Neutral Citation Number: [2020] EWHC 3019 (Admin)

Case No: CO/431/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2020

Before:

JAMES STRACHAN QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Between:

THE QUEEN **-on the application of-** **HAWKHURST PARISH COUNCIL**	**Claimant**
- and - **TUNBRIDGE WELLS BOROUGH COUNCIL**	**Defendant**
-and- **(1) PROGRESSIVE DEVELOPERS LAND LIMITED** **(2) McCARTHY AND STONE RETIREMENT LIFESTYLES LIMITED**	**Interested Parties**

- -
- -

Mr Alistair Mills (instructed by **Richard Max Solicitors**) for the **Claimant**
Ms Megan Thomas (instructed by **Sharpe Pritchard**) for the **Defendant**
Mr Giles Cannock QC (instructed by **Shoosmiths**) for the **Second Interested Party**

Hearing dates: 28-29 July 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 11 November 2020.

MR JAMES STRACHAN QC (Sitting as a Deputy Judge of the High Court):

Introduction

1. By this claim for judicial review the Claimant, Hawkhurst Parish Council, challenges the lawfulness of a decision of the Defendant, Tunbridge Wells Borough Council, given by notice dated 23 December 2019 to grant planning permission (reference number 19/01271FUL) to the Second Interested Party, McCarthy & Stone Retirement Lifestyles Ltd, at The White House in Hawkhurst ("the Site") for:

> "Demolition of existing dwelling and erection of 43 retirement living apartments with associated communal facilities, access, parking and landscaping…"

2. In broad terms, the Claimant contends that the Defendant was materially misled by the Officers' Report recommending the grant of planning permission because:

   i) it failed to deal with the issue of the highways impact of the proposed scheme cumulatively with other committed development (Ground 1);

   ii) it failed to address a particular heritage development plan policy, Policy EN4, concerning demolition and conservation areas (Ground 2); and

   iii) it misinterpreted national policy on the protection to be given to the Area of Outstanding Natural Beauty ("AONB"), and the finding that there were exceptional circumstances for development in the AONB was not reasonably open to the Council (Ground 3).

3. The Claimant was granted permission to bring the claim by Thornton J by an Order dated 11 March 2020. The Claimant was subsequently granted permission to amend its ground of claim by Order of Neil Cameron QC (sitting as a Deputy High Court Judge). The Deputy Judge also granted the Claimant's application to admit the second witness statement and exhibits of David Warman, but with permission for the Defendant to submit further evidence in response if so advised. The Defendant did so in the form of a second witness statement from Ms Vicki Hubert dated 26 June 2020.

4. The substantive hearing took place by video conferencing with the co-operation of the parties. The Claimant was represented by Mr Mills. The Defendant was represented by Ms Thomas. The Second Interested Party was represented by Mr Cannock QC. I am very grateful to them all for the clarity and helpfulness of their written and oral submissions. The First Interested Party did not appear and was not represented.

5. In its skeleton argument, the Claimant identified that it was not pursuing that part of Ground 2 of its Amended Statement of Facts and Grounds alleging there had been a misinterpretation of heritage policy in the National Planning Policy Framework ("the NPPF"). Mr Mills confirmed this at the hearing. During the course the hearing itself, Mr Mills also announced that the Claimant was withdrawing that part of Ground 1 alleging that that there had been a misinterpretation of 109 of the NPPF and that the Council had only considered highway safety, rather than the impact on the highway more broadly. He therefore withdrew paragraphs 94-97 of his skeleton argument.

Given that those parts of the grounds of challenge have been formally withdrawn, I do not address them further in this judgment.

The Facts

The Site

6. The Site is located in Hawkhurst, a village located in the High Weald AONB. It is about 0.6 hectares in size. It currently contains a detached dwelling named The White House. The Site fronts on to the A229. This road runs through the village in a north-south direction. Just to the north of the Site, the A229 meets the A268 which runs through the village in an east-west direction. The two roads intersect at a signalised crossroads which the parties have conveniently referred to as the Junction.

The Junction

7. The Junction is the subject of traffic congestion. This has been, and continues to be, a significant source of concern not just to the Claimant, but also to Kent County Council ("KCC"), the local highway authority for this area.

8. On 4 September 2017, Ms Hubert - the Principal Transport and Development Planner in the Highways and Transportation Division of KCC - sent an email to councillors and officers of KCC and the Defendant attaching a document entitled "KCC Highways Position Statement: Development in Hawkhurst – Summary". In the email, she stated that the statement set out that KCC Highways would be objecting to any further development within Hawkhurst village boundary "owing to the impact on the already congested junction being **severe**". She considered this to be in line with the advice in paragraph 32 of the NPPF (in the version of the NPPF extant at that time), which uses the word "severe" as a test. Ms Hubert stated she was attempting to prove this through extensive traffic surveys undertaken in the last few months. She expected any applications refused owing to the statement to go to appeal where her interpretation of "severe" would be tested.

9. The attached Position Statement document stated (amongst other things):

> "Hawkhurst village has grown around a junction where two major A roads cross. This junction is recognised by KCC as being at capacity with significant delays experienced, particularly during peak hours. Following KCC's investigation into several possible improvement schemes during the last few years, no solution has been found that can both be delivered and achieve the required additional capacity."

The conclusion section stated:

> "… It is therefore KCC's position that, in line with NPPF paragraph 32, no development will be recommended for approval within the village boundary that generates any additional trips through the junction, unless the developer can demonstrate a scheme that mitigates their specific impact."

10. Ms Hubert received an email from Mr Barrington King at KCC asking about other similar situations in the borough. Ms Hubert replied that Hawkhurst was currently in a unique position in that she believed that KCC had explored all possible options to improve the junction to no avail (in contrast to other locations). She also received an email on 7 September 2017 from Mr Baughen, a senior planning officer of the Defendant. He asked a number of questions to which she responded on 15 September 2017. The questions (which I have italicised) and her answers included the following:

> "1. Does KCC have a set a criteria for "development that generates any additional trips through the junction?
>
> -eg for residential development, is this as low as a single additional dwelling? If so, is it the case that the cumulative impact will be judged served as outlined in the NPPF?
>
> This has been a testing part of the statement to commit to, but in essence we are saying the cumulative impact of several/many individual units will add to the severity of congestion experienced at the junction. As we have judged that the existing situation is 'severe', it should apply that any additional units/trips would compound the effect.
>
> …
>
> 4. Have KCC had any discussions with applicants/highway consultants about how impacts can be mitigated? If so, can a summary of these please be relayed to us?
>
> The only realistic proposal that mitigates this problem is the Golf Club owner's proposal to construct a relief road to the north-west of the junction. I have also spoken to PBA …[for another site] about mitigation, stating we will be open to any suggestions that have a realistic positive impact. PBA tentatively suggested public transport improvements but I am dubious about the benefits tinkering with timetables would have. They will be considering the options and coming back to me. I'll keep you updated."
>
> …
>
> 5. How do the objections fit with existing allocations, both the longstanding ones.. and the newer ones in the allocations document?
>
> Owing to windfall sites and sites not in the Core Strategy that have been allowed at appeal, the number of dwellings KCC stated we would not object to within the parish has been exceeded. Even with some allocated sites not yet applied for planning application, the line has to be drawn. With our evidence showing the junction is now suffering from severe congestion at peak times, and the original allocation number of

> 240 dwellings having been exceeded, we propose to object to any applications from this point forwards – whether they are allocated or not."

11. Mr Mills draws attention to this correspondence as setting out an approach which the Claimant supports. He submits it is not "blanket approach", as it left open the possibility of a developer coming forward with a scheme to mitigate the impact of development. He also seeks to place reliance on Ms Hubert's comments about public transport improvements as effectively discounting the realism of them as a solution. However, Mr Mills acknowledges that the Position Statement Summary, and the approach it advocated, did *not* become KCC policy. To the contrary, the approach Ms Hubert had outlined was in fact withdrawn as the subsequent correspondence reveals. Moreover, I do not accept Mr Mills' characterisation of the comments made about the potential for public transport to provide mitigation. While Ms Hubert expressed some scepticism about "the benefits tinkering with timetables would have", her response to Mr Baughen makes it clear that she was awaiting further information about this and intended to keep Mr Baughen updated.

12. On 4 October 2017 Ms Hubert sent an update to the original recipients. She referred to "very constructive and challenging conversations" that had taken place with the Defendant's officers, developers and KCC's legal team about the fundamental question of whether the impact of any development would be "severe", whether any proposed boundary over development as expressed in the position statement would be arbitrary and whether a planning inspector would conclude that KCC had a good case for recommending refusal if applications were to go to appeal. Some detail about the discussion on those issues was provided. Ms Hubert also noted the absence of evidence as to the origins of traffic through the Junction and a desire to establish this through further survey work. She also referred to the Council's inability to demonstrate a five-year supply of housing land and the consequential approach of planning inspectors towards traffic impacts. At the end of her email she stated:

> "… To clarify, this statement will not become policy until all these issues are satisfactorily addressed.
>
> In the meantime, please be assured we will continue to assess each application on its own merit."

13. Ms Hubert provided a further email update on 21 December 2017, further to this email of 4 October 2017. She confirmed that an approach of automatic objection to further development in Hawkhurst would *not* be taken. She referred to legal advice that KCC would be at risk of costs at an inquiry in taking such a stance. She stated that a clearer thought process was now emerging from appeal decisions where the term "severe" was tending to be suggesting a seriously adverse impact on safety and efficiency. She stated that whilst a certain level of development (yet to be ascertained) might trigger that stance, at the current time it was not suitable to refer to the previously discussed position statement for every development application in Hawkhurst. She also noted again the issue of the Council's lack of five-year supply of housing land affecting the approach. She stated that any future application would be judged on its own merit against paragraph 32 of the NPPF. She went to explain:

> "With no mitigation scheme identified to improve the flow of traffic through the junction, KCC Highways will be looking for well-considered sustainable development which facilitates and encourages walking, cycling and travelling by public transport in order to reduce car-borne trips. The village has good facilities within its boundary, including education, retail and healthcare. Access to these key destinations by sustainable modes should be a primary consideration."

14. She also identified that KCC had now established that 87% of traffic going through the junction did not stop in the village. She referred to working with 'satnav' companies to deter freight from using the route, but noting that as an obvious north/south corridor, it would continue to hold appeal. She continued:

> "Whilst KCC will not be automatically objecting to developments in Hawkhurst, little can currently be done to mitigate the situation. The advice we have taken from colleagues in the Legal department and other councils is that we do not have a strong enough case to justify automatically objecting, and therefore development proposals with a robust Transport Assessment that minimises car-borne traffic through the junction will be scrutinised by KCC highways.
>
> One way in which developers can improve sustainable transport options in the village is to support and enhance the bus service. To this extent, KCC officers have drawn up a business case to share with developers, showing how this can be achieved. I have attached this document for information."

15. Ms Hubert therefore made it clear that: (1) KCC Highways would not be putting forward automatic objection in respect of development proposals which minimised car-borne traffic through the Junction; and (2) one way in which developers might improve sustainable transport options was through providing support and enhancement to the bus service.

16. The attached document was entitled "Business case for the retention and/or enhancement of bus services in Hawkhurst". It set out details of KCC's approach to such bus services based on estimated costs. It reiterated the point that in the absence of a mitigation scheme to improve the flow of traffic through the Junction, KCC highways would be looking for investment from developers into well-considered sustainable measures. It stated:

> "With this in mind, KCC proposes that as a starting point any future developer in the town (subject to the proposal/site and compliance with relevant regulations and the NPPF/G) contributes £1,000 per dwelling (contribution for other land uses to be calculated separately) towards public transport services, and improves (including providing new) bus infrastructure (i.e. bus boarders and shelters) adjacent to their site to an appropriate level, determined at the time for each development …"

17. It is evident that Ms Hubert's initial scepticism about the benefits of "tinkering to bus timetables" to provide mitigation had been replaced with a more positive view of the benefits of physical improvements to bus infrastructure close to a development site, but to be judged on a case-by-case basis.

The Original Planning Application from the Second Interested Party

18. In 2018 the Second Interested Party submitted a planning application for redevelopment of the Site (reference number 18/02767/FULL). The development proposed was in similar form to that which was subsequently approved under the planning permission now challenged in seeking permission for demolition of the existing building and the provision of 43 retirement living apartments.

19. The original application was supported by a Transport Statement. It was also accompanied by a document entitled "Sequential Test (August 2018)" from the Planning Bureau Ltd. This document sought to assess whether there were alternative sites for the provision of the Second Interested Party's form of development. The authors concluded that the Site passed the sequential test as being the most appropriate on which to meet what it considered to be the established need for specialist retirement housing in the part of the Tunbridge Wells they had addressed.

20. The original application was refused by the Defendant by notice dated 1 March 2019 for four reasons. The first of these was that:

> "1) The proposal does not demonstrate that safe and suitable access to the site can be achieved for all users. It has also failed to demonstrate that significant impacts from the development on the transport network (in terms of capacity and congestion) can be mitigated to an acceptable degree through public transport enhancements. It is thereby in conflict with Part 9 of the National Planning Policy Framework 2018, and saved policy TP 4 of the Tunbridge Wells Local Plan.

21. The other three reasons concerned a lack of affordable housing and the absence of developer contributions.

The Resubmitted Planning Application from the Second Interested Party

22. Following that refusal, the Second Interested Party submitted a further planning application for a similar form of development, but with changes seeking to address the reasons for refusal for the original application. The main differences were: inclusion of changes to the position and the alignment of the proposed access, with a consequential removal of one of the street trees outside the Site; revisions to the parking area and the inclusion of three additional spaces so as to provide 33 parking spaces in total; some minor alterations to the footprint of the proposed building close to the western boundary and the layout of internal pathways; and some minor alterations to the internal layout. The Second Interested Party also agreed to pay a figure towards the provision of off-site affordable housing.

23. The resubmitted planning application was accompanied by a Transport Statement dated April 2019 by Odyssey on behalf of the Second Interested Party. Paragraphs 1.4 and

1.5 of that document referred to there being two aspects to the first reason for refusal for the original application: (1) the question of a safe and suitable access to the Site for all users and (2) the impact of the development on the transport network in terms of capacity and congestion and mitigation. Paragraph 1.8 stated:

> "1.8 With respect to the second part of RfR1, this was not considered a concern to KCC Highways, as the local highway authority. It is, however, understood that this was a concern of the Parish Council and, therefore, further justification in this regard is contained in this report."

24. Section 3 of the Transport Statement dealt with the Site's locational accessibility, reviewing existing conditions near the Site, walking, cycling and public transport routes and accessibility to facilities and services. Amongst other things, it dealt with the existence of several bus stops within a 200m walk of the Site and addressed the services available, their destinations and frequencies. Section 4 of the Transport Assessment dealt with access to the Site by all modes and parking. Section 5 of the Transport Statement dealt with trip generation and traffic impact.

25. It is agreed that section 5 included an assessment of vehicle trip generation from the proposed development. Table 5.1 sets out predicted vehicle trip generation from the proposed development in the AM Peak (08:00-09:00) and PM Peak (17:00-18:00) respectively, using the Second Interested Party's research data as to trip generation from its own schemes of the type proposed. In short, it predicted three two-way movements in each such peak hour.

26. The research data was based on the Second Interested Party's schemes where the average entry age of residents is in fact over 78 years old (as set out in paragraph 4.34 of the Transport Assessment). In these proceedings, the Claimant criticises this approach because Condition 22 of the permission granted for this development sets the lower age limit of 55 years of age for one of the occupants of each unit of accommodation.

27. For my part, I do not see anything inherently inconsistent with using such research data in these circumstances. Condition 22 self-evidently will permit younger residents to be present within the scheme, but that would not necessarily mean the average age actually experienced by the Second Interested Party in its schemes is in fact lower than the 78 years of age identified as the average in the Transport Assessment. As the Second Interested Party points out, the equivalent of Condition 22 is commonplace for all its schemes, but that does not affect that actual average age experienced. In any event, neither the Defendant nor KCC in its capacity as highways authority considered that use of such data was inappropriate; nor did the Claimant identify any criticism of it when commenting on the planning application, including the Transport Statement.

