CO/2872/2016

IN THE PLANNING COURT

BETWEEN:

LECKHAMPTON GREEN LAND ACTION GROUP LIMITED

Claimant

-and-

TEWKESBURY BOROUGH COUNCIL

Defendant

-and-

(1) REDROW HOMES LIMITED

(2) MARTIN DAWN (LECKHAMPTON) LIMITED

Interested Parties

CLAIMANT'S SKELETON ARGUMENT FOR SUBSTANTIVE HEARING

29 NOVEMBER 2016

Key documents/passages:

(i) Plans/maps

a. Environmental Statement - Figure 3.1 - Planning application boundary [E833]

b. Environmental Statement - Figure 5.2-5.5 – Site plans

c. Joint Core Strategy – Strategic allocation C6/A6 [E830 – E832]

(ii) **Environmental Statement**

a. "scope" [E15 – E16 #1.3.1-1.3.2]

b. "cumulative effects" [E26 – E27 #2.2.24]

c. "land being tested" [E30 #3.1.12]

d. "surroundings" [E32 #3.3.6]

e. "alternative sites" [E49 #6.3]

f. "adopted development plan" [E57 #8.2.9]

g. "emerging development plan" [E58 #8.2.14]

h. "housing" [E65 #8.4.22]

i. "education" [E65 – E66; E66-E67 #8.4.26-#8.4.28; #8.4.31]

j. "education" [E74 – E75 #8.5.28-#8.5.30]

k. Chapter 9 "landscape" [E85 – E135]

l. Chapter 11 "ecology and nature conservation" [E175 – E216]

m. Chapter 14 "cultural heritage" [E265 – E266; E271 – E272] #14.4.16-#14.4.21 and table 14.8

n. Chapter 19 "cumulative effects" [E379 – E389]

(iii) **Officer Report to Committee**, [E485 – E486] in particular:

a. Cheltenham Borough Council objection [E487-E488]

b. "LEGLAG objection" [E488 – E489]

c. "806 letters of objection" [E489]

d. "Emerging development plan" [E491 – E492 #5.4-#5.8]

e. "Conclusions on the principle" [E492 #5.13]

f. "Archaeology and Cultural Heritage" [E501 – E502 #16.1-#16.5]

g. "Comprehensive development and prematurity" [E503 – E504 #18.1-#18.5]

h. "masterplans" [E504 #18.3]

i. "Local green space" [E504 – E505 #19.2-#19.5]

j. "Overall balancing exercise" [E505 – E506 #20.1-#20.9]

k. "Conclusion" [E506 #21.1]

(iv) **Minutes 29 September 2015**E519 – E559; Land to the West of Farm Lane [E532 – E538 #35.44-#35.56]

(v) **Correspondence**

a. Cheltenham BC letter of objection 1 December 2014 [E2-E7]

b. Cheltenham BC letter of objection 6 July 2015 [E447 – E450]

c. Cheltenham BC NPCU call-in letter 23 October 2015 [E560 – E561]

d. Tewkesbury BC 30 October 2015 [E562 – E564]

e. Origin 3 4 November 2015 [E565 – E567]

(vi) **JCS Inspector's preliminary findings 16 December 2015** [E579 – E605 particularly #1-#66: #121-#136] {EBLO 106 as in footnote 47 to paragraph 47 is at E1]

(vii) Planning Permission 26 April 2016 [E676 – E682]

(viii) **Skeleton Arguments of the three participating parties**.

THIS SKELETON ARGUMENT

1. This Skeleton Argument is designed to be a free-standing summary of the Claimant's case and should be substituted for the Claimant's Statement of Facts and Grounds.

2. The Annex to this skeleton argument lists the points made in response by Tewkesbury and Redrow and identifies the paragraphs of this skeleton argument particularly relevant to each point.

OVERALL

3. On 29 September 2015 the Tewkesbury's Planning Committee considered an application by the 1st Interested Party ("Redrow") for planning permission to build 377 dwellings on land to the west of Farm Lane, Leckhampton~~Shurdington~~, Gloucestershire [E835, E836+E833] ("the site").

4. Title to the site is vested in the ~~2nd~~1st Interested Party, the 2nd Interested Party hold a charge on the land.

5. In the light of a report from Tewkesbury officers [E485 – E486], the Committee delegated authority to Tewkesbury's Development Manager to grant the planning permission subject to (among other things) completion of a section 106 agreement [E614 – E675].

6. On 26 April 2016 the Development Manager did so, as set out in decision notice "14/00838/FUL" [E676 – E682].

7. The Claimant group comprises and represents approximately 1100 residents living close to the site, and took an active part in the determination of the planning application, including in making a number of representations to Tewkesbury.

8. On 6 July 2016 Lewis J granted permission to bring judicial review proceedings on three of four grounds set out in the Claimant's application for judicial review but refused permission on the final ground [A116 – A117.

9. The Claimant renews its application for permission on the final ground. That has been listed to be heard (with the substantive consideration of the point if permission is granted as part of this hearing).

10. As explained below, the Claimant asks the court to:

    (a) Grant permission for JR on Ground 4;

    (b) Declare that the grant of planning permission was unlawful.

    (c) Quash the planning permission.

BACKGROUND

The Application Site

11. As seen on the plan at [E835, E836+E833], the site comprises some 15 hectares of land lying on the southern fringe of Cheltenham in the vicinity of the village of Leckhampton and north-east of the village of Shurdington.

12. As seen on the plans at [E832-E833], the site forms the western part of a larger site at the time being jointly promoted as a housing allocation in the Cheltenham, Gloucester & Tewksbury Joint Core Strategy ("the JCS"). That was known as the "South Cheltenham Urban Extension" contained within emerging JCS policy SA1 and lying mostly within the administrative boundary of Cheltenham Borough Council. It was also known as the "A6 Allocation or C6 Cheltenham Strategic Site".

13. Throughout Tewkesbury's consideration of this planning application the JCS (and the C6/A6 allocation within it) was before an Inspector appointed by the Secretary of State to determine its soundness: Inspector Elizabeth Ord. The Claimant has taken an active role in resisting the allocation and has appeared at the hearing sessions convened by Inspector Ord.

14. The site also lies within the setting of a number of Grade II listed buildings: Leckhampton Farmhouse, its barn and Brizen Farmhouse, as considered further below.

The Environmental Statement

15. The application was validated on 10 October 2014 and was accompanied by an Environmental Statement (ES) dated August 2014 because the scheme amounted to "EIA Development" within paragraph 10b to Schedule 2 Town and Country Planning (Environment Impact Assessment) Regulations 2011 [E8 – E405].

16. The ES dealt with a number of matters, including some cumulative effects relating to the site. But it did not assess the entire South Cheltenham Urban Extension as a single urban development project to anything like the same degree of analysis.

The Cheltenham Planning Application

17. On 13 September 2013 a planning application had been submitted to Cheltenham Borough Council concerning the other part of the C6/A6 allocation, namely: 650 dwellings, a mixed use local centre, a local convenience store, retail units, potential further space for a pharmacy, GP surgery, dentist practice, children's' nursery, primary school, strategic open land and allotments.

