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Queen's Bench Division

Regina (Legard) *v* Kensington and Chelsea Royal London Borough Council

[2018] EWHC 32 (Admin)

B

2017 July 12, 14;
Sept 28;
Oct 11, 12;
2018 Jan 12

Dove J

Planning — Development — Neighbourhood development plan — Decision of local planning authority to permit neighbourhood development plan to proceed to C *referendum — Whether apparent bias in selecting independent examiner and in conducting neighbourhood plan process — Summary of applicable principles — Town and Country Planning Act 1990 (c 8) (as amended by Localism Act 2011 (c 20), s 116, Sch 10, para 1), Sch 4B, paras 3(1), 7(4)*

Planning — Development — Neighbourhood development plan — Independent examination approving proposal in draft plan to designate site as local green space — Whether examiner misinterpreting national planning policy — Whether D *designated land required to "serve" local community — Whether plan to be revised — National Planning Policy Framework (2012), para 77*

The claimant entered into a contractual relationship with the proposed developer for the residential development of a parcel of his disused land ("the site"). The proposed development was inconsistent with the neighbourhood forum's proposed designation of the site in the draft neighbourhood plan, prepared pursuant to Schedule 4B of the Town and Country Planning Act 1990[1], as a local green space E under paragraph 77 of the National Planning Policy Framework[2] ("the NPPF"). Following an independent examination, which found in favour of the designation, the local planning authority permitted the draft plan to proceed to a referendum. The claimant sought judicial review of that decision asserting, inter alia: (i) that the decision was tainted by the local authority's apparent bias in favour of the neighbourhood forum in the neighbourhood plan process, and (ii) that the examiner had failed to construe paragraph 77 of the NPPF as requiring any site considered for F designation as a local green space to "serve" the community, which requirement the site did not meet. In relation to the first issue, the claimant relied on the role played by an individual, on behalf of the neighbourhood forum, who had allegedly been afforded privileged access to the local authority's members and officers and exerted an overwhelming influence on the authority, inter alia, in its selection of the independent examiner.

On the claim for judicial review—

G *Held*, dismissing the claim, (1) that paragraph 3(1) of Schedule 4B to the Town and Country Planning Act 1990 imposed an obligation on a local authority to provide advice and assistance to a qualifying body in order to facilitate the making of a neighbourhood plan and the fair-minded and well-informed observer was to be taken to be aware of that obligation for the purposes of determining an allegation of apparent bias against a local authority in the local development plan process; that it was clear from paragraph 7(4) of Schedule 4B to the 1990 Act that both the local H authority and the qualifying body had a role to play in the appointment of an independent examiner to assess a neighbourhood plan; that, furthermore, in the context of modern public administration it was expected that local government

[1] Town and Country Planning Act, Sch 4B, as inserted, paras 3(1), 7(4): see post, para 116.
[2] National Planning Policy Framework, para 77: see post, para 137.

officers would engage with representations made to them by all members of the public, and democratically elected councillors were expected to receive and consider representations and lobbying from those interested in the issues they were determining; and that, accordingly, there had been neither apparent bias nor unfairness in the local authority's involvement in the making of the plan, and in particular the proposal for the local green space designation of the site, and the examiner had been selected in accordance with a lawful process (post, paras 141–145, 153, 195).

(2) That in determining whether pursuant to paragraph 77 of the NPPF a site was to be designated as local green space, the criteria set out in the three bullet points to paragraph 77 were to be read and applied together and considered in the context of the NPPF as a whole; that the first bullet point did not create a separate and freestanding requirement that the land had to be shown to serve the local community; that, rather, the word "serves" in the first bullet point had to be read in the context of the second and third bullet points so that the local community would be served by the green space if that space were shown to be "demonstrably special" to, and held a "particular significance" for, the community; that the examiner's report set out the qualities in terms of views, nature and conservation value and historical significance, all of which were relevant to the application of paragraph 77, and all of which explained his conclusion that he was satisfied that the site was "demonstrably special" to the local community and held a particular significance for them; that having identified the qualities of the site which made it "demonstrably special" and of "particular local significance" for the community, so satisfying the second and third bullet points of paragraph 77, and which provided the manner in which it served the local community, the only remaining question under the first bullet point of paragraph 77 was whether the site was in proximity to that local community, a proposition which could not have seriously been contested; and that, accordingly, the examiner had properly applied paragraph 77 of the NPPF and his conclusions had been adequately and properly reasoned (post, paras 186–189, 195).

Summary of the general principles applicable to consideration of the issue of apparent bias (post, paras 133–136).

The following cases are referred to in the judgment:

Ai Veg Ltd v Hounslow London Borough Council [2003] EWHC 3112 (Admin); [2004] LGR 536

British Muslims Association v Secretary of State for the Environment (1987) 55 P & CR 205

Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government [2016] EWCA Civ 562; [2016] JPL 1207, CA

Competition Commission v BAA Ltd [2010] EWCA Civ 1097; [2011] UKCLR 1, CA

Cotterell v Secretary of State for the Environment [1991] 2 PLR 37

Furmston v Secretary of State for the Environment [1982] JPL 49

Georgiou v Enfield London Borough Council [2004] EWHC 779 (Admin); [2004] LGR 497

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)

Jory v Secretary of State for Transport, Local Government and the Regions [2002] EWHC 2724 (Admin); [2003] 1 PLR 54

Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; [2002] 2 WLR 37; [2002] 1 All ER 465; [2002] LGR 51, HL(E)

R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531; [1993] 3 WLR 154; [1993] 3 All ER 92, HL(E)

R (Bewley Homes plc) v Waverley Borough Council [2017] EWHC 1776 (Admin); [2018] PTSR 423

R (Crownhall Estates Ltd) v Chichester District Council [2016] EWHC 73 (Admin)

R (DLA Delivery Ltd) v Lewes District Council [2017] EWCA Civ 58; [2017] PTSR 949, CA
R (Island Farm Development Ltd) v Bridgend County Borough Council [2006] EWHC 2189 (Admin); [2007] LGR 60
R (Lewis) v Redcar and Cleveland Borough Council [2008] EWCA Civ 746; [2009] 1 WLR 83; [2008] LGR 781, CA
R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409, CA
R (Swan Quay llp) v Swale Borough Council [2017] EWHC 420 (Admin)
Simmons v Secretary of State for the Environment [1985] JPL 253
South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)
Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc)

The following additional cases were cited in argument or referred to in the skeleton arguments:

Barker Mill Estates (Trustees of the) v Test Valley Borough Council [2016] EWHC 3028 (Admin); [2017] PTSR 408
Belize Bank Ltd v Attorney General of Belize [2011] UKPC 36, PC
De Haes and Gijsels v Belgium CE:ECHR:1997:0224JUD001998392; 25 EHRR 1
Dombo Beheer BV v The Netherlands CE:ECHR:1993:1027JUD001444888; 18 EHRR 213
Fairmount Investments Ltd v Secretary of State for the Environment [1976] 1 WLR 1255; [1976] 2 All ER 865; 75 LGR 33, HL(E)
Gill v Humanware Europe Ltd (unreported) 3 June 2009, EAT
Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 WLR 2416; [2009] 2 All ER 1031, HL(E)
Hopkins Developments Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 470; [2014] PTSR 1145, CA
Khan (Bagga) v Secretary of State for the Home Department [1987] Imm AR 543, CA
Lloyd v McMahon [1987] AC 625; [1987] 2 WLR 821; [1987] 1 All ER 1118; 85 LGR 545, CA and HL(E)
Newport Borough Council v Secretary of State for Wales [1998] 1 PLR 47
Newsmith Stainless Ltd v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74; [2017] PTSR 1126
Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E)
R v Lancashire County Council Ex p Huddleston [1986] 2 All ER 941, CA
R v Secretary of State for Health, Ex p United States Tobacco International Inc [1992] QB 353; [1991] 3 WLR 529; [1992] 1 All ER 212, DC
R v Secretary of State for the Home Department, Ex p Al-Mehdawi [1990] 1 AC 876; [1989] 3 WLR 1294; [1989] 3 All ER 843, HL(E)
R v Secretary of State for the Home Department, Ex p Harry [1998] 1 WLR 1737; [1998] 3 All ER 360
R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, DC
R v Westminster County Council Ex p Ermakov [1996] 2 All ER 302; 95 LGR 119, CA
R (Al-Sweady) v Secretary of State for Defence (No 2) [2009] EWHC 2387 (Admin); [2010] HRLR 2, DC
R (BDW Trading Ltd) v Cheshire West and Chester Borough Council [2014] EWHC 1470 (Admin)
R (Fuller) v Secretary of State for Communities and Local Government [2008] EWHC 3357 (Admin)

R (Gladman Developments Ltd) v Aylesbury Vale District Council [2014] EWHC 4323 (Admin); [2015] JPL 656
R (Hayes) v Wychavon District Council [2014] EWHC 1987 (Admin); [2015] JPL 62
R (Lanner Parish Council) v Cornwall Council [2013] EWCA Civ 1290; [2013] 45 EG 75 (CS), CA
R (Maynard) v Chiltern District Council [2015] EWHC 3817 (Admin)
R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472; 126 BMLR 134, CA
R (Sager House (Chelsea) Ltd) v First Secretary of State [2006] EWHC 1251 (Admin); [2007] JPL 413
R (Shoesmith) v Ofsted [2011] EWCA Civ 642; [2011] PTSR 1459; [2011] ICR 1195; [2011] LGR 649, CA
Tweed v Parades Commission for Northern Ireland [2006] UKHL 53; [2007] 1 AC 650; [2007] 2 WLR 1; [2007] 2 All ER 273, HL(NI)
Virdi v Law Society (Solicitors Disciplinary Tribunal intervening) [2010] EWCA Civ 100; [2010] 1 WLR 2840; [2010] 3 All ER 653, CA
Woodcock Holdings Ltd v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Admin); [2015] JPL 1151

CLAIM for judicial review

By a claim form the claimant, William Robert Legard, sought judicial review of the decision of Kensington and Chelsea Royal London Borough Council, the local planning authority, to allow the neighbourhood development plan prepared by the second interested party, St Quintin and Woodlands Neighbourhood Forum, ("the neighbourhood forum") to proceed to a referendum under paragraph 12 of Schedule 4B to the Town and Country Planning Act 1990. Under the plan the parcel of land belonging to the claimant, in respect of which he had entered into a contractual relationship with the first interested party, Metropolis Properties Ltd ("the proposed developer") for potential residential development, was designated as a local green space under paragraph 77 of the National Planning Policy Framework ("the NPPF"). Permission to proceed with the claim was granted by Lang J on 17 March 2016 on five grounds, post, para 2. On 10 June 2016 Ouseley J granted the claimant permission to consolidate and amend the pleaded grounds into three core issues, namely that (i) the decision was tainted by the local authority's apparent bias in favour of the neighbourhood forum in the neighbourhood plan process and the local authority had treated the claimant unfairly; (ii) the independent examiner had failed to understand and properly apply paragraph 77 of the NPPF with the consequence that his reasons for designating the parcel of land as a green space were wrong and, in any event, inadequate; and (iii) throughout the process the local authority's own officers had indicated, as a matter of professional judgment, that the designation of the site could not be supported and in reaching its conclusion in the key decision it had been incumbent upon the local authority to explain why its position had been reversed, and a failure to do so constituted a failure to provide proper reasons in relation to the decision.

The facts are stated in the judgment, post, paras 1–107.

Richard Wald (instructed by *CMS Cameron McKenna Nabarro Olswang llp*) for the claimant.

Hereward Phillpot QC and *Isabella Tafur* (instructed by *Director of Legal Services, Kensington and Chelsea Royal London Borough Council*) for the local authority.

Stephanie Hall (instructed directly) for the neighbourhood forum. The proposed developer did not appear and was not represented.

The court took time for consideration.

12 January 2018. **DOVE J** handed down the following judgment.

Introduction

1 This claim concerns the defendant's decision of 10 December 2015 to permit the St Quintin and Woodland's Neighbourhood Plan ("the neighbourhood plan") to proceed to a referendum. The neighbourhood plan had been promoted by the second interested party. It contained as one of its most controversial proposals the designation of a parcel of land off Nursery Lane ("the site") as a "local green space" ("LGS") pursuant to paragraph 77 of the National Planning Policy Framework ("the Framework"). The claimant is the owner of the site and the first interested party is in a contractual relationship with the claimant for the purposes of pursuing residential development of the site. The designation of the site as LGS is inconsistent with the promotion of residential development, and thus the second interested party's proposals through the neighbourhood plan to designate it as such were controversial.

Procedural history

2 On 17 March 2016 Lang J granted permission to apply for judicial review on five grounds which were initially pursued by the claimant. Those grounds were that the defendant had failed to address a principal controversial issue in its decision, namely whether the designation of the site as LGS satisfied the necessary criteria for designation. It was further contended that inadequate reasons had been provided for concluding that the site served the local community so as to satisfy the requirements for designation which were contended for by the claimant and further failed to address the inconsistency between the decision which was reached in relation to the site and the defendant's earlier view that designation was inappropriate. It was submitted that the site was in a lawful use for unconstrained commercial purposes and that was a factor that had not been taken into account. Furthermore, it was alleged that the defendant had taken into account the factor that the site might facilitate a future communal recreational use to which it was not currently put, and which was immaterial and an improper purpose in relation to the designation of the land as an LGS.

3 As a consequence of further information coming to light in respect of the factual background, which is set out below, the claimant obtained permission on 10 June 2016 from Ouseley J to amend his grounds. The amended grounds relied upon allegations of apparent bias and breaches of the requirements of fairness which are set out in greater detail below. Ouseley J further ordered that the hearing of the matters should be postponed until the outcome of the decision of the Court of Appeal in *R (DLA Delivery Ltd) v Lewes District Council* [2017] PTSR 949. That judgment was handed down on 10 February 2017 leading to the matter being brought on for a hearing on 12 and 13 July 2017. During the course of the hearing in July 2017 the parties determined that there was a need for consideration to be given as to whether or not there was further

documentation and evidence that should be disclosed as a consequence of the issues which had been raised. A further order was made addressing the potential disclosure of further material and making provision for the receipt of further submissions in relation to that material with the opportunity for a resumption of the hearing if necessary. In the event, a substantial amount of further evidence was disclosed, leading to the introduction of extensive new submissions and the need for a further hearing.

4 At the hearing on 28 September 2017 concerns were expressed by the parties as to whether or not it was appropriate for the hearing to commence. Concerns were expressed as to the adequacy of the time estimate and, on behalf of the defendant, a need to respond to matters contained within a further chronology provided to the court by the claimant. A need to rationalise the extent of the further documentation was also identified. As a consequence, the further hearing in relation to the additional disclosure occurred on 11 and 12 October 2017.

5 Prior to embarking on explaining the factual background to the case I wish to place on record my gratitude to all counsel and solicitors in the case. I am indebted to the care which has been exercised in the preparation of this complex case, and the quality of the written material and submissions which I received. All those involved are to be commended for the assistance which they have provided with the court's task.

The early evolution of the neighbourhood plan

6 On 2 July 2013 the second interested party was designated as a neighbourhood forum for the purposes of the Town and Country Planning Act 1990. The second interested party had in fact, prior to designation, embarked upon consultation with the community and certainly by March 2014 started to formulate draft policies for inclusion within the neighbourhood plan. One such draft policy sought the designation of the site (amongst others) as LGS. The justification for that designation was described in the text provided as part of a newsletter in the following terms:

> "The CAPS refers to the remaining backland open spaces behind Highlever Road, Barlby Road, and Kelfield Gardens and includes a clear policy statement '*Some leisure and recreational activities have made good use of these spaces and proposals to develop them for more housing will not be permitted*'.
>
> "Local residents view these statements as being as important now as when first written and adopted by the council. The threat of residential development on the Nursery Lane site has prompted almost every one of the 50 households backing onto the site to come together to form the Nursery Lane Action Group and to support the proposal to acquire the site as shared communal green space."

7 It seems from the evidence that at some time in April 2014 the chair of the second interested party, Mr Henry Peterson, became aware of a marketing brochure from estate agents inviting offers for the site as an opportunity for residential development. On 6 May 2014 Mr Peterson wrote to Mr Jonathon Wade, the head of forward planning for the defendant, to inquire whether there had been any discussions with the defendant to justify the description of the site as a residential opportunity. Mr Peterson had already written to Mr Angus Morrison at the defendant on

28 March 2014 asking where the Oxford Gardens/St Quintin's conservation area might sit in the council's programme for updating "very vintage" conservation appraisals, bearing in mind the original version dated from 1979 having been updated in 1990. Mr Wade responded to Mr Peterson indicating there had been no pre-application discussion or advice and that the description must have been provided by Knight Frank.

8 In the run up to local elections on 19 May 2014 Mr Peterson wrote to candidates in the relevant ward containing the site asking their views on how they saw its future. The two candidates who were ultimately successful in the election indicated, almost by return and prior to polling day, that they supported the designation of the site as LGS under the proposals in the neighbourhood plan. By 23 May 2014 Mr Peterson was in correspondence with Mr Wade in relation to whether or not any informal discussions had occurred with the council about the planning merits of the site. Mr Wade confirmed that they had not. On 9 June 2014 Mr Peterson wrote to Mr Wade copying in other officers including Ms Joanna Hammond who is the neighbourhood planning team leader for the defendant. In his e-mail enclosing a letter seeking a meeting in relation to the first draft of the neighbourhood plan, which had been recently published on the second interested party's website for consultation purposes, he indicated that there was a second reason for writing, namely inquiring about the progress which had occurred in relation to the potential sale of the site. Mr Peterson noted that the claimant was pursuing sale of the site as swiftly as possible "before the neighbourhood plan creates additional planning obstacles for them". Mr Peterson wrote:

> "The planning history of the site is covered in the open spaces section of the Draft StQW Neighbourhood Plan, and the plan proposes that this (and other remaining 'backland' sites in the St Quintin Estate) are designated as local green space. My letter of May 6 to you, and copied to Knight Frank, explained that this was a probable step. An open meeting of the StQW Forum on May 29, attended by over 60 local residents and three of the four recently elected councillors for Dalgarno and St Helens wards, confirmed the strength of local feeling on this issue.
>
> "We wish to avoid a scenario in which the Legard family sell quickly to the highest unconditional offer, with the site being taken on by a residential developer who has done inadequate due diligence, and hence overpays for the land. We do not want a situation in which such a developer then spends years submitting a series of applications which are unacceptable to the council and do not conform with a (by then) adopted neighbourhood plan."

9 On 10 and 11 June 2014 Mr Peterson was exchanging e-mails with Mr Mumby, a consultant acting on behalf of the claimant. He advised Mr Mumby of the presence of the draft of the neighbourhood plan on the second interested party's website and rehearsed the objections to residential development and the planning constraints which he considered to be present on the site. On 12 June 2014 Mr Peterson wrote to Ms Hammond addressing the question of whether or not any application for development of the site would be subject to an objection based upon prematurity. Mr Peterson referred to the relevant provisions of the Government's Planning Practice Guidance ("PPG") in relation to questions of prematurity.

Further he went on to inquire as to whether or not there had been any advice given by the defendant and, in particular, what advice had been given on the status of the draft neighbourhood plan as "emerging policy".

10 On the same date, 12 June 2014, the second interested party sought to nominate the site as an "asset of community value" under the Localism Act 2011. In fact that application was ultimately unsuccessful and by a letter dated 1 August 2014 the second interested party were informed that the application had failed for the following reason:

> "The Clifton Nurseries site is not currently, nor in the recent past has it been, in a use that furthers the social wellbeing or social interests of the local community. The definition of land of community value as set out in section 88 of the Localism Act 2011 is therefore not satisfied and the nomination is refused."

11 On 13 June 2014 Ms Hammond responded to Mr Peterson's e-mail explaining that in her view the neighbourhood plan could not have any material weight at that time on the basis that it was at an informal consultation and drafting stage and had not been formally submitted to the defendant. She further advised that no requests for pre-application advice had been received in relation to the site. On 9 July 2014 Mr Peterson wrote to Mr Graham Stallwood, the defendant's head of development management and conservation, explaining that he had previously been in correspondence with Mr Wade as to whether or not the defendant had provided planning advice on the site. He advised Mr Stallwood that he understood that two bidders for the site, Clarendon and Octavia Hill, had both had their offers rejected. He further advised Mr Stallwood that residents surrounding the site had also submitted an offer to buy it as a shared garden for the sum of £1·25m. He again inquired of Mr Stallwood as to whether or not the council had been approached for planning advice on the site and if so by whom. On 11 July 2014 Mr Stallwood responded that there had been "no approaches so far".

12 On 27 August 2014 the first interested party had a pre-application meeting with the defendant in relation to a 31 residential unit scheme on the site. On 4 September 2014 Mr Peterson wrote to Ms Hammond copying in Mr Wade expressing a number of detailed concerns in relation to the defendant's response to the draft neighbourhood plan and seeking a more detailed understanding of the concerns which the defendant had expressed. In introducing these points Mr Peterson observed his view that "at the end of the day it is for the independent inspector and not the council to decide whether the draft plan is in 'general conformity' or if it has other problems or flaws in terms of planning legislation". On 5 September 2014 the defendant produced notes of the first pre-application meeting which had occurred on 27 August 2014 in which it was observed that the defendant "considered that the use of the land for residential development could be supported". On 8 September 2014 Mr Peterson wrote again to Mr Stallwood asking whether or not the defendant had been approached for pre-application advice. Mr Stallwood responded on 9 September 2014 in the following terms:

> "We have received a request for advice and have responded. I cannot of course tell you who has asked or what the request relates to, but we

A have not been encouraging at this stage. I probably shouldn't be telling you we have received request, or the gist of our response, so please bear this in mind when deciding how to share the news!"

13 On 29 September 2014 Mr Peterson wrote to Ms Hammond explaining that Mr Christopher Lockhart-Mummery QC had confirmed that he was willing to undertake a health check of the neighbourhood plan, B but that prior to doing so he would need to have the defendant's comments on the neighbourhood plan which were still awaited. On 3 October 2014 Mr Peterson wrote to one of the local councillors, Councillor Thompson, expressing his concern that they were still awaiting the defendant's detailed comments on the draft of the neighbourhood plan which had been with the defendant since the start of August 2014. Mr Peterson suggested that the C delays that were being experienced were "beginning to feel like stalling tactics by council officers" and requesting that if proper feedback was not achieved whether Councillor Thompson would be prepared to raise the matter with Councillor Tim Coleridge, the defendant's cabinet member for planning policy, transport and the arts. In fact, the defendant's response to the draft plan, which identified concerns on their behalf in relation to its contents, was forwarded by Ms Hammond to Mr Peterson on 6 October D 2014. On 7 October 2014 Mr Peterson wrote to Ms Hammond expressing concern about the "less than supportive" stance of the defendant, and there was a subsequent exchange following which a lengthy letter was written by Mr Peterson to Mr Wade on 9 October 2014. The inference from that letter is that the defendant was not supportive of an LGS designation at the site and the letter discussed a fallback position if the proposal for designation as LGS failed at the examination. This letter, together with the defendant's E comments, was provided by Mr Peterson to Councillor Coleridge along with local councillors.

14 The defendant's scepticism about the ability to designate the site as an LGS is made plain in their letter to Mr Peterson of 24 October 2014, in which Mr Wade on behalf of the defendant stated that he thought "you may struggle with [the Framework] designation of a local green space" in relation F to the site. On the same date Mr Peterson wrote to Mr Stallwood noting that Mr Wade and Ms Hammond considered that the designation of the site as an LGS was unjustifiable in terms of the Framework criteria, and posed Mr Stallwood two questions: firstly, he asked whether or not the defendant agreed with the second interest party's position that the site did not qualify to be considered as previously developed land for the purposes of the Framework. Secondly, Mr Peterson asked whether anything had been said G on this issue in the pre-application advice which had been provided by the council. He accepted that a copy of the pre-application advice would not be available to the second interested party until a planning application was submitted but suggested that the neighbourhood forum might make a freedom of information ("FOI") request. The response to this inquiry was provided by Mr Stallwood in an e-mail on 28 October 2014 in the following H terms:

"We didn't conclude on whether it's previously developed land in our advice and it's not straightforward.

"The site was in a sui generis (rather than agricultural) use and there are small-scale glasshouses on the site which are fixed to the ground.

There are also a number of shipping containers. Both the glasshouses and the containers appear to have been on the site for around or over 30 years to have some permanency.

"Parts of the site have materials stored externally on pallets which could be argued to give the land a developed appearance.

"We haven't had to reach or commit to a conclusion and have not done so—and that's probably best at this stage. However, if I was their planning consultant and thought it helped my case, there is arguably good evidence to say it is previously developed land under [the Framework] definition."

15 On 13 November 2014 the first interested party had their second pre-application meeting with the defendant in relation to a proposal to develop the site for 31 residential units. The notes which were subsequently furnished by the defendant on 20 November 2014 again recorded the defendant's position being that the principle of development of the site for residential use was supported.

16 On 27 November 2014 Ms Preety Gulati Tyagi contacted a number of local councillors as well as Mr Peterson to advise them that the defendant was engaged in a programme of appraising or reappraising all of the conservation areas within the defendant's administrative area, and that the Oxford Gardens Conservation Area was the next conservation area which was going to be appraised. Through the e-mails she invited ward councillors and Mr Peterson, as a representative of a resident's association, to join them on a walkabout of the conservation area so as to assist in the process. On 9 December 2014 Ms Hammond wrote to Mr Peterson as part of the dialogue over the wording of the draft neighbourhood plan stating particular concern about the designation of Nursery Lane as an LGS "as we do not think this site meets the criteria specified in the [Framework]".

17 It appears that on 11 December 2014 Mr Peterson went on the walkabout with Ms Gulati Tyagi and others. Following this he wrote an e-mail to Ms Hammond expressing his concern about the timing of the preparation of the Oxford Gardens Conservation Area appraisal ("CAA") and the production of the neighbourhood plan. He wrote:

"Our suggestion would be for the council to complete the drafting of the CAA, including a section of the document which explains its relationship to the neighbourhood plan and to the StQW conservation policies, but to hold off from adoption until the outcome of the referendum on the StQW Plan is known. We are still trying to reach this point before the recess at the end of July 2015 (and hope that the council will be helping to make this happen). This date will still be well before the original timetable for the Oxford Gardens CAA."

"Preparing the Oxford Gardens CAA at this time does feel (for us) a bit like duplication. For the sake of a few months it would seem better for the council to finalise and publish the Oxford Gardens CAA at a time when there is certainty as to the conservation policies which will apply in different parts of the conservation area and on whether the StQW Neighbourhood Plan will be coming into force."

Ms Hammond responded later that day in the following terms:

> "We brought production of the Oxford Gardens CAA forward to assist the neighbourhood plan and we don't see any overlap with the contents of the neighbourhood plan as they are doing completely different things. The CAA supports the neighbourhood plan in providing clarity on where there is potential for change/alterations without causing harm to the character or appearance of the [conservation area].
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> "We are on a tight schedule to get all the CAAs updated and, as you point out in the neighbourhood plan, the current CAPS is quite old, so we see no point in delaying."

18 On 12 December 2014 the first interested party held a public exhibition in relation to its housing proposals. Shortly thereafter on 16 December 2014 Mr Peterson wrote to Mr Wade expressing the view that he considered that it would be premature for the defendant "to take up a firm position" on the question of whether or not the site met the criteria in paragraph 77 of the Framework to qualify for designation as LGS". He stated his view that it was premature in advance of formal consultation on the neighbourhood plan and the examination of the draft plan. He further placed reliance on the health check which had been undertaken by Mr Lockhart-Mummery who had stated that he considered that "a convincing case for this proposal has been made". The letter went on to note that the first interested party had refused to provide a copy of the pre-application advice they had received from the defendant to Mr Peterson and went on to reiterate the request that this advice be provided to him. He suggested there was a strong case to do so where the proposal was within the area of a neighbourhood forum which enjoyed powers to designate land in a neighbourhood plan.

