Truro City Council v Cornwall City Council

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
13 August 2013

Case No: CO/670/2013

High Court of Justice Queen's Bench Division Administrative Court

[2013] EWHC 2525 (Admin), 2013 WL 3994891

Before: Frances Patterson QC

Date: Tuesday August 13th 2013

Hearing dates: 24th and 25th July 2013

Representation

Philip Coppel QC (instructed by Follett Stock) for the Claimant.
Jonathan Clay (instructed by The City Solicitor) for the Defendant.

Approved Judgment

Frances Patterson QC:

Introduction

1. This is a challenge by way of judicial review by Truro City Council, “the claimant”, to a planning permission granted on the 26 October 2012 by Cornwall Council, “the defendant” for the demolition of two houses and construction of Truro Eastern District Centre to comprise Park and Ride, Household Waste and Recycling facility, Cornish Food Centre (Use Class A1), Energy Centre, Hub Building, residential development (97 dwellings and separate lodge house), formation of four new vehicular accesses (A39 Newquay Road), two accesses off A390 Union Hill, bus only access (A39/A390 Union Hill), car and cycle parking, open space, landscaping, and associated works.

2. The challenge was lodged on the 21st January 2013. Permission was granted on the papers by Mr Justice Collins on the 6th March 2013.

Background

3. The Planning Application was submitted by Cornwall Council, the Duchy of Cornwall and Waitrose Limited. The latter two parties have taken no part in the proceedings. The Planning Application was for the development of a green field site of some 19 ha on the eastern edge of Truro adjacent to the developed area of the city. It was a controversial development proposal. Amongst the objectors was Truro City Council, the claimant. It made representations that, inter alia,

i) The planning application was premature;

ii) The proposal would result in the loss of high quality agricultural land;
iii) The proposed development would cause material harm to and adversely impact upon the vitality of Truro city centre contrary to policy in PPS4;
iv) That the proposed development was in conflict with the Development Plan, especially because new residential development in the open countryside was not justified.

4. Cornwall's Principal Planning Delivery Officer prepared lengthy reports on the application for consideration by the Council's Strategic Planning Committee. That met, first, on the 15th December 2011 to consider the application. The decision on the application was deferred on that day:

i) To complete further work in relation to the sequential test for the retail disaggregation option;
ii) To undertake further work on the buffer zone;
iii) To undertake further work on the estimated traffic generation of the figures;
iv) To undertake further work in relation to prematurity of the application.

5. A further report on those matters was prepared for consideration by the Strategic Planning Committee which met again on the 8th March 2012. At that meeting members resolved that authority be delegated to the Head of Planning and Regeneration to grant conditional planning permission, with the decision deferred and subject to:

> i) " That the application be referred to the Secretary of State pursuant to paragraph 5(1)(ii) of the Town and Country Planni .
>
> ii) That consequent upon the Secretary of State deciding not to call in the application that the planning permission be granted subject to conditions and to the completion of a planning obligation, the heads of terms of which are set out in the report.
>
> iii) That authority be delegated to the Head of Planning and regeneration in consultation with the Chairman, Vice Chairman and Electoral Division Members to approve the satisfactory completion of a Section 106 planning obligation to secure the community benefits (*The request for community benefits related to the need to provide funding for a series of measures which would directly mitigate against the defined loss of trade within the city centre arising from the new retail store, particularly because of the impact on city centre food retailing) to include the establishment of a Liaison Group to help guide the distribution of the developers contributions."

6. The application was referred to the Secretary of State on the 16th June 2012. On the 7th July 2012 a letter confirming that the Secretary of State did not wish to call in the application and that the decision should remain with Cornwall Council was received from the National Planning Case Unit (NPCU).

7. On the 24th October 2012 the defendant's Development Manager, Mr Tony Lee, emailed an update note to the defendant's Head of Planning and Regeneration and Chairman of Strategic Planning. That reported on matters since the 8th March resolution. Amongst other things the note reviewed the application against the new National Planning Policy framework (NPPF) which had been published on 27th March with immediate effect.

The note concluded:

> "A reassessment of the application by the SPC, following the publication of the NPPF, would appear to be unwarranted and inconsistent with the NPPF presumption in favour of sustainable development which the application is clearly able to deliver. The decision by the NPCU not to call in the application would appear to be consistent with its view."

8. Planning permission was granted on the 26th October 2012 subject to 46 conditions and a planning obligation between the defendant and the Duchy of Cornwall.

9. The reason for the grant of planning permission was summarised on the decision notice as follows:

> "The proposal constitutes sustainable development which fulfils economic, social and environmental roles, contributing to a strong, competitive economy, safeguarding the viability of the city centre, delivering sustainable transport, making a small but significant housing contribution, including 34 local needs affordable housing units, is of a good standard of design, safe, accessible and which both improves integration and addresses flood risk. Whilst having what is considered to be negative landscape impacts and involves loss of agricultural land (not of the most versatile and highest quality grade), mitigation measures seek to limit impacts and address biodiversity concerns; the proposal seeks to address food production issues and delivers sustainable transport infrastructure in accordance with advice in the National planning Policy Framework such that the benefits sufficiently the identified negative impacts."

Claimant's Case

10. The claimant challenges the planning permission on six grounds. They are

i) Whether the defendant complied with its duty under s38(6) of the Planning Compulsory Purchase Act 2004 ;
ii) Whether the defendant gave adequate reasons for the grant of planning permission in accordance with article 31 of the Town and Country Planning (Development Management Procedure)(England) Order 2010 ;
iii) Whether the defendant ought to have refused planning permission on the grounds of prematurity;
iv) Whether the defendant failed to have regard to material considerations that had arisen since the resolution of the 8th March 2012 to grant consent, namely,

i. progress that had been made in the local plan and neighbourhood plan;
ii. progress that had been made on a site known as Langarth Farm.

v) Whether the defendant misdirected itself as to the availability of

(i) The sequentially superior site at Pydar Street, Truro;
(ii) On the possibility of disaggregation

vi) Whether the defendant misdirected itself as to the meaning of its affordable housing policy.

Ground One

Whether the defendant complied with its duty under section 38(6) of the Planning and Compulsory Purchase Act 2004?

Legal Framework

11. Under section70(2) of The Town and County Planning Act 1990 , when a planning application is made to a local authority:

> "In dealing with such an application the authority shall have regard to provisions of the Development Plan, so far as material to the application, and to any other material considerations."

Under section 38(6) of the Planning and Compulsory Purchase Act 2004 ,

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

12. The meaning of section 38(6) has been the subject of judicial decision. In City of Edinburgh Council v the Secretary of State for Scotland and others [1997] UKHL38 the House of Lords considered section 18(a) of the Town and Country Planning Scotland Act 1972 which is in the same terms as section 38(6) of the Planning and Compulsory Purchase Act 2004 . Because a fair amount of the argument before me turned on the nature of the duty of section 38(6) imposed on a Local Planning Authority it is necessary to set out relevant parts of the judgments. Lord Clyde said at pp1457- 1459 as follows:

> "By virtue of section 18 A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought useful to talk of presumptions in this field it can be said that there is now a presumption that the Development Plan is to govern the decision on an application for planning permission. It is distinct from what has been referred to in some of the planning guidance, such as for example in paragraph 15 of PPG1 of 1988, as a presumption but what is truly an indication of a policy to be taken into account in decision-making. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the Development Plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.
>
> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the Development Plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he falis to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it.. He will also have to consider whether the development proposed in the application before him does or does not accord with the Development Plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the

> opposite direction. He will require to assess all of these and then decide whether in light of he whole plan the proposals does or does not accord with it.. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether they are considerations of such weight as to indicate that the development plan should not be accorded the priority which statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

Lord Hope said (at pp) as follows:

> "It is not in doubt that the purpose of the amendment introduced by section 18A was to enhance the status, in this exercise of judgment, of the Development Plan.
>
> It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision taker. The Development Plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged to adopt Lord Guest's words in Simpson v Edinburgh Corporation, 1960 S.C. 313, 318, " slavishly to adhere to " it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what has been laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up to date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority…….
>
> The function of the court is to see that the decision taker had regard to the presumption, not to assess whether he gave enough weight to it where there were other material considerations indicating that the determination should not be made in accordance with the Development Plan."