18. That parallel application was refused by Cheltenham by a decision notice dated 31 July 2014.

19. The developer's appeal against that decision was dismissed by the Secretary of State on 5 May 2016 [E685 – E786]. The Claimant was a

"Rule 6" party in that inquiry. It was represented by counsel and called its own expert witness.

20. A subsequent application pursuant to section 288 of the 1990 Act to quash the decision was refused by Holgate J. on 2 September 2016 but has since been renewed to the Court of Appeal. The Claimant (an interested party in that appeal) resists that appeal.

The Planning Committee

21. As noted above, the planning application in issue here was considered by Tewkesbury's Planning Committee on 29 September 2015.

22. Members considered the application on the basis of Officer's Report [E485 – E486].

23. The crux of the Officer's reasoning on the controversial matters here was summarised in the concluding paragraphs of the Report under the heading "overall balancing exercise" [E505 – E506], together with a number of other references in the report which emphasised to members that:

    (a) The site falls within and was in accordance with the C6/A6 allocation in the JCS including noting that the weight to be given to that would depend in part on the stage which the JCS process had reached, with greater weight the more advanced [E491 – E492 #5.4-5.8, #51.13];

    (b) The JCS process was indeed at an "advanced stage" [E504 #18.3]

    (c) The planning application was suitably master-planned to deliver the wider allocation [E504 #18.3]. Cheltenham Borough Council contradict this statement in their objection at E487 and correspondence [E2-E7], [E447-E450], and [E560-E561]

    (d) The Parish Council's~~Claimant's~~ NPPF L~~l~~ocal G~~g~~reen S~~s~~pace (July 2013, 75pp, updated in December 2015 (JCS EiP EXAM 121A)) proposal stood little prospect of success as it covered an existing residential site allocation in the emerging plan [E505 #19.4]

    (e) The development would cause "less than substantial" harm to the setting of three listed buildings [E502, 16.4]

    (f) In Conclusion, planning permission should be granted because the development accorded with the local plan "and is identified for housing as part of the wider strategic allocation [C6/A6]" [E506 #21.1]

24. Minutes of the meeting [E519 – E559] show the Planning Officer, Redrow's agent and then the Development Manager emphasising to members during the meeting the importance of the JCS allocation [E532 – E535 #35.45; #35.49; #35.50].

25. In the light of those things the Committee resolved to delegate authority to the Council's Development Manager to:

> "PERMIT the application, subject to the formal comments from County Highways, and required highway conditions/contributions, and the completion of negotiations from a Section 106 Agreement to secure the required infrastructure for the development and to ensure that the delivery of the wider strategic allocation was not prejudiced, in accordance with the Officer recommendation."

26. Where members have voted in accordance with their officer's recommendation, it can be reasonably inferred that, absent reasons to the contrary, they voted for the reasons set out within the officer's report: **Siraj v Kirklees Metropolitan Council** [2010] EWCA Civ. 1286 per Sullivan LJ at [16]-[17]. There are no reasons here to depart from the inference that members made their decision for the reasons set out in the officer report (which were reinforced by what was said at the meeting, as seen in the minutes, as considered further below).

27. As for the content of such a report, in **R v Selby DC ex p. Oxton Farms** [1997] EG 60 Judge LJ held the standard for impugning an Officer's Report to be where:

> "… 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."

The request for a call-in

28. In response to a request by local MPs that the Secretary of State "call in" the application, Tewkesbury emphasised (letter of 30 October 2015) that the development was in accordance with the JCS which was now "at examination" [E562] and stressed that [E563]:

> "The site is not only identified for development in the emerging plan for the area but is also allocated for development in the adopted Tewkesbury Borough Local Plan"

The adopted 2006 Tewkesbury Borough Local Plan to 2011 (JCS EiP SUB105) however also makes it clear in the Housing section introduction (p21) that this site of SD2 should not be developed in isolation.

> *"PLANNING PERMISSION WILL NOT BE GRANTED FOR DEVELOPMENT OF THE SD2 SITE PRIOR TO ~~-~~ITS IDENTIFICATION AS AN APPROPRIATE LOCATION FOR STRATEGIC DEVELOPMENT THROUGH THE RSS PROCESS."* (capital letters used for emphasis ~~is used~~ in the original ~~planning~~ document)

And in the Reasoned Justification of p22

"If the SD2 site is identified as part of a sustainable urban extension through the Green Belt review process then a process of joint working with Cheltenham Borough will be entered into in order to develop an appropriate comprehensive mixed development scheme for the area."

29. Redrow's agents also wrote (letter of 4 November 2015) emphasising the same point [E565]:

> "[the site is] part of the South Cheltenham urban extension in the emerging Joint Core Strategy (JCS) ….
>
> …
>
> … the locally elected councillors … again ratified the allocation of the site for residential development through several rounds of drafting of the emerging JCS, culminating with the approval of the submission version JCS which is currently before Inspector [redacted] and includes the application site …."

30. The Secretary of State did not call in the application, the Mike Hale (NPCU Senior Planning Manager South) decision letter, 29th Feb. 2015, stated that the SoS was content for this to be a local decision. In a clarification email of 18th April 2016 that *"sustainability and many other planning merit considerations are not considered by the Secretary of State"*.

The JCS Inspector's Preliminary Findings

31. The Council (in the form of the Development Manager acting pursuant to the authority to which the Committee had delegated to him) had still not granted planning permission when, on 15 December 2015 Inspector Ord published a document entitled "Inspector's Preliminary Findings on Green Belt Release, Spatial Strategy and Strategic Allocations" concerning the soundness of the JCS [E579 – E605]. It was published on the examination library under reference EXAM146.

32. In that document Inspector Ord explained a number of important findings with respect to strategic allocation C6/A6 which she referred to within her note as "the Leckhampton Site". The pertinent findings are as follows:

> "The Landscape Report indicates that a large part of the allocation (including land to the South West of Farm Lane) falls within the highest category of landscape and visual sensitivity. One of the key considerations in the Report was that the site has a "*very prominent landform and field pattern to the south adjacent to the AONB which is vulnerable to change and is considered a valuable landscape resource.*"[footnote 47: EBLO 106 October 2012, page 15 – E1]"

The Inspector expressed her "reservations" about developing the site within Tewkesbury's boundaries (broadly the application site) [E589]:

> "I have reservations about developing this area of high landscape and visual sensitivity, adjacent to the AONB and GB."

The Inspector found the Tewkesbury side of the allocation to be not "sound" at [E589]:

> "On the other hand, for reasons of landscape sensitivity, I am not minded to find the Tewkesbury part of the allocation sound."

The proposed L~~l~~ocal G~~g~~reen S~~s~~pace ("LGS") designation would be "sound" at [E590]:

> "In my judgement, the evidence suggests that the NPPF criteria are met and LGS designation is justified."

There has been no challenge to the legality of Inspector Ord's findings or her approach to the process.

