Neutral Citation Number: [2014] EWHC 3663 (Admin)

Case No: CO/1878/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/11/2014

Before:

THE HONOURABLE MRS JUSTICE PATTERSON DBE

- -

Between:

THE QUEEN ON THE APPLICATION OF KHAN	**Claimant**
- and -	
LONDON BOROUGH OF SUTTON	**Defendant**
- and -	
(1) VIRIDOR WASTE (THAMES) LIMITED	
(2) THAMES WATER UTILITIES LIMITED	
(3) SOUTH LONDON WASTE PARTNERSHIP	**Interested Parties**

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- -

Justine Thornton (instructed by **Deighton Pierce Glynn**) for the **Claimant**
Saira Kabir Sheikh QC (instructed by **Sharpe Pritchard**) for the **Defendant**
David Elvin QC and Heather Sargent (instructed by **Bevan Brittan LLP**) for the **First Interested Party**

Hearing dates: 9-10 October 2014

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Approved Judgment

Mrs Justice Patterson:

Introduction

1. This is an application for judicial review of a decision by the defendant on 14 March 2014 to grant planning permission for development at Beddington Farmlands Waste Management Facility, Beddington Lane, Beddington ("the Beddington site"). The planning permission is in the following terms:

> "Phased demolition of existing buildings and development of an energy recovery facility (ERF) and buildings ancillary to the ERF, construction of two combined heat and power pipe lines, revisions to the approved restoration plan for the Beddington landfill site, amendments to the existing in-vessel composting operations, removal of existing access and provisions of new access road and reconfiguration of access to Thames Water site to the north."

2. The claimant is a hotel manager who lives in Croydon, about two miles from the proposed site. He is co-ordinator of the Sutton and Croydon Green Party. He helped found the 'Stop the Incinerator Group', a loosely formed local group which campaigns against the development.

3. The defendant is the waste planning authority with statutory responsibility for determining planning applications for waste management facilities proposed for its area. The defendant is also part of the South London Waste Partnership, formed in 2003, which consists of the London Boroughs of Merton, Croydon, Sutton and Kingston (the partnership). The partnership is responsible for the collection of municipal waste in the four London Boroughs and its treatment or disposal. It acts jointly on waste matters including the procurement of waste services.

4. The first interested party is a waste management company and the applicant for planning permission at the Beddington site. In 2012 it entered into a twenty-five year contract with the South London Waste Partnership to process the partnership's municipal waste from 2017 onwards. The second and third interested parties did not take part in the proceedings before the court.

5. The Beddington proposal has been high profile and quite controversial. It is development of potential strategic importance to London, by virtue of its size and being located on Metropolitan Open Land (MOL).

6. On 13 June 2014 the claimant was granted permission to bring the proceedings by Collins J on four grounds. Those grounds are:

   i) Whether there was an error in the interpretation of the South London Waste Plan?

   ii) Whether the defendant erred in its consideration of "very special circumstances"?

iii) Whether the defendant fettered its discretion in the decision making exercise? and

iv) Whether the defendant erred in its assessment of the environmental impact of the combined heat and power (CHP) pipework beyond the boundaries of the site?

Background

7. The Beddington site is some 97.2 hectares. The development is planned for the north-eastern corner of the application site. The site has temporary planning permission for a landfill facility which covers most of the site, a recycling and composting centre where the permission expires in 2023 and a skip waste recycling facility.

8. The site is entirely within designated MOL in the London Plan.

9. Policy 7.17 of the London Plan states that, "the strongest protection should be given to London's MOL and inappropriate development refused, except in very special circumstances."

10. In addition to the MOL designation the site has been safeguarded as part of the Wandle Valley Regional Park. In 1996 the defendant teamed up with the boroughs of Croydon and Merton to create the Wandle Valley Country Park Master Plan which includes the whole of the Beddington Farmlands. The proposed Wandle Valley Regional Park includes the 200 hectare country park at Beddington Farmlands linking Beddington Park with Mitcham Common.

11. On 16 July 2012 the interested party applied to the defendant for planning permission in the terms set out above.

12. The planning application was reported to the development control committee on 24 April 2013. The officer report recommended approval of the application subject to the conclusion of a legal agreement, the provision of additional areas for habitat and access and no adverse direction being received from the Mayor of London to whom the application had to be referred.

13. The application was deferred so that there could be further investigation on air quality and traffic issues, to consider reinforced conditions on those topics and related provision in the draft section 106 agreement.

14. On 15 May 2013 the development control committee resolved to grant planning permission.

15. The Mayor was consulted and indicated that he was content for the defendant to decide the application.

16. On 14 March 2014 planning permission was granted subject to conditions and after the execution of a section 106 agreement.

17. As part of a statement under Regulation 24 the defendant set out the main reasons and considerations on which the decision was based. That reads as follows:

"The main reasons and considerations on which the decision is based are set out in the reports to the Development Control Committee on 24th April 2013 and 15th May 2013 and the subsequent minutes of those meetings.

The development would be contrary to London Plan Policy 7.17 and Sutton Core Planning Strategy PMP 9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and wider MOL. It would also constitute inappropriate development on MOL within the terms of the NPPF.

However, it was acknowledged that the application site is expressly safeguarded for continued waste management use under Policy WP3 of the South London Waste Plan. The Waste Plan, which was adopted in 2012, post-dates the Core Planning Strategy by three years and is the most up to date expression of the Council's waste planning policy. Whilst the Waste Plan has a lifetime of 10 years and the ERF would be expected to stand for at least 25 years, the proposal cannot be considered contrary to Policy WP3. Policy WP3 encourages safeguarded sites to maximise their potential for waste use subject to other policies in the Waste Plan and Development Plan.

As the proposal is in conflict with development plan policy, it was necessary to consider whether there were other material planning considerations that outweigh the conflict and whether they constitute the very special circumstances necessary to clearly outweigh the harm including that arising from the inappropriate nature of the development.

The following material considerations to justify inappropriate development on MOL were considered to have been demonstrated:

1. Whilst the current waste use is subject to time limited permissions, waste management activity at the site has taken place for many years and is safeguarded in the development plan. Further, intensification of that use is encouraged by the development plan.

2. There is an identifiable and urgent need to divert residual waste arising from landfill and the proposals will provide for this in line with European Directives and national policies and strategies.

3. The alternative sites assessment report shows that there are no alternative sites that are suitable, available and achievable to deliver this proposal in the required timescale.

4. The ability of ERF in this location to provide heat for local homes to augment and secure local CHP initiatives.

5. The energy to be produced from the biodegradable element of the input to the ERF is classed as renewable, and therefore paragraph 91 of the NPPF applies.

Other material considerations to be taken into account that were considered to weigh in favour of the application are:

1. The proposal would see development consolidated on a smaller area of the site when compared to existing and permitted buildings and hardstandings.

2. The proposed inputs of residual waste and recyclables are already delivered to the site in similar or greater volumes, meaning that new traffic impacts would be limited except than during the construction of the plant.

3. Where potentially adverse environmental impacts have been identified, mitigation has been secured by legal agreement or planning conditions. Importantly, this includes securing access to additional areas of land to help mitigate the permanent loss of part of the restored lands to the ERF and funding for a warden to help manage the restored lands.

The planning conditions which have been applied and the legal agreement which has been entered into ensure that these mitigation measures will be provided.

The permanent loss of part of the site to development and the impact this would have on the open character of the proposed Wandle Valley Regional Park and wider MOL were significant policy concerns. However, the material considerations in favour of the development were also significant and it was considered that sufficient very special circumstances had been demonstrated to justify inappropriate development on MOL. The balance was considered to be clearly in favour of the scheme."

Ground One: Did the defendant err in its interpretation of the South London Waste Plan?

Submissions

18. The claimant's original submission that the defendant had decided the planning application by reference to the wrong waste policy, namely, WP5, was not pursued.

19. Instead the claimant contended that policy WP3 was more than a safeguarding policy. It was a policy which was prescriptive and which set a time period after which waste disposal at the Beddington site was not acceptable.

20. The claimant contends that there is a statutory requirement to determine the application in accordance with the development plan as a whole. As a result the Beddington site is safeguarded until 2023 for waste uses but thereafter it is to return to MOL.

21. To focus exclusively on policy WP3 ignores the development plan as a whole. It depends on characterising the footnote to policy WP3 as no more than supporting text. That is an interpretation which is not sensible or pragmatic. Further, such an interpretation is contrary to the main understanding of the main players in the South London Waste Plan during the evolution of the plan's policies.

