IN THE HIGH COURT OF JUSTICE **CO/4158/2015**
QUEEN'S BENCH DIVISION
PLANNING COURT
BEFORE THE HONOURABLE MR JUSTICE COLLINS

IN THE MATTER OF the Town and Country Planning Act 1990 Section 288

B E T W E E N

Gallagher Properties Limited

Claimant

and

(1) Secretary of State for Communities and Local Government
(2) Maidstone Borough Council

Defendants

ORDER

UPON HEARING Counsel for the Claimant and Counsel for the First Defendant and Counsel for the Second Defendant upon the Claimant's application for an order that the decision of the First Defendant be quashed

AND UPON reading the written evidence submitted on behalf of the Claimant and Defendants

IT IS ORDERED THAT:-

1. This application be dismissed.
2. The Claimant do pay the First Defendant's costs summarily assessed in the sum of £9290 and that the said sum be paid by the Claimant to the First Defendant's Solicitors.
3. The Claimant's application for leave to appeal be refused.

Dated: 14th January 2016

By the Court

Sent to the Claimant and Defendants on: 14/01/2016
Claimant's Solicitor: Bircham Dyson Bell LLP **Ref:** CLS/RJL/160907.0001
First Defendant's Solicitor: Government Legal Department **Ref:** Z1521941/CLJ/B5
Second Defendant's Solicitor: Maidstone Borough Council **Ref:** JS/M007067

Neutral Citation Number: [2016] EWHC 674 (Admin)

CO/4158/2015

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 14 January 2016

B e f o r e:

MR JUSTICE COLLINS

Between:
GALLAGHER PROPERTIES LIMITED

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

MAIDSTONE BOROUGH COUNCIL

Defendants

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(Official Shorthand Writers to the Court)

Mr C Howell Williams QC and Ms I Tafur (instructed by Bircham Dyson Bell) appeared on behalf of the **Claimant**

Mr C Banner (instructed by Government Legal Department) appeared on behalf of the **First Defendant**

Mr S Whale (instructed by Maidstone Borough Council) appeared on behalf of the **Second Defendant**

J U D G M E N T
(Approved)

MR JUSTICE COLLINS: 1. This is an application under section 288 of the Town and Country Planning Act 1990 to quash the decision of an inspector to dismiss the applicant's appeal against the refusal by the Maidstone Borough Council of planning permission for two applications. The first, referred to as Appeal A, was made in September 2013 for the creation of an industrial estate of some 56,000 square metres on land known as Waterside Park, lying between the M20 and the A20, near junction 8 of the M20. This application was refused by the council in February 2014. In July, a further application was made for a reduced scheme, amounting to some 45,500 square metres. This was refused by the council on 22 October 2014 and was referred to as Appeal B. The council's officer dealing with the applications had recommended refusal of Appeal A but allowance of Appeal B. There is no need for the purposes of this judgment to differentiate between the two applications.

2. The development applied for is on what is now a greenfield site. As the inspector records, the applications were controversial and were opposed by all the local parish councils, by the county council, by the Council for the Protection of Rural England, by the Kent Downs AONB Executive, and by Natural England. The inquiry before the inspector lasted for some ten days. The applications were described as hybrid, in the sense that they were in part outline and in part detailed. They included provision for two specific business who would, it was said, occupy part of the estate. By the time the appeals were heard, one of the two had decided that it would move elsewhere, and so there was one anticipated occupant left.

3. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that an appeal be determined in accordance with the material development plan unless there are material considerations indicating otherwise. The relevant plan is the Maidstone Borough Local

Plan of 2000. In 2007, various policies in that plan were saved. The material one is ENV28.

4. Before going to that in detail, I should say that one of the main issues at the appeal was whether the relevant plan provision was out of date. The plan in question was, so far as the economic aspect was concerned, dependent upon information given between 1993 and 1998, and it was apparently anticipated that the plan would only be likely to be material for some six years, that is to say until about 2006. The point that is at issue is that under the plan the particular site in question is not within the boundary of the borough in which development can properly take place. That is the issue which is raised in relation to whether it is out of date; namely, that the exclusion of that site from the area within which development can take place, and in particular business development, if otherwise appropriate, is something which needs reconsideration, and which will have to be reconsidered in the light of the changing circumstances.

5. ENV28 provides as follows:

> "The countryside is defined as all those parts of the plan area not within the development boundaries shown on the proposals map.
>
> In the countryside planning permission will not be given for development which harms the character and appearance of the area or the amenities of surrounding occupiers, and development will be confined to:
>
> (1) That which is necessary for the purposes of agricultural and forestry; or
>
> (2) The winning of minerals; or
>
> (3) Open air recreation and ancillary buildings providing operational uses only; or
>
> (4) The provision of public or institutional uses for which a rural location is justified; or
>
> (5) Such other exceptions as indicated by policies elsewhere in this plan.

