Neutral Citation Number: [2019] EWHC 2677 (Admin)

Case No: CO/1023/2019

IN THE HIGH COURT OF JUSTICE
ADMIISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 October 2019

Before:

MRS JUSTICE LIEVEN

- -

Between:

HALE BANK PARISH COUNCIL	**Claimant**
- and -	
HALTON BOROUGH COUNCIL	**Defendant**
-and -	
VEOLIA ES (UK) Limited	**Interested Party**

- -
- -

Ms J Wigley (instructed by **Richard Buxton Solicitors**) for the **Claimant**
Mr K Garvey (instructed by **Halton Borough Council**) for the **Defendant**
Mr R Turney (**In-house solicitor**) for the **Interested Party**

Hearing dates: 25th July 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE LIEVEN DBE

Mrs Justice Lieven:

1. This is a challenge to the decision of the Defendant local planning authority, Halton Borough Council, "the Council", to grant planning permission for the proposed change of use to waste transfer and treatment facility with ancillary development, at the former J Bryan Victoria Ltd. site, Pickering's Road, Widnes "the site".

2. The Claimant is the local Parish Council, "the PC". The Interested Party is the holder of the planning permission.

3. The Claimant raises three grounds;
   a. Breach of s.38(6) Town and Country Planning Act 1990 by failing to properly apply WM1 of the Joint Waste Management Development Plan (JWDP) or a failure to give adequate reasons in respect of the same matter;
   b. Failure to provide the required mandatory information in accordance with policy WM12 of the JWDP;
   c. Failure to provide the relevant background papers as required by s.100D of the Local Government Act 1972.

4. Lewis J granted permission on grounds one and two. Ground three was the subject of an amendment to the claim form, which I permitted at the hearing. The Claimant argues that it was only when it received the Council's evidence that it became apparent that there were relevant background documents which had not been provided under the 1972 Act.

The factual background

5. The Site is currently vacant, but was previously used by a demolition contractor and scrap metal processing company as a demolition waste storage yard and depot. The Site became redundant more than 12 months before the planning application was made, following the liquidation of the former demolition contractor and vehicle dismantlers who had previously occupied the Site.

6. The proposed development is for a change of use and includes a waste transfer station with a shredder to manufacture a "refuse derived fuel" and bulking/transfer of recyclates, along with an external area for the storage, treatment and transfer of construction and demolition wastes. There is no limit on where the waste can be received from or sent to and the operation of the proposed development is not limited to dealing with waste arising within the Halton area.

7. The Interested Party, Veolia ES (UK) Limited ("Veolia") is the applicant for the Permission. Veolia holds the recycling contract for the Merseyside area with the Merseyside Recycling & Waste Authority ("MRWA") (see paras 2.31 – 2.32 of the Joint Merseyside and Halton Waste Local Plan (2013) (the "JWDP")). Veolia operates waste transfer stations and waste recycling facilities across the Merseyside region and it has waste facilities in each of the six boroughs in Merseyside.

8. The Site is accessed via a residential area. The proposed development will give rise to 128 HGV movements per day through that residential area (52 refuse collection

vehicles arriving and leaving the site plus 12 bulk load vehicles arriving and then leaving to export the waste off-site).

9. The Claimant is the Parish Council for the area in which the Site is situated. The Claimant objected to the proposed development on the grounds inter alia that it was contrary to development plan policies on the principle of development in this location (policies WM1 and WM5 of the JWDP) and that it is contrary to policy SO6 in terms of its odour, noise and traffic impacts.

10. The Claimant's objection highlighted the following points of particular relevance to this Claim:

    a. The Site is not an allocated site in the JWDP;
    b. Policy WM1 of the JWDP requires that alternatives to allocated sites should only be considered if allocated sites have already been developed out, or are not available for the waste use proposed by the industry, or can be demonstrated as not being suitable for the proposed waste management operation;
    c. At least one allocated site in the Halton area, Widnes Waterfront, has not been developed out, is designated for Waste Transfer Station use, is currently fully available and the vendor was "totally unaware" of Veolia's requirements as he had never been contacted by them;
    d. Unlike Widnes Waterfront, the Site can only be accessed through a residential area and will give rise to at least 90 HGV movements and other heavy traffic;
    e. The Parish Council is extremely concerned about noise, odour and the impact of traffic on air quality resulting in increased nitrogen dioxide levels and harm to the health of Hale Bank residents;
    f. The proposed development will dispose of much larger amounts of differing waste streams when compared with the previous use prior to the Site becoming vacant.

