), as the key advice given to members.

96. The only explicit criticism made in the email dated 8 November 2016 of BDC's judgment that there was insufficient information on the Weeting site for it to be considered further at that stage as an alternative, was that on 6 October 2016 pre-application discussions had been requested and that process was still ongoing. Not surprisingly, the response from BDC's solicitor dated 21 December 2016 continued to rely upon paragraph 67 of the Officer's report, in conjunction with the addendum recorded in the minutes, as a legally proper response to the suggestion that the Weeting site be considered as an alternative to the Interested Party's application. Because of the inadequacy of the information received by the authority on the Weeting site, BDC had been entitled to give limited weight to it, and by definition had not disregarded the existence of that site as an alternative (see also Tesco Stores Ltd v Secretary of State for the Environment [1995] 1WLR 759, 764G and 780F).

97. The email went on to add that that judgment had in effect been confirmed by what had happened subsequently. The only change in circumstance was that BDC's Officers, having completed the pre-application advice process, had informed the Claimant that its proposal had a number of constraints, making it impossible at that stage for Officers to express a view as to whether the Weeting site might be acceptable. In other words, some 2 months after the meeting of the Planning Committee and just before the grant of planning permission, the position remained that there was insufficient information on the Weeting site for the merits of that site to be assessed, and in particular, to be able to see whether constraints affecting that site could be overcome. Given that no challenge is made to the decision not to refer the matter back to the Planning Committee, that was a matter for the judgment of the Officers during the period from the meeting on 17 October and the grant of planning permission on 22

December 2016. There is no basis for saying that the series of judgments I have described was irrational and no attempt was made to argue otherwise.

98. In R (Mount Cook Limited) v Westminster City Council [2004] 2 P&CR 22 the Court of Appeal accepted that "inchoate or vague alternative" schemes may be given little or no weight, even if treated as relevant (paragraph 30). "Vagueness" may include lack of detail sufficient to enable a judgment to be made on the merits or acceptability of an alternative. Of course, if that is the judgment reached by a planning authority, it may also follow that there is doubt about the likelihood of an alternative coming to fruition. The Court of Appeal went on to express its concern that planning authorities should not have to look over their shoulders before granting any planning permission against the possibility of some alternative proposal, however ill-defined and unlikely of achievement (paragraph 32). Mr Strachan QC sought to draw factual distinctions between the circumstances in the Mount Cook case and the present case. But that does not alter the principle, established in Mount Cook and upon which the BDC is entitled to rely, that it was a matter for the authority to consider the adequacy of the information available on the Weeting proposal and how much weight to give to that alternative in the light of that judgment.

99. It is well-established that it is for the decision-maker to decide how far to go in seeking or obtaining information on a factor which it has not excluded as legally irrelevant. That decision may only be challenged on grounds of irrationality (see eg. R (Khatun v Newham LBC [2005] QB 37 paragraphs 34-5; R (Plant) v Lambeth LBC [2017] PTSR 453 at paragraphs 62-3).

100. In paragraph 59 of its skeleton the Claimant simply asserts that BDC could and should have considered the Weeting site as an alternative on the information it had before it. But that is what the Defendant did. The Officers formed the judgment and advised members that in the absence of formal proposals there was insufficient information for the merits of the Weeting site to be assessed. That additional material would have included (inter alia) information in connection with the nearby SPA and the likely effect of the Habitats Regulations.

101. Then in paragraph 60 of its skeleton the Claimant asserts that if BDC considered that necessary information was lacking, which it plainly did, then all it had to do was to request the Claimant to provide it and to allow "a short further period of time" for that purpose. It is also suggested that BDC could have waited for "the short period of time" for the Claimant's planning application to be submitted. Those submissions pay no regard at all to the principle laid down in Khatun and subsequent authorities that BDC's decisions not to defer the determination of the Interested Party's application and on the adequacy of the information on the Weeting site may only be challenged if shown to be irrational.

