Veolia ES (UK) Ltd v Secretary of State for Communities and Local Government v Hertfordshire County Council, Welwyn Hatfield Borough Council, New Barnfield Action Fund, Gascoyne Cecil Estates

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
22 January 2015

Case No: CO/3828/2014

High Court of Justice Queen's Bench Division Administrative Court Planning Court

[2015] EWHC 91 (Admin), 2015 WL 55798

Before: Mr Justice Holgate

Date: Thursday 22nd January 2015

Hearing dates: 16th and 17th December 2014

Representation

Rhodri Price Lewis QC (instructed by Veolia) for the Claimant.
Zoe Leventhal (instructed by Treasury Solicitors) for the Defendant.
No Representation for Interested Party 1.
Wayne Beglan for (instructed by Council Solicitors) Interested Party 2.
No Representation for Interested Parties 3 and 4.

Judgment

Mr Justice Holgate:

1. Veolia ES (UK) Limited ("Veolia") applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the Secretary of State for Communities and Local Government dated 7 July 2014 in which he refused Veolia's application for planning permission. The proposal was for the demolition of existing buildings and the construction and operation of a Recycling and Energy Recovery Facility ("RERF") to treat municipal, commercial and industrial wastes, together with ancillary infrastructure landscaping, habitat creation, drainage and highway improvements at New Barnfield, Hatfield, Hertfordshire ("the site").

2. The application was made on 16 November 2011 to the waste planning authority and First Interested Party, Hertfordshire County Council ("HCC"). On 24 October 2012 HCC resolved to grant conditional planning permission subject to the execution of a section 106 obligation and the referral of the application to the Secretary of State as a departure application.

3. On 28 January 2013 the Secretary of State directed that the application be referred to him pursuant to section 77 of TCPA 1990 , instead of being determined by HCC. The called-in application was the subject of a public inquiry held by an Inspector appointed by the Secretary of State which took place over a number of days between 10 September and 25 October 2013.

4. HCC continued to support the proposal at the inquiry. The site lies within the administrative area of the local planning authority and Second Interested Party, Welwyn Hatfield Borough Council ("WHBC"). WHBC, together with the Third and Fourth Interested Parties, appeared at the inquiry to oppose the scheme strongly. Veolia's project was seen as being very controversial. The site lies in the green belt and it was common ground that the proposal constituted "inappropriate development" for which planning permission could not be granted unless very special circumstances were demonstrated clearly outweighing any harm to the Green Belt and other harm (para. 723 of the Inspector's report). However, I must emphasise at the outset that the Court is not concerned with the merits or otherwise of the proposal. The Court is only concerned with issues of law.

5. On 19 February 2014 the Inspector produced a lengthy, detailed report to the Secretary of State.

6. In a letter dated 1 May 2014 the Secretary of State invited representations on certain matters which had arisen after the close of the inquiry and which, consequently, had not been dealt with in the Inspector's report. The letter was addressed to a number of participants at the inquiry including Veolia, HCC and WHBC. The parties were given until 19 May 2014 to make their representations and a further five working days were allowed for any further representations on the first round of comments circulated between the parties. The Secretary of State stated that he intended to issue his decision on the application on or before 26 June 2014.

7. Representations were made to the Secretary of State by Veolia, HCC and WHBC and the decision letter in fact was issued a few days later on 7 July 2014.

8. Much of the argument in this Court focused on passages in the Inspector's report and the Secretary of State's decision letter. For convenience I will use the prefixes IR and DL when referring to particular paragraphs in those two documents.

The development plan

9. For the purposes of this challenge it is necessary to set out the evolution of the statutory development plan, material parts of which proceeded in parallel with the planning application.

10. At the date of the Inspector's report the statutory development plan comprised the "saved policies" of the Welwyn Hatfield District Plan adopted by WHBC in 2005 ("WHDP") and the Hertfordshire Waste Core Strategy and Development Management Policies Development Plan Document ("WCS") (see IR 25). The WCS was adopted by HCC in November 2012.

Welwyn Hatfield District Plan

11. IR 41 stated that the key WHDP policy for the report was Policy RA6, which identified the site as a "major developed site" in the Green Belt. Policy RA6 provided:

> "Complete or partial redevelopment will be permitted within the boundaries of the Major Developed Sites, as shown on Inset Maps 4 to 8, subject to the following criteria:
>
> > i. Proposals should have no greater impact than the existing development on the openness of the Green Belt and the purposes of land including land within it, and wherever possible should have less impact;
> >
> > ii. …;
> >
> > iii. Proposals should not occupy a greater footprint of the site than the existing buildings, excluding temporary buildings, open spaces with direct external access and areas of hardstanding, unless this would achieve a height reduction to the benefit of visual amenity;
> >
> > iv. Buildings should not exceed the height of the existing buildings;
> >
> > v. The proposal should be brought forward in the context of a master planning brief for the site as defined in paragraph 15.15;
> >
> > vi. …; and
> >
> > vii. …"

12. To put policy RA6 into context, paragraphs 87 and 88 of the National Panning Policy Framework ("NPPF") set out the standard principles for the control of development in the Green Belt:

> "87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

13. Paragraph 89 of the NPPF provides that:

> "A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:

> …the partial or complete redevelopment of previously developed sites (brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it from the existing development."

Thus, RA6 and paragraph 89 operate so that if the new building would have a greater effect on the openness of the Green Belt or its purposes than the existing development, then (a) it cannot be treated as "appropriate development" in the Green Belt and (b) it should not be permitted unless very special circumstances are demonstrated in support of the proposal which clearly outweigh any harm to the Green Belt and other harm.

Hertfordshire Waste Core Strategy

14. Strategic objective SO1 of the WCS promotes the provision of facilities to drive waste management practices up the waste hierarchy and reduce waste volumes to be disposed to landfill (IR 27). The hierarchy is shown diagrammatically in paragraph 4.6 and Figure 1 of the WCS; starting at the top with the prevention of waste creation, then reuse of waste, followed by recycling, next other recovery (which would include incineration of waste in order to produce energy) and lastly disposal to landfill.

15. Policy 1 of the WCS states that provision be made for a network of waste management sites that drive practices up the waste hierarchy and are sufficient to provide for (inter alia) existing and future waste arisings within Hertfordshire (IR 29). Policy 1 identified broad areas of search for facilities for Local Authority Collected Waste ("LACW"). The site is located within one of those areas of search (IR 1045).

16. Policy 6 of the WCS states that applications for new waste facilities in the Green Belt are required to demonstrate very special circumstances sufficient to outweigh harm to the Green Belt and any other harm identified. It also listed a number of relevant considerations, including the need to find locations as close as practicable to the source of the waste and the issue of whether any alternative sites outside the Green Belt would be suitable for meeting the need for the development proposed (IR 32).

17. It was common ground at the inquiry that because of its scale and effect on the openness and purposes of the Green Belt, the proposal had to be treated as "inappropriate development" and justified under the very special circumstances test (IR 116, 296 and 723).

The draft Waste Site Allocations Local Plan

18. As waste planning authority, HCC prepared the "Waste Site Allocations 2011–2026 Local Plan" (referred to by the Inspector and Secretary of State as "WSALLD") for the purpose of allocating sites for waste management facilities in the County in accordance with the strategy and principles contained in the WCS (paras 1.5 to 1.7).