11. The Claimant's objection also challenged the conclusion that the Site is within the vicinity of an area of search under Policy WM5. However, that conclusion was not challenged in the judicial review, it being properly a matter of planning judgement.

12. The Council's Development Control Committee resolved to grant planning permission on 7 January 2019 following the recommendation of the officers' report. The Permission was granted on 30 January 2019. The terms of the Permission (condition 16) allow up to 85,000 tonnes of waste to be accepted at the Site per calendar year.

Key Development Plan Policies

13. The development plan for the area includes the Halton Unitary Development Plan (2005), the Halton Core Strategy Local Plan (2013) and, most pertinently for waste applications, the JWDP.

14. The relevant policies from the JWDP start with policy WM0, which is a policy giving a presumption in favour of sustainable development.

15. The policy at the centre of this claim is Policy WM1 which states:

> "*Policy WM1*

Guide to Site Prioritisation

Developers should develop sites allocated in the Waste Local Plan in the first instance, and should only consider alternatives to allocated sites if allocated sites have already been developed out, or are not available for the waste use proposed by the industry, or can be demonstrated as not being suitable for the proposed waste management operation. There will be presumption in favour of waste management development on allocated sites, as set out policies WM2, WM3 and WM4, subject to compliance with other policies within the Waste Local Plan and other relevant LDF documents. This applies to both allocations for built facilities and inert landfill.

If allocated sites are not available, then the waste industry should seek sites within the areas of search, as set out in policy WM5. These areas are suitable for small-scale waste management activity, such as waste transfer stations, re-processing activity or displacement of existing waste management uses. The applicant should demonstrate why allocated sites are not suitable for the specific proposed use as part of the justification.

Developers must clearly demonstrate that both allocated sites and areas of search are not suitable for the development proposed before unallocated sites will be considered.

These will need to be justified as follows:

1. *That the Waste Local Plan site assessment method is applied, including site selection scoring criteria shown in Tables 5.1 and 5.2;*

2. *Sustainability Appraisal;*

3. *Habitat Regulations Assessment;*

4. *Deliverability Assessment; and,*

5. *Compliance with the criteria based policy and other relevant policies."*

[emphasis added]

16. Paragraph 4.9 of the supporting text makes clear that;

> *"Planning consent will not normally be given unless policy WM1 is complied with in full. Compliance with policies WM12 and WM13 is also essential."*

17. Policies WM2 and WM3 allocate sites for waste development.

18. Three sites, Site H1, (Widnes Waterfront in the Halton area), site K1 (Knowsley) and Site S1a (St Helens) are all allocated by Policy WM2 for suggested waste management uses which are potentially capable of accommodating the uses proposed by the development (including waste transfer station, re-processor, primary treatment and resource recovery). The supporting text to WM2 makes clear that allocated sites may be used to accommodate a number of facilities co-located on the same site.

19. Also, in the Halton area, Site H2, (Eco-Cycle, Johnson's Lane) is allocated by Policy WM3 for waste transfer station and primary treatment uses. In addition, there are a further eleven sites across Merseyside which are allocated by Policy WM3 for suitable waste uses which are potentially capable of accommodating the uses proposed by the development.

20. Policy WM12 requires that specified information must be submitted with applications for waste management development. The required information includes "the nature, volume and tonnages of each waste material to be accepted at the facility having reference to the European Waste Codes" (item 2, Box 1 to Policy WM12).