19 In response to Mr Wade's acknowledgment of that letter Mr Peterson wrote again on 17 December 2014 stating that at a public meeting held the night before it was evident that local residents wished the second interested party to have access to the pre-application planning advice. On the same day Mr Peterson responded to Ms Hammond's e-mail of 11 December 2014 asking her to reconsider his suggestion that the Oxford Gardens CAA should await the outcome of the neighbourhood plan.

20 On 18 December 2014 Mr Peterson wrote e-mails to Mr Wade twice. The first e-mail identified his view that there was a need for an early meeting with the defendant's officers to discuss the position of the site in the neighbourhood plan prior to any planning application being submitted. In this e-mail Mr Peterson records:

> "As set out in my last letter, there are a series of issues we need to discuss with you, to establish how the council sees the planning history and current planning policy context for this site. Residents are increasingly questioning with us whether or not the council will be maintaining policy positions set out at the 1982 planning inquiry and in the Oxford Gardens CAPS document? And if not how, when, and by what means has this policy context changed?
>
> "Secondly, there are a series of issues to discuss around the likely timetables for a planning application, and for the submission, examination, publicity period, and referendum on the StQW Neighbourhood Plan."

Mr Peterson went on to raise issues from a planning decision made by the Secretary of State in relation to a development predetermining decisions to be made about the scale and location of new development in a neighbourhood plan. In his second, and more lengthy, e-mail later that day Mr Peterson set out a number of issues in relation to the site which he wished to discuss with the defendant's officers together with some of his own thoughts in relation to those issues. The issues included any current designation of the site, whether it qualified as previously developed land, how it was going to be treated in the Oxford Gardens CAA and in particular the question of the process of producing the new Oxford Gardens CAA. In that connection he stated:

> "Jo Hammond has advised us that the department is not willing to reconsider deferring the consultation and adoption of the Oxford Gardens CAA until the StQW draft plan has reached the referendum stage. We are also told we cannot have sight of the draft CAA document before it is published for wider consultation. I trust we can discuss these points further. While we understand why the council would not want to open the door to what might be seen by some as preferential treatment for one amenity group over another, this is not the case here.
>
> "The StQW Forum is a statutory body participating in the planning system for the borough, and we think that the council should see the forum in this light rather than treating it as no different from other residents associations and amenity groups. District and parish councils outside London seem generally to have a much closer (and more equal) relationship on neighbourhood plans than has been our experience to date with [the council]."

21 On 7 January 2015 the second interested party had their third pre-application meeting with the defendant's officers this time for a revised 21 residential unit scheme. On the same date a petition from local residents in the following terms went live on the council website:

> "We the undersigned ask the council to affirm the continuation of its planning policy not permitting the development of the remaining St Quintin backland sites and to support their designation as local green space in accordance with the neighbourhood plan developed by residents. We believe this action is urgently needed to protect the character and biodiversity of the conservation area."

22 Councillor Coleridge was made aware of the existence of this petition and he raised the question as to whether or not the site was in fact protected by the council's policies. A briefing was provided to Councillor Coleridge by Mr Wade in relation to the petition. In his briefing he made the following observations:

> "In short the site is not protected by our currently adopted policies which as you know, are contained within the core strategy. Within the Oxford Gardens St Quintin Conservation Area Proposal statement, which was originally adopted in 1979 and updated in 1990, there is a reference to open space, both public and private. It is stated, 'In the St Quintin Estate the use of space has produced *a* pleasant "suburban" enclave within *a* busy high density part of the city' and the point is made

A that amongst other aspects backlands and gardens combine to create a distinctive open character for the area. Backlands are formed by the enclosed terraces of the St Quintin Estate and exist at Highlever Road, Barlby Road and Kelfield Gardens.

"This is then followed by a policy which states: '*Some leisure and recreational activities have made good use of these spaces and proposals to develop them with more housing will not be permitted*.'

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". . . Clearly this policy is in a document which is now 25 years old and has not gone through any of the above processes. It would therefore be assigned very limited or no weight at all in an appeal situation and we would not recognise it as a planning policy under the current planning regime. This has been explained to Mr Peterson and he is fully aware of the situation.

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"The St Quintin Neighbourhood Forum have put forward three backland sites for designation as local green space in their draft neighbourhood plan."

23 Following the pre-application meetings it appears that on 12 January 2015 a query was raised by Mr Kevin Savage (one of the defendant's officers involved in the discussions with the first interested party) about the time

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scales for the adoption of the neighbourhood plan. He noted that at the meeting the applicants had been very anxious that the neighbourhood plan would be adopted by Summer 2015 with the LGS designation at the site within it. On the following day Ms Hammond responded indicating that it would not be possible to say when the neighbourhood plan would be adopted, but that the defendant was under pressure from the second

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interested party to move as quickly as possible. She explained that she had advised the first interested party's consultants that the plan was out to consultation until 25 January and would be submitted at some time after that date depending upon the length of time taken to review the fruits of the consultation. On 16 January 2015 Mr Peterson again wrote to Mr Wade once more pressing the case in support of the LGS designation at the site and

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drawing his attention to the existence of the petition. He attached a schedule of responses to date which he contended also showed the strength of feeling on the subject. He suggested the idea that once the long-term value of the land as open space had been established a partnership between the defendant and a community interest trust formed by the second interested party could acquire it to serve as a garden square for its immediate

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neighbours.

24 On 21 January 2015 Mr Peterson wrote to Mr Jonathan Bore, the defendant's executive director of planning and borough development. The subject matter of the e-mail was his concern about the way in which responses to an "Issues and Options" paper on enterprise were being reported to a meeting of the defendant's public realm scrutiny committee ("PRSC") on 26 January. The detail of these complaints is not material for

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present purposes, but in essence the complaint was that the way in which responses had been reported was inaccurate. In particular it appears that the report purported to record that the defendant's formal response to the pre-submission draft of the neighbourhood plan had been submitted to the second interested party, when in fact at the time of writing and drafting

the report that was not the case. Mr Peterson concluded his e-mail in the following terms:

> "Increasingly the StQW Forum feels that our relationship with the planning department is becoming Kafkaesque. Officers seem to feel free to say and write what they would like to believe about the StQW Forum and the draft neighbourhood plan, when it is not evidenced, or simply not true. When such officer reports are presented to committee in the name of the Cabinet member, this creates a dangerous disconnect between elected councillors and the public, which I am sure councillors do not wish to see.
>
> "I am copying this to our ward councillors and to Councillor Coleridge, and will communicate further with Councillor Thompson before the committee meets. As a committee member, I hope he will have the chance to set the record straight at the meeting. This appears to be our only recourse in ensuring that the committee is properly and accurately informed."

25 In fact the defendant's response to the draft neighbourhood plan was provided on 23 January 2015. On the same date Mr Peterson wrote to planning consultants acting on behalf of the first interested party querying the ownership of the site on the basis of his concern that conflicting information had been given as to whether or not the claimant had any interest in the land, judging by the information which had been passed to him. Further, on 23 January 2015 the claimant's planning consultants made representations on the draft neighbourhood plan. Their representations focused amongst other matters on the question of whether or not the site properly satisfied the criteria to be designated as LGS.

26 On 28 January 2015 Mr Peterson wrote, on behalf of the second interested party, to the defendant's monitoring officer querying the defendant's decision to withhold information requested under an FOI application in respect of the pre-application advice which the defendant had furnished to the first interested party. He particularly emphasised within this request the status of the second interested party as a body granted the power to prepare a neighbourhood plan as being a particular feature which distinguished the second interested party from a rival developer or an amenity society when considering whether or not it should be afforded access to pre-application advice furnished to the first interested party.

From the first draft of the neighbourhood plan to the selection of the examiner

27 On 28 January 2015 Mr Peterson wrote to Mr Wade on the topic of making progress with the neighbourhood plan. In the e-mail he covered the appointment of the examiner who would be undertaking the independent examination of the neighbourhood plan. He made the following observations:

> "In any event, we feel that the council should now start thinking about the examination of the draft plan. We are assuming that you will be using the well-established NPIERS service to identify and commission an examiner? Their 'top tips' for LPAs suggest that councils should start making plans once the pre-submission consultation is concluded (i e the stage now reached on the StQW Draft Plan). As you would expect, we will want to be properly involved in the selection of an examiner.

A The NPIERS notes recommend that Qualifying Bodies be 'jointly involved' from the stage of preparing the brief for NPIERS onwards, and in any selection interviews that are held."

28 The reference to NPIERS is a reference to the Neighbourhood Planning Independent Examiner Referral Service. NPIERS is an initiative which is sponsored by the Royal Institute for Chartered Surveyors ("RICS").
B On 28 January 2015 Mr Peterson wrote to Ms Gulati Tyagi once again raising the question of the timing of the preparation of the Oxford Garden CAA in relation to the process of progressing the neighbourhood plan. In the e-mail he observed:

"We have just completed the pre-submission consultation on the StQW Neighbourhood Plan and will be finalising the submission version in
C the next few weeks. The draft plan proposes designation of all three backland sites as local green space. The council's latest comments on this consultation now takes a neutral stance, agreeing that the two other backlands (The Bowling Club and the Methodist site) are 'capable of meeting' the [Framework] criteria for LGS designation. On the Nursery Lane site, the [council] comments say that it is up to the StQW Forum to
D demonstrate that the [Framework] criteria are met.

"This sets up a scenario (as you are no doubt aware) in which the consultation draft of the Oxford Gardens CAA will be very closely scrutinised for what it says on the subject of these backlands.

"• If the council dilutes or backs away from what was said about the importance of these open spaces in the CAPS document, a large army of local residents will be responding to the consultation
E asking why, and suspecting that this is happening because the council is trying to usher through a housing development on the land. (The petition on the [council] website on Save our Open Spaces had over 480 signatures when I last looked, many of who will respond to the Oxford Gardens CAA consultation if they feel the council is changing its position on the St Quintin backlands).

F "• If the council continues to maintain its 1990 line on the historical and amenity significance of these pieces of land, the firms of planning consultants now working for the owners of Nursery Lane (CgMs Consulting) and for the developers Metropolis Property/London Realty (Rolfe Judd Planning) will doubtless respond to the CAA attempting to argue that Nursery Lane is
G nothing more than an operational contractors yard of no merit or beauty (as they have already argued in lengthy representations on the consultation version of the StQW Draft Plan).

"Either way a consultation on this CAA is going to prompt further questioning of the position the council takes on all three backland sites and Nursery Lane in particular.

"Currently the council is saying that an examiner of the StQW Draft
H Plan should make the decision on the proposed LGS designation. We are puzzled as to why the council now seems to have no strong view on the issue. While the CAA cannot 'make policy' on this issue, it must presumably be going to say something, given the content of the 1990 CAPS?

"Hence we would suggest that the council proceeds as the [PPG] asks of LPAs, and defers the consultation on the Oxford Gardens CAA until the StQW Draft Plan is examined. We think this time period could be as little as three–four months in total, if the council is willing to progress expeditiously through the remaining stages of the neighbourhood plan. Given that the work on the CAA will have been done, we cannot see why a short delay in consultation should be a problem? It is after all 1990 since the last consultation on this conservation area, and we residents can wait a few months longer."

In response to this e-mail Mr Bore replied and stated:

"The CAA is a descriptive rather than a policy document and it is perfectly possible to identify the parts of the conservation area that contribute to its character as a whole without getting too involved in neighbourhood planning policy issues. On that basis I see no purpose in delaying the work. I'm going to have a look at these sites personally."

29 On 30 January 2015 Mr Peterson wrote to Mr Bore forwarding an e-mail he had written to the managing director of the company who were the claimant's tenants of the site and in occupation of it, together with some photographs showing what he observed as being the rapid degradation of the site. Following his site visit, on 4 February 2015, Mr Bore wrote to, amongst others, Mr Wade and Ms Hammond explaining his opinion that the site was not worthy of designation as open space and that the need for housing could carry far more weight than the relatively limited benefits arising from the draft neighbourhood plans proposed used as open space. He concluded that they should "seek to resist its inclusion as such in the NP". Following this internal e-mail Mr Bore wrote to Mr Peterson (copying in Councillor Coleridge, Mr Wade and Ms Hammond amongst others) setting out where the officers of the council stood in relation to the designation of the site. He expressed himself in the following terms:

"5. The issue of Nursery Lane relates to the balance of planning considerations in the public interest. The provision of housing is a strategic issue, a strategic policy in the development plan, and a strategic priority for national planning policy as set out in [the Framework]. In comparison, the site is not an existing open space and has little public benefit. It is seen from some private rear windows but contributes little if anything to the character appearance or visual amenity of the area. Even if the site were to be designated open space by the NP, the community's need for housing would be a material consideration of considerable weight when considering any subsequent planning application for housing.

"6. We would expect any housing scheme for the site to be low rise, relatively low density and retain trees and greenery, and will be making these points in our pre-application advice to developers, but I will be recommending strongly that the council resist the emerging NP designation and will defend that point at the examination too.

"7. Please be in no doubt that we will stand by these points at the examination. We still hope that you will accept our position and remove these designations from the emerging NP, otherwise we will be in serious

A conflict at the examination, many would say unnecessarily when it would be much better to work together."

30 Mr Peterson wrote on behalf of the second interested party in response to this e-mail on 9 February 2015. In a lengthy letter he set out his concerns in relation to the contents of Mr Bore's e-mail in particular in connection with Mr Bore's continuing involvement in the processes involved
B in examining the neighbourhood plan. In particular Mr Peterson made the following observations:

"What we do wish to request of you, absolutely seriously, is for you to agree to now to relinquish to another department of the council the organisation and administration of the concluding stages of the council's various responsibilities in bringing the submission version of the StQW
C Plan through to a conclusion.

"These are tasks which the Localism Act requires the council to undertake. They are essentially administrative tasks which those parts of the council dealing with democratic governance and electoral services are well equipped to undertake (we do not know exactly who did what in the final stages of the Norland Plan).

D "Our considered view is that your e-mail of last Friday makes it very clear that you and your department would not be able to undertake these remaining stages in a sufficiently neutral fashion, as the legislation and guidance requires of local authorities. We hope that you accept this.

"We see little prospect of reaching agreement with you on the selection of an independent examiner. Our members, and we believe other resident bodies, would have serious doubts about the integrity of an 'independent'
E examination of the StQW Plan, were the process to be handled by a [council] director who has set out in advance what decisions he will 'allow' such an examiner to make. Mistrust at the ways of the Town Hall would become a very big issue in this neighbourhood (and beyond) unless the examination is seen to be entirely objective and fair."

"In a situation where the you have said in advance that you will be
F arguing strongly against several proposed policies in the draft plan, the council's handling of the arrangements for such an examination must not only be neutral, but must now also be seen to be neutral.

"It will be necessary to avoid any suggestion or local concerns that the council might be choosing to delay the arrangements for the examination in order to 'get ahead' of the StQW Plan. Adopting a new Oxford
G Gardens CAA to replace the current CAPS, and pausing on the StQW Plan until the enterprise review is more advanced, are two instances where we have seen signs of such tactics.

"Hence timely arrangements for the examination of the StQW Plan will be needed, to avoid possible complaints on this score.

"We very much hope that you will take these points on board, and agree that the StQW Forum can work with a different director on these
H final stages of the StQW Draft Plan. This will leave you and the planning department free to take as robust a position as you wish, in arguing against the forum at the public hearing, without fear that the selection of the examiner will be seen by the public as having been unduly influenced to achieve the particular outcome that you seek . . .

"In these circumstance we would find it very hard to accept your role in overseeing the remaining organisational/administrative duties and responsibilities that the council must now undertake to see this neighbourhood plan through to a conclusion. We feel that you would clearly be conflicted, and that this is evidenced by your latest e-mail. If you feel that you cannot agree to our proposal, we would need to raise our concerns, firstly with Mr Holgate, the leader, and Councillor Coleridge, and if necessary beyond the council . . ."

31 Mr Peterson's letter provoked an internal discussion between Ms Hammond, Mr Bore and Mr Wade as to the manner in which the examination process would operate. Ms Hammond explained that the examiner would have to be appointed with agreement from the second interested party, and that there was a need for transparency between administrative issues and issues in relation to the merits of the plan.

32 On 23 February 2015 Ms LeVerne Parker, the defendant's chief solicitor and head of regeneration law, wrote to Mr Peterson following the receipt of his letter of 28 January 2015. Ms Parker is the defendant's monitoring officer and had undertaken an internal review of the defendant's decision in relation to the disclosure to the second interested party of the pre-application advice that had been given to the first interested party. Her conclusion was set out in the following terms:

"I accept that there is considerable public interest in releasing the information relating to any development proposals for the land at Nursery Lane. Having said that, as you quite fairly point out, much of the information needed by the forum to support the policies in the proposed neighbourhood plan is in the public domain already. Other information such as, for example, the views of the [council] officers on the planning status of the land could be sought without the release of the pre-application advice. Statements made by the landowner and the prospective developer can be challenged, if necessary, by asking them to produce evidence to support their arguments.

"In this case it is my view that the correct balance has been struck between confidentiality and the transparency which would arise from the disclosure of the information to the public and therefore the pre-application advice should not be disclosed."

33 On the following day Mr Peterson replied to Ms Parker reiterating his arguments in relation to the need for the pre-application advice to be disclosed and indicating that the second interested party might appeal to the Information Commissioner.

34 On the same date, 24 February 2015, Mr Wade responded to Mr Peterson in respect of the issues pertaining to the site. In particular he introduced the defendant's officers' approach to the site and his own views as follows:

"I appreciate the level of concern raised about the possible future development of the Nursery Lane site and I have read many of the representations that have been made. In the council's response to the draft plan dated 23 January we remained deliberately silent as to whether the Nursery [Lane] site was capable of designation as local green space using the criteria laid down at paragraph 77 of the [Framework]. This is

because this is a decision for the neighbourhood plan examiner, not the council and it is up to the forum to put the case as to why the land should be designated.

"I did not think it would be helpful in view of what the forum is trying to achieve for the council to express a view, but I am happy to do so if you so wish. Clearly, as you may anticipate, it could be a negative one in terms of designation. To emphasise this, the council has not shifted its position on the subject and the advice given to you in our letter of September 2014 remains. However, I think I should warn you that the latest advice we have heard from a NPIERS examiner is for local authorities to advise neighbourhood forums against designating as local green space any space which is not used by the public."

Mr Wade went on to observe that the pre-application advice which had been provided would have to remain confidential. Further, he expressed his own view as to the merits of the site in the following terms:

"My view of the site is that public views are extremely limited and confined to the access road. The site is surrounded by housing and any views of the site are limited to the rear upper floor windows of that housing. The site itself is privately owned and is not available for public access, There are some mature trees which provide visual amenity to the occupiers of the surrounding houses, particularly the willow tree on the boundary. However, the site itself, due to its enclosed nature is not considered to make a significant contribution to the character or appearance of the Oxford Gardens St Quintin Conservation Area. Clearly if a development scheme came forward it would have to demonstrate that it preserved or enhanced the character and/or appearance of the conservation area and the merits of the site as it stands would also have to be assessed to ascertain whether it made an equal or better contribution than the development proposal."

Mr Wade went on to explain that he was not committed to the policy statement in the current Oxford Gardens CAA as it was 25 years old and in urgent need of review nor did he regard the site as apparently fulfilling the criteria of providing visual amenity to the public which was a requirement of policy CR5 of the adopted core strategy in respect of resistance to loss of private open space. He regarded the question of whether the site was previously developed land as moot and not decisive.

35 On 27 February 2015 Ms Hammond responded to Mr Peterson's earlier correspondence, in particular she provided the following in relation to the selection of an examiner for the neighbourhood plan:

"We are happy to proceed with selection of an independent examiner. The key experience required is a track record of examining urban neighbourhood plans and holding of a hearing, as this may be necessary. Ideally the examiner should also have knowledge of London. Do you agree? If you do I will ask NPIERS to provide CVs for us to review. However, the forum must also be part of the process so that you have faith in it being undertaken appropriately and we will share this information with you. Clearly the examiner is totally independent of the council so I am unclear as to the nature of the concerns you expressed in your letter to Mr Bore dated 9 February. It is entirely up to you whether

you wish to accept the views of the councillor [or] not and I simply do not understand how you think this can influence any administration of the plan, the two are not linked in any way."

The letter went on to identify a number of points arising as outstanding issues with the draft neighbourhood plan.

36 On 12 March 2015 Mr Bore responded to Mr Peterson's letter of 9 February 2015 in the following terms:

"I reply in respect of the attached letter and subsequent correspondence you have had with Jo Hammond and Jon Wade.

"I've had a quick word with Nicholas and am content to hand over the selection of the examiner to him, but as he is not a planner he needs to reserve the right to seek my advice on the matter.

"As for the CAA, I am quite happy to delay the publication of the consultation draft until after the examiner's report has been received on the neighbourhood plan and we know where we stand."

The reference to Nicholas was a reference to Mr Nicholas Holgate, the defendant's town clerk.

37 On the same day Mr Peterson was again in correspondence with Mr Wade, Ms Hammond and Ms Gulati Tyagi with respect to the Oxford Gardens CAA. He expressed his concern that Mr Bore's e-mail of 6 February and Mr Wade's letter of 24 February "paint a very different picture of the conservation and amenity value of [the site]" compared to the extant version of the Oxford Gardens CAA. He went on to again reiterate his concern that the draft of the new Oxford Gardens CAA would have to say something about the site, and that it appeared to him that if the emerging document took a different view of the site from that set out in the existing document there would be many of the 1,500 people who had signed the petition referred to above who would want to know why, and question why it was happening and whether that was with a view to assisting an imminent application for housing on the site. As events turned out this letter to Mr Wade was overtaken by the e-mail from Mr Bore later in the afternoon of the same day expressing that he was happy to delay the publication of the consultation draft of the Oxford Gardens CAA until after the examiner's report had been received on the neighbourhood plan.

38 Following this correspondence Mr Holgate was involved in internal discussions to obtain an understanding as to how the examiner was to be appointed. On 16 March 2015 there was a fourth pre-application meeting between officers of the defendant and the first interested party, this time discussing a revised 22 residential unit scheme. On 17 March 2015 Mr Peterson wrote to Mr Wade indicating that the second interested party would not be formally submitting the draft neighbourhood plan to the defendant for another week or so, and assuming that the defendant would start the six-week final publicity and consultation stage "fairly swiftly". He also expressed his assumption that there would need to be a hearing given the matters upon which the defendant and the neighbourhood forum did not agree and the likely representations of the claimant and the first interested party in relation to the site. It should be pointed out that the site was not the only matter which was the subject of controversy between the defendant and the second interested party. The defendant also had

A expressed its concerns in relation to proposals at Latimer Road where, without unnecessarily rehearsing the details, there was controversy in relation to the draft neighbourhood plan's proposals for non-employment related uses.

39 Mr Wade interpreted Mr Peterson's e-mail as expressing a desire to liaise directly with Mr Holgate in relation to the information which was to
B go into the NPIERS examiner application form so as to assist NPIERS in providing the defendant and the second interested party with a list of three potential examiners along with their CVs. Mr Holgate in response on 18 March 2015 said:

> "I wish to limit my role to understanding what criteria both Mr Peterson and you wish to apply, how this affects the choice of
C examiner if at all and then to pick one of those suited at random. So please see if you can agree the application form. I am of course happy to decide on any points of disagreement."

40 On 20 March 2015 Mr Peterson wrote to Councillor Coleridge seeking an opportunity to meet with him and explain the latest position on the neighbourhood plan. He enclosed a copy of the latest draft of
D the neighbourhood plan and provided the following observations as the background to his desire to meet with Councillor Coleridge:

> "As you know, the StQW Forum has had lengthy disagreements with the council's planning department about the legal context for neighbourhood plans. Our differences of view have narrowed and Jonathan Bore and his staff now seem to accept that the policies in a neighbourhood plan, as and
E when 'made' as part of the local plan, take precedence.
>
> "We also continue to have disagreements with the department over our view, strongly supported in the recent eight week consultation on the StQW Draft Plan, that Latimer Road is a good location for new housing (above and retaining existing ground floor commercial space) whereas the backland at Nursery Lane is not a suitable residential site.
>
F "The StQW Draft Plan is due to be submitted to the council shortly for independent examination. You are probably aware that Jonathan Bore has agreed that the process of selecting an independent examiner should be handled by Nicholas Holgate. This follows from Mr Bore e-mailing us last month to say that he would 'not allow' the StQW proposed policies and land designations to prevail at examination, and threatening
G consequences if we did not drop key parts of the StQW Draft Plan.
>
> "The petition with 2,500 signatures asking the council to reconfirm its stated policy towards the three St Quintin backlands will be debated at the council meeting on 15 April. I think you would find it helpful to be briefed on the advice that the StQW Forum and local residents have had, from planning consultants and from Christopher Lockhart-Mummery QC, before taking a view on a response to the petition.
>
H "We understand that the potential developers (London Realty/ Metropolis Property Ltd) are revising their proposals for a housing development at Nursery Lane in discussion with the planning department. Planning officers have not so far been able to explain to us how and when the council changed its stated view on this piece of land, or

how the department has now concluded that this land is not 'open space' and is a brownfield rather than greenfield site.

"If officers have persuaded you and your cabinet colleagues on these issues, we would welcome the chance to put the other side of the story in advance of the forthcoming council debate."

41 On 23 March 2015 Councillor Coleridge replied to Mr Peterson in the following terms:

"I would welcome the opportunity to hear your position and views. I may well be hesitant in commenting but am of course willing to listen and understand. I could meet with you on Friday morning at 10 a m. I would like to keep this small so just you, or perhaps one other."

42 On the same day Mr Peterson indicated that he agreed on the need to keep the meeting small and confirmed the date and time of the meeting. He also told Councillor Coleridge that he was contacting Councillor Feilding-Mellen at the suggestion of a local member who had suggested she would welcome a cross-party approach. On 24 March 2015 Mr Peterson wrote to Councillor Robert Thompson advising that Councillor Palmer had told him that Councillor Feilding-Mellen had been lobbied by the prospective developers of the site, and that Councillor Coleridge had agreed to meet with him on the issues related to the site and the Latimer Road proposals. On 25 March 2015 Mr Peterson wrote at length in support of the second interested party's proposals to Councillor Feilding-Mellen.

43 In an e-mail to Councillor Palmer on 25 March 2015 Mr Peterson provided copies of the proposed annex to the basic conditions statement to be submitted alongside the neighbourhood plan to the defendant. He advised Councillor Palmer that he was meeting Councillor Coleridge on Friday and hoping "to make some progress towards an agreed cross-party position on Nursery Lane which could perhaps be brokered before the April 15 debate at the council meeting". He pointed out that there was disagreement between the second interested party and the planning department on a range of issues and that these issues "will be decided on by an independent examiner" of the neighbourhood plan in due course.

44 The meeting between Mr Peterson and Councillor Coleridge and others occurred on 27 March 2015. On 9 April 2015 Mr Peterson wrote to Councillor Coleridge indicating that subsequent to the meeting there had been further discussions between those promoting the petition and the Nursery Lane Action Group. Mr Peterson suggested Mr Coleridge may wish to consider "a formulation of the outcome to the petition" which might have universal support. He stated that they were "trying to find a way forward which would have cross-party support". The suggestion involved Councillor Coleridge as the cabinet member for planning making known to the examiner a set of views in relation to the sites proposed for LGS designation and in particular expressing the council's view that those sites were not suitable and should not be developed for housing. Councillor Coleridge immediately sought advice, initially from Mr Bore and then from other officers. In his e-mail to Mr Bore he said:

"Just received this and notice you are not copied. I have read it and clearly am unable to agree to this approach. Do you have any comments.