13. In Cala Homes (South) Ltd v Secretary Of State for Communities and Local Government [2011] EWHC 97 Lindblom J having set out extracts from City of Edinburgh said (at paragraph 28):

> "From this analysis it is clear that although section 38(6) requires a local planning authority to recognize the priority to be given to the Development Plan, it leaves the assessment of the facts and the weighing of all material considerations with the decision-maker. It is for the decision-maker to assess the relative weight to be given to all material considerations, including the policies of the Development Plan."

The Court of Appeal in dismissing the appeal from Lindblom J's Judgment did not doubt that approach.

Argument

14. The Claimant submits that the approach required by the City of Edinburgh was not followed . The centrality of the Development Plan to the decision-making process means that it is not sufficient just to state the policies of the Development Plan and their age. If there is to be a departure from the adherence to section 38(6) the local planning authority has to identify how it has gone through the appropriate process and explain that departure. It is under a duty to act with rigour and particularity.

15. The defendant submits that it always recognised that the development was in conflict with the Development Plan. The officer reports identified the relevant local and national policy and members were correctly advised on conflict with the Development Plan and the weight to be attached to it because the policies were out of date. The claimant itself recognised that the policies were out of date and the attachment of less weight to Development Plan policies was entirely consistent with paragraphs 12 and 14 of the NPPF. It is unrealistic, the defendant submits, that in respect of each policy a Decision-maker is required to set out all the changes that have occurred that make the policy out of date. Such a methodology is not required by the City of Edinburgh .

Discussion

16. The starting point is the Development Plan. At the material time it comprised the Cornwall Structure Plan, approved in 2004, the saved policies in the Carrick District Local Plan, adopted in 1998, and the Balancing Housing Markets DPD 2008.

17. The first report to the Strategic Planning Committee of the 15th December 2011 is some 76 pages. It dealt at some length with the various elements of the mixed use proposals identified in the planning application as a departure from the Development Plan and advised that, if members wanted to approve the application, it was one that would require referral to the Secretary of State.

18. The report began with a summary followed by a more detailed appraisal of what were seen as the key issues. The first section is headed, "The principle of development including policy considerations and prematurity." That section reads:

> "1.5 The site is located in the rural area and is outside but adjacent to the developed area of Truro. The land is not allocated in the Development Plan and the proposal has been advertised as and would constitute a departure from Saved policies in the Development Plan.
>
> 1.6 Like many centres, Truro suffers from the effects of traffic congestion. A key factor are the major traffic arteries the A39 and A390 which converge on the city from the East and West, merging in what becomes a bottle-neck at peak periods between Union Hill in the East and Arch Hill in the West. The Western Park & Ride (P&R) at Langarth has helped ease congestion and was conceived as a multi-stop strategy. This proposal to site an Eastern P&R at the Eastern confluence of the A39 and A390 seeks to build upon this success and ease traffic congestion especially at peak periods, reduce journey times, improve convenience and free up town centre parking for short stay visits. The proposed development, while allowing linked trips to the various uses, generates an additional demand which to some extent has the potential to negate the benefits arising out of P&R. The assessment of the overall transportation benefits to Truro therefore to a significant extent holds the key to whether this scheme should be encouraged or resisted, having regard to the other pros, cons and material considerations implicit in such a complex proposal, including any conflict with aspects of the Development Plan.

> 1.7 Given the age of the Development Plan, the status and time frame for the Core Strategy (estimate 2014), the absence of any interim policy guidance likely to hold substantial weight emerging in the interim and the present transportation situation, it is necessary to consider the issue of prematurity. In short, do the strategic nature of the proposals give rise to issues which should only rightly be resolved through the Plan process ? My considered view is that there is sufficient evidence of need to support the location of a P&R, moreover that this location is optimum and transportation benefits of the proposal are evident. The Development Plan is outdated and the need for infrastructure to serve the City's transportation and waste needs is well known and has been the subject of much discussion and consideration. In the absence of up to date policy guidance this opportunity for much-needed infrastructure to ease congestion and improve opportunities for Truro, while a Departure, is not premature and should not be set aside lightly.
>
> 1.8 The extent of housing proposed, 98 units, is not significant in strategic housing supply terms. As such I consider that the recent planning appeal decision at Winchester involving Cala Homes which was dismissed as being of a strategic nature and premature in advance of the Core Strategy process-which itself was well advanced-are not comparable."

It is clear from that section that the transportation aspects of the development were regarded as a highly material consideration.

The next section of the report proceeds to deal with transportation issues. As there was no dispute on the transportation aspect they formed very little part of the argument before me. Nevertheless, they are part of the overall consideration that the planning committee had to make of the planning application. Relevant parts of that section are as follows:

> 1.9 Transportation issues, principally relating to the development of P&R, are the driving force behind the proposals and are therefore among the key considerations. Congestion in the City is an increasing factor, with the A39 and A390 feeding into the City from two directions, creating a central bottle-neck which affects how traffic by-passes and accesses the City. It is the management of how traffic is funnelled through and to the City that P&R, along with other associated highway measures, is designed to improve. Congestion is an important factor in the quality of life of residents, sustainability and in the economic health of the City……
>
> 1.12 Much more is said in the report below about the pros and cons of the location and the proposals. However, my conclusion is that the application site is the optimum site available for an Eastern P&R, best suited as it sits at the confluence of the A39 and A390, capturing traffic from both the North and East with the need for only one set of infrastructure and most conveniently located for maximum use. Highways colleagues acknowledge this is a complex development with an impact on the highway network and conclude there are considerable advantages which will accrue from the implementation of the scheme as a whole. This relates primarily to the completion of the East-West linked Park & Ride scheme for Truro and the attendant benefits it would bring to the people of Truro. A 'do nothing' approach gives rise to serious concerns that in a few years considerable traffic delays along the corridor into Truro from the East will be compounded. The capacity improvements of removing 15% of inbound morning peak traffic and modest evening peak improvement with the 25% capacity improvement at Union Hill is based on the position estimated to exist at 2018. It must be acknowledged that the benefits of network improvements tend to fall away gradually to present levels but that is dependent upon traffic growth (at present levels this is at a flat rate) and other factors. The proposals also offer improved pedestrian and cycle crossing facilities at a number of junction, improved cycle and passenger transport links. The initial gains in capacity, reduced congestion and improved journey times will diminish over time. The traffic modelling demonstrated Truro's roads would benefit from the proposals and this infrastructure improvement would be a key asset to the City thereby contribute positively to Truro's future and its key role in the local economy, about which more is said below

> 1.13 While some do not consider this site to be the best P&R solution (and these issues are explored more fully in the report), engineers do and overall I concur. There is though considerable support for P&R and varying degrees of support for other elements of the scheme. There is also a great deal of opposition to P&R to the development of the valley and to the mixed use elements of the scheme. It is unlikely that the greater benefits of the provision of the Eastern Park and Ride will be achievable in the future unless this scheme is considered in whole as a package. On balance the transportation improvement opportunities are considered vital to the City's transportation strategy and overall outweigh the negative scheme impacts.

Although an on-balance judgment the report regarded the transportation benefits described in full in the report as sufficient in themselves to outweigh the negative impacts of the scheme. It is apparent that the officers were bringing clearly to the attention of the members the importance of the transportation elements of the proposal as a highly material consideration.

19. The report moved on to consider the retail issues including the local economy. It concluded at paragraph 1.19 as follows:

> 1.19 Having regard to the range of positive, negative and neutral impacts associated with this proposal it is unlikely to affect any planned town centre investment or the delivery of Development Plan allocations, whilst it could also add to choice and competition. There are however some negative impacts associated with the proposal, including the diversion of up to 8–9% of Truro city centre's convenience goods turnover and a potential impact upon the regular Farmers Market within the city centres. However, in overall terms, it is not considered that the proposed development will affect the health of the city centre as a whole. On balance, the potential benefits to the Cornish food industry through this potentially innovative initiative are such that the retail proposals are recommended favourably.

It should be recorded at this stage that the council had employed independent retail consultants, GVA Grimley, to advise them on retail issues.

20. The defendant employed independent consultants also to advise on ecology matters as the site was a Greenfield site and close to a special area of conservation, a site of special scientific interest and a site of county wildlife importance. With mitigation, the measures proposed were regarded as sufficient to negate the potential impact on each of the ecological receptors.

21. Landscape impact was assessed as negative. Design and layout were assessed with the proposal being recorded as extremely well-designed producing a scheme of good quality.

22. Agricultural issues were reviewed concluding that there would be a loss of versatile agricultural land and the loss of land to a farmer.

23. The household waste and recycling centre (HWRC) was recorded as a much-needed and long-overdue facility. Its location at the edge of the city was said to be ideal to minimise long-distance trips and to enable heavy vehicles servicing the site to avoid Truro.