22. In particular, the claimant refers to the initial policy comments made by the then relevant planning officer, Duncan Clarke, when he said:

> "5.5. The South London Waste Plan recognises the importance of the Metropolitan Open Land designation on the site but also notes the Resolution to Grant Planning Permission that exists on the site. Through Policy WP3, the site is safeguarded for its existing waste use (as required by Policy 5.17 of the London Plan and Policy BP8 of the Sutton Core Strategy) but it is recognised, in Schedule 1 that accompanies the policy, that when the current Resolution to Grant expires in 2023, the site will cease to be safeguarded and so other designations will have their full effect.
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> 5.6. The policy stance taken by the South London Waste Plan has been formulated to be in conformity with the higher policy documents and also in response to representations received from statutory consultees at consultation stages on the South London Waste Plan. At publication stage, the Mayor of London commented: "The GLA support the inclusion of this site in the SLWDPD given the fact that note has been made of the Mayor's previous advice with regards to the site having temporary permissions for waste only till 2023, after which, the land will be required to be incorporated into the Wandle Valley Regional Park." Natural England stated: "Natural England acknowledges the location of this existing, and operational site together with the adjacent Thames Water site. The statement that upon expiration of the existing permissions for the Viridor site, the land will be remediated and incorporated in to the Wandle Valley Regional Park, by 2023 is welcomed and strongly supported".
>
> 5.7. Consequently, the extension of any waste activities on the site beyond 2023 would be considered contrary to policy expressed in the South London Waste Plan, which has been formulated on the advice of the Mayor of London and to be in conformity with the Sutton Core Strategy."

23. That officer continued when dealing with the Wandle Valley Regional Park as follows:

> "5.14. During the Consultation to the Proposed Changes to the South London Waste Plan (September 2011), Viridor made representations to alter the Schedule 1 by proposing that the final sentence ("After this, the land will be incorporated into the Wandle Valley Regional Park.") should be deleted and replaced with: "However, there is potential for the grant of further planning permissions for continuing waste management uses, or for additional waste management uses, in accordance with the policies of the development plan and taking into account the wider landfill restoration plan and proposals for a Wandle Valley Regional Park." In addition, Viridor also made a representation to change the reference on Page 71 to "Ensuring that any proposals for new facilities, extension of time, or intensification of use at the site takes account of the sites relationship with the proposed Wandle Valley Regional Park." The Inspector did not accept these representations."

24. As a whole the Core Strategy, South London Waste Plan and the London Plan which together are the development plan make the policy position clear, namely, that the waste use is to cease in 2023. The error made by the defendant in concluding that there was compliance with waste policy was one that carried through into its consideration of very special circumstances. There was a further flaw in that the defendant failed in its evaluation of the proposal, to consider it against a post-2023 baseline with no development on the site.

25. The case of *R (on the application of Cherkley Campaign) v Mole Valley District Council* [2014] EWCA Civ 567 relied upon by the defendant and interested party was inapplicable in the current circumstances. That was because there was no inconsistency within the development plan.

26. The defendant and interested party contend that policy WP3 is clear in its wording. It applies to existing permitted sites which Beddington clearly is. The sites are listed in schedule 1. They are to be encouraged to maximise their potential provided that the proposals satisfy all other policy requirements of the South London Waste Plan and satisfy other relevant policies within the applicable borough's development plan.

27. There is nothing in the footnote to the policy which states that the site is safeguarded beyond the planned period which expires in 2021. Nor is there anything which says the site is to be within the Wandle Valley Regional Park. What the footnote sets out is a factual statement of the position.

28. The defendant refers to the inspector's report at the examination of the plan when he considered under issue 2 policy WP3. He raised the following issue:

> "3.4. Once planning permission is granted for a waste management or waste transfer site does it then come within the scope of this policy? In which case, is there not a tension between this policy and other aspirations with respect to Viridor's non-landfill facilities at Beddington Farmlands (both existing and prospective)?"

29. The Local Authority responded as follows:

> "3.2.4. The boroughs intend that, once planning permission is granted for a waste management site over 0.2 ha in size, it will come within the scope of this policy. As a waste management facility, it will be recorded as existing capacity in the boroughs' monitoring procedures. Since the plan is for ten years, the boroughs do not consider there is tension between Policy WP3 and Viridor's non-landfill facilities at Beddington Farmlands. Until the end of the plan period (2021), Viridor has scope to develop its recycling and composting centre as it sees appropriate provided development meets the other requirements of the South London Waste Plan and the London Borough of Sutton's Development Plan. The requirement to vacate the site at Beddington Farmlands by 2023 in order to make way for the creation of Wandle Valley Regional Park is well-known and is established by references within the plan and previous planning decisions. It is intended that a future plan dealing with the period beyond 2021 will address the issue of the loss of capacity."

30. The inspector concluded:

> "12. Any proposals brought forward by the successful bidder are likely to be within the Partnership Councils' area and therefore considered against the policies in the SLWP. Not knowing either the technology to be used or the site(s) to be considered has caused a degree of frustration among some participants who have therefore found it difficult to engage effectively with the process. It is evident also that some of the representations focus upon the NSW contract process rather than the SLWP proposals. That is not within my remit, something I emphasised in my Guidance Notes."

31. The case of *Cherkley* is applicable. That makes it clear that the planning policy is the policy itself and does not extend to supporting text.

32. The officer report clearly did deal with the position post-2023. An addendum to the ES was submitted in February 2013 which incorporated the 2023 baseline report. That had been requested by independent environmental compliance consultants, SKM Enviros, who had been retained by the defendant to assist with the technical assessment of the ES. A fair reading of the officer report of the 24 April shows that the post-2023 position without the development was very much taken into account: see 6.4 on the impact on openness, 6.9 and 6.10 for an overview on conservation management and landscape impact, 6.25 and 6.27 develop those matters in greater detail and 6.33 considers the transport position after 2023.

33. The overall conclusions note the position if the restoration to open land does not proceed and deal with the harm identified: see paragraphs 7.7 and 7.12 in particular.

34. The community impacts were also taken into account within the officer report as is evident in paragraphs 6.86, 6.87 and 6.94. The evaluation of that impact was a matter of planning judgment for the council.

35. The Wandle Valley Regional Park is an aspiration in the process of being developed. It had some funding from the National Heritage Lottery Fund and the Lord Mayor's Green Fund and some core funding. The Wandle Valley Regional Park Trust has been established as an independent body and a charity to link the four boroughs of Croydon, Merton, Sutton and Wandsworth within which the mapped area of the park is situated. Not all of the land within the park is green space and discussions are ongoing between the Trust and the boroughs on issues and opportunities to develop projects and funding opportunities.

Discussion and conclusions

36. The South London Waste Plan was prepared jointly by the London Boroughs of Croydon, Kingston, Merton and Sutton.

37. Policy WP3 is entitled 'Existing waste sites', it reads:

> "All existing permitted sites (except those with a site area of 0.2 ha or less that are located outsides SILs and LSILs) will be safeguarded for their current use or conversion to waste management. The current list (2011) is set out in Schedule 1.
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> These sites will be encouraged to maximise their potential, provided that proposals satisfy all other policy requirements of this South London Waste Plan. Proposals must also satisfy any other relevant policies within the applicable borough's Development Plan.
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> If, for any reason, an existing site is lost to a non-waste use, replacement compensatory provision will be required that, as a minimum, meets the maximum throughput that the site could have achieved. Any compensatory provision will need to comply with the policies of this South London Waste Plan together with any other relevant policies within the applicable borough's Development Plan.
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> In accordance with the plan's objectives and Policy WP1, if a redevelopment results in waste being treated higher up in the waste hierarchy but leads to a reduction in overall throughput, permission may also be granted."

38. Schedule 1 referred to is entitled 'Existing permitted waste sites', and contains a list of sites safeguarded by the 2011 London Plan. Site 18 is described as "Viridor Recycling and Composting Centre' (also known as CIC), Beddington Lane, Beddington*."

39. The asterisk is explained in a footnote at the end of the schedule in the following words:

> "These sites are subject to temporary planning permissions or resolutions to grant temporary planning permissions. All are due to expire in 2023. After this, the land will be incorporated into the Wandle Valley Regional Park."

40. As no reliance is now being placed on WP5 I do not set that out. It deals with windfall sites which the Beddington site is clearly not and is not applicable to the development proposals.