A What all the 'cross-parties' reference is about I am not sure as planning is not political."

Having been copied into this e-mail Councillor Thompson responded to Mr Peterson saying that the proposals seemed very reasonable to him.

45 On 10 April 2015 Mr Peterson e-mailed to Mr Holgate a partially completed NPIERS application form for the selection of an independent B examiner via their service. Mr Holgate later on the same day asked Mr Wade to complete the form in discussion with Mr Peterson. Also on 10 April 2015 Councillor Coleridge responded to Mr Peterson's e-mail about the suggested approach to the petition. He explained that Mr Peterson would have an opportunity to present the petition and that he would respond to the views expressed by members. He advised that there was no C mechanism for a vote. He observed as follows as to the council's approach:

> "The response to the neighbourhood plan as made by the council to the inspector will be the view that we believe to be in accordance with national and local planning policies. These views are well explained in the paper that accompanies the petition report to council, which you doubtless will have carefully read.
>
> "I shall be listening carefully to the speech that you make and any D contribution from the council thereafter, I shall then respond. I must be clear that the three points that you outline below as points A, B and C are not statements that we can agree with as set out. We have explained why we believe your statements are incorrect and would not be either supported by the planning inspector or indeed be in compliance with national or local policy. The Royal Borough has many policies that E protect our environment and they have to be applied as and when appropriate, but the bar for designating land as green open space is clear and it will be for the inspector to decide as they see fit."

On 11 April 2015 Mr Peterson wrote to Councillor Coleridge again pressing his case in support of the response to the petition which he had suggested in his correspondence of 9 April 2015. In pressing his case Mr Peterson F suggested to Councillor Coleridge that the second interested party could only assume from his e-mail and that of Mr Bore of 5 February that he and his colleagues "now positively wish to see the Nursery Land developed as a housing site". Further he argued that people in the second interested party's part of the borough would find the council's approach "incomprehensible", and a view would take hold that "the council simply does not care about the G opinions of residents" in the wards forming the second interested party's neighbourhood area.

46 On 13 April 2015 an e-mail was sent by Mr Bore to Councillor Coleridge in relation to the petition to be presented to the defendant. Mr Bore advised that it was unacceptable to adopt the proposed response to the petition both on the basis that the meeting of full council had no remit to commit itself to a policy from the Oxford Gardens CAA, and also, H moreover, because it had no remit to adopt planning policy in an ad hoc manner. He went on to advise Councillor Coleridge in the following terms:

> "It will therefore be important to avoid any council debate on the merits of Nursery Lane for open space or housing and also avoid debate on the merits of residential in the Latimer Road employment zone because

that would pre-judge consideration that should take place elsewhere. The proper place for discussing the merits of their neighbourhood plan is the examination, and the proper place for considering any planning application is the planning committee. If full council makes any kind of a resolution on these matters the local planning authority cannot be bound by it."

On the same date Councillor Coleridge forwarded this advice to all of his party members under cover of the following comment in the e-mail forwarding it:

"Clearly my response on Wednesday will not be along the lines below . . . but will be explaining that the planning Inspector will decide the issue when the examination for the St Quintins Neighbourhood Plan [sic] goes ahead. We will remain fairly neutral on the issue as it is their plan that is being presented to the examiner, not the councils. We can not however openly support it as Mr Peterson's arguments are not correct and not supported by the [Framework] or the local plan."

47 On 13 April 2015 Mr Peterson wrote to Mr Wade pointing out that there were rumours that the defendant's architect's appraisal panel would be shortly reviewing a proposal for the site. He pointed out in the correspondence that in his view it was strange that a panel of architects were being consulted upon proposals about which local residents had been given no information and expressed his concern about the lack of openness in relation to providing the second interested party with copies of the pre-application advice which had been provided.

48 On 15 April 2015 the first interested party presented its proposed scheme to the defendant's architectural design panel. Also on the same date the petition, which by this time had 2,556 signatures, was presented to the defendant's meeting of full council. Its presentation was accompanied by a report under the hand of Mr Bore providing advice in relation to the petition. That advice was summarised in the conclusion of the report in the following terms:

"10.1 In summary the advice from the executive director of planning and borough development is that:

"• the policy in the Oxford Gardens Conservation Area Proposals statement protecting the St Quintin backland sites is not part of the council's current adopted Local Plan policies and carries very little, if any, material weight because it has not been through the examination process;

"• the draft Oxford Gardens Conservation Area Appraisal sets out the principal aspects of what is considered to contribute to the character and appearance of the Oxford Gardens Conservation Area. The views of the neighbourhood plan examiner in relation to local green space designation for the backland sites will be taken into account as part of the drafting of this document;

"• the 1982 appeal decision for the Nursery Lane site appraised a specific scheme in relation to the openness of the site. The decision is over 30 years old and did not deal with the principle of developing the site, only the scheme in question;

A "• the adopted policies in the Local Plan enable any development proposals coming forward to be properly assessed;
"• officers consider the Nursery Lane site is unlikely to meet the criteria for designation of a local green space, so this designation for this site cannot be supported; and
"• it will be for the examiner of the neighbourhood plan, not the council, to decide on designation of local green spaces in the
B St Quintin and Woodlands Neighbourhood Area."

49 The minutes of the meeting record the debate in relation to the petition and the fact that Mr Peterson, amongst others, addressed the meeting on behalf of the petitioners. The response from Councillor Coleridge and the resolution of the meeting is recorded in the following terms:

C "The cabinet member for planning policy, transport and the arts, Councillor Coleridge, responded. He thanked those who had contributed to the debate. The council did support the neighbourhood plan. This would be determined by the examiner. If planning applications came forward they would be need to be assessed through the planning process, but any applications would be considered premature if they were
D submitted before the examiner had made a decision. He expressed sympathy that the changes made by the Planning and Compulsory Purchase Act 2004 meant that the council's decision in respect of the Oxford Gardens Conservation Area Proposal statement could no longer be given weight. He added that, contrary to the petitioners' view, the area had been subject to applications for development before, but this had been refused. In 1982 an application was turned down on design issues
E rather than on the principle of development.

"RESOLVED: (i) to note the cabinet member's response; and (ii) to invite the cabinet and cabinet member to take fully into account the matters raised during the debate when considering the petition."

50 After the meeting on 15 April 2015 and later that evening Mr Peterson e-mailed local councillors thanking in particular Councillor
F Mason for his contribution to the debate, and noting that Councillor Coleridge had not responded to the substance of the councillor's submission. Mr Peterson noted the recognition in Councillor Coleridge's response that any planning application would need to be deferred or refused as premature until the examiner had reported as "a significant advance, in our terms". This point in relation to the prematurity of any application being determined
G prior to an examiner reporting was also noted by Mr Peterson in a letter on behalf of the second interested party to Councillor Coleridge on 17 April 2015.

51 In addition, on 17 April 2015 Ms Hammond wrote to Mr Peterson advising that Mr Holgate had asked her and Mr Wade to complete the NPIERS form with him, following which she indicated that it was to be sent in Mr Holgate's name and the decision as to who of the three nominated
H potential examiners to appoint would be made by him. Ms Hammond indicated that an examination should be held in September as the statutory time scales would take the process to mid July and it would be preferable to hold the examination after the school summer holidays had finished. Mr Peterson replied by return, indicating that the second interested party

was very unhappy to see the examination deferred until September and that the second interested party could see no problem in holding the examination during school holidays. He pressed his case for expediting these matters on the basis that not only were there local residents waiting for an outcome but also land owners including the claimant awaiting the outcome "with bigger issues at stake". The NPIERS form was returned to Mr Peterson by Ms Hammond on 21 April 2015 with two points outstanding prior to it being signed out by Mr Holgate. The application form was confirmed as having been received by the RICS on 5 May 2015.

52 In the meantime, on 30 April 2015 the first interested party submitted a planning application to the defendant for 20 four-bedroom family homes. On 11 May 2015 Mr Stallwood wrote to Mr Peterson stating: "A small measure of prior warning for you. We have received an application to redevelop this site for housing." Later the same day Mr Peterson responded reciting what he described as Councillor Coleridge's "undertaking that the council would 'seriously consider' refusal on grounds of prematurity on any application submitted for Nursery Lane . . . prior to the outcome of the examination of the [neighbourhood plan]". He went on to explain his concern about the delays which had occurred in formally submitting the plan and finally observed:

> "Formal submission of the StQW Draft Plan will now take place very shortly. As you know, the council is then required to publicise the draft for a further six-week period. This timetable has relevance to the issue of prematurity, as CLG PPG 014 makes clear. If there is any suggestion from the council that the StQW Draft Plan cannot be given the weight that it merits as 'emerging policy' (and in assessing the question of prematurity) as a result of the fact that the local authority publicity period has not been completed prior to consideration of a planning application for Nursery Lane, there will be predictable uproar from local people in this part of the borough."
>
> "The fact that an application on Nursery Lane has now been submitted will not be seen locally as a coincidence, unless the council acknowledges and takes account of the part that it has played in creating an extended timetable for bringing the draft plan to examination. The council needs to approach the question of prematurity in a fair and open manner—giving full weight to the fact that the StQW Draft Plan completed its eight week public consultation period on January 25 and that the council has had the outcome of this exercise since February."

Mr Stallwood responded later that day stating that he had been trying to be helpful to Mr Peterson and therefore had hoped that his response would be more positive. He went on to reassure Mr Peterson that the application would be dealt with openly and fairly.

53 On 12 April 2015 correspondence occurred between Ms Hammond and Mr Peterson about disclosure of material to Historic England. In particular Ms Hammond wished to provide a representative of that organisation with the defendant's response to the neighbourhood plan which was not at that time in the public domain. Later that day Mr Peterson confirmed he was happy for any of the correspondence passing between the defendant and the second interested party to be provided to

A Historic England. He did make an exception to this expressed in the following terms:

> "The document which we are not making public at present is the [5 February] e-mail from JB to the forum. We feel that the examiner will already have enough to have to read. We do not have any problem in correspondence between the council and the forum being made available
B to anyone who is interested."

54 On 14 May 2015 Mr Peterson, on behalf of the second interested party, wrote to Mr Wade raising the question again of whether or not the site fulfilled the definition of previously developed land. Mr Peterson contended that the question was now urgent in the light of the submission of the planning application, and sought confirmation of what had been stated in
C the first interested party's planning consultant's planning statement, namely that officers had suggested in pre-application advice that "though the site does not display all the characteristics of PDL . . . it does fulfil criteria for PDL in some respects and these should be taken into account in assessing a development proposal for the site". Mr Peterson pointed out that he had been previously advised that the defendant's pre-application advice did not
D give a view on the question of whether or not the site was previously developed land but this appeared incorrect. In this connection Mr Peterson advised that the FOI request for the pre-application advice had been reactivated. He explained that he was pressing this point on the basis of the proposed policies in the submission draft of the neighbourhood plan and in respect of a further proposed draft policy on previously developed land sites.

55 On 17 May 2015 the draft neighbourhood plan was submitted to the
E defendant for the purposes of a statutory consultation period lasting from 4 June–16 July 2015. After its submission correspondence ensued in relation to the production of the consultation leaflet. Ms Hammond suggested that the leaflet needed to be produced before the consultation could commence. Mr Peterson questioned this suggestion in the following terms:

> "Why does the leaflet have to be printed and distributed before the
F draft plan goes onto the [council] website and the start of the publicity period? It is after all a six-week consultation. As you will appreciate, we are sensitive on the subject of delays to the start of the consultation—given that Metropolis Property have submitted their application and the issues around 'prematurity'. Any significant gap between submission and the start of the consultation will become an issue, if this is seen as tactics
G by the council."

56 On either 21 or 22 May 2015 Mr Peterson attended a workshop in relation to neighbourhood planning in London, which featured a session in which Mr John Parmiter, the person who as it will become clear became appointed to be the examiner of the neighbourhood plan, was making a presentation. It appears from the evidence that Mr Peterson had a brief
H conversation with Mr Parmiter during the course of that event. On 23 May 2015 Mr Peterson wrote to Mr Bore again addressing the question of the defendant's approach to pre-application advice and their failure to disclose the contents of that advice to the second interested party. On 26 May 2016 Mr Bore replied advising of his view that pre-application discussions between council officers and developers should remain confidential on the basis that

they enable developers to obtain planning advice "without fear of widespread publicity and reaction", and also allowed them to share confidential information for instance in relation to viability and ownership matters. Mr Peterson responded later on the same day contesting Mr Bore's opinions, and suggesting that the defendant had not been as positive and supportive of the neighbourhood plan as in other areas. Moreover he contended that the defendant's approach to pre-application advice differed from the approach taken in the London Borough of Camden. Mr Bore responded on 27 May 2015 explaining that there was a difference between developers giving pre-application presentations to residents and members and pre-application advice which was a process which needed to remain confidential. He expressed views as to what he considered to be shortcomings of the approach taken in Camden.

57 Shortly after receiving Mr Bore's response on 27 May 2015 Mr Peterson chased the outcome of the FOI request and Mr Derek Taylor, one of the defendant's development management area team leaders, responded indicating that the deadline was not until 11 June. He went on to indicate in his e-mail the following in relation to the first interested party:

> "It won't surprise you to know that they have been trying to move fast with their proposals for the site. Rather than heed our advice to continue with evolution of their proposals through pre-application discussion, they elected to submit a formal application instead, fearful of the impact of a neighbourhood plan being adopted with a designation for the site that would preclude development. Even now the draft plan is clearly a material consideration to be applied to their proposals. However I won't say more about the application at this point, as clearly it is out to public consultation and we then need to assess all representations and comments, and we're some way from hearing from our various internal and statutory consultees as well, but we can it discuss it further in the near future."

58 It appears that on 27 May 2015 Mr Peterson had a meeting with the first interested party in relation to the planning application. The following day he wrote to Mr Derek Taylor and prefaced his e-mail in the following fashion:

> "These were the main points arising from a meeting which I had yesterday (along with a representative from the Nursery Lane action group) with London Realty and with SPS Broadway. This e-mail to you and your colleagues is not in the nature of a representation on the planning application, and should not be posted on the planning file as such. It is part of what the StQW Forum sees a continuing dialogue with the council on the StQW Draft Neighbourhood Plan . . ."

The e-mail went on to explain that the second interested party still continued to object to the application on the basis that it was "the wrong sort of housing development for the area, on the wrong site". Mr Peterson went on to express his concern that the first interested party did not understand the implications of parking problems and the benefits of parking permits as well as the second interested party's concerns in relation to the fact that no affordable housing units were proposed on site. He concluded his e-mail by reiterating his concerns in relation to access to the pre-application advice

that had been provided by the defendant. Mr Taylor responded thanking Mr Peterson for his e-mail and stating that he had copied in the case officer "for his information only, not to be confused with your representations on the application".

59 It appears that by 3 June 2015 the defendant and second interested party had received CVs from three candidates from whom the examiner was going to be chosen. In an e-mail to his colleagues on the second interested party's management board providing brief details in relation to the credentials of the three potential candidates, Mr Peterson asked his colleagues for thoughts "as to which of three we should try to get appointed". Following this, on 9 June 2015 Mr Peterson wrote to Mr Holgate in the following terms:

> "Our management committee has considered these three sets of CVs, and we would propose John Parmiter as our preferred choice. Paul McCreery we did not feel has sufficient relevant experience or background. Our reasons for choosing John Parmiter over Jeremy Edge are as follows:
>
> "• he has relevant experience of examining a complex draft neighbourhood plan for an area of Camden larger than the StQW neighbourhood;
>
> "• he has an earlier career history as a planning officer in Westminster and Camden;
>
> "• he has experience of environmental and heritage issues;
>
> "• he has specialised in economic viability issues;
>
> "• he has attended a number of courses on the legal framework for neighbourhood planning;
>
> "• both Joanna Hammond and I heard him speak recently on his experience of examining the Fortune Green and West Hampstead Draft Plan, and his approach appears both thorough and fair-minded.
>
> "We hope that the council will accept this recommendation from us. I am copying this to Joanna Hammond and will liaise with her as to next steps."

60 Having received this e-mail Ms Hammond wrote to Mr Holgate indicating that whilst she had not seen the CVs that had been sent to him on Mr Peterson's insistence, she would concur with his view that the West Hampstead examination was the closest to the present case. Mr Holgate then indicated to Ms Hammond that that was "fine by me" and asked her how to proceed. She suggested that he respond to NPIERS and the second interested party stating that they would wish to select Mr Parmiter. Mr Parmiter's appointment was confirmed by Ms Hammond on 24 June 2015. She forwarded Mr Peterson's e-mail of 9 June 2015 as confirmation that the second interested party approved his appointment. She explained that there would be a tight time scale and if a hearing was necessary it would be held in September. Mr Parmiter replied on the same date thanking her for the confirmation and for the second interested party's e-mail. Mr Parmiter copied Mr Peterson into his e-mail indicating that in order for there to be a referendum by the end of the year he would have to concentrate his time in September which was possible but that October would be "more

comfortable". Also on the same date Mr Peterson replied in the following terms:

> "Dear John,
>
> "Thanks for copying me in to your e-mail to Jo Hammond. We are glad to hear that you are able to undertake the examination of the St Quintin and Woodlands Draft Neighbourhood Plan.
>
> "From the forum's perspective, we would be content if the examination hearing (assuming one is held) needs to be towards the end of September and the report-writing in October. We would not wish you to be under time pressures at this stage of the process, given how long it has taken us to get here."

From appointment of the examiner to the production of his report

61 By this stage the second interested party had supplied the advice on the first interested party's application which they had received from Mr Matthew Horton QC on 12 June 2015. On 17 June 2015 Mr Peterson was in correspondence with the defendant's property manager in respect of corporate property Mr David Vickerstaff in relation to whether Nursery Lane was adopted highway, why it had been recently resurfaced, and whether or not the council had, in that connection, had any dealings with either the claimant or the first interested party.

62 On 24 June 2015 solicitors acting on behalf of the first interested party wrote to Mr Stallwood principally in connection with the petition which had been received by full council on 15 April 2015. They observed that the minutes of the meeting recorded Councillor Coleridge expressing the view "that planning applications coming forward in respect of these 'green spaces' would need to be assessed through the planning process, but would be considered premature if submitted before the examiner into the neighbourhood plan had made a decision". The letter made the case that prematurity could not properly be applied to the first interested party's application which was "for a relatively modest housing scheme on a site of 0·48 hectares". Further arguments were advanced both against the suggestion that prematurity applied to the application and contending that the application fell to be determined in accordance with the defendant's usual planning procedures: suspension of determination of the application "would be wrong and open to challenge".

63 On 30 June 2015 Ms Parker wrote an e-mail to Ms Hammond and Mr Wade describing a seminar which she had attended the previous day at Landmark Chambers at which Mr Peterson was also in attendance. She records in the e-mail that Mr Peterson raised some questions directly bearing upon the neighbourhood plan and in particular raised the following point:

> "Mr Peterson also challenged whether the [local planning authority] has the power to modify the [neighbourhood plan] after receiving the examiner's report to ensure it meets the basic conditions before submitting to a referendum. The panel were clear there was such a power."

64 On the following day, 1 July 2015, Mr Peterson wrote to Mr Stallwood in response to the letter from the first interested party's

A solicitors of 24 June 2015. In the letter he sought to refute the arguments made. He also commented upon a further letter from the first interested party's planning consultants and invited the defendant to note the following point:

> "The letter misrepresents the position the council has taken on the local green space designations proposed in the StQW Draft Plan for the
B three remaining St Quintin backlands. The council has *not* concluded that the Nursery Lane land would fail to meet the [Framework] criteria for LGS designation. The council has accepted that this is a matter for the independent examiner of the neighbourhood plan to decide, on the evidence."

When the first interested party met Mr Taylor and another officer of the
C defendant on 7 July 2015 the defendant's representatives raised the question about the principle of residential development on the site at the meeting.

65 On 10 July 2015 Historic England provided their advice in relation to the neighbourhood plan. They focused in particular on the backland sites as open spaces including the site owned by the claimant. Their advice was expressed in the following terms:

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> "With regard to the new policies 4b and 4c we note that the justification rests in part on the evidence contained in the council's 1990 Conservation Area Proposal statement ('CAPS'). As we previously indicated a robust and up-to-date evidence base is necessary for conservation policies to be justified and effective. Given the limited weight that can be given to the CAPS document due to its age, we welcome the additional work included
E in Appendix C carried out by the neighbourhood forum that seeks to justify these policies. In our view it is regrettable that the contribution that these backland areas make to the Oxford Gardens Conservation Area has not been subject to recent review by the council as part of their review of conservation area appraisals, or by local residents using a structured approach in line with our Understanding Place guidance documents. Both
F types of review would have provided robust support for these policies.
>
> "Nevertheless we consider that a case has been made for the policies that seek to conserve the backland sites as open spaces. In line with the council's CAPS document the additional evidence in the neighbourhood plan suggests that these backland sites have been, and remain, important features that contribute to character of this part of the Oxford Gardens Conservation Area. We also consider that the evidence in
G the neighbourhood plan could make a valuable contribution to the forthcoming review of the conservation area appraisal."

66 On 15 July 2015 the first interested party made further representations to the submission version of the neighbourhood plan rehearsing their objections to its proposals in respect of the site. On 16 July 2015, alongside receiving a letter from Mr Taylor on behalf of the defendant
H questioning the principle of the residential development for amongst other reasons the question of prematurity, the first interested party withdrew their planning application. Also on the same day Mr Parmiter was formally instructed by Ms Hammond to act as the examiner for the neighbourhood plan.

67 On 22 July Mr Parmiter wrote to Ms Hammond indicating that he had decided that a public hearing was necessary and provisionally suggesting an agenda including four topics, identifying as item three the issues in relation to the site as proposed green space and asking the questions: "is it demonstrably special to the local community? . . . how does it hold particular local significance?" The generic e-mail address for the second interested party was included on the circulation list of that e-mail, leading Mr Peterson to reply to Mr Parmiter in the following terms:

> "Thanks for copying us into your e-mail to Jo Hammond. I assume that we may also comment on whether your proposed topics cover the ground of the content of the StQW Draft Plan? We have a few suggestions to make, and I will get back to you and Jo Hammond on these, if this is acceptable."
>
> "I note that Jo Hammond has sent you a copy of the RBKC comments on the latest consultation, as a separate document, given that the full set is a little hard to follow as a continuous comment. Likewise I am enclosing the comments that we submitted, covering recent events locally and some developments on the legal front since the StQW Draft Plan was submitted in May."

68 Mr Parmiter responded on 23 July 2015 indicating that he was sensing a misunderstanding about the examination, and pointing out that the examination was already underway and was not to be confused with the possible public hearing which was for his benefit and not in any sense a public meeting. He went on to observe:

> "As a general rule, now that the consultation period has closed I am not going to accept new material. I believe Jo sent me their comments as their comprehensive are reps to the Plan, which was not strictly necessary, but also their official position on conformity, which they have to. I will see copies of all original comments next week, no doubt. I note what you you (sic) have sent me but I don't need anything else at this stage. In passing, I note that Jo sent me a copy of the 2015 FM viability report, which is not part of your evidence base, so I will give you the opportunity to respond to that at the hearing. I can see the PBA material you refer to on line.
>
> "Can I urge you and the council to keep on talking. I appreciate there are, in some cases strong, differences between you but I would find it helpful if you can continue to seek agreement on any matters that you can (such as viability evidence); also if you can suggest to me any improved wording to policies (e g where the language could improve use in development control), or mapping, where appropriate, I would find that helpful."

69 On 24 July 2015 Mr Peterson again wrote to Mr Parmiter in response to his e-mail indicating that the second interested party would wish to make its views known in relation to a 2015 viability report relevant to the Latimer Road issues. He asked whether or not the list of questions proposed for the agenda could be shared with the second interested party's management committee. Later that day Mr Parmiter agreed to it being shared. In response to this on 27 July 2015 Mr Peterson sent a lengthy e-mail to Mr Parmiter suggesting additional material contributions in respect of all four topics that

had been provided on the draft provisional agenda. In particular in relation to the site Mr Peterson proposed that there should be discussion on whether the site was previously developed land as he suggested that the second interested party thought that that was relevant to its proposed LGS designation, as well as being a matter on which the second interested party and the planning advisers to the claimant and the first interested party had very different views. He went on in the e-mail to comment on the names which had been suggested alongside the draft provisional agenda as being participants in the examination, indicating that two of the names were wholly new to him and providing background in relation to other individuals. He stated that he was providing this information "as it feels important that there is transparency as to whom is giving views at an examination hearing". On 27 July 2015 Mr Parmiter responded in the following terms:

> "The purpose of the hearing is to help me on specific matters. It's not an opportunity for people to express views that I'm already aware of and can deal with from the written material before me. Or because they want to emphasise points already made. But I do understand your points!"

70 On 31 July 2015 Mr Peterson was in contact with Ms Hammond expressing his frustration in the delays fixing the date for the examination. Indeed on 3 August 2015, whilst Ms Hammond was on leave, he was in communication with one of her colleagues to seek to attempt to fix the date of the hearing. On 4 August 2015 Mr Parmiter provided the formal agenda and questions for the public hearing in the light of the fact that a date and venue had by then been agreed. There was then direct liaison between Mr Parmiter and Mr Peterson over corrections to the details on the agenda and publicity for the public hearing. On 5 August 2015 Mr Peterson sent Mr Parmiter information in the form of an e-mail from Imperial College dealing with plans to construct a pedestrian/cycle underpass under a railway line adjacent to Latimer Road. He expressed views in the e-mail as to the possible effects which might arise in planning terms from the construction of the underpass. On the following day, 6 August 2015, Mr Parmiter sent an e-mail to Ms Hammond expressing the concern that he was having difficulty locating some documents on the website. Mr Peterson was copied into this e-mail, and on the following day he provided the documents to Mr Parmiter direct. On 17 August 2015 Mr Peterson advised Ms Hammond that the hearing for the examination had now been fixed for 22 September 2015.

71 On 26 August 2015 the first interested party's planning consultant wrote to Ms Hammond in relation to the arrangements for the hearing and asking for a copy of their representations from July to be forwarded to the examiner. This was forwarded on to Mr Parmiter by Ms Hammond and Mr Peterson was copied into her e-mail. On the same day Mr Peterson wrote an e-mail commenting upon the suggestion contained in the first interested party's planning consultant's letter that both they and representatives of the claimant should be included as participants at the hearing. Whilst he indicated that the decision was finally for Mr Parmiter, he rehearsed his concerns in relation to what he considered to be a lack of clarity as to the nature of the legal interests in the land that either the claimant or the first interested party enjoyed. Mr Parmiter responded on the same day: "you will have the opportunity to put all this to me at the hearing." Alongside this

Mr Parmiter e-mailed Ms Hammond indicating that he was content for both the claimant and the first interested party to be invited to attend but that he did not require any additional representations as the consultation period had closed.

72 Following a meeting between Mr Peterson and officers of the council on 28 August 2015, as a reaction to the examiner's indication that they should continue to talk and endeavour to reach agreement, Mr Peterson wrote to Mr Parmiter a lengthy e-mail bearing upon the questions of viability in relation to the neighbourhood plans proposals at Latimer Road. He advised that the second interested party had obtained their own evidence in response to the 2015 viability report commissioned by the defendant. He enclosed with the e-mail a copy of the second interested party's new viability report, contending that it should be received as an exception to the examiner's reluctance to receive new evidence and offering the opportunity for others to comment upon it at the hearing. On 1 September 2015 Mr Parmiter advised that he was not prepared to accept new material at that stage, in particular since the viability material had relevance to a wide range of parties with interests in Latimer Road who it would not be possible to re-consult in relation to the new evidence.