24. Although not an allocated housing site the provision, within the application, for 97 houses, including affordable housing, was said to make a valuable contribution to the housing stock as there was an unmet 5-year housing supply target.

25. A planning obligation with the heads of terms placed before the committee was recommended as necessary to make the development acceptable in planning terms. The recommendation was:

> 1.35 It is recommended that the transport infrastructure and other benefits of the proposal are substantial and outweigh the harm identified, in particular in relation to landscape impacts and conflicts with aspects of the Development Plan and that permission be granted on the basis outlined on the front page of this report.

26. The report then proceeded to deal with each of the issues in greater detail.

27. Section 6 dealt with the relevant local, national, regional policy guidance. In that section the component parts of the statutory Development Plan are identified. The report recited that the Cornwall Structure Plan and Carrick District-wide Local Plan were both dated within the context of the national planning policy arena. Part of the site had been identified in the Truro and Three Milestone Area Action Plan (AAP) as a district centre, Park & Ride, potential waste and recycling site and housing option (urban area) but that AAP could not be progressed without further work through the core strategy (CS). As a result the AAP could be afforded no material weight and only limited weight could be afforded to the core strategy. The Truro and Kenwyn neighbourhood plan had not progressed to any consultation stage. As a result no weight could be afforded to it.

28. Section 9 , of the report provided an assessment of the key planning issues. Having set out the parts of the Development Plan, the then-draft NPPF and the emerging parts of the Development Plan the report continued.

> "I am of the opinion that there is sufficient evidence of transportation need and benefits to public transport and wider non car models of travel such that support may be given in principle to siting a P&R in advance of further policy progression. This location provides the optimum transportation benefits securing access from traffic from both the East and the North before entering the City traffic bottle-neck between Tregolls Road and Morlaix Avenue. The Development Plan is outdated and the need for infrastructure to serve the City's transportation and waste needs is well known and has been the subject of much discussion and consideration. In the absence of an up to date Development Plan and policy guidance this opportunity for much-needed infrastructure to ease congestion and improve opportunities for Truro, while a Departure, is not considered to be premature and should not be set aside lightly.
>
> The co-location of mixed uses is a positive element of the scheme and there are significant benefits arising from co-location which are discussed elsewhere. The introduction of a new HWRC will benefit the residents of Truro and the wider area who currently have to travel significant distances

to United Downs for recycling. The retail offer has the potential to add value to the Cornish food industry without significant adverse effects on the centre. Combined trips may help towards reducing congestion and the detailed traffic implications, positive and negative are explored in the transportation chapter of this report.

As such it can be seen that the development, while contrary to the provisions of the Development Plan, is consistent in part with the evidence which informed the preparation of emerging guidance and the development has the potential for both positive and negative impacts. It is little different from many development proposals in this latter regard and though agricultural, immediately borders the Eastern part of the city and in principle would be considered to be an urban extension of the city."

29. The report concluded by referring to the significant transportation, waste, housing and potential benefits to the Cornish food industry as overriding issues associated with the benefits of the development of the site which justified approval and outweighed the negative impacts of the scheme.

30. Mr Coppel QC, for the claimant, accepted that the conflict with the Development Plan was acknowledged on the face of the report but submitted that the defendant has fallen into error.

31. In particular, he referred to the Carrick District Local Plan and the retail policies within that document which focused retail development into the town centres, including Truro, to enhance their vitality and viability and which were to resist out of town shopping initiatives. Saved policies 7(a) and 7(g) were relied upon. They read:

"Policy 7A

Retail developments within Falmouth, Penryn and Truro will be consolidated within or adjoining the central shopping area identified on the Proposals map. Proposals for significant development outside of these areas will be required to show that the needs of the area cannot be adequately provided for within or adjoining the Central Shopping Area having regard for the need for flexibility in respect of the format, design and scale of development (including the amount of parking) and it would have no significant adverse impact upon the long term viability and vitality of the centre as a whole.

Policy 7G

Proposals for supermarket and superstores located outside of the town centres of Falmouth, Penryn and Truro will only be permitted where the needs of the area cannot be accommodated within or adjoining the central shopping areas identified in Policy 7A and where all of the following criteria are met:—

i) There is no significant conflict with policies for the environment and built environment;

ii) The development would have no significant adverse impact upon the vitality and viability of the centre as a whole when considered on its own or together with any other recent and committed large scale developments in the locality;

iii) Adequate parking can be provided in accordance with approved standards as set out in Policy 5EA;

> iv) The development would not involve the loss of industrial land or buildings;
>
> v) A safe means of access exists or can be provided and the roads leading to the site are capable of catering for the volume of traffic likely to be generated;
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> vi) The site should allow for satisfactory landscaping particularly in respect of large car parking areas;
>
> vii) The scale and design being compatible with surrounding land uses;
>
> viii) There are no problems in the provision of essential services including water supply, surface water and sewage disposal;
>
> ix) The development is accessible to public transport, cyclists and pedestrians.
>
> Where any future changes to the retail character of such developments would threaten the vitality and viability of a town centre shopping area, the district planning authority will seek an obligation under section 106 of the Town and Country Planning Act 1990 to limit the range of goods sold and to restrict future sub-divisions."

He submitted that there was no reference to the conflict with those policies and why they were out of date.

32. The saved policies from the Carrick District Local Plan were adopted in 1998. They were based on PPG6 published in 1996. Since that time that PPG had been replaced by a revised PPS6 and then by PPS4. Policies in the local plan were of some 13 years' or so vintage. It is quite right that the chronological age of a policy is of little or no relevance if the policy itself is reflective of the National Planning Policy position. Policies from the Cornwall Structure Plan were not referred to by the claimant in this context. But the emphasis in national retail policy had developed and that was something to be considered in the report.

33. The report sets out that the council had taken independent advice from GVA Grimley who had prepared the Cornwall Retail Study of 2010. They were asked to consider the proposals in the context of the Development Plan and other material planning policy considerations such as PPS4: Planning for Sustainable Economic Growth (2009) together with the review of all relevant application documents. The retail section of the report is, in itself, some 14 pages in length. The retail section of the report reviewed the Development Plan policy position as follows:

> "Within the Local Plan proposals map the application site lies outside of the defined Central Shopping Area in Truro city centre and, given the distance to this defined area, can be classified as an out of centre location. On the basis of this definition, Policy 7G of the Local Plan, Policy EC6 of RPG10 and Policy 14 of the Structure Plan will apply to this proposal. In addition, the proposed development should also be considered against policies EC14–17 of PPS4.
>
> There is not a Development Plan policy to support the application site becoming a defined district centre in the local retail hierarchy and therefore it should be treated as an out-of-centre development proposal. No material weight can be afforded to the draft AA in advance of the process to pursue the Council's Core Strategy through to adoption. This reinforces the need to define the application site as an out-of-centre location."

34. It then reviewed issues of retail capacity, disaggregation of the retail aspects of the development and, following the sequential approach, reviewed the analysis submitted by the applicant on alternative development sites. It then concluded

> "Therefore, on the basis that it can be concluded that the retail elements of the proposed development cannot be disaggregated, it is considered that the retail elements of the proposed development meet the provisions of the sequential approach as set out in Policy 7G of the Carrick District-wide local Plan and policies EC15 and EC17.1(i) of PPS4."

35. The report then proceeded to look at the retail impact of the proposals against the criteria in the then-current PPS4. It concluded that the health of the city centre as a whole would not experience any significant adverse impact. The summary and conclusions to this section read:

> "Policy EC17.1 of PPS4 indicates that planning applications for main town centres uses that are not in an existing centre and not in accordance with an up to date development pan should be refused where the applicant has not demonstrated compliance with the requirements of the sequential approach or there is clear evidence that the proposal is likely to lead to significant adverse impacts in terms of any one of the tests at policies EC16.1 or EC10.2 of PPS4
>
> In this instance, the compliance of the proposed development with the sequential approach is heavily influenced by the ability to disaggregate the Waitrose and Cornish Food Hall retail floor space elements. The applicants' case is reliant on the financial link between these elements and there is some missing information/analysis from what otherwise is a prima facie justification that the Cornish Food Hall requires the financial support of the proposed Waitrose.
>
> If weight is afforded to the benefits of the Cornish Food Hall use to the local economy and accepting the applicant's case that the proposed development is the only way of providing this use in a financially viable format, then a conclusion can be made that disaggregation of these retails elements is not a realistic option. On this basis, alternative sites should be assessed on the basis of their ability to accommodate the entire retail element of the proposed development and analysis has found that there are unlikely to be any suitable, available, and viable alternative locations either within or on the edge of Truro city centre.
>
> With regard to the impact of the proposed development, a decision will need to judge whether any of the negative aspects of the scheme outlined about constitute a significant adverse impact. If it is considered that there are one or more significant adverse impacts, PPS4 suggests that the application should be refused under Policy EC17.1 (although this does not side-step need to take account of the Development Plan and other material planning considerations). None of the impacts associated with the proposed development could be likely to be classified as significantly adverse in their own right.
>
> As such this proposal falls to be considered under EC17.2 of PPS4 which notes that planning application should be determined by taking account of the positive and negative impacts of the proposal in terms of policies EC10.2 and EC16.1 and any other material considerations."