Proposals should include measures for habitat restoration and creation to ensure that there is no net loss of wild life resources."

6. It is clear that the proposed development is not permitted by that policy, and so in order to obtain permission it would be necessary to establish that it was proper to grant it notwithstanding that it was contrary to the plan.
7. The reasons for this particular policy are derived clearly from government advice in PPG7, which has been overtaken by the National Planning Policy Framework (NPPF), which is now in force. To that extent, it clearly is necessary to consider the development on the basis of the NPPF rather than the PPG7 policies which were then in force.
8. It is clear from the evidence before the inspector that there is a need for additional employment land in order to ensure the economic growth of Maidstone. The applicant called evidence to support its claim that not only was the site one which was, having regard to the access to the M20 and the A20, highly desirable, but that there was no other site which would meet the requirements, particularly the requirements for substantial warehousing. There had for some ten years been a process of reconsideration of a plan, but as yet no final decisions had been made. It followed that little weight could be attached to any indications of what might be in the future plan, but it was a major issue raised in the inquiry, and Mr Howell Williams submits that the evidence was such as meant that the inspector had to decide whether ENV28 was indeed out of date and what weight, if any, should in the circumstances be attached to it. In ground 1, he submits that the inspector wrongly failed to decide whether it was out of date, and further failed to consider what weight should be attached to it. He has referred me to some authorities on this issue. The matter was considered by the House of Lords in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447. At page 1458 of the report at letter

E, Lord Clyde referred to section 18A of the relevant Scottish provision, which is the equivalent of section 38(6), and he said this:

> "By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance. Thus the priority given to the development plan is not a mere mechanical preference for it. There remains a valuable element of flexibility. If there are material considerations indicating that it should not be followed then a decision contrary to its provisions can properly be given.
>
> Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it."

9. More recently, in Crane v Secretary of State for Communities and Local Government [2015] EWHC 425 (Admin) Lindblom J, as he then was, has considered this issue. I refer to paragraphs 71 and 72 of his judgment. The case in question concerned housing, and housing is dealt with in the NPPF specifically in paragraph 49, which indicates that if there is a failure to provide sufficient housing for a five year period, that is a matter which can properly be taken into account in deciding whether a particular application for a housing development ought to be permitted, but the principles which Lindblom J refers to are not dependent upon it being a housing application. What he said, so far as material, was this:

> "As I have said, Mr Hill points, for example, to an expression used by Males

J in paragraph 20 of his judgment in Tewkesbury Borough Council -- 'little weight' -- when referring to 'relevant policies' that are 'out of date'. In Grand Union Investments Ltd (at paragraph 78) I endorsed a concession made by counsel for the defendant local planning authority that the weight to be given to the 'policies for housing development' in its core strategy would, in the circumstances of that case, be 'greatly reduced' by the absence of a five-year supply of housing land. However, the weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, or could it be, fixed in the case law of the Planning Court. It will vary according to the circumstances, including, for example, the extent to which the policies actually fall short of providing for the required five-year supply, and the prospect of development soon coming forward to make up the shortfall.

72. But in any event, however much weight the decision-maker gives to housing land supply policies that are out of date, the question he has to ask himself under paragraph 14 of the NPPF is whether, in the particular circumstances of the case before him, the harm associated with the development proposed 'significantly and demonstrably' outweighs its benefit, or that there are specific policies in the NPPF which indicate that development should be restricted. That is the critical question. The presumption in favour of the grant of planning permission in paragraph 14 is not irrebuttable. And the absence of a five-year supply of housing land will not necessarily be conclusive in favour of the grant of planning permission. In this case it was not.

73. The reference in paragraph 14 of the NPPF to its policies being 'taken as a whole' is important. It indicates that the decision-maker is required, when applying the presumption in favour of 'sustainable development', to consider every relevant policy in the NPPF. As paragraph 6 of the NPPF says, the policies in paragraphs 18 to 219, 'taken as a whole', constitute the Government's view of what 'sustainable development' means in practice for the planning system."

10. The unfortunate decision maker thus has to consider, in deciding on sustainable development, any material provision in the NPPF, since there are some 200 paragraphs which identify what can be said to be sustainable development.

11. I should accordingly refer to the relevant provisions of the NPPF. Paragraph 2 states:

"Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The NPPF must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions. Planning policies and decisions must reflect and where appropriate promote relevant EU obligations and statutory

requirements."

12. Paragraph 7 indicates the three dimensions to sustainable development, namely economic, social and environmental. The economic role is contribution to building a strong, responsive and competitive economy, ensuring that sufficient land of the right type is available in the right places at the right time to support growth and innovation. The social role is to support strong, vibrant and healthy communities, and that relates largely to housing. The environmental role contributes to the protection and enhancement of natural, built and historic environment.