The Decision to issue planning permission

33. In-spite of that preliminary~~interim~~ report and the Council responding within the JCS examination to that preliminary~~interim~~ report, the Development Manager did not refer the matter back to its planning committee, and instead on 26 April 2016 issued planning permission.

The JCS Inspector's Interim~~Preliminary~~ Findings Report

34. After the issue of planning permission, and having considered further evidence, Inspector Ord delivered an Interim Report dated 26 May 2016 [E787 – E829]. The relevant sections areE810 #112- 125.

35. Whilst post-dating the Decision, and not of course determinative of its legality, Inspector Ord's further findings do place beyond doubt the meaning of her Preliminary Findings Report. Inspector Ord concluded as follows [E810]:

> 112. In my Preliminary Findings. I indicated that I was not minded to find the Tewkesbury side of the Leckhampton allocation, West of Farm Lane, sound and that overall, built development should avoid areas of high landscape and visual sensitivity. Having considered additional evidence submitted since then, including Redrow's planning application documents relating to Land West of Farm Lane107, I remain of this view."
>
> 115. Tewkesbury Borough Council has granted planning permission for the West of Farm Lane site and the developers are ready to proceed. Whilst it was suggested at the March hearing that this

part of the allocation could be retained for pragmatic integration reasons, in my judgement, this is inappropriate. The permission is now being challenged by residents and a letter before claim has been issued. Consequently, the permission could be overturned. Given my finding of unsoundness and the uncertainty surrounding the site, I recommend that it be removed from the allocation and the urban extension boundaries be accordingly redrawn.

…

123. Overall, in my judgement, a limited amount of development could be supported towards the north of the site where public transport is more accessible, subject to the avoidance of land of high landscape and visual sensitivity. Therefore, for reasons of landscape/visual amenity and highway impacts, I recommend that the Cheltenham part of the site be allocated for a modest level of built development in the order of 200 dwellings.

124. … It is, therefore, my recommendation that the Leckhampton urban extension be removed in its entirety from the JCS."

Pre-Action Correspondence

36. The Claimant sent a letter before claim to the Council, Developer and Landowner on 12 May 2016 [D1 – D10]. The Claimant received a response from the Council on 27 May 2016 [D16 – D19] but not from the Developer until 3 June 2016 [D20 – D32].

THIS JUDICIAL REVIEW CLAIM OVERALL

The grounds in summary

37. The Claimant contends that in granting planning permission:

    (a) **Ground 1:** The Defendant unlawfully failed to have regard to a material consideration (contrary to section 70(2) Town and Country Planning Act 1990) arising from a change of circumstances between the Committee's resolution and the grant of permission itself .

    (b) **Ground 2:** The Defendant's approach in considering the harm to heritage assets in the planning balance was contrary to section 66(1) Planning (Listed Buildings and Conservation Areas) Act 1990.

    (c) **Ground 3:** The Defendant's Officer's Report misled Members as to a correct understanding and requirements of the applicable NPPF heritage policy and/or Members misdirected themselves as to the proper approach and/or failed to apply the proper approach.

    (d) **Ground 4:** The Defendant failed to take into account all the required environmental information of the project, being the significant environmental effects of the South Cheltenham Urban Extension allocation, contrary to Regulation 3 EIA Regulations.

38. The Claimant seeks (1) permission on ground 4, (2) a declaration that the planning permission was unlawfully granted and (3) the quashing of the grant of planning permission.

Relief

39. As considered further below, Tewkesbury and Redrow invite the court not to quash the planning permission even if it concludes that the decision was unlawfully granted (A119 – A231; A90 – A108).

40. By section 31(2A) Senior Courts Act 1981:

    "(2A) The High Court—

    (a) must refuse to grant relief on an application for judicial review, and

    (b) may not make an award under subsection (4) on such an application,

    if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred."[1]

41. This newly inserted subsection has recently been considered by John Howell QC (sitting as a Deputy High Court Judge) in **Cooper v Ashford Borough Council** [2016] EWHC 1525 (Admin.) at [#107]:

[1] Inserted by the Criminal Justice and Courts Act 2015.

> "In my judgment, although the court must consider section 31(2A) of its own initiative when considering final relief (as opposed to the grant of permission when it may have a discretion whether or not to do under section 31(3C)), the court must still be satisfied on the balance of probabilities that it is highly likely that (in this case) permission would have been granted had the unlawful conduct found had not occurred. In determining whether it appears that it is highly likely that would have occurred, the question is not whether it is highly likely that the judge hearing the case would have taken the same decision. Section 31(2A) of the 1981 Act does not require the court to treat itself as the decision maker. Moreover the court must act on the evidence it has or on reasonable inferences from it."

42. As Blake J held in **Logan v London Borough of Havering** [2015] EWHC 3193 at [55] that assessment should "normally be based on material in existence at the time of the decision and not simply post-decision speculation by an individual decision maker" and as Laing J held in **Enfield LBC v Secretary of State for Transport** [2015] EWHC 3758 at [106] the threshold is "relatively high", with the burden on the Defendant per Laing J in **Bokrosova v Lambeth LBC** [2015] EWHC 3386 (Admin.) at [88].

43. With particular regard to the witness statements made by Joan Desmond and Paul Skelton for the Council, the caution of Lewis J concerning statements of opinion on planning merits post a decision, in **Pemberton International Ltd v Lambeth LBC** [2014] EWHC 1998 (Admin.) at [72] should be born in mind that:

> "Views expressed in statements made in the course of litigation as to how a decision-maker might have acted are rarely, if ever, of assistance in considering whether a decision might have been different if the decision-maker had considered the issues properly. Such statements start from a position where a decision has been taken and carry with them the risk that they seek to justify or rationalise the decision already taken rather than seeking to assess whether or not matters might, not would, have been different if the decision-making process had been carried out properly at the time that the decision was taken."

GROUND 1 – FAILURE TO TAKE INTO ACCOUNT MATERIAL CONSIDERATIONS/FAILURE TO REFER BACK TO THE COMMITTEE

The legal obligation

44. By section 70(2) Town and Country Planning Act 1990 the decision taker (here the planning committee) is required to have regard to "any other material consideration" as part of deciding whether to grant of planning permission.

45. In **Kides v South Cambridgeshire DC** [2002] 1 P & CR 19 Jonathan Parker LJ held at [126] that:

> "In practical terms … where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a "material consideration" for the purposes of section 70(2) , it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority would reach (not might reach) the same decision."

46. Jonathan Parker LJ held at [121] that "material" in this context meant a factor that "when placed in the decision-maker's scales, would tip the balance to some extent, one way or the other", and that "has some weight in the decision-making process, although plainly it may not be determinative".

47. Carnwath LJ explained in **Dry v West Oxfordshire District Council** [2010] EWCA Civ. 1143 at [16] that **Kides** should be "applied with common sense". Pitchford LJ then explained in **Hinds v Blackpool Borough Council** [2012] EWCA Civ. 466 at [35] that:

> "35 Carnwath LJ pointed out at paragraph 16 of his judgment in R **(Dry) v West Oxfordshire DC and Taylor Wimpey** [2010] EWCA Civ 1143 that Jonathan Parker LJ was seeking in paragraph 126 only to give guidance as to the cautious approach to be taken by the officer and that the guidance should be applied with common sense. It is important, in my view, to appreciate that the court in Dry was not offering a route by which to avoid the requirements of s.70(2) ."