Because the members wanted more information on the issue of the sequential test and disaggregation further work was requested from the applicant's consultants. That was then analysed in the second report of March 8th 2012 under the heading "Sequential Test and Retail Disaggregation."

36. The conclusions on that aspect began by reminding members of the national position as follows:

> "2.21 Policy EC17.1 of PPS4 indicates that planning applications for main town centre uses that are not in an existing centre and not in accordance with an up to date Development Plan should be refused where the applicant has not demonstrated compliance with the requirements of the sequential approach or there is clear evidence that the proposal is likely to lead to significant adverse impacts in terms of any one of the tests at policies EC16.1 or EC10.2 of PPS4."

The report proceeded by restating the position on retail impact and then continued:

> "2.25 As such, officers remain of the opinion that whilst the proposal will have a negative impact on Truro city centre it is not large enough on its own to suggest a significant adverse impact or fundamentally affect the overall health of the city centre. On this basis, and accepting that the sequential test has been met, the application cannot be resisted under EC17.1 of PPS4 and should be determined based upon the relative merits of the case.
>
> 2.26 It remains the position that the Council needs to control the future use of the proposed ToC unit to ensure that it is occupied by a ToC-style operation and that it cannot become part of an expanded Waitrose store in the future.
>
> 2.27 The sequential report demonstrates that there are no suitable sites to accommodate the two retail units if disaggregated. There is no doubt a prima facie case regarding financial viability can be made, given that this is a new and untested retail format in Cornwall. In accepting the assertion that the ToC unit must be located adjacent to the proposed Waitrose store and receive financial support from Waitrose, then we accept the case against disaggregation is proven as far as it can reasonably be expected with a new and innovative venture such as the one proposed."

The final conclusion was set out in paragraph 7.4 which reads:

> "7.4 The issues continue to hinge upon whether the significant transportation benefits of Park & Ride including improved capacity and improvements to non car modes, (notwithstanding that the mixed use element will negate some of those benefits), together with the wider waste, housing and potential benefits to the Cornish food industry, (notwithstanding the limited adverse retail impacts) are such that they sufficiently outweigh the negative landscape and other identified impacts."

The recommendation of the second report was that planning permission should be granted subject to conditions.

37. The update note of October 24th 2012 considered the effect of the NPPF as follows, where material:

> "2.1 The NPPF is also material in that it scrapped the PPGs and PPSs and replaced them with a requirement for development that is sustainable to go ahead, without delay and it provides a presumption in favour of sustainable development. The framework sets out clearly what could make a development unsustainable and provides 12 principles to support sustainable development.
>
> The reports considered by SPC referred to the draft NPPF but its introduction post dated the March SPC. The sequential test for retail development remains and is enhanced by an impact test in the NPPF. Although the NPPF is not specifically addressed in the Officers report the assessment by officers and consultants engaged to give detailed advice on these matters is sufficiently close to the principles of the NPPF so as not to be materially deficient or undermined by the publication of the NPPF. The objectives of the development to achieve improvement to the economy, transport, waste and housing needs of people in Truro and beyond in a sustainable way is evident throughout the application and reports."

38. What the reports and update note demonstrate is a consistent theme of identifying and weighing material considerations that, in the event, overrode any conflict with the Development Plan. The transportation, waste and housing benefits, in particular, were stated throughout the process as being other material considerations that indicated that planning permission should be granted.

39. On analysis it is apparent, in my judgment, that the defendant was aware of the primacy of the Development Plan; it was not relegated, as submitted, to the category of other material considerations. The conflict of the proposed development with the Development Plan was recognised throughout the process as evidenced in the reports to the committee and by referral to the NPCU. It is important to read the reports as a whole. When doing so it is apparent that the defendant did apply rigour to its approach by first looking at the Development Plan position and then considering other material considerations and considering what weight was to be attached to them.

40. Even when focusing on the retail aspects it is apparent from what I have set out above that the report took the Development Plan as its starting point, then considered national policy and reached conclusions on the acceptability or otherwise of the proposal. Far from just stating the retail policies and their age, as the claimant submits, they were subject to analysis of considerably greater depth. It is apparent, therefore, that when the defendant departed from the Development Plan the reasons for so doing, on a fair reading of the reports, are clear. It is not realistic to expect every officer report to consider each Development Plan policy on an individual basis and in each case set out with particularity why that policy is no longer up to date and to be followed. The degree of particularity required will vary on a case-by-case basis. What is needed is a clear examination of the Development Plan and the policies relevant to the application in question. If it is not to be followed, because material considerations indicate otherwise, those material considerations need to be clearly set out together with the weight attached to them so that it is clear that they override the statutory Development Plan.

41. That is what the report did here. It noted at the outset that there was a conflict with the Development Plan. It noted those considerations which supported the application and those which did not, such as the landscape. It attributed weight to those material considerations such as transportation, waste disposal and housing and concluded that the weight to be attached to

them was such as to override the priority that would otherwise attach to the Development Plan. Ultimately, the members agreed with that analysis and resolved to grant planning permission. The exercise was, in my judgment, conducted with appropriate rigour.

42. It follows, that ground one fails.

Ground Two

43. Whether the defendant gave adequate reasons for the grant of planning permission in accordance with article 31 of the Town and County Planning (Development Management Procedure) (England) Order 2010 .

Legal framework

44. Paragraph 31 of the Town and County Planning (Development Management Procedure) (England) Order 2010 where material reads:

> (1) when the local planning authority gives notice of a decision or determination on an application for planning permission or for approval of reserved matters—
>
> b) where planning permission is granted, the notice shall—
>
> > i. include a summary of their reasons for grant of permission
> >
> > ii. include a summary of the policies and proposals in the Development Plan which are relevant to the decision to grant permission; and
> >
> > iii. where the permission is granted subject to conditions, state clearly and precisely their full reasons for each condition imposed, specifying all policies and proposals in the Development Plan which are relevant to the decision;
>
> c) where planning permission is refused, the notice shall state clearly and precisely their full reasons for the refusal, specifying all policies and proposals in the Development Plan which are relevant to the decision."

45. That duty and its extent under its predecessor, the Town and County Planning (General Development and Procedure) Order 1995 have been reviewed in several cases relied upon by the parties.

46. In the case of R (on the application of Tratt) v Horsham District Council [2007] EWHC 1485 Collins J said:

> "18. Although not specifically raised by either counsel, it seems to me that there was a failure here to include a summary of the relevant policies. It is in my judgment insufficient simply to identify a policy without indicating what it concerns. What is required is a summary of the relevant policies, not merely a list of policies which are considered to be relevant. The summary need be no more than a few words identifying the relevant aspect of any policy but that in my view at least must be given. Accordingly, the decision failed to comply with that part of article 22(1)(b)(i). However, as I say, that point was not taken by Mr. Kolinsky and he concentrated on what he submitted was a defect in the reason, as it was stated. He submitted that that could not on any view be regarded as a sufficient reason for granting the permission in the circumstances of this case.
>
> 20. Sullivan J helpfully sets out what led to the decision of Parliament to include article 22(1) in its present form and Sullivan J's experience in planning is of course second to none. In paragraph 53 he said this, on page 588:
>
> > "53. Over the years the public was first enabled and then encouraged to participate in the decision-making process. The fact that, having participated, the public was not entitled to be told what the local planning authority's reasons were, if planning permission was granted, was increasingly perceived as a justifiable source of grievance, which undermined confidence in the planning system. Thus the requirement to give summary reasons for a grant of planning permission should be seen as a further recognition of the right of the public to be involved in the planning process. While the requirement to give 'full reasons' for a refusal of planning permission, or for the imposition of conditions, will principally be for the benefit of the applicant for planning permission, who will be better able to assess the prospects of an appeal to the Secretary of State, the requirement to give summary reasons for the grant of planning permission will principally be for the benefit of interested members of the public. The successful applicant for planning permission will not usually be unduly concerned to know the reasons why the local planning authority decided to grant him planning permission.
> >
> > 54. Parliament decided that this extension of the public's rights under the Planning Code was necessary even though in many cases it could reasonably be inferred that the members would have granted planning permission because they agreed with the planning officer's report. Parliament could have, but did not, limit the obligation to give summary reasons to those cases where the councillors did not accept their officers' recommendation."