41. The relevant paragraphs of the officer report are:

> "**Impact on openness**
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> 6.4. The site of the ERF already includes buildings, hardstandings and structures associated with the permitted existing waste management uses, and is subject to a resolution to grant permission for additional development in the form of an anaerobic digestion plant. The openness of MOL in this location is therefore already affected, albeit on the basis of temporary planning permissions that require all buildings and structures to be removed by 2023 and the land to be fully restored soon after.
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> …
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> 6.6. The proposals would be mostly contained within the boundaries of the safeguarded site and would have a marginally smaller footprint than the existing buildings and structures. However, where the existing uses are divided between a number of medium size buildings of limited height spread over a relatively wide area, the proposal is to replace these with a single very large building (the ERF) and a number of lower height but not insubstantial ancillary buildings. The latter would stand in close proximity to the ERF giving the proposals a monolithic character that the existing buildings and structures lack. It is considered that this monolithic character would impact adversely on the openness of that part of the site on which the ERF is to stand. However, this adverse impact must be balanced against the removal of all buildings and structures (with the exception of the gas plant compound) from the remaining area of the safeguarded site. It is relevant to note that the proposal would consolidate waste management on about 3 hectares of the 7.4 hectare safeguarded area, and the remainder would be restored to open land uses.
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> …
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> 6.8. Overall, having regard to the additional height and mass of the ERF building, it is considered that the development would be harmful to the openness of the proposed Wandle Valley Regional Park and wider MOL contrary to London Plan Policy

7.17 and that part of Sutton Core Planning Strategy Policy PMP 9 that seeks to enhance MOL within the borough.

Conservation Management, Public Access and Landscape Impact

6.9. Core Planning Strategy Policy PMP5 states that the Council will promote the creation of the Wandle Valley Regional Park including improved provision for recreation and leisure. Core Planning Strategy Policy PMP9 confirms that the Council will seek to safeguard open space and to protect and enhance biodiversity within the area of the proposed Regional Park. Policy PMP9 also confirms the importance of protecting MOL. Site Development DPD Policy DM17 addresses development within a Site of Importance for Nature Conservation (SINC), stating that permission will not be granted where there is a significant damaging impact on the nature conservation value or integrity of the site unless the need for, and benefits of, the development clearly outweigh the harm, the Council is satisfied that there are no reasonable alternative sites that would result in less harm and adequate mitigation and compensation measures can be put in place.

6.10. The applicants state that landfill activity at the application site would cease upon completion and commissioning of the ERF, expected in 2017. Operations in 2018 would include final importation of inert fill to complete the landform, importation of remaining topsoil, seeding, planting and path construction in all areas except that occupied by the IVC operations which would continue until 2022 when the IVC contract with the Partnership ends. Restoration would be completed in 2023.

Conservation Management and Biodiversity

6.11. The restored landfill would be subject to on-going maintenance as set out in the agreed Conservation Management Scheme (CMC) (see 1.11 to 1.14 above). However, the construction of the ERF would result in the loss of about 3% of the agreed area. The area lost to the ERF is shown under the agreed CMS to become wet grassland and although the applicant proposed to provide a comparable amount of wet grassland elsewhere within the Beddington Farmlands, this would result in the fragmentation of this particular habitat.

6.12. The fragmentation of wet grassland is a key concern for all nature conservation bodies who consider this a key habitat for bird life. Wildlife groups seek the relocation of the ERF to the frontage land so that one large area of wetland might be retained and/or compensatory provision for lost grasslands within the Hundred Acres to the north. The Beddington Farmlands Bird Group is also concerned about a possible

adverse impact on the tree sparrow population (the site is one of London's most important sparrow habitats) and on reptiles (they refer to their own reptile survey which is not reflected in the applicant's study).

6.13. In respect of nature conservation, the applicant has agreed three main measures. Firstly, they propose to provide funding of £40,000 per annum for 25 years (index linked) for a warden to oversee management of the Beddington Farmlands from both an access and nature conservation point of view. Secondly, they have agreed to secure an additional area from the Hundred Acres, broadly equivalent to the site area of the ERF, to supplement the area for habitat creation, together with a payment of £50,000 to fund this and additional access (see below). This sum will be in addition to the £1.84m already secured through the existing Section 106 legal agreement to manage the restored lands. It should be noted that the additional land to be provided does not form part of the planning application or the restoration scheme, but would be subject to the control of the Beddington Farmlands Conservation and Access Management Committee (CAMC) established under the existing legal agreement. Thirdly, they have agreed to develop and implement a tree sparrow mitigation strategy, to be secured by a planning condition.

…

Public Access

6.19. Viridor claim that bringing forward implementation of the CMS by up to five years is a significant material consideration in their favour. Although there will be no significantly earlier access to the main public access area identified in the CMS because landfill has already ceased in this area, earlier access to some peripheral parts of the site still to be restored is possible. The application also proposed to retain the existing north-south footpath on the western site of the site, whereas the 2005 application replaced this with a route within the site. Both routes are now proposed, representing an increase in access provision over the previous proposals.

6.20. Also, the applicants have agreed to secure additional land within the SAM site to enable an access to be created to Beddington Lane from the public access area within the restored land. As for the additional Hundred Acres, this would not be part of the application but would be made available to the CAMC to implement the access, together with £50,000 funding for this and the project to manage habitats within the Hundred Acres. While this access was implied in the original restoration scheme there were no measures to implement it.

6.21. It should be noted that public access to the restored site will always depend on health and safety risks associated with methane gas emissions, which are likely to persist for a number of years. Full public access is unlikely to be provided for 20 to 30 years, with access until then limited to defined footpaths. This is a similar timescale to the original proposals. Nevertheless, the increased certainty of the new proposals is considered beneficial.

6.22. The applicant was specifically requested to provide funding to secure the future of the bridges over the railway line linking the restored area to Hackbridge. The applicant would ensure that the restored area provides links to these bridges, but does not propose to fund the retention of the bridges specifically.

6.23. In summary, although the majority of the restored land would continue to be reserved for nature conservation purposes, the proposals offer some additional public access to the restored lands relative to the previously agreed scheme. The area of the ERF and associated buildings that would be lost to any form of public access for the life of the development had been identified to become a wet grassland habitat in the previously agreed restoration plans and would have offered limited if any public access. Overall, the proposals are not considered contrary to Core Strategic Planning Policy PMP5 or the public access expectations of Policy PMP9.

…

Landscape Impact

6.25. The proposed Wandle Valley Regional Park will comprise a network of open spaces and the relationship between these spaces is both a visual and functional one. The London Plan and Sutton Core Planning Strategy both require the Regional Park to be considered as a whole. The ERF would introduce a large new element in the landscape that would have a significant impact on views across and therefore the open character of the Regional Park.

6.26. The applicants accept that the proposal would have a significant and adverse landscape impact, although they argue that this would be ameliorated by the urban context particularly of Croydon and the industrial background. The applicants have agreed to fund off-site landscaping in the sum of £35,000, and this should be helpful in softening the impact from some short views, but the longer views could not readily be mitigated.

6.27. For these reasons it is considered that the development would be contrary to London Plan Policy 7.17 and Sutton Core

> Planning Strategy Policy PMP9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and wider MOL.
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> **Transport**
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> 6.33. It is considered reasonable for the applicants to argue that their proposals have no adverse impact to 2023, other than for construction traffic, and the proposals for the construction phase are considered reasonable. They also argue that there is no adverse impact post-2023, as the adverse comparison with the traffic situation if waste management ceased is hypothetical, and any continuing highways concerns at that time relate more to growth in background traffic levels, and cannot reasonably be taken into account from a planning point of view. However, it is considered that there should be some mitigation post-2023, as from then landfill traffic would have ceased in the absence of the ERF proposal, but this should take the form of community funding rather than highways funding, as the issue being addressed is community well being, not highways mitigation. A contribution of £100,000 is therefore proposed to supplement the community find referred to in 6.37 below. The funds might be used to address concerns related to traffic by contributing to highways improvements, or to some other environmental or community project to offset the adverse impact on well being. The sum of £100,000 is justified to enable the community to undertake a project or projects of sufficient significance to off-set the adverse impact on well being significant.
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> …
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> **Section 106 Matters**
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> 6.94. The legal agreement would also secure the establishment of a community fund. This is required to address the considerable community concern about the adverse impacts of consolidating a waste management use on this site, given the previous commitment to discontinue waste management in 2023."

The relevant paragraphs from section 7 of the officer report are set out in paragraph 73 below.