73 On 3 September 2015 Mr Peterson wrote responding to some comments on the neighbourhood plan from Westway Trust. On 4 September 2015 Mr Parmiter responded to Mr Peterson and others including representatives of the Westway Trust and Ms Hammond stating: "I am not taking on board late submissions." Also on 3 September 2015 the first interested party had a fifth pre-application meeting with the defendant; the defendant's notes of this meeting illustrate the principal concerns were in connection with housing design and layout, without any reference being made to prematurity or the principles of development.

74 Discussions continued between the defendant and second interested party as to potentially agreed edits to the neighbourhood plan, and on 10 September 2015 Mr Parmiter thanked Ms Hammond and Mr Peterson for updating him in relation to the outcome of their discussions and encouraged them to continue. He also asked about the arrangements for the hearing. Mr Peterson responded on the same date indicating that Ms Hammond would be able to update him in relation to the attendance of participants. On 11 September 2015 Ms Hammond indicated that two individuals had declined the invitation to attend and that she would chase Mr Butchoff and Mr Jones who had been listed as participants. On 14 September 2015 Ms Hammond advised that neither Mr Butchoff nor Mr Jones could attend the hearing. On 17 September 2015 Mr Parmiter expressed his regret that these participants would not be able to attend but indicated that the absence of these individuals was not critical to the examination. He queried the arrangements for a site visit to the site, and Ms Hammond confirmed that the planning consultants for the claimant had made arrangements for access to be obtained. In response to this Mr Peterson indicated his availability and sought confirmation that the protocol would be similar to a Planning Inspector's site visit namely that "the various parties keep quiet and let John see the site for himself, without comment or additional lobbying". Mr Parmiter confirmed that that was indeed the case.

A 75 In the meantime, and in connection with development proposals at the site, Mr Peterson had written to Ms Ruth Angel at the defendant's housing department seeking an assurance that the defendant had considered the potential commercial value of the access way to the site as a form of ransom strip in the event of development being granted planning permission. In his e-mail to Ms Angel Mr Peterson went on to explore and seek a reaction B to the second interested party's suggestion that if the defendant were to purchase the site there might be opportunity for development of a small part of it as extra care housing, whilst retaining the rest of it as green space for use by local residents. In connection with this suggestion Mr Peterson drew attention to the fact that Octavia Hill had been in contact with the second interested party when the land was on the market, and that their offer had been rejected in favour of the first interested party's offer for "a development C of luxury market housing", whereas Mr Peterson's understanding was that Octavia Hill were a preferred partner of the defendant in relation to sheltered and extra care accommodation. Ms Angel responded on 21 September 2015 indicating that she also understood that Octavia Housing Trust had expressed an interest unsuccessfully, and advising that she was unable to help Mr Peterson any further.

D 76 On 18 September 2015 there was an exchange between Mr Wade and Mr Peterson in relation to the procedure for the hearing. Mr Wade indicated that whilst it was ultimately for Mr Parmiter to determine, he and Ms Hammond might "hot seat", taking it in turns to represent the defendant at the hearing. In response Mr Peterson suggested that he thought Mr Parmiter had been clear that representation would be one person per organisation and went on to observe:

E

> "Supposing StQW were to wish to 'hot seat' as well? I think that if you are intending to make such a request it should be raised with him advance [sic], as we discussed at our last meeting. We may otherwise choose to object at the lack of notice.
>
> "We will not be happy to see e g Rolfe Judd Planning being allowed to swap between Nigel McGurk and one of their own staff more familiar F with the Metropolis development proposals. If they choose to go with a hired consultant for the occasion, that is their choice and they need to stick with it even if he is not fully briefed on all the detail.
>
> "Alternatively, if JP is going to allow extra people to take the place of the main representative, as it suits, then there a number of people [sic] with whom I may want to 'hot seat' at different points of the day and for G specific issues."

77 It appears that this discussion may have emerged from an e-mail of 14 September 2015 from Mr Peterson to Mr Parmiter in which Mr Peterson had observed the following in relation to participation at the hearing:

> "We are a little concerned at the lack of proposed 'participants' who have responded and are able to attend the hearing, other than H CgMs Consulting and Rolfe Judd Planning and Tania Martin. Others of the public attending next Tuesday may feel that this arrangement does not provide for a very balanced view 'at the table'. If you wished to invite a representative of the Nursery Gardens Action Group (the group which organised the Save our Green Space petition earlier this year) I can

provide Jo Hammond with e-mail addresses for several of those local residents involved.

"We would welcome confirmation from the council as to who will be representing [the council]? (a question which I left with Jon Wade and Jo Hammond when we last met).

"I am assuming that I will need to provide a response on behalf of the forum to most if not all of the questions on your agenda, and that there will not otherwise be an opportunity to make representations on other matters? We are aware that different examiners have taken different views on whether material on transport issues should be included in [neighbourhood plans, or excluded as not being a planning or development matter. Christopher Lockhart-Mummery suggested in his health-check of an earlier version of the plan that some of the transport text was extraneous."

78 On 21 September 2015 Mr Jones responded to Ms Hammond indicating that he was unable to be present at the hearing and expressing his concern that others who would be available should be invited to speak, and in particular that other owners in Latimer Road should be permitted the opportunity to speak. Ms Hammond responded indicating that she would pass Mr Jones's comments to Mr Parmiter and asked whether he was aware of any other owners who might be available to speak at the examination the following day. Having had the e-mail forwarded to him, Mr Parmiter indicated that if an owner of one of the units in Latimer Road was in attendance he might be prepared to hear them, but that this was not critical. He noted with interest the point made by Mr Jones in his e-mail about the absence of transparency for local people as to what was happening.

79 On 22 September 2015 the examination hearing took place. On 25 September 2015 Ms Parker e-mailed Ms Hammond and Mr Wade asking how the hearing had gone. Ms Hammond replied in the following terms:

"I came out feeling a bit despondent, but the examiner handled it very well and it may just be that he was making a real effort to be very even handed.

"I'd be amazed if he thinks the Nursery Lane site is 'demonstrably special' to the local community because he went to look at the site as part of the hearing. Where he will decide on the strategic policy question is harder to guess but he was asking some probing questions about evidence of the viability of the development they are proposing (they don't have any).

"We expect his report for fact checking in mid October . . ."

80 On the same day Mr Peterson wrote to Ms Hammond noting that the hearing had concluded and drawing attention to the next key decision for the defendant, namely that following receipt of the examiner's report the defendant would have to decide what action to take in response to each of the recommendations and whether to send the plan to referendum. Mr Peterson sought an undertaking that the second interested party would be able to have a chance to see the key decision report in draft before it was published. On 28 September 2015 Ms Parker advised Ms Hammond, having seen Mr Peterson's e-mail, that this would not be "part of the usual process", but that subject to Councillor Coleridge being agreeable it would

not be prohibited to disclose the draft report to the second interested party prior to it being published. She went on to suggest that a better way of involving the second interested party might be to share the defendant's conclusions with them, and then include their comments in the reports, agreeing to let them see the draft report before it was published.

81 The issue was then raised with Councillor Coleridge who expressed concern as to how the defendant's conclusions might be shared without the second interested party seeing the draft report. Ms Hammond responded that the defendant could share its conclusions on the examiner's report with the second interested party, and thereafter write the report including any comments which the second interested party might have on the defendant's conclusions. She observed that the advantage would be that the second interested party would have the opportunity to comment in advance, but that the report would clearly remain the defendant's upon which the second interested party could comment in the usual way when it was published. This was a proposal which she then shared with Mr Peterson through an e-mail of 30 September 2015. Mr Peterson responded on the same day noting that the response sounded "a bit ominous" in the following way:

> "The circumstances with which a local authority can make further modifications or decline to accept the recommendations of an independent examiner of a neighbourhood plan are heavily constrained, as you will know. Schedule 10 [to] the Localism Act (now 4B of the [Town and Country Planning Act 1990]) sets these out at [paragraphs] 12 and 13.
>
> "I think that the council has already accepted that the draft plan meets the necessary EU Human Rights Convention [sic], as well as the authority's statutory duty on conservation. The screening opinion and what was stated at the public hearing would seem to cover these requirements.
>
> "Were the council to be minded to reject the examiner's decisions on the basic condition of 'general conformity', we would be in territory which (to my knowledge) is uncharted in respect of the near 100 neighbourhood plans which have passed the examination stage. The council would be attempting to substitute its own view on this question in the place of an independent examiner who has carried out a full review of all the documentation and held a public hearing. I am not aware of this ever happening anywhere else across England.
>
> "I trust that the council is not even considering going down this road, and that this is not the reason for the department's reluctance to make available to us the relevant key decision report as a draft?"
>
> "We will have to wait until John Parmiter issues his report and his decisions on this issue. But it is as well that you and Councillor Coleridge should know that any attempt by the council to override the decisions of an examiner, and to '*not allow*' certain StQW policies to proceed to referendum (this being what Jonathan Bore threatened in his 6 February e-mail to us) will meet with a very robust and very public response."

82 On 30 September 2015 Mr Peterson wrote to Ms Hammond in relation to a contention made on behalf of the first interested party at the hearing. He raised the issue in the following terms:

> "One of the stranger claims made by Nigel McGurk when giving evidence on behalf of Metropolis Property, at last week's public hearing,

was that the council has itself been involved in a 'waste recycling operation' based at Nursery Lane. This was part of the argument made by Rolfe Judd Planning that the land has long been an 'operational depot' rather than in agricultural/horticultural use since the 1960s.

"When I was at the site visit after the hearing, I was shown a photograph by one of the consultants/agents for Metropolis Property which appeared to show a [council] refuse vehicle parked in the middle of the Nursery Lane site.

"When I raised this at our public meeting last Thursday, none of the residents present (including those who live round the site and who had been at the hearing) could offer any explanation.

"In all the planning files on the site, going back to the 1950s, I have never seen any reference to [the council] having a contract or permission to do anything on the site, 'waste recycling' or otherwise.

"It seems to us that the most likely explanations for the presence of a [council] refuse vehicle on the site are as follows:

"• RBKC were commissioned by Clifton Nurseries to take part in the extensive removal of fly-tipped waste that was organised by Clifton in March/April of this year, before they left the site. This seems unlikely, as we noted private contractors on site for this operation.

"• A RBKC refuse vehicle has been taking part in some recent and unofficial operation to dump waste on the site."

"It is clear from the heritage statement provided by Metropolis that they wish to make great play of the fact that the land is in a 'degraded' condition rather than a potential asset to the conservation area."

"So we would like to get to the bottom of why a [council] refuse vehicle should have been photographed on the site, and whether [the council] has ever entered into any official arrangements (contractual or otherwise) to use the site for any purpose to do with waste recycling? Whom should I address this query to? Mr Siddique, or the newly appointed interim director of environmental services?"

83 Mr Parmiter was copied into this e-mail, alongside other officers of the defendant, on the suggested basis that it involved clarification of points raised at the hearing. Ultimately a response was received from the defendant's contracts manager indicating that the only records which they had were of five visits by waste crews to 1 Nursery Lane per week, which would be the only reason why waste collection vehicles would have been at that location.

The examiner's report

84 On 13 October 2015 Mr Parmiter wrote to Ms Hammond and Mr Peterson enclosing a copy of his report, and providing it to them for the sole purpose of checking it for inaccuracies or identifying where in their view his reasoning was unclear or insufficient. Mr Peterson replied thanking him for the report and for his work on the examination, and indicating that he would return a tracked version picking up minor typos and filling a couple of identified gaps. He raised a "substantive query" in relation to a policy concerned with Crowthorne Road and set out reasons why he was puzzled in relation to the inspector's conclusions. Mr Peterson wrote again on 15 October 2015, attaching a tracked version of the report picking up

typographical errors and adding some comment boxes on factual points. It appears that Ms Hammond also provided a track changed copy of the report to Mr Parmiter along with a number of comments and corrections including, for instance, cavilling at Mr Parmiter's language when he described the council's approach to defining strategic policies as not "credible".

85 On 18 October 2015 Mr Peterson again wrote to Mr Parmiter commenting upon a phrase in the report which suggested that the Basic Conditions statement accompanying the neighbourhood plan did not address the PPG. He pointed out that in fact there was reference to the PPG in the Basic Conditions statement and he suggested that it was important this was corrected as it "could resurface at a later date depending on how [the council] responds to your recommendations". Ms Hammond was copied into this e-mail. Subsequently on 21 October 2015 Mr Peterson chased the outcome of the defendant's comments on the report with Ms Hammond. This correspondence escalated on 23 October 2015 when the defendant's fact check comments had still not been received. Mr Peterson reinforced his concerns in the following manner:

> "As per earlier e-mails, I have kept the draft to myself. But the delay raises my concerns that your department is debating ways of refusing to accept one or more of the examiner's recommendations—either by questioning his conclusions as part of this 'fact check', or via a subsequent [council] decision notice."

Mr Wade responded on behalf of the defendant in the following terms:

> "I am sorry, I find these e-mails very unhelpful. The report is not being discussed with colleagues and a response will be sent today which is within the agreed timetable. Please do not keep making baseless accusations."

Mr Peterson responded to this in the following terms:

> "Am sorry if you feel my concerns are baseless and should not be raised. They are based on experience to date and the February 2015 threat from former Direction [sic] Jonathan Bore that the council 'would not allow' certain StQW policies to prevail. Plus the more recent refusal of our request to see in draft the [council] key decision report once the examiner's report is published.
>
> "Are you able to provide the confirmation requested in my e-mail to Jo, i e that the council will accept all the modifications in John's report and will not seek to add to or to change these? This seems a fairly simple and legitimate question at this stage of preparation of a neighbourhood plan?"

Mr Wade was provoked to respond to this e-mail in the following terms: "you now have our comments. There really is no conspiracy theory here—we have better things to do with our time."

86 As promised by Mr Wade, later on 23 October 2015 Ms Hammond forwarded the track changed version of the report to Mr Parmiter copying in Mr Peterson. After he had received it he e-mailed Mr Wade and Ms Hammond. In doing so he sought confirmation of the defendant's stance and whether they were going to accept the recommended modifications

without further change, or take the line that the draft plan still failed to meet the general conformity test in respect of certain policies and that the defendant would not be accepting the examiner's modifications. He went on to observe in relation to that latter scenario:

> "The latter scenario has rarely if ever happened on an examiner's report, and the popular understanding is that the examiner's decision is final. I do not wish to set any hares running that the position might be otherwise in [the council], but am still puzzled as to why we were told we could not see a copy at draft stage of the forthcoming key decision report. What would be the problem over that, given that the report will not be an exempt item?"

87 Mr Peterson later the same day wrote to Mr Parmiter and Mr Wade disputing and responding to some of the tracked observations that Ms Hammond had put on the document. Shortly after he received this e-mail Mr Parmiter e-mailed Mr Peterson, Ms Hammond and Mr Wade stating: "Lets call a halt here? I now have both your responses and will come to my own view on the matters that remain in contention."

88 On 25 October 2015 Mr Peterson again wrote to Mr Parmiter providing comments on Ms Hammond's observations on the Latimer Road policies. On 26 October 2015 Mr Parmiter replied to him in the following terms: "I have now completed my report and sent it to the council. It is now up to them as to when and how they publish it. Thank you again for all your support." Later that day Mr Parmiter sent his finalised report to Ms Hammond indicating that he would let Mr Peterson know that it had been sent to the defendant but recording that it was not commonly sent to a qualifying body at the same time. Mr Parmiter handed over the question of when it was going to be published.

89 Prior to this on 23 October 2015 Mr Peterson had been writing to Mr Taylor in relation to the outcome of the examiner's report. Having advised Mr Taylor that the examiner had found in favour of the LGS designation on all of the backland sites including the site in question in this litigation, he went on to observe:

> "I am now giving thought to how the Legard family and Metropolis Property Ltd will react to this outcome. Assuming that the council accepts this recommendation (and Councillor Coleridge gave every indication that it would do so, at the council debate on 15 April) and assuming the draft plan is successful at referendum, the level of planning protection against future development at Nursery Lane now looks to be solid."

Mr Peterson went on to seek guidance in relation to the defendant's view as to the existing uses of the site and the ends to which the site might be put. He observed that he considered that local residents would want to know the defendant's stance on the status of the site as soon as the examiner's report was published. In a similar vein Mr Peterson wrote to Mr Stallwood seeking a meeting in relation to the wording of the key decision report on the examiner's recommendations, which he considered needed to be undertaken with great care and "an eye to potential legal consequences". Mr Stallwood responded reassuring Mr Peterson that the defendant's officers were well aware of judicial review risks and the need to choose the right language in

producing written material. Mr Stallwood indicated that the report would be prepared under Ms Hammond and Mr Wade's supervision. Mr Peterson responded indicating that the "JR scenario" he was considering related to positions that Ms Hammond and Mr Wade had already taken to date, and which were a matter of record, and as such expressing his uncertainty that they were the best people for him to be discussing these matters with.

90 On 28 October 2015 Ms Hammond advised Mr Peterson that she was going back to the examiner with some minor points, and therefore did not have at that point a final version of the report, and suggesting that they meet the following day to discuss his concerns. By return Mr Peterson confirmed the appointment for the following day but expressed his view that it was not acceptable for the defendant to be going back to the examiner with minor points at this stage, and observing that all correspondence had been copied to the second interested party as well as the defendant and inquiring what the points were. Ms Hammond responded advising that the changes were minor typographical errors where track changes had gone wrong. On 29 October 2015 Mr Peterson met with Ms Hammond and Mr Wade; and on the same day wrote after the meeting to Mr Taylor, stating that he had met with Ms Hammond and Mr Wade to discuss the reaction that there might be from the first interested party and the claimant in response to the examiner's report which was about to go public. He alluded to his understanding that there was some form of legal action going on between the defendant's corporate property department and the claimant over rights of way over Nursery Lane, which was a private road. He went on to return to what he considered to be the untidy state of the site and inquiring as to what uses the site might be put without further planning permission.

91 The report of the examiner is dated 26 October 2015. So far as particularly pertinent to the matters engaged in this case the conclusions which he reached as to the designation of the site were set out as follows:

> "7. Open spaces
>
> "7.1 Objective 4 is to protect and enhance the area's open spaces, gardens and trees, both private and public, bringing 'backland' green areas into community use where ownership permits. At the heart of this part of the plan is the designation of three sites as local green space. The designation of the Nursery Lane 7.3 as a local green space ('LGS') site was one of the most contentious aspects of the plan.
>
> "7.2 The plan's Annex C contains the justification to these designations, which are made in the context of the ability to so designate, as explained in paragraph 76 of the Framework; though the glossary contains no definition of local green space. However, the Framework refers to both green areas as well as open space (providing a definition for the latter, to which I was directed by the site's promoters but found only partially helpful in the context of the wider scope of LGS in the body of in the Framework itself).
>
> "7.3 The Framework (at paragraph 77) sets out the three conditions for designation, explaining that such designations will not be appropriate for most green areas or open space. Two of the factors (first and third bullet points) are that the space should be reasonably close to the community it serves; and that the green area be local in character and not

a large tract of land. All three proposed sites meet these two conditions. All designations must meet all three conditions.

"7.4 The remaining condition has two parts: where the green area is demonstrably special to a local community; and that it holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife. The list is clearly illustrative.

"7.5 The three sites are the remnants of 'backlands' that formed part of the original estate layout. They are referred to (in general) in the [CAPS] (which has its origins in the 1970s), have been referred to in planning appeal decisions (as open spaces to be protected from development) and are identified in the Consolidated Local Plan (map on p 216) as 'Garden Squares or other green spaces'. The council considers that adopted plan Policy CR5 (which protects open spaces) applies to all three sites.

"7.6 From my consideration of the evidence, the representations made and my own inspections, I have concluded that the West London Bowling Club and the Methodist site (sites 1 and 3 on map 3) meet the three conditions and can be supported as designations.

"7.7 The Nursery Lane site was the subject of significant interest, extensive representations and one of the principal topics of the public hearing. Nursery Lane was in horticultural use, recently ceased, which could continue with or without designation.

"7.8 The key question was whether the site met the second condition. The case was made for the owners and their development partners that the use was essentially a commercial operation, on what is akin to previously developed land, was not identified in the 2004 audit and that it could not meet the elements of the second condition—beauty, historic significance, recreational value (including as a playing field), tranquility or richness of its wildlife.

"7.9 In the extensive written representations and orally each element of its alleged significance was rebutted as not applicable to the site. I don't repeat here the detail of the cases made in writing or orally at the hearing. That it failed to gain listing as an asset of community value also pointed to its lack of significance. The point was made that local people were really opposed to a recent planning application not the value of the space itself. It was not demonstrably special.

"7.10 The local community disagreed. The forum and others pointed to the history of the site which was originally in recreational use during the 1950s and early'60s, which later became horticultural without the need for planning permission (being within the definition of agriculture). I do not regard the site as previously developed land. The southern part of the original site has, however, been developed for social housing.

"7.11 The forum and others pointed to previous housing proposals and the recognition of the site's status as open space in an appeal decision. They pointed to the long history of local opposition to its development, most recently, the petition against housing, which attracted 2,500 signatures (which triggered a debate in full council)—the application has since been withdrawn. They pointed out the significant number of representations, particularly from those in the site's vicinity, to retain the site as green/open space.

A "7.12 I find the site to be a tranquil green space where a significant number of households have a direct view of it. Many of the significant number of representations made positive statements about its value to them. The consultation statement annexe records the wildlife and birds that have been recorded, listing the species. The site contains a number of substantial trees, including beech and weeping willows and dense
B boundary vegetation. The general impression is of a green space that, nevertheless, in parts, has been tipped and strewn with rubbish, as well as the remains of horticultural activity.

"7.13 I find that the backlands have historical significance and have been accepted as a feature of the conservation area at least since the original publication of the [CAPS] (1970s), at the 1982 planning appeal and by Historic England in their recent representations on the plan's
C polices and proposals: 'we *consider that a case has been made for the policies that seek to conserve the backland sites as open space*.'

"7.14 Overall, I conclude that from the content of the evidence in Annexe C, from the significant number of representations in favour of the designation and my own site visits, that the site is indeed demonstrably special to the local community; and that it holds a particular local
D significance for them. It also meets the other two criteria. I therefore conclude that the designation of the Nursery Lane site as local green space meets the Basic Conditions." (Paragraph numbers as per the original document.)

From the examiner's report to the key decision

E **92** On 30 October 2015 Mr Peterson wrote, firstly, to Councillors Coleridge and Feilding-Mellon together with Mr Holgate expressing the second interested party's hope that the defendant would support the policy proposals and allocations which had been endorsed by the examination. He advised that he was unaware of any situation where a local planning authority had sought to make a significant change to a neighbourhood plan
F after the outcome of the examination and indicated that there would be a public outcry if the defendant sought to do so. He stated that he had no reason to suspect that would be the defendant's course of action following his meeting with Ms Hammond and Mr Wade, but stated that the second interested party had "not forgotten Jonathan Bore's repeated insistence that we should drop the main policies from the neighbourhood plan". He advised that he had also had discussions with the officers with a view to
G seeking to avoid any judicial review from the claimant or the first interested party as a consequence of the defendant's conduct. When Mr Holgate passed this e-mail on to Mr Wade it provoked further internal correspondence, in which Mr Wade disputed Mr Peterson's views as to the defendant's approach in Mr Peterson's detailed criticism in the e-mail of what the defendant had done. Mr Wade in particular stated that he and
H other officers:

> "are privately somewhat surprised at the examiner's support for the Nursery Lane site to be designated as local green space, given what we consider to be the weakness of the arguments put forward, but publicly we have remained neutral on this and will continue to do so."

He indicated that officers were not objecting to the designation or the examiner's findings in general, and would be recommending that the plan went forward for referendum with the changes recommended by the examiner. Mr Peterson, secondly, e-mailed Councillor Thompson and others forwarding a copy of the examiner's report and advising on the upholding of the designation of the site as an LGS. He again advised them that at his meeting with Ms Hammond and Mr Wade they had indicated that they thought it likely the defendant would accept the examiner's recommendations and Mr Peterson reiterated that there had been few, if any, cases of local planning authorities challenging the recommendations of an examiner of a neighbourhood plan.

93 On 1 November 2015 the first interested party's planning consultant wrote to Mr Stallwood and Mr Taylor requesting that the defendant not accept the recommendations of the examiner and not put the neighbourhood plan forward for referendum. He set out a number of detailed criticisms of the examiner's findings, and indicated that the first interested party intended to seek leading counsel's opinion with a view to pursuing a legal challenge having already obtained the view of other planning professionals involved in neighbourhood planning that the report was unsound.

94 It appears that, following the internal correspondence referred to above, a briefing note for the defendant's members on the outcome of the examination was prepared. Further, it appears that that briefing note was passed to Mr Peterson to provide him with the opportunity to comment upon it. Mr Peterson provided comments including the contention that the briefing felt "more like a statement seeking to maximise 'not agreed' and with no positive comment on the 'agreed' ". He was concerned that the note continued to present the neighbourhood plan in an adversarial context. In response to this e-mail Mr Wade wrote to Ms Hammond suggesting that Mr Peterson might have a point, and he observed: "although we wished to keep it short and simple perhaps it is a bit too stark—probably a few more soothing words for Henry might do it." Also on 3 November 2015 Mr Peterson issued a press release entitled *Planning Victory for North Kensington Residents* and in addition to Ms Hammond and Mr Wade he copied in Mr Parmiter.

95 The briefing note to councillors was agreed by officers and also Mr Peterson and passed for circulation on 6 November 2015. Around this time Mr Peterson was continuing to press Ms Hammond and Mr Wade for an understanding as to whether or not the defendant were proposing to accept the examiner's recommendations. He was also pursing Mr Vickerstaff in relation to whether there was any legal action ongoing between the site owners and the defendant over the private access road and rights of way. The planning consultants instructed on behalf of the first interested party were seeking to obtain a copy of the petition (which was denied on the basis that it contained personal data).

96 On 12 November the first interested party had its sixth and final pre-application discussion with the defendant. It appears that by this time there was a travelling draft of the key decision report. Mr Taylor made inquiries, having been asked by the first interested party, as to the time-scales for the referendum and the defendant's approval of the plan and whether or not the defendant would be challenging the conclusions on Latimer Road. Ms Hammond advised that the key decision report was being drafted and

A was expected to go to a meeting of the PRSC on 26 November 2015 and that, whilst the officer's recommendation was not to challenge the examiner's conclusions, Mr Taylor ought not to say anything until Councillor Coleridge had had an opportunity to see the report. Within the court's papers was a copy of the travelling draft of the key decision report together with Ms Hammond's comments tracked on to it. At para 5.5 of the
B draft report, having noted that the council's officers had advised the second interested party that the site would not meet the requirements for designation as LGS, Ms Hammond changed the text from the officers "were content for the draft plan to be submitted this was a matter for the examiner to decide" to "were content for the draft plan to be submitted for the examiner to consider". In her commentary on the tracked change Ms Parker observed: "we were wrong its ultimately for the council to decide."

C **97** On 13 November 2015 Mr Peterson wrote to Ms Hammond and Mr Wade objecting to certain aspects of the key decision report. In particular he objected to reference to sheltered housing having been built on part of the site in the 1970s, and to the description of the site as having use as a storage facility in the light of an e-mail that he had received from the occupiers stating that the land was an agricultural hereditament used for growing and caring
D for plants. This was resisted later that day by Ms Hammond, but Mr Peterson persisted in pressing the point. Further exchanges ensued in relation to final editing of the neighbourhood plan and on 19 November Councillor Coleridge was asked by Ms Hammond to confirm that he was happy with the recommendations in the key decision report and content for it to be released as a late paper for the upcoming PRSC meeting. Councillor Coleridge indicated that he was happy for her to proceed, following which
E Ms Hammond notified Mr Peterson that Councillor Coleridge had authorised the papers for the PRSC meeting going out that day. In fact the key decision report did not contain the amended text suggested by Mr Peterson in his e-mail of 13 November 2015; but in response to Ms Hammond's e-mail on 19 November 2015 he indicated that he considered the key decision report to be robust. In the same e-mail he explained that Councillor Thompson and
F other local councillors had attended an open meeting of the second interested party the previous evening and were briefed as to the defendant's response to the outcome of the examination.