48. Lindblom J. summarised the law in **Wakil t/a Orya Textiles v Hammersmith & Fulham LBC** [2014] EWHC 2833 (Admin.) at [94]:

> "94 The law relevant to this ground is clear. The jurisprudence is to be found in the decisions of the Court of Appeal in **Kides**, **R. (on the application of Dry) v West Oxfordshire District Council** [2010] EWCA Civ 1143 and **R. (on the application of Hinds) v Blackpool Borough Council** [2012] EWCA Civ 466 . When a grant of planning permission is challenged on the ground that the local planning authority, having resolved to approve the development proposed, ought to reconsider that decision, the court will have to consider whether the new factor relied upon in the challenge would have been capable of affecting the outcome. What is required therefore

> is not merely some obvious change in circumstances but a change that might have had a material effect on the authority's deliberations had it occurred before the decision was made. The crucial question for the court to consider is whether the new factor might have led the authority to reach a different decision."

The illegality here

49. The fact the site was part of the emerging allocation in the JCS was a material matter before the planning committee.

50. Indeed, as explained below, it formed a central part of the justification to grant planning permission, see the following advice to Members at various points in the Officer's Report to Committee:

51. On the principle of development [E491 at para.5.6]:

> "This site comprises part of the proposed urban extension to the south of Cheltenham (C6/A6) where a total of 1,124 dwellings are proposed"

52. On the landscape and visual impact [E494 at para.6.6.]:

> "In conclusion, the site is allocated for residential development in both the adopted and the emerging JCS. As such the principle of residential development on this is site is considered to be acceptable"

53. On the provision of outdoor sports facilities [E499 – E500]:

> "In accordance with these policies, the proposal would generate a requirement for 2.08ha of open space of which 1.4ha should be playing pitches. As detailed above, this development is however, part of a wider strategic allocation where the majority of the strategic open space including an informal kick-about area, allotments, community orchard and children's play areas will be provided."

54. Furthermore, the Parish Council's ~~Claimant's~~ NPPF Llocal Ggreen Sspace allocation of July 2013, updated in December 2015 (JCS EiP EXAM 121A) was dismissed by reference to the JCS allocation as unlikely to succeed [E505]:

> "The emerging JCS considered that whilst there is clearly a strong need for strategic green infrastructure and effective and useful green and amenity space as part of the development, these requirements do not outweigh the value of a sustainable urban extension to this part of Cheltenham … The NPPG advises that LGS designation would rarely be appropriate where the land has planning permission for development. Whilst not specifically referred, it is reasonable to expect that a LGS designation would

also rarely be appropriate for an existing residential site allocation."

55. Members were advised that the JCS was at "an advanced stage" [E504]

56. The minutes of the meeting show that consistency with the JCS process was, at least, one fundamental plank of the rationale for officer's advice to grant permission, as Development Manager is noted as advising [E535]:

> "It was considered that the scheme which had been negotiated was much improved and would meet the aspirations of the Joint Core Strategy which was the reason for the recommendation for a delegation permission."

57. Members were plainly (and rightly) concerned about the results of the JCS process. The minutes note a motion to defer consideration of the application until after the JCS examiner had expressed her views. The reasoning behind that motion is recorded as follows [E536]:

> "The proposer of the motion noted that Policy SD2 set out that development should be via the planning process; the Joint Core Strategy would set the blueprint for development until 20131 and he did not feel that sites should be released before its adoption in order to suit developers. There was no way of knowing what conclusion the Inspector would reach in relation to the Joint Core Strategy and the housing figures included within the plan."

58. Further the Council submitted to the Secretary of State, as a key reason not to call-in the planning application [E563]:

> "The site is not only identified for development in the emerging plan for the area but is also allocated for development in the adopted Tewkesbury Borough Local Plan"

59. There can be no doubt as to the materiality of the JCS allocation in the minds of the decision-maker here.

60. Inspector Ord's December 2015 preliminary findings plainly bore heavily on that position. In particular, the Inspector found the site to be unsound in landscape impact terms and, the Parish Council's NPPF L~~l~~ocal G~~g~~reen S~~s~~pace allocation sound. In short, it turned on its head that advice members had been given about the likely progress of the C6/A6 allocation in the emerging JCS, from a virtual certainty to a dubious proposition.

61. The Claimant's complaint is therefore simple: the Council failed to take into account a highly material consideration which shifted a number of fundamental assumptions upon which planning permission had been resolved to be granted. That falls well within the tests in **Kides** as follows: (i) the Council was aware of a new factor, Inspector Ord's preliminary findings yet, (ii) it was not possible for Members to have considered the preliminary findings when determining the Developer's application, and

(iii) it cannot be said the Council's planning committee "would reach (not might reach) the same conclusion" to grant permission on such a fundamental change of context.

Tewkesbury and Redrow's contention as to the legality of the findings

62. Tewkesbury and Redrow submit that [A119 – A231; A90 – A108] the Inspector's interim findings report in relation to allocation C6/A6 did not meet the test in **Kides** for referral back to members, because they were not material. The principal basis for this submission is an assertion that (so they claim) her findings were unlawful.

63. Tewkesbury also asserts that, notwithstanding their unlawfulness, it was not open to them to seek judicial review of that interim finding because of the self-contained code for challenging development plan documents at s.113 Planning and Compulsory Purchase Act 2004 [A38 – A85].

64. That is all simply wrong in law.

65. In **Manydown Co. Ltd. v Basingstoke & Deane BC** [2012] EWHC 977 (Admin.) Lindblom J held that, notwithstanding s.113 of the 2004 Act, the Court was not precluded from considering the lawfulness of a decision not to promote a site it had previously acquired for that purpose, within a pre-submission development plan document.

66. In **IM Properties Development Ltd) v Litchfield DC** [2014] EWHC 2440 (Admin.) Patterson J held that the Court had no jurisdiction to hear a judicial review of a decision to endorse modifications to a development plan document after its submission. However, the IM Properties challenge is factually a quite different situation to this situation, whereby a discrete preliminary judgment by an Inspector could, if unlawful, send the remainder of the plan making process off on an erroneous track. In such a scenario judicial review is the most appropriate and proportionate procedure, so as to avoid the very problem identified by Patterson J in IM Properties at [70] of late challenges:

> "The effect of a successful challenge would be to start that process again: a re-making of main modifications, further consultation, further representations which would then be considered at a deferred examination. It is precisely because of the potential chaos that could be caused by a successful challenge at this stage in the plan making process that, in my judgement, Parliament inserted the ouster in the statutory provision."