28. Section 5 of the Transport Statement also contained what was described as a "sensitivity assessment" which looked at expected trip generation from private flats, using data contained within the TRICS database (a database that records vehicle trip generation from different types of existing development). At paragraph 5.3 the authors expressed the view that this "sensitivity assessment" represented a robust analysis given that the development proposals were for age restricted living and therefore vehicle movements would be lower than for unrestricted (age) private dwellings. Again, there does not

appear to have been any adverse comment on this view expressed by the Defendant, KCC or the Claimant.

29. The results of this "sensitivity assessment" were shown in Table 5.2, predicting 11 two-way vehicle movements in the AM Peak, and 12 two-way movements in the PM Peak. At paragraph 5.5 of the Transport Statement the authors stated: "… These levels of vehicle movements would not be material with respect to their impact on the local highway network. This is further demonstrated below."

30. What then follows is an analysis of the effect of the predicted vehicle movements generated on the A229 during the AM and PM peaks, based on automatic traffic counts of existing flows on that road. Those counts showed 617 existing two way vehicle movements in the AM peak and 730 such movements in the PM peak. The vehicle trips generated by the development are then added onto the flows, based on assumptions as to whether they would travel north or south from the Site. Table 5.3 uses the trip generation based on the Second Interested Party's research data (ie 2 two-way vehicle movements in both the AM and PM Peaks). Table 5.4 uses the data from the "sensitivity assessment" of trip generation based on flats from the TRICS database (ie 6 two way vehicle movements in the AM peak and 7 two way vehicle moments in the PM peak).

31. The parties agree that these Tables show that the increase in two-way traffic at the Junction (which is to the north of the Site access) is assessed to represent an increase of 0.2% in the AM and PM peaks assuming trip generation based on the Second Interested Party's own research data (i.e. 617 existing two way movements + 2 from the development in the AM peak; and 730 existing two way movements +2 from the development in the PM Peak). It represents a 1.0% increase in the AM Peak and 0.9% in the PM Peak respectively assuming the trip generation that would arise from private flats based on TRICS data.

32. It is relevant to observe that as far as I am aware, at no point in the planning application process was the information in this part of the Transport Statement subject to material challenge by any party. It is evident that KCC Highways considered the Transport Statement both for the original application and the resubmitted application. Whilst they had concerns over the application (for example in relation to the access and parking provision), they did not express any concerns over this part of the assessment. To like effect, the Defendant's officers did not express any concerns. Nor, as far I can see from the material that has been presented in support of this claim did the Claimant or any other party in commenting on the planning application.

33. This section of the Transport Statement concluded as follows:

> "5.10 Further to this analysis, discussion with KCC Highways regarding development growth and the A229/A268 traffic signalised junction in the centre of Hawkhurst was had in advance of the planning application. KCC Highways stance in this regard is set out in Appendix K.
>
> 5.11 Based on the information in Appendix K, KCC Highways raised no objection with respect to traffic impact with the previous planning application submission.

> 5.12 Based on the information set out in this section, it is considered that the proposed development will have no material, and certainly no severe, impact on the local highway network; therefore no further traffic impact justification is required."

34. Appendix K contained the email from Ms Hubert dated 21 December 2017 to which I have referred above, along with "Business case" document attached to that email in relation to contributions towards bus service improvements.

35. One of the Claimant's criticisms is that the Transport Statement does not carry out an assessment of the impact of the proposed development on the Junction cumulatively with other committed development. This is a matter that was raised in front of the Planning Committee. I will return to this issue when considering Ground 1.

36. The resubmitted planning application was also accompanied by the document entitled "Sequential Test (August 2018)" from the Planning Bureau Ltd. This was the same document which had accompanied the original planning application.

37. Comments were provided on the resubmitted planning application by KCC in its capacity as the relevant highway authority by letters dated 28 June 2019 and 16 August 2019 [HB/37/495/496]. In both instances, the comments were provided by Margaret Parker, Senior Development Planner. The consultation responses are summarised in the subsequent officer report regarding the application to which I will refer in more detail below.

Legal Advice obtained by KCC

38. In summer 2019, therefore at around the same time that KCC were considering the resubmitted White House application, KCC revisited the question of its approach to the Junction in light of continuing concerns about the effects of development.

39. On 13 June 2019, Mr David Joyner of KCC responded to an email from Mr Marchant, KCC's Head of Strategic Planning Policy raising the possibility of obtaining Leading Counsel's advice on a different issue, namely what could be done in circumstances where a local planning authority ignored advice from KCC as a local highway authority. Mr Joyner raised the possibility of using such an opportunity to get a bit more advice about what he described as the "Hawkhurst conundrum", and the question of "lots of small development proposals coming forward adding relatively small amounts of extra traffic to already severe levels of congestion at a crossroads where there is nothing that can be done to mitigate it".

40. Mr Marchant replied asking Mr Joyner (amongst other things) whether the sites in question were allocated sites, and whether KCC Highways was objecting to such proposals at the planning application stage on grounds of severity if the schemes could not mitigate their impact on the local highway network. Mr Joyner answered that the sites in question were not allocated, and stated that the "sites are all small (under 50 houses a piece) and add just a few extra trips through the A229 central junction – like a dripping tap in an overflowing bath". He stated that whilst the Junction can be said to be severely congested, KCC Highways could not argue that the impact of each individual development was severe in itself and that, in any case, if it went to appeal

the Inspector would dismiss KCC Highways' argument as the Defendant was below its housing target.

41. On 2 July 2019, Mr Marchant emailed Ms Hubert with wording for Instructions to Leading Counsel in the following form:

> "Further to your recent Advice, my colleagues in Highways & Transportation have cited a situation in Hawkhurst, Tunbridge Wells. The local planning authority is receiving numerous planning applications for residential development (schemes generally less than 50 dwellings) and each scheme adds a relatively small amount of traffic to an existing crossroads experiencing severe levels of congestion where there are no options for mitigation. To date, the County Council, as Local Highway Authority, has not objected to these schemes. There is also a view held that given the absence of a five year housing land supply, the grant of planning permission by the local planning authority (or a Planning Inspector) is inevitable.
>
> In my view, the test required under the National Planning Policy Framework at paragraph 109 is clear; it is the <u>cumulative</u> impact that is critical, and this should be assessed when a proposal is considered together with other committed developments. Therefore, in this Tunbridge Wells scenario, there are very valid reasons for the County Council, as Local Highway Authority, to object to these proposals. The absence of a five year housing land supply is a matter for the local planning authority to address in its decision-taking exercise but even where the presumption at paragraph 11 of the NPPF is engaged, part d) ii. does offer latitude to the local planning authority (or a Planning Inspector) to not grant planning permission."

42. Ms Hubert replied to this email on the same day, stating "Perfect, thanks Tom". Advice was subsequently received from Christopher Lockhart-Mummery QC, dated 4 July 2019. Mr Lockhart-Mummery set out the context of his Advice at paragraph 2:

> "The local planning authority is receiving numerous applications (generally for less than 50 dwellings) and each scheme adds a relatively small amount of traffic to an existing crossroads experiencing severe levels of congestion, where there are no options for mitigation. To date, KCC has not objected to these schemes. Given the absence of a 5 year housing supply, the "tilted balance" in paragraph 11d of the NPPF applies, so there is considerable pressure for these applications to be granted."

43. The Advice stated at paragraphs 4-5:

> "4. The view of the Head of Strategic Planning and Policy is that "…it is the <u>cumulative</u> impact that is critical and this should be assessed when a proposal is considered together with other committed developments. Therefore, in this Tunbridge Wells

> scenario, there are very valid reasons for the County Council, as local highway authority, to object to these proposals…"
>
> 5. That advice is entirely correct…"

44. Mr Marchant sent Ms Hubert a copy of the Advice by email on 4 July 2019. Later that day, Ms Hubert sent an email to the Defendant's officers regarding the Junction's capacity. She stated that having had the opportunity to discuss the Junction again with colleagues, KCC Highways had decided to stick with its current position, that is, until there was a fundamental change (such as a significant size application or a change to the Junction), KCC Highways would not object to small scale developments on the impact they have on the Junction. The email then went on to consider modelling work that KCC Highways had received in respect of the large application for residential development at Hawkhurst Golf Course. She explained in that respect:

> "… although the applicant only needs to achieve nil detriment at the junction to satisfy us, any subsequent additional trips through a junction that is over capacity from day one are likely to result in an objection from KCC Highways."

45. One of the Claimant's contentions is that there is an inconsistency between the advice sought and obtained from Leading Counsel as to the need to consider the cumulative impact of a proposal and the legitimacy of objection based on that cumulative impact, and the approach adopted by Ms Hubert to small-scale applications such as the White House application. I will return to this criticism in the context of Ground 1.

<u>The Officer Report for the White House application</u>

46. The resubmitted application for the White House was the subject of a report to the Defendant's Planning Committee on 11 September 2019 ("the Officer Report"). The Defendant's officers recommended that planning permission should be granted subject to the completion of a section 106 agreement and subject to the imposition of 25 conditions. The Officer Report provided a summary of reasons for that recommendation on the first page. It also included a section on relevant planning history in respect of the Site in reverse chronological form. Consequently, the first item identified in that section was the refusal of the previous planning application (18/02767/FUL). It set out in full the four reasons for refusal, including the first reason that I have set out above.

47. The main body of the Officer Report set out a description of the Site in section 1. It then considered the proposal in section 2. This included identification of the differences with the scheme that had been refused. Paragraph 2.10 began as follows:

> "The previous application 18/02767/FULL was not refused on principle or landscape/AONB grounds, but due to details relating to the access arrangements and lack of a satisfactory affordable housing provision."

48. The Claimant notes that this is, in fact, an incorrect summary of the first reason for refusal of the previous application because it was not limited to a concern about access, but also a concern about impact on the transport network, as can be seen from the reason

for refusal itself and the way in which the Second Interested Party addressed it in the accompanying Planning Statement at paragraph 6.22. In my judgment, although this summary in paragraph 2.10 is incomplete, I do not consider that any of the members would have been materially misled by it (in the sense relevant under the well-established authorities addressed further below) when one reads the report as a whole. Any reader of the report reading paragraph 2.10 would have already read the section on the planning history which sets out all four of the reasons for refusal for the original application in full, including the first reason for refusal.

49. Section 3 of the report provided a summary of information as to the differences between the existing site and what was proposed. Section 4 set out planning constraints. The first constraint identified was the AONB. The fifth constraint identified concerned the proximity of the Site to conservation areas as follows:

> "Highgate C[onservation] A[rea] boundary is 100m to the north; the Moor CA is 600m to the south (statutory duty to preserve or enhance the significance of heritage assets under the Planning (Listed Buildings and Conservation Areas) Act 1990)"

50. Section 5 set out policy and other considerations. In relation to policies of the Tunbridge Wells Borough Local Plan 2006, Policy EN5 is identified but not Policy EN4. This is the subject of Ground 2. Section 6 summarised local representations that had been made about the application. The summary included identification of a concern about the "Impact on congestion at crossroads and surrounding road network".

51. Section 7 dealt with other consultation responses, including those of the Claimant. It began with identifying the opposition the Claimant had expressed to the first application and noting that the resubmission did not address the Claimant's concerns. The concerns (taken from the Claimant's letter of objection) were then set out including points about access, parking and the AONB. They also included the Claimant's position that:

> "…
>
> - The Transport Statement still refers to the village centre being in comfortable walking distance but this is actually up a very steep hill, with pavements that are not easily negotiable, especially if one were reliant on an electric buggy.
>
> …
>
> - There is no disputing the Hawkhurst crossroads junction is already over capacity. Any additional traffic will impact negatively on this junction – the proposed development will have a material impact on the junction.
>
> …"

52. Pausing at this point, it is evident that the Claimant had considered the April 2019 Transport Statement submitted with the planning application. The Claimant makes express reference to it, to the point of disagreeing with the views expressed about walking distances given the topography. By contrast, there is no disagreement

expressed with that part of the Transport Statement that dealt with the actual levels of trips likely to be generated and the percentage increase on the traffic flows predicted. The Claimant's point of objection can be seen to have been one of principle, namely that any additional traffic would impact negatively on the Junction which was already over capacity and have a "material impact". As a matter of fact, the objection did not articulate a view that such impact would be "severe". In the letter of objection itself (which the Officer Report was summarising), the Claimant had stated:

> "There is no disputing the Hawkhurst crossroads junction is already overcapacity. The fact that KCC Highways are not prepared to use this as grounds for refusal does not actually change the reality of the situation faced by Hawkhurst residents every day. Any additional traffic will impact negatively on this junction, so it is quite simply incorrect to state that the proposed development will not have a material impact on the junction."

53. Paragraphs 7.29-7.37 dealt with the consultation responses received from KCC Highways, in reverse chronological order, as follows (with the numbering as used in the report retained, but noting that the numbering goes awry):

> "7.29 **(16/08/19)** - Further to my earlier comments it has now been confirmed that the access for mobile scooters will not be taken along the vehicular access and removal of the tree has been agreed with KCC Arboricultural Team. Throughout this and the previous application, the highway authority has recommended improved parking levels but no extension to the car parking area has been forthcoming.
>
> 7.30 Despite further discussions regarding possible allocation of spaces between residents and visitors, the proposals now allocate 27 spaces for residents with six for visitors. The highway authority continues to recommend that a minimum of nine spaces be made available to visitors which would be in keeping with the requirement for general purpose housing.
>
> 7.31 Furthermore, if this balance is not adjusted, the highway authority would recommend that funds are secured through the S106 to cover the costs for extension to a TRO which would allow the highway and parking authorities to manage any overspill parking on the highway. I have discussed this option with your parking team who have recommended that £2500 should be secured towards these costs, to be used should overspill parking occur. This would be in addition to the previously agreed contribution to sustainable transport measures of £1000 per unit. Conditions and informatives also recommended.
>
> 7.32 **(18/06/19)** - Further to initial consultation response, regarding the highway tree, have now consulted with KCC Arboricultural Manager who has advised that mitigation costs to the full value of the assets will be required. However whilst in

this instance the full value would be £40,000, this has been capped at a value of £25,000. Anticipate that this would be secured through the S.106 agreement.

7.30 (**28/06/19)** - This revised application follows discussions with the highway authority and now includes revised access arrangements.

7.31 Additional details include levels and long section, which are in keeping with those discussed with the highway authority and are considered adequate for vehicular access but are too steep to provide disabled access.

7.32 The revised access arrangements will require removal of a highway tree and the applicant was requested to discuss alternative provision with the KCC Arboricultural Team.

7.33 With regard to parking provision, 33 spaces are now proposed. As previously set out, IGN3 would expect of the order of 1 space per unit plus 0.2 visitor spaces per unit (9 visitor spaces) giving a minimum of 52 spaces for general purpose housing.

7.34 The TS presents a variety of statistics regarding typical car ownership levels amongst residents with an estimate of 30 resident's cars. If these figures are employed, the highway authority would still conclude that there is currently under provision, particularly for staff and visitors, as these spaces will also accommodate any visiting carers etc.

7.35 Therefore once again the highway authority would recommend that overall levels be improved, possibly with further extension to the car park to the west.

7.36 Furthermore, reference has been made within the TS to limit the number of spaces available to residents to 27, but this would leave only 6 for staff and visitors. Further consideration should also be given to the balance of spaces and the highway authority would recommend that resident spaces are further limited, as car ownership levels can be controlled at the point of sale, to ensure that the requirement for minimum visitor spaces (9) can be provided.

7.37 As you are aware, with no mitigation scheme identified to improve the flow of traffic through the A229/A268 junction, the highway and planning authorities are seeking investment from developers into well-considered sustainable measures which facilitate and encourage walking, cycling and travelling by public transport in order to reduce car-borne trips. With this in mind, future residential development is requested to contribute £1,000 per dwelling towards public transport services, and

> improved bus infrastructure adjacent to the site. The applicant has previously agreed to this contribution."

54. Section 8 summarised supporting comments made by the applicant, summarised the Planning Statement that had been submitted. Section 9 identified 'BACKGROUND PAPERS AND PLAN'. The documents then listed included: (1) the Planning Statement April 2019; (2) the Transport Statement with attached drawings; and (3) the Sequential Test August 2018 document.