19. On 24 June 2013, HCC submitted the draft WSALLD to the Secretary of State for independent examination by one of his Inspectors under section 20 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"). One of the roles of the Inspector is to determine whether the draft plan is "sound" (section 20(5)(b)). According to paragraph 182 of the NPPF "soundness" depends upon (inter alia) whether the plan seeks to meet objectively assessed development and infrastructure requirements, whether the plan provides the most appropriate strategy considered against reasonable alternatives and based on proportionate evidence, and whether the plan would enable delivery of sustainable development in accordance with the policies of the NPPF.

20. The Secretary of State has direct powers of intervention under section 21 . If he considers a draft plan to be unsatisfactory, he may at any time before the document is adopted under section 23 direct the plan-making authority to make modifications (section 21(1) to (2)) or he may direct that the plan (or part of it) be submitted to him for his approval. I note that no such intervention occurred in the present case, in particular once the Secretary of State had received the report of the examining Inspector on the WSALLD (see below).

21. In the usual way the submitted WSALLD was examined by the Inspector through a combination of written representations, written questions from the examining Inspector and public hearings between 3 September and 6 November 2013. Those hearings therefore overlapped with the public inquiry held by a different Inspector into the called-in planning application.

22. Where an Inspector examining a submitted plan concludes that the document is unsound then, subject to section 20(7) , he is obliged to recommend that it not be adopted (section 20(7A)) and the plan-making authority is unable to adopt it in the form in which is was submitted (section 23(4)). In that situation the authority will only be able to avoid withdrawing the draft plan (section 22), by submitting to the "main modification" procedure introduced as an amendment of PCPA 2004 by the Localism Act 2011 . Section 20 (7C) enables the local authority to request the Inspector to make modifications to the plan that would satisfy (inter alia) the requirement of "soundness". Where the procedure in section 20(7C) is invoked and the Inspector recommends "main modifications", the local authority may adopt the submitted plan but only as altered by those "main modifications" (plus any additional, immaterial modifications) (section 23(2), (2A) and (3)).

23. The main modification procedure was applied to the WSALLD. In December 2013 HCC published a schedule of proposed main modifications and an updated Sustainability Appraisal, which were then the subject of public consultation for six weeks. The examining Inspector then took those representations into account (see para. 4 and footnote 3 of the report of the Examining Inspector). It appears that "text on the approach to allocations in the Green Belt" was inserted into the WSALLD "in order that the Plan will reflect national policy and guidance on related Green Belt matters" (footnote 2 to the Non-Technical Summary of the Report).

24. The Court was informed that the Inspector who held the inquiry into the called-in planning application was not supplied with a copy of the December 2013 "main modifications" or related material. So when he submitted his report to the Secretary of State on 19th February 2013 he was unaware of these matters.

25. The report of the Inspector on the statutory examination of the draft WSALLD was submitted to HCC on 24 March 2014. Of particular relevance to the planning application by Veolia, and also to this challenge, were main modifications 3 and 9 ("MM3" and "MM9") which inserted a "new policy" WSA2 after paragraph 4.18 of the plan and replaced paragraphs 4.10 and 4.11 of the submission draft with paragraphs 4.7 to 4.10 of the adopted plan. I will refer to these provisions under ground 1 of the challenge.

26. In his letter of 1 May 2014 to participants at the call-in inquiry, the Secretary of State gave an opportunity for comments to be made on (inter alia) "the Inspector's report into the examination of the Hertfordshire Waste Site Allocations Plan."

27. Veolia replied on 19 May 2014. They referred back to an earlier letter they had sent on 16 April 2014 (see also 1.1 of HCC's response to the Secretary of State). A copy of that document has not been shown to the Court and I assume that it contains nothing of relevance to these proceedings. Veolia relied upon the Inspector's endorsement of the WSALLD *subject to the modifications* and HCC's approach to (inter alia) the release of Green Belt sites and "in particular the basis for the allocation of the New Barnfield site for a wide range of waste management uses". Veolia relied upon findings that the allocation site would comply in principle with Government Policy on Green Belt in contrast to the six sites deleted from the plan where release from the Green Belt had not been justified.

28. Paragraph 2.9 of HCC's "Response" informed the Secretary of State that the WSALLD was to be considered for adoption at a meeting of the County Council on 15 July 2014. HCC also submitted (para. 2.2) that:

> "In particular, it means that once the WSA is formally adopted, the principle of developing a Recycling and Energy Recovery Facility ("RERF") plant on the New Barnfield site will be entirely in accordance with the up-to-date development plan. The objection to this particular proposal must,

> therefore, be viewed in the context that a RERF on the New Barnfield site is acceptable in principle and consistent with the Local Plan."

29. In his letter of 1 May 2013 the Secretary of State announced that he would issue his decision on the planning application on or before 26 June 2014. In fact, it was not issued until some 11 days later on 7 July and only 8 days before the date when the WSALLD was formally adopted as part of the statutory development plan, to which section 38(6) of PCPA 2004 applied. No explanation for the timing of the decision letter has been given. But in any event, given:

(i) sections 20 and 23 of PCPA 2004 ;
(ii) the use of the main modifications procedure from December 2013 onwards;
(iii) the report of the Inspector into the examination; and
(iv) HCC's Response to the letter of 1 May 2014,

it must have been clear to the Secretary of State that the adoption of the WSALLD as altered by MM3 and MM9 was *imminent* . In a few days the WSALLD would form an up-to-date part of the statutory development plan.

30. Although the Secretary of State had the power to intervene under section 21 of PCPA 2004 if he thought any part of the plan, including main modifications MM3 and MM9, was unsatisfactory, he did not do so. Moreover, although WHBC is the local planning authority responsible for making any alterations to Green Belt boundaries when its local plan comes to be reviewed, it has not brought any legal challenge against the adopted WSALLD.

The Inspector's Report and the Decision Letter on the planning application

31. I begin with the Inspector's report. The proposed development was described at IR 46 to 55. 28,000 tonnes per annum of waste received would be recycled (IR 78) and 352,000 tonnes per annum would be incinerated generating sufficient electricity for about 50,000 households (IR 62 and 78).

32. Of the 537,000 tonnes of LACW collected within Hertfordshire primarily from households, a residual 45% has to be transported by road out of the County for disposal in landfill (IR 913). In the future recycling rates will increase (IR 914) but the landfill capacity for the residual waste will decrease (IR 915). In addition, one million tonnes of commercial and industrial waste is produced in the County. Even after allowing for recycling, a substantial proportion has to be landfilled. A principal objective of the WCS is to move away from dependence on landfill, aiming for a diversion rate from landfill of 93% by 2026 (IR 918).

33. The Inspector's conclusions ran from IR 722 to IR 1075. To a very large extent they were adopted by the Secretary of State in his decision letter. In IR 722 the Inspector set out the order in which he would set out his conclusions under the following subjects:

- Effect on the Green Belt
- Landscape and visual effects
- Effect on heritage assets
- Noise
- Effect on Southfield School
- Highways and Traffic
- Air Quality

- Health and Equality
- Ecology
- Need for the development
- Technology choice
- Alternative sites
- Urgency of Need
- Carbon balance and climate change
- Opportunities for Combined Heat and Power
- Compliance with the Development Plan and other relevant policy
- Prematurity

The first nine topics involved an assessment of the extent to which the proposal would cause harm. The next six topics considered aspects of the need for the proposal and alternatives thereto. Then the Inspector assessed the application against compliance with the Development Plan and other relevant policy, therefore going on to consider prematurity in relation to the draft WSALLD. He then stated in IR 726 that after having evaluated those topics separately, he would carry out a balancing exercise (IR 1058 to 1075) in order to determine whether there were very special circumstances clearly outweighing harm. A key issue in relation to several of the grounds of challenge is what matters were taken into account in that final balancing exercise.