Pausing there, clearly, interested members of the public will be those for whom the reasons to grant will be of the greatest concern but it must be remembered that an objector may well want to know whether there is a prospect of a claim for judicial review of the decision and therefore the summary reasons will be material so that he can indeed consider whether the Council has on the face of it properly had regard to all to which it ought to have had regard. Equally, the applicant may also have an interest to know and to be satisfied that there is no legal problem in the grant because obviously if there were he would know that it might be dangerous for him to go ahead immediately

in reliance upon that permission, particularly if there had been vociferous and detailed objection by interested parties to it. Accordingly, as it seems to me, the need to give reasons is based upon the same considerations as the need to give full reasons for the refusal of a planning permission but of course, as Sullivan J pointed out, so far as the applicant is concerned, if there is a refusal, it is wider than whether there was an error of law because he has to consider whether there is a chance that, were he to appeal, that appeal might meet with success."

47. The *Court of Appeal in the case of R (Siraj) v Kirklees Metropolitan Council [2012] EWCA Civ 1286 considered* what was required. Sullivan LJ said:

"14. A local planning authority's obligation to give summary reasons when granting planning permission is not to be equated with the Secretary of State's obligation to give reasons in a decision letter when allowing or dismissing a planning appeal. I mention this because, although Mr Roe in his oral submissions before us recognised that there was indeed such a distinction between summary reasons and the reasons to be expected in a decision letter, the appellant's skeleton argument relied on the speech of Lord Brown in *South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953* at paragraph 36. It is important to remember that that case was concerned with the adequacy of reasons in a Secretary of State's decision letter. Although a decision letter should not be interpreted in a vacuum, without regard for example to the arguments that were advanced before the inspector, a decision letter is intended to be a "stand-alone" document which contains a full explanation of the Secretary of State's reasons for allowing or dismissing an appeal. By their very nature a local planning authority's summary reasons for granting planning permission do not present a full account of the local planning authority's decision-making process.

15. When considering the adequacy of summary reasons for a grant of planning permission, it is necessary to have regard to the surrounding circumstances. Precisely because the reasons are an attempt to summarise the outcome of what has been a more extensive decision-making process. For example, a fuller summary of the reasons for granting planning permission may well be necessary where the members have granted planning permission contrary to an officer's recommendation. In those circumstances, a member of the public with an interest in challenging the lawfulness of planning permission will not necessarily be able to ascertain from the officer's report whether, in granting planning permission, the members correctly interpreted the local policies and took all relevant matters into account and disregarded irrelevant matters.

16. Where on the other hand the members have followed their officers' recommendation, and there is no indication that they have disagreed with the reasoning in the report which lead to that recommendation, then a relatively brief summary of reasons for the grant of planning permission may well be adequate. Mr Roe referred us to the observations of Collins J in paragraph 28 of his judgment in R (on the application of Midcounties Co-operative Ltd) v Forest of Dean DC [2007] EWHC 1714 (Admin). For my part, I would respectfully endorse the observations of Sir Michael Harrison in paragraphs 47 to 50 of R(Ling)(Bridlington) Limited v East Riding of Yorkshire County Council [2006] EWHC 1604 (Admin)."

As was said later, in paragraph 24, "this was a summary. In that summary the respondent was not required to give reasons."

48. Richards LJ giving judgment in *R (on the application of Telford Trustee No 1. Ltd) v Telford and Wrekin Council [2011] EWCA Civ 896* dealt with submissions that the reasons given by a local authority were insufficient because they did not explain why the main issues had been decided in favour of the applicant for planning permission as follows,:

> "If one asks why planning permission was granted, then the answer which is apparent on the face of the summary reasons is that it was granted because, so far as material, the proposal was assessed to be in accordance with PPS4. If one goes on to ask why it was assessed to be in accordance with PPS4, and in particular why it was assessed to meet the requirements of the sequential approach and the impact assessment, one is drawn ineluctably into the giving of reasons for reasons and/or the giving of reasons for rejecting the Trustees' objections. I am wholly unpersuaded that, in the circumstances of this case, it was necessary for the Council to go down that route in order to fulfil the requirement to give a summary of the reasons for the grant of planning permission." (paragraph 57)

Argument

49. The claimant submits that the summary reasons given by the defendant on the decision notice are inadequate. This was a large controversial development. Thirteen key issues were identified in the report to committee. For many of them not a word is to be found in the reasons which consist of a "perfunctory procession of planning platitudes." By way of example there was no reference to conflicts with the Development Plan or prematurity. The development policies were simply listed.

50. The defendant submits that there is no obligation to set out all things that were looked at but which were not significant. A summary of the reasons for the grant of permission is sufficient. The identification and summary of the Development Plan policies is also sufficient.

Discussion

51. I have set out the reasons for approval above.

52. The reasons for the grant of planning permission are shortly stated but follow on from detailed officer reports the recommendations in which were ultimately followed by the Committee. The relevant Development Plan policies in the Cornwall Structure Plan 2004, the saved policies of the Carrick District-wide Local Plan 1998 and the Balancing Housing Markets DPD are listed together with their title. No criticism is made of the reasons which were set out for each of the conditions on the planning permission.

53. As Sullivan LJ said in Siraj where members have followed their officer recommendation and there is no indication that they have disagreed with the reasoning in the report leading to the recommendation then a relatively brief summary of reasons may well be adequate. In my judgment, that is the position here. It was submitted that the voting by the members was reasonably close. That is correct, but the majority of members acceded to the recommendation that was made. In those circumstances, the fact that a significant minority were exercising their democratic right to vote against the application does not affect the approach to the giving of reasons. The members had initially been troubled by various aspects of the application before them and so had deferred the decision before delegating approval to officers on the 8th March 2012 upon being satisfied with the additional information that they received in the second report. There was no necessity, therefore, to provide extensive reasons.

54. It has to be remembered that the duty of the local planning authority was to provide reasons for the granting of planning permission. It was not to repeat each of the main issues in the report to members and set out how they were resolved. In that context, it is not surprising that there was no mention of conflict with the Development Plan or prematurity; they were not reasons for the grant of permission. They were prior issues which had arisen and been resolved by the members as part of the balancing exercise that they undertook to determine whether planning permission should be granted.

55. Retail issues are dealt with somewhat elliptically by referring to "sustainable development which fulfils the economic, social and environmental roles, contributing to a strong competitive economy safeguarding the viability of the city centre". However, that was the overall conclusion of the committee based upon advice they received about the impact on the health of the town centre as a whole and the absence of any adverse affect on the Development Plan retail proposals. To go further would be to advance into the territory of giving reasons for reasons.

56. The claimant submits that there is no reference in the reasons to residential amenity which is identified as one of the main issues in the committee report. That is true. In the first report though many of the residential amenity issues were thought to be appropriate to be dealt with by way of condition and it is clear from the last sentence of the reasons that the "benefits sufficiently outweigh the identified negative impacts" so that whatever residential disamenity there was it was outweighed by the overall benefits. Examination of the conditions on the planning permission confirms that many did deal with residential amenity issues. I do not think that the local planning authority was under a duty to do more in the reasons advanced for the grant of permission.

57. In terms of the policies they are set out, listed, and given their title. That is sufficient to identify the policy and the topic to which it relates. Read with the reasons there is sufficient for a member of the public to know what was considered and why the local planning authority thought it was appropriate to grant planning permission. If they wanted anything further they could seek the committee reports. If I am wrong on this aspect I would not have quashed the planning permission. Rather, I would have held that the deficiency did not cause the claimant or anyone else substantial prejudice. The reasons why planning permission was granted can be seen from the officer reports. The remedy then, would have been mandatory relief requiring the reasons to be made good: see R (on the application of Prideaux) v Buckinghamshire County Council & FCC Environment UK Limited [2013] EWHC 1054 at 168.

Ground Three: whether the application was premature ?