21. Policy WM13 sets criteria for planning applications for waste management facilities on unallocated sites. It states that "*Planning permission will only be granted for additional waste management facilities on unallocated sites where the applicant has provided written evidence to demonstrate (1) that a suitable allocated site is not available or suitable for their proposed use, and (4) that the proposal complies with the vision and spatial strategy for the Waste Local Plan and satisfies criteria in policy WM1 and WM12".*

The Council's consideration of the application

22. The application was accompanied by a Planning Statement. In these proceedings the Council has filed witness statements from Mr Glen Henry, the principal planning officer at the Council, and Ms Lucy Atkinson. Mr Henry explains that the Council, together with a number of other Merseyside authorities, retain Merseyside Environmental Advisory Service (MEAS) to advise on proposals involving the transfer, treatment and disposal of waste. Ms Atkinson is employed by MEAS as Team Leader. The arrangement was that Ms Atkinson provided advice to the Council, but communications with Veolia all went through the Council, so Veolia were not themselves aware of Ms Atkinson's role and neither was the Parish Council. The documents exhibited to Ms Atkinson's witness statements were not seen by the Parish Council until the first witness statement was filed on April 2019.

23. On 11 July 2018 Ms Atkinson wrote to Mr Henry giving advice on the application. At para 7 she said;

> *"the applicant has supplied sufficient information to demonstrate compliance with policies WM1, …., subject to satisfactory HRA" [HRA in this context must been Habitats Regulations Assessment]*
>
> No more was said in the report about the sequential test and WM1. Some further information was then submitted by Veolia but not relevant to WM1.

24. On 2 December 2018 Ms Atkinson emailed Mr Henry in the following terms;

> *"Hi Glen,*
>
> *Further to our telephone conversation on Tuesday, I have reviewed my technical analysis which I prepared prior to formulating my response and it covers much of what we were discussing. I have provided an extract of the technical analysis below.*
>
> 1. *The proposal is supportive of the vision for the Waste Local Plan, and o the majority of the Strategic Objectives. It will also assist the WLP area achieve net self-sufficiency, as the purpose of the facility is to serve Veolia's business needs in the area.*
>
> 2. *The site was previously used as a permitted waste facility (J Bryan (Victoria) Ltd), therefore although not an allocated site, it was consented as part of the existing waste infrastructure. No site scoring has been produced for this reason. It also lies within an area of search for Halton. The site has been chosen due to its proximity to Veolia's existing depot at Ditton Road, and the synergies this provides for their business, therefore, allocated sites were not considered suitable. It is anticipated that this proximity will lead to reduced transport movements, as collection vehicles will drop waste at the new facility at the end of the day before parking up at the depot. This should have positive impacts from a carbon emissions perspective. This information is sufficient to demonstrate compliance with policies WM1, WM2, WM3, WM5 and WM13, subject to satisfactory HRA.*
>
> *With regards to point 2, we consider all the consented infrastructure to be essential as it managing our existing waste management needs, and therefore as the proposed facility would be occupying an existing site, this is supported by the WLP. For clarity regarding the areas of search, the boundaries are not accurately defined but should be viewed in conjunction with the text in policy WM5- in the case of Halton this includes industrial areas of Widnes."*

25. Two points were agreed between the parties about this email. Firstly, references to "self-sufficiency" are to self-sufficiency within the Merseyside area, rather than within Halton alone. Secondly, when Ms Atkinson refers to "technical analysis" this appears to be a reference to her own private analysis rather than to any document shared with the Council. Certainly, no document showing any technical analysis has been produced to the Court.

26. Mr Henry's witness statement says that having received Ms Atkinson's advice he was satisfied that sufficient information was available to demonstrate compliance with the Waste Local Plan policies. None of the emails or the Advice Note were placed before the Committee, nor were they referred to as background papers.

27. Ms Atkinson also made a second witness statement where she set out more detail on the information that she had sought, and said that in her professional opinion she had all the information that she needed, and that if she had asked for the European Waste codes it would have made no difference to the outcome or to her judgement.