34. Ultimately, the Inspector concluded (IR 1059 to IR 1061) that there would be "serious harm" to the openness of the Green Belt arising from inappropriate development. There would also be serious harm to the character and appearance of the area, harm to the amenity of users of the footpath network and "less than substantial" but "significant" harm to heritage assets, including "the ensemble at Hatfield House and Park". He rejected claims that a number of other interests would be harmed (IR 1062). After summarising the various benefits of the scheme he wrote the following striking paragraph (IR 1074) with which the Secretary of State expressly agreed with (DL 54):

> "This scheme provides a classic illustration of the problems encountered in seeking to locate large scale infrastructure in an area which is affected by major planning constraints. The waste management case for the proposal is very strong, but must be balanced against the substantial weight to the identified Green Belt harm, and other harm."

35. In IR 1076 the Inspector concluded that although substantial weight should be given to the strong case for the development on waste management grounds, that did not clearly outweigh the harm to the Green Belt and other harm identified. He found the objections to the development in this location to be equally strong.

36. IR 920 to IR 943 continued a detailed analysis of the "capacity gap" in the provision of waste management facilities, ending with the following conclusion on need in IR 945:

> "The capacity of the RERF would allow Hertfordshire to achieve 100% diversion of LACW residual waste from landfill when the plant is built, and would provide capacity for a significant element of the substantial quantities of residual C & I waste produced in the County. There appears little realistic alternative in the short term other than to continue disposal of high levels of waste to landfill and export of waste to areas outside Hertfordshire. While it is possible that in the medium to longer term other treatment facilities would be developed to meet this deficit, and the contract between HCC and Veolia allows for this to happen in the event of planning permission not being granted for the RERF at New Barnfield, there is likely to be very significant delay in such alternative facilities coming on stream."

37. The Inspector accepted Veolia's case (IR 106) that, on the basis of the WCS, over half the land in the County is designated as Green Belt, and much of the more populous southern part of the County outside towns and settlements, which generate the greater proportion of the County's waste and where the pressures for development are strongest, is covered by the Green Belt (IR 1014 and see HCC's case at IR 238(6)).

38. The Inspector reviewed the assessment of alternative sites and visited a number of them (IR 956 to 972). He concluded that "there is no obvious alternative site that would perform significantly better in environmental terms and that is suitable for the use and development on the scale proposed at the application site" (IR 977).

39. IR 979 to IR 983 addressed WHBC's suggestion that a range of facilities should be provided on smaller sites. But it is plain on any fair reading of the report that he did not consider that to be a satisfactory alternative because (in summary):

(i) There are no alternative proposals of a sufficient scale to address the identified problem (i.e. the capacity gap – see e.g. the cross-reference to IR 94);
(ii) It would involve a continuation of the export of waste to landfills outside the County while alternative methods of treatment to take waste up the hierarchy are progressed which might well include "energy from waste" by incineration in any event (see e.g. the cross-reference to IR 238);
(iii) Such an alternative would involve considerable delay, in the order of 10 years before coming into operation;
(iv) Plant capable of handling smaller tonnages would not necessarily be proportionally smaller or less visually intrusive.

As the Inspector clearly stated in IR 1066, "in view of the uncertainties and delay involved, very little reliance can be placed on this outcome in the determination of this Application."

40. The Inspector dealt with the effect of the proposal on the Green Belt in IR 727 to 742. He found that the volume of the RERF would be approximately 20 times the volume of the existing buildings on the site, which were mainly single storey (IR 728) and that the site occupied a prominent location (IR 729). The proposed development would contribute significantly to the sprawl of a large built up area and the encroachment of development into the countryside (IR 730). The proposal would fail to comply with the criteria in Policy RA6 of the WHDP for the redevelopment of a major developed site by a substantial margin (IR 731). "The practical effect" of failing to comply with Policy RA6 and paragraph 89 of the NPPF is that there would be "a severe impact on openness of the Green Belt …" (IR 734 and see also IR 739 and 741).

41. The Decision Letter of the Secretary of State generally adopted the sequence of topics and the reasoning set out in the Inspector's report. In addition it also referred to post-inquiry representations (DL 5 to 8). In so far as the letter dealt with the outcome of the examination of the WSALLD, Ms Zoe Leventhal submitted on behalf of the Secretary of State that that was dealt with in DL 12, 17 and 18.

Legal Framework

42. Section 288 of the 1990 Act provides as follows:

> "(1) If any person –
>
> (a) …
>
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds –
>
> (i) that the action is not within the powers of this Act, or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that action,
>
> he may make an application to the High Court under this section.
>
> (2), (3), (4) ….
>
> (5) On any application under this section the High Court –
>
> (a) …;
>
> (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

43. The general principles concerning the grounds upon which a Court may be asked to quash a decision of an Inspector or the Secretary are well-established. I gratefully adopt the summary given by Lindblom J at paragraph 19 of his judgment in Bloor Homes East Midlands Ltd v Secretary of State for Communities and local Government [2014] EWHC 754 (Admin).

Grounds of challenge

44. Ground 2 complained that the Secretary of State had misinterpreted paragraph 88 of the NPPF by putting into the "very special circumstances" balance not only harm to the Green Belt but also other harm. In the light of the *Court of Appeal's decision in Redhill Aerodrome Ltd v Secretary of State of Communities and Local Government [2014] EWCA Civ 1386* this ground became unarguable and was not pursued at the hearing.

45. Ground 6 complained about an inconsistency in decision-making based upon the principles established in *North Wiltshire D.C. v Secretary of State for the Environment (1992) 65 P & CR 137* and related authorities. The challenge was based upon a decision issued by the Secretary of State on 14 July 2014, shortly after the instant decision, in which he granted planning permission for a strategic rail freight interchange on Green Belt land in the neighbouring district of St. Albans ("the Helioslough decision"). Mr Rhodri Price Lewis QC, who appeared on behalf of Veolia, accepted that the North Wiltshire principle would not be engaged unless at the very least the Claimant demonstrated to the Court (a) why the Helioslough decision was similar to the instant case in relevant respects and (b) that there were inconsistencies between the two decisions calling for an explanation. Paragraph 54 of the Claimant's skeleton merely made generalised assertions and the ground was not developed in oral argument in order to show how those requirements could be satisfied. Accordingly, ground 6 has to be rejected. For these reasons, it is unnecessary for me to say anything about the significance of the Helioslough decision being issued *after* the instant decision, albeit by only 7 days, and whether any obligations of consistency could arise internally within the Department when both decisions were under consideration.

46. It is convenient next to deal with grounds 3, 4 and 5 before coming lastly to the main ground of challenge, ground 1.

Ground 3

47. A number of participants at the inquiry objected to the proposal on the grounds that it was premature in relation to the then emerging WSALLD. The Inspector dealt with this issue at IR 1051 to 1057.

48. In IR 1051 the Inspector referred to the national guidance on prematurity then in force. Paragraph 17 of "The Planning System: General Principles" was replaced in March 2014, between the Inspector's report and the decision letter, by similar advice in the National Planning Practice Guidance. It is common ground that there is no material difference between the two documents for the purposes of these proceedings. The Inspector correctly directed himself that "for planning permission to be refused on prematurity grounds there must be a clear demonstration of how the grant of permission would prejudice the outcome of the DPD process" (IR 1051).

49. I respectfully agree with the approach taken by Frances Patterson QC (as she then was) in paragraph 64 of the judgment in Truro City Council v Cornwall City Council [2013] EWHC 2525 (Admin):

> "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 a real risk that it might do so."