98 On the morning of 23 November 2015 Ms Hammond was contacted by the claimant requesting that he and a representative of the first interested party be permitted to speak at the PRSC meeting, and suggesting that there might be a way for the ambitions of both the second interested party and the
G claimant to be achieved "whereby, in return for a smaller but landscaped and publicly accessible local green space, a small amount of residential development including affordable housing is allowed". Ms Hammond wrote to an officer in the defendant's governance services department who in turn spoke to the chair of the committee, Councillor Rossi. Later that afternoon Ms Hammond wrote to Councillor Coleridge advising that
H Councillor Rossi was going to be speaking to him about developments that day in relation to the neighbourhood plan. In particular she advised that she had spoken to Mr Peterson about the approach from the claimant and that Mr Peterson did not think the second interested party would wish to consider the claimant's proposal. Ms Hammond advised: "in view of this Councillor Rossi feels it would not be appropriate for anyone to address the

committee." Later that evening Mr Peterson wrote a lengthy e-mail to Councillor Coleridge attaching a copy of a letter which he had written to the claimant that day. In the letter to the claimant he raised once again his concerns in relation to the position as to the ownership of the site and the relationship between the claimant and the first interested party. He offered to meet the claimant if they were still maintaining "a decision-making role" over the future of the land. In his accompanying e-mail to Councillor Coleridge he explained that he had been asked at the open meeting of the second interested party to write to the claimant and, having set out a history of some of the contact between the second interested party and the claimant and the first interested party, concluded in the following terms:

> "Hence I think it unlikely that local residents will be persuaded that there should now be any form of negotiation over the proposed local green space designation. The examiner's reasoning in supporting this designation is clear, and he has been satisfied that stringent national criteria for this form of planning protection have been satisfied. You made it clear in your letter to us following the 15 April council debate that the council would abide by the decision of the examiner.
>
> "There remain a range of uses of the land at Nursery Lane which would be compatible with local green space designation, and the attached letter to the Legards suggests early discussions as to what eventual outcome would make most sense. We hope that the council will be willing to participate in such discussions, and help in finding a solution that will bring long term benefit to this part of the Royal Borough."

99 On 24 November 2015 there was a further exchange between Ms Hammond and the officer in governance services, and confirmation was obtained that Councillor Rossi was not going to allow the claimant and the representative of the first interested party to speak at the meeting. In the meantime Mr Peterson had written to Ms Hammond stating his view that it would be "inadvisable for the scrutiny committee to decide or to minute anything which could call into question the examiner's conclusions on Nursery Lane or to hear representations were there to be this prospect". His reasons appeared from the e-mail to be that the examiner had had all of the material informing the examination, whereas the members would not, and that the members of PRSC were not experienced with planning decisions. They would also not be well placed to decide whether the land was "demonstrably special to the local community". He went on to indicate his suspicion that the claimants and first interested party would send written representations arguing that alternative sites in the neighbourhood plan were not developable or deliverable, which was why he had e-mailed Councillor Coleridge as set out above.

100 On 25 November 2015 the PRSC met and considered the key decision report. The recommendation of the report was that the recommendations of the examiner's report should be accepted and the neighbourhood plan proceed to a referendum. So far as relevant to the present proceedings the key parts of the report provided:

> "Executive summary
>
> "The Draft St Quintin and Woodlands Neighbourhood Plan has been developed by the St Quintin and Woodlands Neighbourhood Forum.

A It was formally submitted to the council on 17 May 2015. It has been examined by an independent examiner ('the examiner') appointed by the council, with the agreement of the neighbourhood forum. The examiner has concluded that with some modifications the plan meets the basic conditions and has followed the proper legal process required of a neighbourhood plan and should proceed to a referendum.

B "Now that the examiner's report has been received, the council as local planning authority has to decide to accept the report's recommendations or make further amendments before a referendum can be held."

"2.3 The council has to consider each of the recommendations in the examiner's report and decide what action to take on each recommendation.

"2.4 The council also has to be satisfied that plan meets the basic C conditions set out above, or would meet those conditions subject to any modifications the authority consider appropriate."

"4.4 There are three key issues concerning the Basic Conditions (i e as set out in para 2.1 of this report) that the executive director has considered in relation to the draft neighbourhood plan. (a) Is designation of the Nursery Lane site as a local green space (Policy 4a) appropriate: D does the space meet the National Planning Policy Framework requirements for designation? Council officers, in their advice to the forum, had indicated that in their opinion the Nursery Lane site would not meet the requirements for designation as local green space because there is no public access, or public views, into the site but were content for the draft plan to be submitted for the examiner to consider. The report to the full council on the Save Our Green Spaces petition clarified that Policy E CR5 would apply to this site but concluded designation was not appropriate because: the site had not been in recreational use since the 1970s, sheltered housing was built on part of the site in the late 1970s, the current tenants of the remainder of the site, Clifton Nurseries, use it as a storage facility, there is no public access and public views are largely limited to the rear windows of surrounding houses. This view was reached in relation to consideration of the [Framework] criteria, before F the full council debate made the level of local concern clear and Historic England's consultation response supporting designation was received. The council did not comment on proposed designation of the Nursery Lane site in its response to the public consultation and the basic condition statement, or at the public hearing, as a result.

"The examiner concluded that the Nursery Lane site meets the G requirements for designation: it is reasonably close to the community it serves; it is demonstratively special to the local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field) tranquillity or richness of its wildlife; and it is local in character and not a large tract of land. In reaching this conclusion the examiner noted that the first and third criteria were not contentious.

H "In relation to the second criteria he noted that the list of examples was clearly illustrative and cited: recognition of the site's status as open space in a planning appeal decision; the long history of local opposition to development of the site and the recent petition which triggered a full council debate; his view that the site was tranquil and the significant

number of households that have a view of it; the number of representations about the positive value of the site; the wildlife that has been recorded on the site; the substantial trees and dense boundary vegetation; and the historic significance of the backlands as a feature of the conservation area, endorsed by Historic England as evidence that the site was demonstrably special to the local community and holds a particular local significance for them."

"4.6 The executive director has considered each of the recommendations made in the report and the basic condition issues discussed above and considers that, with the examiner's recommended changes, it meets all the necessary legal requirements, and it should proceed to referendum without further amendment."

101 On the following day Mr Peterson e-mailed Mr Stallwood as a follow up to the meeting the previous evening. In the e-mail he wrote in the following terms:

"The forum has no problem with what was said last night, other than a slight concern that PRSC councillors may have left the meeting thinking that there is some form of 'challenge' option provided for at this stage of the neighbourhood planning process. As I am sure you and colleagues (and Councillor Coleridge) are aware, there is no such thing.

"An examiner's recommendations cannot be legally challenged directly, since these are but recommendations. Nor can the proposals of a neighbourhood forum/parish council (see [section] 61N of the 1990 Act).

"The council's decision to accept an examiner's recommendations and to progress a neighbourhood plan to referendum can of course be challenged via [judicial review] in the same way as can any decision made by an English public authority. You will have more experience than me of such legal actions on planning matters (although I have some). As I understand, it is very unusual for a court to override a planning decision unless there is a fault of process or some irrational or *Wednesbury* unreasonable decision has been made [see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223].

"I struggle to see any legal grounds for a challenge in this case, although the Legards (and Metropolis) have the funds to hire the best QCs in the land. So we may see some surprises."

"It was also helpful to hear public confirmation that the council will support the examiner's conclusions, in the face of legal action if necessary. As I am sure committee members understood, the council would also be open to legal challenge if it chose to do otherwise."

102 On 1 December 2015 Mr Peterson wrote to Ms Hammond explaining that he had received no reply to his letter to the claimant and asking whether the defendant had heard anymore from the claimant. He stated:

"There is no planning application in play and I find it hard to see why the family should be given the opportunity to communicate or attempt to negotiate with the council in private. They have had their chance to state their case in public at the hearing in September and this is a matter of public interest in the area."

A 103 On 2 December 2015 the planning consultants acting on behalf of the first interested party wrote to Mr Stallwood expressing the desire to raise confidentially and without prejudice a matter for discussion which was said to represent a fair compromise suiting all parties. The letter indicated that leading counsel's opinion had been taken and that on the basis of that advice a legal challenge was being prepared. The letter indicated that options for the site had been reviewed and some proposed scheme options were attached to the letter. The letter stated:

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> "We wish to present this option to Councillor Coleridge and ultimately to the neighbourhood forum as representing a fair and equitable compromise which allows a substantial area of land on the site to be designated as local green space (and therefore protected) but also deliver a reasonable provision of housing including affordable housing."

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The letter then contained drawings illustrating three options for the partial development of the land leaving the remainder as landscaped open space.

104 On 7 December 2015 the first interested party's planning consultants wrote to Councillor Coleridge again expressing their profound disagreement with the examiner's report and the fact that they were preparing a legal challenge on leading counsel's advice and attaching the scheme options which had earlier been provided to Mr Stallwood. The letter stated that they wished "to present this option to you (and ultimately to the neighbourhood forum) without prejudice as representing a fair and equitable compromise".

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105 On 8 December 2015 the claimant's then solicitors contacted Mr Peterson by e-mail expressing a wish to meet and explaining that they were proposing to take legal action in relation to the plan and seeking to defer the decision to send it to a referendum so as to enable negotiations to occur. Mr Peterson, having spoken to the solicitors on the telephone, then e-mailed Ms Hammond to inquire about the time line for the key decision being reached and whether the defendant's legal department were saying there was a realistic prospect of a successful judicial review. Ms Hammond responded stating that she was meeting with the legal department on the following day to discuss the advice to be given to Councillor Coleridge in relation to the points raised by the first interested party's planning consultant. This gave rise to a further e-mail from Mr Peterson later that day expressing concern that he had no knowledge of any approach from the first interested party's planning consultants and asking what they had raised with the defendant. He further explained that any change to the second interested party's current position would require them to hold a public meeting to consider the matter which left little, if any, scope for any negotiation.

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106 On 10 December 2015 the key decision in relation to the examiner's report was signed off by Councillor Coleridge. He explains in the key decision report that on 30 November 2015 he had indicated he was minded to accept the findings of the key decision report. His decision is expressed in the following terms:

H

> "I now direct the council to:
>
> "1.1 Accept the recommendations of the examiner's report and for the Draft St Quintin and Woodlands Neighbourhood Plan to proceed to a referendum.

"My reason for taking the above-mentioned decision was as follows: I concurred with the advice contained in the officer's report. Before taking the decision I considered a representation dated 7 December 2015 from Rolfe Judd on behalf of Metropolis Property, the developer of the site at Nursery Lane. I have considered the representation carefully and noted that Metropolis Property and the Legard family, the owner of the site, strongly disagree with the examiner's report. The representation has not however led me to change the decision I indicated that I was minded to take."

On the same day there was an exchange between Ms Hammond and Mr Peterson by e-mail in relation to the referendum. Ms Hammond states that Mr Peterson had expressed concern about the possibility of 18 February 2016 as the date for the referendum and explaining that the defendant's electoral services department had said that they could go to 25 February 2016. Mr Peterson accepted that they should go for 25 February 2016 as the date for the referendum.

107 On 26 January 2016 judicial review proceedings in relation to the decision to allow the neighbourhood plan to proceed to a referendum were issued.

The claimant's grounds in brief

108 It will be helpful at this stage to set out in very brief terms the nature of the grounds upon which the claimant's application proceeds. There is an inevitable overlap between the various grounds which the claimant relies upon. The purpose of setting them out at this stage is not so as to provide an exhaustive examination of the many points raised by the claimant within each of their broad headings but to provide a framework for an exposition of the relevant law and policy which follows. The analysis of the grounds upon which the claimant's arguments proceed is based upon the presentation of the claimant's case at the hearings.

109 The claimant's ground 1 is a sequence of contentions under the heading of fairness, apparent bias and ultra vires. Starting with the allegation of apparent bias, it is contended by the claimant that the defendant was apparently biased in favour of the second interested party in the neighbourhood plan process and the decision which was subsequently reached. There are a number of features of the factual evidence which are relied upon in this connection. Firstly, the claimant draws attention to the essentially uncontrolled and pivotal role played by Mr Peterson on behalf of the second interested party in the neighbourhood plan process. He was, it is contended, afforded privileged access to the defendant's members and officers and exerted an overwhelming influence on the defendant which clearly bespoke an apparent bias toward him. Amongst the episodes from the factual history set out above upon which the claimant relies are: the ousting from the choice of the examiner of Mr Bore, the deferral of the preparation of the conservation area appraisal, the selection of the examiner (the approach to which underpins the claimant's allegation that the role afforded the second interested party rendered the decision to select Mr Parmiter as the examiner outwith the provisions of the legislation set out below), the undue influence in relation to the timing and arrangements for the examination together with seeking to influence who appeared, privileged access in relation to ventilating

A arguments of prematurity, the effective vetoing of the claimant and the first interested party's offer of compromise toward the close of the process and the fact that it appears that the officers never actually expressed their genuinely held professional views to the examiner in respect of the merits of designating the site as LGS.

110 It has been necessary to set out the factual history at some considerable length because, it is submitted by the claimant, only by examining the whole of what occurred is it possible to gauge the arguments made in relation to apparent bias by the defendant toward Mr Peterson and the second interested party throughout the neighbourhood plan process. The claimant's argument is that Mr Peterson was permitted to perpetuate a misconception which persisted right up until shortly before the making of the key decision in relation to the neighbourhood plan, namely that it was not for the defendant to decide whether the merits of designating the site as an LGS had been made out. Mr Peterson repeatedly referred to this being a decision for the examiner when, ultimately, it was in truth a question for the defendant. Viewed as a whole, whilst there was no suggestion that the examiner was biased, the defendant was clearly apparently biased in the second interested party's favour.

111 Associated with this ground are also contentions in relation to fairness. The claimant draws attention to the fact that throughout the neighbourhood plan process, Mr Peterson was afforded regular and repeated access to the defendant's officers and members, and was able to present a case to them confidentially about which the claimant knew nothing, and in relation to which the claimant was unable to put its side of the question. In particular, from time to time, the second interested party through Mr Peterson was able to put its case directly to the examiner, again without the claimant or the first interested party having any knowledge of the submissions he was making and without them having any opportunity to offer their own perspective on his contentions. Examples of this include the representations which he made following the hearing in respect of the presence of waste lorries on the site, into which the examiner was copied without the knowledge of the claimant or those representations being in the public domain.

112 An aspect of both this part of the case and also the claimant's concerns in relation to apparent bias is the consistent and continual efforts which Mr Peterson was allowed to make to hurry the neighbourhood plan process along, well knowing that the purpose of this was to frustrate any potential grant of planning permission for residential use on the site in favour of the claimant or the first interested party. Mr Wald described what was occurring as a "secret race". It was a race for Mr Peterson to get the neighbourhood plan in place, or sufficiently far advanced so as to frustrate the claimant and the first interested party's development aspirations. It was secret because at all times Mr Peterson was forcing the defendant and pushing it to make progress alongside lobbying it about prematurity without the claimant or the first interested party having any knowledge of the representations which were being made and without, save on one occasion, more than a year after Mr Peterson had started his pressure, the claimant and the first interested party having the opportunity to comment on his argument. It is submitted by Mr Wald that this was obviously unfair.

The defendant was only hearing one side of the argument as a consequence of permitting wholly unjustified access to officers and members by Mr Peterson.

113 Ground 2 is a sequence of contentions relating to the proper understanding of paragraph 77 of the Framework and the examiner's reasons. It is submitted on behalf of the claimant by Mr Wald that each of the three bullet points within paragraph 77 as set out below are to be read and applied as separate criteria. It is submitted that the examiner failed to understand and apply the policy correctly, in that the examiner failed to reach any proper conclusion as to whether or not the site served the community, which was a separate test of eligibility from the test of being "demonstrably special" and holding "a particular local significance". In any event it is submitted that the examiner's reasons were inadequate, in that they failed adequately to explain why he had concluded that the designation should apply, and further failed to engage with the fact that the site had a lawful use as a consequence of being used for commercial purposes associated with storage and horticulture as well as being used primarily as contractor's stores.

114 Ground 3 is a suite of submissions made by Mr Wald under the heading "The volte-face". Under this heading Mr Wald focuses upon the fact that Mr Bore and the defendant's other officers appear both at the start of the neighbourhood plan process and, indeed, throughout it to be clearly of the view that as a matter of professional judgment the designation of the site could not be supported. That appears to have remained the position even after the receipt of the examiner's report. It is submitted, firstly, that it was incumbent upon the defendant to explain why, in reaching the conclusions in the key decision report, the defendant's officers' position had been reversed and the designation was now supported. Failure to do so constituted a failure to provide proper reasons in relation to the decision. Furthermore, the reasons provided were inadequate in that they failed to provide any proper justification for designating the land as LGS within the neighbourhood plan.

The law

115 It is convenient to commence the analysis of the law relevant to these proceedings with the legal framework in respect of a neighbourhood development plan. By virtue of section 38(3)(c) of Planning and Compulsory Purchase Act 2004 the development plan for an area includes any neighbourhood plans which have been made in relation to that area. The significance of being part of the development plan is that under section 38(6) of the 2004 Act, if regard is to be had to the development plan for the purpose of a determination such as the granting of planning permission, then "the determination must be made in accordance with the [development] plan unless material considerations indicate otherwise". Detailed provisions exist in relation to the process of making a neighbourhood plan. They are contained within Schedule 4B to the Town and Country Planning Act 1990, as inserted, and, although the language of Schedule 4B is expressed in terms of neighbourhood development orders, by virtue of the provisions of section 38A of the 2004 Act, as inserted, the provisions also apply to the making of neighbourhood development plans.

A **116** The relevant provisions of Schedule 4B to the 1990 Act for present purposes are:

"1(1) A qualifying body is entitled to submit a proposal to a local planning authority for the making of a neighbourhood development order by the authority in relation to a neighbourhood area within the area of the authority."

B "*Advice and assistance in connection with proposals*

"3(1) A local planning authority must give such advice or assistance to qualifying bodies as, in all the circumstances, they consider appropriate for the purpose of, or in connection with, facilitating the making of proposals for neighbourhood development orders in relation to neighbourhood areas within their area ."

C "*Consideration of proposals by authority*"

"6(1) This paragraph applies if— (a) a proposal has been made to a local planning authority, and (b) the authority have not exercised their powers under paragraph 5 to decline to consider it.

"(2) The authority must consider— (a) Whether the qualifying body is authorised for the purposes of a neighbourhood development order to act
D in relation to the neighbourhood area concerned as a result of section 61F, (b) whether the proposal by the body complies with provision made by or under that section, (c) whether the proposal and the documents and information accompanying it (including the draft neighbourhood development order) comply with provision made by or under paragraph 1, and (d) whether the body has compiled with the requirements of
E regulations made under paragraph 4 imposed on it in relation to the proposal

"(3) The authority must also consider whether the draft neighbourhood development order complies with the provision made by or under sections 61E(2), 61J and 61L.

"*Independent examination*

"7(1) This paragraph applies if— (a) a local planning authority have
F considered the matters mentioned in paragraph 6(2) and (3), and (b) they are satisfied that the matters mentioned there have been met or complied with.

"(2) The authority must submit for independent examination— (a) the draft neighbourhood development order, and (b) such other documents as may be prescribed.

G "(3) The authority must make such arrangements as they consider appropriate in connection with the holding of the examination.

"(4) The authority may appoint a person to carry out the examination, but only if the qualifying body consents to the appointment.

"(5) If— (a) it appears to the Secretary of State that no person may be appointed under sub-paragraph (4), and (b) the Secretary of State considers that it is expedient for an appointment to be made under this
H sub-paragraph, the Secretary of State may appoint a person to carry out the examination.

"(6) The person appointed must be someone who, in the opinion of the person making the appointment— (a) is independent of the qualifying body and the authority, (b) does not have an interest in any land that may

be affected by the draft order, and (c) has appropriate qualifications and experience."

"8(1) The examiner must consider the following— (a) whether the draft neighbourhood development order meets the basic conditions (see sub-paragraph (2)), (b) whether the draft order complies with the provision made by or under sections 61E (2), 61J and 61L, (c) whether any period specified under section 61L(2)(b) or (5) is appropriate, (d) whether the area for any referendum should extend beyond the neighbourhood area to which the draft order relates, and (e) such other matters as may be prescribed.

"(2) A draft order meets the basic conditions if— (a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order, (b) having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order, (c) having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order, (d) the making of the order contributes to the achievement of sustainable development, (e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area), (f) the making of the order does not breach, and is otherwise compatible with, EU obligations, and (g) prescribed conditions are met in relation to the order and prescribed matters have been compiled with in connection with the proposal for the order."

"9(1) The general rule is that the examination of the issues by the examiner is to take the form of the consideration of written representations.

"(2) But the examiner must cause a hearing to be held for the purpose of receiving oral representations about a particular issue at the hearing— (a) In any case where the examiner considers that the consideration of oral representations is necessary to ensure adequate examination of the issue or a person has a fair chance to put a case, or (b) in such other cases as may be prescribed.

"(3) The following persons are entitled to make oral representations about the issue at the hearing— (a) The qualifying body, (b) the local planning authority (c) where the hearing is held to give a person a fair chance to put a case, that person, and (d) such other persons as may be prescribed.

"(4) The hearing must be in public.

"(5) It is for the examiner to decide how the hearing is to be conducted, including— (a) whether a person making oral representations may be questioned by another person and, if so, the matters to which the questioning may relate, and (b) the amount of time for the making of a person's oral representations or for any questioning by another person."

"10(1) The examiner must make a report on the draft order containing recommendations in accordance with this paragraph (and no other recommendations).

"(2) The report must recommend either— (a) that the draft order is submitted to a referendum, or (b) that modifications specified in the report are made to the draft order and that the draft order as modified is

A submitted to a referendum, or (c) that the proposal for the order is refused."

"(6) The report must— (a) give reasons for each of its recommendations, and (b) contain a summary of its main findings.

"(7) The examiner must send a copy of the report to the qualifying body and the local planning authority."

B "*Consideration by authority of recommendations made by examiner etc*

"12(1) This paragraph applies if an examiner has made a report under paragraph 10.

"(2) The local planning authority must— (a) consider each of the recommendations made by the report (and the reasons for them), and (b) decide what action to take in response to each recommendation

C "(3) The authority must also consider such other matters as may be prescribed.

"(4) If the authority are satisfied— (a) that the draft order meets the basic conditions mentioned in paragraph 8(2), is compatible with the Convention right and complies with the provision made by or under sections 61E(2), 61J and 61L, or (b) that the draft order would meet those D conditions, be compatible with those rights and comply with that provision if modifications were made to the draft order (whether or not recommended by the examiner), a referendum in accordance with paragraph 14, and (if applicable) an additional referendum in accordance with paragraph 15, must be held on the making by the authority of a neighbourhood development order."

"(6) The only modifications that the authority may make are— E (a) modifications that the authority consider need to be made to secure that the draft order meets the basic conditions mentioned in paragraph 8(2), (b) modifications that the authority consider need to be made to secure that the draft order is compatible with the Convention rights, (c) modifications that the authority consider need to be made to secure that the draft order complies with the provision made by or under sections 61E(2), 61J and F 61L (d) modifications specifying a period under section 61L(2)(b) or (5), and (e) modifications for the purpose of correcting errors."

"(10) In any case where the authority are not satisfied as mentioned in sub-paragraph (4), they must refuse the proposal.

"(11) The authority must publish in such manner as may be prescribed— (a) the decisions they make under this paragraph, (b) their reasons for making those decisions, and (c) such other matters relating to G those decisions as may be prescribed."

117 It is important to note that within this detailed framework for the preparation and making of a neighbourhood development plan the claimant draws specific attention to paragraph 7(4) and submits that in the present case, in effect, the second interested party picked and appointed the examiner for the purposes of the independent examination. The claimant also draws H attention to the requirement for both the examiner and the local planning authority to give reasons for their decisions (see paragraphs 10(6) and 12(10), 12(11)), and the requirement under paragraph 12 that the final decision as to whether or not the plan goes forward to referendum is that of the local planning authority who are not bound to adopt the conclusions of the

examiner's report. The defendant in the course of its submissions emphasises paragraph 3(1) of Schedule 4B, noting that the local planning authority is obliged to give advice or assistance to qualifying bodies as appropriate so as to facilitate the making of the neighbourhood development plan. This, it submits, characterises its relationship with the second interested party and Mr Peterson as the second interested party's representative.

118 Turning to the question of the legal standard of the reasons required by an examiner in providing his report there has been some discussion in the authorities as to the correct approach. Although the question was discussed in both *R (Crownhall Estates Ltd) v Chichester District Council* [2016] EWHC 73 (Admin) and *R (Swan Quay llp) v Swale Borough Council* [2017] EWHC 420 (Admin), the point was considered by Lang J in greater detail than in those cases in *R (Bewley Homes plc) v Waverley Borough Council* [2018] PTSR 423. Lang J concluded that the approach required by the classic synthesis of the duty to give reasons in *South Bucks District Council v Porter (No 2)* [2004] 1 WLR 1953 in respect of an inspector's (or the Secretary of State's) decision on an appeal (or called-in application) needed to be modified to reflect the extent of the duty placed upon an examiner by paragraph 10(6) of Schedule 4B. In paras 49–55 she contrasted the duty placed upon an inspector determining an appeal under section 78 of the 1990 Act, which requires the inspector to "notify his decision on an appeal, and his reasons for it, in writing", and the duty of an examiner to "give reasons for each of [the report's] recommendations and . . . contain a summary of its main findings". Thus, the breadth of the matters which will require to have reasons expressed about them will be greater in the context of an inspector's decision (or equivalent) than is the case with an examination, where the examiner has a duty restricted to the report's recommendations and, merely, a summary of its main findings. As Lang J noted, at para 54, this reflects the inquisitorial process of the examination. Most importantly it reflects the statutory language. I agree with Lang J's analysis. In testing whether or not the examiner' s reasons are legally adequate it is important to focus upon such reasons as are necessary to explain the report's recommendations and to bear in mind that in respect of the main findings of the report the duty is simply to provide a summary. In respect of the reasons provided they will of course have to be intelligible and explain why the recommendation has been reached; but they do not have to refer to every matter raised in the context of the debate, solely the principal controversial issues.

119 It is now well established that the proper interpretation of planning policy is a question of law for the court: see *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983 as applied in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623. In the *Hopkins Homes* case, at paras 22, 24, 25, Lord Carnwath JSC observed in relation to the role of the court in interpreting planning policy:

> "22. The correct approach to the interpretation of a statutory development plan was discussed by this court in *Tesco Stores Ltd v Dundee City Council (ASDA Stores Ltd intervening)* [2012] PTSR 983. Lord Reed JSC rejected a submission that the meaning of the development plan was a matter to be determined solely by the planning authority,

A subject to rationality. He said, at para 18: 'The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise B of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others . . . policy C statements should be interpreted objectively in accordance with the language used, read as always in its proper context'. He added, however, at para 19, that such statements should not be construed as if they were statutory or contractual provisions: 'Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which D may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: *Tesco Stores Ltd* E *v Secretary of State for the Environment* [1995] WLR 759, 780, per Lord Hoffman'."