42. In dealing with officer reports to planning committees Sullivan LJ said in *R (on the application of Siraj) v Kirklees Metropolitan Borough Council* [2010] EWCA Civ 1286 at [19]:

> "It has been repeatedly emphasised that officers' reports such as this should not be construed as though they were enactments. They should be read as a whole and in a commonsense manner, bearing in mind the fact that they are addressed to an informed readership, in this case the respondent's planning subcommittee. In *R v Selby District Council ex parte Oxton Farms* [1997] EGCS 60, Judge LJ, as he then was, said this:
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> > "From time to time there will no doubt be cases when judicial review is granted on the basis of what is or is not contained in the planning officer's report. This reflects no more than the court's conclusion in the particular circumstances of the case before it. In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken.""

43. In *R (on the application of Morge) v Hampshire County Council* [2011] UKSC 2 Baroness Hale said at [36]:

> "Some may think this an unusual and even unsatisfactory situation, but it comes about because in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities. As Lord Hoffmann put it in *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2003] 2 AC 295*, para 69, "In a democratic country, decisions about what the general interest requires are made by democratically elected bodies or persons accountable to them." Democratically elected bodies go about their decision-making in a different way from courts. They have professional advisers who investigate and report to them. Those reports obviously have to be clear and full enough to enable them to understand the issues and make up their minds within the limits that the law allows them. But the courts should not impose too demanding a standard upon such reports, for otherwise their whole purpose will be defeated: the councillors either will not read them or will not have a clear enough grasp of the issues to make a decision for themselves. It is their job, and not the court's, to weigh the competing public and private interests involved."

44. It follows that, in considering an officer report, the court must consider it as a whole and in the context that it was addressed to an informed local readership.

45. There are two material issues under this ground. First, the meaning of policy WP3. Second, whether the defendant adopted the appropriate baseline in its assessment by

failing to take into account as a material consideration how the land would be post-2023 without any development.

46. The construction of policy is a matter of law for the court to determine: *Tesco Stores Limited v Dundee City Council* [2012] PTSR 983 at [17] to [19].

47. The meaning of policy WP3 is, in my judgment, clear. It applies to all existing permitted sites the current list of which (in 2011) was set out in schedule 1. That list includes the Beddington site. The policy is that the listed sites will be safeguarded for their current use or conversion to waste management during the plan period.

48. Not only that but the listed sites are to be encouraged to maximise their potential for waste uses. That is to be subject to, first, all other policy requirements of the South London Waste Plan, and second, any other relevant policies within the applicable borough's development plan.

49. The policy position is thus that the site is safeguarded for waste use for the life of the plan under policy WP3, namely, until 2021.

50. In *R (on the application of Cherkley Campaign) v Mole Valley District Council* [2014] EWCA Civ 567 Richards LJ said:

> "16. Leaving aside the effect of the saving direction, it seems to me, in the light of the statutory provisions and the guidance, that when determining the conformity of a proposed development with a local plan the correct focus is on the plan's detailed *policies* for the development and use of land in the area. The supporting text consists of *descriptive and explanatory matter* in respect of the policies and/or a *reasoned justification* of the policies. That text is plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy. I do not think that a development that accorded with the policies in the local plan could be said not to conform with the plan because it failed to satisfy an additional criterion referred to only in the supporting text. That applies even where, as here, the local plan states that the supporting text indicates how the policies will be implemented.
>
> 17. In this case, therefore, the correct focus is on the terms of Policy REC12. That policy contains no requirement to demonstrate need. It sets out six criteria against which proposals for new golf courses will be considered, none of which relate to need. It provides in addition that the Council will require evidence that the proposed development is a *sustainable* project without the need for significant additional development in the future. It also provides that new golf courses in the AONB and the AGLV will only be permitted if they are consistent with the primary aim of *conserving and enhancing* the existing landscape. None of those matters can

> be equated with or involves a requirement to demonstrate need and in my view no such requirement can be read into them. The policy must of course be read in the light of the supporting text, given the statutory role of that text as descriptive and explanatory matter and/or reasoned justification for the policy, and also bearing in mind the statement in paragraph 1.10 of the Local Plan that the text indicates how the policy will be implemented by the Council. But making all due allowance for the role thereby performed by paragraph 12.71, I do not see how the paragraph can provide a basis for reading a need requirement into the policy. For whatever reason, the reference to a requirement to demonstrate need was not carried over into the terms of the policy. Nor can paragraph 12.71 operate independently to impose a policy requirement that Policy REC12 does not contain.
>
> …
>
> 21. It should already be clear why I disagree with that reasoning. The policy is what is contained in the box. The supporting text is an aid to the interpretation of the policy but is not itself policy. To treat as part of the policy what is said in the supporting text about a requirement to demonstrate need is to read too much into the policy. I do not accept that such a requirement is implicit in the policy or, therefore, that paragraph 12.71 makes explicit what is implicit. In my judgment paragraph 12.71 goes further than the policy and has no independent force when considering whether a development conforms with the Local Plan. There is no requirement to demonstrate need in order to conform with the Local Plan either in its original form or as saved."

51. Policy WP3 itself is the equivalent of what Richards LJ was referring to in *Cherkley* as being contained within the box. The policy can go no further than safeguarding the listed sites for the duration of the plan period. I reject the claimant's submission that *Cherkley* is inapplicable. It clearly is. It restates in very clear terms the relationship between a planning policy and the supporting text which is one of the points in issue in the instant case.

52. The asterisk/footnote is, in my judgment, to draw attention to the fact that there is a temporary planning permission on the Beddington site. If, therefore, there is to be any change to that position there is a clear link to other policies in the development plan. There would be no expectation to find any designation of country parks or policies which deal with land use proposals outside waste in a waste local plan. In my judgment, the only sensible interpretation of the asterisk/footnote is that it is there to draw the decision maker's attention to the fact that any proposal for development on the Beddington site would have to consider other parts of the development plan.

53. That there was cognisance of the broader development plan position is clearly evident from the officer report and the extracts set out above. In particular, given the concern of the claimant that the land should return to the proposed Wandle Valley Regional

Park it is noted in paragraph 6.27 of the officer report that the development would be contrary to London Plan policy 7.17 and Sutton Core Planning Strategy policy PMP9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and wider MOL.

54. The fact that other consultees during the course of the planning application or even preceding that may have held different views is not material to the proper interpretation of the policy itself. Likewise, the genesis of the policy and the inspector's examination of it as part of the Local Plan are interesting background but not determinative of what the policy means.

55. The remaining issue under this ground is whether the officer report was misleading in that it failed to consider an accurate baseline position in omitting to consider the situation after the expiration of the temporary planning permissions in 2023 when the land would otherwise be restored as the appropriate comparison against which the development proposal was to be judged.

56. It is abundantly clear from the officer report that full consideration was given to the post-2023 situation.

57. At the beginning of the report as part of the summary as to why the application proposals are acceptable the first bullet point begins, "although the proposals would perpetuate waste management on the site in the long term, contrary to community expectations…" and the second bullet point sets out that the development would be contrary to London Plan policy 7.17 and Sutton Core Planning Strategy policy PMP9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and the wider MOL.

58. Those points are then dealt with in greater detail in section 6 of the report. Paragraph 6.4 deals with the restoration of the site on the basis of the temporary planning permission, paragraph 6.8 deals with harm to openness of the proposed Wandle Valley Regional Park, paragraphs 6.18 to 6.23 deal with community concern about public access, paragraphs 6.25 to 6.27 deal with the significant adverse landscape impact contrary to London Plan policy 7.17 and Sutton Core Planning Strategy policy PMP9 and paragraph 6.94 deals with the establishment of a community fund to address community concern after the previous commitment to discontinue waste management in 2023.

59. Reading the report fairly and as a whole there is no basis for saying that the officer report failed to consider the proposals without taking into account the effect of the expiry of the existing planning permissions in 2023.

60. This ground fails.

Ground Two: Was there an error on the part of the defendant in its assessment of Metropolitan Open Land?

Submissions

61. The claimant submits that the defendant failed to take into account harm to the MOL and the Wandle Valley Regional Park arising from the fact that the Beddington site

would no longer be open land from 2023. There was a passing reference only in the officer report and no in depth discussion or analysis of harm. There was no consideration of "other harm" to the local community.

62. Further, the defendant fell into error in its identification of very special circumstances. What was relied upon were factors that were commonplace and not special enough to merit the classification as very special circumstances: see *Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692.

63. Further, the assertion that there was an "urgent" need to divert waste from landfill was not borne out by any target or the Local Plan. The government had withdrawn funding from the waste procurement project on the basis that it would no longer be needed in order to meet the 2020 landfill diversion targets set by the EU. The revised definition of municipal waste included more commercial waste than previously which affected the waste disposal performance against EU landfill targets. Yet further, the inspector on the South London Waste Plan referred to a greater imperative rather than an urgent need.