50. In the present case the Inspector noted the advanced stage reached by the WSALLD, the substantial objections to it, the difficulties of allocating sites in a County of which over half is designated as Green Belt and the proposed alteration of the application site (IR 1052 to 1053). He then noted that according to the terms of the proposed allocation, planning permission would only be granted for a scheme such as the RERF if "very special circumstances" were found to justify the development, noted the slippage in the timetable for the preparation and adoption of the WSC and WSALLD (see also IR 584) and added that "in such circumstances it is not unusual for planning applications to proceed in advance of the final

adoption of the policy framework" (IR 1055 to 1056). Thus far, the Inspector was not suggesting that the application should be refused on grounds of prematurity.

51. Ground 3 focuses on IR 1057, where the Inspector addressed an objection that the proposal would cater for the treatment of all of Hertfordshire's residual LACW and a substantial proportion of the residual commercial and industrial waste and was so large that it would dominate the treatment of such waste for many years to come "which may adversely affect the investment prospects for other developments". The Claimant then criticises the following sentence:

> "To that extent its approval would be highly likely to prejudice the outcome of the DPD process."

Mr Price Lewis QC submitted that there was no evidence before the Inspector or the Secretary of State to indicate that the objection referred to in IR 1057 involved an issue in the examination of the WSALLD and so could not have justified a prematurity argument (see also IR 245 (iii)).

52. Neither Ms Leventhal nor Mr Wayne Beglan (for WHBC) were able to explain why IR 1057 raised a prematurity issue in relation to the outcome of the WSALLD process. The reference they made to IR 1002 does not assist in view of what was said in IR 1003. The report from the examining Inspector dated 24 March 2014 does not suggest that the alternative put forward in IR 1057 was the subject of an objection to the submitted version of the WSALLD and nothing was provided to the Court to show otherwise.

53. DL 47 dealt with prematurity. In essence the Secretary of State repeated and endorsed each of the points made by the Inspector in IR 1057, ending with the words:

> "To that extent, he agrees with the Inspector that to grant planning permission would be highly likely to prejudice the outcome of the WSALLD process."

That statement was in my view quite bizarre. By the time of the decision letter the Secretary of State, unlike the Inspector, had the benefit of the report from the examining Inspector. He therefore knew what issues had been considered in that report and the outcome. In particular, he knew that the adoption of the WSALLD was imminent, subject to the specific "main modifications" identified by the Inspector. No basis for refusing the proposal on the grounds of prematurity was properly identified in the decision letter or, on the material before the Court, could have been identified. This part of the decision reveals a troubling lack of care in the preparation of the decision letter and I note that it does involve the outcome of the examination of the WSALLD. It appears that the Secretary of State simply repeated the Inspector's conclusion without either identifying the gap in the latter's reasoning on prematurity or, more importantly, acknowledging the outcome of the WSALLD process and the imminent adoption of that plan.

54. Nevertheless, I am persuaded by Ms. Leventhal that the decision should not be quashed on ground 3 for the reason she advanced, namely that planning permission was refused simply because (a) the very special circumstances of the proposal were insufficient to outweigh the identified harm and (b) prematurity harm was not included by either the Inspector or by the Secretary of State in the final balancing exercise (see paras. 37 to 39 of the Secretary of State's skeleton).

55. I accept her submission that the only harm weighed in that balance was identified specifically by the Inspector in IR 1059 to IR 1061, drawing upon earlier conclusions which dealt with *the same types of harm* . For example, IR 1062 referred to three separate types of harm in addition to Green Belt harm:

(i) serious harm to the character and appearance of the area, drawn from the concluding paragraph on the section covering "Landscape and Visual Effects (IR 777)";
(ii) the harmful effect on the setting of Southfield School, drawn from the conclusion at IR 872 to the section of the report starting at IR 864; and
(iii) harm to the amenity of users of the footpath network, drawn from IR 888.

56. Ms Leventhal also relied upon IR 1077 in which the Inspector stated that if, contrary to his view, the Secretary of State should conclude that very special circumstances do exist so as to clearly outweigh the harm to the Green Belt, then notwithstanding the harm identified to heritage aspects, planning permission should in that event be granted. I agree with Ms Leventhal that it is highly significant that no mention was made at that point either of prematurity harm.

57. Although the Secretary of State did not adopt IR 1077, it is nevertheless plain that he took the same approach to the "very special circumstances" balance as the Inspector in IR 1058 to 1076 and did not take prematurity harm into account in that critical and freestanding reason for refusal of planning permission (see DL 50 to 55).

58. For these reasons I am satisfied that, applying the tests in *Simplex G.E. (Holdings) Limited v Secretary of State for the Environment (1987) 57 P&CR 306* and *R (Smith) v North East Derbyshire Primary Care Trust [2006] 1 WLR 3315* (para. 10), the decision of the Secretary of State to refuse permission would inevitably have been the same if paragraph 47 of the decision letter had been omitted.

Ground 4

59. Veolia criticises the manner in which the Inspector and the Secretary of State took into account Policy RA6 of the WHDP when assessing the effect of the proposal upon the openness and purposes of the Green Belt. It was submitted that Policy RA6 is only concerned with whether a proposal would constitute "inappropriate development" in the Green Belt and not with the assessment of harm to the Green Belt when carrying out a "very special circumstances" balancing exercise for development already found to be "inappropriate". Initially Veolia suggested that reliance upon RA6 when assessing harm to the Green Belt involved a misinterpretation of policy and impermissible double-counting.

60. However, Mr. Price Lewis QC accepted during the hearing that his argument would also apply to the category of appropriate development in paragraph 89 of the NPPF relating to the redevelopment of previously developed sites. He accepted, rightly in my view, that these policies, properly interpreted, do not preclude regard being had to the *extent to which* the openness and purposes of the Green Belt would be affected by a proposal as part of the "very special circumstances" balance, as well as at the prior stage of deciding whether the development should be categorised as "inappropriate". That approach does not involve any improper double-counting. Once a proposal for redevelopment of previously developed land has been found to be "inappropriate" because of its impact on openness, it is plainly necessary to evaluate the extent of that harm as part of the "very special circumstances" balance. The extent of such harm will vary from case to case, as will the "very special circumstances" and other relevant considerations to be weighed in the balance, whether telling in favour of or against the development proposed.

61. Veolia's real complaint under ground 4 related to IR 1049 in which the Inspector made the following points:

(i) The proposal substantially breached criteria (i), (iii) and (iv) as regards the impact of the redevelopment on the Green Belt;
(ii) The criteria in paragraph 89 of the NPPF are very similar to RA6 and therefore substantial weight should be given to the non-compliance with that policy (see also IR 732).

Mr Price Lewis QC submitted that the decision was flawed because that attribution of *substantial weight to RA6* , a policy which effectively performed the same function as paragraph 89 of the NPPF, was improperly included in the "very special circumstances" balance as increasing the weight to be given to Green Belt harm.

62. Mr. Price Lewis accepted that the section of the Inspector's report dealing with the "very special circumstances" balance did not refer to any breach of planning policy as forming part of the harm being weighed. He simply relied upon the reference to "other harm" in IR 1058 and 1074 as incorporating the conclusions in IR 1049 on non-compliance with RA6.

