Case No: CO/9587/2013 & CO/9276/2013

Neutral Citation Number: [2014] EWHC 654 (Admin)

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham

Date: 11/03/2014

Before :

MR JUSTICE GREEN

- -

Between :

1) Mrs Jean Timmins	**Claimants**
2) A W Lymn (The Family Funeral Service) Limited	
- and -	
Gedling Borough Council	**Defendant**
- and –	
Westerleigh Group Limited	**Interested Party**

- -
- -

Paul Brown QC (instructed by **Taylor & Emmet LLP**) for the **First Claimant**
James Strachan QC (instructed by **Clyde & Co LLP**) for the **Second Claimant**
Richard Kimblin and Hashi Mohamed (instructed by **Helen Barrington, Gelding Borough Council**) for the **Defendant**
Paul Tucker QC (instructed by **Hill Dickinson LLP) for the Interested Party**

Hearing dates: 14th February 2014

- -

Judgment

Mr Justice Green :

1. Issues

1. Three issues arise upon this application for judicial review.

2. First, whether pursuant to the Green Belt ("Green Belt") Policy as set out in the March 2012 National Planning Policy Framework ("NPPF") *all* developments are prima facie inappropriate and can therefore only be justified by very special circumstances unless they fall within the specific exceptions set out in paragraphs 89 and/or 90 NPPF. A related issue is whether the exceptions from the requirement to prove very special circumstances in paragraph 89 NPPF applies to (1) buildings for cemeteries or (2) the cemeteries themselves.

3. Secondly, this application concerns the meaning of "openness" and "visual impact" and the relationship between these two concepts. Are they different? Do they overlap? Can an evaluation of openness take into consideration measures proposed to mitigate the visual perception of the structure in question? Alternatively, is it permissible as part of the very special circumstances balancing exercise to take account of such proposed measures?

4. Thirdly, what is the scope and extent of the duty on planning authorities under the Town and Country Planning (Development Management Procedure) (England) (Amendment No. 2) Order 2012 (hereafter "DMPO"), as from 1st December 2012, to include a statement on every decision letter stating "how" they have worked with the applicant in a positive and proactive way? The issue arising in this application is whether the Defendant complied with that duty and, if not, what the consequences of that failure may be.

2. The facts

5. The facts may be summarised as follows. This case concerns a dispute over the grant of planning permission for the siting of a crematorium and cemetery in an area known as the "Lambley Dumbles" in Nottinghamshire. This is an area of rolling farmland and deep wooded valleys. It runs from the Mapperley Plains towards the ancient village of Lambley. The area is reputed to have been visited by DH Lawrence. It is an area popular with walkers and constitutes designated Green Belt.

6. In May 2012 Westerleigh Group Limited (hereafter "Westerleigh") made an application to Gedling Borough Council (hereafter "GBC") for planning permission for the construction of a crematorium and cemetery on Catfoot Lane, Lambley.

7. In June 2012 a further application for permission to develop a crematorium within the same area was submitted by A W Lymn the Family Funeral Service Limited (hereafter "Lymn"). Lymn is a family run firm of funeral directors of longstanding in Nottingham, Derby and Mansfield. The Lymn application concerned a proposed crematorium but there was no proposal for an additional cemetery. The proposed siting for the development was at Orchard Farm, 216 Catfoot Lane, Lambley.

8. Both the Westerleigh and Lymn sites are within the Green Belt. Although the proposed crematoria had different designs they are both of a broadly similar size. The

Westerleigh proposal entailed a total internal floor space of 536 square metres and the Lymn proposal entailed a total floor space of 555 square metres. These applications were the culmination of a series of earlier, and unsuccessful, applications by other applicants for the development of a crematorium within GBC. The Westerleigh and Lymn applications came before the GBC Planning Committee on 8th May 2013.

9. In preparation for this meeting the planning officers of GBC had prepared three detailed documents all dated 8th May 2013. The first was an Introductory Report (hereafter "the Introductory Report") and addressed issues common to the Westerleigh and Lymn applications and conducted a comparative assessment of the two competing applications. The second and third Reports concerned the details of the Westerleigh and Lymn applications respectively (hereafter the "Westerleigh Report" and the "Lymn Report"). The Introductory Report is a 42 page report which covered both planning applications and addressed matters of commonality between the applications. Paragraph 3 to this report identified the two central issues. It stated:

> "3. The reason for reporting in this fashion is that Planning Committee needs to consider a number of common issues and reach a view on these before it is able to make either determination. The two most important decisions it must take are to determine:-
>
> i) Whether there is a need for crematoria services in the Borough and if so at what scale.
>
> ii) If this is a situation when, in determining the applications, alternatives to the proposals are a material consideration".

In section 7 of this report the planning officer advised the Committee of the options open to it. These were: (1) refuse planning permission for both crematoriums; (2) grant planning permission for both applications; (3) grant planning permission for one application and refuse the other (see paragraphs [119]-[127] of the Introductory Report). The report provided information to the Committee on the current proposals and the three previous proposals summarising in turn why each had been refused. It provided advice on national and local planning policy. In section 4 it provided legal and evidential advice in relation to the "very special circumstances" test. The report further set out the quantitative and qualitative evidence for "need" for crematoria services within the Borough, including within this section detailed isochronic evidence. The overall conclusion on "need" was in the following terms:

> "96. It is considered that the Council has now had the fullest evidence presented to it on this matter. It certainly has more evidence before it than any of the previous Inspectors had. The decision as to whether need has been proven is extremely finely balanced but in terms of meeting the needs of the residents of the Borough it is therefore recommended that it is in the public interest that a single crematorium site is provided in the Borough to serve the Arnold and Carlton areas, and this is sufficient to be regarded as very special circumstances in this instance".

10. The officers also concluded that there were no reasonable alternative sites which had been identified which were capable of performing better in terms of planning policy and meeting the identified needs of the community than the two sites the subject of the Westerleigh and Lymn applications: see Report paragraph [118].

11. As observed above the Committee also had before it reports from the planning officers on the merits of the individual Westerleigh and Lymn applications. When the time came for the Committee to vote the position was hence that the officers were advising that in principle one or other of the applications should prevail. One application proposed a crematorium and cemetery; the other only a crematorium. In short the officer's conclusion, if accepted, placed Westerleigh and Lymn in direct competition with each other for the grant of a single permission.

12. By a decision dated 17th May 2013 ("the Decision") GBC granted to Westerleigh permission, subject to compliance with conditions, for the development of a crematorium and cemetery.

13. The Decision has triggered litigation on two fronts. First, Mrs Jean Timmins seeks judicial review of the Decision to grant permission to Westerleigh. Mrs Timmins is a 69 year old retired civil servant. She joined an opposition group to the grant of any permission for a crematorium in the Lambley Dumbles area known as the Catfoot Crematorium Opposition Group ("CCOG"). The second application for judicial review was brought by Lymn, the disappointed competitor to Westerleigh. Whilst both Westerleigh and Mrs Timmins challenge the decision of the Defendant both do so of course for very different reasons.

3. Ground 1: Scope and effect of section 9 NPPF on Green Belt policy

(i) Legal Framework

14. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") requires that planning applications be determined in accordance with the development plan unless material considerations indicate otherwise.

15. It is common ground that the NPPF constitutes "material considerations" and that therefore planning applications must be taken with due regard being paid to that Framework. The Introductory Report purports to apply the NPPF upon the basis that GBC's own development plan is fully consistent therewith. Paragraphs 17 and 18 of the Introductory Report provide:

> "17. The publication of the National Planning Policy Framework (NPPF) on 27th March 2012 has not altered the fundamental legal requirement under Section 38(6) of the Planning and Compulsory Purchase Act 2004 that decisions must be made in accordance with the Development Plan unless material considerations (such as the NPPF) indicate otherwise.
>
> 18. However, the NPPF makes clear at paragraphs 214 and 215 that the weight to be given to older development plans not prepared in accordance with NPPF was time limited. Paragraph 215 stated that, following a 12 month period from the date of

> the application of the NPPF, due weight should be given in determining planning applications to the relevant policies according to their consistency within the Framework".

16. The Planning Officer then stated that in his view the saved policies in the Replacement Local Plan were up to date and consistent with the NPPF: Introductory Report paragraph [20]. He then continued:

> "21. The NPPF is an important material consideration in determining the applications. The aim of the NPPF is to deliver "sustainable development" which balances environmental, social and economic objectives. As part of this the NPPF includes a presumption in favour of sustainable development, which should be seen as a golden thread running through both the plan-making and decision-making.
>
> 22. However the NPPF, in Section 9 (paragraphs 79-92), still retains the requirement that inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances. It goes on to say that 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.
>
> 23. The NPPF goes [on] (sic) to define the construction of new buildings as inappropriate with various exceptions. Building for crematoria are not listed in the exception".

17. The present application turns upon the construction and proper meaning of the NPPF and whether, in the circumstances of this case, it has been misconstrued and misapplied by the Defendant.

(ii) Defendant's interpretation of NPPF

18. The position of the Planning Officer in relation to cemeteries is set out in paragraphs 469 and 470 of the Westerleigh Report. These provide:

> "469. With regard to the proposed cemetery, the list of appropriate Green Belt uses within paragraph 89 of the NPPF and Policy ENV 26 of the RLP include cemeteries and, as such, this element of the proposal is acceptable in policy terms, if it were proposed on its own.
>
> 470. In my opinion, therefore, the proposed cemetery constitutes an appropriate form of development within the Green Belt and that, given the nature of the proposed use, its extent and the fact that it would be screened by existing and proposed hedgerows, it would preserve the openness of the

> Green Belt in this location and would not conflict with any of the purposes of including land within the Green Belt, in accordance with Policy ENV 26 of the RLP and paragraphs 89 of the NPPF".

19. It is apparent that the Planning Officer thus construed the NPPF as not treating cemeteries as inappropriate and adverse to the Green Belt.

20. The NPPF addresses Green Belt policy in section 9 entitled "Protecting Green Belt land". Paragraph 79, within that section takes as its fundamental starting point the importance of maintaining "openness" on a "permanent" basis. It provides:

> "79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence".

Paragraphs 87-90 of section 9 NPPF sets out various exceptions where a development will not be subject to the very special circumstances test but may be subject to some other criteria of assessment. The second bullet point in paragraph 89 refers to cemeteries. These paragraphs provide:

> "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.
>
> 89. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. Exceptions to this are:
>
> ● buildings for agriculture and forestry;
>
> ● provision of appropriate facilities for outdoor sport, outdoor recreation and for cemeteries, as long as it preserves the openness of the Green Belt and does not conflict with the purposes of including land within it;
>
> ● the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
>
> ● the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;

> ● limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
>
> ● limited infilling or 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 than the existing development.
>
> 90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:
>
> ● mineral extraction;
>
> ● engineering operations;
>
> ● local transport infrastructure which can demonstrate a requirement for a Green Belt location;
>
> ● the re-use of buildings provided that the buildings are of permanent and substantial construction; and
>
> ● development brought forward under a Community Right to Build Order".