13. Paragraph 14 is material, because at the heart of the NPPF there is a presumption in favour of sustainable development, which is said to be seen as a golden thread running through both plan making and decision taking. For decision taking, this is said to mean:

> "Approving development proposals that accord with the development plan without delay; and
>
> Where the development plan is absent, silent or relevant policies are out of date, granting permission unless:
>
> > Any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this framework taken as a whole; or
> >
> > Specific policies in this framework indicate development should be restricted."

14. So far as economy is concerned, paragraph 18 provides that the government is committed to securing economic growth in order to create jobs and prosperity, and that the planning system must do everything it can to support sustainable economic growth and that local planning authorities must plan proactively to meet development needs of business and support an economy fit for the 21st century.

15. So far as the natural environment is concerned, paragraph 109 provides as follows:

> "The planning system should contribute to and enhance the natural and local environment by:
>
> Protecting and enhancing valued landscapes, geological conservation interests and soils;
>
> Recognising the wider benefits of ecosystem services;
>
> Minimising impacts on biodiversity and providing net gains in biodiversity where possible, contributing to the Government's commitment to halt the overall decline in biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures;
>
> Preventing both new and existing development from contributing to or being put at unacceptable risk from, or being adversely affected by unacceptable levels of soil, air, water or noise pollution or land instability; and
>
> Remediating and mitigating despoiled, degraded, derelict, contaminated and unstable land, where appropriate.
>
> 110. In preparing plans to meet development needs, the aim should be to minimise pollution and other adverse effects on the local and natural environment. Plans should allocate land with the least environmental or amenity value, where consistent with other policies in this Framework."

16. There is also a requirement to take into account economic and other benefits of the best agricultural land. I think it is not necessary to go into more detail. It is obvious from the provisions to which I have referred that importance is attached to the protection of the landscape and indeed of any particular areas of land which have the need of special consideration.

17. In his first ground relating to ENV28, Mr Howell Williams has submitted that the inspector failed to have regard to a material consideration, namely whether the local plan, and particularly the policy in question, was out of date, that she failed to give adequate reasons

for her conclusions in respect of whether it was out of date, and that she reached a conclusion which was irrational in respect of the approach to ENV28. I have been referred to the final submissions made to the inspector and to some of the evidence put before her. This was to show the issues which were raised and support the submissions that she failed to deal properly with those issues.

18. Ground 2 relies on an alleged failure properly to deal with the evidence of need produced by the applicant, and that is put in much the same way as the attack on the way she dealt with ENV28, in that it is said that she failed to take into account the claimant's case that there was a need for the proposed development and there was no other suitable land, that she failed to take into account the claimant's case as to the general need and demand for land for large scale businesses in the borough, and failed to give adequate reasons for her decision.

19. What I have to do of course, in a case such as this, is to decide whether the decision of the inspector contains any flaws which mean that the applicants have been prejudiced in the decision that was reached, and thus are entitled to a fresh consideration on proper principles. In paragraph 2, she indicates what she considers are the main issues. She says this:

> "I consider that the main issues in these cases are the effect of the proposed developments on: one, the landscape, character and visual amenity of the surrounding area, including the setting of the Kent Downs area of outstanding natural beauty; and two, the setting of nearby heritage assets."

20. That those were properly regarded by her as the central issues has not been challenged. They clearly were. But what has been challenged is the manner in which she reached her conclusion on those issues, it being said, as I have indicated, that she failed properly to deal with important considerations in relation in particular to the impact of ENV28 and the

weight to be attached to it, and the evidence relating to the economic need. There were raised two further what I think can properly be considered to be subsidiary issues, relating to her dealing with particular evidence in relation to the risk of possible damage to the River Len and a wildlife area nearby, and to traffic concerns raised in relation to the effect of the development. I will deal with those issues in due course.

21. She was clearly dealing with an application for development on what is at present a greenfield site. Thus she had to consider the issue on that basis. It was not a site which was designated for economic development, and so insofar as ENV28 could apply and properly be applied, it was contrary to that. She decided that there would be significant harm to the landscape, character and the setting of the North Downs AONB. In paragraph 33 she said:

> "In terms of the visual impact of the developments, the rural character of the site would be lost and the sensitivity of those receptors most affected, the walkers using the public rights of way, particularly those within the AONB, would be high. With a moderate sensitivity to change, as found in the Maidstone landscape character assessment, the resultant effect would I consider be much greater than the moderate adverse, falling to minor adverse over time, as assessed by the appellant's witness. This harm is in my opinion a significant factor weighing against both the appeal proposals."

That conclusion is one which Mr Howell Williams has properly not been able to attack.