63. I reject ground 4 for the reasons advanced by Ms Leventhal. First, IR 1049 formed part of the section of the Inspector's report dealing with the extent to which the proposal accords with the development plan and other policies. In IR 1044 the Inspector had stated that the policies of the development plan pulled in different directions in this case and it was his task to assess compliance, taking the policies as a whole. In the first part of IR 1050 the Inspector concluded that "the proposal does not, on a balanced assessment, accord with the provisions of the development plan when considered as a whole." The second part of IR 1050 went on to add that *in any event* policies required very special circumstances to be demonstrated for planning permission to be granted and that if such circumstances could be shown then the proposal could be said to be policy compliant in that respect, which could change the overall assessment of compliance with the development plan. I agree that IR 1050 is consistent with the view that non-compliance with RA6 was not treated as a factor in the "very special circumstances" balance.

64. Second, and more importantly, I agree with Ms Leventhal that the section of the Inspector's report dealing with the "very special circumstances" balance took care to identify expressly which elements of harm were being weighed. As with prematurity harm (ground 3), that exercise did not include the substantial weight attributed to non-compliance with RA6 as an additional factor (see paragraph 54 above).

65. Third, IR 1060 did rely upon earlier conclusions reached on serious harm to the Green Belt through loss of openness. That assessment of the effect of the development was contained in IR 733 to IR 742. In that context, the Inspector had referred to the "practical effect" of failing to comply with the criteria in RA6 and paragraph 89 of the NPPF (see IR 731 and IR 732), thus making it clear that his case-specific assessment was not influenced by the weight given to breaches of policy.

66. The same analysis applies to the Secretary of State's decision letter (see DL 19 to 23, 45 and 50 to 55). Accordingly, ground 4 fails.

Ground 5

67. In the section dealing with the assessment of alternative sites (IR 956 to IR 981) the Inspector referred to the argument of WHBC that the WCS allowed for the provision of a range of sites, such that waste could be treated at a number of smaller sites. In that context, he stated at IR 980:

> "… it would be reasonable to expect that HCC and Veolia have considered what options would be available to them in the event of planning permission being refused."

The same point was repeated in DL 39.

68. Veolia challenged that statement essentially on the basis that it was unsupported by any evidence.

69. In my judgment there is no merit whatsoever in ground 5. In *Trusthouse Forte Hotels v Secretary of State for the Environment (1987) 53 P&CR 293* Simon Brown J (as he then was) accepted that an Inspector may be entitled to reach a judgment that a need for development might be met in alternative ways without specific evidence as to what they might be (see pp 302–3).

70. I accept Ms Leventhal's submissions that:

(i) the Inspector did not go so far as to find that Veolia and HCC "must have thought of *something* ". He had simply stated that it was reasonable to expect them to have considered their options if the application were to be refused.
(ii) the Inspector did have before him a document entitled "Note on Residual Waste Treatment Contract" to enable the decision-maker to understand the arrangements in place between HCC and Veolia in relation to the delivery and acceptance of waste (paragraph 3). There is an obligation on HCC to deliver to Veolia, and on Veolia to accept, all "Contract Waste" (effectively residual LACW) collected by HCC up to 352,000 tonnes a year (paragraph 4);
(iii) the Inspector was provided with a link to the contract by which, in the event of the parties reasonably concluding that planning permission for the proposal could not be obtained, HCC could require Veolia to provide a revised project plan (see clauses 3.2, 3.3 and 3.4 of schedule 26).

In the light of that material I do not think that the somewhat tentative comment made in IR 980 and DL 39 can be impugned.

71. In any event, on any fair reading of the Inspector's report and the decision letter it is plain that the short passage criticised by Veolia played no real part in the critical part of the decision, namely the striking of the "very special circumstances" balance. The comment was not used by the Inspector or the Secretary of State to qualify in any material way the weight they gave to the strong need case for the proposal, the current absence of alternatives and the lengthy and harmful delay which would occur whilst any alternative solutions were developed (see IR 977–978, 981–2, 1065–1066 and 1073–1074; DL 36–41 and 53–54). The passage criticised, when read in context, cannot be challenged on grounds of inadequate reasoning.

72. For all these reasons, I reject ground 5.

Ground 1

73. Veolia submits that in striking the "very special circumstances" balance the Secretary of State failed to take into account and evaluate important provisions inserted into the WSALLD as "main modifications".

74. As I have explained previously, these were matters which the Inspector dealing with the planning application was unable to take into account in his report to the Secretary of State. Nonetheless, it is worth noting his statement at IR 1052:

> "If it [the WSALLD] is found sound with or without modification and is adopted before the SoS determines this Application then clearly it will have the full weight of the development plan and will be material to the determination."

It fell to the Secretary of State to take into account and evaluate relevant parts of the report of the Inspector on the examination of the WSALLD and of that plan as it was proposed to be adopted.

75. The examination Inspector recorded that the allocation of the New Barnfield site had attracted a considerable number of representations and was the most controversial matter discussed at the hearings (paragraph 26 and 93).

76. He considered that the soundness of the plan depended upon three main issues, the first of which was whether the site selection process had identified sites that would appropriately meet the need for new waste management capacity in Hertfordshire. Under that heading he considered the justification for allocating sites in the Green Belt (paragraphs 37 to 66). He proceeded on the basis that according to paragraph 83 of the NPPF, Green Belt boundaries should only be altered in exceptional circumstances and therefore if more Green Belt land were to be allocated than necessary to meet the identified need (mainly a function of the capacity of the sites allocated compared to the requirements of the WSC) then the WSALLD was unlikely to be justified.

77. At paragraphs 55 to 60 the Inspector considered three Green Belt sites which had been allocated for thermal treatment schemes in area of search C. He concluded that the most sensitive of the three should not be allocated, but endorsed the allocation of the New Barnfield site.

78. As the result of his analysis of site selection, the Inspector identified at paragraph 66 a number of main modifications necessary to make the WSALLD sound, including the deletion of six of the eleven allocations proposed in the Green Belt.

79. Main modification MM3 required that a new policy WSA 2 be inserted into the WSALLD. WSA 2 provides:

> "Policy WSA 2: Applications for Waste Management Development on Allocated Sites and Employment Land Areas of Search.
>
> The county council will grant planning permission for waste management facilities located on Allocated sites and Employment Land Areas of Search indentified on the inset maps, provided that the development is in accordance with:
>
> i) the relevant policies contained in the Development Plan;
>
> and proposals will be required to take into account;
>
> ii) any cumulative impacts arising from the proposed waste management use;
>
> iii) the *Allocated Site specific requirements identified in the relevant waste site brief*

iv) …" (emphasis added)

80. Main modification MM9 inserted paragraphs 4.7 to 4.10 into the WSALLD in the explanatory section on allocated sites which preceded Policy WSA 2. For the purposes of ground 1 MM9 included the following important points:

(i) Given the extent of the Green Belt within the county, it is not possible to meet anticipated needs without developing waste management facilities on Green Belt land (paragraph 4.7);
(ii) There are exceptional circumstances justifying the allocation of Green Belt sites, including New Barnfield (paragraph 4.8);
(iii) "Having demonstrated exceptional circumstances to justify the allocation of these Green Belt sites, it is envisaged that *they would be omitted from the Green Belt. Related alterations to defined Green Belt boundaries would be effected by the relevant district borough councils* within the county at the time of *adoption of their local plans. Until that time,* there would have to be *a demonstration of very special circumstances* in respect of *any inappropriate* development. Such very special circumstances would include *the fact that allocation of the site for waste management purposes was deemed acceptable under the terms of this Waste Site Allocations Plan* ." (Para 4.9 – emphasis added).
(iv) A waste site brief for each allocated site identifies types of waste management and size of facility that may be permitted on that site. But the size and nature of any development would need to respect the characteristics of the site and its surroundings, including any "particular considerations" noted in the brief.