"24. In the first place, it is important that the role of the court is not overstated. Lord Reed JSC's application of the principles in the particular case (para 18) needs to be read in the context of the relatively specific policy there under consideration. Policy 45 of the local plan provided F that new retail developments outside locations already identified in the plan would only be acceptable in accordance with five defined criteria, one of which depended on the absence of any 'suitable site' within or linked to the existing centres (para 5). The short point was the meaning of the word 'suitable' (para 13): suitable for the development proposed by the applicant, or for meeting the retail deficiencies in the area? It was that question which Lord Reed JSC identified as one of textual interpretation, G 'logically prior' to the existence of planning judgment (para 21). As he recognised (para 19), some policies in the development plan may be expressed in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis.

"25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the [Framework], these are statements of policy, not statutory texts, and must be read in that light. Even where H there are disputes over interpretation, they may well not be determinative of the outcome. (As will appear, the present can be seen in such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and

guidance of the planning inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (*Wychavon District Council v Secretary of State for Communities and Local Government* [2009] PTSR 19, para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence: see *AH Sudan v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening)* [2008] AC 678, para 30, per Baroness Hale of Richmond."

120 Turning to the question of apparent bias, the legal principles were settled in relation to the test which is to be applied in *Porter v Magill* [2002] 2 AC 357. Distilling the position Lord Hope of Craighead observed:

"102. . . . The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711A–B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B–C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726–727: '85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'

"103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

A **121** During the course of his submissions, Mr Wald drew attention to a number of cases illustrating the principle of apparent bias being applied, albeit in cases prior to the settlement of the appropriate test in *Porter's* case. The first of these cases to which he referred (apart from *Furmston v Secretary of State for the Environment* [1982] JPL 49 which related, in effect, to a concession that a decision had to be quashed) was *Simmons v Secretary of*
B *State for the Environment* [1985] JPL 253. In that case the claimant was the disappointed appellant in relation to an application for planning permission. At the inquiry the chairman of the local planning authority's development control committee, whom the claimant held responsible for the failure of his application, was observed by the claimant to be in conversation with the appeal inspector along with the local planning authority's solicitor.
C Forbes J, having considered witness evidence from the parties concerned including the inspector, formed the clear conclusion that there was no evidence of impropriety on behalf of the inspector; but formed the view that what had taken place "was something which could have led somebody who knew the background to the conclusion . . . that something was being done to interfere with the natural course of justice". Having reached that conclusion he suggested that the remedy may have been for the inspector to
D have been "more rude" to those engaging him in conversation or alternatively to have explained to the claimant, bearing in my mind that they were all due to meet at a site visit, that nothing untoward had occurred.

122 Another case involving a conversation between a party to an inquiry and the inspector was *British Muslims Association v Secretary of State for the Environment* (1987) 55 P & CR 205 in which a conversation
E occurred between council officers and the inspector formed a ground of appeal by an objector to the compulsory purchase order that the inspector was considering. Having cited *Simmons's* case Stuart-Smith J applied the test of apparent bias and concluded that, whilst there had in fact been no impropriety, an inference could be reasonably drawn that there might have been. His reasons for forging that conclusion were, firstly, the impression
F made upon the claimants for whom English was not their first language; secondly, that the conversation was not "just any casual conversation which happened by chance when somebody of the other side was not there"; thirdly, the claimant's representative was not present at the time; fourthly, it was not obvious why the conversation had been about other properties rather than the property subject to the order; fifthly, it appeared from the
G circumstances of that case that the conversation had not occurred by accident or inadvertently; and, finally, because the conversation was not brief. All of these circumstances led to the conclusion that the allegation of apparent bias was made out.

123 A further case concerning a conversation between an inspector and one of the parties to an appeal leading to an allegation of apparent bias is *Cotterell v Secretary of State for the Environment* [1991] 2 PLR 37.
H Following site inspections after the close of a planning inquiry the inspector invited those who had accompanied him to join him for a drink in a local pub. The inspector paid for the drinks. One of the parties was a local objector. After the appellant and his planning consultant left the pub the inspector, the representative of the local planning authority and the local

objector remained for a further 20 minutes discussing matters of common interest including the fact that the inspector and the local objector had been to the same college. After the appeals were dismissed a challenge was brought alleging apparent bias. Applying the authorities of, in particular, *Simmons's* case [1985] JPL 253 and the *British Muslims* case 55 P & CR 205, Roy Vandermeer QC sitting as a deputy judge of the Queen's Bench Division formed the view that the inspectors conduct fell "on the acceptable side of the line".

124 Turning to more recent authority, Mr Wald places reliance on the decision of Silber J in *Ai Veg Ltd v Hounslow London Borough Council* [2004] LGR 536. That was a case involving the allocation of tenancies of new market premises and included as one of the grounds for a judicial review that the decisions were tainted by bias through the involvement of a small number of individuals as members of the board of the Tenant's Association who were competitors of the claimants and had a direct financial interest in the decision to allocate space in the new market. In the light of the House of Lords decision in *Porter's* case [2002] 2 AC 357, Silber J set out three preliminary points in his judgment, at paras 79–81:

> "79. Before embarking on the task of deciding whether the complaint of apparent bias succeeds, it is necessary to consider first whether Mr Bray's assertions in his witness statement that he was not biased and was acting fairly are of any relevance. Lord Hope of Craighead explained in *Porter v Magill* that 'looking at the matter from the standpoint of a fair-minded and informed observer, protestation [made by a person who was alleged to have been biased that he was not biased] are unlikely to be helpful' (at p 495, para 104). It follows that I should disregard Mr Bray's protestations in determining the issue before me and that I should proceed to apply the tests to which I have referred.
>
> "80. Second, by the same token, I should stress that the allegation in this case is not whether anybody was *actually* biased, but whether there was an *appearance* of bias. So nothing that I will say will be or should be regarded in any way as any criticism of the Tenants' Association or of the trading members of the relocation committee. The courts have developed the doctrine of apparent bias in order to preserve the integrity of the selection process.
>
> "81. Third, I bear in mind that my approach must be, as Lord Steyn explained in the passage which I have already set out, that any court when faced with the present kind of challenge 'starts by identifying the circumstances which give rise to bias' (per Lord Steyn in *Lawal v Northern Spirit Ltd* [2003] ICR 856, para 20)."

125 A further illustration of apparent bias in this context is contained in the decision of Richards J in *Georgiou v Enfield London Borough Council* [2004] LGR 497. The claimant was an objector to applications for planning permission and listed building consent in relation to a listed building known as Truro House. Four members of the planning committee, three of whom voted in favour of the grant of planning consent, participated in meetings of the local planning authority's conservation advisory group ("CAG") which had considered the merits of the applications prior to them being determined

A by the planning committee. This, it was contended, gave rise to apparent bias. Richards J expressed his view in relation to this contention:

"31. I therefore take the view that in considering the question of apparent bias in accordance with the test in *Porter v Magill*, it is necessary to look beyond pecuniary or personal interests and to consider in addition whether, from the point of view of the fair-minded and informed
B observer, there was a real possibility that the planning committee or some of its members were biased in the sense of approaching the decision with a closed mind and without impartial consideration of all relevant planning issues. That is a question to be approached with appropriate caution, since it is important not to apply the test in a way that will render local authority decision-making impossible or unduly difficult. I do not
C consider, however, that the circumstances of local authority decision-making are such as to exclude the broader application of the test altogether.

"32. On that basis I do have concerns about what happened in this case and the objective impression that it conveyed. Although the CAG's remit was to consider only the conservation implications of the applications, its conclusion was expressed in simple terms of support for the applications,
D without any qualification. Both the note of the CAG meeting on 27 May and the report to the planning committee on 17 June state that CAG 'continued to support' the applications. Moreover, although there is nothing to show that a vote was taken within the CAG, there is equally nothing to show that any of the members present dissented from that conclusion: the support appeared to come from all those present, including the three members who were also members of the planning
E committee. When it came to the meeting of the planning committee, nothing was said about the limited function of the CAG or about the need for those with dual membership to put on one side the support expressed in the CAG and to examine all the relevant planning issues before reaching the planning decisions.

"33. In those circumstances I take the view, though not without a
F degree of hesitation, that a fair-minded and informed observer would conclude that there was a real possibility of bias, in the sense of the decisions being approached with closed minds and without impartial consideration of all the planning issues, as a result of the support expressed by the CAG being carried over into support for the applications in the context of the planning committee's decisions."

"36. Having regard to the objective nature of the question of apparent
G bias, I do not think that any significant weight is to be attached to the members' own witness statements in which they state that they did approach the planning decision with open minds: cf per Lord Hope in *Porter v Magill*, para 104."

126 The observations of Richards J in *Georgiou's* case were subsequently considered by Collins J in *R (Island Farm Development Ltd) v*
H *Bridgend County Borough Council* [2007] LGR 60. Collins J expressed some doubts as to parts of Richards J's reasoning. The *Island Farm* case, alongside other cases to which I have referred, was considered by the Court of Appeal in *R (Lewis) v Redcar and Cleveland Borough Council* [2009] 1 WLR 83. *Lewis's* case concerned a controversial planning proposal for

development on land owned by the local planning authority. A vote was taken prior to an election in relation to the determination of the planning application. This was objected to by the minority group on the council. Nevertheless the meeting proceeded and the recommendation to grant planning permission was adopted, leading to the signing of a development agreement in respect of the land shortly prior to the day of the poll. Political control of the local planning authority changed as a consequence of the poll but, nevertheless, the new majority group decided to proceed with the development and planning permission was granted leading to the challenge. The judge at first instance had concluded that the claimant's allegation of apparent bias had been made out. At para 59, Pill LJ referred to the observations of Collins J in the *Island Farm* case to which there has been some reference above. He set out the relevant extracts as follows:

"59. In *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2007] LGR 60 a claim that a local authority's planning decision was vitiated by predetermination was based on members having a known attitude to the development and one councillor having participated in a protest group. Having set out the relevant paragraphs from the judgment of Richards J in *Georgiou's* case, Collins J stated, at paras 30–31: '30. I confess to some doubt as to this approach, and in particular to what he says at para 36. Councillors will inevitably be bound to have views on and may well have expressed them about issues of public interest locally. Such may, as here, have been raised as election issues. It would be quite impossible for decisions to be made by the elected members whom the law requires to make them if their observations could disqualify them because it might appear that they had formed a view in advance. The decision of the Court of Appeal in *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419, of the New Zealand Court of Appeal in *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 and of Woolf J in *R v Amber Valley District Council, Ex p Jackson* [1985] 1 WLR 298 do not support this approach. Nor is it consistent with those authorities that no weight should be attached to their own witness statements. *Porter v Magill* was a very different situation and involved what amounted to a quasi-judicial decision by the auditor. In such a case, it is easy to see why the appearance of bias tests should apply to its full extent. 31. The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should . . . so it is with councillors and, unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision.'

"60. Collins J concluded, at para 32: 'It may be that, assuming the *Porter v Magill* test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations. In this case, the evidence before me demonstrated that each member was prepared to and did consider the relevant arguments and each was prepared to change his or her mind if the material persuaded him or her to

A do so. I am not prepared to accept that there was apparent bias or predetermination which vitiated the decision.' "

127 Pill LJ went on to consider the position of local members and the correct approach in the following terms:

"62. The difference may, however, arise from a more fundamental
B difference about the role of elected councillors in the planning process. There is no doubt that councillors who have a personal interest, as defined in the authorities, must not participate in council decisions. No question of personal interest arises in this case. The committee which granted planning permission consisted of elected members who would be entitled, and indeed expected, to have and to have expressed views on planning issues. When taking a decision councillors must have regard to material
C considerations, and only to material considerations, and to give fair consideration to points raised, whether in an officer's report to them or in representations made to them at a meeting of the planning committee. Sufficient attention to the contents of the proposal which on occasions will involve consideration of detail must be given. They are not, however, required to cast aside views on planning policy they will have formed
D when seeking election or when acting as councillors. The test is a very different one from that to be applied to those in a judicial or quasi-judicial position."

"66. As to the test to be applied, I respectfully share Collins J's concerns about the test as expressed by Richards J in *Georgiou's* case [2004] LGR 497, though not necessarily his concern about Richards J's views about self-justificatory statements. A series of statements from
E council members saying that they had open minds would not inevitably conclude the issue. Consideration of the standpoint of the fair-minded and informed observer may be helpful in this context to test the provisional views of the court. Moreover, appearances in this context cannot, in the wake of *Porter's* case [2002] 2 AC 357, be excluded altogether from the court's assessment. I agree with the statement of
F Richards J in *Georgiou's* case [2004] LGR 497, para 31 that the test in *Porter's* case should not be altogether excluded in this context. An understanding of the constitutional position of councillors (and ministers), as shown in cases such as *Franklin v Minister of Town and Country Planning* [1948] AC 87, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003]
G 2 AC 295, *Amber Valley* [1985] 1 WLR 298, *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172 and *R (Cummins) v Camden London Borough Council* [2001] EWHC 1116, must however be present. The councillors' position has similarities with that of ministers as the authorities show; ministers too take decisions on planning issues on which they have political views and policies."

"69. Central to such a consideration, however, must be a recognition
H that councillors are not in a judicial or quasi-judicial position, to provide and pursue policies. Members of a planning committee would be entitled, and indeed expected, to have and to have expressed views on planning issues. The approach of Woolf J in the *Amber Valley* case [1985] 1 WLR 298 to the position of councillors, in my judgment, remains appropriate."

"71. It is for the court to assess whether committee members did make the decision with closed minds or that the circumstances did give rise to such a real risk of closed minds that the decision ought not in the public interest to be upheld. The importance of appearances is, in my judgment, generally more limited in this context than in a judicial context. The appearance created by a member of a judicial tribunal also appearing as an advocate before that tribunal (*Lawal v Northern Spirit Ltd* [2003] ICR 856) may make his judicial decisions unacceptable, but the appearance created by a councillor voting for a planning project he has long supported is, on analysis, to be viewed in a very different way."

128 In his judgment, Rix LJ expressed himself to similar effect in the following terms:

"92. The main reason advanced by Mr Drabble for his actual bias test is that otherwise, if an apparent bias test is applied in this context, it would be too simple to advance from the appearance of predisposition to a conclusion that there was a real possibility of predetermination. Such a test based on appearances would therefore inevitably tend to do less than justice to the very real distinction which has long been recognised in this context between the role of judicial (and quasi-judicial) decision-makers and that of democratically accountable decision-makers. On his side the main reason advanced by Mr Clayton for adopting the test of appearances is the recognition that a finding of actual bias is extremely difficult to achieve (to which he adds the submission that the distinction between judicial and non-judicial decision-makers, at any rate in the context of judicial review as a whole, is a false, old-fashioned and discredited one).

"93. There is force in both points of view, and the jurisprudence taken as a whole supports both. In my judgment, however, it would be better if a single test applied to the whole spectrum of decision-making, as long as it is borne fully in mind that such a test has to be applied in very different circumstances and that those circumstances must have an important and possibly decisive bearing on the outcome.

"94. Thus, there is no escaping the fact that a decision-maker in the planning context is not acting in a judicial or quasi-judicial role but in a situation of democratic accountability. He or she will be subject to the full range of judicial review, but in terms of the concepts of independence and impartiality, which are at the root of the constitutional doctrine of bias, whether under the European Convention for the Protection of Human Rights and Fundamental Freedoms or at common law, there can be no pretence that such democratically accountable decision-makers are intended to be independent and impartial just as if they were judges or quasi-judges. They will have political allegiances, and their politics will involve policies, and these will be known. I refer to the dicta cited at paras 43–52 above. To the extent, therefore in *Georgiou v Enfield London Borough Council* [2004] LGR 497 Richards J seems to have suggested, at paras 30–31, that such decision-makers must be subject to a doctrine of apparent bias just as if they were an auditor in *Porter v Magill* [2002] 2 AC 357, with an obligation therefore of both impartiality and the appearance of impartiality, I would, with respect, consider that he was stating the position in a way that went beyond previous authority and

A was not justified by *Porter v Magill*. I do not intend, however, to suggest that the decision in *Georgiou's* case [2004] LGR 497 was wrong, and it is to be noted that the common ground adoption of the *Porter v Magill* test in *Condron v National Assembly for Wales* [2007] LGR 87 did not prevent this court there reversing the judge on the facts and finding no appearance of predetermination.

B "95. The requirement made of such decision-makers is not, it seems to me, to be impartial but to address the planning issues before them fairly and on their merits, even though they may approach them with a predisposition in favour of one side of the argument or the other. It is noticeable that in the present case no complaint is raised by reference to the merits of the planning issues. The complaint, on the contrary, is essentially as to the timing of the decision in the context of some diffuse

C allegations of political controversy.

"96. So the test would be whether there is an appearance of predetermination in the sense of a mind closed to the planning merits of the decision in question. Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an appearance of the real possibility of

D predetermination or what counts as bias for these purposes. Something more is required, something which goes to the appearance of a predetermined, closed mind in the decision-making itself. I think that Collins J put it will in *R (Island Farm Development Ltd v Bridgend County Borough Council* [2007] LGR 60 when he said, at paras 31–32: '31. The reality is that councillors must be trusted to abide by the rules which the law lays down, namely that, whatever their views, they must

E approach their decision-making with an open mind in the sense that they must have regard to all material considerations and be prepared to change their views if persuaded that they should . . . unless there is positive evidence to show that there was indeed a closed mind, I do not think that prior observations or apparent favouring of a particular decision will suffice to persuade a court to quash the decision. 32. It may be that,

F assuming the *Porter v Magill* test is applicable, the fair-minded and informed observer must be taken to appreciate that predisposition is not predetermination and that councillors can be assumed to be aware of their obligations.'

"97. In context, I interpret Collins J's reference to be 'positive evidence to show that there was indeed a closed mind' as referring to such evidence as would suggest to the fair-minded and informed observer the real

G possibility that the councillor in question had abandoned his obligations, as so understood. Of course, the assessment has to be made by the court, assisted by evidence on both sides, but the test is put in terms of the observer to emphasise the view-point that the court is required to adopt. It need hardly be said that the view-point is not that of the complainant."

H **129** The next case to which the court was referred was *Competition Commission v BAA Ltd* [2011] UKCLR 1. This case concerned an allegation of apparent bias against a member of a Competition Commission panel which was investigating the market in relation to the supply of airport services, based on the fact that that person had provided advice to a pension fund for local authorities who owned an airport. In giving the leading

judgment in the Court of Appeal, with which the other members of the court agreed, Maurice Kay LJ summarised the law on apparent bias in the following way: A

"*The law on apparent bias*

"10. There is no dispute as to the relevant legal principles. In *Porter v Magill* [2002] 2 AC 357 Lord Hope expressed the objective test as follows (at para 103): 'whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.' B

"11. In *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 Lord Hope returned to the attributes of the fair-minded and informed observer. He said (at paras 2–3): 'The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509 para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from that conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult form them to judge the case before them impartially. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.' C D E F

"12. Further elucidation was provided by Richards LJ in *Condron v National Assembly for Wales* [2007] LGR 87 (at para 50): 'the court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision.' G

"13. It is common ground that the question whether, on the facts found by the CAT, apparent bias exists is a question of law: *Giles v Secretary of State for Work and Pensions* [2006] 1 WLR 781, per Lord Hope at paras 2–7. At appellate level, it is for the courts 'to assume a vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias' (*AWG Group Ltd v Morrison* [2006] 1 WLR 1163, per Mummery LJ, at para 20). H

"14. It is also pertinent to keep in mind the words of Lord Bingham in *Locabail (UK) v Bayfield Properties Ltd* [2000] QB 451, 472 that,

because proof of actual bias is very difficult, 'the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring to show that such a bias actually exists.' "

130 Dealing with arguments that notwithstanding the finding that there had been apparent bias nevertheless that apparent bias had no operative affect, Maurice Kay LJ provided the following observations:

"28. The Commission advances two discrete arguments which are susceptible to treatment under this heading. However, I shall leave one of them for separate consideration under the heading *Contamination*, below. Here I confine myself to the submission that any apparent bias after 2 December 2008 was and could have been of no operative effect because by September 2008 BAA had decided to sell Gatwick in any event and had made its decision public. That decision continued and there was indeed a sale to a consortium led by Global Infrastructure Partners, in respect of which contracts were exchanged on 20 October 2009 with completion on 3 December 2009 . . ."

"31. It is important in this regard to keep in mind that we are considering apparent and not actual bias and that, for this purpose, "appearances are not without importance": *R v Abdroikov* [2007] 1 WLR 2679, para 16, per Lord Bingham. I accept Lord Pannick QC's submission that BAA ought not to be put in the position of having to prove operative effect once apparent bias has been established. That would be to blur to distinction between actual and apparent bias. I therefore reject the ground of appeal relating to this aspect of operative effect. I turn next to contamination."

131 Finally in this connection is *Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government* [2016] JPL 1207. That case concerned an appeal decision by the Secretary of State in relation to a wind energy proposal. An inspector following a public inquiry had recommended the grant of planning permission. The Parliamentary Under-Secretary of State, Mr Hopkins, disagreed and concluded that planning permission should be refused. It emerged that there had been correspondence and conversations in the House of Commons tea room between Mr Hopkins, the Secretary of State and the local MP, Mrs Leadsom. In particular, it appeared from subsequent correspondence that the conversation in the tea room had enabled Mrs Leadsom to set out several points in opposition to the proposal. In respect of the tea room conversation, Longmore LJ observed, at para 29:

"Mrs Leadsom's letter following the tea room conversation asserts that she made several points to Mr Hopkins and finishes by saying that she appreciates he cannot comment on individual applications. There is no evidence, however, that Mr Hopkins said he could not listen to what she was saying. For the reasons I have given he ought to have so said and, for my part, I would not endorse that part of the judge's judgment in which he said that lobbying of ministers by MPs was part and parcel of the representative role of a constituency MP with its implication that such lobbying was permissible even when the minister is making a quasi-

judicial decision in relation to a controversial planning application. MPs should not, with respect, be in any different position from other interested parties. Whether the failure of the minister to say (politely) that he could not listen to what Mrs Leadsom had to say constitutes, on the facts of this case, a material breach of the rule of natural justice or gives rise to the appearance of bias is, of course, a somewhat different matter."

132 He concluded that notwithstanding that the tea room conversation should not have occurred and should have been cut off by Mr Hopkins, nevertheless that did not justify the quashing of the decision. He went on to conclude in relation to bias:

"36. Nor do I think it arguable that a well-informed observer would consider that there was a real possibility of bias on the part of Mr Hopkins. The well-informed observer would know that it was the responsibility of the relevant minister to make difficult decisions about controversial projects such as on-shore wind farms. He would also know that sometimes such decisions are, as this one was, finely balanced. He would not think that a minister's decision in favour of a vocal body of local objectors supported by their local MP showed any bias against the promoter of the wind farm project. He would accept that the minister had to make a decision one way or the other and think that the parties should accept the outcome.

"37. Nevertheless, the accusation of bias made in this case shows how important the principle is that ministers making planning decisions should not allow themselves to be lobbied by parties to the planning process or by local MPs. If they do allow it, accusations of bias are all too easily made however unjustified they may be once the proper principles exemplified by *Porter v Magill* [2002] 2 AC 357 are applied."

133 Having reviewed the authorities, it may well be helpful at this stage to distil the principles that are particularly relevant to the considerations in this case. The starting point must be a careful examination of all the facts before the court and not simply those which would have been known to the claimant or a hypothetical onlooker. The test to be applied is whether a fair-minded and informed observer, having considered those facts, would conclude that there was a real possibility of bias on behalf of the decision-maker. The fair-minded observer should be neither unduly suspicious nor complacent. The fair-minded observer would need to be satisfied that the complaints made could be objectively justified as giving rise to a real possibility of bias. In addition, the fair-minded observer will take account of the overall context of the evidence in reaching a conclusion on the available facts. Part of that context will include, in relation to cases involving local government, that members of local authority are democratically accountable and will have political allegiances and policy positions. Thus, it has to be acknowledged that councillors may have a predisposition in relation to a particular decision, but that will not amount to predetermination provided they approach the decision with a mind which is willing to grasp all of the merits to be considered, and which is not closed to making a decision amounting to a departure from their predisposition. In a similar way, as part

of the context of a case involving a government minister, the fair-minded observer will be taken to appreciate that ministers often have difficult and finely balanced decisions to take, and that it does not follow from a decision in favour of, for instance, a vocal body of local residents, that the minister was biased in their favour. Once an allegation of apparent bias has been made out, it is not obviated by the fact the apparent bias has had no operative effect upon the decision under challenge.

134 Turning to questions of fairness it was accepted by Mr Wald on behalf of the claimant in this connection that it would be necessary to demonstrate that not only there had been unfairness but also that the unfairness had itself led to prejudice to his clients. Two cases in particular featured in Mr Wald's submissions. The first was *R v Secretary of State for the Home Department, Ex p Doody* [1994] 1 AC 531 in which Lord Mustill stated, at p 560:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

135 By way of example of the operation of the principles of fairness in a planning context, and in particular in the context of a planning appeal, Mr Wald placed reliance upon the decision of Sullivan J in *Jory v Secretary of State for Transport, Local Government and the Regions* [2003] 1 PLR 54. The case was concerned with the conditions which were imposed on a planning permission granted following an appeal under section 78 of the 1990 Act. It appeared, when the inspector's decision was received by the claimant, and objector, that after the hearing the inspector had sought the views of the appellant and the local planning authority on an alternative form of condition in relation to controlling noise from the use of the premises and had imposed a revised condition without asking the claimant or any other objectors who had participated in the hearing for views.

Sullivan J concluded that there had been unfairness as a consequence of this procedure. He expressed his reasons for doing so as follows:

"25. Mr Coppel accepted on behalf of the Secretary of State that there was an obligation to act fairly. Compliance with the relevant procedural rules would not necessarily be sufficient. He submitted that there was a spectrum rather than a hard and fast dividing line between fair and unfair. It would not invariably be unfair to fail to inform one of the parties to an appeal of some further matter on which the inspector sought views. Much would depend upon the particular circumstances of the case. In deciding whether it was unfair to leave a particular party out of the loop one would consider such matters as the subject matter raised by the inspector; how important or significant it was to the decision that was eventually made; the identity of the persons who had not been involved in the discussions; how directly were they affected; the stage at which further representations were sought; to what extent had the inspector reached a concluded view; the scope given by the inspector to those who were invited to make representations; were they invited to comment upon the matter at large, or were their comments invited upon a particular narrow aspect of the case; what on the evidence might have been the response of the person who had not been included in the further discussions.

"26. These were simply examples of the kind of factors that one should take into account in deciding whether or not the procedure adopted by the inspector in a particular case was at the fair or the unfair end of the spectrum. I am happy to proceed on the basis that there is indeed such a spectrum. What fairness requires is bound to depend upon the circumstances of each particular case. I would further accept that in the great majority of cases it will not been in the least unfair if the inspector decided that it is unnecessary to invite further representations dealing with the precise terms of the conditions which he proposes to impose after the close of an inquiry, a formal hearing or an exchange of written representations.

"27. On the particular facts of this case, however, I am satisfied that it was unfair and for the inspector not to send the claimant a copy of the letter of 15 March 2002 which was sent to the appellant and the local planning authority thereby depriving him of the opportunity to comment on the conditions suggested in that letter.

"28. The particular factors which lead me to this conclusion are as follows. Firstly, unlike many decision letters where conditions are dealt with as a tail piece, after the determining issues have been resolved, the extent to which any harm to the living conditions enjoyed by local residents could be mitigated and controlled by conditions was of central importance in the inspector's reasoning in this particular decision letter. His decision turned on whether extending the appeal building for the uses sought would significantly harm the living conditions enjoyed by local residents (see para 8). Their concern, and that of the local planning authority was intensification (see para 9).