55. Section 10 set out the officers' appraisal of the proposal. Paragraph 10.01 began by identifying the main issues as follows:

> "10.01 The site is partly outside the L[imits to] B[uilt]D[evelompent] and within the AONB countryside. The main issues are therefore considered to be the principle of the development at this site, including the sustainability of the proposal and the impact on the AONB/landscape, design issues, residential amenity, highways/parking, the impact on protected trees, ecology, impact on heritage assets, drainage and other relevant matters."

56. Paragraph 10.02 considered the principle of development, dealing with the effect of being outside the LBD, with development plan policies directed residential development to the most sustainable locations as indicated by the LBD, but noting the absence of a 5 year housing land supply as "highly relevant".

57. Paragraphs 10.03-10.12 dealt in more detail with the housing land supply situation, and the absence of a 5 year housing land supply in the context of paragraph 11 (d) of the NPPF. Paragraph 10.07 explained the "tilted balance" that applies where paragraph 11(d) is engaged in favour of the grant of permission, unless policies within the Framework listed in footnote 6 that protect areas or assets of particular importance provided a clear reason for refusing the development proposed, or any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. Paragraph 10.08 identified that the policies in footnote 6 included those relating to AONBs and heritage assets. In respect of the former, paragraph 10.08 identified:

> "Para 172 of the NPPF advises that 'great weight' should be given to conserving landscape and scenic beauty in AONBs, as they have the highest status of protection in relation to landscape and scenic beauty. This does not create a blanket presumption against new housing in the AONB, but does require detailed consideration of the impacts of new development in such locations. Para 172 also restricts major development within AONBs - this is relevant to this proposal and is addressed in detail later on in this report."

58. Paragraphs 10.13-10.16 considered the Defendant's emerging Local Plan. It identified the existence of an emerging allocation for the Site for residential development for approximately 15 residential units, or alternatively a higher number of apartments for the elderly, subject to criteria including confirmation from the highway authority that

there was no objection to the impact of the development on the Junction. Paragraph 10.16 advised, however, that given the very early stage of the new Local Plan, it could not be given any weight as it had not been through the formal consultation process of examination.

59. Paragraphs 10.17 -10.19 dealt with policies in the Hawkhurst Neighbourhood Plan, including Policy HD1(B). Paragraphs 10.20-10.24 dealt with locational sustainability. The Site's location partly outside the LBD was identified, but a recent grant of planning permission on an adjacent site at Herschel Place was noted. Good footpath links to the settlement centre and proximity to public transport services, with the bus routes and frequency, were set out. Officers express the view that the bus route was accessible with bus stops within reasonable walking distance and it was moderately likely that the bus service would be readily accessible to future occupiers. It was noted in addition that KCC Highways were seeking £43,000 for public transport enhancements which could be secured by a section 106 agreement. Officers considered a further factor was that, in addition to be in close proximity to the LBD, it was also in close proximity to a 'Tier two" settlement in the Defendant's Core Strategy, and Hawkhurst was therefore a location where the Core Strategy sought to concentrate some development to support sustainable development, albeit less than "Tier one" settlements like Tunbridge Wells and Southborough. Paragraph 10.24 concluded:

> "It is therefore considered that, although partly reliance on private vehicle use … the fact that some journeys need to be made by private car is an adverse impact, but this is more balanced by the relative position of the application site to the tier two settlement of Hawkhurst and in particular the shops, school and other services within Hawkhurst. The location and accessibility of the site is considered to be moderately sustainable in relation to its proximity to services and the nature of the route to them."

60. Paragraph 10.25 considered the extent to which the Site contained previously developed land. Officers the Site's attributes in this respect was a benefit to which limited weight could be attached.

61. Paragraphs 10.26 – 10.38 set out the officers' analysis of the effect of the proposal on heritage assets in light of the relevant policies in the NPPF, including the consequences of demolishing the White House. This was identified as a non-designated heritage asset. In light of the Claimant's withdrawal of its challenge to that assessment in terms of the NPPF policies (formerly the principal focus of Ground 2), it is not necessary for me to rehearse the detail of the report on these issues. In light of what is now the residual ground of challenge in under Ground 2 in relation to Local Plan Policy EN4 – to which it is agreed there is no reference in the report - I simply note that in paragraph 10.29 it was stated:

> "10.29 Impact on the CA also falls to be considered under LP policy EN5; then more broadly under EN1 and CS Policy 4, which seeks to conserve and enhance the Borough's urban environments (including CAs) at criteria (1) and (5)."

62. The effect of the proposal on the Hawkhurst Conservation Areas and the emerging Local Plan policy for the Site was dealt with in paragraphs 10.36-10.38. Paragraph 10.39 dealt with archaeology. Paragraph 10.40-10.50 dealt with trees. Paragraphs 10.51-10.62 dealt with housing and economic considerations, including the contributions that the applicant had agreed to make, including that towards public transport improvements.

63. Paragraphs 10.63-10.91 dealt with the impact of the development on the AONB, along with an assessment of landscape impact, design, ecology and landscaping. Paragraph 10.63 began by summarising the officers' position on these topics as follows:

> "10.63 This (especially AONB impact) is assessed in more detail below, but in summary it is considered that overall there is likely to be moderate localised harm to the AONB but this can be diminished through a sensitive approach, detailed design and securing long term management. The AONB and landscape harm will most clearly arise from the introduction of an intensive residential use into an otherwise open site. The proposal offers opportunities to improve some aspects of the site condition and management. Many of the harmful impacts would be moderate within the site itself but the impact localised. This is explored in greater detail within the specific AONB section below."

64. The report then set out the officers' analysis of the relevant AONB policy framework and the development proposal in light of that framework. This included identification of the advice in paragraph 172 of the NPPF in paragraphs 10.64-65 of the Officer Report as follows:

> "Development Plan and NPPF AONB and landscape policy
>
> 10.64 … The NPPF within paragraph 172 states that great weight should be given to conserving and enhancing landscape and scenic beauty in AONBs which have the highest status of protection in relation to these issues. Paragraph 172 also relates to major development in the AONB and states that "Planning permission should be refused for major development other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest." Footnote 55 states that 'whether a proposal is 'major development' is a matter for the decision maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined.'. In this case, given that the proposal a significant amount of new built development within the AONB, it is considered that this should be considered as a major development. This is consistent with the approach to the previous application.
>
> 10.65 The NPPF then states that such applications should assess considerations contained in three bullet points and these are set out in the headings below. Many of the matters to be taken

> into account as set out in Para 172 form material considerations in their own right. The assessment against these matters will take place on the basis of the impact being, slight, moderate, large or neutral."

65. The Officer Report then sets out under sub-headings a consideration of the development proposal against each of the three considerations identified in the sub-paragraphs contained within paragraph 172 of the NPPF, namely: (a) the need for the development, including the impact of permitting it or refusing it upon the local economy; (b) the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need in some other way; and (c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which it could be moderated.

66. As to paragraph 172(a) of the NPPF, the Officer Report provided an analysis in paragraphs 10.66-10.71. The officers first dealt with the identified need for residential development and the lack of a five year housing land supply addressed earlier in the report. They noted that the development would provide additional housing for Hawkhurst which, although modest in relation to the overall need, was considered significant in terms its local and cumulative contribution, but gave it less weight in the absence of affordable housing. They then considered the impacts of permitting the development and those of refusing it, concluding that the former were moderately positive and the latter slightly negative, with wider economic impacts arising from the proposal.

67. As to paragraph 172(b) of the NPPF, including the scope for developing outside the AONB, this was dealt with in paragraphs 10.72-75. As these paragraphs form part of the focus under Ground 3, it is convenient to set them out in full:

> "Para 172: Cost of and scope for developing elsewhere outside the designated area, or meeting need in some other way
>
> 10.72 The whole of Hawkhurst and the surrounding area lies within the AONB. Hawkhurst is identified as a Tier 2 settlement in the 2010 Core Strategy settlement hierarchy. The level of housing need for the Borough is high and it is highly likely that additional housing sites within the AONB will be required. Hawkhurst PC object on the basis of conflict with HD1(b) of the NDP, which relates to this point.
>
> 10.73 The site has been chosen by the developer due to its position close to the LBD and the nature of the existing character and built development on the site. Other sites beyond Hawkhurst and outside of the AONB designation are possible for such residential development. However, the settlement of Hawkhurst is wholly within and surrounded by the AONB, and therefore any housing proposed in or on the edge of the settlement would be within that designated area. The proposal would provide a significant addition to the settlement's housing provision.
>
> 10.74 Other sites in Hawkhurst have been submitted through the 'Call for sites' process a part of the new Local Plan. Without

> prejudice to any future decisions made with regards allocating those sites which have come forward through the Local Plan, some of those which are outside are well outside the Hawkhurst LBD and further from the services of the village. It would be premature and outside the scope of this report to try to actively evaluate the merits or otherwise of sites submitted through Call for Sites. That is subject to an entirely different future procedure and it may be that some of those submitted sites are not allocated for residential use.
>
> 10.75 Having regard to the above, it is concluded that there is no scope for developing sustainably located housing for Hawkhurst outside the AONB."

68. As to paragraph 172(c) of the NPPF, this was addressed in paragraphs 10.76-10.111 under a series of sub-headings that considered the effects of the development on a number of different aspects of the environment, including: "Visual and Landscape Character Impact", "Landscape character/landscape features", "Design and layout", "Materials", "Wider AONB/Landscape impact" and "ecology: At paragraphs 10.97-10.99 officers set out conclusions in relation to the design, landscape and AONB impact considerations, expressing the view despite identified shortcomings, the proposal merited approval within the AONB landscape and was considered to meet the requirements of Policy HD1(b) of the NDP which allowed for developments of more than 10 dwellings in exceptional circumstances.

69. The officers set out their overall conclusion in respect of the impact relating to the AONB at paragraphs 10.106-10.111 as follows:

> "<u>Conclusion in respect of the impact relating to the AONB</u>
>
> 10.106 The proposal is considered (subject to the conditions recommended below) to accord with other relevant adopted Development Plan and national policy in respect of landscape impact, ecology and design.
>
> 10.107 The following table weighs the different elements against one another when assessing the overall impact on the environment in terms of para 172 of the NPPF:
>
> 10.108 It is therefore considered that the proposed development would have a slight negative impact on the environment as a matter to be considered under para 172 of the NPPF.
>
> 10.109 Of the three elements within para 172 of the NPPF considered above it has been concluded that there would be a moderately positive economic impact balanced against a slightly negative impact on the environment with no realistic scope for developing housing for Hawkhurst outside the AONB, given the position of the current Local Plan preparation work and the fact

that sites submitted through the Call for Sites exercise are still being evaluated.

10.110 The overall conclusion when assessed against the requirements of para 172 of the NPPF, and having particular

Component of overall "environment impact"	**Considered impact (neutral, slight, moderate, major)**
Landscape Character/Appearance (and AONB)	slight negative
Ecology	Neutral
Drainage	Neutral
Residential amenity	Neutral
Conclusion	Slight negative

regard to the emphasis in the NPPF and NPPG on supporting sustainable development and contributing to the 5 year housing land supply, is that the proposal will have a moderate positive impact overall.

10.111 As such, it is considered that principally due to the housing delivery benefits outweighing the identified harm to the landscape and environment, there are exceptional circumstances where the development is in the public interest in this instance to depart from the NPPF presumption against major development in the AONB. In addition, the Council's Landscape and Biodiversity Officer has no objections to the application."

70. The Officer Report then set out officers' views as to whether the development comprised sustainable development at paragraphs 10.112-10.116 having regard to its negative and positive aspects. The negative aspects were identified as: (a) slight localised harm to the AONB; (b) less than substantial harm to the setting of the adjacent Conservation Area and grade II listed building to the north of the site and the loss of the non-designated heritage asset, the White House. The positive aspects were identified as: (a) the provision of 43 smaller dwellings as a positive addition to address the Borough's housing shortfall, particularly given a lack of five year housing supply, to which significant weight could be attached; (b) a financial contribution towards affordable housing; (c) moderate positive benefits to the economic and social vitality of the area; (d) the Site's location partly within the LBD and not in an "isolated" rural location; (e) the financial contributions towards Cranbrook Hub, the NHS and KCC

sustainable transport measures which they considered to attract significant weight as wider public benefits; (f) additional landscaping.

71. Paragraph 10.115 stated that the summary took into consideration the requirement in paragraph 11 of the NPPF that development should be restricted where AONB and heritage policies indicated so, but given what were considered to be the significant social and economic benefits of the proposal, it did comprise sustainable development. Paragraph 10.116 set out officers' views that these benefits were considered to outweigh the less than substantial harm to the heritage assets and the slight, but localised, harm to the AONB, so that a presumption in favour of granting planning permission applied unless other material considerations indicate otherwise. It stated that: "The following sections of the report therefore assess whether the proposal accords with other elements of policy in the NPPF (and Development Plan)."

72. The Officer Report then turned to deal with highways and parking in paragraphs 10.117-10.125. The opening paragraph referred to paragraph 103 of the NPPF to the effect that the planning system should actively manage patterns of growth, and that significant development should be focused on locations which are, or can be made sustainable, through limiting the need to travel and offering a genuine choice of transport modes. It then set out in terms the particular test in paragraph 109 of the NPPF that:

> "Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe."

73. The report then continued as follows:

> "10.118A full Transport Assessment has been submitted as part of this application. KCC Highways raised significant concerns to the previous proposal based on;
>
> · Insufficient parking, partly due to the parking assessment being based on C2 housing, not C3 (the basis on which the application was made);
>
> · Unacceptable access arrangements (as the proposed access road did not meet back of highway at 90 degrees and the combined effect of this alignment and gradient at the back of highway and the implications for highway safety);
>
> · The design included connections through the site to the car park which require use of a staircase to give access to the main entrance. This was considered likely to result in vehicles standing on Highgate Hill

which is not acceptable. The design was recommended to include a drop off facility providing convenient and level access to the main entrance. In the absence of such provision the highway authority needed to be satisfied that the arrangements within the car park provide adequate access for all and are largely self-enforcing so it is the most convenient place for drop off etc. This was not the case in the previous layout.

10.119 A proposal for seven dwellings was also refused here in September 2017 however that application featured an access point further down the hill. In addition, at the time that application was refused KCC Highways had not developed a scheme relating to alleviating pressure on the crossroads towards which financial contributions would be sought.

10.120 Even if one occupant per dwelling either did not use a car or depended on a scooter or mobility, this does not necessarily mean that there would be less demand for the level of car-spaces required by KCC guidance. This is on the basis that there would be a reasonable likelihood that some of the occupants would still be dependent on cars for their day to day needs, particularly couples where one person does not have mobility difficulties necessitating the use of an electric scooter. Whilst sustainably located, the application site is not in such close and easy proximity to retail facilities and other services to justify insufficient parking for able-bodied elderly people.

10.121 Furthermore, even if all future occupants were reliant on mobility scooters and did not own a car, their higher dependency would result in a much greater frequency of visitors travelling to the site via cars, such as family members, friends, retail deliveries and professionals providing healthcare and assisted living support. There would be insufficient off-road parking space to accommodate these vehicles, which would as a consequence increase the demand on the already limited stretch of on-road parking available outside the site, which is on a busy A-class road. The development would not provide sufficient, safe and convenient parking for future occupiers, which would as a consequence give rise to

highway safety issues as described by KCC Highways. Ultimately, the proposals now allocate 27 spaces for residents with six for visitors. The highway authority continues to recommend that a minimum of nine spaces be made available to visitors which would be in keeping with the requirement for general purpose housing.

10.122 If the absence of securing these three additional spaces, KCC Highways recommends that funds are secured through the S106 to cover the costs for extension to a Traffic Regulation Order (TRO) which would allow the highway and parking authorities to manage any overspill parking on the highway. The TWBC parking team, following consultation with KCC Highways, have recommended that £2500 should be secured towards these costs, to be used should overspill parking occur.

10.123 At this point it is considered necessary to highlight the difference between the inconvenience of parking pressure to local residents and parking-related highway safety matters. Inspectors have, at appeal, traditionally only given weight to highway safety issues arising from parking. It would be difficult to attribute a significant parking-related safety issue directly to this development, given the number of other dwellings that already use the road, the slow speed that vehicles are likely to travel at in the area around the access point and the fact that there is parking availability in nearby streets. Therefore, in this instance, it is not considered that the proposal would cause harm to highway safety if the recommended conditions and financial contributions are secured.