21. The Defendant submits that the directions given by the Planning Officer to the Planning Committee in paragraphs 469, 470 of the Westerleigh Report (see paragraph [18] above) are correct. It is to be noted that the oral address by the Planning Officer to the Planning Committee at their meeting convened to determine the applications was in similar terms in relation to the cemetery. According to the notes of the oral address the officer stated:

> "…it should be noted that the cemetery element of the proposal does not conflict with the GB".

It is clear from a reading of the Introductory Report and the Westerleigh and Lymn Reports that the Planning Officer considered that, substantively, it was only the crematoria element of each application that needed to be justified upon the basis that it was prima facie "inappropriate" and therefore had to be measured against the "very special circumstances" test for approval. There is no reference in any of the Reports to the cemetery element of the Westerleigh application being subject to an equivalent "very special circumstances" assessment. On the contrary the officer's assessment assumed that a cemetery in the Green Belt should be assessed by the lesser test set out in paragraph 89 NPPF (set out above). Accordingly, the manner in which the Planning Officer assessed each application was upon the basis that the cemetery element in the Westerleigh application did not need the same level of justification as the crematorium element.

22. Two questions arise. First, was the Defendant correct to interpret paragraph 89 NPPF as permitting cemeteries to be treated as "appropriate" provided they preserved the openness of the Green Belt and did not conflict with the purposes of including land within it, i.e. by reference to a test which is less onerous than the "very special circumstances" test? Secondly, if the Defendant is incorrect in its construction of paragraph 89 is it, nonetheless, the case that cemeteries fall outwith the scope of section 9 NPPF?

(iii) Analysis of the scope and effect of section 9 NPPF

(a) Question 1: Scope of paragraph 89 NPPF

23. I turn to consider the first question, namely whether the Defendant erred in its interpretation of paragraph 89 NPPF. As to this the answer is, in my judgment, that the Defendant clearly erred. It is apparent that it construed paragraph 89 as treating cemeteries as "appropriate" (provided they met the limited test contained therein). However, paragraph 89 is not concerned with cemeteries *per se* but with the construction of "new buildings" which provide appropriate facilities for cemeteries. The two are clearly different. Thus, for example, paragraph 89 might address toilet facilities, or a cafeteria or a car park which serves a cemetery. But it is not concerned with the cemetery itself. The structure of paragraph 89 makes this clear. It creates a *prima facie* rule namely that the construction of new buildings is inappropriate. It then states that there are certain "Exceptions to this". Amongst the exceptions are the "…provision of appropriate facilities for…cemeteries…". In my judgment the Defendant erred in treating the exception as applying to the cemetery as opposed to a new building which provided facilities to serve the cemetery.

(b) Question 2: Does Chapter 9 NPPF apply in principle to all developments?

24. The conclusion that I have arrived at above in relation to paragraph 89 does not, however, matter if upon a true construction of section 9 of the NPPF as a whole (as opposed to paragraph 89 specifically) cemeteries are not treated as exerting any adverse effect upon the Green Belt. The Defendant argued, in the alternative to its position in paragraph 89, that if paragraph 89 was concerned only with new buildings then properly interpreted cemeteries fell wholly outwith section 9 NPPF and did not have to be justified by "very special circumstances".

25. In my judgment, properly interpreted, section 9 NPPF means that *any* development in the Green Belt is treated as *prima facie* "inappropriate" and can only be justified by reference to "very special circumstances" save in the defined circumstances set out in paragraphs 89 and 90. I accept that there is no express statement in section 9 NPPF to this effect. Indeed there is no definition of "permanently open" or "openness" or "inappropriate" or "not inappropriate", even though these concepts lie at the core of the Green Belt policy contained in section 9. There are a number of reasons which lead me to this conclusion. These are based upon the language of Chapter 9, its underlying purpose, the practical implications of this conclusion being wrong, and the guidance available from decided case law. I have in this respect had regard to the principles of interpretation referred to by Lord Neuberger in *Cusack v Harrow LBC* [2013] UKSC at paragraphs [58] and [60].

26. First, although not express, this conclusion is to be inferred from the language used in paragraphs 79, 87 and 88 NPPF. Paragraph 79 emphasises that a "fundamental aim" of the Green Belt policy is "keeping land permanently open". The "essential" characteristic of Green Belt is its "openness". Paragraph 87 takes as its starting point that inappropriate development is "by definition" harmful to the Green Belt. In answering the question why is development "inappropriate" it is, in my view, because it is adverse to "openness". As I explain below at paragraphs [68]-[75] openness means the absence of buildings or development. Paragraph 87 reflects the policy objective of preserving the Green Belt by stating in effect that any development should not be approved except in very special circumstances. The first sentence at paragraph 88 uses the all embracing "any" on two occasions. It applies to "*any*" planning application. It thus applies in every circumstance. It also provides that "substantial weight is given to *any* harm to the Green Belt". Again the word "any" is notable: Any development constitutes an impairment of openness, at least to some degree. A cemetery may be relatively innocuous in its effect upon openness but there is, nonetheless, some effect. In my view the inference to be drawn from the combined effect of the language used in paragraphs 79, 87 and 88 is that <u>all</u> developments proposed for the Green Belt are *prima facie* treated as "inappropriate" and can only be justified by reference to very special circumstances.

27. Secondly, the way in which exceptions in paragraphs 89 and 90 are drafted reinforce this conclusion. In my view the structure of the reasoning in paragraphs 87-90 is, first, to lay down a general rule and, secondly, to lay down the exceptions to the general rule. Paragraphs 89 and 90 represent those exceptions. Exceptions exist for "new buildings" in certain defined circumstances set out in paragraph 89; and, "certain other forms of development" set out in paragraph 90. The fact that paragraphs 89 and 90 concern "buildings" and "other forms of development" suggests that the prima facie rule (in paragraphs 87 and 88) apply to any "development" whether it comprises a building or some other usage or change thereof.

28. Thirdly, the conclusion can be assessed by considering whether the Defendant's interpretation is consistent with ordinary assumptions concerning drafting practice. The Defendant's submission would imply that there are certain types of development, undefined in section 9, which may nonetheless be engaged upon within the Green Belt without restriction because they will always be treated as "appropriate" (or "not inappropriate"). The fact that the Defendant's interpretation necessarily proceeds through an argument based on inference, or sub-silentio reasoning, is itself significant. If it were indeed the intention of the NPPF to create categories of development wholly outwith section 9 then section 9 would have been expressly drafted so as to set out these exceptions. It is, in my view, inconceivable that an entire category of "appropriate" developments would be permitted by virtue of a drafting lacuna. In short if the draftsman had intended to create a significant exception to the fundamental principle of the permanent preservation of the integrity of the Green Belt this would have been addressed explicitly in the Framework. Accordingly the absence of such text is in my view a strong indication that it does not exist.

29. Fourthly, it is also relevant to consider the practical implications of the Defendant's argument. Were the Defendant to be correct the implications would be highly material for the Green Belt. The approach of considering the practical implications of a posited construction has been recognised in this area upon a number of occasions. In

particular the courts have considered what the cumulative effect on the Green Belt would be if a particular argument were correct. In *Doncaster Metropolitan BC v Secretary of State for the Environment Transport and the Regions* [2002] EWHC (Admin) 808 (10th April 2002) the Claimant Council issued two enforcement notices and refused an application for planning permission in respect of the unauthorised use of land in the Green Belt for the stationing of a mobile home, the construction of a septic tank and the laying of hardcore, for domestic use. However, an appeal was allowed by an Inspector subject to conditions. The Claimant appealed. One of the grounds of appeal was that the Inspector failed to consider the consequences of the precedent that would be set for the Green Belt by the decision. It was further contended that the decision was irrational since the sole factor identified by the Inspector (the educational needs of the children of the applicant for permission) was not in the least unusual and could not sensibly amount to "very special circumstances" sufficient to outweigh the adverse effect on the Green Belt. In paragraph 68 of his judgment Sullivan J stated:

> "68. In paragraph 15 of the present decision letter the Inspector did not state in terms that there were very special circumstances which justify permitting inappropriate development in the Green Belt. The decision letter has to be read as a whole and if this was the only point of criticism I would have accepted Mr Litton's submission that since this was the test posed in paragraph 13 it would be unrealistic to assume that it was not still in the Inspector's mind in paragraph 15 of the decision letter. However, it is very important that full weight is given to the proposition that inappropriate development is by definition harmful to the Green Belt. That policy is a reflection of the fact that there may be many applications in the Green Belt where the proposal would be relatively inconspicuous or have a limited effect on the openness of the Green Belt, but if such arguments were to be repeated the cumulative effect of any permissions would destroy the very qualities which underlie the Green Belt designation. Hence the importance of recognising at all times that inappropriate development is by definition harmful, and then going on to consider whether there will be additional harm by reason of such matters as loss of openness and impact on the function of the Green Belt".

30. It is to be noted that the decision in *Doncaster Metropolitan BC* was in relation to the scope and effect of paragraph 3.2 of Planning Policy Guidance 2 ("PPG2") (see below). That provision is, in substance, reflected in paragraphs 87 and 88 NPPF. A similar observation was also made by Sullivan J in *Heath & Hampsted Society v London Borough of Camden* [2007] EWHC 977 (Admin) at paragraph [37] thereof to the effect that the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause demonstrable harm was precisely the reason that led to the statement of policy that inappropriate development was by definition harmful to the Green Belt. The judge there observed that were this not to be the case the Green Belt would "…suffer the death of a thousand cuts". The

upshot of this point is that the effect of the Defendant's submission would, if it were correct, open Pandora's Box to potentially numerous developments within the Green Belt which, cumulatively, could destroy the very characteristics of permanent openness of the Green Belt which the NPPF seeks to preserve. In this regard paragraph 80 NPPF identifies five purposes of the Green Belt. These include checking unrestricted sprawl of built up areas; assisting in safeguarding the countryside from encroachment; and preserving the setting and special character of historic towns. An unfettered right for developments which are not within paragraphs 89 and 90 to occur within the Green Belt would run counter to each of these purposes. Mr Paul Tucker QC for Westerleigh took me through a number of hypothetical illustrations which he submitted showed that the conclusion I have arrived at could lead to "absurd" results. In fact his illustrations were themselves extreme. But the core point is that chapter 9 NPPF is intended to lay down a principle that any development must be justified by very special circumstances unless it falls within the exceptions in paragraphs 89 and 90. That is coherent and logical. The fact that this principle may throw up some hard cases does not undermine the coherence or logic of the basic position.

31. Fifthly, it is relevant that the NPPF does not, in all respects, mirror its predecessor guidance in relation to Green Belt. The earlier Green Belt policy was contained in PPG2 first published in January 1995 and amended in March 2001. Paragraph 3.12 of PPG2 made clear that material changes in the use of land would be considered inappropriate unless they maintained openness and did not conflict with the purposes of including land in the Green Belt. It accordingly indicated that a change of use which met a test falling short of "very special circumstances" could be considered appropriate. The relevant provision provided:

> "3.12 The statutory definition of development includes engineering and other operations, and the making of any material change in the use of land. The carrying out of such operations and the making of material changes in the use of land are inappropriate development unless they maintain openness and do not conflict with the purposes of including land in the Green Belt. (Advice on material changes in the use of buildings is given in paragraph 3.8 above)".