"29. The inspector considered that issue from two stand points. Firstly, the extent to which there could be intensification in the use of the existing building in any event. Secondly, the extent to which conditions

A could mitigate or control any harm to harm to local residents (see para 10).

"30. The inspector resolved the first of those points in para 12, by concluding that if significantly more people were attracted than could potentially use number 63 (or if a reasonable level of activity was exceeded) then the balance would tip in favour of not permitting the rear extensions.

B "31. Having thus resolved the first point, the second point, the extent to which any harm to residents could be mitigated and controlled by conditions, became of critical importance. Indeed, the importance of efficacy of the conditions to be imposed runs like a thread throughout the decision letter. (see in addition to para 14 paras 16, 19 and 20, the relevant parts of which I have set out above).

C "32. Secondly, while some issues raised at planning inquiries or hearing may be of less immediate concern to local residents, this issue was of vital importance of the claimant and his fellow local residents. In these circumstances, although the claimant was not one of those persons who was entitled to appear at the hearing as of right under Rule 9(1) of the Town and Country Planning (Hearing Procedure) (England) Rules 2000 ('the Rules'), it is readily understandable, that he had permitted by the

D inspector appear under rule 9(2)."

136 As set out above, Mr Wald accepted, and it was common ground, that in relation to the allegations of fairness in order for the claimant to succeed it would be necessary for him to establish not only that unfairness had occurred but also that it had caused prejudice to the claimant.

E *Policy and guidance*

137 It will be apparent from what has been set out above in relation to both the facts of the case, and also the grounds upon which it is advanced on behalf of the claimant, that there were elements of the Framework which were in issue in the case. In particular, that part of the Framework addressing the question of LGS designation. Paragraph 77

F of the Framework provides:

"The local green space designation will not be appropriate for most green areas of open space. The designation should only be used:

"• where the green space is in reasonably close proximity to the community it serves;

"• where the green area is demonstrably special to a local community

G and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and

"• where the green area concerned is local in character and is not an extensive tract of land."

138 In addition to the Framework, further material is available in the

H PPG in relation to LGS designation. The PPG provides:

"Paragraph: 013 Reference ID: 37-013-20140306

"What types of green area can be identified as local green space?

"The green area will need to meet the criteria set out in paragraph 77 of the National Planning Policy Framework. Whether to designate land is a

matter for local discretion. For example, green areas could include land where sports pavilions, boating lakes or structures such as war memorials are located, allotments, or urban spaces that provide a tranquil oasis."

"Revision date: [6 March 2014]

"Paragraph: 014 Reference ID: 37-014-20140306

"How close does a local green space need to be to the community it serves?

"The proximity of a local green space to the community it serves will depend on local circumstances, including why the green area is seen as special, but it must be reasonably close. For example, if public access is a key factor, then the site would normally be within easy walking distance of the community served.

"Revision date: [6 March 2014]

"Paragraph: 017 Reference ID: 37-017-20140306

"What about public access?

"Some areas that may be considered for designation as local green space may already have largely unrestricted public access, though even in places like parks there may be some restrictions. However, other land could be considered for designation even if there is no public access (e g green areas which are valued because of their wildlife, historic significance and/or beauty).

"Designation does not in itself confer any rights of public access over what exists at present. Any additional access would be a matter for separate negotiation with land owners, whose legal rights must be respected."

139 Albeit informal, there is guidance in relation to conducting the neighbourhood development plan process published by NPIERS. It will be recalled that NPIERS were the organisation to which the defendant had resort in seeking to recruit an examiner for the neighbourhood plan. So far as relevant that provides:

"*Appointing an independent examiner*

"1. You should be thinking about sourcing an examiner once a draft neighbourhood plan or order has gone through its pre-submission consultation.

"2. If tendering for an independent examiner, make sure that the brief contains the expected outputs as defined by the legislation and legal requirements that an independent examiner must meet.

"3. Many potential examiners will be independent consultants and do not carry high levels of professional indemnity insurance. Be realistic when considering the level of risk associated with an examination.

"4. The LPA [local planning authority] and QB [qualifying body] should be jointly involved in sourcing an independent examiner.

"5. If applying to NPIERS for names of potential examiners, then ideally both the LPA and QB should be involved in completing the application form. The LPA is responsible for making the appointment, but the QB has to agree to it . . ."

"*Preparing for the examination*

"11. Remember, the contract is between the examiner and the LPA. There should be one point of contact when discussing process with the examiner working through the LPA.

A "12. Make sure all documentation demonstrating that all procedural steps have been undertaken is made available at the outset of the examiner's work. The LPA (and QB) should assemble and supply full documentation, background material and evidence. The examiner should not have to request it . . ."

"16. Be clear about who is doing what—LPA/examiner if a hearing is held.

B "17. If an appointed examiner, LPA and QB meet before the examination begins, they should only discuss administrative arrangements including contracting and invoicing, and the logistics of the examination (e g how it is going to proceed and relevant timetables); the merits of a plan or order must not be discussed.

"18. Discuss and agree the council's role at the hearing (if there is one)
C in advance with the qualifying body and the examiner.

"19. Site visits—the default position for an examiner would be to visit the area which is under examination. In order to safeguard the perception as well as the reality of independence of the examiner, site visits will normally be unaccompanied unless the examiner needs to gain specific access: (a) Details of site visits should be covered in the report
D (b) The examiner should only ask factual questions for example to site boundaries if accompanied."

Submissions and conclusions

Ground 1: apparent bias, fairness and ultra vires

140 As has been observed above it has been necessary to set out at
E considerable length the events which preceded the decision to send the neighbourhood plan to referendum as it is the claimant's submission that the totality of this context needs to be evaluated to determine whether or not there has been apparent bias or unfairness in the process. What has been set out above in the narrative of these events does not pretend to comprehensively describe all of the many interchanges and debates which are illustrated in the many thousands of pages of material before the court.
F The narrative is set out to seek to identify the principal pertinent factual matters which bear upon the consideration of whether or not there was apparent bias in this case.

141 By the same token, it is not necessary or proportionate to deal with each and every individual point made by the claimant in relation to their concerns across all the twists and turns during the narrative. A distillation
G must be undertaken for the purposes of analysis. Without wishing to detract from the claimant's submission that the totality of the context needs to be addressed, a number of particular points of concern were particularly focused upon by Mr Wald in the course of his submissions. Those include the following key themes in relation to the events which, in Mr Wald's submissions, built a picture of apparent bias by the defendant in favour of the second interested party and/or unfairness to the claimant. It will be
H noted that they are directed to relationships with both officers and councillors of the defendant. They were:

(a) The early, regular, persistent and private lobbying of officers in relation to arguments pertaining to prematurity, and in particular Mr Peterson's contention that any application made by the claimant or the

first interested party would be premature. This occurred on several occasions starting from June 2014 and was a theme to which Mr Peterson repeatedly returned in correspondence with officers which was not in the public domain. This is a feature also relied upon in the context of fairness.

(b) Again, in correspondence which was not in the public domain, Mr Peterson repeatedly contacted and lobbied the defendant's officers in relation to the need to have access to pre-application correspondence in relation to the first interested party's application for residential planning permission. This again was a matter which was pursued with relentless persistence by Mr Peterson and which was used as a means of pressurising the defendant's officers to be disposed in his favour and further substantiates the allegation of apparent bias made by the claimant.

(c) The removal of Mr Bore from the process of appointing the independent examiner. This event demonstrated Mr Peterson exerting unwarranted and unjustified influence over the defendant leading to a senior officer removing himself from the process in circumstances where such was unwarranted. Allied to this point is the claimant's submission that a further aspect of the apparent bias towards the second interested party in this case is that the defendant's officers never provided their conscientiously held professional views of the merits of the proposal to designate the site as LGS to the examination. They sat on their hands and did not advocate a case on behalf of the defendant that the site did not meet the criteria for designation, which was in fact their view.

(d) The wholly unjustified influence which the second interested party, and in particular Mr Peterson, played in the selection of the examiner. The legislation required them to consent to the examiner's appointment (see paragraph 7(4) of Schedule 4B to the 1990 Act), but what in fact happened on this occasion was that, far from the random process of picking an examiner which had been contemplated by Mr Holgate, Mr Peterson was allowed to dictate the choice of Mr Parmiter, who Mr Peterson believed to be the examiner most sympathetic to the interests of the second interested party. Mr Parmiter was someone who Mr Peterson had previously spoken to, and appeared from the correspondence to be immediately on first name terms with. This issue was further relied upon as a free-standing allegation of illegality, in that it was contended that the process adopted contravened the requirements of paragraph 7(4) of Schedule 4B.

(e) Mr Peterson was again allowed unjustified and inappropriate access to officers when he lobbied them demanding that they desist from preparing the conservation area appraisal until after the neighbourhood plan had run its course. This approach was bound to favour the interests of the second interested party since it would leave the conservation area appraisal which already existed as part of the material considerations for the purposes of the neighbourhood plan. The defendant's surrender of its position through Mr Bore was another example of Mr Peterson exerting undue influence over the defendant and the defendant capitulating to his pressure.

(f) Mr Peterson was allowed unrestrained and illegitimate access to councillors and in particular Councillor Coleridge both in connection with the debate in relation to the petition in April 2015 and also later in the process when the defendant was approaching making its key decision. Access to the councillors through the correspondence described above showed Mr Peterson again exerting relentless and persistent pressure on

councillors including Councillor Coleridge from which he derived considerable advantage. For instance, in the context of the resolution on the petition this pressure secured a resolution that any application by the first interested party "would be considered premature if they were submitted before the examiner had made a decision" and further in the report it was conceded that it would be for the examiner, not the defendant, to decide whether the backland sites were suitable for designation as LGS: this was an erroneous approach since the final decision on the matter rested with the council. As part and parcel of this point Mr Wald emphasised that the false proposition that the question of the LGS status would be decided by the examiner rather than the council was a fallacy which originated with, and had been relentlessly promoted by, Mr Peterson and one which was not debunked until much later on in the process when the key decision report was being prepared.

(g) The correspondence during the course of the examination with the examiner demonstrated, again, Mr Peterson exerting relentless pressure to seek to secure his own way, and constantly interfering so as to meddle with what was supposed to be an independent process. In addition to the familiarity with which Mr Peterson addressed the examiner, and the frequency with which he sought to engage in private correspondence with the examiner, the correspondence showed that, as a result of Mr Peterson being in a "secret race" with the first interested party he was perpetually seeking to hurry the timetable of the process along and seeking to exercise influence in order to accelerate it. This point also applied to some extent prior to the appointment of the examiner. Mr Peterson also sought to influence the agenda for the hearing by, for instance, addressing the examiner on matters which the second interested party wanted including on the agenda but which the examiner had not identified, and seeking to interfere both with those who would be invited to participate in the examination and also the representation (for instance both in respect of the defendant and also the claimant and first interested party) at the examination. He sought to submit documents to the examiner when the examiner's procedure precluded this and in circumstances when he had not been invited to do so. Further, this correspondence with the examiner and the defendant was not in the public domain and the interested party had no notion that it was taking place prior to disclosure. This is another point which is also relied upon in the context of fairness.

(h) In addition to attempting to submit further documentation illegitimately, Mr Peterson also sought to raise the issue about the waste operation on the site after the hearing had closed and without the first interested party having any knowledge that he was privately corresponding with the examiner on this topic. This is another example of both unfair procedure, and also Mr Peterson on behalf of the second interested party bringing wholly illegitimate pressure to bear upon the defendant in order to seek to get his own way.

(i) After the examination had closed, once more it is contended that Mr Peterson exercised persistent and illegitimate pressure on the defendant and the examiner, and was relentless in his campaign to press and plead the case of the second interested party in secret correspondence with the defendant and the examiner. He was allowed access to the examiner's report prior to it being in the public domain, and although he had only been asked to

look at it for factual checking and typographical errors he immediately sought to exceed his brief by attempting to argue the merits with the examiner in respect of certain conclusions which did not go the second interested party's way. The defendant was involved in this correspondence, and yet again the narrative of events in relation to the finalisation of the examiner's report provides further grist to the mill that there was both apparent bias and unfairness in the way in which matters were dealt with.

(j) In respect of the key decision report, as the defendant's officer Ms Parker acknowledged at the time, permitting Mr Peterson on behalf of the second interested party to comment upon the draft report was not a usual procedure. In truth, it was irregular and wholly illegitimate for the second interested party to have access to, and a measure of editorial control over, the key decision report. At the end of the process when the claimant sought to provide an offer of compromise the narrative of events demonstrates that Mr Peterson was again allowed by the defendant to interfere in that process and effectively operate a right of veto in relation to the offer. This is a further example of him exercising wholly illegitimate influence with the defendant providing cogent evidence in support of the claimant's allegation of apparent bias towards the second interested party.

(k) At the end of the process when the claimant sought to provide an offer of compromise the narrative of events demonstrates that Mr Peterson was again allowed by the defendant to interfere in that process and effectively operate a right of veto in relation to the offer. This is a further example of him exercising wholly illegitimate influence with the defendant, again providing cogent evidence of the claimant's allegation of apparent bias towards the second interested party.

(l) The claimant further relies as part of the context on its contention that the defendant was in breach of the duty of candour and failed to provide all of the material documentation at the time of responding to the claim. The claimant relies upon the fact that there was extensive disclosure initially which led to the amendment of the claimant's grounds, and then subsequently, and from the claimant's perspective, most significantly, a vast amount of further documentation was disclosed giving rise to further contentions in respect of apparent bias and fairness which had not earlier been disclosed by the defendant in breach of the duty of candour.

142 In seeking to form a view in relation to the question of whether or not the claimant has established that the defendant was apparently biased towards the second interested party, in my view it is necessary to have regard to the following features which would be part of the context known to the well-informed and fair-minded observer. Firstly, so far as the defendant's officers are concerned, they are public officials who have a responsibility to seek to take account of legitimately expressed interests raised with them by the members of the public who they are employed to serve. It is part and parcel of their role to have a listening ear to representations that are made to them. Of course, from time to time there will be a necessity to turn representations away: they may be representations which are illegal or vexatious. There also may be the need from time to time, akin to the observations of the Court of Appeal in the *Broadview Energy Developments Ltd* case [2016] JPL 1207 in respect of the conduct of the Secretary of State, to politely observe that there is no purpose in making further repetitious representations. None the less, in the context of modern public administration there will be an expectation

A that local government officers will engage with representations which are made to them by all members of the public, since failing to do so may give rise to justifiable complaint.

143 Secondly, in relation to members of the local authority, as is evident from authorities such as *Lewis's* case [2009] 1 WLR 83 and the *Island Farm Development Ltd* case [2007] LGR 60, councillors are politicians and policy
B makers. As democratically elected representatives they are expected to receive and consider representations and lobbying from those interested in the issues they are determining. As Rix LJ observed in *Lewis's* case, at para 96:

> "Evidence of political affiliation or of the adoption of policies towards a planning proposal will not for these purposes by itself amount to an
C appearance of the real possibility of predetermination or what counts as bias."

As he went on to conclude, something more is required, in the sense of the local member having abandoned the obligation at the point of decision-making to address planning issues fairly and on their merits even though the member may have previously expressed a predisposition in relation to that
D decision.

144 Thirdly, the well-informed and fair-minded observer would have an appreciation of the obligation of the defendant under paragraph 3(1) of Schedule 4B to the 1990 Act to "give such advice or assistance to [the second interested party] as, in all the circumstances, they consider appropriate for the purpose of, or in connection with, facilitating the making of proposals for [neighbourhood plans]". Thus, the narrative of events, and in particular
E the defendant's involvement in that narrative, would be understood by the well-informed and fair-minded observer as taking place against the backdrop of the requirement of the defendant to provide advice and assistance to the second interested party in order to facilitate the making of the neighbourhood plan. The duty is expressed in relatively broad terms and in my view was undoubtedly included within the statutory provisions to
F reflect the fact that, firstly, the local planning authority would be well equipped with experienced professional officers to provide a range of expertise to support a qualifying body in the making of its neighbourhood plan and, secondly, to reflect the fact that many qualifying bodies would by stark contrast not have the resources or expertise available to them to produce a neighbourhood plan unassisted. That is not to say that there is anything in paragraph 3(1) which requires the local planning authority to
G support the proposals of a neighbourhood plan come what may, or whatever may be their views of the merits of the neighbourhood plan. It is obvious that the local planning authority has important tasks within the statutory framework in terms of appraising the merits of the neighbourhood plan against the specific tests which are set out in the legislation. The duty to provide "advice or assistance" does not require uncritical and unthinking
H support. What it does require, however, is undoubtedly relatively close engagement with the qualifying body to facilitate the making of the neighbourhood plan.

145 I shall deal with the detail of the specific points of the claimant's case individually below. Having carefully scrutinised the whole of the factual context set out above, together with those particular features

highlighted by the claimant, I have reached the conclusion that there was neither apparent bias nor unfairness in the defendant's involvement in the making of the neighbourhood plan, and in particular the proposal for the LGS designation of the site. In respect of the specific points raised, my conclusions are as follows.

146 In relation to the point at para 141(a) above I am unable to conclude that there is anything untoward either in terms of apparent bias or unfairness in the fact that Mr Peterson engaged from June 2014 in a protracted campaign of seeking to persuade the defendant that any application furnished by the first interested party for the development of the site would be premature. From the early genesis of the preparation of the neighbourhood plan, and its proposals for LGS designation of the site, it was an obvious concern to the second interested party that the granting of planning permission for residential development of the site would frustrate the neighbourhood plan's aspirations. In principle, the appropriate policy approach to address that concern was the objection that proposals for residential development would be premature to the neighbourhood plan's aspirations. I accept Mr Wald's criticisms that from time to time Mr Peterson articulated his representations in a manner which, at least arguably, did not properly reflect a clear understanding of national guidance in this connection. However, that is not the key point. The reality is that bearing in mind the second interested party's interest in preventing residential development of the site, so as to enable it to be designated as LGS, there was nothing inappropriate or untoward in Mr Peterson repeatedly raising this point. All he was doing was legitimately lobbying the council and raising the second interested party's objections. The fact that Mr Peterson did it regularly and repeatedly does not in my view ground or support the overall allegation of apparent bias and unfairness made by the claimant. It has to be accepted that this correspondence occurred in private, and was not the subject of publicity, but that was inevitable given the position in relation to any residential development proposals at the time when the representations were made, prior to a planning application. This was, in reality, routine correspondence between the defendant's officers and an interested local community group for which there was no reason for it to be widely publicised or sent to the claimant or the first interested party for comment.

147 In terms of fairness it is clear from the narrative that at the point in time when the first interested party had to engage with contentions in relation to prematurity, when it made its application, full representations were made in that connection. Those representations were, of course, made some time after the question of prematurity in relation to the residential development of the site was fully in the public domain as a consequence of the petition presented to full council. There is therefore in my view little substance in the claimant's contention about the second interested party's prematurity objections in the context of apparent bias and unfairness.

148 I turn to the point raised at (b) above, namely Mr Peterson's campaign to have access to the pre-application advice which had been provided to the first interested party at a point prior to them submitting a planning application. I accept Mr Wald's submission here, as elsewhere, that the absence of any actual substantive effect as a consequence of Mr Peterson's conduct is not at all dispositive as to whether or not it

provides support for the overarching allegation of apparent bias. As he pointed out in the course of argument, there can be subconscious and subliminal effects arising from the exertion of unremitting and ceaseless harrying of the kind with which he contends Mr Peterson engaged in with respect to particular aspects of the case. This point is addressed further below. Undoubtedly Mr Peterson engaged in persistent complaints in relation to the pre-application advice, undaunted by the defendant's steadfast refusal to furnish the advice to him. All that said, I am not satisfied that the well-informed, fair-minded observer would gain any support from this campaign for the contention that it led to apparent bias by the defendant.

149 Firstly, it was perfectly legitimate for Mr Peterson to pursue this avenue of inquiry, and indeed to seek to exercise his rights in relation to freedom of information requests in respect of the pre-application advice. No doubt here, as elsewhere, Mr Peterson through his dogged pursuit of the point, sought to exert pressure on the defendant to accede to his request. Furthermore, there were in my view aspects of the correspondence prior to and around the application which have to be noted were inappropriate: for instance, Mr Stallwood on 9 September 2014 tipping Mr Peterson off that the defendant had received a request for advice and responded to it, a disclosure which his own e-mail acknowledged he should not have been making. In addition, it was plainly inappropriate that the e-mail of 28 May 2015 sent by Mr Peterson containing a number of what were in reality objections to the planning application should, at his behest, have been passed to the case officer without being placed on the public planning file. These were, however, in my view isolated aberrations and incapable of providing any significant strength to the claimant's allegations. To reiterate: Mr Peterson's albeit protracted and persistent campaign in relation to seeking access to the pre-application correspondence was a legitimate campaign and not one giving rise to apparent bias.

150 The third issue which was the particular focus of the claimant's contentions, at para 141(c) above, was the removal from the process of selecting the examiner of Mr Bore. The claimant contends this again is part of the picture demonstrating apparent bias on the part of the defendant. The insistent harassing by Mr Peterson led to Mr Bore withdrawing from the process and Mr Peterson getting his own way in relation to this issue in circumstances where there was no sensible reason for Mr Bore to withdraw. Having considered the evidence in this respect, I am unpersuaded that in fact this episode is legitimately an ingredient in the claimant's apparent bias case. It appears to me clear from the correspondence that what in fact occurred was that Mr Bore, in the light of the dispute between him and Mr Peterson and so as to assist in the smooth running of the selection of the examiner, simply decided to hand the task on to Mr Holgate. No doubt Mr Bore was alive to the role that the second interested party would have to take in the process of selecting the examiner pursuant to paragraph 7(4) of Schedule 4B and, bearing in mind his strained relationship with Mr Peterson, stepped aside to facilitate that process. I do not consider that the well-informed, fair-minded observer would detect any real possibility of bias in what occurred.

151 The question of the volte face relied upon by the claimant is dealt with in greater detail below. However, in relation to the claimant's submission that it was an aspect of apparent bias that the officers of the

defendant did not express their genuine professional view of the proposal to designate the site LGS to the examination, it is important in my view to bear in mind that the position of the officers at the examination followed on from the receipt by the defendant's full council meeting of the petition. The response to that petition which came from the officer's report on the petition and was endorsed by members, was that it would be for the examiner to resolve the question of whether or not the designation was justified. That was, in the light of the arguments which had been presented both for and against designation, a reasonable approach to take bearing in mind the process of independent scrutiny which the neighbourhood plan had to undergo. In the circumstances, therefore, there is no substance in the contention that this was further evidence of the defendant's apparent bias towards the second interested party. The approach to the presentation of the defendant's position at the examination flowed from the position which had been taken in correspondence on 24 February 2015 and also in response to the petition, which was undoubtedly grounded in the fact that the designation was the second interested party's proposal and that the examiner would have presented to him and have to consider both sides of the argument in relation to it before forming a conclusion. I do not consider that the fair-minded and well-informed observer would conclude from this that there was substance in the complaint of a real possibility of bias on the part of the defendant.

152 I move then to the concerns expressed in relation to the role Mr Peterson then played in the selection of the examiner: see para 141(d) above. It is, for the reasons which have been set out above, beyond argument that the second interested party and their representative Mr Peterson necessarily had a role to play in the selection of the examiner. True it is that once the co-ordinating role had been passed to Mr Holgate his initial response was that he proposed to pick one of the suitable candidates at random. However, in my view there was nothing untoward about the selection process which then emerged and which departed from this suggested approach. Firstly, the process followed and deployed the NPIERS service so as to enable the selection of three potential candidates. Having identified three possible examiners I see nothing inappropriate in Mr Peterson providing views as to who of the three might be the most suitable nor in the fact that he was influenced in his selection by the workshop which he had attended with Ms Hammond in May 2015. The observations which Mr Peterson provided on 9 June 2015 were a sequence of reasonable points about why Mr Parmiter might be the most appropriate candidate; and I see nothing untoward in his observation that Mr Parmiter might be a person with whom the second interested party could work. Whilst it is surprising that Ms Hammond endorsed the appointment without having seen the CVs for all of the candidates I am not satisfied that that is a matter of any real significance in this connection. Again, I have formed the view that ultimately the well-informed and fair-minded observer would not detect any element of apparent bias in the process which was involved in selecting Mr Parmiter as the examiner.

153 Furthermore, I do not consider that there is any substance in the complaint that the selection of the examiner occurred deploying a process which was in breach of the requirements of paragraph 7(4) of Schedule 4B. It is clear from the legislative provisions that the qualifying body, in this case

A the second interested party, has a role to play in the selection of the examiner. They have to consent to the appointment of the examiner. I can see good sense in engaging the qualifying body, as occurred here, in the examiner selection process so as to ensure that they consent to the individual who emerges from the selection process. I am satisfied that the examiner was selected in this case in accordance with a lawful process.

B **154** The next matter upon which the claimant places detailed reliance is the postponement of the preparation of the conservation area appraisal: see para 141(e) above. This was a further matter addressed in Mr Bore's e-mail of 12 March 2015 at the same time as him handing on the appointment of the examiner to Mr Holgate. To my mind the well-informed and fair-minded observer, taking the totality of the correspondence on this issue into account, would derive the conclusion that there was a balance of arguments C presented both in favour and against postponing consultation upon the conservation area appraisal until after the receipt of the findings and conclusions of the neighbourhood plan examiner. As at one point was observed by the defendant's officers, the neighbourhood plan would only touch on elements of the conservation area appraisal and there was a clear need for the existing appraisal to be updated. On the other hand, as Mr Peterson observed, there was a danger of work being duplicated as there D was an obvious overlap between the merits of the proposals of the emerging neighbourhood plan and the judgments which would have to be reached in the conservation area appraisal. Again, I do not consider that the well-informed fair-minded observer would detect the appearance of bias from Mr Bore's decision to postpone the conservation area appraisal, and accede to Mr Peterson's perspective on this point, on 12 March 2015. A decision E had to be reached on the competing views and he brought the matter to a head in that correspondence. I do not consider therefore that this point materially assists the claimant's case.

155 I should note before departing from this point that the defendant put in a detailed witness statement from Ms Hammond seeking to explain the rationale for the decision. That witness statement was objected to by Mr Wald on behalf of the claimant on the basis that it was ex post facto F reasoning and that, in any event, he was not pursing a rationality challenge in relation to the decision to postpone the conservation area appraisal process itself. It will be apparent from what I have set out above that I have reached my decision on this point without the need to refer to Ms Hammond's witness statement and have not therefore taken account of it in arriving at my conclusions.

G **156** As set out above in para 141(f), the claimant emphasised as part of the apparent bias and fairness case the lobbying of both local ward members and also Councillor Coleridge at various stages of the process. In particular, local ward members were lobbied immediately prior to the local elections in relation to their attitude to the proposals of the neighbourhood plan by Mr Peterson, and Mr Peterson was in close dialogue with councillors including Councillor Coleridge and Councillor Feilding-Mellon in relation to H the petition which was presented to the defendant. Further lobbying occurred in the context of the key-decision report with Councillor Coleridge, who was responsible for that decision.