10.124 As above, Inspectors have traditionally only given weight to concerns regarding highway safety and any impact on convenience of residents is not considered to be a matter that would warrant refusal of this application. In general terms (and unless there is a concern regarding highway safety), the provision, amendment or exclusion of certain properties from residents' parking schemes fall outside of the planning system. Whilst it is not the role of the LPA to manage on-street parking, the recommended £2500 contribution towards the extension of a TRO is

considered reasonable, necessary and related to the development.

10.125 KCC Highways have sought a minimum of nine spaces to be identified within the car park for visitors and to be kept available for visitor parking at all times in connection with the development; and that parking by residents to be controlled through a permit system. However management of the parking area is for the landowner and the way in which the facility is used is likely to be self-policing."

74. Paragraph 10.126-10.127 of the Officer Report then dealt with other matters in the form of refuse storage and amenity space. Section 11 then set out a recommendation to grant planning permission, subject to the imposition of 25 conditions, and the completion of a legal agreement securing contributions, including £43,000.00 towards the cost of improving public transport services in Hawkhurst, and £2,500 to cover the costs for an extension to a Traffic Regulation Order which would allow the highway and parking authorities to manage any overspill parking on the highway.

75. Pausing there, it is fair to note that whilst the Officer Report refers to the existence of the Transport Statement at a number of points, it does not itself set out the contents of Section 5 quantifying the trip generation and consequential impacts. By the same token, it is also fair to note that the information in section 5 was not, of itself, controversial. Whilst KCC Highways had questioned other highway matters (such as the access and number of parking spaces), it had not expressed concerns about the calculations of trip generation and impact on the road network, including the Junction, caused by the development. Odyssey had set out their view in the Transport Statement that the results of the assessment in section 5 demonstrated that the development would have no material impact, and certainly no severe impact, on the highway network such that "no further traffic impact justification is required". KCC Highways self-evidently agreed with this analysis. The Defendant's officers did not express any disagreement with it either.

The Planning Committee

76. By email dated 10 September 2019, a resident of Hawkhurst and planning solicitor, Mr Warman, wrote to the Defendant's planning officer requesting that the planning application be withdrawn from the Planning Committee's agenda. He said this was necessary because there had been a failure to take into account the cumulative impact of the application together with other committed and predicted developments on the congestion at the Junction.

77. He noted that neither Section 5 of the Transport Statement from the applicant, nor KCC's consultation response, contained such an assessment and the Officer Report to committee did not address the issue. He said that the Officer Report did not contain any consideration of the impacts on congestion. He referred to paragraphs of the report dealing with the highways impacts of the scheme, but stated that nowhere in these paragraphs was there any analysis of the impact of the proposal on congestion at the Junction either individually or cumulatively, and stated that the cumulative impact of

the development with other schemes on the village crossroads was a material consideration the determination of the White House application. He then referred to how KCC had dealt with another planning application for development in the village when it had acknowledged cumulative impact was a material consideration, and they had raised concerns about capacity, but appeared to be saying that the issue was "too difficult" for them to consider and suggested this was legally perverse.

78. Mr Warman also contended that KCC and the Defendant did now have information available to assess the predicted future cumulative impact in the form of the Transport Assessment and Transport chapter of the Environmental Statement that had been submitted by another applicant for a large housing application at Hawkhurst Golf Course (reference number 19/02025). He considered this to show a severe residual cumulative impact at the Junction in the "Do Nothing" scenario (ie without the Golf Course development proposal) by 2033, with over a doubling of existing delays in the AM and PM peak periods, and a worsening in the Practical Reserve Capacity of the Junctions. He also noted that whereas Odyssey had identified traffic flows of 617 and 730 two movements in the AM and PM peak respectively, the Transport Assessment for the Golf Course had identified 824 and 893 two movements in the assumed baseline.

79. Following receipt of Mr Warman's email, the Defendant's Principal Planning Officer wrote to KCC Highways asking them for a "short e-mail confirming that the development would not cause severe congestion to the crossroads either in isolation or in combination with other development, so long as the mitigation payments towards public transport services, and improved bus infrastructure adjacent to the site are sought". Ms Hubert, Principal Transport and Development Planner at KCC sent an email in reply stating: "I agree with your statement".

<u>The Committee Meeting</u>

80. Ms Antonia James of the Council was the Presenting Officer for the Defendant at the Planning Committee meeting on 11 September 2019. She has provided a witness statement dated 15 April 2020 providing an account of her presentation. At paragraph 6 she states that she was provided with a typed copy of an update to the Officer Report for the presentation. She read this almost verbatim to the Planning Committee. A copy of the update sheet has been exhibited. It includes the following:

> "Officers have received a further representation from a member of the public alleging that the cumulative impact of the proposal along with other permitted developments and allocated sites on congestion at village crossroads has not been considered.
>
> Officers would draw Members' attention to Committee Report Para 7.37 (KCC Highways comments of 28/06/19) which advises that with no mitigation scheme identified to improve the flow of traffic through the A229/A268 junction, the highway and planning authorities are seeking investment from developers into sustainable measures which facilitate and encourage walking, cycling and travelling by public transport in order to reduce car-borne trips. Thus a contribution of £1,000 per dwelling towards public transport services, and improved bus infrastructure adjacent to the site is sought. This figure has previously been

> sought by KCC for these reasons and was accepted by Members at the 10 April Planning Committee meeting for application 18/02165/FULL (28 dwellings at Land East Heartenoak Road Hawkhurst Cranbrook Kent)
>
> Para 117 of the report quotes NPPF Para 109 ("Development should only be prevented or refused on highways grounds if there would be an unacceptable impact on highway safety, or the residual cumulative impacts on the road network would be severe.") The report further notes at Para 119 that a proposal for seven dwellings was refused here in September 2017 partly because KCC Highways had not developed a scheme relating to alleviating pressure on the crossroads towards which financial contributions would be sought. This is not now the case, as evidenced by the requested contribution and its inclusion within the recommendation at 11.0 (A).
>
> KCC Highways have confirmed that in their view the development would not cause severe congestion to the crossroads either in isolation or in combination with other development, so long as the mitigation payments towards public transport services, and improved bus infrastructure adjacent to the site are sought."

81. Ms James has also exhibited a copy of the Minutes of the Committee meeting. She states these provide an accurate summary of the information she relayed verbally to members. The Minutes of the presentation generally reflect what is set out in the update sheet. The Minutes also record that Mr Warman spoke, along with another objector, at the Planning Committee meeting against the proposal. Ms James identifies in paragraph 13 of her witness statement that Mr Warman raised concerns that the Officer Report did not make a full assessment of the cumulative impact of the development taking into consideration other committee or predicted developments on the Junction; and Mr Warman pointed out to members that this was a material consideration in the determination of the application. He also raised concerns regarding KCC's stance to development in Hawkhurst. The Planning Committee also heard from Parish Councillor Escombe who mentioned traffic congestion in Hawkhurst and raised concerns regarding the demolition of the White House as a non-designated heritage asset.

82. Ms James states that following these presentations, officers were given an opportunity to comment on the matters raised. She took the opportunity to draw members' attention to the fact that KCC had been consulted further since the publication of the agenda and that they had confirmed that the development would not cause severe congestion to the Junction, either in isolation or in combination with other development, so long as the mitigation payments towards public transport services and improved bus infrastructure adjacent to the Site were sought. She also states that she referred members to the Report addressing the Conservation Officer's concerns regarding the demolition of the White House and why, on balance, it was considered acceptable in light of the benefits of the proposal. She states that members of the Planning Committee raised concerns about the capacity of the Junction and questioned how the sustainable transport contribution would be spent. She states that the reiterated the points that she had set out in her

update. Ms James states that it was clear from the Planning Committee meeting that members were aware of the issues regarding congestion, capacity and the cumulative impacts on the Junction. She also states that members are familiar with the fact that a section 106 contribution has to be judged to be necessary in order to make a scheme acceptable.

83. Ms James then refers to subsequent debate that ensured. The Minutes summarise it as follows:

> "Members of the Committee took account of the presentations made and raised a number of questions and issues within their discussions. These included the level of priority given to local residents in respect of affordable housing, potential upgrading of local public transport, time limits on S106 funding, and the particular need for action relating to flooding and foul drainage. Notwithstanding the proposed demographic of the new development, members of the Committee also considered there would be an adverse impact on traffic on Highgate Hill and in particular at the crossroads in the centre of Hawkhurst, which KCC had previously confirmed was already at capacity. Mr Hockney reminded members, however, that without objections from KCC there was insufficient reason to justify a refusal in planning terms. Regret was also expressed over the loss of the White House within the street scene and the failure of the replacement development to respect the local context of the area."

84. Ms James states at paragraph 18 of her statement:

> "… I can confirm that residual cumulative impact on the junction was considered by the Planning Committee through Mr Warman' address to the Committee, the updates provided and through discussion at the Committee meeting."

85. The Planning Committee resolved, by a majority, to grant planning permission for the development in accordance with the recommendation made by officers.

86. Following the Committee meeting, Mr Warman emailed Ms Hubert of KCC in relation to the predicted future position at the Junction, referring again to the Transport Assessment that had been submitted in support of the planning application for Hawkhurst Golf Course. Mr Warman explained what he considered to be the relevance of the Transport Assessment to the White House application (for which permission had not been granted at that stage). The Claimant submits it is clear from this correspondence that Ms Hubert had not considered the evidence from the Golf Course application in the context of the White House application. However, the Claimant submits it is also clear that KCC consider that the Golf Club application material has provided a good indication of the severity of impacts of future development on the Junction.

The Golf Club Application

87. As already noted, the Golf Club application to which Ms Hubert made reference was the subject of a Transport Assessment which did include an assessment of in-combination impacts. Section 5.7 of that document looks at the effects of committed development. Paragraph 5.7.1 identifies that the assessment of individual trip generation, distribution and assignment assessment was carried out for specified committed and proposed developments, in agreement with KCC.

88. Table 7-1 of that Transport Assessment identifies that the Junction already experiences delays of over three minutes per passenger car unit in the morning peak, and approaching four minutes per passenger car unit in the afternoon peak. As already noted, it assessed a "Do nothing" scenario (i.e. if there is no development at the Golf Club), showing how the performance of the Junction will deteriorate over time. It stated at paragraph 7.2.6:

> "It is noted that the junction is currently operating above its design capacity during both the AM and PM peak hours. Its operation is shown to deteriorate further following the addition of committed development trips and wider background traffic growth, with delays of approximately 9 minutes per vehicle forecast in the 2033 future year scenario."

The Emerging Local Plan

89. KCC has also provided a consultation response to the Council's draft Local Plan. This was submitted on 14 November 2019. In that response, KCC indicated that, in order to be acceptable, the Golf Club proposal would have to achieve:

> "nil detriment or decrease the level of traffic/congestion/journey time through the junction – thereby not causing a severe impact for the number of dwellings proposed on the Golf Club site."

90. KCC also submitted an objection to the principle of all allocations of further development at Hawkhurst in the draft Local Plan stating:

> "Until the Golf Club application [which proposes a new road] is assessed, the cumulative impact of all allocations at Hawkhurst would be likely to cause a severe impact on the junction with no mitigation proposed. KCC as Local Highway Authority therefore objects to the allocation of these sites and any subsequent planning applications."

91. The Claimant notes that, consequentially, KCC has objected to the emerging allocation for the White House for fifteen dwellings in Policy AL/HA 2 on the basis of highways impact. The Claimant also notes that since the Defendant's decision on the White House application, KCC has objected to proposed development for 62 dwellings at Ockley Road and Heartenoak Road. KCC stated in that respect:

> "The Highway Authority would like to submit a holding objection to this application owing to the cumulative impact of

> this and other developments on the junction. Since the application was first considered in early 2019 the HA has advised that we would be in a better position to consider the cumulative impact as the Local Plan progresses. In November 2019 the HA objected to the allocation of 7 residential developments in the draft Local Plan totalling 731 dwellings because of the likely impact on the junction. TWBC have been planning to commission a model to test the cumulative impact on the junction, but as this is not yet available KCC, will undertake to build and operate a model of the junction to contribute to the evidence for the Local Plan. In addition, the last year has seen an influx of data relating to the junction as part of pre-applications and planning applications, and this has resulted in disparate conclusions which has underlined the need for a centralised data set. This would allow consistent assessment. The TA submitted with this application may have overestimated the available capacity at the junction, and this centralised approach will allow the HA, TWBC and the PC to agree on one base model as a starting point for capacity assessments."

92. The Claimant points out that the applicant for the Ockley Road site appealed against the Council's non-determination of its application for permission. The Claimant notes that the Defendant's putative reasons for refusal include the fact that it has not been demonstrated that the proposal would not result in an unacceptable cumulative highways impact on the Junction.

93. KCC are undertaking a model of the Junction. The Claimant refers to Ms Hubert's second witness statement in these proceedings in which Ms Hubert stated at paragraph 9 that there is (already) a "mass of evidence from which to make a judgement" for the purposes of paragraph 109 of the NPPF, and that the model "will principally be used to contribute to the evidence for the emerging Local Plan". The Claimant considers that this position is difficult to reconcile with Ms Hubert's comments in an email to the Defendant and the Claimant, dated 12 March 2020, referring to the model being "for both the LP evidence base and to inform our recommendations to TWBC on planning apps". The Claimant also finds it difficult to reconcile with KCC's holding objection in relation to the Ockley Road application. The Claimant also notes that Ms Hubert has stated that it would be beneficial "if we ask any developers of future schemes to pay KCC for the use of the model rather than commission their own".

Legal Principles

94. The correct approach to a judicial review challenge of this kind is not in dispute. Relevant principles were authoritatively summarised in *Mansell v. Tonbridge & Malling BC* [2017] EWCA Civ 1314; [2018] JPL 176, in which Lindblom LJ stated at [41]-[42]:

> "41. The Planning Court – and this court too – must always be vigilant against excessive legalism infecting the planning system. A planning decision is not akin to an adjudication made by a court (see paragraph 50 of my judgment in *Barwood v East Staffordshire Borough Council*). The courts must keep in mind

that the function of planning decision-making has been assigned by Parliament, not to judges, but – at local level – to elected councillors with the benefit of advice given to them by planning officers, most of whom are professional planners, and – on appeal – to the Secretary of State and his inspectors. …

42. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarise the law as it stands:

(1) The essential principles are as stated by the Court of Appeal in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge L.J., as he then was). They have since been confirmed several times by this court, notably by Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286, at paragraph 19, and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J., as he then was, in *R. (on the application of Zurich Assurance Ltd., t/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 (Admin), at paragraph 15).

(2) The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016 EWCA Civ 1061, at paragraph 7). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice.

(3) Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the

advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example *R. (on the application of Loader) v Rother District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, *R. (on the application of Williams) v Powys County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

95. In addition, the Claimant referred to the following:

a. The correct interpretation of planning policy is a matter of law for the court; the application of policy to the facts is a matter of judgment for the decision-maker: see *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983; *Leading Planning Cases* p.303.

b. A question will be one of interpretation, rather than application, when it can be answered objectively without reference to the facts of any particular case: *R (Wiltshire Council) v SSHCLG* [2020] EWHC 954 (Admin), per Lieven J at para. 26.

c. When considering whether development is in accordance with the development plan, the correct focus is on the plan's policies. Supporting text is relevant to the interpretation of a policy to which it relates, but it is not itself a policy, and it does not have the force of policy and cannot trump policy: *R (Cherkley Campaign Ltd) v Mole Valley DC* [2014] EWCA Civ 567, para. 16.

d. It is not appropriate to consider the specific reasons why individual committee members may have voted in a particular way, since a Planning Committee reaches a collective decision by means of resolution. Where a resolution is taken to endorse an officer's recommendation, members of a Planning Committee can be taken to adopt the reasoning of the Officer Report see *R (Historic England) v Milton Keynes Council* [2019] JPL 28, paras 50-52.

e. In *CPRE Kent v Dover DC* [2018] 1 WLR 108, the Supreme Court considered what inquiries needed to be undertaken before a lawful decision as to whether to grant planning permission was made. Lord Carnwath JSC said at para. 62:

> > "The Model Council Planning Code and Protocol…contains…the following advice:
> >
> > "Do come to your decision only after due consideration of all of the information reasonably required upon which to base a decision. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you, request that further information. If necessary, defer or refuse."
>
> This passage not only offers sound practical advice. It also reflects the important legal principle that a decision-maker must not only ask himself the right question, but "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly": *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, 1065B. That obligation, which applies to a planning committee as much as to the Secretary of State, includes the need to allow the time reasonably necessary, not only to obtain the relevant information, but also to understand and take it properly into account."