The present development constituted a change of use from agricultural land to a cemetery. Had paragraph 3.12 of PPG2 been applied then it would be considered appropriate insofar as it maintained openness and did not conflict with the purpose of including land in the Green Belt. However that paragraph has not been replicated in the NPPF. This, in my view, was intentional and reflects a deliberate shift in policy towards a tightening of the circumstances in which development could occur within the Green Belt.

32. For all the above reasons in my view a change of use from agricultural land to a cemetery constitutes a development which is prima facie "inappropriate" and to be prohibited in the absence of "very special circumstances". Further for the reasons that I have already given the creation of a cemetery does not fall within one of the exceptions in paragraphs 89 and 90 NPPF. I turn now to assess these conclusions against existing case law.

(iv) Relevant authorities

33. I draw support for the above conclusion from various authorities.

34. In particular in the recent judgment of HHJ Pelling QC in *Fordent Holdings Limited v Secretary of State for Communities and Local Government* [2013] EWHC 2844 (Admin) is on point and consistent with my conclusion. There the court was concerned with an application under section 288 Town and Country Planning Act 1990 ("TCPA") for an order quashing a decision of a planning inspector appointed by the Secretary of State by which the inspector dismissed an appeal against a refusal of the Council to grant outlying planning permission for a change of use for a 9 hectare site located within the Green Belt from agricultural use to a caravan and camping site to accommodate up to 120 touring caravans and up to 60 tent pitches on a mixture of grass and hard standing together with the construction of a shop, reception and office building.

35. The inspector had concluded that the proposal would amount to an outdoor sports and recreational use which therefore, prima facie, fell potentially within the scope of paragraph 89 NPPF. The Secretary of State did not challenge this particular conclusion about the scope of paragraph 89 in the course of the proceedings: See judgment paragraph [9].

36. The inspector concluded that a change of use from agricultural use to outdoor sport and recreation was an inappropriate development and thus not to be permitted in the absence of very special circumstances. Further, he concluded that paragraph 89 NPPF did not apply to changes of use but was concerned with "new buildings". It was contended by the Claimant that in these conclusions the Inspector erred and particularly that the Inspector erred in failing to have regard to the NPPF policy that significant weight should be given to the need to support economic growth through the planning system: See the summary of grounds at Judgment paragraph [15].

37. In his analysis the Judge started by reminding himself that a change of use constituted "development" within the meaning of section 55 TCPA. He stated that the word "development" in the NPPF had the same meaning as that in section 55, a conclusion previously arrived at by Ouseley J in *Europa Oil and Gas Limited v SSCLG* [2013] EWHC 2643 (Admin) at paragraph [53]. From this the Judge deduced that a material change of use was capable of constituting "inappropriate" development within the meaning of paragraph 87 NPPF. He then stated:

> "19. Previous national policy in relation to Green Belt development defined material changes of use as inappropriate unless they maintained openness and did not conflict with the purposes of including land within the Green Belt – see PPG2, Paragraph 3.12. That approach has not been carried through into the NPPF. However, where the preferred approach is to attempt to define what is capable of being "not inappropriate" development within the Green Belt with all other development being regarded as inappropriate by necessary implication. It is for this reason that there is no definition within Chapter 9 of the NPPF of what constitutes inappropriate development, or any criteria by which whether a proposed development is or is not appropriate could be ascertained. It is for that reason that Paragraph 89 of the NPPF provides that a particular form of

> development – the construction of new buildings – in the Green Belt is inappropriate unless one of the exceptions identified in the Paragraph applies. Paragraph 90 defines the "other forms of development" there referred to as also at least potentially not inappropriate. The effect of Paragraph 87, 89 and 90, when read together is that all development in the Green Belt is inappropriate unless it is either development (as that word is defined in s.55 of the TCPA) falling within one or more of the categories set out in Paragraph 90 or is the construction of a new building or building that comes or potentially comes within one of the exceptions referred to in Paragraph 89".

In paragraph 24 the Judge concluded that paragraphs 89 and 90 NPPF comprised closed lists of classes of development that were capable of being "not inappropriate" by way of exception to the general rule and that there was no general exception for changes of use that maintained the openness of the Green Belt and did not conflict with the purposes of the policy of the Green Belt.

38. It may be of some relevance to the present case that the submissions which the Judge in *Fordent* accepted emanated from the Secretary of State for Communities and Local Government, who was the Defendant to the proceedings. This point was relied upon by the Claimants in the present case although the Defendant Council pointed out, no doubt correctly, that whatever the position of the Secretary of State in those proceedings, the law was for the courts to decide not for the Minister. See *per* Carnwath J in *Wychavon DC v Secretary of State for Communities & Local Government* [2008] EWCA Civ 692 para [31].

39. In short the conclusions I have arrived at are the same as those of the Judge in *Fordent*.

40. In *Europa Oil and Gas Limited v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin) the Claimant challenged the decision of the Inspector under section 288 TCPA 1990 refusing the Claimant's appeal against a refusal to grant permission by Surrey County Council to construct a site for the drilling of an exploratory bore hole for the purpose of testing for hydrocarbons and for the erection of associated security fencing and works. In the course of his judgment Ouseley J set out paragraphs 89 and 90 NPPF in terms making it clear that, in his view, both paragraphs set out basic propositions which were subject to "exceptions". The manner in which the Judge described paragraphs 89 and 90 made it clear that it was, to him, uncontroversial that each paragraph started with a basic proposition then set out exceptions thereto. I make this observation in response to the Defendant's arguments that, properly construed, the categories of activity which are capable of being "appropriate" in paragraphs 89 and 90 were to be treated as generic and not simply exceptions to a basic rule contained within the relevant paragraph. So for example it was submitted in the present case that properly interpreted paragraph 89 meant that both cemeteries and the provision of facilities therefore were to be deemed "appropriate" and this conclusion arose quite irrespective of the reference to "the construction of new buildings" in the introductory part of paragraph 89. I do not accept this submission. I share the view of HHJ Pelling QC, and Ouseley J that paragraph 89 is concerned with new building and not with other types of development.

(v) The Kemnal Manor point

41. There is one other matter relating to case law which I should address. In the Introductory Report at paragraph 30 the Planning Officer stated:

> "30. Both applications are for inappropriate development in the Green Belt. It should be noted that even if an application contains elements that on their own would be appropriate development (such as a cemetery), the Courts have held that the whole of the development is still to be regarded as inappropriate".

42. In support of this proposition the Planning Officer specifically cited (in a footnote) the decision of the Court of Appeal in *Kemnal Manor Memorial Gardens Limited v First Secretary of State* [2005] EWCA Civ 835. It was submitted to me in argument that the direction hence given by the Planning Officer to the Planning Committee was that they were still required to consider the entirety of the development (crematorium and cemetery) as inappropriate and apply thereto the very special circumstances test. I am unable to accept this submission for three reasons.

43. First, the submission is simply inconsistent with the facts. There is no evidence to suggest that the Planning Officers or the Planning Committee applied the very special circumstances test to the cemetery part of the overall proposed development. On the contrary the documents show clearly that the test was applied exclusively to the crematorium part.

44. Secondly, the true meaning of paragraph 30 of the Introductory Report is evident from the judgment of the Court of Appeal in *Kemnal*. In that case the claimant had sought to challenge an inspector's decision refusing to grant permission for a crematorium and cemetery in the Green Belt. The claimant contended that the inspector should have recognised that the cemetery, which constituted the largest part of the proposal, was appropriate development and that the only element of the proposal that was inappropriate was the crematorium. It was contended that because the major part of the development was appropriate that should be dispositive of the characterisation of the entire proposal, i.e. it should be treated as wholly appropriate. Keene LJ, not surprisingly, rejected this ingenious but counter-intuitive argument. He stated – in my view correctly - (ibid paragraph [34]):

> "I would emphasise that a development is not to be seen as acceptable in green belt policy terms merely because part of it is appropriate. That would be the fallacy committed by the curate when tackling his bad egg".

45. Thirdly, that observation must, in my view, be correct. It is the converse of the "death by a thousand cuts" observation of Sullivan J cited at paragraph [30] above. If developers could attach inappropriate development to an otherwise appropriate development and through such alchemy render the entire development appropriate then the cumulative effect would, over the passage of time, be severely detrimental to objectives of the Green Belt policy. In my judgment the reference in paragraph 30 of the Introductory Report was no more than an instruction to the Planning Committee that the inclusion of a cemetery (which the Planning Officers wrongly concluded was

appropriate) did not mean that the crematoria component of the proposal should likewise be treated as appropriate.

(vi) Conclusion

46. In conclusion for the above reasons the proposed change of use from agricultural land to a cemetery constituted a development which was *prima facie* inappropriate save insofar as it was justified by very exceptional circumstances. Further, it did not fall within any of the posited exceptions set out in paragraph 89 and 90. It necessarily follows from this conclusion that the Defendant's Planning Officers erred in directing the Planning Committee that a cemetery was an "appropriate" use. I find as a fact (and it was not contended otherwise before me) that the Planning Committee accepted this advice and acted accordingly: See in relation to the relationship between the Officer's Report and a Committee's decision the observations of Lord Justice Sullivan in *Siraj v Kirklees Metropolitan Council* [2010] EWCA Civ 1286 paragraphs [16]-[17] that where the members adopt a decision consistent with the Officer's Report and there is nothing to suggest the Committee disagreed with the Report it is reasonable to infer that the Committee accepted the advice.

47. I note that in his First Witness Statement on behalf of the Defendant Mr Nick Morley states, with commendable frankness, of the judgment in *Fordent*:

> "9. However, if *Fordent* had been available at that time of writing the report, they would have gone on to consider whether the very special circumstances justified the approval of the cemetery as inappropriate development".

Mr Morley is the Principal Planning Officer of the Defendant and was one of the team dealing with the application made by the Claimant and the Interested Party. I should also observe that the judgment in *Fordent* was delivered on 26th September 2013, some months after the Decision in this case so of course Mr Morley and his team did not have the benefit of sight of this judgment when they composed the Reports.

(vii) Materiality of the error of law

48. I must now consider the question of the materiality of the error. It was contended by the Defendant that if, *ex hypothesi*, they were in error it was immaterial. I cannot accept this. The error is, in my view, fundamental. It would be a substantial incursion into the important principle of preserving the Green Belt if errors in approving "inappropriate" developments were to be waived through without the planning authority being required to reconsider the application, this time applying the correct test which takes into account the strong guidance given in Chapter 9. In any event the error was, in actual fact, material. This is evident from the evidence of Mr Morley who, in his Witness Statement, accepted that in his view the inclusion of the cemetery within the proposal made it more attractive. In the Introductory Report at paragraph 47 the Planning Officers identified as one of the "key points" in the Westerleigh Report in relation to the question of "Needs" as follows:

> "• Alternatively the new cemetery would bring over 94,000 people within a 30 minute catchment area and a further drive time improvement for an additional 66,449 people".

49. In the Westerleigh Report the Planning Officers recorded as one of the advantages which the Westerleigh proposal would bring:

> "280. The provision of a crematorium and a burial ground is better than just a crematorium alone. Having a cemetery for the burial and scattering of ashes on the same grounds as the crematorium means the bereaved can go back to somewhere peaceful to be close to their loved one, which would be appreciated".