102. BDC would have been well aware of the statutory requirement to determine the application, the possibility of an appeal being made by the Interested Party against non-determination (Article 34 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 – SI 2015 No 595 and section 78(2) of TCPA 1990) and the delays which had occurred in the determination of that application since it was submitted in December 2014. It is plain from the Claimant's skeleton that it accepts that any further information would have had to be supplied by the Claimant (or its consultants). It is also plain that the Claimant does not dispute the

rationality of BDC's view that information of the kind necessary for a proper planning application would have been expected in order to deal with the Weeting site. Despite that, nothing has been shown to the Court to explain what the Claimant now means in its skeleton argument by a "short period of time". More importantly, this information was not given by the Claimant to the planning authority at the time, nor was it suggested that their consideration of the planning application should be deferred. The suggestion during the hearing that BDC's approach was irrational, in the sense of being beyond the range of rational responses which could be given by an authority presented with the circumstances as they existed in the latter part of 2016, is hopeless.

103. For completeness, I should also record that the relevant part of the Claimant's Statement of Facts and Grounds was also oblivious to the principle laid down in Khatun and the need to demonstrate irrationality in BDC's response. Paragraph 115 raised a completely different point, which was not pursued at the hearing, namely that it was "illogical" for BDC not to consider the *principle* of the Weeting site because of the absence of further details about the proposal. An allegation of flawed logic concerns a different aspect of irrationality (see R v North and East Devon Health Authority ex parte Coughlan [2001] QB 213 paragraph 65). Plainly a planning authority's decision that it cannot assess whether a site would be acceptable for a particular type of development because of a lack of information can embrace the "principle" of the proposal. This is simply a matter of judgment for the decision-maker and does not give rise to any legal issue upon which the Court could intervene.

Whether there was any legal obligation on the Defendant to assess the Weeting site

104. Thus far, I have addressed ground 2 on the basis that, in my judgment, BDC did not consider the Weeting site to be an irrelevant factor, but dealt with the issue of the Weeting site as an alternative to the application proposal as a matter of weight. But the Claimant insists that BDC instead treated the Weeting site as an irrelevant consideration and it thereby failed to comply with a legal duty to assess alternative sites. For completeness I will address the issue whether any such obligation arose in the circumstances of this case and, even if it did, whether that could affect the lawfulness of the approach taken to the alternative put forward by the Claimant.

105. By reference to the principles summarised in paragraph 71 of Luton, the Claimant submits that BDC was under a legal obligation to assess alternatives to the application proposal by virtue of polices SS1, CP11, DC12 and DC18 of the Core Strategy and paragraph 118 of the NPPF. Mr Strachan QC confirmed that the Claimant no longer relies upon policy DC7 for this purpose, because it is the Claimant's principal case under ground 1 (which is accepted by BDC to this extent) that the proposed development does not fall within the employment uses to which DC7 applies. The same analysis must apply to policy CP14, which was mentioned in passing in this context.

106. I put to one side the policy in the first bullet point of paragraph 118 of the NPPF because that only applies where a proposal would cause "significant harm" to bio-diversity. There is no dispute that in the present case the Officer's assessment, which was accepted by the Committee, was that there would be no such harm, but instead some enhancement.

107. Mr Strachan QC identified these policies because they require development to be sustainable, and/or they require environmental impact to be minimised and/or need to be demonstrated and/or the loss of protected trees to be justified by exceptional circumstances. During oral submissions I drew the attention of Mr Strachan QC to paragraphs 36 to 37 of the judgment of Carnwath LJ in Derbyshire Dales which give examples of types of policy which are insufficient to impose a legal duty on a planning authority to consider alternative sites. Thus, the statutory provisions and policies relating to National Parks and Conservation Areas require special regard to be paid to their protection, but they fall short of imposing a positive obligation to consider alternatives which do not have the same effects. Similarly, policies which require environmental and social impacts to be *minimised* through the careful consideration of (inter alia) *location*, do not give rise to any legal obligation to consider alternative sites.