96. The Claimant places particular reliance on the decision *Hale Bank Parish Council v Halton Borough Council* [2019] EWHC 2677 (Admin). That case concerned a development plan policy (WM1) requiring developers to develop sites allocated in the Waste Local Plan in the first instance, and only to consider alternatives to allocated sites if the allocated sites had already been developed out, or were not available for the waste use proposed by the industry, or could be demonstrated as not being suitable for the proposed waste management operation. The claimant argued that the local planning authority members had to be provided with sufficient information to be satisfied as to whether the policy was met. Whilst they could receive advice, they had to have sufficient information to determine for themselves whether the policy and this was not satisfied by an assertion in the report that the application had provided sufficient information, and that the relevant external advisor had made insufficient inquiries. Lieven J stated:

> "52. … [T]his is not a case about excessive legalism, or whether members were materially misled, it is a case about whether members had sufficient information to make a lawful decision. It is important to bear closely in mind that under the statutory scheme (and here the relevant standing orders) it is members who make the decision not officers. Those members have to have sufficient information to be able to make a lawful decision, see R(Morge) v Hampshire CC [2011] UKSC 2 and CPRE v Dover [2018] 1 WLR 108 at [62] …
>
> 53. Equally, there will be some issues in a planning context where members may be in a good position to make their own judgement even if the OR has little or no analysis of the relevant issue. An obvious example is visual impact where the members when shown plans and photographs may well be able to reach

their own judgements. However, there will be other issues, and in my view this is one, where without fuller (or any) information members cannot "understand the issues and make up their minds" (*Morge* [36]) without further information. As Lord Steyn so famously said, context is all.

54. In my view the vice (and legal error) in this case is twofold. Firstly, the OR told members nothing about why, or on what basis, WM1 was met. It simply said that the Council's advisor (Ms Atkinson) had confirmed that the applicant had supplied sufficient information to demonstrate compliance. The members were therefore not in a position to make up their own minds, but equally were not in a position to reach a view as to the conclusion reached by Ms Atkinson. Secondly, when the background material is examined it is clear that Ms Atkinson had simply accepted Veolia's [the holder of the planning permission's] assertion that the site was chosen because of proximity to Veolia's depot, and "therefore allocated sites were not considered suitable". There was no investigation or even consideration of the suitability or availability of alternative sites. The officers accepted Ms Atkinson's advice and themselves asked no further questions.

55. Ms Atkinson's approach could either be characterised as a failure to apply WM1 lawfully, or a failure to carry out proper inquiries pursuant to the principle in *Tameside BC*, and set out so clearly by Lord Carnwath at [62] of *CPRE v Dover*. The core point is that the sequential test in WM1 cannot be satisfied by a simple acceptance of a developer's assertion that no other site is suitable, without some material to support that assertion, and a proper consideration of whether the assertion was justified. If the developer's assertion alone was sufficient then WM1 and the sequential test would be a wholly meaningless exercise devoid of purpose, because any developer could, and probably would, just say that they wanted their site because it met their requirements and therefore allocated sites were not suitable. In these circumstances the site selection hierarchy so carefully set out in the Waste Management policies in the WLP would have no effect. This error was then compounded by the fact that members were only told that the advisor had accepted the Development Plan had been complied with, without any of the requisite information. They were therefore not in a position to reach any view as to whether sufficient investigation had been undertaken."

97. In relation to Ground 3, the Claimant also relies upon what Hickinbottom J (as he then was) stated at para. 52 of *R (Mevagissey Parish Council) v Cornwall Council* [2013] EWHC 3684 (Admin) in relation to a case concerning development in an AONB:

"Even if there were an exceptional need for affordable housing in an area, that would not necessarily equate to exceptional

> circumstances for a particular development, because there may be alternative sites that are more suitable because development there would result in less harm to the AONB landscape."

Ground 1 – Cumulative Highways Assessment

98. Under Ground 1, Mr Mills submits that the first question that arises is whether the Planning Committee had sufficient information on cumulative highways assessment in order to reach a lawful decision. He submits they did not and that the Council acted unlawfully in any one or more of the following ways:

    (a) A failure to take into account a material consideration, i.e. the evidence in the Golf Club Transport Assessment;
    (b) A failure to take into account material evidence;
    (c) Making a decision without sufficient information, contrary to the principles in *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014;
    (d) An error as to whether there was relevant evidence on a particular point (*E v Secretary of State for the Home Department* [2004] QB 1044; *Leading Planning Cases* p.220);
    (e) An unreasonable decision, in the sense of a decision made without reasonable foundation.

99. He submits the Planning Committee had no information on which to make its own decision, only advice from officers that KCC's view was that, with the financial contribution, the impact would not be severe. He submits this is just a consultee's conclusion and not enough to enable the Planning Committee to exercise its own judgment. He also contends that Mr Hockney's advice to the Planning Committee (as recorded in the Minutes) had the further effect of indicating that KCC's advice could not be departed from.

100. Mr Mills contends this is not the sort of topic, like visual impact, to which Lieven J referred in *Hale Bank Parish Council* where a Planning Committee could reach its own view by looking at photographs, but rather something which needed to be based on calculations and modelling which were absent as to the cumulative impact. He therefore submits the Planning Committee did not have material to allow it to decide whether to agree or disagree with KCC's conclusion.

101. He also submits that it is not appropriate to consider what may have been said in debate during the Planning Committee meeting, nor to take account of what Ms Hubert's further reasoning in her witness evidence submitted in response to this claim. He points out that such reasoning was not before the Council's Planning Committee, nor in the public domain, and such reasoning cannot assist with the legality of the Committee's decision. He argues that there had to be sufficient explanation of KCC's views to allow the Committee to decide what weight to attach them, or whether they should be followed. In any event, he submits, there is no reasoning as to the weight that the Planning Committee gave to KCC's views on cumulative impact. Mr Mills also argues that even if KCC's views (or more specifically Ms Hubert's views) are ascribed to the Planning Committee, those views were not founded on an adequate evidential basis and there was a failure to carry out adequate enquiries regarding the cumulative impact.

102. By reference to a detailed analysis of what Ms Hubert stated she took into account in her first witness statement, Mr Mills submits that it reveals that: (1) she failed to acknowledge that the Junction is already over capacity; (2) she failed to take into account all committed developments; (3) Ms Hubert's approach is not consistent with KCC's approach to other development (such as the Golf Course, the Ockley Road application and the approach to the emerging Local Plan) which he described as KCC's current approach. He contends that KCC's approach in relation to the Golf Club is that any negative impact upon the Junction will be unacceptable, but there is no explanation as to why a different approach is taken to smaller sites. In reliance on the witness evidence provided by Mr Warman, he submits that Ms Hubert, in referring to only two committed developments has ignored a number of other relevant planning permissions which were not taken into account. He notes that committed developments were agreed by KCC for the Transport Assessment for the Golf Course. He also notes that in relation to the Ockley Road application, KCC has referred to an influx of data leading to "disparate conclusions which has underlined the need for a centralised data set", and he submits that same must apply to the White House application and there was insufficient evidence to reach a conclusion about cumulative impact. He makes a similar point in relation to what was said in preparing instructions to Leading Counsel as to the difficulties of addressing the cumulative impact of several small scale developments and he relies upon KCC's response to the emerging Local Plan which emphasises the lack of evidence in terms of cumulative impact. He also does not accept that KCC's change of approach from what was stated in the Position Statement is justified and disputes Ms Hubert's contention that there are options for mitigating transport impacts on the Junction and submits this is difficult to understand and would have made Leading Counsel's advice unnecessary.

103. He also contends that Ms Hubert has made an error in her first witness statement in assuming that the increase in traffic during both peaks would be 0.1% (using the Second Interested Party's data), as it was predicted to be 0.2%, and this indicates that Ms Hubert has not understood the impact of the proposals.

104. By reference to an analysis of her second witness statement, he submits that Ms Hubert now only refers in what he submits are "vague terms" to having taken into account all committed development. He also criticises what he submits is an attempt to distance herself from previous comments that the Junction is over capacity and subject to severe congestion. He notes that Ms Hubert has emphasised her view was a matter of planning judgment, but points out that the relevant judgment is that of the decision-maker, the Planning Committee.

105. Mr Mills also developed a submission at the hearing and in a written note that there is no evidence that members of the Planning Committee read the Transport Statement, or that they were told that it was required reading. In that respect, he relies upon the decision of the Court of Appeal in *R(Hunt) v North Somerset Council* [2013] EWCA Civ 1320, per Rimer LJ at [12] and [83]-[84] to the effect that if members are not told either expressly or impliedly to read documents which may been available to them (in that case Equality Impacts Assessments), but were not provided with the report itself, then one cannot infer that such documents were read by the members. The Court of Appeal considered that this was not altered by the fact that the EIAs in that case were summarised in an Appendix to the report tended to suggest that reading them in full was not essential, otherwise it would not have been necessary to summarise them. Mr

Mills submits that the decision of the Court of Appeal in *R(Lensbury Ltd) v Richmond-upon-Thames London Borough Council* [2017] JPL 96 that officer reports are written for an informed audience who may be taken to have a reasonable understanding of, or the means of checking on, the local context and the legislative and policy framework, in which the decision is to be taken does not cast doubt on the principles in *Hunt*.

106. Both Ms Thomas and Mr Cannock argue that there was no error on the part of the Defendant in relation to Ground 1. Amongst other things, they submit that the question of whether there was any severe residual cumulative impact was a matter of judgment for the Defendant which was addressed. They submit that the Defendant was entitled to take into account the views of KCC that there was no such material impact, let alone a severe one, and that was based on a judgment taken about this particular development proposal, its location and the public transport contribution which was considered to be an effective means of mitigation in this particular case. Ms Thomas submitted that the Defendant was required to place considerable weight on the views of the local highway authority in this sort of case.

107. They also both submitted that the Transport Statement did not need to contain modelling of the cumulative impact of all committed development on the Junction, and they draw a distinction between a Transport Statement and Transport Assessment for these purposes. They emphasise that the extent of investigation of the issue was a matter of judgment. They also rely upon the content of section 5 of the Transport Statement. They point out that the assessment in that document was accepted by KCC Highways and was not challenged. They also submitted that the content of the Transport Statement demonstrates that there would be no material impact on the Junction, given the levels of traffic that would be generated. There was some difference in the way they interpreted the test under paragraph 109 of the NPPF in looking at whether the residual cumulative impact of a development is severe, but both submitted that the evidence in this case demonstrated it would not be and the Defendant was entitled to agree with KCC Highways in that respect. Ms Thomas distinguished the application of *Hunt* case on the facts of this case, and submitted that the principles *Lensbury* were engaged where the Planning Committee members had the ability to check the contents of the Transport Statement if they wished. They both submitted that there was no inconsistency in KCC's submissions on this planning application, as compared with its approach to larger development, the Golf Course application and the principle of the emerging Local Plan application.

Analysis

108. In my judgment, the appropriate starting point for considering the Claimant's criticisms under Ground 1 is the relevant policy framework against which the Defendant was assessing the development proposed. Against that framework, one can then turn properly consider the first question that the Claimant raises as to whether the Defendant had sufficient information available to it in principle to make that assessment and, then the second question that emerged more latterly in Mr Mills' submissions that the Planning Committee in this case cannot be taken to have read the Transport Statement in making their assessment, even if it had provided them with sufficient information (which he did not consider it did).

109. The relevant policy framework in respect of the complaint under Ground 1 was that set out in the NPPF at paragraphs 108-111. The Claimant's criticisms relate to the question

of capacity and congestion (rather than matters of highway safety). Under the heading "Considering development proposals", paragraph 108 of the NPPF identifies that in assessing specific applications for development, it should be ensured that (amongst other things) "any significant impacts from the development on the transport network (in terms of capacity and congestion) … can be cost effectively mitigated to an acceptable degree" – see paragraph 108c) of the NPPF. In this respect, paragraph 109 explains that development should only be prevented or refused on highways grounds if "the residual cumulative impacts on the road network would be severe."

110. Read together, the natural and ordinary meaning of paragraphs 108 and 109 of the NPPF are clear. In assessing an application for development, the decision-maker needs to ensure that significant impacts of development on the capacity and congestion of the highway network can be cost effectively mitigated to an acceptable degree, but there should only be a refusal on that basis if the residual cumulative impacts (which includes taking account of any mitigation that is proposed by the developer) on the road network would be severe.

111. There is no definition in the NPPF of what will constitute "severe" residual cumulative impacts for these purposes. Inevitably a qualitative term of this kind used in the NPPF necessarily calls for the exercise of judgment on the part of the decision-maker. As with all such judgments, they will be subject to the normal constraints that the principles of administrative law impose. As is well-established, those include the need to take into account relevant considerations, to have sufficient information to be able to make a lawful assessment and for the judgment to be rational in a *Wednesbury* sense. But ultimately the judgment itself is one of judgment for the decision-maker. It may well be a matter on which reasonable people can disagree, but that is not a basis for impugning the decision reached.

112. I agree with the general thrust of Mr Mills' submission that a judgment of this kind – namely whether there are severe residual cumulative impacts on the traffic network from a development - will often be one which will require some technical information for the assessment to be made. In this respect, it is relevant to consider paragraphs 108 and 109 of the NPPF alongside paragraph 111 of the NPPF:

> "All development that will generate significant amounts of movement should be required to provide a travel plan, and the application should be supported by a transport statement or transport assessment so that the likely impacts of the proposal can be assessed."

113. The corollary of what is stated in the first part of that paragraph is that development which will not generate "significant" amounts of movement is not necessarily expected to be supported by a transport statement or transport assessment. Here, once again, the NPPF requires a judgment from the decision-maker as to what will constitute "significant" amounts of movement. It is inherent in what is stated that if the decision-maker takes the view that the development is not one which will generate "significant" amounts of movement, then it may not require a transport statement or transport assessment to provided in support of the planning application itself. This further illustrates the role of judgment in the exercise required in this part of the NPPF.

114. It is also relevant to note (as both Ms Thomas and (in more detail) Mr Cannock pointed out) that paragraph 111 of the NPPF is referring to two different types of transport document for these purposes: a transport statement and a transport assessment. Further guidance is provided in the Government's national online Planning Practice Guidance about the differences between these two documents. Paragraph 004 (Reference ID: 42-004-20140306) states:

> "… Transport Assessments are thorough assessments of the transport implications of development, and Transport Statements are a 'lighter-touch' evaluation to be used where this would be more proportionate to the potential impact of the development (ie in the case of developments with anticipated limited transport impacts).
>
> Where the transport impacts of development are not significant, it may be that no Transport Assessment or Statement or Travel Plan is required. Local planning authorities, developers, relevant transport authorities, and neighbourhood planning organisations should agree what evaluation is needed in each instance."

115. Accordingly, whilst both a Transport Assessment and a Transport Statement will be directed at assessing the likely impacts of development where significant movements are anticipated and, ultimately, whether there will be severe residual cumulative impacts (after mitigation is taken into account), a Transport Statement is intended to be a 'lighter touch' evaluation of the likely impacts. Again, this is an area where the exercise of judgment will be in play as to what type of document is required in any particular case.

116. In this instance, it is clear that the Interested Party's highway consultants, KCC in its capacity as highway authority, and the Defendant as the local planning authority were satisfied that a Transport Statement (i.e. a lighter-touch evaluation) was sufficient and proportionate given the nature of the development proposed in this case. No one criticised the provision of the Transport Statement. The Claimant itself has not sought to impugn that approach in principle, either in these proceedings or in the planning application process itself.

117. By contrast, it can be seen the Hawkurst Golf Course planning application to which much reference has been made has been supported by a Transport Assessment. This is not surprising given the much greater scale of what is proposed by that application, along with the fact that it is subject to an Environmental Statement, for which there is a Transport chapter.

118. The difference of approach to what form of supporting material is required in any particular case reflects the important role of judgment in this area. What is required for a particular application will depend a judgment as to what is proportionate based upon matters such as the scale of the proposal and consequential likely impacts, consistent with the approach articulated in paragraph 111 of the NPPF and the guidance in the NPPG.