In paragraph 96 of the Introductory Report set out at paragraph [9] above in relation to the Planning Officers overall conclusion on "need", it is recorded that the decision for the Committee was in the Officers view "extremely finely balanced".

50. There was some evidence, pointed out to me by the Claimant, that the Planning Committee also in fact have treated the inclusion of the cemetery element in the Westerleigh application as an attractive proposition. My attention was drawn to notes of the Planning Committee's meeting from which it is clear that the decision in favour of the Westerleigh application was by a bare majority of one (hence endorsing the view of the officers that the applications were closely matched). Further, that at least one of those voting in favour of the Westerleigh application expressed support for the cemetery element of the proposal.

51. Finally, in this regard I am also influenced by the possibility that because the Planning Officers made an error in their interpretation of the law this might, possibly, have caused them to give misleading advice to the competing developers in the pre-application submission stage which might have exerted an effect upon the decision of either or both of the applicants whether to submit applications which included as a component thereof, a cemetery: See the factual matters referred to at paragraphs [96] and [107] below.

52. It is in my view clear that in a decision between two competing applications where the applications are "extremely finely balanced" (at least in relation to "need" see above), the addition of a cemetery could have been the tipping point between the two competing bids. I cannot say that it necessarily was; but I am clear that since it could have been it would be quite wrong to treat the error as *de minimis*.

53. To overcome this problem Westerleigh has sought to take the forensic sting out of the point by proposing to enter into a unilateral section 106 obligation committing Westerleigh not to bring forward the development at that part of the planning permission which related to the cemetery. Westerleigh submitted as follows:

> "Without prejudice to the Interested Party's submissions on ground 1 it is noted that both Claimants have stressed concerns over the treatment of that part of the planning application which related to the cemetery. It is further noted that in respect of A.W. Lymn that this is a claim brought by a competitor whose real concern revolves over the grant of permission to a direct rival to its proposal for a new crematorium. In those circumstances the Interested Party proposes to enter into a unilateral obligation under s.106 which will commit it not to

> bring forward developments at that part of the planning permission which relates to the cemetery. Such an obligation will be completed in advance of the forthcoming hearing. In the circumstances further consideration of ground 1 is thereby rendered academic, irrespective of the competing merits of the parties".

This is, notwithstanding the pragmatism inherent in the argument, not an answer to the criticism made. For the reasons already given it is possible that as of the date of the Decision the Planning Committee was materially influenced by the attractions of a combined crematorium and cemetery. The unilateral section 106 obligation comes far too late to affect the decision making of the Planning Committee. It cannot, therefore, have any effect upon the analysis of the materiality of the Defendant's error which must be measured as at the date of the Decision.

(viii) The commercial character of the Lymn application

54. There is one further matter that I should refer to. Westerleigh, in part of its submissions, made the point that the Claimant, Lymn, was a direct rival: See e.g. the quotation set out at paragraph [53] above. The oblique message being conveyed was that considerable scepticism should be applied to the complaint of a competitor who was motivated by purely commercial objectives. On the facts of this case I do not accept this submission. In general terms litigation by parties with vested interests is common place, and this includes in judicial review. It is, for example, a regular feature of judicial reviews in specialist tribunals such as the Competition Appeal Tribunal where decisions by the Office of Fair Trading or the Competition Commission approving a merger may be challenged by a rival to that merger. The motivation is always commercial. However that does not mean that the challenge is necessarily unfounded. Experience has proven that many successful and important applications for judicial review have been brought by those who may quite fairly (but irrelevantly) be labelled as "disgruntled" and "disappointed" competitors. No one in the present case described Mrs Timmins and those she represents as NIMBYs. The reason for this is that local residents who are impacted upon by a proposed development are treated within the regulatory regime as legitimate consultees. They play an important part in the planning process. In principle, where they establish *locus* they are entitled to object and pursue their objections through the courts. Equally, but in particular in circumstances where (as here) there are competing applications for permission but where there is a "need" for only one facility, there will inevitably be a disappointed competitor. Such persons also play a legitimate part in the planning process and have every right to bring proper complaints to the courts. The mere fact that such a person has *locus* does not, of course, mean that their application will be granted but it does mean that their concerns will be accorded due weight. I have noted the adverse comments about competitor judicial reviews made by Lord Justice Auld in *Noble Organisation Limited v Thanet DC* [2005] EWHC Civ 782 at paragraph [68] but there the judge was, in substance, objecting to tactical challenges of a highly technical nature lacking any demonstrable "*concern about potential or other planning harm*". That is not the case here. And moreover, the Judge only went so far as to say that such applications for permission should be scrutinised with rigour by the single Judge to ensure that they were properly arguable, which is a proposition that must be wholly unexceptional.

(ix) Relevance of witness statement evidence

55. I have not in the above analysis had regard to the Witness Statement evidence of Mr Morley save insofar as it contains admissions. It seems to me that the decision stands or falls by reference to the Planning Officer's report, the minutes of the meeting of the Planning Committee and the subsequent formal grant of approval and other relevant contemporaneous documentation. I address the more general issue of the relevance of Witness Statement evidence from the decision maker in section 6 below.

(x) Conclusion: Ground 1

56. In conclusion on Ground 1 the Defendant erred in adopting the Decision without applying the very special circumstances test to the cemetery element of the Westerleigh application. That error was material. The proper course is to quash the Decision and remit it to be re-taken. For the avoidance of doubt nothing in this judgment indicates any view whatsoever as to the merits of the decision to be re-taken.

4. Ground 2: Openness v Visual impact

(i) Ground 2: The issue

57. Ground 2 concerns the criticism made by the Claimants that the Defendant wrongly elided the two different concepts of "openness" and "visual impact" and thereby misdirected itself as to the meaning of "openness". This is a challenge to the Decision in relation to the crematorium and is therefore quite separate from Ground 1 which concerns only the cemetery. The point raised is a subtle but not unimportant one. In this section of the judgment I start by setting out the evidence upon which the Claimant relies. I then consider in terms of broad principle how a planning authority should address the issues of openness and visual impact as they apply in the context of Chapter 9 NPPF and the Green Belt. I then consider whether the Defendant erred and if so as to the consequences of this.

(ii) The Claimants' case: Wrongful elision of openness and visual impact by the Defendant

58. The Claimants relied upon the general effect of the three Reports and supplementary advice provided to the Committee taken *as a whole* in support of Ground 2. The overall effect of the advice given was – it is argued - that the Council were either seriously misdirected about, or failed to take into account, or misunderstood, the key difference between the protection of openness and the issue of visual impact. In response to an invitation from me to identify the three or four best examples from the documents which it was said illustrated the Claimants' contention Mr Strachan QC produced a very helpful note which set out and analysed the 3 principal references he relied upon and which reflected the high water mark of his contention. I summarise below the Claimants submissions in relation to each. In each of the three examples the Claimants say that the Defendant can be seen misdirecting itself as to the meaning of "openness".

(a) Example 1: The Westerleigh Report, paragraphs 466-470.

59. The Planning Officer's assessment of the 'Planning Considerations' starts at paragraph 445. The Officer identifies that the key planning consideration is the location of the site within the Green Belt. Although there is reference to relevant parts of Green Belt policy, there is no identification by way of advice, guidance or assistance to the members as to the important difference between impact on openness and visual impact anywhere in the report. The Officer's assessment of openness is contained in paragraphs 466-470.

60. The first part concerns the crematorium:

> "466. With regard to the openness of the Green Belt, it is considered that the amount of built development and the level of parking provision is both proportionate and essential to the proposed use, given that any harm arising as a consequence is outweighed by the very special circumstances that have been demonstrated in the Introduction Report. The layout, scale, appearance, and use of existing contours would minimise the overall impact of the proposed development in this respect and I am satisfied that the proposed levels would ensure that the proposed development would not be unduly prominent on the ridgeline.
>
> 467. The impact on openness would be further mitigated by existing hedgerows and hedgerow trees around the site and as the proposed landscaping matures. It is considered that the level of activity which would be generated would not have any undue impact on the openness of this part of the Green Belt.
>
> 468. As such, it is considered that, given the very special circumstances that apply in this case, the proposed development would not unduly harm the openness of the Green Belt and consider that the proposal complies with Policy ENV26 of and paragraphs 80, 87, 88 and 89 of the NPPF".

61. The second part concerns the cemetery:

> "469. With regard to the proposed cemetery, the list of appropriate Green Belt uses within paragraph 89 of the NPPF and Policy ENV26 of the RLP includes cemeteries and, as such, this element of the proposal is acceptable in policy terms, if it were proposed on its own.
>
> 470. In my opinion, therefore, the proposed cemetery constitutes an appropriate form of development within the Green Belt and that, given the nature of the proposed use, its extent and the fact that it would be screened by existing and proposed hedgerows, it would preserve the openness of the Green Belt in this location and would not conflict with any of the purposes of including within the Green Belt, in accordance with Policy ENV26 of the [the GBC Plan] and paragraphs 89 of the NPPF".

62. The Claimant submitted that in these paragraphs the Planning Officer elided the issue of openness with visual impact. Mr Strachan QC, made five (largely overlapping) main points about the evidence: (1) That the Officer did not recognise the difference between these concepts and did not direct the Committee as to the difference. He failed to treat visual impact upon openness as a separate type of intrinsic harm from openness itself. Visual impact is an additional harm which will need to be overcome in and of itself; (2) in the last sentence of paragraph 466, the Officer explicitly and impermissibly, elided the two concepts. He advised the Committee that the appearance of the crematorium, and the use of existing contours (therefore referring to how it will be located in the landscape and perceived) would "minimise the overall impact of the proposed development in this respect" i.e. in relation to impact on openness. In the same sentence, he expressed his satisfaction that the "proposed levels" would ensure the development is not "unduly prominent on the ridgeline". The Officer thereby confused the issue of impact on intrinsic openness, with the different issue of the development's visual impact and how it would be perceived in the landscape. A conclusion that the impact on openness will be "minimised" is a misconceived approach to the issue of effect on intrinsic openness given that the visual harm that development will cause to the Green Belt is a separate and additional harm to that caused to openness. If a development causes visual harm as well, that is an additional factor to consider to the harm that the development causes to intrinsic openness. In short, limited visual harm is incapable of mitigating or minimising impact on intrinsic openness; (3) the erroneous elision of openness and visual impact error is perpetuated in paragraph 467 where the Officer advises members that the impact on openness *"would be further mitigated by existing hedgerows and hedgerow trees around the site and as the proposed landscaping matures*". The way in which the development will be perceived visually does not mitigate the effect of development on the openness of the Green Belt; (4) The approach reflected in the Officers report gives rise to the creation of an obvious lacuna in the scheme of protection and "death by a thousand cuts" identified by Sullivan J in *Hampstead Heath Society* (ibid at paragraph [37] set out in paragraphs [30] and/or [75] of this judgment); (5) the same error is repeated for the assessment of the cemetery element in paragraphs 469-470 where the Officer (having already and wrongly decided that it was an appropriate development) concluded that in light of its use, extent and the fact that *"it would be screened by existing and proposed hedgerows*", it would preserve the openness of the Green Belt in this location and would not conflict with the purposes of including land within the Green Belt. The Claimant submits that the perceived lack of visual impact of the development cannot in principle be relevant to any assessment of openness and in particular cannot preserve openness.