The officers' report

28. As is the norm the Council's officers produced a full report setting out the various issues that were relevant to the determination (the "OR"). The following parts are relevant, though as so often, unfortunately without paragraph numbers;
    a. The OR records that the site has a history as a demolition waste storage/yard and depot.
    b. Under Documentation it is recorded that the applicant has submitted a Planning/Supporting Statement;
    c. All the relevant Joint Waste Local Plan policies are referred to by number under the heading of the Policy Context;
    d. Under Representations virtually the entirety of the Parish Council's written representation is set out. This refers to WM1 and states

    > *"Furthermore, the Supporting Statement (section 7.5.5) states that 'the site was previously permitted and therefore deemed to be an 'existing waste management licensed' for the purposes of the Waste Local Plan.*
    >
    > *Again referring to the applicant's Supporting Statement 7.5.10 in which Veolia states 'one of the key requirements for a potential transfer station development site was proximity to the depot (existing Widnes depot). The Pikerings Road site offered that benefit and was known to be available through its active marketing. It is recognised that the Waste Local Plan allocates other sites in the Halton area… however these sites were not ideally located for the existing Ditton Road depot operation thereby any synergies reduced, and importantly the sites were not known to be commercially available.' With respect to the applicant, Veolia, Hale Bank Parish Council, would not wish to be the cause of any 'synergies' being 'reduced, but would respectfully point out that Veolia's wish to have a WTS site closer to their existing depot is an irrelevance in terms of compliance with the terms of the JWDP which HBC's planning department is fully aware of and also the Parish Council would be delighted to inform the applicant that as previously stated the allocated WTS site at Widnes Waterfront is fully available and furthermore the Parish Council has learned that the vendor was 'totally unaware' of Veolia's requirements for a WTS as he had NEVER been contacted by them."*

    e. Under the Principle of Development, the OR states;

    > *"The Council's retained adviser on waste has confirmed that the proposal is supportive of the vision for the Waste Local Plan (WLP), and of the majority of the Strategic Objectives. It will also assist the WLP area achieve net self-sufficiency, as the purpose of the facility is to serve Veolia's business needs in the area.*

They confirm that the applicant has supplied sufficient information to demonstrate compliance with policies WM1, WM2, WM3, WM5 and WM13...

Contrary to the views presented by Hale bank Parish Council, the site is considered to be within the area of search as defined by JWLP Policy WM5...

... The proposals are considered to accord with... the Waste Local Plan... and are therefore considered acceptable in principle".

f. The OR then goes on to say that the site is in the view of the officers within the "Area of search".
g. There is a section on noise, dust, odour and other amenity issues and the conclusion is that there are no objections in that regard.
h. Under Highway Considerations the OR refers to the existing lawful use and states that if the site was brought back into that lawful use then the trip generation could be well in excess of that in the proposed use.
i. Under Conclusions it states;

"Conclusions

The application seeks permission for the change of use of the site from a demolition contractor's yard with external waste storage and sorting to a waste transfer and treatment facility. A significant proportion of the waste will be stored and stored within a new proposed waste transfer building which will also enable the planning authority a greater degree of control over the amount and heights of waste stored and processed externally.

Core strategy policy CS2, JWLP Policy WM0 and NPPF paragraphs 11 and 38 set out the presumption in favour of sustainable development whereby applications that are consistent with national and up to date local policy should be approved without delay.

The Council's retained adviser has confirmed that the proposals are compliant with the Joint Waste Local Plan and Core Strategy Policy CS24. The proposals are also considered to accord with UDP Policies MW1 and MW2. Where any areas of such compliance have been queried with the applicant, these are considered to have been adequately addressed and it is not considered that refusal of planning permission could be justified in this regard.

The proposals are considered appropriate to the character of the industrial area, will result in significant environmental improvement when compared with the former use and contribute to the regeneration of the area. The proposals accord with UDP Policy RG5, BE3 and GE30.

The Council's Highways Engineer and Environmental Health Officer have confirmed that they raise no objections."