64. The defendant and interested party contend that it is evident that the defendant applied the correct legal approach as can be seen in paragraphs 6.1 to 6.3 of the officer report.

65. What are very special circumstances is a matter of judgment for the decision maker: see *Wychavon* (supra).

66. The defendant here was entitled to look at the factors which it considered important and weight them accordingly. That was a matter entirely for it.

67. The conclusion section of the report illustrates that the defendant applied itself properly in terms of approach to MOL and very special circumstances that needed to be demonstrated.

68. The impact of the proposed development on the Wandle Valley Regional Park was fully assessed within the officer report.

69. The claimant's contention that there is no urgent need to divert waste from landfill is in substance an impermissible challenge to the merits of the council's planning judgment. In any event there is ample evidence to justify that conclusion, as follows:

    i) The current EU Waste Framework Directive 2008/98/EC;

    ii) The stipulation by the Mayor that by 2025 no municipal waste should be sent direct to landfill;

    iii) The difference in the local plan inspector's phrase of "greater imperative" as opposed to "urgent need" is a semantic quibble;

    iv) The December 2013 Waste Management Plan for England recognises that the landfill tax remains the key driver to divert waste from landfill to ensure that EU targets are met under the Landfill Directive;

    v) The withdrawal of funds by the Department of Environment, Food and Rural Affairs (DEFRA) in October 2010 from the project was for general austerity

reasons as opposed to anything else and did not detract from the obligation to drive waste management up the waste hierarchy.

70. The interested party emphasises that the study of alternatives was carried out for the planning application as it was necessary to know that there was no reasonable alternative site that was available that would not impact on the MOL. The study had considered the three sites referred to in the Waste Local Plan, namely Garth Road Civic Community, Factory Lane and Villiers Road. They were all ruled out as not being alternatives as they were smaller than the minimum size required of 3 hectares.

71. Overall the defendant's approach was entirely appropriate.

Discussion and conclusions

72. The jurisprudence on officer reports, in particular, in the planning context I have set out above.

73. Section 7 of the officer report sets out the conclusions. It reads:

> "7.1. The development would be contrary to London Plan Policy 7.17 and Sutton Core Planning Strategy Policy PMP 9 that broadly seek to protect the open character of the proposed Wandle Valley Regional Park and wider MOL. It would also constitute inappropriate development on MOL within the terms of the NPPF.
>
> 7.2. It needs to be acknowledged, however, that the application site is expressly safeguarded for continued waste management use under Policy WP3 of the South London Waste Plan. The Waste Plan, which was adopted in 2012, post-dates the Core Planning Strategy by three years and is the most up to date expression of the Council's waste planning policy. Whilst the Waste Plan has a lifetime of 10 years and the ERF would be expected to stand for at least 25 years, the proposal cannot be considered contrary to Policy WP3. Policy WP3 encourages safeguarded sites to maximise their potential for waste use subject to other policies in the Waste Plan and Development Plan.
>
> 7.3. As the proposal is in conflict with development plan policy, it is necessary to consider whether there are other material planning considerations that outweigh the conflict and whether they constitute the very special circumstances necessary to clearly outweigh the harm including that arising from the inappropriate nature of the development.
>
> 7.4. It is considered that significant weight should be attached to national waste policy and strategy that seeks to divert waste away from landfill. The Government Review of Waste Policy 2011 supports energy recovery from waste where appropriate and for waste which cannot be recycled. National Policy

Statement EN-1 recognises that the recovery of energy from waste, where in accordance with the waste hierarchy, will play an increasingly important role in meeting the UK's energy needs and form an important element of waste management strategies in England and Wales.

7.5. There is considered to be an identifiable and urgent need to divert residual waste arising from landfill and the proposals would provide for this in line with European Directives and national policies and strategies.

7.6. The choice of the application site rests in large part on the urgent need for the facility and the unavailability of a suitable alternative site that would be available within the required time frame. It is accepted that the alternative sites assessment carried out by the applicant has demonstrated that there are no alternative sites that are suitable, available and achievable to deliver this proposal in the timescale set by the Partnership. The need for the facility to be operational within the identified timeframe reflects also the escalating cost of landfill.

7.7. It is considered that significant weight should be attached to the fact that the site is in existing waste management use and is expressly safeguarded for such use in the development plan. Although the current waste use is subject to time limited permissions and is contained in smaller buildings than now proposed, waste management activity has been a feature of the site since 1995 and is currently a defining characteristic of the land. The adverse impact that the development would have on the openness of MOL derives more from the height and visibility of the ERF than its spread across the site. The adverse impact on the open character of the wider area needs to be balanced against the arguably beneficial but more localised effect of consolidating waste management activity within the safeguarded area and restoring the majority of the safeguarded area to open land uses, although noting that these areas would all be restored to open land under the terms of the existing legal agreements and planning permissions were the ERF not to go ahead. Previous permissions at the site (e.g. that for the anaerobic digestion plant) have used the existing waste uses at the site as a component of the very special circumstances to allow permission, albeit subject to time limitations.

7.8. Significant weight should also be attached to the ability to link an ERF in this location to a scheme being pursued by Viridor to provide heat from the existing landfill gas engines to development at the Felnex site in Hackbridge. This initial heat network has significant potential to be extended in the future. Locating the ERF at the site would allow it to augment the landfill gas potential, providing greater longevity and security of supply. Whilst the delivery of heat to local homes cannot at

this stage be guaranteed, a strong business case for the applicant to enter into a CHP agreement with an ESCo has been demonstrated, so there is good reason to believe the measure will be implemented.

7.9. The energy to be produced from the biodegradable element of the input to the ERF is classed as renewable. The NPPF, at paragraph 91, states that where renewable energy projects are located in the Green Belt (and therefore MOL also) Very Special Circumstances may include the wider environmental benefits associated with increased production of energy from renewable sources.

7.10. In summary, the following Very special Circumstances to justify inappropriate development on MOL are considered to have been demonstrated:

- Whilst the current waste use is subject to time limited permissions, waste management activity at the site has taken place for many years and is safeguarded in the development plan. Further, intensification of that use is encouraged by the development plan.

- There is an identifiable and urgent need to divert residual waste arising from landfill and the proposals will provide for this in line European Directives and national policies and strategies. The alternative sites assessment report shows that there are no alternative sites that are suitable, available and achievable to deliver this proposal in the required timescale.

- The ability of ERF in this location to provide heat for local homes to augment and secure local CHP initiatives.

- The energy to be produced from the biodegradable element of the input to the ERF is classed as renewable, and therefore paragraph 91 of the NPPF applies.

7.11. Other material considerations to be taken into account that are considered to weigh in favour of the application are:

- The proposal would see development consolidated on a smaller area of the site when compared to existing and permitted buildings and hardstandings.

- The proposed inputs of residual waste and recyclables are already delivered to the site in similar or greater volumes, meaning that new traffic impacts would be limited except than during the construction of the plant.

> - Where potentially adverse environmental impacts have been identified, these are capable of mitigation to be secured by legal agreement or planning conditions. Importantly, this includes securing access to additional areas of land to help mitigate the permanent loss of part of the restored lands to the ERF and funding for a warden to help manage the restored lands.
>
> 7.12. The permanent loss of part of the site to development and the impact this would have on the open character of the proposed Wandle Valley Regional Park and wider MOL remain significant policy concerns. A building of the size of the ERF would inevitably be visible in long views across a wide area and this adverse landscape impact could not readily be mitigated. However, the material considerations in favour of the development are also significant and it is considered that sufficient very special circumstances have been demonstrated to justify inappropriate development on MOL. The balance is considered to be clearly in favour of the scheme.
>
> 7.13. The recommendation, therefore, is that permission be granted subject to the conditions set out in the draft decision letter, the completion of the legal agreement to secure the mitigation measures outlined in this report and confirmation of the delivery of the additional areas to provide additional habitat and access to the restored lands."

74. The claimant submits that the defendant failed to identify and take into account harm to the MOL and to the proposed Wandle Valley Regional Park that would result from the proposed development. Originally, the claimant placed reliance upon *R (on the application of Riverclub) v Secretary of State for Communities and Local Government* [2010] JPL 584 which considered the phrase " any other harm" against the then policy framework of PPG 2. The claimant submitted that the defendant had failed to provide a clear identification of harm against which the benefits of the development could be weighed so as to be able to conclude whether very special circumstances existed to warrant the grant of planning permission.