22. In addition, she decided that it would be particularly harmful to the setting of Leeds Castle, a grade 1 listed building, and its grade 2 starred listed park. Again, that conclusion is one which again cannot be attacked and is not attacked. She said, so far as that is concerned in paragraph 40:

> "The intrusion of a substantial industrial development into an otherwise well preserved setting seems to me to be particularly harmful. Whilst this harm to the setting might be experienced only from a narrow field of view, it would nevertheless detract from the largely unspoilt and tranquil scenario in which the castle is experienced and which has historically surrounded it. The castle has up to now been fortunate in retaining this setting and the intrusion of

modern development into this particular view would, I consider, diminish the significance of the heritage assets."

23. Thus on the face of it there were two powerful reasons for refusing this particular application, and in the circumstances it would only be proper to have allowed it if the inspector were persuaded that the economic benefits, and in particular the absence, as it was submitted, of any other site which was appropriate for this sort of development which was needed in Maidstone, would outweigh the harmful effects to which she referred.

24. In paragraphs 34 to 37, she considered the question of the application of ENV28. Since there is an attack on this aspect of her decision, I should set out those paragraphs. She said as follows:

"34. There was much discussion at the inquiry on whether policy ENV28 was out of date in terms of the framework. In relation to the aim of protecting the countryside by controlling harmful development within it, the policy is not out of step with the framework. Although the supporting text makes reference to wording from policy guidance that has now been superseded, the core of the policy does not depart from the aim of the requirement set out in paragraph 17 of the framework to recognise the intrinsic character and beauty of the countryside.

35. ENV28 could be considered as a relevant policy for the supply of housing and might therefore be out of date in relation to paragraph 49 of the framework, as this paragraph requires the Local Authority to demonstrate a five year supply of housing which will need to be confirmed through an adopted LP.

36. However, paragraph 49 makes no reference to policies for employment sites, although the borough council agrees there is an unmet need. It is therefore possible, but not inevitable, that the development boundary set in the adopted LP will be revised in the emerging version to satisfy the identified need for additional industrial development.

37. However, until these boundaries have been agreed and it is confirmed that the appeal site no longer falls within an area designated as countryside, I consider that policy ENV28 still carries significant weight in accordance with its consistency with the framework. I find therefore that the proposals do not accord with the adopted policy in the development plan that relates to the protection of the countryside."

25. That is attacked on the basis that the inspector failed to decide or to indicate her conclusions as to whether the policy was indeed out of date, and failed properly to consider the weight which should be attached to the relevant policy. But the authorities make clear that in considering what weight to attach to a policy which is or may be out of date, the full facts of an individual case must be taken into account. The inspector regarded ENV28 as having weight, but in accordance with its consistency with the framework. Thus she was effectively reading the requirements of the framework into the approach that should be adopted in the application of ENV28. In my view that is an exercise that was perfectly proper.

26. Her final conclusion in paragraph 97 was:

> "I find that the environmental harm would be greater than the identified economic advantages and the adverse impacts would significantly and demonstrably outweigh the benefits. Whilst Scheme B would be less harmful than Scheme A due to its reduced scale, there would not be enough differences between the two proposals to overcome the concerns outlined above or to tip the balance in favour of the smaller proposal. Therefore neither of the proposals amount to sustainable development as defined in the framework, due to the extent that they would conflict with the environmental policies contained within it, particularly in relation to the impact on the landscape, character and the setting of the heritage assets."

27. Now that is a straightforward application of the NPPF provisions, and she is applying ENV28 in that way. It seems to me in those circumstances that whether or not the policy should be regarded as out of date is immaterial in the way that the inspector has perfectly properly dealt with it. Even if one assumes that no weight should be attached to ENV28 as it stands, clearly insofar as it reflects the policy of protection of the environment which is contained in the NPPF, it has weight. That is what the inspector is clearly deciding.

28. Accordingly, in the circumstances of this case, and looking at the matter as one should as

a whole, any alleged failures to deal with whether ENV28 was out of date, or its weight, get the applicant nowhere. The application would clearly on the inspector's approach have failed because of the harm that it did, which was not in her view counteracted by the advantages to be gained from the development. Thus whatever weight she attached to ENV28 was, in the circumstances of this case, not in any way determinative of the issue.