29. There was an oral update by officers at the Committee meeting, and a note of what was said was produced to the Court. In that note it is said;

> *"The Council's retained adviser has confirmed that they consider that sufficient information has been provided to demonstrate compliance with the Waste Local Plan".*

30. The Parish Council made representations at the meeting and the minutes record that; "*..it was confirmed [by officers] that the proposal was in accordance with Waste Policy WM5 as the site was in the vicinity of an area of search".* There is also reference in the Minutes to the Parish Council having threatened judicial review, and members being advised that if there was an appeal it was likely to go in Veolia's favour "*no evidence having been put forward to dispute the technical evidence included within the agenda".*

The legal principles

31. The decision-making framework under statute is set out in s.38(6) of the Planning and Compulsory Purchase Act 2004 (PCPA) and s.70(2) of the Town and Country Planning Act 1990. The general approach to officer's reports was summarised by Lindblom LJ in Mansell v Tonbridge and Malling BC [2018] JPL 176 at [42]:

> *"The essential principles are as stated by the Court of Appeal in R. v Selby DC Ex p. Oxton Farms [1997] E.G.C.S. 60 (see, in particular, the judgment of Judge LJ, as he then was). They have since been confirmed several times by this court, notably by Sullivan LJ in R. (on the application of Siraj) v Kirklees MBC [2010] EWCA Civ 1286 at [19], and applied in many cases at first instance (see, for example, the judgment of Hickinbottom J, as he then was, in R. (on the application of Zurich Assurance Ltd, t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin) at [15]).*
>
> *•The principles are not complicated. Planning officers' reports to committee are not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in R. (on the application of Morge) v Hampshire CC [2011] UKSC 2 at [36], and the judgment of Sullivan J, as he then was, in R. v Mendip DC Ex p. Fabre [2017] P.T.S.R. 1112; (2000) 80 P. & C.R. 500 at 509). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison LJ in R. (on the application of Palmer) v Herefordshire Council [2016] EWCA Civ 1061 at [7]). The question for the court will always be whether, on a fair reading of the report as a whole, the officer has materially misled the members on a matter bearing upon their decision, and the error has gone uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the*

> *members in a material way—so that, but for the flawed advice it was given, the committee's decision would or might have been different—that the court will be able to conclude that the decision itself was rendered unlawful by that advice.*
>
> *Where the line is drawn between an officer's advice that is significantly or seriously misleading—misleading in a material way—and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it. There will be cases in which a planning officer has inadvertently led a committee astray by making some significant error of fact (see, for example R. (on the application of Loader) v Rother DC [2016] EWCA Civ 795; [2017] J.P.L. 25), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, R. (on the application of Watermead Parish Council) v Aylesbury Vale DC [2017] EWCA Civ 152). There will be others where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law (see, for example, R. (on the application of Williams) v Powys CC [2017] EWCA Civ 427; [2017] J.P.L. 1236). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."*

32. In the Court of Appeal in *SSCLG v. BDW* ([2016] EWCA Civ 493), Lindblom LJ summarised and reiterated what is required to ensure that the statutory duty under s.38(6) is properly met:

> *"First, the section 38(6) duty is a duty to make a decision (or "determination") by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan. Secondly, therefore, the decision-maker must understand the relevant provisions of the plan, recognizing that they may sometimes pull in different directions. Thirdly, section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty. It does not specify, for all cases, a two-stage exercise, in which, first, the decision-maker decides "whether the development plan should or should not be accorded its statutory priority", and secondly, "if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration". Fourthly, however, the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole. And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the*

> *same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance."*

33. Ms Wigley relies on *Bovis Homes v New Forest DC* [2002] EWHC 483 at [111-1112] where Ouseley J was considering pre-determination:

> *111. In my judgment a Council acts unlawfully where its decision-making body has predetermined the outcome of the consideration which it is obliged to give to a matter, whether by the delegation of its decision to another body, or by the adoption of an inflexible policy, or as in effect is alleged here, by the closing of its mind to the consideration and weighing of the relevant factors because of a decision already reached or because of a determination to reach a particular decision. It is seen in a corporate determination to adhere to a particular view, regardless of the relevant factors or how they could be weighed. It is to be distinguished from a legitimate predisposition towards a particular point of view. I derive those principles from the Kirkstall Valley Campaign Ltd case to which I have already referred, particularly at page 321G.*
>
> *112..There is obviously an overlap between this requirement and the commonplace requirement to have rational regard to relevant considerations. But, in my judgment, the requirement to avoid predetermination goes further. The further vice of predetermination is that the very process of democratic decision making, weighing and balancing relevant factors and taking account of any other viewpoints, which may justify a different balance, is evaded. Even if all the considerations have passed through the predetermined mind, the weighing and balancing of them will not have been undertaken in the manner required. Additionally, where a view has been predetermined, the reasons given may support that view without actually being the true reasons. The decision-making process will not then have proceeded from reasoning to decision, but in the reverse order. In those circumstances, the reasons given would not be true reasons but a sham.*

34. In *CPRE v Dover DC* [2018] 1 WLR 108 the Supreme Court considered what inquiries needed to be undertaken before a lawful decision was made. Lord Carnwath at [62] said:

> *"62. The Model Council Planning Code and Protocol, already referred to (para 60 above) contains under the same heading the following advice:*
>
> *"Do come to your decision only after due consideration of all of the information reasonably required upon which to base a decision. If you feel there is insufficient time to digest new information or that there is simply insufficient information before you, request that further information. If necessary, defer or refuse."*

> *This passage not only offers sound practical advice. It also reflects the important legal principle that a decision-maker must not only ask himself the right question, but "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly":* Secretary of State for Education and Science v Tameside Metropolitan Borough Council *[1977] AC 1014, 1065B. That obligation, which applies to a planning committee as much as to the Secretary of State, includes the need to allow the time reasonably necessary, not only to obtain the relevant information, but also to understand and take it properly into account."*

35. The duty to produce background papers is contained in s.100D of the Local Government Act 1972. This provides, as relevant;

> *"100D.– Inspection of background papers.*
>
> *(1) Subject, in the case of section 100C(1), to subsection (2) below [a time limit], if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public–*
>
> *(a)those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and*
>
> *(b)at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.*
>
> *…*
>
> *(3) Where a copy of any of the background papers for a report is required by subsection (1) above to be open to inspection by members of the public, the copy shall be taken for the purposes of this Part to be so open if arrangements exist for its production to members of the public as soon as is reasonably practicable after the making of a request to inspect the copy.*
>
> *Background papers are defined in section 100D(5) .*
>
> *(5) For the purposes of this section the background papers for a report are those documents relating to the subject matter of the report which—*
>
> *(a)disclose any facts or matters on which, in the opinion of the proper officer, the report or an important part of the report is based, and*
>
> *(b)have, in his opinion, been relied on to a material extent in preparing the report,*

but do not include any published works."

36. In *R (Joicey) v Northumberland CC* 2014 EWHC 3657 Cranston J considered a challenge to a failure to comply with s.100D and said at [47];

> *"46.For the Council, Mr White QC advanced three main arguments, all subsumed in a sense in his contention that the claimant was not prejudiced by the statutory breaches or the denial of the claimant's legitimate expectation. First, he submitted, the councillors had the WSP noise assessment report before them on the day of the planning committee. The claimant himself had access to it, for some 36 hours before the meeting. Not only was he able to make the point about its late availability in his 5 minute presentation, but he was also able to lay before the committee the main points of his critique of the noise assessment report and where the applicant's consultants had gone wrong. In Mr White's submission the claimant's line that the report was flawed could not have been clearer. His presentation to the committee was a clear, cogent and powerful case about the noise issues. The points about the WSP noise assessment, which he made in his email on 8 November to the Council, and in his email on 10 November to Cllr Kelly he made in his presentation to the planning committee. Even now we have not been told what would have been in the detailed submissions which the claimant contends with more time he would have made. If the committee meeting of 5 November had been postponed for several months the claimant's submissions would have remained the same.*
>
> *47.If this is an argument that the Council complied with its legal obligations to publish, it is not one I accept. Right to know provisions relevant to the taking of a decision such as those in the 1972 Act and the Council's Statement of Community Involvement require timely publication. Information must be published by the public authority in good time for members of the public to be able to digest it and make intelligent representations: cf. R v North and East Devon Health Authority Ex p. Coughlan [2001] Q.B. 213, [108]; R (on the application of Moseley) (in substitution of Stirling Deceased) v Haringey LBC [2014] UKSC 56 , [25]. The very purpose of a legal obligation conferring a right to know is to put members of the public in a position where they can make sensible contributions to democratic decision-making. In practice whether the publication of the information is timely will turn on factors such as its character (easily digested/technical), the audience (sophisticated/ ordinary members of the public) and its bearing on the decision (tangential/ central)."*