Legal Position

58. The case of Arlington Securities Ltd v Secretary of State for the Environment and another [1989] 2 EGLR 179 (CA) confirmed that the issue of prematurity could be a material consideration. The case concerned planning permission for a business park covering a site of 180 acres and possibly generating 7000 jobs. Challenged on the basis of inadequate reasons and that prematurity was not a good ground for the refusal of planning permission Nicholls LJ said:

> "Third, I can see nothing unreasonable in the view of the Secretary of State which is implicit, if not explicit, in paras 5 and 6 of his decision letter, that this development is of such a size and importance, covering, as I have said, 18 acres and generating eventually some 7000 jobs, that in the public interest its implications ought to be investigated and considered by the local plan process, and that in this case the risk of prejudice and error which could arise if a decision were made regarding this development without that process having been undertaken outweighed the prejudice resulting from Arlington's having to wait for that process to unwind. This was so because of the major implications mentioned in para 5. It was also so because of the need to find the most suitable site in Crawley borough for such a major development as mentioned in para 6.

> I considered that it was open to the Secretary of State to form the view that in this way and having regard to the size and importance of the development and the significance of the implications arising from the creation of thousands of new jobs, to permit the development at this stage would in this case cause demonstrable harm to interests of acknowledged importance."

The case of Larkfleet Limited v Secretary of State for Communities & Local Government and South Kesteven District Council [2012] EWHC 3592 considered the issue of prematurity more recently. Kenneth Parker J having reviewed the relevant policy said:

> "Prematurity as correctly understood and applied, is simply one relevant circumstance among others, and the weight to be given to it will depend crucially on the individual circumstances of each case. Prematurity no more than the completed operation of area action plans, is not a bar or practically insuperable hurdle to the grant of planning permission"

59. The relevant planning policy at the material time was set out in the Planning System: General Principles. Paragraphs 17 to 19 are material. They read:

> "17. In some circumstances, it may be justifiable to refuse planning permission on grounds of prematurity where a DPD is being prepared or is under review, but it has not yet been adopted. This may be appropriate where a proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by predetermining decisions about the scale, location or phasing of new development which are being addressed in the policy of the DPD. A proposal for development which has an impact on only a small area would rarely come into this category. Where there is a phasing policy, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have that effect.
>
> 18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications should continue to be considered in the light of current policies. However, account can also be taken of policies in emerging DPDs. The weight to be attached to such policies depends upon the stage of preparation or review, increasing as successive stages are reached. For example:
>
> • Where a DPD is at consultation stage, with no early prospect of submission for examination, then refusal on prematurity grounds would seldom be justified because of the delay which this would impose in determining the future use of the land in question.
>
> • Where a PDP has been submitted for examination but no representations have been made in respect of relevant policies, then considerable weight may be attached to those policies because of a string possibility that they will be adopted. The converse may apply if there have been representations which oppose the policy. However, much will

> depend upon the nature of those representations and whether there are representations in support of particular policies.

> 19. Where planning permission is refused on the grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process."

Argument

60. The claimant submits that the size, scale and nature of the development are such that a grant of planning permission would put at risk or would impinge upon the local plan process. The claimant refers to the second committee report where it deals with the issue. It says:

> "5.3 For an application to be considered premature there is a burden of proof required that the proposal would prejudice due to scale or strategic direction, future options for growth that are at an advanced stage of community involvement.
>
> 5.4 If considered to be contrary to the emerging Core Strategy, there would need to be a specific designation in the strategy which would be compromised by the proposal. I can see no such conflict within the emerging Core Strategy upon which to base any argument for prematurity. Nor is the strategy particularly advanced, being by the most optimistic estimates still a year from adoption. In addition, due to its strategic nature the Core Strategy is unlikely to contain any site allocations fro Truro and Kenwym.
>
> 5.5 Similarly, with the Neighbourhood Plan, the Plan would need to be sufficiently advanced to demonstrate how the development would be in conflict with it. Notwithstanding that CC are supportive of the neighbourhood plan process the plan is not at a stage advanced enough and subject to substantive community involvement that the plan can be considered as expressing a definite community aspiration for or against any particular site. It is understood the Neighbourhood Plan Steering Panel has agreed a list of sites that they support. There is currently no information available in the public domain regarding the suitability, availability and deliverability of those sites. CC is unable to currently demonstrate a deliverable 5 years supply of housing needs in respect of the Truro area as required in both PPS3 and the emerging NPPF. As yet through the Neighbourhood Plan process there is no evidence of any engagement of the community, landowners, developers and infrastructure providers to assist in the development of a land supply that would be suitable, viable and deliverable. In the absence of such it would not be possible to demonstrate what aspects of the Neighbourhood Plan the proposal would be in conflict with and little material weight can be attributed to an emerging Neighbourhood Plan for which, despite having a suggested timetable for completion by the end of this year, there is nothing yet in the public domain for consideration."

61. The claimant submits that those paragraphs demonstrate a manifest misunderstanding of the policy on prematurity. The claimant further submits that the present case is a paradigm of where prospects of local plan allocations might be prejudiced. The fact that the emerging policy documents are not well advanced is not to the point. The officers here have confused prematurity with materiality of an emerging Development Plan. Once it is clear that policies are outdated the absence of others

does not mean that the local planning authority can proceed without reference to other policies that might emerge. There is a possibility of pre-empting subsequent land allocations. That was something which was not addressed in the committee reports.

62. For the defendant three propositions were made, namely,

i) Prematurity was capable of being a material consideration;
ii) Absent perversity it was a matter of discretion for the decision-maker and the weight to be given to it would depend on the circumstances of each case;
iii) Provided the decision-maker had regard to relevant circumstances it was a matter for the discretion of the decision-maker. The relevant circumstances may include

- The scale and nature and location of the development proposalp
- The stage of the preparation of the local plan
- The need to progress the application
- Whether the emerging plan contained policies and allocations that might be affected by the application.

63. At all material times the Core Strategy and Neighbourhood Plan were embryonic. There were no Neighbourhood Plan documents at any stage. The published Core Strategy document relied upon by the Claimant was a pre-submission stage document published in March 2013. Prior to that the Core Strategy had been out for consultation only on, firstly, options and, secondly, the nature of growth. It was not a case where the retail impact was significant. The housing numbers would not prejudge the scale and location of housing allocations and the need for and suitability of the site for Park & Ride and as a household waste recycling site was not in dispute. The topic of prematurity was given specific consideration in each report and was a matter upon which members had wanted further information.

Discussion

64. It is quite impossible to divorce the issue of prematurity from the local plan process: after all, the impugned decision is premature to what?. The essence of a successful claim of prematurity is that the development proposed predetermines and pre-empts a decision which ought to be taken in the Development Plan process by reason of its scale, location and/or nature or that there is real risk that it might do so. Whether the proposed development will actually do so is something which should therefore be addressed.

65. Here the two elements of the emerging Development Plan were at a very early stage. The Core Strategy was considering options for growth and development patterns. It had been out to consultation on both by the time of the grant of planning permission. The second round of consultation took place between the 11th March 2012 and 22nd April 2012. Responses to that exercise were considered on the 7th November 2012, after planning permission was granted. However, the Core Strategy was not a document that made site allocations. It is difficult to see, therefore, how it could be said that the development proposed pre-empted its process which, in any event, had a considerable way to go.

66. The Truro and Kenwyn Neighbourhood Plan was even earlier in the process. Nothing had emerged at all. Whilst the issue of prematurity needed to be considered it was not one to which much weight could attach.

67. What is clear from the first and second reports to committee is that the residential development was not strategically significant in overall housing supply terms. That was a matter of planning judgment to which the officers and members were entitled to come in the light of the current policies and not one which could be said to be perverse.

68. The transportation benefits that flowed from the siting of an eastern Park & Ride at the confluence of the A39 and A390 completed the East/West link Park & Ride scheme for Truro. The results of traffic modelling demonstrated that Truro's roads would benefit from the proposals such that the infrastructure improvements would be a key asset to the city, contributing positively to Truro's future and providing a key role in the economy. They implemented also part of the local transport plan. The first committee report considered it unlikely that the greater benefits of the provision of the eastern Park & Ride would be achieved in the future unless the scheme was considered as a whole package (see first report, paragraph 1.13). Again, that was something that the officers were entitled to point out to members as part of the need for the application before them.