29. Furthermore, it is not necessary for an inspector to deal in detail with matters which are truly, when one looks at the decision as a whole, not properly to be regarded as material. The leading authority on what is required in relation to reasons is South Bucks District Council v Porter (No 2) [2004] 1 WLR 1953. At paragraph 36 Lord Brown, who gave the only reasoned judgment, set out a summary of the law, although he indicated that what he was setting out was not definitive or exhaustive, nor, he feared, would it avoid all need for future citation of authority. So far as I am concerned, for the purposes of this case, no further citation is indeed needed, and I am pleased to say that none was suggested, albeit reference was made to the longstanding decision of Forbes J in Seddon Properties v Secretary of State for the Environment. However that case, I am bound to say, is perhaps not of the greatest assistance because it related to the reasons to be given by the Secretary of State when he was not following the advice given by the inspector. But it seems to me that Lord Brown's observations are what now matter. What Lord Brown said was this:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons

> need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

30. I am told that the inspector had before her no less than some 330 paragraphs of final submissions, and of course she had considered the matter over a period of ten days. Her decision is in my view admirably concise, and there should be no encouragement to lengthy decisions which deal with issues which are not in the end regarded as in any way determinative of the matter in issue. It is inevitable that in inquiries, opponents or applicants will raise issues which in the end are not regarded as in any way likely to be either helpful or determinative of the result, and if it is not necessary for the purposes of reaching a proper decision to deal with them, then it is not necessary that decisions be lengthened, or, in the case of an appeal, judgments be lengthened, in going through those issues in detail.

31. Provided, as I say, that the real issue and the real basis upon which a decision is reached is clear, and that the reasons for reaching that conclusion are properly set out, the decision will stand. So here, in relation to ENV28, as I have said, it is quite clear from the approach of the inspector that she regarded the harm to the AONB, to the countryside, and to the listed park and buildings as being so strong as to mean that these applications had to be rejected.

32. The second ground, as I say, relates to the strong evidence called by the applicant that the site

was one which was not only ideal for proposed economic development, which was clearly needed, not only to ensure that Maidstone prospered but that the remaining proposed occupant's business survived, since it needed to expand its site to enable it to carry on its business properly. But Mr Howell Williams recognises that he could not submit that it was inevitable that the site would be designated within any future plan. In paragraphs 47 to 54, the inspector dealt with the need for the development. So far as material, she said this:

> "47. Although the borough council accepts that there is a qualitative need for additional industrial and employment floor space in the Maidstone administrative area, the other parties submit that it has not been demonstrated that the proposed developments could not be located elsewhere, either in the borough or within the wider local area, under the duty to cooperate set out in the framework.
>
> 48. The appellants produced a specialist economic witness on the topic of the identified need whose evidence was unchallenged by the parties. She drew attention to the fact that the proposal was strongly supported by the borough council's employment development team, who concluded that whether or not the proposed occupants took possession, the proposed developments on it would provide significant economic benefits and fill a gap in the qualitative demand."

33. That was for what I think was described as "large box", which I think refers to large scale warehousing or the possibility of some industrial process.

34. She then sets out the considerations. The area around junction 8 had been considered in several studies, and there was certainly a consideration of the possibility of that being a proper area, but, as she said in 53:

> "Of course this does not mean that this land will necessarily be considered suitable for allocation in the emerging local plan, or that even if it is, the appeal site would be the preferred location. Neither is it definite that the identified need, whatever quantum is eventually adopted, would have to be satisfied through the allocation of a greenfield countryside site. There are other competing sites, such as the existing business park of Detling Aerodrome, that might possibly come forward as the preferred location."

35. She then considered the question of prematurity but rejected that as a proper ground for refusing, but as I say, it has not been possible for Mr Howell Williams to submit on the evidence that existed that it was inevitable that this particular site would be, in any future plan, regarded as one which was suitable for this sort of development. She did, however, accept in paragraph 70 that the proposals would be of considerable economic benefit to the borough, and would be supported by the policies in chapter 1 of the framework aimed at building a strong, competitive economy.

36. In paragraph 88, in setting out the balancing exercise, she stated as follows:

> "The appellant's economic witness put forward a detailed explanation of why she considers the GVA report to be flawed and why it underestimates the identified need for industrial sites in the borough. This evidence was not challenged by the parties at the inquiry, none of whom produced an expert witness on this topic, although the need to use this particular site rather than others in the vicinity, albeit outside the borough, was questioned. The appellant's evidence puts a clear economic case for the proposals."

37. She then deals with the occupant, whose evidence was that this development was needed to enable it to continue properly in business, and indeed without it its business would, it was said, be at risk.

38. There can be no question, therefore, that the inspector did have full regard to what I can call the economic evidence produced by the applicant. But there was no overwhelming probability that this site would in due course be one which was designated as a possibility for this sort of development in any future local plan. It seems to me in those circumstances that the inspector had to consider the issue on the basis that she did, namely whether the economic benefits, which she accepted, of this particular development did outweigh the harm which she found to exist in the way that I have already set out. In paragraph 97, which I have already cited, she makes clear that her view was that it did not, and thus there

would be a breach of ENV28, in the context of paragraph 14 of the NPPF.