The submissions

37. The Claimant's argument under ground one, was that WM1 was a central policy in the decision to be made. In order to ensure that the statutory duty under s.38(6) PCPA was met the decision maker had to understand the relevant provisions of the Plan and establish whether or not the proposal accorded with them, *SSCLG v BDW* 2016 EWCA Civ 493.

38. Ms Wigley says that it follows that the Development Control Committee had to be provided with sufficient information for itself to be satisfied as to whether the key development plan policies were met. It was open to the Committee to take advice on these issues, but it had to be in a position to determine for itself whether it agreed with the advice. She says the Committee erred by relying on a bare assertion of the planning officer that an external adviser, Ms Atkinson, had confirmed compliance with WM1.

39. She says that the OR failed to address the key policy requirement in WM1, save for the assertion in the OR that the application had provided sufficient information to secure compliance.

40. She refers to the fact that the evidence now disclosed shows that Ms Atkinson simply relied on Veolia's Planning Statement that they were "not ideally located" for the developer's operation and that it was not known if they were commercially available. She points to Ms Atkinson's email of 20 December 2018 as containing a plain misdirection because it simply says that WM1, and the other policies are complied with, when there was no material to support that and no consideration whatsoever as to whether other sites were available.

41. There are two limbs to Ms Wigley's argument; firstly that the Committee did not receive any or sufficient information on whether the WM1 test was met; and secondly, that Ms Atkinson failed to make adequate inquiries, or failed to have regard to material considerations, namely that Widnes Waterfront was indeed suitable and available. The second limb is based on the well-known principle in *Secretary of State for Education v Tameside MBC* [1977] AC 1014, that a decision maker must "take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly". This was particularly important because the issue of alternative sites had been strongly raised by the PC, and the Council had been told by the PC that at least one of the allocated sites was commercially available.

42. On ground three Ms Wigley relies on the duty in s.100D(1) and (5) of the Local Government Act 1972 to provide copies of background papers for inspection. The advice from Ms Atkinson on dated 11 July 2018 and 11 December 2018 were not provided as background papers and as such Ms Wigley says that there was a breach of the statutory duty.

43. On ground two Ms Wigley says that policy WM12 required certain specified information to be produced and considered by the Council, including reference to the European Waste Codes and this was not done.

44. Mr Garvey for the Council argues that whether WM1 was met was a matter of planning judgment. The only issue for the Court is whether members were significantly misled. The OR referred on a number of occasions to WM1, and said that the Council's advisor (Ms Atkinson) had confirmed that the proposal was "supportive of the vision" for the WLP and compliant with the Plan. He therefore says that the Council did the exercise required by WM1 He also refers to the fact that the PC's argument that the sequential test had not been met had been expressly raised at the meeting and brought to the Committee's attention so they plainly had regard to it. Mr Garvey in his Skeleton Argument referred to *Hawksworth Securities v Peterborough City Council* [2016] EWHC 1870 as to the standard of reasons required. I do however note that some doubt was cast on Lang J's approach by Lord Carnwath in *Dover DC v CPRE* [2018] 1 WLR 108 at [41]. Mr Garvey also relied on [34-36] of *Pagham PC v Arun District Council and others* [2019] EWHC 1721 where Andrews J said;