119. It follows that the detail of what may be required in a Transport Statement, as compared with a Transport Assessment, may well differ. The fact a Transport Assessment for a

larger form of development in the same area includes specific modelled calculations of the effects of all committed development on a junction in that area does not necessarily mean that a Transport Statement for a smaller form of development in the same area must also include such calculations. In both cases, the same test under paragraph 109 of the NPPF will be engaged - namely whether the residual cumulative impacts of the development in question are severe. But the extent of the information required by way of modelling and calculations to reach a judgment on that issue may well differ in each case.

120. This is clear in the recognition in the guidance that a 'lighter touch' evaluation may be proportionate for development with more limited transport impacts. Decisions about the proportionality of what is required in any particular case are very likely to be matters of judgment in themselves on which reasonable people may disagree, but which will not necessarily be unlawful because there is disagreement.

121. There is a further point that logically arises from the recognition that assessment of traffic impacts will ordinarily require some technical information for that assessment to be made, albeit with judgment to be made as to the extent of such information and its form will vary from case to case in light of what I have set out above. Where technical information is required, a decision-maker will often take account of advice from persons or consultees with technical expertise or experience in that area. And in some cases, the local planning authority will in fact be obliged to consult those with such expertise or experience.

122. In the case of impacts on the highway network, the local highway authority is a consultee. But it is also particularly well placed to assist a local planning authority in making the sort of judgment required under paragraph 109 of the NPPF. As Mr Mills correctly points out, the judgment still remains that of the local planning authority, rather than the local highway authority as a consultee. A local planning authority can ultimately disagree with a consultee (subject to the normal principles of administrative law to which I have already referred). It may then have to defend that disagreement at appeal. But equally, it is entitled to agree with a consultee of this kind. It is axiomatic the weight it chooses to attach to such views is a matter for its own judgment.

123. Ms Thomas and Mr Cannock rely on cases which address the potential requirement of a local planning authority to attach considerable, or great, weight to the views of Natural England, when it acts as the "appropriate nature conservation body" statutory consultee in respect of certain ecological matters: see *Prideaux v Buckinghamshire County Council* [2013] EWHC 1054 (Admin) at 116; *R. (Akester) v Department for the Environment, Food and Rural Affairs* [2010] Env. L.R. 33, at 112, *R (Morge) v Hampshire County Council* [2011] UKSC 2 at 45.

124. I do not consider it necessary for me to decide how far that principle can be extended beyond that particular situation so as to require considerable weight to be attached to the views of a local highway authority in relation to highway impacts. It is sufficient in the context of this challenge to apply conventional principles, namely that the Defendant is entitled (if not obliged) to take into account the views of KCC on such impacts as material to its decision, but thereafter it is a matter for the Defendant's judgment as to what weight it applies to those views as material considerations.

125. It is also relevant to recognise that KCC's views in this case were not limited to its judgment that the residual cumulative impacts were not material, let alone severe, with the proposed public transport mitigation, but also its satisfaction with the extent of the information provided by the applicant the Transport Statement for such an assessment.

126. It is against that policy framework, and those principles, that the first question the Claimant has posed falls to be answered: did the Defendant have sufficient information available to it in principle to be able to reach a lawful judgment on whether or not the residual cumulative impacts would be severe in this case?

127. It is helpful to consider what information the Defendant did have available to it to make such an assessment before considering the question of sufficiency. The Claimant's case in a nutshell is that there was no information available on the cumulative effect of all committed development on the Junction in question because neither the Transport Statement, nor any other document that formed part of this application, modelled such an effect.

128. In my judgment the Claimant's analysis in this regard is flawed. It confuses the question of what information was available with the question of whether that information enabled the decision-maker to make a judgment as to whether the residual cumulative impact of the proposal would be severe. The mere fact that one could model the cumulative effects of all committed development on the Junction (as has self-evidently been done for the Golf Course application) does not necessarily mean that such information was necessarily required for an assessment of this particular application's effects under paragraph 109 of the NPPF. To import a well-known aphorism into this area, context is everything.

129. The Second Interested Party's planning application for 43 retired living apartments on this particular Site was supported by the Transport Statement dated April 2019. This document set out an assessment of (amongst other things): (1) the site's locational attributes in terms of its proximity to services and relationship to public transport in the form of buses; (2) the predicted vehicle trip generation for a development of this kind; and (3) the impact of that trip generation on the road network in terms of percentage increases in traffic flows on the road that joins the Junction. Although the Claimant has, for the first time in these proceedings, sought to advance some criticism of the assessment itself in its use of the Second Interested Party's data, I have already explained why I do not consider those criticisms to be well-founded. Moreover, it was not a criticism made at the time in response to the application. I am unable to detect any unlawfulness in KCC, as the local highway authority, and the Defendant as the local planning authority, accepting the use of that data in the Transport Statement.

130. The Transport Statement therefore provided technical information available to the Defendant when making a judgment as to whether the residual cumulative impact on the road network would be severe.

131. It is true that the Transport Statement does not include technical information as to the amount of traffic that will be present on the road network with all committed development in place. It only presents the impact of the predicted trip generation as a percentage increase over the automated traffic count flows of the road leading to the Junction in its current state, without including all committed development. It therefore does not contain or model the Junction in the way that is done in the Hawkhurst Golf

Course Transport Assessment, such as looking at the traffic flows through the Junction which will exist in the year 2033 (or any other future year) based on committed development and natural growth in traffic on the road network. The Claimant is therefore correct in stating that this information was not before the Defendant. But the real question is whether the Defendant was required, in law, to have such information in order to be able to make a lawful judgment on whether the residual cumulative impact on the road network of this development would be severe. I do not consider it was for a number of reasons.

132. First, the policy framework of the NPPF itself does not purport to specify what technical information will need to be obtained in order to reach a conclusion under paragraph 109 of the NPPF as to whether the residual cumulative impacts are severe. To the contrary, it contemplates that the amount of information that may be required in any particular case will be fact-specific, with a Transport Statement involving a lighter-touch evaluation than a Transport Assessment. This is an area where judgments about how much information is required in a particular case are ones which involve questions of proportionality. Here the Applicant's highway consultants, KCC as local highway authority and the Defendant as local planning authority self-evidently were content that the Transport Statement provided a proportionate amount of information. I cannot discern any error of law in reaching that judgment. The Transport Statement identifies very small numbers of vehicle movements at critical times of the day. It contained information about the Site's relatively good location in terms of its proximity to services and facilities and public transport. It was provided in a context where additional mitigation in the form of a public transport contribution to improve the physical infrastructure for the bus services was being proposed.

133. Second, it is inevitable that a judgment on whether further information might be needed to apply the test under paragraph 109 of the NPPF is likely to be fact-sensitive, and affected by what information has already been provided in the application. Here the Transport Statement was predicting three two-way movements from the development in each of the AM and PM peaks. In terms of consequential impact on the road network, and more particularly increase in traffic at the Junction, this equated to an increase over the existing levels of traffic of 0.2%. The Transport Statement also provided equivalent data for the "sensitivity assessment". These are very low numbers as the Claimant does not actually dispute. In my judgment, both KCC Highways and the Defendant were entitled not to require further technical information in order to reach a judgment as to whether the residual cumulative impact of the development on the Junction would be severe. Whilst they did not have the technical data to know exactly what the increase in traffic flows would be from committed development, they were able to make such a judgment without such additional data. It was well within the ambit of a rational conclusion that a 0.2% increase over existing levels of traffic would not create a "severe" residual cumulative impact and that judgment would not change with higher levels of traffic from committed development. This is simply a question of judgment, based on the facts before them as to very low increases with which they were concerned. Neither KCC Highways, nor the Defendant in accepting their advice, disagreed with the Transport Statement assessment that the levels that would be generated were not material, let alone severe.

134. Third, the preceding point is reinforced by considering the logic of what further modelling would show in any event. If the Transport Statement had in fact

incorporated increased traffic flows on the road network from committed development which had not yet been constructed, rather than simply looking at existing flows, the baseline numbers would have increased; but this would have meant that the percentage increases caused by the development would actually have decreased, not increased. The development would have involved the same very small number of trips being generated in the peaks, but the effect of these would have been further diluted in percentage terms if added into higher projected baseline flows. In circumstances where the figures from the development were already so low, it is difficult to see how the sort of further technical calculations would have added materially (or at least in a way which would have assisted the Claimant) to the overall assessment that was to be made by the Defendant. Given the very low levels of traffic from the development that had been identified, it seems to me that there is no basis for suggesting that KCC or the Defendant did not have information to make the assessment required under paragraph 109 of the NPPF, or that they acted unlawfully in not requiring such additional modelling, in circumstances where the levels of traffic generated were so low.

135. Fourth, the Claimant's challenge focuses on the concept of "cumulative" impact and the role of committed development, but this does not take proper account of the test also requiring one to consider the "residual" impact of what is proposed in terms of severity. The overall assessment under paragraph 109 of the NPPF allows one to consider the expected impact in light of all relevant considerations, including the location of the Site itself in terms of accessibility to services within the village which can potentially reduce reliance on the car, coupled with the requirement that was being imposed to make contributions towards enhancing the attractiveness of using the bus. All of this requires a judgment based on all the available information, but without necessarily requiring further modelling work. In my judgment, KCC and the Defendant would have been able to make a lawful judgment about "residual cumulative impact" in this particular case based on the predicted very low trip generation, the Site's particular location, along with the potential mitigating effects of the contribution that was being proposed, without the need for further modelling or technical information as to the precise effects of committed development.

136. Fifth, the reality is that Claimant's real concern is that of "death by a thousand cuts". In reality, this concern is not something which would be addressed by further technical evaluation or modelling for this particular development with its very low trip generation. The Claimant's real concern is that permitting incremental small-scale development, with minor increases in traffic, is not acceptable for a Junction that is already congested and is bound to become increasingly so with committed development and normal traffic growth. But that concern is a general point which is well-known to KCC and the Defendant already. It was one raised by Mr Warman and the Parish Council in front of the Planning Committee which they considered. But it is not one which necessarily means that further technical information was required on this particular application to make a judgment under paragraph 109 of the NPPF.

137. Other colloquial expressions were used by the Claimant to articulate this point, such as "the straw that breaks the camel's back", or "a dripping tap into an already overflowing bath". I recognise the nature and force of the Claimant's concern. In reality, it is one that is shared by KCC. None of the analogies is entirely accurate to express it. But howsoever it is expressed, it is not one which means that every small scale development requires the sort of cumulative impact modelling the Claimant seeks for a lawful

judgment under paragraph 109 to be made. Indeed, it is difficult to see how such cumulative modelling would add materially to the judgment to be made. By way of example, the cumulative modelling presented in support of the Hawkhurst Golf Course application demonstrates that in 2033, with committed development and natural traffic growth, delays at the junction will continue to get worse and an authority might choose to describe them as severe. But this will not establish, let alone materially assist, in showing that very small levels of additional traffic assumed from a development of this kind will create a "residual cumulative impact" which is of itself severe. Mr Mills suggests that the point is similar to that considered by Jay J in in *Wealden District Council v SSCLG* [2017] Env LR 31 to the effect that a number of impacts, individually small, can exceed a threshold if added together. Here there is no threshold that Mr Mills is arguing will be breached, let alone breached by the addition of the very small number of movements proposed in this particular case.

138. It is recognition of this sort of point that no doubt led KCC to recognise that objection in principle to any further development affecting the Junction is not consistent with paragraph 109 of the Framework. Such blanket objection would not recognise the potential for minor impacts to be addressed by mitigation measures such as public transport measures. And such blanket objection would not be based on a case-by-case assessment of whether the particular impact caused by the particular development could be treated as "severe". In my judgment, paragraph 109 of the NPPF necessarily requires consideration of whether the residual cumulative impact of the proposed development is severe, not simply whether existing or projected congestion without that development would be severe.

139. Sixth, the fact that the residual cumulative impacts of this particular development are not judged to be severe does not mean that "death by a thousand cuts", or more accurately, an ever-increasing material worsening of the Junction from small scale development is inevitable. Each case will still need to be judged on its own merits, having regard to factors such as the Site's specific location, the particular development proposed, its characteristics, the extent to which the public transport improvements to be secured by the contribution are relevant to that Site, and ultimately the trips it will generate on the road network. The extent to which there is a need for further technical information to assess whether something is severe, such as additional modelling of cumulative effects, will depend upon such fact-sensitive assessment. In this respect, KCC's actions in objecting to the greater impacts of the Ockley application and to the emerging Local Plan allocations as a whole illustrate that KCC itself is continuing to scrutinise closely the effects of further development on the Junction. The fact that they consider that this particular application does not cause any material impact (given the very low level of traffic generated) does not mean that it will allow the Claimant's concern of "death by a thousand cuts" to materialise. It demonstrates an approach of scrutinising the effect of each "cut", or the size of any additional "drip" from the tap, coupled with the effects of any mitigation proposed, in each case.

140. Seventh, I do not accept the Claimant's argument that this case is equivalent to the unlawfulness found in *Hale Bank Parish Council* on proper analysis. In that case, the Planning Committee simply relied upon the statement of the Council's advisor that policy WM1 was met, but without any information available to them to make up their own minds, or reach a view on the advisor's conclusion. Second, the background material demonstrated that there is in fact no information provided by the applicant to

justify the advisor's conclusion anyway. I address Mr Mills' submission about whether the Planning Committee read the Transport Statement below, but subject to this, the same factual situation did not arise here. The Defendant's Planning Committee undoubtedly took into account the views of their own officers, and in turn, the advice of KCC as the acceptability of the proposal in terms of traffic impacts, but the Planning Committee did have information available to them in the Transport Statement to enable them to make up their own minds if they disagreed. Moreover, neither KCC officers nor the Defendant's officers were in fact simply accepting an assertion of the applicant as to the impacts of the development. There was an analysis provided in the Transport Statement. I have explained why I am satisfied that the information in that document is sufficient to enable a judgment to be reached under paragraph 109 of the Framework in this particular case.

141. Eighth and finally, it is also important not to misapply the principles in *Hale Bank.* In that case, there was no information necessary to make an assessment of the kind that the policy required, namely investigation and consideration of the suitability or availability of alternative sites in conflict with the duty identified in *Tameside.* But nothing in that decision, given its facts, detracts from the principles articulated by the Court of Appeal in *R(Jayes) v Flintshire County Council v Jayes* [2018] EWCA Civ 1089, Hickinbottom LJ at [14]:

> "Although any administrative decision-maker is under a duty to take all reasonable steps to acquaint himself with information relevant to the decision he is making in order to be able to make a properly informed decision (Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1997] AC 1014), the scope and content of that duty is context specific; and it is for the decision-maker (and not the court) to decide upon the manner and intensity of inquiry to be undertaken into any relevant factor (R (Khatun) v London Borough of Newham [2004] EWCA Civ55; [2005] QB at [35]). That applies to planning decision-making as much as any other (see, e.g., R (Hayes) v Wychavon District Council) [2014] EWHC 1987 (Admin) at [31] per Lang J, and R (Plant) v Lambeth London Borough Council [2016] EWHC 3324 (Admin); [2017] PTSR 453 at [69]-[70] per Holgate J). Therefore, a decision by a local planning authority as to the extent to which it considers it necessary to investigate relevant matters is challengeable only on conventional public law grounds."

142. The Claimant's challenge founders on the proper application of these principles to the facts of this particular case. This is not a situation where the Defendant had no information to enable it to come to a decision about the development for the purposes of paragraph 109 of the Framework. It did have such information. In reality, the Claimant considers it should have sought more. That is the sort of unjustified challenge to the exercise of judgment that conflicts with the principle in *Jayes.*

143. In light of this analysis, I consider that many of the alternative ways in which the Claimant has advanced its criticisms under Ground 1 fall away. The Claimant alleges that the Defendant failed to take into account a material consideration in the form of the evidence in the Golf Club Transport Assessment. For the reasons I have already given,

I do not consider that the Defendant was obliged to treat information in the Golf Club Transport Assessment as material to its decision on this particular development. Moreover, I am still not clear how it would have materially assisted the Defendant in making the decision required of it under paragraph 109 of the NPPF. It had to consider whether the residual cumulative impact of the White House development would be severe and it had the information available to it to do this. I also reject the Claimant's contention that the Defendant failed to take into account material evidence. To the contrary, the Defendant (through its own officers and in taking account the advice of KCC and with the Transport Statement available) took into account the relevant evidence it needed to make an assessment about this application on its own particular facts. I do not agree that it made its decision without sufficient information for the reasons I have already given. I do not consider it made any error as to whether there was relevant evidence on the matter before it. I also reject the notion that it made an unreasonable decision in the *Wednesbury* sense.