81. The waste site brief for the New Barnfield allocation at pages 113 to 116 of the WSALLD stated (inter alia) that:

(i) The site could potentially be used for recycling and thermal treatment on a scale ranging from small to large;
(ii) Key planning issues included the site's location in the Green Belt;
(iii) "Inappropriate development" for the purposes of Green Belt policy should not be approved except in very special circumstances. Thus, any proposal should confine built development to the existing footprint, otherwise it would be necessary "to demonstrate very special circumstances to outweigh the harm to the Green Belt (in particular openness) together with any other harm identified.

82. In DL 5 to 6 the Secretary of State referred to the responses which he had received on (inter alia) the Inspector's report into the examination of the WSALLD. At DL 12 the Secretary of State said:

> "As the emerging WSALLD is at a relatively advanced stage the Secretary of State attaches significant weight to its policies as proposed to be modified by the Examination Inspector."

At DL 17, he treated the "main issues" as being those identified by the Inspector who had reported on the planning application inquiry (at IR 722) together with the provisions of the emerging WSALLD "as proposed to be modified by the plan examination Inspector".

83. The only detailed consideration given by the Secretary of State to the WSALLD was set out in DL 18:

> "The Secretary of State has had regard to the fact that Inspector who held an inquiry into the WSALLD endorsed the allocation of New Barnfield for waste management uses including thermal

> treatment. He has given careful consideration to the assessment on this allocation in the WSALLD Examination report of 24 March and to relevant policies in the adopted development plan including WHDP Policy RA6, the thrust of which is set out at IR41–42. As the WSALLD inspector noted at paragraph 101 of his report, the terms of the allocation mean that, unless there is a demonstration of very special circumstances, new buildings on the site should not have a greater impact on openness than the existing buildings. The Secretary of States does not consider that any points in the post inquiry representations affect the conclusion at IR 1056 that planning permission for the proposed development will only be granted if very special circumstances are found to exist."

Submissions

84. Mr Price Lewis QC submitted that when he struck the "very special circumstances" balance the Secretary of State failed to take into account and evaluate a combination of factors arising from his Inspector's examination of the WSALLD, namely:

(i) The WSALLD was about to become part of the statutory development plan so as to engage section 38(6) of the PCPA 2004 . Indeed, the WSALLD was adopted only 8 days later, in line with the representations made by HCC to the Secretary of State in May 2014;
(ii) There were exceptional circumstances to justify the allocation of the New Barnfield site for a waste management facility in the Green Belt;
(iii) It is envisaged by paragraph 4.9 of the WSALLD that the site will be deleted from the Green Belt in a future review of the local plan. At that stage the site would cease to be protected by green belt policy and issues such as whether inappropriate development could be justified by very special circumstances would not then arise;
(iv) Until the review of green belt boundaries the requirement to demonstrate very special circumstances continues to apply; but such circumstances should include the consideration that the allocation of the site for waste management purposes had been found to be acceptable under the WSALLD process (i.e. it had been tested through the processes leading to adoption).

It is important to note that Veolia's complaint is not restricted to a failure on the part of the Secretary of State to take into account the mere fact of allocation or its status, but also includes the consequences of the allocation as summarised above. During the hearing it was not suggested by the Secretary of State or by WHBC that any of points (i) to (iv) were inaccurate.

85. Mr Price Lewis QC submitted that the Secretary of State made no attempt to evaluate these points in the balancing exercise. The only substantive point that the Secretary of State took from the examining Inspector's assessment of the allocation in the WSALLD (see DL 18) was that unless there is a demonstration of very special circumstances, new buildings on the site should not have greater impact on the openness of the Green Belt than the existing buildings. That was a trite point which had been common ground at the public inquiry into the called-in application (see paragraph 17 above). Indeed, it is to be noted that the Secretary of State linked that point back to IR 1056.

86. The submissions for the Secretary of State (and for WHBC) were put in a variety of ways. But in summary it was submitted that:

(i) The mere fact that a site has been allocated for development cannot of itself amount to a benefit which is capable of being weighed against harm as part of the very special circumstances of a proposal. The *reasons* why a site has been allocated may be capable of being balanced against harm, but *not the allocation itself* . An allocation per se cannot mitigate harm to the Green Belt.
(ii) Similarly, the likelihood of the site's removal from the Green Belt at a later date cannot be taken into account as part of very special circumstances. That is not capable of offsetting harm to the Green Belt (para. 27 of the Defendant's skeleton).
(iii) Paragraphs 94, 96-97, 101, 105 and 107 of the Report into the Examination of the WSALLD [and I would add paragraph 104], along with the terms of MM9, and the cross-reference in WSA 2 to the Site Brief and the Brief itself, all explained that the allocation of the site was made on the basis that a proposal of the present kind (i.e. one having a greater impact on the openness of the Green Belt than existing development) would need to be justified by very special

circumstances. That is exactly what was said by the Secretary of State in DL 18. That was "the thrust" which the Secretary of State took from main modification MM9 (see paragraphs 4c and 5d of the Note for the Secretary of State submitted to the Court on the second day of the hearing);
(iv) The Claimant's submission that the allocation had become a factor to be weighed in the "very special circumstances" balance, would undermine the very basis upon which the examining Inspector had recommended the main modifications, namely the express safeguard that before planning permission could be granted for "inappropriate development", the "very special circumstances" test would have to be satisfied, taking into account the site brief. Indeed, Veolia's submission amounts to a circular argument (paragraph 13 of the Secretary of State's Note);
(v) The Secretary of State specifically weighed in the "very special circumstances" balance " *all* relevant factors" underlying the allocation which qualified as "benefits" of the proposal, namely the need for the proposal on the site, the lack of suitable alternatives, and the waste management advantages of meeting HCC's objectives (IR 1063, 1065 and 1073 and DL 53) (see paragraph 11a of Secretary of State's Note);
(vi) The only additional benefits which the Claimant suggests were not expressly weighed in the balance were the status of the allocation in the WSALLD together with the process of examination. But these were not additional benefits of the proposal requiring to be weighed in the balance (Paragraph 11d of the Secretary of State's Note);
(vii) Alternatively, those benefits had been evaluated in DL 12 and DL 18 and that evaluation did not have to be reiterated later on in the decision letter as part of the "very special circumstances" balancing exercise (paragraph 11c of the Note).

Discussion

87. There was some ambivalence in the Secretary of State's submissions. Several were directed to the proposition that the matters relied on by Veolia in these proceedings could not as a matter of principle be treated as benefits of the proposal in the "very special circumstances" balance (see submissions (i) to (iv) and (vi) in paragraph 86 above). Of course, such submissions would be unnecessary if the Secretary of State had taken the matters in question into account in the balance. Therefore a possible implication of these submissions was that he had not done so. Indeed, the submission in paragraphs 4c and 5d of the Secretary of State's Note that "the thrust" taken from MM9 was simply a requirement to carry out the "very special circumstances" balancing exercise reinforces this view.

88. A further consequence of the "principle" advanced by the Secretary of State would be that, in a case where such factors *have been taken into account* as part of the balancing exercise, then, as a matter of law, they *ought not to have been* . Nevertheless, when these issues were ventilated during the hearing, the Secretary of State's response was to contend that the matters relied upon by Veolia had been taken into account in the decision in any event.

89. Part of the problem with the Secretary of State's case under ground 1 is that it was, with respect, advanced too widely. Initially it was suggested that Green Belt policy should be interpreted so that only a factor which is capable of "mitigating" harm caused by the proposal to the Green Belt can be taken into account as part of the very special circumstances of the case (see e.g. paragraph 23b and 27 of the Defendant's skeleton). On that basis it was suggested that neither the mere allocation of the site, nor the statement that the site would be removed from the Green belt in the future, could qualify as part of the very special circumstances to be weighed in the balance against such harm.