67. Indeed, later in **Central Bedfordshire Council v SSCLG** [2015] EWHC 2167 (Admin.),Patterson J entertained, but dismissed on its merits, a judicial review application, following the submission of a development plan

document, to an interim finding by the examining Inspector that Central Bedfordshire Council had failed, when preparing a development plan document, to discharge the duty imposed upon them by section 33A Planning and Compulsory Purchase Act 2004 (commonly referred to as "the duty to co-operate"). Permission to appeal was granted by Laws LJ on 21 October 2015 against the substantive finding my Patterson J. No jurisdictional issue was taken at any stage.

68. Accordingly, in this instance, it was perfectly open to Redrow to seek judicial review of the JCS Inspector's preliminary findings here. It did not do so.

69. By a presumption of regularity administrative acts are valid unless and until they are quashed by the Court as unlawful, see, for example: **Hoffman-La Roche & Co v Secretary of State for Trade & Industry** [1975] AC 295, HL per Lord Diplock at 366A-E. If the time has passed for them to be challenged by way of judicial review, they stand, notwithstanding that the reasoning on which they are based may have been flawed, see: **O'Reilly v Mackman** [1983] 2 AC 237, HL per Lord Diplock at 283F.

70. Accordingly, in this instance, the JCS Inspector's preliminary findings that (i) the Tewkesbury land was not suitable for residential development and (ii) the Local Green Space allocation was justified, were both open to challenge, they were not however challenged, and the period for them to be challenged has long since passed. The attempt to impugn the reasoning upon which that preliminary judgment was based, as a justification for not referring the matter back to the planning committee, is therefore misconceived.

71. The Inspector's December 2015 preliminary findings have not been challenged by judicial review, although they could have been challenged, and therefore stand see: Hoffman-La Roche and O'Reilly (above). Indeed a further May 2016 Interim Report has been issued reinforcing the same findings as within the preliminary report.

Tewkesbury's "high level" assessment point

72. The Council's answer [A119 – A231], that Inspector Ord's analysis of landscape impact (as to which, see E588 #52 and footnote 47, referencing the Landscape Assessment at E1) was "high level" and therefore irrelevant, is also plainly no answer.

73. That is because Inspector Ord found the site so unsuitable for development that it should not even be allocated in the plan for any level of housing. It will be recalled that the local plan Inspector is performing a high level assessment as to whether allocations in a local plan are "sound" which, in broad terms means, whether they are suitable.[2] They are not

[2] The Government defines "sound" as "positively prepared, justified, effective and consistent with national policy" paragraph 182 NPPF.

determining whether a given scheme is acceptable in all respects. Accordingly, it is not unusual for a planning application, which comes forward pursuant to an allocation in a local plan, to be refused because, on detailed consideration, a particular scheme is unacceptable. However, it is most unusual if a local plan Inspector having come to the view that no scheme, however designed, would be acceptable as a matter of principle on a piece of land, would then be granted planning permission. Whilst it is not unlawful for a Council to come to that view, the Inspector's contemporary high-level analysis would be a powerful material consideration weighing against the grant of planning permission.

Tewkesbury's point about consultees

74. Tewkesbury's reference [A119 – A231] to the positions of Cotswolds Conservation Board and Natural England are nothing to the point. As Inspector Ord explained of her December Findings in her May Interim Report atE810 #113 - #114:

> "Whilst the Cotswolds Conservation Board did not object to the West of Farm Lane planning application, the Board commented that the most suitable option for the land's future management and retention of character would be to leave it undeveloped as agricultural land. Although Natural England in their letter of August 2015 stated they did not wish to comment, deferring to the Conservation Board's knowledge of the location, they did raise significant concerns over the impact on the AONB in their earlier letter of November 2014."
>
> "I also note that the Council's Landscape Officer referred to stunning views from Leckhampton Hill from the Devils Chimney and Cotswold Way, which would be negatively impacted, bringing the perception of the southern edge of Cheltenham closer to the viewer with a greater mass of conurbation in view. In my judgement, development on the West of Farm Lane site is environmentally unsustainable mainly due to its impact on the setting of the Cotswold Hills AONB and the high landscape and visual sensitivity of the site."

75. Accordingly, in the Claimant's submission, the Inspector's findings on landscape could, notwithstanding the views of the AONB Board and Natural England have had a material bearing on the Council's planning committee had they been afforded the opportunity to take them into account.

Overall

76. Accordingly, the Council therefore unlawfully granted planning permission in breach of section 70(2) Town and Country Planning Act 1990 by failing to have regard to a highly material consideration.

77. This is not such a case where it can be said it was highly likely that Members would have come to same conclusion. The preliminary findings of the JCS Inspector shifted a number of fundamental assumptions which underpinned the grant of planning permission.

78. Furthermore, as Ms Desmond explains within her witness statement [C3 – C11], and the minutes reveal, there was even a motion, based on the evidence Members had before them, to defer consideration until after the JCS Inspector had come to a view [C10]. This is not a case in which the Court should conclude the decision would have been highly likely to be the same had the matter been referred back.

79. Finally, Mr Skelton's assertion that the JCS Inspector's preliminary findings would not have tipped the balance (at paragraph 24 of his Witness Statement) is to be afforded very limited weight pursuant to the obiter guidance of Lewis J in **Pemberton** at [72].

GROUND 2 – BREACH OF STATUTORY DUTY AT S.66(1) PLANNING (LISTED BUILDINGS AND CONSERVATION AREAS) ACT 1990

Legal background

80. Section 66(1) Planning (Listed Buildings and Conservation Areas) Act 1990 provides as follows:

> (1) In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses.

81. In **East Northamptonshire District Council v SSCLG** [2014] EWCA Civ. 137 Sullivan LJ (with whom Maurice-Kay and Rafferty LJJ agreed) held at [22]-[23] that:

> "22 …. In the present case the Inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less than substantial harm to the setting of the heritage assets. … I accept that (subject to grounds 2 and 3, see [29] et seq below) the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight.."
>
> "23 That conclusion is reinforced by the passage in the speech of Lord Bridge in South Lakeland to which I have referred ([20]

> above). It is true … that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will be a 'strong presumption' against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell L.J.'s conclusion in Bath. There is a 'strong presumption' against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of 'considerable importance and weight." [underlining added]

82. The statutory duty was considered again following the Court of Appeal's judgment by the High Court in **R(Field Forge Society) v Sevenoaks District Council** [2014] EWHC 1895 (Admin.) at [48]-[49]. In particular, when considering the statutory presumption, Lindblom J. held at [49] that:

> "… a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. <u>But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering</u>." [underlining added]

83. In **Jones v Mordue** [2015] EWCA Civ. 1243 however, Sales LJ at [26]-[27] clarified the scope of East Northamptonshire as a requirement to supply reasons only to dispel a contrary impression that the decision taker had not afforded considerable importance and weight to the statutory duty in the planning balance.

84. However, as Kerr J. held recently, post Jones, in **Blackpool Borough Council v SSCLG** [2016] EWHC 1059 (Admin.) at [54] a decision taker will still err if they:

> "54 … [regard] the harm to the significance of the [heritage asset] as relatively slight and, because it was relatively slight, … [decide] that the weight to be given to that harm should also be relatively slight."