(b) Example 2: The Introductory Report: Table at paragraph 127

63. In the Introductory Report the Officer performed a comparative summary assessment of the attributes of the two applications in a Table (as set out in the individual reports on the two applications). The Claimant submitted that the Table evidenced the same flawed elision of the concepts of openness and visual impact. The first three criteria in the Table are: (1) Openness of Green Belt; (2) Landscape Character; and (3), Landscape Visual Impact. The relevant part of the Table is as follows:-

Attributes	**Westerleigh**	**Lymn**

Openness of Green Belt	Local impact on openness	Local impact on openness partly mitigated by demolition
Landscape (Landscape Character)	Slight Adverse	Moderate Adverse
Landscape (visual impact)	Slight adverse	Moderate adverse

64. It was submitted that the reference to a "local" impact on openness is a reference to the Officer's analysis in the respective committee reports on how the two proposals will be perceived in the "local" landscape. But, it is said, the concept of a local impact on intrinsic openness is misconceived in principle. The impact on Green Belt openness occurs from physical development. It can never properly be characterised, or minimised, as "local". It either occurs or it does not and it has the same intrusive effect on openness whether perceived locally or from afar. The concept of "local impact" reflects the erroneous mixing up of how the development will be perceived visually (so giving rise to perceived local effects), rather than a proper assessment of its effect on openness.

(c) Example 3: Planning Officer's Oral Address and Additional Material to Members of the Planning Committee (8 May 2013)

65. The third example relied upon by the Claimants relates to part of the Officers oral address to the Committee The notes for that oral address (reflecting the presentation by the Planning Officer) were disclosed by the Defendant. The Claimants submitted that no advice was given to the Committee as to the difference between openness and visual impact. On the contrary, the address included specific direction by the Planning Officer to the Committee members on the comparison exercise he considered should be applied when considering "Openness of Green Belt". The notes record:

> "Comparison
>
> Openness of GB;
>
> W[esterleigh]; Regarding the impact on the openness of the GB, the scale of development and parking is considered to be proportionate. Proposal uses contours and layout, including the footprint of the bldg and its location within the site to minimise impact. Not unduly prominent on ridgeline. Therefore local impact on openness. It should be noted that the cemetery element of the proposal does not conflict with the GB.
>
> L[ymn]; overall similar local impact on openness. Strength here is that there are already buildings on site, which already have an impact".

66. The oral address on 'Openness of G[reen] B[elt]' was subsequently followed by a separate oral address on 'Landscape Character' and then 'Visual impact' and, so it is

submitted, it therefore cannot hence be argued that the advice given on 'Openness' was intended to be more compendious and somehow incorporated (separate) advice on 'Visual impact'. In respect of the Westerleigh proposal the notes say: "*Proposal uses contours and layout, including the footprint of the [building] and its location within the site to minimise impact*". The advice is accordingly that the impact on openness is minimised or mitigated because of the way that the development will be seen visually. Equally there is a reference to the development not being "*unduly prominent on ridgeline*" which treats an effect upon openness as being reduced by visual perception. There is then a reference to "local" impact which, for the reasons already referred to, reflects the basic error in approach.

(iii) Analysis: The relationship between openness and visual impact

67. I start the analysis of this issue by considering two questions of principle. First, is the visual impact of a development a relevant factor to be taken into account in considering its openness? Secondly, what are the correct questions for a planning authority to ask itself in relation to the connection between a building and its visual impact?

68. The point of departure is to define "openness" which is an important question since the essence of the Green Belt is its openness. This is plain from the NPPF paragraph 79 which provides:

> "The Government attaches great importance to the Green Belt. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green belts are their openness and their p-permanence".

69. There is however no specific definition of "openness" in the NPPF.

70. The issue was considered, albeit in a somewhat different context, in *Heath & Hampsted Society v London Borough of Camden* [2007] EWHC 977 (Admin) (3rd April 2007). There Sullivan J (as he then was) was concerned with a challenge to the grant of permission for the demolition of a 2 story building and with its replacement by a 3 story building in the Vale of Health, Hampstead, London. Under the existing guidance (paragraph 3.6 of PPG2) a replacement dwelling was not necessarily inappropriate provided the new dwelling "*is not materially larger than the dwelling it replaces".* The dispute before the Court was whether the Officers' report correctly identified and applied the test of materiality and whether, if it did, the decision of the planning committee was one that was reasonably open to them to take: See Judgment paragraphs [9] and [10]. If the conclusion was that the new building was not materially larger than the original building then there was no need to consider the merits of the application (which included its visual impact); but if the conclusion was that the new building did materially outstrip the dimensions of the original building then the merits of the development would need to be considered. These considerations would include:

> "its visual impact and, in the circumstances of the present case, whether the new dwelling would preserve or enhance the character or appearance of the conservation area…".

71. In paragraph 21 the Judge explained the difference between openness and visual impact in the context of paragraph 3.6 PPG2:

> "21. Paragraph 3.6 is concerned with the size of the replacement dwelling, not with its visual impact. There are good reasons why the relevant test for replacement dwellings in the Green Belt and Metropolitan Open Land is one of size rather than visual impact. The essential characteristic of Green Belts and Metropolitan Open Land is their openness (see paragraph 7 above). The extent to which that openness is, or is not, visible from public vantage points and the extent to which a new building in the Green Belt would be visually intrusive are a separate issue. Paragraph 3.15 of PPG 2 deals with "visual amenity" in the Green Belt in those terms:
>
> > "The visual amenities of the Green Belt should not be injured by proposals for development within or conspicuous from the Green Belt which, although they would not prejudice the purposes of including land in Green Belts, might be visually detrimental by reason of their siting, materials or design".
>
> The fact that a materially larger (in terms in footprint, floor space or building volume) replacement dwelling is more concealed from public view than a smaller but more prominent existing dwelling does not mean that the replacement dwelling is appropriate development in the Green Belt or Metropolitan Open Land".

72. In paragraph 22 the Judge explained that openness was a concept which related to the absence of building; it is land that is not built upon. Openness is hence epitomised by the lack of buildings but not by buildings that are unobtrusive or camouflaged or screened in some way:

> "22. The loss of openness (i.e. unbuilt on land) within the Green Belt or Metropolitan Open Land is of itself harmful to the underlying policy objective. If the replacement dwelling is more visually intrusive there will be further harm in addition to the harm by reason of inappropriateness, which will have to be outweighed by those special circumstances if planning permission is to be granted (paragraph 3.15 of PPG 2, above). *If the materially larger replacement dwelling is less visually intrusive than the existing dwelling then that would be a factor which could be taken into consideration when deciding whether the harm by reason of inappropriateness was outweighed by very special circumstances*".

73. It is clear from the (added) italicised part of this quote that measures taken to limit the intrusiveness of the development whilst not affecting the assessment of openness may nonetheless be relevant to the "very special circumstance" weighing exercising.

Hence openness and visual impact are different concepts; yet they can nonetheless relate to each other. The distinction is subtle but important.

74. Any construction harms openness quite irrespective of its impact in terms of its obtrusiveness or its aesthetic attractions or qualities. A beautiful building is still an affront to openness, simply because it exists. The same applies to a building this is camouflaged or rendered unobtrusive by felicitous landscaping.

75. In *Heath & Hampsted* (ibid) the Judge found that the Officers report, which had been adopted by the planning committee, was significantly flawed because he came to a conclusion about the materiality of the difference between the old 2 story building and the new 3 story building by reference to visual perception. This was wrong said the Judge because were it to be correct it would subject the Green Belt to "*death by a thousand cuts*". I have referred to this above (at paragraph [30]) but the quotation from the judgment is worth setting out in full:

> "37. The planning officer's approach can be paraphrased as follows:
>
> > "The footprint of the replacement dwelling will be twice as large as that of the existing dwelling, but the public will not be able to see very much of the increase".
>
> It was the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause "demonstrable harm" that led to the clear statement of policy in paragraph 3.2 of PPG 2 that inappropriate development is, by definition, harmful to the Green Belt. The approach adopted in the officer's report runs the risk that Green Belt or Metropolitan Open Land will suffer the death of a thousand cuts. While it may not be possible to demonstrate harm by reason of visual intrusion as a result of an individual - possibly very modest - proposal, the cumulative effect of a number of such proposals, each very modest in itself, could be very damaging to the essential quality of openness of the Green Belt and Metropolitan Open Land.
>
> 38. Turning to paragraph 6.8.5, the question was not whether the "loss" of Metropolitan Open Land as a result of this particular development was "significant". Again it would be extremely difficult in many cases to demonstrate that a "loss" of Metropolitan Open Land or Green Belt as a result of a particular proposal would be "significant". It is precisely this danger that the policy approach in paragraph 3.2 of PPG 6 is intended to avoid. The question was whether the replacement dwelling was materially larger, not whether it was no more visually intrusive from the Heath. The report simply failed to grapple with that key question".

76. The key question therefore in my view is whether visual impact can properly be taken into account in assessing very special circumstances. As to this I can see no reason

why in logic that it cannot be and the quotation from Sullivan J in *Heath & Hampstead* (set out at in paragraph [72] above) supports this conclusion.

77. In terms of the policy underlying chapter 9 of the NPPF any development in the Green Belt is by definition harmful and offends against "openness". In order to justify that development it follows that the countervailing ("very special") benefits relied upon to justify the grant of permission must not only get the development back to par (i.e. be neutral in the balancing exercise) but it must go well beyond par. This is clear from paragraph 88 of the NPPF which provides that the harm must be "*clearly outweighed*" by countervailing considerations. To be "*clearly outweighed*" it is not enough simply to show that the harm and the countervailing considerations are in balance – this is neutralising but not outweighing and certainly not "clearly" outweighing. When a planning authority is conducting this balancing exercise I can see no reason why visual impact cannot be taken into account. Since measures to reduce or mitigate visual impact are, as their name suggests, mitigating measures, they can only bear a modest weight in the scales. They reduce to some degree the harm caused by the adverse effect of the development and to this extent they can begin to redress the scales. But as measures in mitigation they can never completely remove the harm since a development that is wholly invisible to the eye remains, by definition, adverse to openness. But, in principle, it is not wrong to place visual impact onto the scales of very special circumstances. In practice (and certainly in this case) the very special circumstances will invariably be much more affected by issues of "need" and the availability of alternative sites than visual impact.

78. In short it seems to me that there are three points which arise from the above analysis. First, there is a clear conceptual distinction between openness and visual impact. Secondly, it is therefore is wrong *in principle* to arrive at a specific conclusion as to openness by reference to visual impact. Thirdly, when considering however whether a development in the Green Belt which adversely impacts upon openness can be justified by very special circumstances it is not wrong to take account of the visual impact of a development as one, inter alia, of the considerations that form part of the overall weighing exercise.