90. There is no legal justification for that proposition. First, it is inconsistent with established law that the disbenefit side of the balance is not confined to harm to the Green Belt. It includes any relevant planning harm (see Redhill (supra) at para. 20). So there is no logical basis for restricting the "very special circumstances" of a proposal to matters which mitigate harm *to the green belt* .

91. Second, a factor need not *mitigate* harm at all (whether that be harm to the Green Belt or other planning harm) in order to qualify as a "very special circumstance". The test is whether the very special circumstances of a proposal taken overall "clearly outweigh" harm to the Green Belt and any other harm. For example, very special circumstances may comprise substantial

economic benefits or the provision of a service in the public interest (such as a hospital) or even personal circumstances (*Brentwood Borough Council v Secretary of State (1996) 72 P&CR 61* , 68). Such benefits will do nothing to *mitigate* or lessen harm to the openness or purposes of the Green Belt in which the proposal is located, or indeed other harm. But they may constitute, or contribute to, very special circumstances which, taken as a whole, *clearly outweigh* the harm to the Green Belt and any other harm which the proposal would cause. The Secretary of State's submission conflicts with the approach taken by the *Court of Appeal in Wychavon District Council v Secretary of State [2009] P.T.S.R. 19* at paragraphs 21 to 24. As was stated by Carnwath LJ (as he then was) in paragraph 23, "the guidance neither excludes nor restricts the consideration of any potentially relevant factors, including personal circumstances."

92. A second difficulty with the Secretary of State's case was the manner in which it shifted quite substantially during argument. As I have noted, initially it was suggested that allocation *per se* could never be a relevant factor in the balancing exercise. But by the end of the argument it was being submitted that although allocation is not a relevant factor in every case, it could be in some cases depending on the circumstances (see paragraphs 9 and 10 of the Secretary of State's Note). I am unable to accept this alternative argument.

93. *Tesco Stores Ltd v Dundee City Council [2012] PTSR 983* was cited on the role of the court in the interpretation of development plans. But it is important to note part of the Supreme Court's rationale for rejecting the argument that the Court can only intervene if a decision-maker's interpretation of policy is perverse. Lord Reed JSC pointed out that that would deprive sections 38(6) and 70(2) of TCPA 1990 of much of their effect (paragraph 19). He continued:

> "The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning-authorities in decision-making unless there is a good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained."

That statement reflects the importance of the plan-led system which lies at the heart of development management decisions.

94. The plan-led system is well-entrenched. Nearly 20 years ago in *Loup v Secretary of State for the Environment (1996) 71 P&CR 175* Glidewell LJ held that section 54A of the 1990 Act (now section 38(6) of the PCPA 2004) requires the authority determining a planning application "to give priority to the provisions of a development plan …." He added that national guidance on the weighting of development plan policies was given in the then PPG1. Now it is to be found in the NPPF which states that:

- The plan-led system is a core principle (paras. 17 and 196)
- The NPPF aims to reinforce the importance of up to date plans (para. 209)
- Local plans are the key to delivering sustainable development (para. 150)
- The extent to which policies are up to date is an important factor in decision-making (paras. 11 to 14).

Paragraphs 150 to 185 are devoted to the requirements for proper plan-making. The policy in paragraph 216 of the NPPF on the weight to be given to a draft plan as it evolves toward adoption, reflects the self-evident importance of the statutory processes which such a plan must undergo, including Strategic Environmental Assessment ("SEA"), public consultation and independent examination by an Inspector.

95. Consequently, a question was raised during argument. Suppose that a decision-maker were to be faced with competing applications for the same type of inappropriate development on two Green Belt sites (e.g. development justified by need but where only one application can be approved). Would it be irrelevant to take into account as part of "very special circumstances" potentially outweighing the harm caused by a proposal the fact that one of the two sites had been allocated for that purpose in a recently adopted local plan, having survived the rigours of objection and examination, whereas the other had not?

96. The Secretary of State answered that in such a case the allocation *itself* could be weighed as a factor of "particular relevance" in the very special circumstances balance, and not merely the rationale for the allocation (see paragraph 9e of the Secretary of State's Note). In other words, the Secretary of State resiled from the earlier position that allocation was legally incapable of *ever* being weighed against harm to the Green Belt (or other harm). Once that position is reached, logically there is no reason for saying that allocation itself cannot as a matter of law be treated as part of the very special circumstances of the proposal, where the application site is *not* in competition with another Green Belt site (or indeed any other site). No argument to support any such distinction was advanced.

97. In my judgment there is no legal justification for the proposition that, in general, it is only the rationale for an allocation in an adopted plan, or the factors underlying an allocation, which may be taken into account as part of the very special circumstances of a proposal and not the fact of allocation. In this context references to the "fact of allocation" should be taken to include (a) relevant statutory processes which have led to the allocation being confirmed through the adoption of the plan (including SEA, consultation, objection, independent examination and the "main modification" process) and (b) any relevant consequences of the allocation. No real explanation has been put forward as to why allocation and its consequences can only be relevant to "very special circumstances" in some instances (which have yet to be fully identified by the Secretary of State) and not generally.

98. Next, in paragraphs 9 and 10 of the Secretary of State's Note it was suggested that the last sentence of paragraph 4.9 of the WSALLD (inserted by MM9 – see para. 80 above) should be construed in accordance with his legal submission that allocation itself cannot be a factor to be weighed as part of the very special circumstances in every case, or in every case to which the policy applies. But for the reasons already given, including the principles concerning the plan-led system, I have rejected that submission. Moreover, I can see nothing in the language used in MM9 or the WSALLD to indicate that the last sentence of paragraph 4.9 should be read down in the way suggested by the Secretary of State. The text of the plan uses straightforward language which is sufficiently broad to cover the process, status and consequences of allocation, as well as any other factors relevant thereto, such as the reasons for allocation.

99. In my judgment none of the above analysis alters because the WSALLD recognises that the allocation covers proposals of such a scale as to amount to "inappropriate development" in the Green Belt and requiring to be justified by very special circumstances. The Secretary of State submits that that is incorrect because the analysis would undermine the very basis upon which the allocation was made, the so-called "circularity" argument (paragraph 13 of Secretary of State's Note – and see also paragraphs 9c and 10 where effectively the same submission is made). But this submission fails to face up to the simple fact that in MM9 (now paragraph 4.9 of the adopted WSALLD) the policy states that the fact that the allocation of the site for the purpose of waste management facilities has been found to be acceptable is a factor to be weighed in the "very

special circumstances" balance. There is no circularity in that part of the policy whatsoever. It does not provide that the mere fact of allocation should determine the outcome of the "very special circumstances" test, i.e. as providing the very special circumstances sufficient to outweigh clearly any harm resulting from the proposal. Instead its effect is to require that the allocation be evaluated as one of the factors in the balance.

100. Rather, the Secretary of State's suggestion that a requirement to attach weight to the allocation would undermine the basis on which the policy was made is itself flawed. First (and quite apart from the misconstruction identified in paragraph 99 above), it depends upon reading wording into the last sentence of paragraph 4.9 of the WSALLD to the effect that only factors underlying the allocation should be taken into account, which is simply not supported by the language used and has not otherwise been justified.