75. At the hearing it was accepted that *Riverclub* had been overtaken by *Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 2476 which considered the issue of any other harm in the National Planning Policy Framework (NPPF) context. During the course of the hearing it became known that that decision had been overturned by the Court of Appeal but that their reasons were to be handed down later. As a result I gave the parties a total period of fourteen days after the hand down of that judgment with which to make any submissions upon it in the context of the current case. Judgment was handed down on 24 October 2014 in [2014] EWCA Civ 1386. All parties have notified the court in the instant case that they have no further submissions to make on the issue of "any other harm" and the judgment in *Redhill*.

76. The upshot of the *Redhill* judgment is that the approach of *Riverclub* survives the coming into effect of the NPPF. The judgment means that "any other harm", in

addition to that caused as a result of the development being harmful due to its inappropriateness, is to be taken into account as part of the harm caused by the proposed development and only if that cumulative harm is clearly outweighed by other considerations will very special circumstances exist. In short, the NPPF on this aspect of green belt policy has wrought no change to the previous policy position.

77. The claimant's submission that the defendant failed to identify and take into account the harm that would be caused to the MOL and to the proposed Wandle Valley Regional Park if the site was not returned to open land in 2023 and also failed to give any consideration to the harm which that turn of events would cause to the local community is based, in my judgment, on a misreading of the officer report. There was nothing in the report which significantly misled the committee about material matters. In particular:

i) in the summary of why the first interested party's proposals were acceptable the report began by acknowledging perpetuation of waste management on the site contrary to community expectations, conflict with London Plan policy 7.17 and Sutton Core Strategy policy PMP9 together with an adverse impact on the openness of the MOL but, concluded that subject to the completion of a legal agreement and implementation of mitigation … there will be an acceptable impact on amenity and nature conservation interests.

ii) the report acknowledged that the site was within the MOL and part of the proposed Wandle Valley Regional Park both of which in part would be lost if the proposed development proceeded.

iii) as the proposal constituted inappropriate development in the MOL an assessment of alternative sites was sought by the defendant and provided by the interested party and scrutinised in the officer report. Within that the application site was ranked joint second behind land in the ownership of Thames Water.

iv) the establishment of a community fund to address the considerable community concern about adverse impacts of consolidating a waste management use of the site was also referenced.

v) within the conclusions the fact that the proposed development was inappropriate development and was in conflict with development plan policy so that there was a need to consider whether there were other material planning considerations and whether they constituted very special circumstances was clearly identified: see paragraph 7.3

vi) the harm to the open character of the wider area was acknowledged but needed to be balanced against the consolidation of waste management activity within the safeguarded area: see paragraph 7.7.

vii) permanent loss of part of the site and the impact that had on the proposed Wandle Valley Regional Park and the MOL were clearly set out but the conclusion drawn that material considerations in favour of the development were also significant and were sufficient to enable a judgment to be drawn that

> very special circumstances had been demonstrated to justify inappropriate development: see paragraph 7.12.

78. It is quite clear that the officers considered the issue of harm by reason of the development being inappropriate together with any other harm to the Wandle Valley Regional Park and other development plan policies but were satisfied that there were sufficient very special circumstances to overcome the identified harm. The defendant's approach was thus unassailable.

79. That leads on to the separate point as to whether the defendant properly identified very special circumstances. In *Wychavon* Carnwath LJ (as he then was) said at 21:

> "I say at once that in my view the judge was wrong, with respect, to treat the words "very special" in the paragraph 3.2 PPG2 as simply the converse of "commonplace". Rarity may of course contribute to the "special" quality of a particular factor, but it is not essential, as a matter of ordinary language or policy. The word "special" in PPG2 connotes not a quantitative test, but a qualitative judgment as to the weight to be given to the particular factor for planning purposes."

He continued at 23:

> "…As it is, the guidance neither excludes nor restricts the consideration of any potentially relevant factors (including personal circumstances). PPG2 limits itself to indicating that the balance of such factors must be such as "clearly" to outweigh Green Belt considerations. It is thus left to each inspector to make his own judgement as to how to strike that balance in a particular case."

80. The guidance in the NPPF is unchanged in relation to very special circumstances. As such, whether a factor constitutes a very special circumstance is a matter for the decision maker in the exercise of his judgment in any particular case.

81. The claimant submitted that compliance with policy is commonplace and, therefore, could not constitute a very special circumstance. The position, in my judgment, is more nuanced than that. Waste management use of the MOL or greenbelt is unusual. As the committee report set out at paragraph 6.2, "the proposal is therefore in the unusual position of being in conformity with the waste policies of the development plan, including the use of safeguarded site, whilst also being inappropriate development in MOL." The defendant clearly thought that policy compliance was sufficient as a very special circumstance as summarised in paragraph 7.10 above.

82. As to the identifiable and urgent need to divert residual waste from landfill the claimant contends that the defendant should have asked whether the need to maximise waste diversion from landfill was so urgent as to require the Beddington waste site. That was not done because the urgency came from the contractual relationship between the interested party and the defendant.

83. In my judgment the evidence before the council amply justified its conclusion that an urgent need existed, as follows:

i) The EU Waste Framework Directive 2008/98/EC requires authorities to drive waste management policy away from disposal including landfill which is regarded as the waste management option of last resort. Article 4 sets out the waste hierarchy which has disposal at the bottom. The purpose of the Directive is set out in the preamble which includes at 6:

> "The first objective of any waste policy should be to minimise the negative effects of the generation and management of waste on human health and the environment. Waste policy should also aim at reducing the use of resources and favour the practical application of the waste hierarchy."

ii) The Mayor has stipulated that by 2025 no municipal waste should be sent direct to landfill.

iii) The reference to the inspector's examination of the local plan and his reference to greater imperative as representing a change from urgent need is to take a pedantic approach and look at the words out of context.

iv) The witness statement of Mr Ryan explains the financial driver to divert waste from landfill to ensure that EU targets under the Landfill Directive are met. The financial cost of landfill tax is a burden upon the partnership boroughs which, as Mr Ryan explains, can be alleviated through the development proposed.

84. As to the withdrawal of funding by DEFRA in October 2010 from the partnership it is clear from the DEFRA letter dated 20 October 2010 that that was in response to the general climate of austerity and the broader financial issues which the government was required to manage. It did not detract from the obligation to drive waste management up the waste hierarchy.

85. It follows that there was an ample basis upon which the defendant could conclude rationally that there was an urgent need to develop their waste facilities. It was a matter for its judgment as to whether it constituted a very special circumstance. Its judgment that it did is unimpeachable.

86. The remaining issue then is the alternative sites survey that was carried out by the interested party in response to a request on behalf of the defendant. The claimant contends that the sites that should have been accorded preference to the application site were those which had been identified in the South London Waste Disposal Plan exercise. That submission ignores the fact that the three sites identified in the local plan exercise were excluded at an early sift of alternative sites by reason of them being too small to accommodate the development proposals. In my judgment it was reasonable to have a size threshold as part of the alternative site exercise and, therefore, the exclusion of the local plan sites cannot be vulnerable to any challenge.

87. It follows that there is nothing in this ground of challenge.

Ground Three: Did the defendant fetter its discretion?

88. The claimant contends that the reality of the case is that the decision making was driven by contractual considerations and not planning considerations.

89. The claimant relies, in particular, upon the following chronology:

- July 2011: Sutton and the other London Boroughs made it clear in the public examination into the South London Waste Plan that there would be cessation of waste use at the Beddington site in 2023.
- May 2012: In pre-application discussions with Viridor senior planning officers from the defendant were not prepared to accept waste use at the site after 2023.
- September 2012: The interested party applied for planning permission.
- November 2012: The waste contract was signed containing a key requirement for an incinerator at the Beddington site by no later than 2017.
- April 2013: The defendant's planning officer recommended approval of the waste development on the application site until 2040.

90. There was evidence of deference to the procurement process as seen in the officer report as follows:

> "Viridor's selection of the application site over the frontage land relies heavily on operational deliverability by 2017. Whilst the terms of Viridor's contract with the waste partnership are not *per se*, considered to be a material planning consideration, the terms given for the delivery of the project is…"

91. In addition the officer said:

> "Whilst it might theoretically be possible to provide for the waste needs of the partnership by splitting activities between small sites, possibly involving more upfront processing, this did not emerge as an option from the procurement process and therefore cannot realistically be considered to be a deliverable waste management solution for the partnership."

92. In fact, rather than being theoretically possible, the three sites identified in the South London Waste Plan process were able to meet the waste needs of the boroughs.

93. The claimant submits that the need to meet the targets set within the contract meant that the defendant did not assess the planning application with an open mind. Although the claimant accepts that in principal time scale for delivery can be a material consideration it was not so in this case because of the availability of alternative sites.