The illegality here

85. The Claimant's complaint under this Ground is simple: the Defendant unlawfully equated to less than substantial harm to a less than substantial objection to the grant of planning permission. That was contrary to the

statutory duty at Section 66(1) of the 1990 Act as explained by the Court of Appeal in **East Northamptonshire**.

86. In particular, Members of the planning committee were not told of the statutory duty at any point or of the approach of national policy towards listed buildings and their settings ("designated heritage assets") and thus failed to give effect to that legal requirement.

87. That omission, coupled with the perfunctory way the harm is treated within the report, is compounded by the positively misleading policy advice at paragraph 16.1 that:

> "The NPPF advises that the effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing the applications that affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset".

88. That advice relates to <u>non-designated</u> heritage assets, to which the statutory duty does not apply. It had no relevance whatsoever for weighing the harm, however limited it is said to be, to the setting of the three Grade II listed buildings (as here), against the public benefits of the scheme.

89. Accordingly, in the absence of proper direction and in the presence of a misdirection, the only proper inference is that Members were mislead as to the proper approach (and/or failed to apply the proper approach) to assessing the setting impact on listed buildings. As Sales LJ explained in **Jones** at [27] the obiter comments in **Forge Field** and **East Northamptonshire** remain good law in circumstances where the reasons (in this case the Officer's Report) contained: "positive indications that the decision-maker had failed to comply with the duty under section 66(1) of the Listed Buildings Act".

90. Accordingly, Tewkesbury breached section 66(1) of the 1990 Act in the approach it took to the importance and weight to be attached to the preservation of the setting of the listed buildings, including in erroneously treating the standard as being a simple balance without any particular importance or weight being attached to the harm to the heritage asset.

Tewkesbury and Redrow's response

91. It is no answer to suggest, as Tewkesbury and Redrow do [A119 – A231, A38 – A85] that councillors would have read into the advice within the Officer's Report that "… moderate development scheme benefits" would be required to outweigh the "temporary moderate and permanent moderate/minor adverse effects…"[E501 – E502] to the heritage assets, as

a direction to attach considerable importance and weight to the harm, pursuant to their statutory duty, because:

(a) First, it does no more than suggest equal "moderate" benefits could outweigh the "moderate" harm. That falls into the trap indented by Kerr J in **Blackpool** (above) of equating "moderate" harm to heritage assets as a moderate objection to the grant of permission.

(b) Second, it has to be read in the context of the preceding advice that a straightforward "balanced judgment will be required having regard to the scale of any harm or loss and the significant of the heritage asset". That advice was misleading because it related to non-designated [E501] heritage assets.

Overall

92. Members were misled as to the correct test (and are taken to have acted accordingly in their decision-making) in that they were directed to the non-designated heritage asset test. Nothing was then done to correct that impression by reference to the statutory duty, expressly or in substance.

93. As such, the Council erred in law by failing to have regard to the statutory duty at s.66(1) of the 1990 Act as identified by the Court of Appeal in **Jones** (above).

94. This is again not an error which the Court can safely conclude, absent the error, it would be highly likely the decision would be the same. The obligation is one which flows from primary legislation to which the Council is obliged to have very careful regard.

GROUND 3 – UNLAWFUL FAILURE TO CORRECTLY APPLY PARAGRAPH 14 NPPF

Legal background

95. The Claimant accepts that, given the absence of a five-year housing land supply and any other material considerations, the policy presumption at paragraph 14 NPPF was engaged by operation of paragraph 49 NPPF which states that:

> "Housing applications should be considered in the context of the presumption of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

96. Paragraph 14 then provides (and applied here) as follows [F5]:

> "At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and

decision-taking.

For decision-taking this means:

- approving development proposals that accord with the development plan without delay; and
- where the development plan is absent, silent or relevant policies are out of date, granting permission unless:

— any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or

— specific policies in this Framework indicate development should be restricted."

97. Paragraph 14 is subject to a footnote, footnote 9, which provides a non-exhaustive list of "specific policies" which indicate development should be restricted, it reads as follows:

> "For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); **designated heritage assets**; and locations at risk of flooding or coastal erosion."[emphasis added]

98. The operation of the presumption in favour of planning permission at paragraph 14 and the interaction with heritage assets was examined in detail in **Forest of Dean DC v SSCLG** [2016] EWHC 421 (Admin.) Coulson J. held at [47]:

> "The last bullet point in paragraph 14 meant that the presumption in favour of planning permission was to be dis-applied in two separate situations. Both Limbs had to be considered. In this case, because of the harm to the designated heritage assets, Limb 2 fell to be considered first. The appropriate test was the ordinary (unweighted) balancing exercise envisaged by the words in paragraph 134. Nowhere did the inspector carry out that exercise. He only undertook the weighted exercise in Limb 1. He therefore erred in law."

99. A decision taker will therefore err if they fail to identify whether there are specific policies in the Framework which indicate development should be restricted and, if so, then proceed to assess the application against those policies following an un-weighed or ordinary planning balance.

100. Paragraph 134 NPPF provides as follows [F7]:

> "Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm

should be weighed against the public benefits of the proposal, including securing its optimum viable use."

The illegality here

101. However, the Officer's Report (and therefore the Committee) simply did not consider, let alone come to any conclusion on, the harm to the heritage assets versus the public benefits in accordance with paragraph 134 NPPF, within the "Archaeology and Cultural Heritage" section of the Report. A tentative suggestion was made at [E501 – E502 16.3] that:

> "The listed buildings at Leckhampton Farm Court, comprising Leckhampton Farmhouse and the Barn would experience temporary moderate and permanent moderate/minor adverse effects arising out of impacts to their wider setting and likely to require moderate development scheme benefits to balance the harm."

102. A conclusion was reached within the "Overall Balancing Exercise" section which provided [E505]:

> "20.1 … The NPPF therefore requires the Council considers applications for housing the context of a presumption in favour of sustainable development …
>
> 20.5 With regard to the environmental dimension … this development would result in less than substantial harm to the settings of listed buildings in close proximity to the site …
>
> 20.8 The NPPF sets out at paragraph 14 that in the context of the presumption in favour of sustainable development, proposed development that accord [sic] with the development plan should be approved without delay. Where the development plan is absent, silent or relevant policies are out-of-date, permission should be granted unless, inter alia, any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the Framework as a whole.
>
> 20.9 Whilst the proposal would result in harm to the character and appearance of the area it is concluded that the identified harm would not significantly and demonstrably outweigh the benefits of the proposals and the scheme represents sustainable development for which there is a presumption in favour"

103. But that unlawfully failed to recognise that harm to heritage assets is a situation to which the NPPF, paragraph 14 indicates development should be restricted: see footnote 9, paragraph 14 NPPF.

104. Accordingly, the Defendant erred in law in the said same manner identified by Coulson J. in **Forest of Dean** at [47], by failing to first weigh the harm to the heritage assets (having regard to the statutory duty at

section 66(1) of the 1990 Act) against the public benefits of the proposal, outside of the paragraph 14 NPPF "tilted" balance, that is to say in an un-weighted manner.