101. Second, it is a barely disguised attack upon part of main modification MM9, now contained in the adopted WSALLD. In effect, it was being said that the examination Inspector ought not to have included in MM9, and HCC ought not to have adopted, the last sentence in paragraph 4.9 of WSALLD, unless that text is read down according to the construction in the Secretary of State's Note. But I have rejected that construction (para. 100) and, in that event, no submission has been made as to why that part of the Plan should be treated as improper or disregarded in the decision on the planning application. As I have said, the Secretary of State did not exercise his power of intervention and no legal challenge was made to the propriety of this part of the plan, including the statement that the site would be removed from the Green Belt in the future.

102. For the reasons given in paragraph 86 above, I also reject the contention in paragraph 27 of the Secretary of State's skeleton that "the likelihood of the site's removal from the Green Belt at a later date" is not capable of affecting current harm and therefore cannot be taken into account as part of very special circumstances. The submission has an air of unreality about it. For example, what if at the date of determining a planning application a local plan had not yet been adopted but the published report of the examination of the plan endorsed the removal of the site from the Green Belt, or made such removal the subject of a "main modification". There would be no legal basis for treating that factor as irrelevant to "very special circumstances". Thereafter, it is a matter for the decision-maker as to how that factor should be weighed. I cannot see any reason for treating references in an adopted plan (or a plan on the verge of being adopted) to prospective changes in a Green Belt boundary differently in terms of *legal relevance* .

103. In my judgment it is plain that the package of factors set out in paragraph 84 above ought to have been taken into account by the Secretary of State and evaluated as part of the "very special circumstances" of the proposal. The real question in this case is whether they were. These factors were additional to the ones which the Secretary of State did refer to expressly in his decision letter (para. 86(v) above).

104. Having carefully considered the Inspector's report and the Decision Letter, together with the other relevant materials and applying the standard principles of review, I have reached the firm conclusion that the Secretary of State failed to take into account the factors set out in paragraph 84 above, and in particular to weigh them in the "very special circumstances" balance alongside those matters which the Secretary of State did take into account (see paragraph 86(v) above). I do so for a combination of reasons:

(i) Although there is no requirement for the Secretary of State to identify separately the weight given to each factor, there should nonetheless be a careful evaluation of the factors relied upon, both individually and collectively (per Frances Paterson QC in R(River Club) v Secretary of State for Communities and Local Government [2009] EWHC 2674 (Admin) paras. 29-31);
(ii) The merits of ground 1 stand or fall by reference to the decision letter only. The Inspector's report could not have dealt with MM9;
(iii) DL 18 expressly considered "the allocation", but the allocation policy should be read as a whole including MM9 and the stated *consequences* of the allocation, as set out in paragraph 84 above.

(iv) The Secretary of State submitted to the Court that the thrust he took from MM9, and hence paragraphs 4.7 to 4.10 of the WSALLD, was merely that new buildings on the site should not have a greater impact on the openness of the Green Belt than the existing development unless justified by very special circumstances. Undoubtedly that was one of the stated consequences of the allocation policy, but that reading was too narrow. The requirement to satisfy the "very special circumstances" test had been common ground at the call-in inquiry (see para. 85 above). Other important consequences of the allocation stated in the policy included the expectation that the site would be removed from the Green Belt in the next local plan review of boundaries and the requirement to treat the allocation as forming part of the "very special circumstances" of a proposal for "inappropriate development" prior to that review;
(v) That misreading of MM9 is reflected in DL 18, which simply referred to *only one* consequence of the allocation policy, namely the need to satisfy the very special circumstances test for development of the present kind. DL 18, like the Secretary of State's explanation in Court of MM9, wholly failed to evaluate or even acknowledge the other significant consequences of the allocation stated in the examination report and the WSALLD;
(vi) DL 47 adopted the reasoning of the Inspector's report into the called-in application at IR 1055 to 1056, where the only point drawn from the WSALLD by the Inspector, without of course the benefit of the report into the Examination of the WSALLD and the main modifications, was that the present type of development would need to be justified by very special circumstances;
(vii) I have already referred to the bizarre, and in this Court unexplained, conclusion at the end of DL 47 that the grant of planning permission "would be highly likely to prejudice the outcome of the WSALLD process" (see paragraph 53 above). Like DL 18 that passage betrayed a failure by the Secretary of State to take into account and grapple with important consequences of the allocation policy in its final form;
(viii) The reasoning of DL 54 shows the Secretary of State adopting the same approach to the WSALLD. He repeated and endorsed IR 1074 and 1075, but they were only concerned with policies adopted at the time of the Inspector's report (specifically the WCS and PPS 10) and with the need for Veolia to demonstrate very special circumstances clearly outweighing harm. DL 54 provided a stage in the Secretary of State's reasoning at which the position before the Inspector should have been updated by reference to the imminent adoption of the WSALLD, including an evaluation of all the significant consequences of the allocation policy in the WSALLD.
(ix) When rejecting grounds 3 and 4 of the challenge I accepted the Secretary of State's submissions that other potential legal errors did not taint the striking of the "very special circumstances" balance upon which the decision rested, because those matters were not expressly identified as harm which was being taken into account at that final stage of the reasoning process (paragraphs 54 — 55 and 64 above). I heard no submission, and see no reason, as to why any different approach could be taken by the Court to the absence of any express reference in that same section of the decision to the additional matters set out in paragraph 84 above, including all the important consequences stated in the allocation policy. The section of the decision letter dealing with the very special circumstances test (DL 50 – 55) was drafted so as to take into account only those matters which were expressly referred to therein.

105. It was suggested by the Secretary of State that I should exercise the Court's discretion so as not to quash the decision on ground 1 because the matters now relied upon by Veolia were not put forward in its representations dated 19 May 2014. I reject that submission for several reasons, individually and in combination.

106. First, just as the decision letter is to be read fairly and as a whole, so should the representations received by the Secretary of State in May 2014. I consider that the representations made by HCC and Veolia sufficiently indicated that they were relying upon the relevant modifications to the WSALLD, which were important considerations not least because the plan had been subjected to independent scrutiny and was about to be adopted (see paragraphs 27 and 28 above). As a matter of common sense these representations were not asking for weight to be attached to the allocation policy simply to provide yet another basis for requiring the "very special circumstances" test to be applied. The requirement to apply that test had been common ground if not trite at the call-in inquiry (see paragraph 17 above and also the opening words of paragraph 2.2 and paragraph 2.4 of HCC's Response in May 2014). The sensible way of reading HCC's contention that the proposal was in accordance with an up-to-date development plan, was that the authority was relying upon the consequences of the allocation as set out in the WSALLD (e.g. paragraph 4.9), and treated them as altering the "very special circumstances" balance. These were matters which the Secretary of State was obliged to take into account and evaluate.

107. Second, if the decision letter had been issued a few days later on 15 July 2014 then, as I pointed out during argument, the Secretary of State would have been obliged to take into account, evaluate and apply relevant policies in the WSALLD, whether mentioned by any participants in the application process or not (see Ouseley J in *R (on the Application of St James Homes Ltd) v Secretary of State for the Environment [2001] PLCR 27* at paras. 47 to 53). In the circumstances of this case, if the Secretary of State was to issue a decision on 7 July 2014, then in my judgment he had to assess all the relevant implications of the *imminent* adoption of the plan for himself.

108. Third, the matters relied upon by Veolia have such importance that, notwithstanding IR1076 and DL55, I am wholly unable to say that the decision of the Secretary of State would necessarily have been the same if the matters set out in paragraph 84 above had been weighed in the balance properly, applying the tests in Simplex (supra) and Smith (supra).

Conclusion

109. For the above reasons the challenge succeeds, but only on ground 1. Consequently the decision of the Secretary of State dated 7 July 2014 refusing Veolia's application for planning permission must be quashed by the Court.