(iv) How to construe the Officers Reports

79. An issue in this case concerns the manner in which the Officers Report should be interpreted.

80. The law relating to the approach to be adopted towards the interpretation of Officers' reports and the decisions of planning authorities or inspectors reports is settled. In *Heath & Hampstead* (ibid) Sullivan J stated:

> "32. I am mindful of the fact that the report is not to be construed as though it was a statutory instrument. The dicta of Lord Justice Hoffmann (as he then was) in South Somerset District Council v Secretary of State for Environment [1993] 1 PLR 80 apply with even greater force to an officer's report to a planning committee. Lord Justice Hoffman was dealing with an inspector's decision letter:

> "The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to polices must be taken in the context of the general thrust of the inspector's reasoning. A reference to a policy does not necessarily mean that it played a significant part in the reasoning: it may have been mentioned only because it was urged on the inspector by one of the representatives of the parties and he wanted to make it clear that he had not overlooked it. Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the relevant policy or proposed alteration to the policy." (Page 83)".

81. Officers' reports must therefore be read as a whole, in their entirety, and a judgment formed as to whether they actively risk misleading the planning committee or are otherwise unfair in an overall sense: See e.g. *R v Selby District Council ex parte Oxton Farms* [1997] EB 60 (CA) per Pill LJ and per Judge LJ; and, *R v Mendip DC ex parte Fabre* (2000) 80 P&CR 500.

82. It also needs to be borne in mind that the Officers' report is not the Decision of the Planning Committee itself. It is guidance to them which includes advice and recommendations. In the absence of detailed reasons from the Planning Committee itself a Court can *prima facie* assume that the guidance, advice and recommendations contained within that report were accepted: See paragraph [46] above. However, sometimes the notes of the Planning Committee will themselves be available and can be assessed: see e.g. *Heath & Hampstead* (ibid) paragraphs 39 *et seq*. In this connection the Courts have recognised that the members of Planning Committees are well versed in the issues that relate to their locality and come to the decision they are required to take with local knowledge and understanding. They can also, as a collective, be treated as having some experience in planning matters: See e.g. per Sullivan J in *Fabre* (ibid) at page 509. It is not therefore to be assumed that every infelicity of language or expression by the Officer or every mis-description of the relevant test will necessarily have exerted any material impact upon the Committee even in respect of reports that are accepted by the Committee. To conclude otherwise would mean that even if the decision of the members was taken in an altogether impeccable manner with experienced members directing themselves perfectly, their decision would nonetheless be at risk of being quashed because the Officers report contained infelicities or ambiguities which the Committee had recognised and ignored.

83. In the present case the Planning Committee's Decision does not provide detailed reasons. It is consistent with the Officers' Reports. Argument before me proceeded upon the basis that (at the very least) it was highly germane to the Committee's thinking. But this does not mean that I should, for this reason, assume that every infelicity in language or expression in the Reports inevitably operated upon the thought processes of the Committee. In *Doncaster Metropolitan BC* (supra) Sullivan J pointed out that infelicities in the way in which the modalities of the test were applied

would rarely be material, though he also pointed out that they might be in a "finely balanced" case. The judge stated as follows (ibid paragraph [74]):

> "74. It is important that the need to establish the existence of very special circumstances, not merely special circumstances in Green Belt cases is not watered down. Even if it cannot be categorised as perverse, this decision is so perplexing on its face that it is of particular importance that the Inspector should be seen to have applied the correct test in Green Belt policy terms. I fully accept that there will be many cases where the underlying merits of the decision are relatively obvious, so that the court can safely ignore what might be regarded as infelicities in drafting. It may be obvious in the great majority of cases but it would make no difference whatsoever to the eventual conclusion on the merits whether the true test was whether one factor was outweighed by another, as opposed to whether it was clearly outweighed by another, or whether limited harm to openness was to be regarded as reducing harm in Green Belt policy terms, or as additional harm over and above that due to inappropriateness, or whether circumstances were described as special rather than very special.
>
> 75. In most decisions, fine distinctions of that kind are likely to be of no practical importance and dismissed as matters of emphasis, but there will be a small minority of very finely balanced cases where such detail will be important. This is such a case, given the terms of paragraph 15 of this decision letter I am left in real doubt as to whether the policy in paragraph 3.2 of PPG2 was correctly applied by the Inspector".

(v) The approach adopted by the Defendant

84. I turn now to apply the law to the facts. I have come to the conclusion that the Planning Committee did not commit any material error in accepting the Officers' Reports even though the Officers' Reports do betray a certain looseness of language about the nexus between openness and visual impact.

85. I have arrived at this conclusion for three reasons.

86. First, generally speaking the concepts of openness and visual impact were treated as different in the procedure leading up to the Decision and in the various reports. It was pointed out by Mr Kimblin for the Defendant that the consultation responses separated the issues of openness from visual impact and that the reports had been drafted with differences between the concepts well in mind. He pointed out that the Committee had been fully advised on the NPPF, and on the test of very special circumstances. In the Westerleigh report there were discrete sections on "Landscape" considerations which included discussion of visual impact. Viewed in the round the 3 reports will have placed squarely in the Committees' collective mind the high importance to be attached to openness; the real burden presented to applicants by the very special circumstances test; and, the landscaping issues which were to form part of the overall assessment which the Committee had to perform. And

of course it should not be overlooked in this context that by far and away the dominant considerations for the Committee were the two questions of "need" and alternative sites. The issue of the impact of visual mitigation upon openness was, in my view, very much a tertiary consideration, at best.

87. Secondly, in the paragraphs complained of there are – it is true - some suggestions that the Officer did treat visual impact as a part or component of the single concept of openness. However, read more roundly it seems to me that this criticised text is fairly to be described as nothing more than infelicitous drafting and that the pith and substance of the exercise being referred to by the Officer is the very special circumstances weighing exercises that I have referred to above. I have no doubt that the paragraphs criticised could be better phrased. But the distinction being drawn is a subtle – albeit important - one and drafting lapses must not be seen in and of themselves as warranting the setting aside of the Decision unless the error is sufficiently serious as to warrant that result i.e. risks misleading the Committee or results in an overall unfairness: See authorities cited at paragraph [81] above. In context I do not consider that the errors of drafting come close to meeting this standard. I turn now to consider the actual drafting infelicities. They include the following expressions:

a) "…the level of traffic activity which would be generated would not have any undue impact on the openness of this part of the Green Belt" (Westerleigh Report paragraph 467);

b) "given the nature of the proposed use, its extent and the fact that it would be screened by existing and proposed hedgerows , it would preserve the openness of the Green Belt" (Westerleigh Report paragraph 470 in relation to the cemetery);

c) The reference to "*local*" in the comparative table at paragraph 127 of the Introductory Report (set out in paragraph [63] above);

d) "Proposal uses contours and layout, including the footprint of the bldg and its location within the site to minimise impact. Not unduly prominent on ridgeline. Therefore local impact on openness. It should be noted that the cemetery element of the proposal does not conflict with the GB. L[ymn]; overall similar local impact on openness. Strength here is that there are already buildings on site, which already have an impact" (oral presentation of the Officer to the Committee set out at paragraph [65] above).

88. However, the thrust of paragraphs 466 – 470 in the Westerleigh Report, and of the oral presentation of the Officer to the Committee, is concerned with the (legitimate) weighing exercise:

- Paragraph 466 expressly refers to the weighing exercise and I consider that it is fair to read the references to "*layout, scale, appearance and use of existing contours"* as "*minimising the impact of the proposed development in this respect*" in that paragraph as a reference to the role that visual impact plays in that weighing exercise.

- The reference to the "*impact on openness would be further mitigated by"* in paragraph 467 should be read in the context of the reference to very special circumstances in paragraph 468.

- The oral observations *Proposal uses contours and layout, including the footprint of the bldg and its location within the site to minimise impact. Not unduly prominent on ridgeline. Therefore local impact on openness"* is not unequivocal as the Claimants submit. The reference to "*minimising impact*" is a reference to how landscaping reduces the *effects* of the building but it does not suggest that the harm of openness will necessarily thereby be lessened in quantitative terms. It can fairly be understood to be a reference to the impact that the development has on openness (which remains a constant) being mitigated in the overall weighing exercise by measures to reduce visual impact.

89. Thirdly, the visual impact issue here is the effect of measures mitigating the impact of the perception of the crematorium. As to this the statements made by the Officer as to visual impact are true. As statements of fact they are not challenged. Hence it is not disputed that the proposed visual impact mitigation measures would be effective in mitigating the adverse visual effects of the development. Nor is it argued that if the drafting had been more precise and the Officer had said that notwithstanding the adverse impact on openness when the overall weighing exercise was being conducted the mitigating measures could be taken into account, that this would have represented an error of law. Put another way if the criticised matters had been lifted from their present place in the Officers report and re-located to the visual impact / landscaping sections then there could have been no objection.

90. In my judgment the errors are no more than infelicities in drafting. I consider that the Committee was sufficiently advised about the test to be applied to the crematorium not to have been misled by the niceties of the distinctions now being drawn. But I also take the view that since visual impact mitigation measures have a role to play in the overall weighing exercise and the conclusions arrived at were factually correct any error is *de minimis* and immaterial. I do not take the view on the facts of this case that simply because the decision was finely balanced in relation to "need" this can be taken as impacting upon the position of the Planning Committee in relation to the issue of openness and visual impact. It follows that Ground 2 fails.

5. Ground 3: The scope of Article 31(1)(cc) of the DMPO

(i) Ground 3: The issue

91. The issue here is a narrow, somewhat technical, point concerning the scope of the duty on the planning authority to state "how" it has worked positively and proactively with applicants. Permission was granted in relation to this ground because of its novelty.

(ii) Statutory Framework

92. Article 31 of the DMPO is entitled "Written notice of decision or determination relating to a planning application". This Article imposes an obligation upon local planning authorities to include within planning notices a statement explaining "how"

in dealing with the application the authorities worked with the applicant in a positive and proactive manner. This obligation arises in two circumstances. First, where planning permission is granted subject to conditions (cf Article 31(1)(a)). Secondly, where planning permission is refused and where the notice is required to state clearly and precisely the full reasons for refusal (cf Article 31(1)(b)). Article 31(1)(cc) states:

> "(cc) Where sub-paragraph (a) or (b) applies the notice shall include a statement explaining how, in dealing with the application, the local planning authority have worked with the applicant in a positive and proactive manner based on seeking solutions to problems arising in relation to dealing with the planning application…".

This sub-paragraph was added by the Town and Country Planning (Development Management Procedure) (England) (Amendment No. 2) Order 2012/2274, 1st December 2012. There is, accordingly, no dispute but that the obligation contained therein applied in the present case.

93. The Chief Planner at the Department for Communities and Local Government, on 18th September 2012, sent a round-robin letter to all Chief Planning Officers in local planning authorities in England. He headed the letter: "Extending existing planning permissions & the positive and proactive statement in decision notices". The first two paragraphs of the letter are not relevant for present purposes. The third paragraph was in the following terms:

> "In addition, one of the statutory instruments introduces a requirement for local planning authorities, from 1 December 2012, to include a statement on every decision letter stating how they have worked with the applicant in a positive and proactive way, in line with the NPPF. We envisage that in the majority of cases it will be sufficient for the authority to include a simple statement, confirming that they implemented the requirement in the NPPF".