39. It seems to me in those circumstances that the reasons that she gives were quite sufficient to make clear that she had properly had regard to all that she should have had regard to.

Indeed, in paragraph 94 she said this:

> "I consider that the need for developments on these scales in this location, and the consequent loss of greenfield land within countryside, has not been fully justified through proposals that would not accord with the adopted development plan and result in significant environmental harm. I have taken into account the economic and social benefits of the proposals in terms of the provision of jobs and employment premises, as required by the framework, but while there does appear to be a need for more employment land allocations, it has not yet been demonstrated that these will necessarily result in the allocation of land in the countryside."

40. That has been criticised as a "wait and see" approach, but in my view it is no such thing. What it is is a proper recognition that what she is dealing with at the time is an application on a greenfield site which, as things stand, has to be justified on the basis that it nonetheless, for the economic benefit reasons, can be allowed to go ahead. She was not persuaded that that was so. In those circumstances, as it seems to me, it was quite unnecessary for her to go into any further detail, such as is submitted was needed by Mr Howell Williams.

Accordingly, I reject ground 2.

41. I should deal with what I have, subject to one proviso, referred to as the subsidiary grounds. Ground 3 relates to concerns which were raised by a local councillor, Mr Harwood, who gave evidence about the risk of an adverse impact on the River Len and its wildlife, and on the local wildlife reserve managed by the Kent Wildlife Trust. There were no material objections raised by the Wildlife Trust or by the Environment Agency, and indeed in the environmental statement it was clearly stated that the view taken was that there was no risk

of any adverse effect. Mr Harwood was a local wildlife enthusiast who said that in his experience, in particular his having dealt with the silting of the river resulting from the construction of the M20, it was in his view inevitable that some adverse effect would be likely to result.

42. He had, it was submitted, no expertise, and the inspector therefore acted irrationally in accepting his evidence against that of the experts, including in particular what was set out in the environment statement and bearing in mind the lack of any objection by, perhaps in particular, the Kent Wildlife Trust, who could be expected to have real concerns were there any chance of any adverse effect, it is said, and a judgment of Beatson J is relied on for this proposition in Shadwell Estates v Breckland District Council [2013] EWHC 12 (Admin), that there was a need for cogent and compelling reasons to depart from the views of a statutory consultee.

43. That depended of course upon the facts of that particular case, and it certainly is not the case that the evidence given by an expert can only be properly contradicted by evidence given by an expert. Mr Harwood stated that he had considerable experience in dealing with the River Len and the wildlife around it, and that despite indications that there would not be any damage from the M20, there was. It seems to me that the inspector was, in the circumstances, having regard to the evidence given by Mr Harwood, entitled to give it some weight, as I say, bearing in mind his experience and his local knowledge of the relevant conditions. It is quite unnecessary that there be an expert.

44. What she said in paragraph 81 in this connection was as follows:

> "81 there is concern that the substantial remodelling of the land form would have an impact on the Kent Wildlife Trust's local wildlife reserve and the River Len through the deposit of silt. This has apparently already proved to be a problem following the construction of the M20 and the CTRL, although the ES found that there would be a negligible impact.

> 82. Natural England has not objected on these grounds, but I have noted the arguments of the CPR witness [that is Mr Harwood] on this topic, who is a well informed and enthusiastic supporter of local wildlife conservation products. He made the point that he is likely to have more direct and detailed experience of the specific effects of similar construction sites on the River Len and the wildlife in its environs than may be available to other less local consultees. I consider that his evidence raised valid concerns, particularly given the proximity of the proposed development platforms to the river and the consequent changes in land levels that would result from their construction."

45. I do not regard that as being in any way irrational, because that is the test that is applicable in deciding whether the inspector was entitled to have regard, as she did, and give some weight to, the evidence before her of Mr Harwood. Accordingly, ground 3 is not made out.

46. Ground 4 relates to traffic. Again, there were no objections on traffic grounds. However, there had been an appraisal provided to the borough council in 2012. That was referred to by the inspector, who noted that:

> "New strategic economic development at junction 8 had the potential to have a significant adverse effect on the transport network due to the increased traffic generation adding to existing congestion issues."

47. True it is that the borough council did not raise any objection on traffic grounds, and indeed no material body raised any such objection. However, there was in addition, quite apart from any problems of extra congestion, a particular concern which was raised that at times when stacking had to be in operation, which one is bound to say seems to have been occurring rather more frequently in recent times, no doubt due to problems relating to would-be asylum seekers who have caused problems in relation to ferries, coupled with what seems to be altogether more frequent industrial action by the French, which has led to problems in relation to ferries. Be that as it may, if there is stacking, then junction 8 is the

junction at which traffic has to divert to the M20. So there is obviously on the face of it some concern about additional congestion.