108. Mr Strachan QC did not quarrel with this analysis by Carnwath LJ, with which I also agree. On this basis, in my judgment, the language of the policies upon which Mr Strachan QC relied under ground 2 *cannot* be distinguished from the policies which Carnwath LJ held could *not* result in a planning authority becoming under a legal obligation to consider alternative sites. Plainly the mere fact that a party identifies a site which he would like the planning authority to consider as a preferable alternative, can make no difference to that legal analysis.

109. I am unable to accept Mr Strachan's alternative submission that BDC was under an obligation in the present case to consider alternative sites because this was an "obviously material" consideration (an expression of the irrationality principle). The factors relied upon in paragraph 56(4) of the Claimant's skeleton are simply matters which go to the question whether a decision-maker is permitted, not obliged, to have regard to alternative sites (see Derbyshire Dales and Luton). The only other point advanced by the Claimant was that in the present case the Weeting site was identified by the Claimant to the planning authority for consideration as a preferable alternative to meet the need for an additional crematorium. But, whether by itself, or in conjunction with the other points to which I have referred, this factor did not in the circumstances of this case give rise to a legal obligation to consider alternative sites for the reasons already explained above.

110. I have therefore reached the clear conclusion that on the facts of this case the decision-maker was under no legal obligation in any event to consider alternative sites. Even if I had reached the opposite conclusion, I do not think that ground 2 could succeed. The Claimant has pursued this challenge *solely* on the basis that BDC failed to assess the Weeting site as an alternative and *not* on the footing that the authority failed to consider alternative sites more widely, for example, throughout its district. Even where an obligation to consider alternative sites exists, it must remain a matter for the planning authority's judgment as to (i) how much information should be sought on alternative sites (whether a particular site or sites in general) and (ii) how much weight to give to any alternative site or proposal for that site. It must also be a matter of judgment for the planning authority as to when it is appropriate for the planning application before it to be determined and whether further time should be allowed for an alternative scheme to be worked up. For the reasons I have already given there are no public law grounds upon which the approach taken by BDC in the circumstances of this case could possibly be impugned.

Conclusion

111. Accordingly, ground 2 must be rejected.

Ground 3

112. Mr Strachan QC accepted that if ground 3 had been the only cause for complaint his client would probably not have applied for judicial review. It adds little to the grounds already considered and it can be dealt with more briefly.

113. First, it is submitted for the Claimant that there was an internal inconsistency in the Officer's report (paragraphs 78, 82, 83 and 122), and hence in the decision, between concluding that the proposal would breach policy CP11 by causing some harm to the rural character and appearance of the area and yet would accord with policy DC16. There is no inconsistency at all. On the one hand paragraph 78 sets out the extent of the harm that would be caused to the open countryside by the introduction of the built development, activity, and urbanising influences of the proposal. Paragraph 79 then described how to some extent those effects would be mitigated. On the other hand policy DC16, as its heading makes clear, is concerned with various aspects of "design" and goes on to set out a number of design principles and issues. For example, the policy deals with the form and character of proposed built development, including the design of buildings, and also "building detailing and materials" which can have a significant effect upon the overall appearance of a development. Policy DC16 also addresses the qualities of the landscaping proposed and whether it would "preserve or enhance the character of an area" or reinforce "locally distinctive patterns" of "landscape".

114. Paragraphs 80 and 81 of the Officer's report gave a positive assessment of the proposals for the design of the built development and the additional landscaping. Reference was made to "the extensive planting" proposed "to help assimilate the development into its landscape setting and fully mitigate the loss of any existing trees and hedgerow". This includes native tree planting and blocks of woodland. It was concluded that "this landscape treatment would be sympathetic to the character of the area …".