94. The reference to the NPPF was (by virtue of footnote 3 to the letter) to paragraphs 186-187 therein. Those paragraphs are in a section of the Framework entitled "Decision-taking". The paragraphs are in the following terms:

> "186. Local planning authorities should approach decision-taking in a positive way to foster the delivery of sustainable development. The relationship between a decision-taking and plan-making should be seamless, translating plans into high quality development on the ground.
>
> 187. Local planning authorities should look for solutions rather than problems, and decision-takers at every level should seek to approve applications for sustainable development where possible. Local planning authorities should work proactively with applicants to secure developments that improve the economic, social and environmental conditions of the area".

(iii) The statement made by GBC in the decision letter

95. In the present case, in purported compliance with this requirement, the Notice of Planning Permission, under the heading "Notes to Applicant" contained the following statement:

> "Planning Statement – The Borough Council has worked positively and proactively with the applicant in accordance with paragraphs 186 to 187 of the National Planning Policy Framework".

(iv) The challenge to the statement

96. The Claimant, Lymn, challenges the adequacy, and hence lawfulness, of this statement upon the basis that it simply purports to record, as a matter of elementary fact, that the Council did work positively with the applicant. But this does not comply with the requirement in Article 31 which is to explain "how" the Council went about that exercise in positive engagement. A statement that it has worked with the applicant provides no information as to the *modus operandi* of that relationship. The Claimant submits that this obligation is of particular importance when there are competing applications for permission since both applicants (but in particular the disappointed applicant) are entitled to know what positive and proactive steps the planning authority took *viz a viz* each applicant. In his oral submissions in amplification of this ground Mr James Strachan QC for Lymn sought to emphasise the importance of the obligation. He submitted that the purpose behind Article 31 was two fold. First, to encourage the adoption of a proactive approach by the planning authorities towards applicants by requiring them to explain "how" they have behaved proactively. Secondly, to facilitate transparency and confidence in the planning process on the part of the public because a statement on the part of the authority as to "how" it has engaged with applicants will enable the public to understand whether what was done was legitimate in terms of good administration. Mr Strachan cited the witness statement of Mr Lymn Rose, the Managing Director of the Claimant, and the competitor to Westerleigh in the application for the grant of planning permission, who explained that in view of the Green Belt nature of the site location and the concerns expressed to the Claimant in pre-application consultation discussions Lymn did not include a cemetery within their proposed design. There is hence a suggestion in the evidence that by virtue of the pre-application discussions the Claimant was deterred from submitting an application which incorporated a cemetery whereas it is suggested Westerleigh might have been advised that submission of a cemetery was appropriate and/or desirable. It is pointed out that in his Witness Statement evidence Mr Morley, the principal planning officer of the Defendant, stated that he wished to make it clear that "…officers considered that the provision of a cemetery was an additional factor in favour of the Westerleigh application". In short, the Claimant submitted that the obligation to explain "how" pre-application engagement occurred could be critical in enabling disappointed applicants to satisfy themselves that in pre-application discussions they had not been (unlawfully) discriminated against in an inappropriate manner.

(v) The purpose behind the obligation in Article 31(1)(cc)

97. In the course of discussions with counsel during the hearing I expressed the tentative view that Article 31(1)(cc) should be interpreted purposively. Once the purpose was identified it was much easier then to pinpoint how the obligation should be satisfied. I postulated that one of the purposes of the Article might (as Mr Strachan QC had suggested) be to render transparent a process of prior dialogue and engagement which might, were it not subject to scrutiny, risk becoming inappropriate. On reflection I have concluded that the purpose of the statement is more limited in nature. The reasons for this are as follows.

98. First, the amendment which introduced Article 31(1)(cc) post-dated the NPPF. It is clear from the language of the Order that it was, indeed, intended to render more concrete the policy set out in paragraphs 186 and 187 thereof. The reference in the Article to local authorities having worked with applicants in a positive and proactive manner based upon seeking solutions to problems reflects the actual language of paragraph 187. That paragraph is in the preface to the section on "Decision-taking". It is elaborated upon in paragraphs 188-207 which concern such matters as pre-application engagement and front loading; the importance of applying a presumption in favour of sustainable development; the need to tailor planning control to local circumstances; the encouragement of authorities to render *prima facie* unacceptable development plans acceptable through the use of conditions and/or planning obligations; and, enforcement as a means of maintaining public confidence in the planning system. The purposes of this overall section of the NPPF can be seen through the following statements said to justify a policy of proactive engagement: "to improve the efficiency and effectiveness of the application system" (paragraph [188]); to ensure a better coordination of public and private resources (paragraph [188]); to achieve "better outcomes for the community" (paragraph [188]); to incentivise local authorities to take maximum advantage of the pre-application stage and to encourage applicants to engage with their local communities before submitting applications (paragraph [189]); to facilitate the resolution of issues at an earlier stage and to make the participation of statutory planning consultees more effective and positive (paragraph [190]); to assist local authorities to issue timely decisions and to ensure that applicants do not experience unnecessary delays and costs (paragraph [190]); to facilitate good decision making by ensuring that applicants discuss the information required by the authorities at an early stage (paragraph [192]); to encourage the conclusion of planning performance agreements where this might achieve a faster and more effective application process (paragraph [195]); to ensure that planning controls are tailored to local circumstances to a greater and more effective degree (paragraphs [199]-[202]); and, to facilitate the effect of enforcement of the planning system as a means of maintaining public confidence (paragraph [207]).

99. In view of this analysis of the relevant section of the NPPF it seems to me that the predominant purpose behind Article 31 is simply to promote the efficiency and effectiveness of the application system. Whilst it is possible that it could in theory <u>also</u> have served the purpose of improving the propriety and legitimacy of the planning process and thereby avoiding improper or inappropriate engagement between the local authority officials and applicants, this was <u>not</u>, in actual fact, the purpose behind the introduction of the obligation. In my view this is relevant because it guides the nature of the "how" in the Article. An obligation to explain "how" pro-active engagement has occurred which is directed towards demonstrating that the authority has sought to encourage efficiency may be very different in nature to a

disclosure statement intended to satisfy the public that the decision making process had been operated in good faith and without bias and avoiding conflicts of interest.

100. The difference between the two can be demonstrated by reference to the facts and matters asserted by the Claimant. The Claimant suggests that there was a bias or discrimination in favour of Westerleigh in the decision making process. I emphasise that I have formed no view whatsoever about the merits of this allegation. Nonetheless, if Article 31 had as a purpose the demonstration of probity, propriety, good faith and absence of conflicts then the statement might need to address a range of issues of a materially different nature to a statement designed to show simply that the authority was proactive, encouraging and generally open for business.

(vi) Conclusion on breach

101. I turn now to consider whether, applying these principles, the statement in the notice was adequate. In this regard there are a number of points to make. First, it is apparent that the form adopted by the Planning Officer was intended to reflect the advice given by the Chief Planner as referred to in paragraph [93] above. The advice given by the Chief Planner is that the obligation in Article 31 can be met minimally by a "simple" statement confirming that they have implemented the requirement in the NPPF. With respect I do not agree. The obligation in Article 31 is explicitly to state "how" they have worked with an applicant. The statement by an authority that they have in fact implemented the requirement in the NPPF does not, and cannot, satisfy this obligation. Secondly, the actual statement in issue in the present case (set out at paragraph [95] above) is somewhat more nuanced than that envisaged by the Chief Planner. It is a positive statement that "the Borough Council has worked positively and proactively with the applicant in accordance with paragraphs 186 to 187 of the National Planning Policy Framework". It is accordingly not simply a naked cross-reference to the existence of the obligation referred to in the relevant NPPF paragraphs; it goes one step further and is a positive statement that the Defendant "has" worked positively and proactively with the particular Applicant. But thirdly the statement by the Defendant in the terms described does not explain "how" that positive and proactive engagement occurred. A statement that it has occurred is not a statement as to "how" it occurred. Accordingly it seems to me that the statement by the Defendant partially complies with the obligation in Article 31 but does not do so fully. I therefore conclude that there has been a breach of the Article.

(vii) Consequences of breach: Parties' submissions

102. The question now arises as to the consequences of this conclusion.

103. Various alternatives have been put to me by the parties.

104. The Defendant submits that the statement is adequate because reasons were given for the grant of planning permission upon the face of the decision notice and it is appropriate in a case in which planning permission is granted in accordance with the recommendations of grant from officers that the statement pursuant to Article 31 be read in the context of the officer's report. Further, it is submitted that it is very difficult to envisage any circumstance in which a breach of the Article would provide a foundation for quashing a planning permission since the very grant itself indicates that a positive approach was taken by the authority. Further, it is submitted that the

Claimant cannot point to any substantial prejudice caused by the incomplete statement and that any remedy ordered by this Court should be limited to making good the deficiency in the statement. As to this the Defendant submits that Mr Morley has now provided material to further explain the steps taken so that, albeit with the benefit of hindsight, no lacuna exists in the Defendant's reasoning. Finally, it is submitted that the High Court is not a proper forum for the argument and the Claimant's remedy is to challenge the refusal upon an appeal before an inspector appointed by the Secretary of State.

105. For their part, the Claimant, Lymn, submits that the provision of an explanation by Mr Morley constitutes "*ex post facto*" rationalisation which should not be permitted: see *Lanner Parish Council v The Cornwall Council, and Coastline Housing Limited* [2013] EWCA Civ 1290 at paragraphs [59] *et seq*; *R v Westminster City Council ex parte Ermakov* [1996] 2 All ER 302 at [315h-j] per Hutchison LJ. Further the Claimants submit that the statement in the Notice is from the planning officer not from the Council and that, accordingly, the explanation given by Mr Morley as to the steps that were taken cannot constitute a statement by the Council which would, of necessity, have had to have been adopted in accordance with the planning procedure at the time of the decision. Further, it is stated that, in any event, the explanations given by Mr Morley indicate that the proactive and positive steps that affected his approach to the Westerleigh application included the provision of a new cemetery as part of that application. It is stated by Lymn that had it known that the provision of a cemetery was not only viewed as an appropriate development but also something that the planning officers treated as having merit then Lymn would have been able to pursue this option itself either on the proposed site or upon another site so as to meet any perceived need for a cemetery. Finally, it is submitted that if an error is found this is not a case where it is appropriate to decline relief to quash a decision notice which is defective. If the decision notice is quashed the Council continues to have jurisdiction over the Westerleigh application and in accordance with the principle in *R (Kides) v South Cambridgeshire District Council* [2002] EWCA 1370 the Council was required to reconsider any additional material consideration which has arisen of relevance prior to considering the resolution to grant permission. It is submitted that the discussion and debate which the Defendant entertained with Westerleigh about the cemetery constitutes such a material change in circumstance.