144. In reality, the decision it was required to make under paragraph 109 of the NPPF was very much a judgment based on all the available material and the particular characteristics of the development proposed. Given the very low levels of traffic that were to be generated which were not disputed, the consequential percentage increase set out in the Transport Statement, the site's location and the mitigation proposed for buses, the decision was not actually surprising. But more relevantly, given the function of the court in conducting judicial review, I do not consider there to be any basis for describing that decision as irrational in the *Wednesbury* sense.

145. I am also unable to discern any inconsistency between the approach KCC and the Defendant has adopted to this particular application and the advice obtained from Leading Counsel. Leading Counsel endorsed the view that paragraph 109 of the NPPF requires one to look at the cumulative impacts of development, so taking account of committed developments. There is nothing in the foregoing analysis which is inconsistent with that. The reality is that KCC's view was and remains that the cumulative impacts of this development are not material.

146. The Claimant raised an issue about Mr Hockney's advice to the Planning Committee (as recorded in the Minutes) to the effect that without objections from KCC there was insufficient reason to justify a refusal in planning terms as suggesting that KCC's advice could not be departed from. I do not consider that to be a fair reading of the advice read in context. In my judgment, Mr Hockney was reminding members the difficulty that the Defendant would face in justifying a refusal in planning terms on highway grounds in the absence of any objection to what was proposed from KCC as the local highway authority. I do not consider that such advice would be treated as preventing the Defendant from departing from KCC's views. Indeed, in the determination of the first planning application, it is clear that the Defendant had in fact chosen to articulate a reason for refusal on highway grounds which went beyond KCC's objection. I do not consider Mr Hockney's advice materially misled members.

147. The conclusions I have reached largely deal with the Claimant's criticisms of Ms Hubert's conclusions on the part of KCC. Ms Hubert (like the Defendant) was entitled to reach a view on whether the residual cumulative impact of the development was severe by reference to the information provided in the Transport Statement. There was no legal error in KCC not requiring further information. That conclusion applies with particular force to Ms Hubert given her inevitable familiarity and experience in making

judgment about what information is required to support an application and her inevitable knowledge of the traffic issues in Hawkhurst (given the undisputed factual background of her involvement to date). Ms Hubert, like the Defendant, was well aware of the general concern about "death by a thousand cuts" arising from incremental increases in congestion from small scale development when making the judgment she did about this particular development.

148. My conclusions also make it unnecessary to consider the additional reasoning Ms Hubert advanced in her witness statements. Mr Mills rightly pointed to the dangers of this court taking into account evidence that constitutes further reasoning beyond that which is expressed in the contemporaneous materials and, in any event, which was not before the Defendant when it made its own decisions. I would have been very reluctant to place any material weight on those parts of Ms Hubert's statement seeking to expand upon the reasoning behind the consultation responses provided to the Defendant. It is the consultation responses on which the Defendant officers and Planning Committee acted. My conclusions do not depend upon Ms Hubert's further explanations. But one of the consequences of providing such reasoning is that it may in fact serve to disclose an error on the part of a consultee, which potentially vitiates the judgment the consultee has reached and, consequently, taints the advice provided to the decision-maker which has been taken into account in making the decision.

149. I therefore cannot simply discount Mr Mills' criticisms of Ms Hubert's evidence where they are criticisms of that kind. Having considered each of the criticisms made, I do not consider them to support the existence any material errors of that kind.

150. First, Mr Mills argues that Ms Hubert failed to acknowledge that the Junction is already over capacity and, in her second witness statement, she wrongly sought to distance herself from the description of the Junction as congested. I do not regard this as a realistic assessment of Ms Hubert's evidence read fairly as a whole. There is a degree of equivocation of the description of the Junction in Ms Hubert's second witness statement. Nonetheless, it is very clear from the history of events that Ms Hubert is well aware of the problems with the Junction. Indeed, she was responsible for initiating the subsequently withdrawn policy approach of objection to new development in 2017 in light of those concerns. It is unrealistic to contend that Ms Hubert was not fully aware of the problems with the Junction when reaching her judgment about this application, given her long experience of it and her own efforts to compile data about its use.

151. Second, Mr Mills contends Ms Hubert failed to take into account all committed developments when making her assessment. Ms Hubert refers to only two committed developments being taken into account at paragraphs 10-11 of her first witness statement, whereas there are others that Mr Warman has identified. Ms Hubert's second witness statement does assert that she has considered all the committed development. So the criticism may not be well-founded on the facts. More importantly, though, even if Ms Hubert had omitted some of the committed development from her deliberations, it is unrealistic to suggest such omissions are material to the current application. Ms Hubert did not consider the level of traffic to be generated, given the public transport mitigation, to be material. It is unrealistic to suppose that this view would be altered by there being more committed development. It also brings one back to the point as to the questionable utility of a precise quantification of the problems at the Junction from committed development, in making the sort of judgment required under paragraph 109 of the NPPF for this particular small scale development. Such judgment is concerned

with the residual cumulative impact of this particular development and whether it could be described as severe. Variations in what one assumes to be the existing or future traffic flows from any omitted "committed development" are very unlikely to be capable of affecting that overall judgment.

152. Third, Mr Mills argues that Ms Hubert's approach to this application is not consistent with KCC's approach to other development, such as the Golf Course application or the Ockley Road application, or the approach it has adopted to the emerging Local Plan. He contends that for those forms of development, KCC has adopted an approach that any negative impact on the Junction will be unacceptable and the subject of objection (absent a deliverable mitigation solution such), but Ms Hubert has adopted an inconsistent approach to the White House application. In my judgment, there is no force in this point as I have pointed out. KCC's approach of objection to the Golf Course application, the Ockley Road application (which is estimated to generate approximately 22 two-way movements in the AM and PM peaks) and the allocations in the emerging Local Plan, absent a specific scheme of mitigation, in fact serve to reinforce the point that KCC is adopting an approach of assessing proposals on a case-by-case basis as one would expect. It shows that for development that will have different impacts to those arising here, KCC may well object. Its objection to the emerging Local Plan allocations is an objection in principle to the volume of such allocations in the absence of effective mitigation.

153. Fourth, Mr Mills argued that Ms Hubert has made an error in her first witness statement in assuming that the increase in traffic during both peaks would be 0.1% (using the Second Interested Party's data), whereas it was predicted to be 0.2%, and this indicates that Ms Hubert has not understood the impact of the proposals. Again, I do not consider there to be any real force in this criticism. There is a possibility that Ms Hubert may have been referring to one way movements in that part of her statement, but even if not and she has made the mistake suggested, it is impossible to see how a difference of 0.1% is a material error that that affected her judgment.

154. During his submissions, Mr Mills sought to counter the significance of the public transport contribution by arguing that: (1) the KCC Business case states that £1,000 per dwelling should be provided in addition to improved infrastructure, whereas here the contribution offered is simply £1,000 per dwelling; and (2) there is no Travel Plan secured by conditions or by the section 106 obligation. Neither of these points, if they are being advanced as grounds of challenge, features in the Amended Statement of Facts and Grounds. There was no application for further amendment. I therefore do not consider them to form part of this challenge. In any event, they also do not appear to have real merit. It was a matter for KCC in terms of its advice and the Defendant in its discretion as to what contribution to seek. The contribution that has been secured reflects what was sought. To similar effect, it was a matter for the Defendant to decide what conditions to impose and what section 106 agreement to secure. The conditions imposed reflect those resolved by the Planning Committee and the section 106 agreement similarly reflects the content of what the Committee resolved should be included.

155. This just leaves the additional question raised by Mr Mills' further submission advanced at the hearing and in his Note as to whether the Defendant, acting through its Planning Committee, did in fact take into account the information available to it in the Transport Statement when making the necessary assessment under paragraph 109 of

the NPPF as to impact on the junction. In light of the approach set out in *Hunt* (above), Mr Mills submits that there is no evidence that the members of the Planning Committee read the Transport Statement, and it is not sufficient that it may have been available to the members if they were not either impliedly or explicitly being told that they should consider that document. In my judgment, the concern raised by Mr Mills does not justify quashing the Defendant's decision to grant planning permission for any or all of the following reasons.

156. First, the Officer Report to members did draw members' attention to the Transport Statement as part of the material relevant to the application. It is identified as one of the documents in the background papers in Section 9. It is referred to in the objections of the Parish Council. And it is referred to in Section 10 when dealing with highway matters. Whilst members were not told expressly that they should read it themselves, they could have been in no doubt as to its existence. They were able to check its content if they wished. This is different to the situation in *Hunt* where members in that case, performing a rather different duty, were given the impression that the report itself contained all that members needed to know, whereas they actually needed to read the EIAs in order to discharge their duty.

157. Second, although I consider it would certainly have been better if the Officer Report had summarised the content of Section 5 of the Transport Statement, that has to be seen in the context of what the Defendant's officers considered to be in dispute. As the documents reveal, KCC Highways had accepted the content of Section 5. There was no need for officers to discuss it for these purposes. Likewise, no objector had in fact disputed the trip generation figures from the proposed development in the Transport Statement when the matter was being reported to the Planning Committee. Although an issue was being raised as to the question of cumulative residual impact given the state of the Junction, this was an objection in principle to the idea of any further development based on the Claimant's point about "death by a thousand cuts" or the "dripping tap". It was not a specific challenge to the prediction that this development would generate the very low levels of traffic that had been identified in Section 5. It would have been better for the report to have identified specifically the levels of traffic that were to be generated, but those figures were not in dispute.

158. Third, and related to the preceding point, Mr Mills himself accepted that the required content for an Officer Report does need to be contextualised. In circumstances where a statutory consultee accepts the technical information provided (the example being the Environment Agency having no objection based on the content of a Flood Risk Assessment), there may be no need for the Officer Report to set out all of the detail of that technical information in the Officer Report. In my view, that example is close to the situation that arose here. KCC Highways had accepted that there was no material impact on the highway network from the development proposed, with the public transport contribution proposed. Whilst it remained a matter for the Defendant to reach its own conclusion on this and each and every issue, that does not mean that an Officer Report always needs to set out the detail of all accompanying materials in the Officer Report itself. Members will have access to all the relevant application material and will be able to access it to satisfy themselves in respect of any issue that arises; that does not mean that an Officer Report always has to report all technical information the report itself. As in *Lensbury*, the listing of relevant information in the report will make it easier for the local planning authority to show that such information has been properly

taken into account, but it does not necessarily follow that a failure to list all such information means that it has not been taken into account.

159. Fourth, if I am wrong in any of these conclusions on the facts of this case, and the Planning Committee failed to take into account the information in the Transport Statement when reaching their judgment under paragraph 109 of the NPPF, it appears to me to be highly likely that the outcome would not have been substantially different if that error had not occurred; therefore I must refuse to grant relief under section 31(2A) of the Senior Courts Act 1981 in any event. Had the Officer Report set out the trip generation from the development in section 5 of the Transport Statement for members, it would have simply confirmed the existence of the very low level of traffic to be generated which had caused KCC Highways to be satisfied that there was no material (let alone a severe) impact to the Junction, taken with the public transport contribution proposed. Although the judgment under paragraph 109 of the NPPF was a judgment for the Planning Committee, they were already aware that KCC Highways considered the cumulative impact not to be material. It is difficult to see how the quantitative figures underpinning KCC Highways judgment could do anything other than confirm why KCC Highways had taken that view. I am satisfied it is highly likely that the Planning Committee would have reached the same conclusion had that quantitative information been presented in the Officer Report. In this regard, I consider it is important that no one was challenging the accuracy of that quantitative assessment.

160. For all these reasons, I reject Ground 1.

Ground 2: Heritage

161. Under this ground (as now amended), Mr Mills submits that the Defendant erred in failing to have regard to Policy EN4 of the Local Plan. It stated as follows:

> "POLICY EN4
>
> Development involving proposals for the total or substantial demolition of unlisted buildings which contribute positively to the character or appearance of a conservation area will not be permitted unless an overriding case can be made against the following criteria:
>
> 1. The condition of the building, and the cost of repairing and maintaining it in relation to its importance and to the value derived from its continued use;
>
> 2. The adequacy of efforts made to retain the building in use, including efforts to find compatible alternative uses;
>
> 3. The merits of alternative proposals for the site, and whether there are acceptable and detailed plans for any redevelopment; and
>
> 4. Whether redevelopment will produce substantial planning benefits for the community, including economic regeneration or environmental enhancement."

162. It is common ground that the Defendant did not have regard to it. The issue is whether it was relevant. Mr Mills submits it was. Ms Thomas and Mr Cannock submit it was not. They also point out that the Claimant did not raise this issue in response to the planning application or the officer's report. The Site was not within a Conservation Area, but the Officer Report concluded that the proposed development would cause less than substantial harm to the nearby Conservation Area in consequence of the loss of the White House as a non-designated heritage asset. Both sides argue that Policy EN 4 of the Council's development plan is "clear in its terms", but argue for opposite results.

163. Mr Mills submits its scope is established in its first sentence of the policy, and that there is no requirement that demolition must actually be in the Conservation Area itself. He submits that the policy applies, according to its terms, to development involving proposals for the total or substantial demolition of unlisted buildings which contribute positively to the character or appearance of a conservation area. He notes that the heading "Demolition in Conservation Areas" is not contained within the policy itself, but rather in the supporting text, and one cannot use such text to trump the meaning of the actual wording of EN4, in accordance with the principles set out in *Cherkeley*.

164. He also claims the Defendant's position is "incoherent" because it contends that Policy EN5 is applicable to development outside conservation areas, despite appearing underneath the heading in the supporting text: "Development in Conservation Areas". He notes that the Supporting Text to Policy EN5, and indeed the wording of Policy EN5 itself, makes clear that it applies to proposals which affect the character of a conservation area, and this demonstrates that the headings in the Supporting Text do not control the meaning of these policies. Accordingly, he submits that Policy EN4 was a policy of the development plan material to the determination of this application which the Defendant failed to take into account.

165. Both Ms Thomas and Mr Cannock argue that Policy EN4 was not applicable and, properly interpreted, it only applies to demolition of a building in a conservation area. They submit this is consistent with the sub-heading in the supporting text, the paragraphs in the supporting text and the general framework applicable at the time that the policy was adopted in 2006.

Analysis

166. I am satisfied that the dispute is principally one of interpretation for the court, rather than consequential application for the decision-maker. Consequently, the task is to identify the correct meaning in accordance with the well-established principles that apply to this area.

167. Both Policy EN4 and Policy EN5 appear in a section of the Local Plan dealing with 'CONSERVATION AREAS'. As the parties note, Policy EN4 is set out with supporting text in a section with a sub-heading: "Demolition in Conservation Areas", and Policy EN5 is set out with supporting text in a section with a sub-heading: "Development in Conservation Areas".

168. The supporting text for Policy EN4 provides as follows:

> "Demolition in Conservation Areas

> 4.39 Conservation areas often contain buildings of architectural or historic importance which, when grouped with other buildings, walls, trees and other features create areas of distinct character worthy of conservation. Many such important features are identified within approved Conservation Area Appraisals. PPG15 establishes a general presumption in favour of retaining buildings which make a positive contribution to the character or appearance of a conservation area. The Local Planning Authority will therefore seek the retention of all such buildings, walls and other features within the designated conservation areas. Apart from certain exceptions laid down in directions made by the Secretary of State for the Environment, Transport and the Regions, Conservation Area Consent is required for the total or substantial demolition of buildings and of many walls in conservation areas.
>
> 4.40 When demolition of a building that makes a positive contribution to the character or appearance of the conservation area is proposed, the Local Planning Authority will require clear and convincing evidence of the condition of the building, the repair costs, and all efforts that have been made to sustain existing uses or find viable new uses, and will require evidence that these efforts have failed. Consent for demolition will not be given unless there are acceptable and detailed plans for any redevelopment.
>
> 4.41 Where the building makes little or no contribution to the area, the Local Planning Authority will need to have full information about what is proposed for the site after demolition with detailed and acceptable plans for any redevelopment."