115. There is plainly a distinction to be drawn between a landscaping design which is appropriate to the character of the area and one which is not. It was perfectly permissible for BDC to make a judgment that details of the design for the building and landscaping proposed accorded with the design principles in policy D16, whilst at the same time concluding that the nature of the development and uses proposed would be harmful to the character and appearance of the area in terms of the loss of openness, increased activity and urbanising effect. In addition, paragraph 83 explained how the harm to the rural character of the area "would be localised and would be mitigated to an extent by sensitive building design and extensive planting". Thus, although to that extent the proposal did not comply with policy CP11, it accorded with relevant design principles in DC16. There was no inconsistency between these two statements and this was simply a matter of planning judgment.

116. Next, the Claimant criticises paragraphs 103 and 122 of the Officer's report because it was concluded that despite the loss of two protected trees, the proposal complied with policy DC12 in that the policy allows for such a loss in exceptional circumstances

where the loss is unavoidable and there are overriding benefits. The Officer's report explained that the loss of the trees and hedging was unavoidable because of (inter alia) access requirements and that the public benefits of the development would outweigh the limited harm involved. As paragraph 74 of the Claimant's skeleton makes clear, this criticism relates to the existence of the Weeting site as an alternative and is therefore dependent upon ground 2, which I have already rejected.

117. Next, the Claimant complains that BDC wrongly treated policy CP13 as not applying to the application proposed because it was not to be regarded as a "community facility". The Claimant criticises the reasoning in paragraph 92 of the Officer's report that a "community facility" is a local facility which broadly falls within the D1 use class and not a facility serving a district-wide need. However, the complaint is completely hollow because in paragraph 93 the proposal was assessed on the basis that policy CP13 did apply and was found to be compliant. BDC's view that accessibility by public transport and by car (see also paragraphs 84 and 85) would suffice to meet the requirement for a location that allows for "ease of access by a variety of methods" was a matter of judgment and is not susceptible to any public law challenge.

118. The Claimant then relies upon paragraph 109 of the NPPF, which states that the planning system should contribute to and enhance the natural and local environment by protecting and enhancing (inter alia) "valued landscapes". That expression is not defined in the glossary to the NPPF and is not a term of art. It is not limited to landscapes which have been formally designated (Stroud District Council v SSCLG [2015] EWCA 488 (Admin) at paragraphs 13-16). The Claimant's criticism is that BDC failed to make a finding on whether the proposal would harm a "valued" landscape. Like other criticisms under ground 3 this is simply nitpicking. BDC gave adequate consideration to paragraph 109 of the NPPF by applying the parallel policy in the Core Strategy, policy CP11 and by assessing the landscape qualities of the area by reference to the relevant Landscape Character Area and the characteristics of the landscape in the vicinity of the application site. These are qualities which CP11 seeks to protect "for their own sake and intrinsic beauty". The Officer's report then assessed the effect of the proposal on that character (paragraphs 76 to 78). In substance therefore, BDC applied the relevant part of paragraph 109 of the NPPF and reached conclusions which cannot be impugned.

119. Likewise the Claimant's complaint that BDC failed to deal with that part of paragraph 118 of the NPPF which relates to the protection of "veteran trees" is without foundation. The matter was adequately dealt with in paragraphs 98 to 103 of the Officer's report by reference to the parallel policy in the Core Strategy, policy DC12. This complaint is also hopeless.

120. For all these reasons ground 3 must be rejected.

Conclusion

121. All of the grounds of challenge fail and the application for judicial review must be dismissed.

Consequential matters.

122. I am grateful to the parties for the written submissions they have provided on costs and the Claimant's application for permission to appeal.

Costs

123. It is accepted by the Claimant that BDC is entitled to an award of costs as the successful party and I am asked to make a summary assessment of costs. BDC has put forward a schedule claiming a total figure of £37,650, but the schedule does not comply with CPR PD44 para 9.5 and does not contain a breakdown as to how time has been spent. Certain items are disputed.