(viii) Conclusion on Ground 3

106. In the circumstances of this case I have decided that the proper course of action is to grant declaratory relief only and that it would be disproportionate to quash the decision purely and simply upon the basis of what is, in my view, quite a technical breach of the law. I have also concluded that there is no utility in remitting this specific matter to be re-performed given that the Decision is in any event to be remitted pursuant to my conclusion in relation to Ground 1 such that a new statement will in due course need to be adopted. This is for the following five reasons:-

i) *No necessary connection between breach and merits of the substantive decision*: A breach of Article 31 does not have an automatic or necessary connection with the merits of a planning decision. It is quite possible, for instance, to envisage the situation of a decision that was impeccable in every way but which had not been taken following any or any sufficient "positive" engagement with applicant(s). Is a Court to strike down such a decision? It

seems to me that in the absence of a clear nexus between the breach and the Decision it would be wrong (disproportionate) to assume that every breach of the article necessarily justifies a quashing remedy.

ii) *No clear obligation on planning authorities to engage in positive / pro-active engage*ment: No express obligation is imposed upon planning authorities to engage in proactive engagement with applicants. Nothing of that sort is found in the relevant legislation. There is for example no statutory obligation upon planning authorities to "*approach decision making in a positive way*" (to use the language of paragraph 186 NPPF) or to "*work proactively with applicants to secure developments that improve the economic, social and environmental conditions of the area"* (to use the language of paragraph 187 NPPF). Further the obligation in Article 31 assumes that authorities have (already) acted positively and imposes a form of *ex post facto* certification obligation upon them to state "how". But it does <u>not</u> itself impose an *a priori* obligation to act positively. The nearest the law comes to creating an obligation of this nature is to identify the desirability of authorities behaving in a positive manner as a material consideration in the NPPF and for that to then become relevant under section 38(6) PCPA 2004. But even here the NPPF simply states that planning authorities should "take account of" policies set out in the NPPF (cf paragraphs 212 – 215). In fact the NPPF is predominantly concerned with policies that impact directly upon the substantive merits of the decisions being taken; the exhortation upon authorities to act positively and proactively seems to be a weaker and less precise and direct consideration than other policies which go to the heart of the merits of an application. In my view the fact that the obligation is brought into the law through a relatively weak mechanism is a further factor that militates against an automatic assumption that quashing is the appropriate and proportionate remedy for every breach of the article.

iii) *The extent of the duty on planning authorities*: In fashioning a remedy the Court should also have in mind what the obligation breached otherwise required the authority to do. The obligation here is to explain "*how*" the authority has been positive and proactive. I do not consider that this should be treated as a very onerous obligation. It should ordinarily suffice for the authority to produce a concise statement of the main steps taken at the relevant time to encourage applicants in a positive and proactive manner. This case is not the occasion to attempt to set out in any detail what the content of such statements should be. Guidance can however be obtained by reference to the sorts of activities set out in paragraphs 188-207 of the NPPF, which are the paragraphs elaborating upon paragraphs 186 and 187. In particular, I do not envisage that the authority is required to provide a detailed, blow by blow, chronological, account of relations with applicant(s). I am in particular concerned that if this were the case it would serve to provide ammunition and encouragement for what might then become undesirable satellite litigation and applications for pre-action disclosure, which seems to me to be contrary to the spirit and intent of the NPPF as a whole.

iv) *No utility in remitting in this case*: Given that the Decision is going to be set aside and remitted anyway, there is no present utility in remitting the Article

31 issue for the statement to be re-issued. Once a new decision is taken the Defendant can readdress the obligation in Article 31 afresh.

v) *The approach adopted by the authority*: Finally and importantly there are the facts of this case. In selecting an appropriate remedy I have taken account of the approach that the Defendant adopted towards its obligations under Article 31. This is not a case where it is suggested that the Defendant authority failed altogether to engage with the applicant(s) at an early stage or otherwise address itself to paragraphs 186 and 187 NPPF. The authority did what it believed was the advised course of action, as set out in the Chief Planner's letter. The point of law arising is entirely novel and in the light of the Chief Planners letter the error is understandable. I consider that this is one of those rare cases where it is sensible, pragmatic and permissible to examine the Defendant's evidence (see discussion at Section 6 below). In this regard Mr Morley has explained in his Witness Statement (paragraphs 46 – 50) that he and his team did work positively and proactively with the applicants and that they did this by seeking solutions to problems by:

> "Meeting the applicant & agent to discuss consultation response.
>
> Providing details of issues raised in consultation responses.
>
> Requesting clarification, additional information or drawing in response to issues raised.
>
> Providing updates on the applicant progress.
>
> Holding a Technical Briefing for Members of the Planning Committee by the applicant & his team".

107. I should also address the Claimant's point that had the obligation been complied with then the differences in approach allegedly adopted by the Defendant towards Lymn and Westerleigh in relation to a cemetery would have been apparent. As to this there are two responses. First, on my assessment of the nature of the obligation this level of detail would never have been evident from the concise statement that in my view is all that is required to comply with Article 31(1)(cc). However, and secondly, I do not wholly discount this evidence and I have taken it into account in deciding that the error under Ground 1 is to be treated as a material error and leads to the Decision being set aside (See paragraph [51] above). I do not have anything approaching the sort of evidence that would be necessary for me to determine this point. I conclude only that in circumstances where the Defendant has erred in law in its approach to the question of cemeteries it is not to be excluded that confused messages might have been conveyed to the two applicants which could have encouraged Westerleigh to include a cemetery in their application which might, for reasons given, have been a material advantage to them in a "finely balanced" decision.

108. For these reasons, and in the unusual circumstances of this case, I limit the relief to a declaration that the statement given by the Defendant did not comply with the requirements of Article 31(1)(cc) of the Order.

6. The admissibility of after the event evidence by the Planning Authority

(i) The different uses of after the event evidence

109. There is one final matter that loomed large in submissions that I should deal with. Lymn objected strenuously to the service and admissibility of witness statement evidence by Mr Morley on behalf of the Defendant. They submitted that his evidence was an attempt to re-write history and plug errors in the various planning reports submitted to the Planning Committee. There is no black and white rule which indicates whether a court should accept or reject all or part of a witness statement in judicial review proceedings. A witness statement might serve a number of purposes. First, it might make admissions in pursual of the duty of a public authority to act with candour and openness. Secondly, it might provide a commentary on documents which are provided by way of disclosure in pursuit of the public authority's duty to come to court with its cards face upwards on the table. Thirdly, it might provide an explanation why an authority did or did not do something. Fourthly, the statement may seek to plug gaps or lacuna in the reasons for the decision or elaborate upon reasons already given. Given the multiplicity of purposes that a statement can serve it is necessary to identify in relation to each contention the basis upon which the impugned statement is relied upon.

(ii) The reluctance of courts to allow elucidatory statements

110. In the present case a considerable portion of the statement of Mr Morley seeks to summarise and explain the reasons set out in the various reports. Mr Kimblin, for the Defendant, submitted to me that there was no need for me to have recourse to the statement where this merely served to summarise or explain the Reports. It seems to me that as a matter of first principle it should be rare indeed that a court will accept *ex post facto* explanations and justifications which risk conflicting with the reasons set out in the decision. The giving of such explanations will always risk the criticism that they constitute forensic "boot strapping". Moreover, by highlighting differences between the reasons given in the statement and those set out in the formal decision they often actually serve to highlight the deficiencies in the decision. Fundamentally, a judicial review focuses the spotlight upon the reasons given at the time of the decision. Subsequent second bites at the reasoning cherry are inherently likely to be viewed as self-serving.

111. In *Ermakov v Westminster City Council* [1995] EWCA Civ 42 the applicant came to the UK from Greece and applied to the respondent for housing under the Homelessness Provisions of the Housing Act 1985. The respondent refused the application saying that the applicant was intentionally homeless. The respondent gave reasons for its decision as required under the Act which were challenged in a judicial review. The respondent then filed supplementary evidence setting out different reasons for its decision from those originally given. A Deputy Judge accepted that evidence and dismissed the claim. The Court of Appeal reversed that decision. The Court of Appeal held that since the respondent was required to give reasons at the time of its decision and those reasons were deficient, the decision should be quashed. Hutchison LJ gave the leading judgment, with which Nourse and Thorpe LJJ agreed. At page 315h-j Hutchison LJ stated:

> "The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in ex parte Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence - as in this case - which indicates that the real reasons were wholly different from the stated reasons".

112. That judgment was endorsed by the Court of Appeal in *Lanner Parish Council v The Cornwall Council* [2013] EWCA Civ 1290 at paragraphs [61] in relation to contradictory evidence. At paragraph [64] the Court stated:

> "Save in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached. In the present case the officer's report, the minutes of the Planning Committee meeting and the stated reasons for the grant of planning permission all indicate a misunderstanding of policy H20. These are official documents upon which members of the public are entitled to rely. Mr Findlay's submission that this is not a "reasons" case like *Ermakov* misses the point. The Council should not have been permitted to rely upon evidence which contradicted those official documents. Alternatively, the judge should not have accepted such evidence in preference to the Council's own official records".

113. A further indication of the reluctance of the courts to permit elucidatory statements is found in the recent judgment of Ouseley J in *Ioannou v Secretary of State for Communities and Local Government* [2013] EWHC 3945. There, the Judge was confronted with a gap plugging witness statement from an inspector who gave evidence that he did consider a particular issue in circumstances where it was not apparent from the decision letter that he had in fact done so:

> "51. I add that I would strongly discourage the use of witness statements from Inspectors in the way deployed here. The statutory obligation to give a decision with reasons must be fulfilled by the decision letter, which then becomes the basis of challenge. There is no provision for a second letter or for a challenge to it. A witness statement should not be a backdoor second decision letter. It may reveal further errors of law. In my view, the statement is not admissible, elucidatory or not

> 52. However, if that is wrong, the question whether the statement elucidates or contradicts the reasoning in the decision letter, and so is admissible or inadmissible on *Ermakov* principles, can only be resolved once the decision letter has been construed without it. To the extent that a Court concludes that the reasoning is legally deficient in itself, or shows an error of law for example in failing to deal with a material consideration, it is difficult to see how the statement purporting to resolve the issue could ever be merely elucidatory. A witness statement would also create all the dangers of rationalisation after the event, fitting answers to omissions into the already set framework of the decision letter, risking demands for the Inspector to be cross-examined on his statement, and creating suspicions about what had actually been the reasons, all with the effect of reducing public and professional confidence in the high quality and integrity of the Inspectorate.
>
> 53. Inspectors could be required routinely to produce witness statements when a reasons challenge was brought or when it was alleged that a material consideration had been overlooked, since the challenging advocate would be able to say that, in its absence, there was nothing to support the argument put forward by counsel for the Secretary of State, when there so easily could have been, and he must therefore be flying kites of his own devising. This is not the same as an Inspector giving evidence of fact about what happened before him, which can carry some of the same risks, but if that is occasionally necessary, it is for very different reasons".

114. In the present case I have not had regard to Mr Morley's statement in relation to Ground 1 save insofar as Mr Morley has made an admission as to the fact that he did not have the *Fordent* judgment available to guide him as of the date of the Reports or his oral advice to the Committee (see paragraph [47] above). This admission did not however influence my analysis of Ground 1 which is essentially a question of law. Equally, I have decided Ground 2 on the basis of the contemporaneous documents not the Witness Statement evidence. On Ground 3 I have taken account of Mr Morley's evidence (See paragraph 107(vii) above) but it was not in any way decisive to my reasoning.

7. Overall conclusion

115. In conclusion:

i) The applications succeed on Ground 1. The Decision is quashed and remitted to be taken again.

ii) The applications fail on Ground 2.

iii) The Lymn application succeeds on Ground 3 but only to the extent that a declaration is granted.