94. The defendant has filed a witness statement from Mr Webber, head of development management and strategic planning. In that he deals with the structures of decision

making within the defendant to ensure that it has and maintains a clear separation of its functions. The council has a scrutiny committee which can hold main committees including the development control committee to account. The role of the scrutiny committee is critical to the functioning of the defendant by demonstrating openness and accountability in the council's decision making process. The scrutiny committee had reported on the waste disposal contract and proposal for an energy recovery facility at the Beddington waste site. That made findings and recommendations as to how, if the planning application proceeded, it was to be dealt with. As Mr Webber says:

> "One of the key roles of the scrutiny committee is to ensure there is complete transparency in the understanding of how various decision making functions of the council are separated to remain independent and mutually exclusive of each other in their terms of reference. This is to ensure that there is no fettering of decision making of relevant policy and regulatory committees by the decisions of another."

95. The defendant entered into a planning performance agreement with the interested party on 10 August 2012. In a letter of the same date the interim executive head of planning and transportation wrote to the interested party and agreed the terms of the PPA. Paragraph 1.3 of the agreement states:

> "Nothing in this agreement shall predetermine or prejudice the proper consideration or determination of any consent or application or override or fetter the statutory powers, duties or responsibility of any party."

96. The report of the scrutiny overview committee clarified the different roles within the Local Authority as follows:

> "The scrutiny committee acknowledge and assert that by making recommendations regarding the proposed energy recovery facility at Beddington Lane waste site, the committee is not seeking to predetermine or even usurp any decision making function of the development control committee delegated to it by full council. Scrutiny function of the committee and the decision making function of the development control committee are separate and distinct."

97. The separate nature of the functions of the two committees was repeated elsewhere within the report. It continued:

> "The executive head of street scene services outlined to the committee that as unitary authority, the council had responsibility for both waste collection and disposal of household waste. It also has an entirely separate responsibility as the planning authority for assessing new developments proposed within the area. The committee was assured that these were two completely different functions overseen by different committees made up of different members."

98. As part of the briefing sessions to members on the planning application members were reminded to avoid active lobbying either against or for the proposal and to contact the council's monitoring officer for advice if they were in any doubt as to whether they had a disclosable pecuniary interest in the matter.

99. Further, within the contract of 5 November 2012 clause 1.8 on statutory capacity reads:

> "Save as otherwise expressly provided, the obligations of the Authority under this Contract are obligations of the Authority in its capacity as a contracting counterparty and waste disposal authority and nothing in this Contract shall operate as an obligation upon, or in any other way fetter or constrain, the Authority in any other capacity, nor shall the exercise by the Authority of its duties and powers in any other capacity, lead to any liability under this Contract (howsoever arising) on the part of the Authority to the Contractor."

Discussion and conclusions

100. The dual role of the defendant as local planning authority and as waste disposal authority is a requirement imposed by Parliament. The relevant statutory provisions are section 1(2) of the Town and Country Planning Act 1990 which reads:

> "The council of a metropolitan district is the local planning authority for the district and the council of a London borough is the local planning authority for the borough."

Under the Environmental Protection Act 1990 section 30(2) waste disposal authorities are:

> "(b) in Greater London, the following—
>
> (i) for the area of a London waste disposal authority, the authority constituted as the waste disposal authority for that area;
>
> (ii) for the City of London, the Common Council;
>
> (iii) for any other London borough, the council of the borough;"

101. Mr Webber's witness statement shows that the defendant took care to ensure that those council members involved in decision making were properly informed of their different functions and so were aware of the need to act properly in respect of both.

102. Not only that but clause 1.8 of the partnership's residual waste treatment contract set out above clearly records that the authority shall not be fettered or constrained in acting in any other capacity as a result of being a contracting party.

103. The claimant can point to no specific act on the part of the defendant that would demonstrate that its discretion in determining the planning application had been

fettered. As a result the claimant is seeking to run an argument that the defendant's discretion is fettered by inference. That is tantamount to saying that because permission was granted after the contract was procured the council's discretion was inevitably fettered.

104. Such a submission ignores:

i) The explicit dual role of the council imposed by Parliament;

ii) The specific precautions taken in the contract and in the decision making process by the defendant to ensure distinct and proper decision making;

iii) The absence of convincing or any evidence that there was any fettering of discretion in the planning process.

105. The claimant asserted, but not with any real force, that there was a real possibility of bias or predetermination on the part of the defendant. I reject that submission as quite hopeless. Mr Webber's evidence makes it clear that the council was throughout sensitive to the potential for challenge on that ground and took all necessary steps to ensure that no such ground for any challenge arose.

106. There is simply no evidence in the officer report or anywhere of deference to the procurement process. Paragraph 6.57 of the officer report states expressly:

> "The terms of Viridor's contract with the waste partnership are not, *per se*, considered to be a material planning consideration, the timescale for deliverability of the project is. The need for the facility to be operational within the identified timeframe reflects also the escalating cost of landfill and the need to plan now and deliver the necessary facilities to divert waste from landfill in line with European Directives and national targets. Were Viridor to be required to acquire or assemble a site this would risk delaying the delivery of the facility and perpetuating the landfill activities unacceptably."

There is simply no basis for this ground.

Ground Four: Did the defendant err in failing to assess the environmental impact of the CHP pipes?

Submissions

107. The environmental statement which accompanied the planning application did not assess the environmental impact of the CHP pipelines running from the boundary of the site onwards to customers for the heat.

108. The claimant submits that the development includes the provision of underground pipelines for the delivery of heat to the site boundaries in order to allow for onward connection to customers. Two pipelines are proposed. The interested party has relied on the export of heat from the ERF to show that the project was compliant with the London Plan. The ES envisages CHP provision:

> "The CHP plant will initially operate in electricity only mode. Once potential heat customers are agreed, contracts signed and offsite infrastructure has been provided, the plant can operate in full heat and power mode."

109. The interested party has entered a memorandum of understanding with the company that is developing a sustainable housing development nearby called Felnex. The pipeline route has been defined. Where the installation and use of CHP pipes is probable, the environmental effects of laying them down and using them should be assessed: see *Marton-cum-Grafton Parish Council v North Yorkshire County Council and Others* [2014] Env LR 10.

110. Both the defendant and interested party submit that the relevant legal authority dealing with general principles is set out in *R (on the application of Blewett) v Derbyshire County Council* [2004] Env LR 29 and *R (on the application of Littlewood) v Bassetlaw District Council* [2009] Env LR 21.

111. It is well established that it is for the local planning authority to determine whether the environmental statement meets the requirements of the EIA regulations in a specific case subject only to Wednesbury scrutiny.

112. The position prior to the grant of permission was reviewed by the defendant in February 2014 when it considered whether any new material considerations had arisen that required the application to be taken back to committee prior to issuing the decision notice. That included the possible need to provide details of the proposed pipeline for CHP as a result of an email sent by solicitors acting for the claimant which referred to the then recent judgment of *Marton-cum-Grafton Parish Council* (supra).

113. As a result the matter had been given express consideration and the judgment made by the defendant was that there was no need for further information. The pipeline route concerned was entirely speculative. As a result the defendant's judgment was that it was unreasonable to request further information.

114. It was not the case that the defendant had overlooked the issue.

Discussion and conclusions

115. The proposed development was "EIA development" within the meaning of regulation 2(1) of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the EIA regulations). Regulation 3(4) of the EIA regulations provides:

> "The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken the environmental information into consideration, and they shall state in their decision that they have done so."

116. Environmental information is defined by regulation 2(1) of the EIA regulations as:

> "…"environmental information" means the environmental statement, including any further information and any other information, any representations made by any body required by these Regulations to be invited to make representations, and any representations duly made by any other person about the environmental effects of the development;…"

117. Environmental statement means a statement:

> "(a) that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile, but
>
> (b) that includes at least the information referred to in Part 2 of Schedule 4;…"

118. The information referred to in part 1 of schedule 4 includes:

> "A description of the likely significant effects of the development on the environment, which should cover the direct effects and any indirect, secondary, cumulative short, medium and long term permanent and temporary, positive and negative effects of the development…"

119. The general principle is that it is for the local planning authority to determine whether the ES meets the requirements of the EIA regulations in a specific case. In *Blewett* (supra) Sullivan J (as he then was) held:

> "40. In the light of the environmental information the local planning authority may conclude that the environmental statement has failed to identify a particular environmental impact, or has wrongly dismissed it as unlikely, or not significant. Or the local planning authority may be persuaded that the mitigation measures proposed by the applicant are inadequate or insufficiently detailed. That does not mean that the document described as an environmental statement falls out with the definition of an environmental statement within the Regulations so as to deprive the authority of jurisdiction to grant planning permission. The local planning authority may conclude that planning permission should be refused on the merits because the environmental statement has inadequately addressed the environmental implications of the proposed development, but that is a different matter altogether. Once the requirements of Sch.4 are read in the context of the Regulations as a whole, it is plain that a local planning authority is not deprived of jurisdiction to grant planning permission merely because it concludes that an environmental statement is deficient in a number of respects.