48. Furthermore, as the inspector decided, and properly decided, there was a likelihood, having regard to its location, that those who eventually worked at the site would be likely to use cars rather than public transport. That again would create possible problems. She deals with those issues in paragraphs 71 to 80 of her decision.

49. It seems to me that all those were matters which she was entitled to take into account, despite the lack of any objection by the bodies concerned. The experience of local people who were affected by those traffic matters was a relevant consideration. It seems to me quite impossible to say that the way in which she had regard to those matters was in any way irrational.

50. The only caveat I have relates to what she says in paragraph 93. She says:

> "There would also be a risk of harm resulting from traffic impacts, ecological damage and a detrimental impact on residential amenity at Old Mill Farm, which although on their own might not be sufficient to refuse planning permission, nevertheless together adds considerably to the overall weight of objections to the proposals."

51. I would question certainly the use of the adjective "considerably", and indeed Mr Howell Williams, for obvious reasons, relies on that, because he submits that those issues are ones which clearly might have persuaded the inspector to decide as she did, because they were needed to be added to the major matters which she relied on.

52. I have already decided that there is nothing in the attacks on the way in which she dealt with grounds 3 and 4, and so whether or not they added considerably in her view is immaterial, but even if I had been persuaded that grounds 3 or 4 were made out, it seems to me quite clear that her decision rested essentially on the harm to the AONB and the countryside and

to the listed heritage assets. I do not think that there is any reasonable possibility that her decision would have been any different if the matters raised in grounds 3 and 4 had not been properly taken into account.

53. In those circumstances, and for the reasons that I have given, I dismiss this application.

MR BANNER: My Lord, thank you for that judgment. I do ask for an order that the claimant pays the Secretary of State's costs, given that the Secretary of State has won on all grounds.

MR JUSTICE COLLINS: Yes, well I don't imagine Mr Howell Williams is able to resist that particular application.

MR HOWELL WILLIAMS: No, that's correct. My Lord, in terms of the costs for the Secretary of State.

MR JUSTICE COLLINS: To be subject to detailed assessment if not agreed.

MR HOWELL WILLIAMS: That's correct, my Lord.

MR JUSTICE COLLINS: Yes. How do you get round -- I mean, are you applying for costs?

MR WHALE: I'm going to apply on this basis, my Lord: I'm absolutely not going to apply for an order whereby the claimant ends up with what is in truth two sets of costs, I'm not going to apply for that at all.

MR JUSTICE COLLINS: As you properly recognise, you would have difficulty in persuading me that that was appropriate.

MR WHALE: Absolutely. It seems to me from the judgment, if I may say so, and I hope this is right, that my Lord has derived some assistance from the evidence that the borough council put in the papers and also aspects of the submissions that the borough council has made, so what I propose -- and I am just if you like thinking aloud, to be frank about it -- is a contribution is awarded to the borough council, that might be for example, just as an example, the claimant pays the cost of the witness statement, or another way of approaching it might be to say well, the claimants to pay, I don't know, three quarters of the Secretary of State's costs, a quarter of the council's. You see what I mean.

MR JUSTICE COLLINS: I see what you mean, but I don't think the Secretary of State would be very happy with that.

MR WHALE: No, I dare say he wouldn't. So I think my Lord I invite you to I suppose decide the principle of the matter first, if you're against me on the principle there's nothing more to be said. If you some see some merit in a division of the spoils, if I might use that term, however you care to divide it, well I would ask that you do so.

MR JUSTICE COLLINS: No, Mr Whale, I am bound to say that I think I made it clear from my decision that really it wasn't in my view necessary to go into the details of the evidence in all the circumstances. As a general proposition -- and I think frankly there was quite enough from the final submissions, which were already made available to me, insofar as it was helpful to have those.

MR WHALE: Indeed.

MR JUSTICE COLLINS: I mean obviously I've taken them into account.

MR WHALE: Of course.

MR JUSTICE COLLINS: But in all the circumstances I don't think this is an appropriate case for any costs to be ordered to you, I am afraid.

MR WHALE: Very well. Thank you, my Lord.

MR JUSTICE COLLINS: So you get 100 per cent of them.

MR BANNER: I'm grateful, my Lord.

MR JUSTICE COLLINS: Yes.

MR HOWELL WILLIAMS: My Lord, might I just mention one matter, I've just received a note and just so it's on the record. On behalf of the Secretary of State, there was some revision to the costs. I won't trouble your Lordship --

MR JUSTICE COLLINS: I haven't seen anything.

MR HOWELL WILLIAMS: On the basis of your Lordship's order, I don't need to trouble your Lordship with the details of it.

MR JUSTICE COLLINS: Yes, I have some ... where are we.