69. The second report gave further guidance pointing out that both the Core Strategy and the Neighbourhood Plan were at an early stage in their development. The claimant submitted that there was no consideration of how the application might pre-empt the forthcoming Development Plan process. Paragraph 5.4 of the second report considered the issue of forthcoming specific designations and concluded that there were none in the Core Strategy. Likewise with the Neighbourhood Plan which, although it might in the future contain allocations, was at an even more embryonic stage. Further, the Neighbourhood Plan required endorsement by the local community through the undertaking of a referendum which had yet to take, and has still to take, place. It follows that little weight could attach to each of the future limbs of the Development Plan. At the material time neither had early prospects for submission. Neither had published proposed allocations. The subsequent update note of October 2012 concluded that the early emerging status of the Neighbourhood Plan meant little if any weight could be attributed to it and that it could have little if any bearing on the most recent resolution on the application.

70. The fact that there was an identified need for a household waste facility and retail capacity had been demonstrated for the retail element of the development proposal added to the need to progress the planning application. Only through so doing could the development benefits which were regarded as tangible be realised.

71. In the circumstances, the defendant did not err in the way that it approached the issue of prematurity. Rather, it followed the guidance set out in The Planning System General Principles set out above. The defendant considered the existing and emergent Development Plan position and concluded that little weight could attach to either. Nothing could be identified in any emerging document which would or could be pre-empted by the development proposals. The alternative would have been to await an uncertain timetable and uncertain outcome of the Development Plan process. The defendant then considered the need for the application, took account of the benefits that flowed from it and considered those to be overriding factors. There was nothing irrational or in error in the way that the defendant proceeded. This ground fails.

Ground Four

Whether the defendant failed to have regard to material considerations that had arisen since the resolution of the 8th of March 2012 to grant consent ?

Legal Position

72. *R (on the Application of Kides) v South Cambridgeshire District Council [2002] EWCA Civ 1374 considered* the nature and extent of the duty on a planning authority under section 70(2) of the 1990 Act and the requirement on an officer delegated to sign a decision notice to refer the application back to committee for further consideration. Lord Justice Parker said (at paragraph 125):

> " On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of statutory duty."

Argument

73. The claimant submits that that is the position here. There were three new material considerations which made it incumbent on the officer writing the update note to refer the matter back to committee, namely,

i) progress that had been made in the Local Plan and Neighbourhood Plan
ii) progress that had been made on a site known as Langarth Farm
iii) progress that had been made on the affordable housing DPD

74. Cumulatively, the movement in the local authority decision-making meant that the application should have been referred back.

75. The defendant points out that the claimant did not seek to persuade the defendant to take the application back to committee at the time even though it was a very active participant in the decision-making process and was not reticent with its written comments.

Discussion

76. I deal with each of the three points in the order set out above.

Progress in the Local Plan

77. I have set out what had occurred between March and October 2012 with the Core Strategy and Neighbourhood Plan above under issue three.

78. It is submitted by the claimant that the members needed an update and there was nothing in the October update note. I can see no merit in this submission. As at October 2012 there had been no material progress on the Development Plan since March 2012 to report to members that would affect the decision-making process.

Langarth Farm

79. On the 3rd May 2012 the claimant submits that the defendant resolved to grant planning permission for a development which included a 1,000 square metre supermarket. It is submitted that there was a material change of circumstance that required a re-evaluation of the retail impact on Truro city centre. Even if there was a restriction proposed on the size of the food unit at Langarth Farm the application should still have been taken back.

80. The witness statement of Tim Marsh, principal development officer with the defendant for the central planning area in which the application site is located, sets out that the council had passed a resolution on the 3rd of May 2012 to conditionally approve an outline planning application for a major mixed use development including 1,500 houses at Langarth Farm. Permission was dependent upon the execution of a section 106 agreement which had not been signed by the 26th October 2012 and the finalisation of a Design Code and Parameter Plan. Although the proposed development included a total of 1,120 square metres of A1 retail floor space an agreed condition restricted the largest retail unit to a maximum of 400 square metres. Furthermore, the development was subject to a phasing plan with a build programme over 10–15 years such that with an anticipated start date of 2014 the proposed retail provision was unlikely to be completed much before 2020.

81. In fact, in the second report, the trading impact of the retail units at Langarth Farm was taken into account as part of the reworked retail analysis. As a result the committee were aware of the cumulative impact of the proposed development with that of Langarth Farm should planning permission be granted there.

82. There is nothing, therefore, in the claimant's submission. All matters of concern to it had in fact either been taken into account or were not of any material substance

Affordable Housing Policy

83. Despite the claimants submission that this did amount to a material change it is clear from the witness statement of Mr Marsh that the Cornwall Balancing Housing Policy DPD was abandoned in early 2011. It was thus never a material consideration in the determination of the application.

84. It follows that individually and cumulatively the factors pointed to by the claimant did not warrant taking the application back to committee.

Ground Five

Whether the council misdirected itself

i) as to the availability of a sequentially superior site at Pydar Street in Truro;
ii) on the issue of disaggregation of the development

Pydar Street

85. Pydar Street is a town centre site in Truro, it is jointly owned by Cornwall Council and Stanhope LaSalle. Within the saved policies of the Carrick Local Plan it is identified as a potential redevelopment site. Paragraph 7.7.2(ii) the plan reads:

> "ii) Land to the rear of Pydar Street & St. Austell Street
>
> This site, which includes the District Council Offices and many of the surrounding buildings offers potential for redevelopment for mixed uses including office/residential (the Council will seek 50 residential units as part of any mixed development) and retail. Any redevelopment of this site would be dependant upon the relocation of the Council Offices to an alternative site."

Mr Gazard, the clerk to Truro City Council, in his witness statement says that he received a letter from Stanhope's agent, Mr Seaton Burridge, the day before the strategic planning committee meeting. Paragraph 11 of his witness statement reads:

> "11. On 7 March 2012, I received a letter from Stanhope's agent, Mr. Seaton-Burridge. In that letter Mr Seaton-Burridge sets out the situation at that time (i.e. the day before the strategic planning committee meeting) in relation to his client's land Mr Seaton-Burridge states:
>
> > Our clients… are currently in the process of discussing the future of the site with Cornwall Council with a view to promoting an independent scheme or merging their interest with the council and undertaking a larger development. The site is currently occupied by a variety of individuals and companies on short leases, al of which contain a development break clause enabling vacant possession to be gained with no more than three months' notice. The site is therefore not only earmarked for comprehensive development but is also being actively promoted by a major developer for a mixed commercial use.
> >
> > My client's site extends to approximately 2.5 acres and could easily accommodate both a new Waitrose store… with ancillary car parking and indeed the local produce market, if required. My clients have in fact contacted Waitrose advising them of the site's availability and have indicated that they would be keen for them to be accommodated within their development proposals.
> >
> > The conclusion of the sequential test relating to this site are completely inaccurate and I would therefore be obliged if you would relay the fact that the site is available to whomsoever you think appropriate. Whilst writing I also enclose a Planning policy Brief Note prepared by Montagu Evans, together with Cabinet Report and Minutes, from which it can clearly be seen that the site is ideally suited for food store use."

His statement then proceeded as follows:

> "15. The strategic planning committee meeting was available on a webcast. During the meeting Jonathan Banham of Waitrose was asked if 2.5 acres in Truro was a big enough site, to which he replied that he "believed so". Councillor Nolan then commented that the Pydar site excluding Cornwall Council's part extends to 2.5 acres and that there were 3 month breaks on leases. Councillor Nolan then asked Mr Banham again if 2.5 acres was big enough and again Mr Banham confirmed that it was though adding that "any redevelopment of Pydar Street would be dependant upon relocation of Council offices to an alternative site.

> 16. Councillor Nolan sought clarification of this by asking if the only obstruction was Cornwall council in its capacity as the owner of the other parcel of land comprising the Pydar. Mr Banham responded saying 'potentially' though adding that potentially the site was not viable for Waitrose without explaining why."

As a consequence the claimants submit that when Pydar Street was presented to the committee it was mischaracterised in a material way so that the advice given to the committee was in error. As the committee was reliant on a planning officer who was not producing an accurate position of how things were on the ground there was a material error of law. Further, there was a material omission in that not a word was said about the letter from Mr Seaton-Burridge: the committee needed to be informed of its existence, it was then a matter for them whether they believed it or not.