124. The first issue concerns costs amounting to £4,400 which were incurred in attending the oral hearing of the renewed application for permission. I agree with BDC that, having regard to R (Davey) v Aylesbury Vale DC [2008] 1 WLR 878, in particular paragraphs 19-21 and 29-30, the Court may award a successful defendant preparation costs incurred before the grant of permission, which may include the costs of attending the renewal hearing. In this case I am persuaded that such an order is justified for a number of reasons. First, the renewal hearing was listed for 3 hours rather than the standard 30 minutes. This was because it was envisaged that the renewed application would be contested, fully argued by the parties and would deal with the many grounds (and sub-grounds) pursued by the Claimant. Second, BDC was successful in persuading Ouseley J to refuse to grant permission on ground 4. Third, the claim for judicial review has been brought wholly, or at least mainly, for commercial reason. Fourth, because the claimant has been unsuccessful in the claim, the costs have been imposed on a public body with the effect of diverting funds from its primary public functions. Fifth, if the Claimant had been successful it would have been entitled to recover from BDC its costs of the renewal hearing.

125. I consider the reductions proposed by the Claimant for the fees of leading and junior counsel to be unjustified for a case of this nature and the work which the defence of BDC's decision against the claim necessitated. However, I accept the Claimant's submission that BDC's schedule has not been particularised sufficiently and therefore its ability to check and contest specific items has been compromised to a degree. For that reason alone a modest reduction is appropriate. In all the circumstances of this case, in my judgment the reasonable and proportionate amount to be awarded for BDC's costs is £34,000.

The Claimant's application for permission to appeal

126. The Claimant seeks permission to appeal on certain of the arguments it raised under grounds 1 and 2. I refuse the application because the proposed grounds do not have a real prospect of success and there is no other compelling reason why the appeal should be heard.

127. The first proposed ground of appeal relates to the third part of ground 1, in which it was contended that on the findings contained in the officer's report, and which were treated as having been adopted by the Planning Committee, BDC could not lawfully have concluded that the proposal accorded with the statutory development plan taken as a whole. This argument was rejected in paragraphs 67 – 71 of the judgment.

128. The proposed of ground of appeal depends upon the novel proposition that, as a matter of law, no proposal which conflicts with even only one policy in a development plan can be considered to "accord with" the development plan as a whole under section 38(6) of PCPA 2004 unless it complies with at least one policy "providing positive support" for that particular development or type of development (see also paragraph 51 of the Claimant's skeleton). Read properly in context, Lord Clyde's dictum in City of Edinburgh did not deal with any such gloss on the language of section 38(6) (see paragraph 67 above).

129. The application then goes on to misunderstand paragraph 68 of the judgment and does not address paragraph 69. Plainly a development plan can contain support for a development of a kind which is not specifically dealt with in a plan. There is no legal requirement for a plan to deal with every conceivable type of development which might be proposed during the duration of the plan.

130. The second ground of appeal relates to the correctness of the decision of the Court of Appeal in the Luton case on the tests for determining when a planning authority becomes legally obliged to take into account an alternative site or sites for the development proposed. This ground does not arise because the challenge failed in any event on the facts of the case, for the reasons given in detail between paragraphs 80 – 102 of the judgment. The Claimant has made no attempt to explain why that analysis is wrong. In addition, even if the Claimant were to succeed in persuading the Court of Appeal that its statement in Luton is not good law, and that BDC failed to comply with an obligation to take the Weeting site into account as an alternative to the application site, the claim would still fail for the reasons set out in paragraph 110 above which have not been challenged.

131. In any event the decision in Luton is based on the judgment at first instance of Carnwath LJ in Derbyshire Dales which (at paragraph 18) expressly referred to Lord Hoffman's speech in Tesco at [1995} 1 WLR 780 and other related authorities, and so could not possibly be said to have been *per incuriam*.