MR BANNER: My Lord, perhaps I can explain, there is a costs schedule but obviously the default position is there would be a detailed assessment. All I have done for the benefit of my learned friends is reduce the time that my instructing solicitors and I have spent in court because we were a little bit quicker than we thought we might be.

MR JUSTICE COLLINS: Unless anyone wants me to assess it, and I'm not very happy to do that in a case such as this, that's a matter for to you discuss.

MR BANNER: Indeed, I'm happy either way. The total figure is £9,290.

MR JUSTICE COLLINS: The total becomes £9,290, does it?

MR BANNER: £9,290.

MR HOWELL WILLIAMS: My Lord, if it helps, I've taken instructions and it's not in anybody's interests to take undue time, wherever that argument should take place.

MR JUSTICE COLLINS: No, absolutely, and usually --

MR HOWELL WILLIAMS: We're content -- well I say content, that's putting it far too high.

MR JUSTICE COLLINS: I know what you mean.

MR HOWELL WILLIAMS: But we're happy with -- we agree the figure.

MR JUSTICE COLLINS: So £9,290?

MR HOWELL WILLIAMS: That's correct.

MR JUSTICE COLLINS: So I can simply say that the court order will be that you pay the Secretary of State's costs in the sum of £9,290?

MR HOWELL WILLIAMS: Yes.

MR JUSTICE COLLINS: Sorry, was that right?

MR BANNER: £9,290. Thank you.

MR HOWELL WILLIAMS: My Lord, one other matter is the question of leave to appeal. I do

seek leave to appeal on all the grounds, if I may.

MR JUSTICE COLLINS: Does this count as a second appeal?

MR HOWELL WILLIAMS: No.

MR JUSTICE COLLINS: No.

MR HOWELL WILLIAMS: No, my Lord.

MR JUSTICE COLLINS: Right.

MR HOWELL WILLIAMS: So the grounds --

MR JUSTICE COLLINS: Maybe it should, but it doesn't.

MR HOWELL WILLIAMS: The grounds for appeal, in very short terms, are as follows: that in relation to ground 1, whilst your Lordship placed his reasoning on the specific circumstances of the case, the premise for the judgment on this ground relates to the approach to section 38(6) and paragraph 14, and that's plainly of significance and importance, and in particular the reference your Lordship made to the inspector's reliance on the framework and consistency with that, for the reasons given in our submissions, consistency of the framework needs to be distinguished between the question of whether or not a policy is out of date, and similarly distinguished from the separate question, consequent upon a finding of a policy being out of date, of the question of weight to conflict with it. I won't go into those grounds again.

MR JUSTICE COLLINS: No.

MR HOWELL WILLIAMS: But that seems perfectly proper and we would suggest is a good ground for appeal.

I draw into that the manner in which your Lordship dealt with the case of Crane.

MR JUSTICE COLLINS: Yes.

MR HOWELL WILLIAMS: In which some focus was placed on paragraph 72, your Lordship

will remember, on the test in paragraph 14, but, as we have said and submitted, the mechanism in paragraph 14 does not obviate the need to consider whether a policy is out of date, and the weight to be attached to conflict. Indeed the mechanism requires consideration of those two questions, and so for that reason, too, we would seek leave to appeal.

In relation to ground 2, there are a number of reasons why we would wish to appeal on that, not least because your Lordship's judgment has not dealt with the complaint about the inspector's failing to deal with the consequences of not granting permission in the economic context, bearing in mind what we have said, that it is not a question of not achieving the benefits, it is a question of going below the status quo and the future resilience of the Maidstone economy, and similarly your Lordship's judgment did not deal with paragraph 97 and the point the inspector made about overprovision and, as we said, her failure to take into account the substantial evidence from Mr Alderton about the need for such a site for the same reason.

On grounds 3 and 4, and I deal with them together, my Lord, they of course raise the question of the principle of Shadwell, amongst others, and the approach that the court should take to consideration of expert evidence when placed against the evidence of a non-expert, and whilst of course every case will be specific to its own facts, in this case, on these facts, we would wish to appeal on the basis set out in our grounds, which we would say with respect your Lordship has not fully grappled with.

So for those reasons on all grounds we would seek leave to appeal.

MR JUSTICE COLLINS: Well, you are making the same points against me as effectively you made against the inspector, that I have not dealt in detail with every argument. For the reasons I have indicated, I did not think I needed to, because it seemed to me that all I had

to decide was whether the inspector's decision in the circumstances of this case was one which was a proper decision, and for the reasons that I gave I was satisfied that it was. You will have to persuade the Court of Appeal if you want to take the matter further.

MR HOWELL WILLIAMS: My Lord, would your Lordship give me one moment to take instructions?

MR JUSTICE COLLINS: Yes.

(Pause)

MR HOWELL WILLIAMS: Thank you very much, my Lord.