86. The defendant submits on Pydar Street that the local plan policy is to develop the whole site. The whole site was not and is still not available. The Council offices remain on the Council-owned land, and there is no resolution to dispose of the site. The letter from Mr Seaton-Burridge relied upon by the Claimant was in fact one of two letters from him. The second letter made it clear that the original letter was written in a personal capacity and without referral or sanction from the site owners. In addition, by reference to a letter dated the 14th March 2014 from Stanhope it was made clear that Scott Burridge were not advising Stanhope on their development proposals. Their appointed advisors were another firm, Montagu Evans. The letter of the 14 March continued:

> "As you know, it is early days in our regeneration proposals but Stanhope is committed to taking forward an exciting and substantial regeneration project which we hope will include Council land at the rear of the site owned by LaSalle. By combining the two sites we believe we can deliver a project of real significance and quality. Our proposals are to bring forward a comprehensive retail led scheme providing predominantly comparison shops, to improve the fashion content and choice of shops in the city centre. We also hope we can engage a number of exciting new restaurant operators to open in the city on this site.
>
> At this point in time we have not had reason to engage with Waitrose and there have been no discussions progressed with them at any time in connection with this letter.
>
> I have asked Nick Seaton-Burridge to confirm that he wrote this letter unilaterally without any consultation with us or LaSalle."

The defendant submitted that the timescale on Pydar Street was too uncertain for it to be a sequentially preferable site.

87. The claimant submits that the first report cast doubt on the issue of disaggregation. The applicant had claimed that the Cornish Food Hall was dependant on the adjacent Waitrose food store yet the development on a site at Kingsley Village cast doubt upon the applicants claim as there the food hall was anchored by other forms of commercial development. The second report provided further evidence by way of financial information about the dependency of the Taste of Cornwall on Waitrose but that was inconsistent with what had been said previously.

88. The defendant submitted that they had taken advice from their independent retail consultants on the further work carried out by the applicants which in turn had been reviewed by their officers. They had, therefore, acted reasonably in their advice to committee which had provided all the relevant information to the Committee on which to take the decision as to whether to grant planning permission.

Discussion

89. The meeting of the strategic planning committee on the 8th of March 2012 was the subject of a webcast. As a result the full transcript is before the court.

90. That shows that there was some considerable discussion on both Pydar Street and the topic of disaggregation.

91. On Pydar Street members were advised about the two ownerships and the outcome of further work that had been carried out since the earlier meeting in December 2011. The officer is recorded as saying:

> "We are very, very clearly being told that the Pydar Street site is currently not available, the council are in very early stages of discussion with the joint owners but there is no cabinet decision to dispose of that land, there's not yet a decision taken as regards the office accommodation, substantial office accommodation is on the Council owned part of the site."

That was tested by Councillor Nolan who is recorded as saying:

> "…there is still enough space on the remainder of the land to develop that site and there's a willingness on behalf of the agent to do it. I'll move on, the buffer zone, it's a hedge and you've admitted it, its about as much use as Belgium's buffer zones go and it offers no protection and it will stop development down the valley road and down the main Road and there is nothing we can do about that. Is that your position?"

Councillor Plummer later raised the issue of the current status of the Pydar Street site and whether it had been declared surplus to the requirements of the Council. He was told by officers it had not.

92. Mr Jonathan Banham, employed by Waitrose, addressed the committee. He confirmed that his company had viewed the city centre sites in Truro and there were none that could accommodate a Waitrose either on its own or with the Taste of Cornwall. All of the sites had been thoroughly tested for their availability, suitability and viability as required by the sequential test. No site could meet all three requirements although there were many that could meet one or two of them. He was asked by Councillor Nolan:

> "242. Nolan- Well I'll ask that one again then. The Pydar Street site excluding the county council element is 2.5 acres with people on three month breaks in their lease can be available fairly quickly, is that big enough for you?
>
> 243. Banham- It is, but actually it will be contrary to the local plan policy 7.7.2 which actually states 'any redevelopment of the Pydar Street site would be dependant upon the relocation of the Council offices to an alternative site'.
>
> 244. Nolan- so the only obstruction is Cornwall Council?
>
> 25. Banham- That's potentially one. I mean the sites not viable for us."

Later on Councillor Bull said:

> "254. I mean presumably were Pydar Street information to be different in say a year or two years, you're saying that Waitrose would rule Truro out forever.
>
> 255. Banham- As I think I mentioned, we've been working on this for 10 years. Pydar Street was also in the local 1998 plan identified as redevelopment. This is the only available opportunity at this moment"

93. What is apparent from that review is that although Mr Seaton-Burridge's letter does not appear to have been brought to the attention of the members, they were clearly aware of the various permutations at Pydar Street both on the local plan site as a whole, and on the smaller Stanhope ownership where Councillor Nolan expressly advised his colleagues that there was willingness on behalf of the agent to develop it. In my judgment, the Councillors were aware of the position on the Pydar Street site and their decision was taken in the full knowledge of all the relevant factors. If it was an oversight on behalf of the planning officer to fail to bring the first Seaton-Burridge letter to the attention of the committee it had in fact no material consequence. It cannot be said, therefore, to be a material error of law.

94. On disaggregation, the further information provided by the consultants for the applicant was reviewed by GVA Grimley on behalf of the defendant and then further reviewed by the defendants' own officers. That process suggested that only through co-location of Waitrose with Taste of Cornwall could a turnover of more than 4 million pounds per annum be reached for the Taste of Cornwall. That level of turnover was necessary to make the Taste of Cornwall retail unit viable. Its requirement, therefore, was to be on a site next to a main food shopping destination. There were no such sites available in Truro. In the face of the advice which was given after the additional analysis flowing from the further work presented on the 8th March 2013, it was open to the committee to reject the Pydar site as sequentially preferable and to come to a conclusion that retail disaggregation was not a realistic possibility on the facts of the case before them. As a result ground five fails.

Ground Six

Whether the defendant misdirected itself as to the meaning of its affordable housing policy ?

95. In the Balancing Housing Markets DPD of February 2008 policy BHM2 applied in the urban areas of Truro, Falmouth and Penryn. Where 15 or more dwellings were proposed the amount of affordable housing was typically expected to be 35%. In the rural area policy BHM4 applied with a typical expectation of 50% affordable housing. The relevant part of that policy reads:

> **"Policy: BHM4**
>
> IN THE RURAL VILLAGES (THOSE OUTSIDE THE URBAN AREAS OF TRURO, FALMOUTH AND PENRYN), ON SITES WITHIN DEFINED SETTLEMENT BOUNDARIES OF 0.1 HECTARES OR WHERE TWO OR MORE DWELLINGS ARE BEING PROVIDED, THE COUNCIL WILL SEEK AN ELEMENT OF AFFORDABLE HOUSING."

Argument

96. The claimant submits that the reports are clear. The area is rural in character, outside, but adjacent to the urban area of Truro. To treat the site as an urban site and seek only 35% affordable housing is a misunderstanding of the policy. Even if it were to be the case of identifying which of the two policies was a closer fit for the application site that should have been set out so that the committee could determine which was the more appropriate.

97. The defendant submits that BHM4 applies only to rural villages on sites within a defined settlement boundary. This site was not within that description. It was not capable of supporting the needs of a rural community. As the site adjoined the urban area it was a question of judgment as to which policy should apply. The decision that BHM2 was the appropriate policy was within the band of reasonable decisions that could apply.

Discussion

98. It is clear that the application site was not within a rural village and not within any defined settlement boundary which applied to such a village. It was not, therefore, perverse or unreasonable on behalf of the defendant to conclude that policy BHM4 was not of direct application.

99. Whilst it is a matter of record that the site was described as being rural in character in the committee report that does not mean, given the wording of the policy, that BHM4 applied to the application site. The only other affordable housing policy was BHM2. As the site was adjacent to the urban area and was not within a rural village it was not unreasonable for the officer to conclude that policy BHM2 was the more appropriate for the application site. Mr Marsh, in his witness statement, explained the officer approach,

> "The site does however adjoin the City of Truro and would help to meet Truro's urban housing needs and therefore policy BHM2 is the relevant policy in the Carrick BHM DPD applicable to the site."

100. It was submitted by the claimant that if it was a question of identifying which policy was the closer fit that should have been set out together with the reasons why the site was regarded as appropriately governed by BHM2. That presupposes that BHM4 is a contender with BHM2 for being a close fit. In my judgment it is not. The plain and ordinary meaning of BHM4 is that it is of application to rural villages with defined settlement boundaries only, as opposed to areas of urban fringe that happen to have a rural character As a result there was no obligation on behalf of the officer to put both policies before the committee members so that they could choose between the two and determine which was the more appropriate policy. Far from being perverse or irrational in my judgement it was a reasonable exercise of planning judgment to apply policy BHM2 to the application site. It follows that ground six fails also.