Tewkesbury and Redrow's response

105. Tewkesbury and Redrow suggest that the advice that moderate benefits would be needed to outweigh the moderate harm is evidence of the un-weighted planning balance taking place. It is not, for the following reasons:

(a) First, at no point is that balance undertaken and a conclusion reached for Members to take into account.

(b) Second, if that balance was undertaken and it were silently concluded that the public benefits outweighed the harm to heritage assets, affording that harm considerable importance and weight, as the Council and Developer would have the Court believe, there would have been no need to carry forward the harm to the conclusion section where the presumption in favour of planning permission was then applied to the scheme.[3] That is because the paragraph 14 presumption would have been dis-engaged by operation of footnote 9.

[3] CB/D/492 para.20.5

Overall

106. The Council failed to understand and then correctly apply national planning policy. The Council therefore erred in law.

107. There would be no basis here to conclude that, absent that error, it is highly likely that the same decision would have been reached.

GROUND 4 – FAILURE TO TAKE ACCOUNT OF "THE ENVIRONMENTAL INFORMATION" AND JCS EVIDENCE BASE

108. The Claimant renews its application to seek judicial review of the Decision upon this Ground.

The legal obligation

109. The Council was obliged to take into account "the environmental information" prior to granting consent, by Regulation 3(4) EIA Regulations . The "environmental information" is defined as "the environmental statement", and that in turn is defined by Regulation 2(1) EIA Regulations as:

> "… 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…
>
> … at least the information referred to in Part 2 of Schedule 4"

110. Within the mandatory Part 2 requirements, the Environmental Statement had to include "the data required to identify and assess the main effects which the development is likely to have on the environment" and "a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects".

111. The EIA Regulations transpose into domestic legislation the provisions of Environmental Impact Assessment Directive 2011/92/EU ("the EIA Directive") . Article 2(1) provides as follows :

> "1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. Those projects are defined in Article 4"

112. As the European Court of Justice held those provisions in Case C-142/07 **Ecologistas en Acción-CODA v Ayuntamiento de Madrid** [2009] ECR I-6097 at [44]:

> "… the purpose of the amended [EIA] directive cannot be circumvented by the splitting of projects and the failure to take

> account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive …"

113. The mischief to be avoided is not simply an attempt to avoid assessment under the EIA Directive altogether, but also a situation where a single project has been presented as smaller EIA developments in order to make it easier to gain planning permission, as Richards LJ observed in **Larkfleet Ltd v South Kesteven DC** [2015] EWCA Civ. 3760 at [37]:

> "It is true that the scrutiny of cumulative effects between two projects may involve less information than if the two sets of works are treated together as one project, and a planning authority should be astute to ensure that a developer has not sliced up what is in reality one project in order to try to make it easier to obtain planning permission for the first part of the project and thereby gain a foot in the door in relation to the remainder …"

114. A correct direction on the scope of an assessment was most recently articulated by Lang J in **Larkfleet Ltd v South Kesteven DC** [2014] EWHC 3760 (Admin.) at [54(ii)] (approved by Richards LJ on appeal [2015] EWCA Civ. 887 at [52]):

> "… the starting point will always be the proposed development. However, the planning authority ought also to go on to consider whether there are other proposed developments in the vicinity and if so, whether they should be assessed jointly with the proposed development, as if they comprised a single Schedule 2 development. The test is whether they ought to be regarded "as part of the same substantial development" (per Davis LJ in **Burridge**[4]) or whether the proposed development is "an integral part of an inevitably more substantial development" (per Simon Brown J. in Swale[5])."

115. Whether the Defendant issued planning permission in breach of its obligation at Reg.3(4) EIA Regulations is a straightforward question of law: **Burridge v Breckland DC** [2013] EWCA Civ. 228.

116. Furthermore, whilst Richards LJ expressed the view in Larkfleet that a **Wednesbury** standard might be appropriate at [44], his Lordship expressly did not decide the point, and approached the question as one of law for the Court, posing the question for resolution at [44] thus:

[4] **Burridge v Breckland DC** [2013] EWCA Civ. 228

[5] **R v Swale Borough Council ex p. RSPB** [1991] PLR 6

> "I am of the view that the link road proposal is a "project" for EIA purposes which is distinct from the proposed development of the residential site."

117. Furthermore, in **Bowen-West v SSCLG** [2012] EWCA Civ. 321 Laws LJ grappled with the question as one of law as well as a Wednesbury standard, at [38]:

> "38 Thus I would not merely acquit the Secretary of State of a Wednesbury error. I consider, so far as the facts of the matter appear to me, that his conclusion was correct."

Accordingly, his Lordship declined to refer the question of the standard of review to the CJEU for determination at [45].

118. 1

The Environmental Statement

119. Chapter 5 of the ES "setting the development parameters" explained [E35 paragraph 5.1.1] that:

> "The Environmental Statement examines the plans and the associated description of development. The plans identify the extent of proposed built development and the component parts being tested".

120. The Chapter went on to make clear that the principal focus of assessment was the planning application submitted by the Developer.

121. Chapter 19 assessed the cumulative effects of the scheme explaining that the planning application forms a part of a larger emerging site allocation. Whilst there is a summary evaluation of the likely adverse effects it is clear the application was not assessed with the rest of the South Cheltenham Urban Extension (emerging JCS policy SA1) as a single urban development project. It is plain that omission has resulted in significantly less environmental information being provided to the decision taker about the effects of the project as a whole than would be the case had it been so assessed, for example:

(a) A full Landscape and Visual Impact Assessment ("LVIA") was undertaken for the application site. That assessment analysed, in accordance with Guidelines for Landscape and Visual Impact Assessment ("GLVIA 3"), the significance of impact by reference to defined criteria. The results of the LVIA are summarised within Chapter 9 of the ES. That is to be compared to the much lower intensity of assessment undertaken of the landscape and visual effects of the entire allocation - examining only potential for "combined or simultaneous visibility", "potential successive viewpoints" and "potential sequential visibility" - without the detailed of analysis undertaken for the application site.

(b) The ecology and nature conservation effects of developing the application site are set out at Chapter 11. The ecological survey undertaken in March 2014 only considered the application site. The ES relies upon a survey undertaken in 2012 to support an outline planning application for a neighbouring site, which is said to also consider the application site. The results or detail of that survey are however not explained within the ES, and certainly no assessment of the kind done of the application site is set out within the ES for the broader C6/A6 allocation, such as would justify the conclusion in Chapter 19 that the nature conservation effects would be "negligible".