157 Having examined the narrative in relation to the contact between Mr Peterson and both local members and Councillor Coleridge I do not

consider that there was anything untoward or which might support the claimant's case in relation to apparent bias in these events. Establishing the position of candidates in the local election in relation to the neighbourhood plan immediately prior to the poll (including making plain that one's vote depends upon their attitude to particular issues about which they are being lobbied) is simply part and parcel of the democratic process. There could be no better time to establish the opinions of those seeking to be local representatives than at the point in time when they are standing for election and the poll is imminent. Similarly, I see nothing to support the claimant's case in the lobbying of Councillor Coleridge, either at the time of the petition and the meeting of full council or at the later stage of the key decision report. It is clear from the correspondence that Councillor Coleridge was circumspect about the suggestion of some kind of cross-party initiative at the time of the petition. It was part and parcel of the political process that he should agree to meeting Mr Peterson so as to receive representations from him. There is no suggestion here that Councillor Coleridge was not open to consider all representations that might be made by those interested in the petition if they were furnished to him. In my view, it is important that local councillors, including those in leading roles within the council, remain open to receiving representations and evidence in respect of the decisions which they are charged to make.

158 Once again it appears to me that there was nothing inappropriate in Mr Peterson making representations to Councillor Coleridge after the receipt of the examiner's report and at the time of the preparation of the key decision report and setting out his case that the examiner's conclusions should be supported. This again is all, in my view, part and parcel of effective local government. As Mr Phillpot on behalf of the defendant pointed out, in a similar vein on 7 December 2015 the first interested party's planning consultants wrote to Councillor Coleridge also making their counter representations to him in respect of the examiner's conclusions. Again, that was a perfectly proper course for them to have taken. I see nothing, therefore, which supports the claimant's case in any of the communications set out above in the narrative of events occurring between Mr Peterson and a range of local councillors including ward councillors, Councillor Coleridge and other councillors with a leadership role. All of these representations were made with the legitimate end of seeking to advocate a particular outcome in relation to democratic decision-making processes, and would have been regarded as such by the well-informed, fair-minded observer.

159 As set out above part of the claimant's case in relation to these issues (at para 141(g) and (h)) relates to the correspondence between Mr Peterson and the examiner and officers of the defendant in relation to the running of the examination. Starting from the position that it is contended Mr Peterson is immediately overly familiar with the examiner, the claimant then draws attention to the persistent interference from Mr Peterson with the content and the organisation of the examination process. It is contended that he illegitimately sought to interfere with the agenda of the examination, inappropriately meddled both in the issues as to who was to appear at the hearing for the examination and issues pertaining to representation and hot seating, and further that he sought to submit documents as it were via the

back door, at a time when the examiner had specifically concluded that no further documentation was to be provided to the examination.

160 When these concerns are analysed I find myself quite unpersuaded that they are capable of supporting an allegation of apparent bias against the defendant. Indeed, perhaps, they point to the contrary. An important part of the context of the claimant's submissions in this connection must be, as Mr Phillpot was astute to emphasise, that there is quite properly no allegation of bias levelled against Mr Parmiter the examiner. There can be no doubt but that from time to time Mr Peterson sought, whether naively or otherwise, to push the boundaries, in particular in seeking to exercise control over the hearing element of the examination process. Examples of this include when he sought to suggest to the examiner the expansion of the topics which should be on the agenda for the hearing, and when he sought to submit further viability work at a time when the examiner had made plain that there would be no submission of any further documentation. The fact that he made these and other attempts to control or take advantage of his position in the examination process does not in and of itself in my judgment support any allegation of apparent bias. There will always be occasions where participants in administrative processes of this kind will seek to take tactical advantage. What is interesting and of importance in my view is that on each of the occasions where Mr Peterson sought to behave in this way the examiner politely and firmly refused to accede to Mr Peterson's requests. The conduct of the examiner in this respect in the main demonstrated independence, impartiality and, where necessary, robustness. The examiner, having behaved perfectly properly, it is difficult to see how these exchanges could give rise to concern about apparent bias on behalf of the defendant, who observed this behaviour and the examiner's firm treatment of it.

161 It could be said that the examiner afforded Mr Peterson too much latitude in allowing him to continue to make procedural and substantive representations to him. I have no doubt that the interests of transparency in the process would have been better served by all correspondence from all parties with the examiner being open and available, for example, on a convenient associated website. However, both of these matters are in my view related to good practice, rather than giving rise to any substantive concern about apparent bias. For the reasons which I have given I am satisfied that the well-informed, fair-minded observer examining the totality of the correspondence exchanged between Mr Peterson, the defendant and the examiner during the course of the examination process up to the receipt of the report would not consider that it demonstrated a real possibility of bias in favour of Mr Peterson and the second interested party.

162 A further aspect of the claimant's case in this respect is the contention that Mr Peterson was engaged in a "secret race" and used privileged access afforded to him by the defendant (fostering the allegation of apparent bias) to hurry along the timetable for the making of the neighbourhood plan. It is undoubtedly the case that Mr Peterson was keen to urge the defendant to progress the neighbourhood plan and regularly expressed his impatience and frustration at what he considered to be the slow pace at which it was proceeding. Once more, the context of the claimant's contentions is important. Whilst Mr Wald described what was occurring as a "secret race" the truth is that both the claimant and first interested party and also the second interested party were fully aware of the importance of time

scales in relation to their competing projects. The only secret dimension was that Mr Peterson was, in correspondence with the defendant, seeking to chase progress with the neighbourhood plan and that correspondence was not in the public domain. I do not consider that the fair-minded and well-informed observer would form the view that Mr Peterson's determined and persistent efforts to expedite the neighbourhood plan process was evidence giving rise to the real possibility of bias on the part of the defendant. In my view all that it evidences is Mr Peterson, on behalf of the second interested party, diligently pursuing their interest in having the plan made and its proposals part of the development plan. Here, and in relation to Mr Peterson's persistent engagement in correspondence elsewhere in the narrative, I do not accept that his approach created subconscious pressure or through attrition, corroded the defendant's will-power so to give rise to the real possibility of bias. In my view the well-informed and fair-minded observer, examining the narrative as a whole, would conclude that this was the type of campaigning behaviour that experienced local government officers of the kind involved here were used to dealing with, retaining their objectivity in respect of the issues. Indeed, the only real evidence of any exception to their even-handed approach is on the occasions when they become obviously irritated (as opposed to cowed) by Mr Peterson's approach.

163 A particular dimension of the claimant's concerns in this regard is the correspondence which occurred after the hearing, and privately, in relation to Mr McGurk's contention at the hearing that the site had been used by the defendant as part of a waste recycling operation. This correspondence from Mr Peterson on 30 September 2015, which was directed at the defendant, had the examiner copied into it. It is unfortunate that the examiner did not respond directly to this e-mail indicating that the hearing had closed and that there was no basis for receiving any further representations. Nevertheless, in my view, the well-informed and fair-minded observer would not conclude from Mr Peterson's inappropriate e-mail that there was the real possibility of bias on behalf of the defendant towards the second interested party. It was an irregularity at most and nothing more. Mr Peterson's perpetration of this irregularity, which probably required dealing with robustly, was a further example of Mr Peterson's energy and persistence. The failure to deal with his intervention robustly does not bespeak apparent bias on the part of the defendant.

164 The next matter relied upon by the claimant, at para 141(i) above, was the access afforded to Mr Peterson on behalf of the second interested party to the examiner's report. The claimant's case is that whilst it is entirely appropriate for an examiner to pass to the local planning authority the draft report following an examination for them to fact check and proof read, it is a clear example of the preferential treatment afforded to Mr Peterson, and therefore apparent bias, that he was also allowed the opportunity to proof read and fact check the examiner's report. Furthermore, Mr Peterson in any event exceeded the brief which he had been given when for instance on 13, 15 and 18 October 2015 he wrote to the examiner providing substantive observations on the draft report which exceeded any proof-reading or fact-checking exercise.

165 The claimant's submissions in this connection are correct so far as they go. However, the well-informed and fair-minded observer would, of necessity, examine the totality of the correspondence at this time which has

been set out above. It is clear that in reality both that the second interested party and the defendant engaged in commentary upon the draft report which exceeded the requirements of the examiner, and ultimately on 23 November 2015 the examiner had to call a halt to this discussion so as to complete his report. In my view, it is not possible to deduce any apparent bias of the defendant in favour of Mr Peterson from this correspondence; in fact in some respects it appears that the defendant and Mr Peterson had adopted oppositional positions in relation to aspects of the report which the examiner had to resolve. I cannot therefore conclude that this part of the case provides any material support to the claimant's contentions in relation to apparent bias.

166 In a similar vein, at para 141(j) above, the claimant places reliance upon the access which the defendant afforded to Mr Peterson to both the key decision report and also the briefing which was to be provided to members about the outcome of the examination. Emphasis is placed by Mr Wald upon the observation of Ms Parker that this procedure, in particular in relation to the key decision report, was one which was irregular and not the defendant's usual practice. The claimant contends that that is, again, Mr Peterson being afforded preferential treatment and special access to the defendant's procedures which demonstrates a clearly established allegation of apparent bias against the defendant.

167 In my view, the well-informed and fair-minded observer would take note of the particular context in which this issue arises, namely that it is the second interested party's neighbourhood plan (which has by this time been subject to an independent statutory process) which is the subject matter of the briefing note and the key decision report. Whilst ultimately the decision as to whether or not the neighbourhood plan should proceed to referendum and the examiner's conclusions be endorsed was a matter for the defendant (an issue to which I shall return shortly), I am satisfied that the well-informed and fair-minded observer would perceive no difficulty or objection in principle to the second interested party being consulted upon and permitted to comment about both of these documents. Bearing in mind that the neighbourhood plan was the fruit of the second interested party's labours as a qualifying body, it had a particular interest in the defendant's response to the examiner's report which justified the engagement of the second interested party in considering the draft of these documents. Their involvement in the process does not therefore give rise to any support to the claimant's concerns in respect of apparent bias.

168 A dimension of the claimant's case which it is worthwhile to pick up at this stage is the point which is made about Mr Peterson apparently persuading the defendant's officers and also Councillor Coleridge that it was for the examiner, and not the defendant, to determine whether or not the LGS designation on the site was appropriate. This was a consequence of Mr Peterson perpetually repeating this refrain as part of the extensive correspondence he which had with the defendant's officers and Councillor Coleridge. The fact that they acceded to this flawed proposition for as long as they did is relied upon by the claimant as another instance of apparent bias toward the second interested party on the basis that the faulty proposition was accepted without scrutiny or examination.

169 Even accepting that the defendant up until the time of the preparation of the key decision report appeared to accept Mr Peterson's

submission in this respect without critical scrutiny, I am unable to accept that that alone is capable of supporting an allegation of apparent bias. Even allowing for the fact that the defendant was misled by Mr Peterson on this particular issue pertaining to the making of the neighbourhood plan, I am not persuaded that the well-informed and fair-minded observer would take their having been misled on this issue as evidence of the real possibility of bias towards Mr Peterson and the second interested party. Again, the question has to be placed in context. There were many other representations made by Mr Peterson which the defendant roundly rejected. In my view, the well-informed and fair-minded observer would simply perceive this point as one of the many issues in the to and fro between Mr Peterson and the defendant's officers and members, and not something which specifically supported the claimant's contention of apparent bias when placed in the context of the narrative as a whole.

170 It is necessary now to turn to the matters raised at para 141(k), namely what the claimant characterises as the veto of the offer put forward by the claimant as a compromise proposal after the receipt of the examiner's report. I can deal with these submissions relatively briefly. In my view the well-informed and fair-minded observer would observe as follows. Firstly, when this offer was received the defendant went through an appropriate procedure of consultation in respect of the proposal. This occurred firstly with the chair of the PRSC, and secondly with Mr Peterson on behalf of the second interested party. Secondly, this offer was being considered at a time when the second interested party had persuaded the examiner of the merits of their proposal to designate the site as LGS. It was unsurprising given that this was the state of play that the second interested party had little interest in the proposal, and that in the light of this the chair of the PRSC did not consider it appropriate for the proposal to be presented to the PRSC meeting. In that the offer arose at a time when the question of the suitability of the site for designation had been independently determined against the claimant and the first interested party, I do not consider that the well-informed and fair-minded observer would be surprised either that the second interested party rejected it or, more pertinently, that the defendant did not consider that there was anything to be gained by exploring it further. It arose too late in the process to be realistically meaningful.

171 Finally, the claimant relies in this part of the case upon its contention that the defendant failed to comply with the duty of candour. In essence, the claimant, reliant upon the observations of Laws LJ in *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 as giving support to their contentions that apparent bias and unfairness have arisen in the present case. In developing his submissions in this connection, Mr Wald drew attention not only to the volume of material which was produced in between the two hearings in this case as evidence of failure to comply with the duty of candour, but also to the fact that many of the documents which had been produced were authored by individuals who were already part of the dramatis personae in the case.

172 In response to these submissions Mr Phillpot essentially contends that the point is academic if the allegations in relation to apparent bias are, on the totality of the material, unfounded. Furthermore, he submits that the claimant's case has evolved, for instance in relation to reliance upon requests

for pre-application advice and the point in relation to the defendant's power in respect of the conclusions of the examiner's report, and that these are both matters which arose late in the litigation giving rise at that stage, but not before, to the need for further disclosure.

173 It will be apparent from the reasons which have already been provided that I am not persuaded that there is substance in the claimant's allegation that the defendant was apparently biased toward the second interested party. Thus, there is force in Mr Phillpot's submission that this contention could not in any event and independently provide support for the claimant's case. The claimant has not established any element of apparent bias on the basis of all the material now disclosed: even if the later disclosure occurred following an earlier breach of the duty of candour, that takes the claimant's case no further forward it now being accepted that the duty of candour has been satisfied. None the less, I offer some observations in respect of this issue.

174 Firstly, Mr Wald is entirely correct to observe that the duty of candour is a continuous duty. Secondly, I have some sympathy for the position of the defendant in this sense. The ease and convenience of modern communication (in particular via e-mail) creates considerable difficulties for disclosure when, as in the present case, many hundreds of e-mails are generated in a relatively short period of time and the sheer volume of material renders the task of sorting the wheat from the chaff obviously problematic. I have no doubt that the production of a significant quantity of further documentation did not arise from any deliberate breach of the duty of candour or failure of the defendant to seek to conscientiously provide all of the material relevant to the issues in the case. There is force in Mr Phillpot's submissions that aspects of the claimant's case emerged during the course of the litigation and as such there is limited scope for criticism of the defendant. Overall, I am not persuaded that there was a breach of the duty of candour in this case, or that there is anything in the conduct of the defendant in relation to disclosure which would justify the drawing of inferences, including adverse inferences, in respect of the substantive issues in the case.

175 I have reached the conclusion, having considered the totality of the narrative of events in this case and all of the correspondence and documentation relevant to what occurred, that there is no substance in the contention of the claimant that the defendant was apparently biased toward the second interested party taking the overall context into account, and also bearing in mind the particular features of the narrative which I have set out above upon which reliance is placed.

176 I turn then to the issues of fairness raised by the claimant reliant upon both the generality of the process of making of the neighbourhood plan, and also the relevant specific features set out above. In essence, the contention of the claimant is that the second interested party through Mr Peterson was regularly and repeatedly afforded privileged access in private to the defendant and able to make extensive representations on a variety of issues, such as prematurity, the merits of the LGS designation, the postponement of the conservation area appraisal process as well as access to important preparatory documents such as the examiner's report and the key decision report without the claimant having any opportunity to address the submissions which were being made by Mr Peterson adverse to the

claimant's interests and respond to them putting their own point of view. The procedure which was adopted both in the context of the preparation of the neighbourhood plan and the examination along with the final stages of the key decision report all involved aspects of unfairness to the interests of the claimant.

177 As Mr Wald accepted during the course of argument, in essence the claimant relies upon points raised in relation to apparent bias in the context of fairness. For the reasons set out above, in my view the specific features of the case relied upon by the claimant are no more supportive of contentions in relation to fairness than they are to apparent bias. I would, however, offer these further observations in relation to the particular fairness dimensions upon which the claimant relied.

178 Firstly, there was no unfairness in principle in Mr Peterson corresponding with the defendant on behalf of the second interested party in relation to issues of prematurity in respect of any planning application which might be made at the site for housing bearing in mind its interests in promoting the neighbourhood plan. As I have indicated above, it was perfectly proper for the defendant to receive those representations, and in my view the requirements of fairness, at the stage when there was no application for planning permission at the site, did not require that correspondence to be forwarded to the claimant or the first interested party for comment.

179 Neither Mr Peterson, nor the second interested party, on a comprehensive analysis of the correspondence enjoyed any special or privileged status, or had any privileged access, beyond that which necessarily arose from the second interested party's status as a qualifying body promoting a neighbourhood plan. Bearing in mind the requirements of paragraph 3(1) of Schedule 4B to the 1990 Act and the second interested party's status it was unsurprising and certainly not unfair that they should be in regular dialogue with the defendant in respect of promoting the plan, and fairness did not require that that dialogue prior to the examination should be in the public domain affording the claimant the opportunity to comment upon it. As indicated above, and as a matter of transparency and good practice, it seems to me that it would have been desirable for all correspondence with the examiner to have been undertaken openly, so that all those interested in the neighbourhood plan could understand the nature of the communication between the examiner, the defendant and the second interested party. However, the fact that the correspondence was not in the public domain was not in my view, in principle, unfair.

180 In any event, as Mr Wald has to accept, it is necessary for him to show prejudice to his client's interest as a consequence of any unfairness. There is no prejudice which could be demonstrated from Mr Peterson's correspondence during the course of the examination with the examiner and the defendant, since as will be evident from the narrative of events, the examiner dealt firmly with those occasions when Mr Peterson sought to exceed the proper limits of his involvement with the process and, for instance, rejected the submission of any further documentation at a time when no further documentation could be admitted. Whilst, as I have set out above,it was unfortunate that in my view the examiner did not deal more firmly with Mr Peterson's correspondence in relation to the suggestions

about a waste recycling operation at the site, as will be apparent from the narrative of events again no prejudice arose from Mr Peterson raising this issue nor was that issue in any way engaged in the examiner's conclusions.

181 I have also expressed concerns above in relation to the defendant receiving correspondence in the context of the first interested party's planning application which was not placed on the planning file but nevertheless passed to the case officer. However, again, it is not possible for the claimant to demonstrate any unfairness arising from that event in the circumstance that the planning application was withdrawn, and the issues raised by Mr Peterson in that connection were essentially irrelevant to the conclusions of the examiner and the outcome of the key decision.

182 It was not unfair in principle in my view for Mr Peterson, on behalf of the second interested party, to lobby members of the defendant including Councillor Coleridge in the manner and circumstances which have been set out above. This lobbying is part and parcel of the democratic process. Indeed it was a procedure which was, as I have set out above, adopted by the first interested party on 7 December 2015.

183 Overall, therefore, I do not consider that the procedure throughout the making of the neighbourhood plan up to the decision of the defendant to send the neighbourhood plan to referendum involved any unfairness to the claimant's interests. In particular, at the key points of the decision-making process, namely the examination of the neighbourhood plan and the key decision following the receipt of the examiner's report, the claimant was afforded, and took, a full opportunity to engage in the merits of the proposal to designate the site as LGS and make their representations that this proposal was misconceived in planning terms.

184 On the basis of the matters which I have set out above, I am ultimately unable to accept that there is substance in the claimant's ground 1.

Ground 2: the correct interpretation of paragraph 77 of the Framework

185 The claimant's contention in relation to ground 2 is articulated in two ways. Firstly, it is submitted that the examiner misinterpreted paragraph 77 of the Framework when applying it to the site. The claimant's submission is that when the Framework sets out the three bullet points at paragraph 77, the first bullet point includes a requirement that the green space must be found to currently serve the community. It was the claimant's contention that the site did not at the time of the examination "serve" the local community in any way at all. They had no access to it and it had a very limited visual envelope. As such therefore, on the basis of the claimant's interpretation of paragraph 77 of the Framework, the site could not fulfil the criteria. Secondly, the claimant contends that the reasons given by the examiner are not adequate. They do not address the impact of the actual use of the land at the time involving skips, shipping containers, pallets, building materials and other debris dumped upon it. The examiner failed to properly address these considerations or provide reasons in relation to them.

186 The defendant's response to this submission is that there is no separate and distinct test proposed by the use of the word "serves" in the first bullet point of paragraph 77. The bullet points are intended to be read and applied together and there will necessarily be an element of overlap between

each of the bullet points. What the word "serves" is cross-referring to is how the green space serves the community by being "demonstrably special" in one of the ways illustrated in the non-exhaustive list of the second bullet point. Thus, the focus of the first bullet point is "close proximity", and the use of the word "serves" introduces the requirement that the green space is "demonstrably special" by reference to examples of qualities and characteristics which it may enjoy and which are of benefit to the community. The defendant submits that once paragraph 77 is understood in that way, the reasons provided by the examiner are perfectly adequate.

187 Having considered these submissions, in my view the interpretation of paragraph 77 of the Framework suggested by the defendant's submissions and which was plainly deployed by the examiner is the interpretation which is to be preferred. I can see no justification for having, in effect, a separate and free-standing requirement that the land "serves" the local community, other than by being "demonstrably special" and holding "a particular significance" for the local community in the manner required by the second bullet point. In my view, read in the context of the policy as a whole, the word "serves" operates in this way, and I see no justification for reading it more widely to create a requirement that the open space "serves" the local community in a free-standing manner beyond the question of being "demonstrably special" and holding "a particular local significance". This interpretation is in my view, clearly more consistent with the purpose of the policy than the claimant's construction. Furthermore, as Mr Phillpot on behalf of the defendant pointed out, it also reflects the approach of the PPG which reflects the interrelationship and overlap of the bullet points of paragraph 77 when addressing the question of proximity and observing: "the proximity of the local green space to the community it serves will depend on local circumstances, including why the green area is seen as special, but it must be reasonably close." I am unable therefore to accept the submission that the examiner misinterpreted paragraph 77.

188 Having identified the correct interpretation of paragraph 77, I am equally not persuaded that the reasons provided by the examiner were inadequate. Indeed, in my view the reasons provided by the examiner arguably went beyond that which was necessarily required of him as a matter of law. That cannot, of course, amount to any criticism of them. Indeed, the fuller reasons make clear to the reader not only the opposing contentions which the examiner had to address, but also make clear the findings which he reached against the background of those competing arguments. Within the report the examiner set out the qualities in terms of views, nature and conservation value and historical significance, all of which were relevant to the application of paragraph 77, and all of which explain his conclusion that he was satisfied the site was "demonstrably special" to the local community and held a particular significance for them. In reaching those conclusions it is clear that he took account of the present condition of the site in so far as its current use had impacted upon its visual amenity value. After taking account of those matters they did not deter him from his overall conclusion.

189 Having identified the qualities of the site which made it "demonstrably special" and of "particular local significance" for the local community that, in accordance with the interpretation of paragraph 77 as I have set out above, provided the manner in which it served the local

community, leaving in terms of the first bullet point only a judgment necessary as to whether or not the site was in proximity to that local community, a proposition which could not have seriously been contested. Thus I am satisfied that the examiner's reasons were clear and adequate, and further that the conclusions which he reached were arrived at following a proper interpretation of paragraph 77 of the Framework.

Ground 3: the volte-face

190 Under this heading it will be recalled that the claimant contends that the defendant has failed to provide any adequate basis for the change in view which it undertook in reaching the conclusion that the neighbourhood plan should progress to a referendum. On behalf of the claimant, Mr Wald focuses upon the fact that it is clear from the documentation that Mr Bore and other officers of the defendant appear both at the start of the neighbourhood plan process, and indeed through until the examination hearing, to hold the opinion that the designation of the site was not capable of being supported. Their professional judgment was that the requirements of paragraph 77 of the Framework could not be met by the site. Notwithstanding this, the defendant chose to remain neutral at the examination and not argue their corner that the designation was not justified. The officers then proceeded to endorse the conclusion of the examiner and prepare a report favourable to the designation leading to the resolution to send the neighbourhood plan to referendum. No reasons have ever been provided to explain this approach to the examination and the key decision.

191 It is undoubtedly true that the opinion of the officers of the defendant appears to have been adverse to the designation of the site as LGS from the inception of the proposal through to the conclusion of the examination hearing. The evidence for that is contained, for instance, within the e-mails sent by Mr Bore and other officers of the defendant expressing their concern that the designation of the site as LGS was not justified. It will be recalled that after the examination Ms Parker asked Ms Hammond and Mr Wade on 25 September 2015 how the examination had gone, and Ms Hammond expressed her view that she would be amazed if the examiner found the justification for designating the site as LGS made out. That said, there was nothing in my view unlawful about the approach of the defendant's officers to this issue. After all, the views of the officers were no secret when on 15 April 2015, in the report in respect of the petition before the defendant, the officers' views were recorded as being that the site was unlikely to meet the criteria for designation. Furthermore, the position which that report, under the hand of Mr Bore, took was that it would be for the examiner to scrutinise and decide upon whether or not the designation was justified. That was in my view a legitimate approach for the council to take following the receipt of the petition and its consideration. It was foreshadowed by Mr Wade on 24 February 2015 when he adopted this approach on the basis that the examiner would hear both sides of the questions as part and parcel of the examination. Clearly, after the examiner had considered that question it would then be for the defendant to consider the matter in the light of the conclusion which the examiner had reached, and that is what occurred in the key decision report.

192 By the time that the key decision report came to be written, there were a number of new material considerations which needed to feature in the assessment of whether or not the plan could proceed in its modified form following the examination to a referendum. First and foremost, there were the conclusions of the examiner that the site met the criteria for designation. Having scrutinised ground 2, I am satisfied that there was no error of law in the examiner's approach which might have thereafter infected the defendant's decision-making process upon which it was based. Thus, the examiner's report was an important material consideration in support of the designation which the defendant was obliged to take into account. Furthermore, and related to the examiner's report, there were the observations provided by Historic England in relation to the historic significance of the site. These two factors featured in the key decision report at para 4.4 as part and parcel of the justification for the defendant forming the conclusion that they were satisfied that the basic conditions had been met (subject to the examiner's recommended changes) and that having met all the necessary legal requirements the neighbourhood plan should proceed to referendum.

193 In my view, both of those factors, namely the emergence of the views of Historic England and the receipt of the examiner's report, were perfectly clear and sensible reasons underpinning the key decision. I do not share the claimant's concerns in relation to the relevance of Historic England's consultation response, which bore directly upon the question of whether the site was "demonstrably special" in a relevant respect. The claimant was also critical of a third reason relied upon in the key decision report by the defendant, namely the extent of local concern in respect of the site evidenced by the submission of the petition. Again, I do not accept the claimant's contention that this level of local concern was irrelevant to the considerations material to the key decision. Of course, planning is not a popularity contest. However, in the context of this particular policy, which seeks to examine whether or not an open space holds a particular local significance and is demonstrably special to a local community, the extent of the community sharing a commonly held view as to the reasons why it is "demonstrably special" is in my view obviously material to assessing the extent to which the requirements of the policy have been met. It will be recalled that the petition which was submitted to the council on 7 January 2015 related specifically to the proposals of the neighbourhood plan and supported the LGS designation, as the petitioners believed that the site's designation was "urgently needed in order to protect the character and biodiversity of the conservation area". It was therefore material to issues pertinent to the site's designation.

194 In my view, what the claimant has characterised as a volte-face is, as the defendant contended, the gradual evolution of the defendant's views on the designation, forged by the nature and extent of the submissions that they received from residents and the body with statutory responsibility for the historic built environment, coupled with the outcome of the independent scrutiny to which the designation proposal was subjected through the examination process. That evolution of the defendant's opinions is in my view understandable and lawful. The reasons can be clearly discerned from the publicly available documentation. I am therefore satisfied that there is no substance in the claimant's ground 3.

Conclusions

195 For the reasons which have been set out above, I am satisfied that the claimant has not made out any of the grounds that have been raised in relation to the decision of the defendant under challenge, namely to pass the neighbourhood plan forward to referendum. Having considered the claimant's arguments, I have not been persuaded that there was any illegality in the decision which the defendant reached. This claim must therefore be dismissed.

Claim dismissed.

THOMAS BARNES, Solicitor