169. Whilst Policy EN5 appears under a sub-heading that appears to limit its application to development within a conservation area, Policy EN5 itself demonstrates that it has wider application. It states:

> "POLICY EN5
>
> Proposals for development within, or affecting the character of, a conservation area will only be permitted if all of the following criteria are satisfied:
>
> …"

170. I agree with Mr Mills that the supporting text, which includes in this case the sub-headings, are not part of the relevant policies themselves and cannot "trump" the meaning of the policy itself. However, the supporting text is relevant to the interpretation of the policy to which it relates. It is important in arriving at the correct meaning of the policy itself in a case of potential ambiguity such as this.

171. Mr Mills is correct that the wording of Policy EN4, read on its own, does not expressly limit its application to demolition of a building <u>within</u> a conservation area. It refers to

demolition proposals of unlisted buildings which "contribute positively to the character or appearance of a conservation area". It is possible in principle for a building to affect the character of a conservation area, even if it is not within the conservation area. Policy EN5 itself recognises this in referring to proposals for development "within or affecting the character" of a conservation area. The Defendant necessarily accept this in the application of Policy EN5 to the development proposal in this case. Logically, it is therefore possible in principle for a building outside a conservation area "to contribute positively" to its character; consequentially, demolition of such a building is capable of falling within the scope of Policy EN4 if one were to read the words literally, and in isolation from the supporting text and the wider context of the policy.

172. In my judgment, such an interpretation would suffer from the vice of interpreting the meaning of the policy as if it were a statute, or contract, and without reading the policy in context as is required, in accordance with the principles derived in *Tesco Stores v Dundee* as summarised recently by Dove J in *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] PTSR 81 at [23]*:* the context of a policy includes its subject matter and the planning objectives which it seeks to achieve and serve and the context is also comprised by the wider policy framework within which the policy sits and to which it relates.

173. I consider that the supporting text to Policy EN4, along with the terms of Policy EN5 and its supporting text, are particularly relevant to the interpretation of Policy EN4. This is not a question of such supporting text becoming part of Policy EN4, or trumping the meaning of Policy EN4, but rather part of the process of ascertaining whether it applies to demolition outside a conservation area or not, as the wording of Policy EN4 read in isolation might suggest.

174. Once one takes account of that context, it becomes clear that Policy EN4 does not bear the meaning for which Mr Mills contends (albeit that Mr Mills' interpretation is a reasonable one of the words read in isolation). There are a number of factors that lead to this conclusion:

i) First, there is sub-heading in the supporting text to Policy EN4. It is a clear indicator that Policy EN4 is directed at demolition in a conservation area, rather than demolition outside it, as that is what it states. I accept one must be cautious about attributing too much weight to this in the interpretative exercise for two main reasons: (1) the sub-heading is within the supporting text, not the policy itself; and (2) there is a similar sub-heading for Policy EN5, yet it is accepted that it does not prevent Policy EN5 applying to development outside a conservation area which affects it. Nonetheless, when one considers the overall context, neither of these points prevents the sub-heading from having important significance. One cannot ignore the sub-heading's straightforward meaning. The similarity of the sub-heading used in Policy EN5 undoubtedly creates some doubt over that straightforward meaning. Had the sub-heading in Policy EN5 read "Development in, or affecting the character of, a Conservation Area", the position would have been much clearer. Yet the important point to note is that when one reads that other sub-heading with Policy EN5 itself, it becomes clear that the sub-heading is expressly to be understood in that way, whereas the same is not true of the sub-heading in respect of Policy EN4. That is because Policy EN5 itself makes it clear that it is a policy which applies to proposals "within,

or affecting the character of, a conservation area". By contrast there is no such equivalent express identification in Policy EN4.

ii) Second, and linked to the preceding point, the direct contrast between the wording used in Policy EN4 and that used in Policy EN5 is also important. Policy EN5 is unambiguous. It applies to development proposals "within, or affecting the character of, a conservation area". Policy EN4 contains no such specific locational clarity. Where the Local Plan intends a policy to be applicable to development proposals outside the conservation area, as well as those within, it makes this explicit in the way it has in Policy EN5. The absence of such explicit wording in Policy EN4, when read with the presence of such explicit wording in Policy EN5, is another strong contextual factor for rejecting Mr Mills' interpretation.

iii) Third, it is not simply the sub-heading to the supporting text for Policy EN4 which provides relevant interpretative context, but also the content of the paragraphs of the supporting text itself. Paragraphs 4.39-4.42 read as a whole are focused upon the issue of demolition of buildings in conservation areas. Paragraph 4.39 identifies the role of buildings within conservation areas in creating distinct character with the use of the words "often contain". It is concerned within buildings within the conservation areas, not outside them. It then goes on to note that many such important features are identified "within" approved Conservation Area Appraisals. This is identifying the practice prevalent in such appraisals of identifying buildings within the area which are considered to be positive, neutral or harmful to the character of the conservation area. Again, the focus is on buildings within conservation areas, rather than any buildings outside those areas.

iv) Fourth, paragraph 4.39 also refers to former national policy when the Local Plan was adopted in PPPG15. As Ms Thomas identified, PPG15 identified a general presumption in favour of retaining buildings within a conservation area that made a positive contribution to that character or appearance. PPG15 identified the need for conservation area consent (applicable at the time) for the total or substantial demolition of buildings "in" conservation areas. All of this is consistent with a focus on demolition of buildings in conservation areas. That part of PPG15 which is being referenced in the Local Plan came under a heading "Conservation area control over demolition" in PPG15. Paragraph 4.25 of PPG15 began by noting that conservation area designation introduced control over the demolition of most buildings within conservation areas, with reference to the terms of section 74 of the Planning (Listed Buildings and Conservation Areas) Act 1990 in the form that then existed). Paragraph 4.26 of PPG15 referred to the duty on local planning authorities under section 72 of that Act to pay special attention to the desirability of preserving or enhancing the character or appearance of the area in question, and noted that in the case of conservation area controls, account should clearly be taken of the part played in the architectural or historic interest of the area of the building for which demolition is proposed, and in particular of the wider effects of demolition on the building's surroundings and on the conservation as a whole. It is in this context that paragraph 4.27 of PPG15 stated:

> "4.27 The general presumption should be in favour of retaining buildings which make a positive contribution to the character or appearance of a conservation area. The Secretary of State expects that proposals to demolish such buildings should be assessed against the same broad criteria as proposals to demolish listed buildings (paragraphs 3.16-3.19 above). In less clear-cut cases - for instance, where a building makes little or no such contribution - the local planning authority will need to have full information about what is proposed for the site after demolition. Consent for demolition should not be given unless there are acceptable and detailed plans for any redevelopment. It has been held that the decision-maker is entitled to consider the merits of any proposed development in determining whether consent should be given for the demolition of an unlisted building in a conservation area."

v) All of this is focused upon demolition of unlisted buildings in a conservation area. Whilst none of this text can be treated as forming part of the policy, it is relevant to its interpretation and provides a strong indicator that Policy EN4, properly interpreted in context, is concerned with demolition of buildings in a conservation area. Paragraphs 4.40 and 4.41 of the supporting text are also consistent with this interpretation, picking upon on the need for acceptable and detailed plans for redevelopment where demolition is to be permitted which was a feature of PPG15 for demolition of buildings in conservation areas.

vi) Sixth, there is also the wider legal context that was applicable when Policy EN4 was formulated and adopted by the Defendant in 2006. At my request, the parties provided. written submissions as to control over demolition of buildings as at 1 March 2006. The parties were not able to reach full agreement on a note for the court, but there is no significant dispute as to the reality. Section 55(1A) of the 1990 Act at the time included "demolition of buildings" within the definition of "building operations" that would, in turn, fall within the definition of "development" requiring planning permission. Section 55(2)(g) excluded "demolition of any description of building specified in a direction given by the Secretary of State to planning authorities generally or to a particular local planning authority". Pursuant to the Town and Country Planning (Demolition – Description of Buildings) Direction 1995, certain buildings were so excluded, including listed buildings, buildings within a conservation area and (subject to some exceptions) any building other than a dwellinghouse, or a building adjoining a dwelling-house. That Direction was later found to be unlawful in certain respects in light of the obligations under the Environmental Impact Assessment Directive, but it is not necessary for me to consider that here. For present purposes, it is common ground that as at 1 March 2006, subject to some exceptions demolition of any building (save for a dwelling house or a building adjoining a dwelling house) did not require planning permission. All of this makes it less likely that Policy EN4 applies to demolition of a building outside a conservation area, given that there were only limited cases where planning control applied to such demolition at the time. It is fair to say that none of this

would *necessarily* preclude a local planning authority having a restrictive policy with the sort of criteria in Policy EN4 for buildings outside a conservation area which might still affect the character of that conservation area. It is just that some uneven and strange consequences would flow. For the demolition of most buildings in that category, Policy EN4 and its restrictive criteria would not apply at all, simply because planning permission would not have been required for such demolition (and no conservation area consent would have been necessary). Policy EN4 would therefore only have applied to buildings not specified in the direction, such as dwellings. Even in those circumstances, the Town and Country Planning (General Permitted Development) Order 1995, Schedule 2, Part 31 granted planning permission for such demolition, subject to a prior approval procedure. It is difficult to see the overall strategic purpose of having a restrictive policy like EN4 to demolition of buildings outside a conservation area in these circumstances. By contrast, interpreting Policy EN4 as applicable to demolition in conservation areas, which did remain subject to control by a local planning authority through the conservation area consent under section 74 of the P(LBCA)Act 1990, is far more consistent with that legislative context and an overall strategic purpose as at 1 March 2006, when that policy was adopted.

175. For these reasons, I have reached the firm view that Policy EN4 was not applicable to the development proposal, as it did not involve demolition of a building in a conservation area.

176. In light of this conclusion, it is unnecessary for me to consider Mr Cannock's further submission that even if there had been an error, relief should be refused under section 31(2A) of the Senior Courts Act 1981. I would have had difficulty accepting that submission. If the Defendant had been in error in failing to take into account Policy EN4, restrictive criteria to justify demolition of the White House would have applied. That would have required analysis of the criteria in Policy EN4 which are not evident on the face of the Officer Report, nor in the material supporting the application. That is hardly surprising because neither the Second Interested Party nor the Defendant considered them to be applicable.

Ground 3 - AONB

177. Under Ground 3, the Claimant argues that that there two errors by the Council: (1) an error in relation to whether there were "exceptional circumstances" to justify the development in the AONB for the purposes of paragraph 172 of the NPPF and Policy HD1(B) of the Neighbourhood Plan; and (2) a failure to consider heritage matters in relation to the AONB, where paragraph 172 notes that the "conservation and enhancement of … cultural heritage" is an important consideration in such areas.

178. Mr Mills submits that the reasoning in the Officer Report regarding the AONB and the existence of exceptional circumstances was to the effect that:

i) The Borough lacks a 5-year housing land supply;

ii) Hawkhurst is a Tier 2 settlement in the Core Strategy;

iii) Therefore there are exceptional circumstances for housing.

179. He submits that the jump from (2) to (3) is a *non sequitur* and that, in light of the reasoning in *Mevagissey*, alternative locations for housing had to be properly considered. He says there is no explanation as to why further development had to be in Hawkurst to meet the five year supply, or why there was a particular need for housing in Hawkhurst which has accommodated more than was assigned to it in the Core Strategy.

180. Both Ms Thomas and Mr Cannock submit that this is not a fair reading of the Officer Report which undertook a comprehensive examination of the AONB, and the reasons why it was considered that exceptional circumstances did exist (as summarised in paragraph 10.111). It was based on a cumulative assessment of the positive and negative impacts of what was proposed.

181. I have no hesitation in rejecting the Claimant's contentions on this point. I agree with the submissions made by Ms Thomas and Mr Cannock as to the fair reading of the Officer Report as a whole. I do not accept Mr Mills' characterisation of the Officer Report as simply containing the three steps he suggests. This is not a fair reading of the report as a whole, including paragraphs 10.66-75 in particular. The absence of a five year housing land supply and Hawkhurst's role as a Tier 2 settlement in the Core Strategy were both factors that are identified in analysing the existence of exceptional circumstances, but they are certainly not the only factors identified. Nor is the reasoning expressed in the way that Mr Mills attempts to characterise it, so his allegation of a non sequitur is simply not applicable. There were a number of factors which cumulatively went into the conclusion overall that exceptional circumstances existed for the development proposed which are ignored by Mr Mills.

182. These included: (1) the whole of Hawkhurst and the surrounding area being within the AONB; (2) the high level of need for new housing: (3) the conclusion that it was "highly likely" that additional housing sites in the AONB would be required: (4) the Site's particular location close to the LBD; (4) whilst other sites beyond Hawkhurst and outside the AONB were possible for the development proposed, any housing proposed in or on the edge of that settlement would be within the AONB and the proposal would provide a significant addition to that settlement's housing provision; (5) in the call for sites for Hawkhurst's housing provision, some of which were well outside the LBD and further from services within the village; and (6) there was no scope for developing sustainably located housing for Hawkhurst outside the AONB.

183. The Claimant's analysis also ignores, or sidelines the significance attached to the need for new housing to serve Hawkhurst, given its Tier two status, within the context described. This was a matter for the judgment of officers and the Defendant. They were entitled to take this into account when considering the existence of exceptional circumstances for the development. Moreover, the Claimant's analysis ignores those parts of the report which addressed the impacts on the AONB in considerable detail which led to the judgment that principally due to the housing delivery benefits outweighing the harm to the landscape and environment, there were exceptional circumstances (see paragraph 10.111). In these circumstances, the Claimant's reliance on what is stated in *Mevagissey* does not assist. As it happens, the Officer Report did consider the question of alternatives. The officers concluded that there was no scope for developing sustainably located housing for Hawkhurst outside the AONB. The Claimant is essentially seeking to challenge the weight that the Defendant attached to the need for housing for Hawkhurst, but there are no proper grounds for doing so.

184. The second element of the challenge under Ground 3 is a complaint that the Officer Report contained no advice to the Planning Committee that the conservation of cultural heritage was an important consideration in an AONB. The Claimant argues that whilst heritage harm was addressed, it is a matter which should be considered in the context of harm to the AONB. Mr Mills submits that the table at paragraph 10.107 demonstrates that the environmental aspects of the scheme considered in the context of paragraph 172 did not include the cultural elements of the scheme.

185. Both Ms Thomas and Mr Cannock submits that this is also an artificial reading of the report as a whole and that members were well aware of the advice in paragraph 172 and aware of the heritage effects of the scheme when considering paragraph 172 of the NPPF.

186. Again, I have no hesitation in rejecting this part of the ground of challenge when assessing the Officer Report as a whole, in accordance with the well-established principles summarised in *Mansell.* Paragraph 172 of the NPPF was a paragraph drawn to the member's attention and, in accordance with the relevant principles, it can be assumed that they would be familiar with its content. Paragraph 172 of the NPPF identifies that the conservation of cultural heritage is also important in an AONB (ie in addition to the great weight to be given to conserving and enhancing landscape and scenic beauty).

187. In this case, the Officer Report had already dealt in detail with the conservation of cultural heritage in paragraphs 10.26-10.38. There is then a detailed section on the AONB in the paragraphs to which I referred which looked at effects on the landscape and the environment. Mr Mills is correct in saying that the heritage impacts are not specifically included in that section, but the Officer Report then returns to the question of whether the development was sustainable development in a way which sought to draw all the threads together at paragraph 10.112-10.116. There all the identified negative aspects are identified, including the "less than substantial harm" to the heritage assets along with the slight localised harm to the AONB that had been identified in the earlier section on the AONB. In my judgment the effect on heritage assets was treated as important generally in the overall assessment. The Officer Report therefore did not set out expressly that the conservation of cultural heritage in an AONB is important, as it was being treated as important anyway.

188. Even if there had been any error in not repeating the conclusions about heritage impacts in the section dealing with effects on the AONB, I am satisfied that it is highly likely that the outcome would not have substantially different if that error had not occurred. I would therefore be obliged to refuse relief for such an error under section 31(2A) of the Senior Courts Act 1981. I therefore reject the Claimant's complaint under Ground 3.

189. For all these reasons, despite the thorough and attractively presented arguments presented by Mr Mills on the Claimant's behalf, I dismiss this claim for judicial review.