(c) The impacts on Leckhampton Farmhouse, the barn and Brizen Farmhouse are set out within Chapter 14. Within Chapter 19 it is simply asserted that the full allocation would have no greater than "moderate adverse" significance on heritage assets. However, Inspector Ord records within her interim report on the JCS (E798 #53) a number of other heritage assets, including Church Farm, the Rectory, the Olde England Cottage and the Moat Cottage affected by the C6/A6 allocation. None of which are mentioned within the cumulative impact section of the ES, but yet the evidence base before the JCS Inspector recorded "there are major heritage concerns to development"[E855]. Whilst, the Defendant draws on [A119 – A231] the supplementary "Built Heritage Assessment" updated in May 2015, it again only assesses impact by reference to the application scheme, not the wider allocation. Such is made clear at para.6.5:

> "**Olde England, Moat Cottage, Church Farmhouse, Church of St Peter, and The Rectory**
>
> As has been covered previously, the application site makes an overall negligible contribution to the significance of these listed buildings. Other than views of the spire of the Church of St Peter from the north-west part of the application site, there is no intervisibility between the site and any of these assets. Nevertheless, the site does lie within their wider setting, but given the distance between them, the separation provided by planting, fields, development and Farm Lane, it is considered that their significance and settings will suffer no harm or negligible harm resulting from the proposed development."

122. A fair reading of the treatment of the issue of "master-planning" in the officer's report to Committee reveals that the planning application was being considered (indeed justified) as a smaller part of a larger, single urban development project, namely the emerging South Cheltenham Urban Extension (known as the "C6 or A6 allocation"). For example:

(a) At paragraphs 5.4-5.8 of the officer's report to Committee the emerging allocation is set out.

(b) At paragraph 5.13 one of the two key issues identified is whether "it would be premature to grant permission given the site's allocation as part of the wider strategic allocation (C6/A6) in the emerging JCS".

(c) At paragraph 18.3 an analysis is undertaken of the masterplan submitted by the applicant of the wider urban extension. That masterplan set out community facilities, local centre, new educational provision and play areas.

(d) At paragraph 20.4 Members are told to take into account the contribution to educational facilities, open space and playing pitches, health and community facilities and improvements to public transport as benefits of the scheme. A fair reading of the Report would lead Members to conclude these benefits were the same benefits which were outlined at paragraph 18.3 as being delivered as part of this C6/A6 allocation.

(e) At paragraph 20.7 it is concluded that the planning application would complement the emerging C6/A6 allocation.

~~(e)~~(f) Importantly Members of the Planning Committee were not provided with evidence from the JCS Natural Environment and Broad Locations series reports, EBLO 106 JCS Landscape and Visual Sensitivity (Oct 2012), section 6, p14-17, extract [E1], ENAT 100 JCS Greenbelt Assessment (Final, Sept. 2011), sections (5.2.6) (5.4.5) and (7.3.8), and E104 JCS Halcrow Strategic Flood Risk Assessment level 2, (Final July 2012), reference site T10, section 7.

The legal error

123. It is therefore clear that planning permission was granted of the basis of the application forming an integral part of a broader urban development project, namely the C6/A6 allocation.

124. In particular, it is plain that the planning application before the Council and the remainder of the C6/A6 allocation formed part of the "same substantial development" (per Davis LJ in **Burridge**) and was "an integral part of an inevitably more substantial development" (per Simon Brown J in **Swale**). Indeed, in many key respects they were treated as such by the Council.

125. But the environmental effects of that wider project were not assessed or taken into account by the decision taker.

JR permission

126. Lewis J considered this ground to be unarguable because the Cheltenham application concerned (i) a different piece of land, (ii) which had been refused planning permission.

127. However, what is clear is that the Council treated the planning application under challenge as an integral part of the broader scheme and, fatally in the Claimant's submission, entreated Members to take into account the benefits of the broader scheme without presenting Members with an equal assessment of the environmental harm of that single urban development project. The fact that the Cheltenham planning application concerned a different piece of land is, with respect, not relevant because the Tewkesbury and the Cheltenham applications were part of the same land which comprised the C6/A6 Allocation, which was one of the fundamental benefits underpinning the grant of permission set out within the Tewkesbury officer's report. Further, the fact that a planning application had been refused was again not relevant, this is because the allocation as a whole was still proceeding through examination and it was that fact which was a key justification for permission.

Overall

128. The legal error of failing to cast the net wide enough, resulting in the benefits but not the environmental harm of the allocation being placed before the decision taker falls within the mischief identified by the ECJ in the **Ecologistas** and the Court of Appeal in **Larkfleet** , as to be avoided and a breach of the EIA Directive.

129. Accordingly, JR permission should be granted and the planning permission should be quashed on this basis also.

CONCLUSION

130. The Claimant asks the court to grant permission on ground 4, declare the permission to have been unlawfully granted and quash the planning permission.

DAVID WOLFE QC

ASHLEY BOWES

31 October 2016 (full references added 4 November 2016)

ANNEX TO C's SKELETON ARGUMENT

Tewkesbury Detailed Grounds of Resistance

Submission in Detailed Grounds	**Response in C's skeleton argument**
Ground 1 – Failure to refer back	
The preliminary findings report of the JCS Inspector did not meet the **Kides** test for tipping the balance at [33]	See paragraphs 49-61
The JCS Inspector's preliminary findings were inchoate and could have had no material impact accordingly at [42]	See paragraphs 72-73.
If there was an error of law it was highly likely the same decision would have been reached at [43]	See paragraph 77-79
Ground 2 – S.66(1) P(LB&C)A	
The officer's report implicitly advised that greater scheme benefits were required to outweigh the matching harm [46]-[47] at [50]	See paragraph 91
If there was an error of law it was highly likely the same decision would have been reached at [52]	See paragraph 94
Ground 3 – Paragraph 14 NPPF	
The correct approach in *Forest of Dean* was followed at [59]	See paragraphs 101-104
Ground 4 – EIA Directive	
The scope of the ES is entirely a matter of planning judgment, challengeable on *Wednesbury* grounds only at [20].	See paragraphs 116-118
It was reasonable to exclude the Cheltenham part of the allocation from the ES at [24].	See paragraphs 123-125
Concerns about project splitting are limited to EIA screening at [27]	See paragraphs 116

Redrow Summary Grounds of Resistance

Submission in Detailed Grounds	**Response in C's skeleton argument**
Procedural Complaint	
C failed to grapple with IP's PAP response [3]-[7]	see paragraphs 36
Ground 1 – Failure to refer back	
The JCS Inspector's preliminary findings were unlawful [19]	See paragraphs 62-71
The JCS Inspector's preliminary findings would not have made a difference [20]	See paragraphs 77-79
Ground 2 – S.66(1) P(LB&C)A	
There is no indication that officer's failed to advise members of the statutory duty [28(e)]	See paragraphs 85-90
The direction that minor/moderate harm would be likely need to be outweighed by moderate benefits was sufficient to discharge the duty [28(f)]	See paragraph 91
Ground 3 – Paragraph 14 NPPF	
The correct approach in *Forest of Dean* was followed at [59]	See paragraphs 101-104
Ground 4 – EIA Directive	
The objective of the Directive is to avoid situations where there is no EIA assessment at all [10]	See paragraph 114
The judgment is a fact sensitive one not to be impugned except on *Wednesbury* grounds [11]	See paragraphs 115-118
It was reasonable to exclude the Cheltenham part of the allocation from the ES at [24].	See paragraphs 123-125

The cumulative effects were assessed as part of the ES [16]	See paragraph 127
The failure to present the full environmental effects of the A4 allocation would have made no difference	See paragraphs 128 .