> 41. Ground 1 in these proceedings is an example of the unduly legalistic approach to the requirements of Sch.4 to the Regulations that has been adopted on behalf of claimants in a number of applications for judicial review seeking to prevent the implementation of development proposals. The Regulations should be interpreted as a whole and in a common-sense way. The requirement that "an EIA application" (as defined in the Regulations) must be accompanied by an environmental statement is not intended to obstruct such development. As Lord Hoffmann said in *R. v North Yorkshire CC Ex p. Brown [2000] 1 A.C. 397*, at p.404, the purpose is "to ensure that planning decisions which may affect the environment are made on the basis of full information". In an imperfect world it is an unrealistic counsel of perfection to expect that an applicant's environmental statement will always contain the "full information" about the environmental impact of a project. The Regulations are not based upon such an unrealistic expectation. They recognise that an environmental statement may well be deficient, and make provision through the publicity and consultation processes for any deficiencies to be identified so that the resulting "environmental information" provides the local planning authority with as full a picture as possible. There will be cases where the document purporting to be an environmental statement is so deficient that it could not reasonably be described as an environmental statement as defined by the Regulations (*Tew* was an example of such a case), but they are likely to be few and far between."

120. In the case of *Littlewood* (supra) it was argued that the council ought to have required the production of a master plan and EIA for the area as a whole before determining the application. Its failure to do so, it was submitted, amounted to a failure to take into account the likely significant environmental effects of the development, including the cumulative impact of the proposal together with any likely future proposal on the rest of the site, contrary to the requirements of the EIA regulations. Sir Michael Harrison rejected that argument and said:

> "32. Equally importantly, at that time no proposals had yet been formulated by Laing for the rest of the site for the reasons that I have mentioned. I simply do not see how there could be a cumulative assessment of the proposed development and the development of the rest of the site pursuant to the EIA Regulations when there was no way of knowing what development was proposed or was reasonably foreseeable on the rest of the site. The site was not allocated for development in the local plan. No planning application had been made and no planning permission given in respect of the rest of the site, and no proposals had yet been formulated for that part of the site. There was not any, or any adequate, information upon which a cumulative assessment could be based. In my judgement, there was not a legal requirement for a cumulative

> assessment under the EIA Regulations involving the rest of the Steetley site in those circumstances.
>
> 33. Having therefore considered the various submissions made under the planning regime and under the EIA regime, I have come to the conclusion that there was no legal error involved by the council not insisting on a masterplan as a pre-condition to the grant of permission, and there was no obligation on the council in the circumstances to consider the cumulative impact of the unknown future development on the rest of the Steetley site. In my view, the council were entitled to decide the application as a stand alone development and to require the subsequent production of a masterplan by way of s.106 agreement so that cumulative impact could be considered when future proposals for the rest of the site were forthcoming."

121. The key is that the environmental statement in the EIA regulations is only required to include such information as is reasonably required to assess the environmental effects of the development and which the applicant can reasonably be required to compile having regard to current knowledge.

122. In *R (on the application of Bristol City Council) v Secretary of State for Communities and Local Government* [2011] EWHC 4014 a case which concerned future CHP pipelines which had not got beyond a possibility Collins J said:

> "26. It was only because on its facts, as is clear, that there was known to be a probability of CHP and the routes were again known, in the sense that there had been a degree of research into what would be appropriate, that it was considered, on the facts of that case to be a reasonable requirement (and note a reasonable requirement). There is an element of judgment involved in whether that situation can properly be said to have arisen.
>
> 27. In those circumstances, in my view, this other ground would have no prospect of success. Accordingly, whether or not I granted leave to amend would make no difference. So I simply dispose of it in that way."

123. On the facts in the instant case the February 2014 report of the defendant dealt with the email from the claimant's solicitors. Paragraph 6 set out the earlier decision that there was no reasonable basis for the applicants to submit further information relating to the pipe network outside the application site under the provisions of regulation 22 of the EIA regulations.

124. Notwithstanding that the report went on to consider again whether it was reasonable to require further information in relation to the environmental impact of the pipe network. In some detail and over the following thirteen paragraphs the matter was considered by the officer. The report considered that:

i) While commitments given by the applicants were such that significant weight to the ability for the CHP to be implemented could be given the reports to both authorities made it clear that there was no certainty that CHP would be provided (paragraph 11);

ii) That the interested party had referred to potential heat users to the east and west of the site as potential and any CHP was dependant on a number of factors which could not be certain at the outset (paragraph 9);

iii) The applicants had confirmed that there was no contract to provide heat from the proposal (paragraph 10).

125. Mr Molnar's first witness statement dealt with the fact that it was not possible to include details of the route for the CHP pipe work beyond the boundary of the site when the application was prepared as the end users were not the subject of any concluded contract. Once end users had been identified it would be necessary to design the route for the required pipe work and infrastructure necessary which would require planning permission. At that stage, if necessary, environmental effects arising from the proposed pipe work and infrastructure would be assessed as part of that planning application.

126. Mr Ryan's first witness statement indicates that the defendant intended to establish an energy services company to facilitate the use of the CHP between the interested party and potential end-users such as the development at Felnex. However, there was no memorandum of understanding or binding agreement in relation to any CHP user.

127. In those circumstance there remains a want of detail about both the end-user and possible route of the pipeline. The defendant was, therefore, reasonably entitled not to require further information.

128. Until the end-user and likely route were known it would be virtually impossible to include a description of the likely significant environmental effects of the relevant pipe work. Once that was known an EIA of the offsite pipe work, including the assessment of the cumulative effect of the pipe work together with the proposed development, could be carried out as part of that planning application. Until then it is an unrealistic expectation to contend that the defendant should have sought that that was done as part of the instant application.

129. In paragraph 20 of the February 2014 report SKM Enviros, the independent environmental consultants instructed by the defendant, are recorded as emailing the defendant saying, "I also concur with the conclusion that no further information needs to be sought from the applicant on the CHP pipes issue on the basis that the ES in front of the committee at the time of the decision was complete in terms of scope of issues assessed therein."

130. The February 2014 report concluded on this issue in paragraph 21. That reads:

> "21. It is therefore concluded that it would be unreasonable to request further information from the applicants in relation to the pipe network outside the application site because:

> - There is no certainty of either a pipe network being provided, or of the route of any pipe network
>
> - If a CHP network is implemented it is likely that the first phase would be to provide a pipe network to the gas engines within the application site to a heat user, so the ERF will link to a pre-existing pipe network and will not itself be the cause of the pipe network outside the site being provided
>
> - If a CHP network is provided, it may well include a link from the application site to the Felnex development, but while not formally assessed, this link would be short and entirely underneath a road and is therefore highly unlikely to have any adverse environmental consequences."

131. That conclusion was entirely justified on the information before the defendant. It would be quite unrealistic to hold that the defendant's decision was unreasonable on the evidence before it.

132. For the sake of completeness the claimant relied upon the case of *Marton-cum-Grafton Parish Council* (supra) where, at [50], His Honour Judge Gosnell sitting as a Deputy High Court Judge said:

> "I think what can be learnt from a comparison of the two decisions is that where the installation use of CHP pipes is probable the environmental effects of laying them and using them should be assessed. This of course makes logical sense as if it is probable that the pipes would be used then it is easier to argue that they are part of the physical characteristics of the whole development and subject to environmental assessment."

The claimant submits that it is probable in relation to the Felnex site CHP pipes will be used.

133. It is clear from what I have set out that at the time of making the decision there was no application for pipe work outside the red line of the planning application site. What in essence was being considered by the defendant was a phased development the second phase of which had not reached any real level of probability. There were no confirmed end-users. In the absence of that there was no known pipeline route. Without that, it is quite impossible to say that the defendant acted unreasonably or irrationally in not requiring an amendment to the environmental statement. Any future pipelines will doubtless be subject to their own EIA which will consider the cumulative impact with the permitted development as part of that next phase.

134. It follows that this ground fails also.

135. In these circumstances I dismiss this application for judicial review. I invite submissions as to the final order and costs.