> *34.In the absence of evidence to the contrary, it may reasonably be assumed that in adopting the planning officer's recommendation, the members of the Committee followed the advice that he gave them, including as to their legal duties. It may also be reasonably inferred in such circumstances that members of the Committee followed the reasoning of the report: see e.g. R(Zurich Assurance Ltd t/a Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin) per Hickinbottom J at [15], and, in the specific context of the s.66(1) duty, R(Palmer) v Hertfordshire Council (above), per Lewison LJ at [7]. Dr Bowes relied on observations of Lord Carnwath in R (CPRE Kent) v Dover District Council (above) to similar effect at [48]; but those observations were made in the context of an Environmental Impact Assessment case, in which there was a positive duty to give reasons.*
>
> *35.It does not follow from the fact that such an inference may be drawn, that in a case where the decision maker is under no such duty to give reasons, objectors can mount a challenge to the decision on the basis of the alleged inadequacy or insufficiency of the reasoning of the planning officer when making his recommendations, on the basis that his reasoning is to be ascribed to the committee. I do not read Lord Carnwath's observations, made in an entirely different context, as a basis for giving carte blanche to those who are dissatisfied with a grant or refusal of planning permission to mount a "reasons based" challenge to the decision taken by a planning committee of the LPA simply because they adopted the recommendations of the planning officer.*
>
> *36.It is well settled that applications for judicial review based on criticisms of an officer's report do not normally begin to merit consideration unless on a fair reading of the report, its overall effect is to significantly mislead the planning committee about material matters which are then left uncorrected. Minor or inconsequential errors may be excused. That is quite a different thing from arguing that the planning officer was under a duty to give further or better reasons for his recommendation. The Court should be astute to avoid imposing too demanding a standard on such reports, for otherwise their whole purpose will be defeated: see e.g. the observations of Baroness Hale in Morge v Hampshire County Council [2011] UKSC 2 [2011] 1 WLR 268, at [36].*

45. He argues that the OR said that the Development Plan policies were met, and Ms Wigley is wrong to argue that members had to be taken through all the stages of WM1 in order to conclude that it was complied with. He argues it was sufficient that Ms Atkinson had concluded that WM1 was met, and had accepted Veolia's Planning statement on this issue.

46. Ms Atkinson in her witness statement had suggested that because Widnes Waterfront was a sub-regional allocation it would be expected to be developed as a strategic resource, rather than on a piecemeal basis. However, this reasoning does not appear in the OR.

47. On ground three Mr Garvey argued that there was no breach of s.100D (5) because the material in question did not amount to "facts or matters" within the meaning of that sub-section. Further, he said that the only paragraphs relating to WM1 were captured within the OR itself. He argued that there was no prejudice to the Claimant, and that the documents were not "background papers" but rather they were matters of opinion.

48. On ground two Mr Garvey said there was no requirement to provide the European Waste Codes as the council already had the information on the tonnage and composition of the waste

49. Mr Turney for Veolia supported Mr Garvey's arguments. He started by referring to the fact that the application site had been found by the Council to be environmentally acceptable and was a suitable site within the meaning of WM1. He suggested that WM1 was not at the heart of the Development Plan and there was nothing wrong or misleading about the conclusion that the Development Plan policies were complied with looking at the issue of compliance for the purposes of s.38(6) as a whole.

50. He referred to the caselaw, including a decision of Patterson J in *R (Carnegie) v London Borough of Ealing* [2014] EWHC 3807, where planning authority decisions had been upheld where the applicant's planning analysis had simply been accepted in the OR.

51. He also argued that relief should be refused because there was highly likely to be the same result on any redetermination because Ms Atkinson would inevitably advise that the Widnes Waterfront site was not available, and given that there was clear compliance with the development plan as a whole planning permission would be granted again.

Conclusions

52. The principles which I need to apply in considering the OR are those set out in *Mansell* and referred to above. However, in my view this is not a case about excessive legalism or whether members were materially misled, it is rather a case about whether members had sufficient information to make a lawful decision. It is important to bear closely in mind that under the statutory scheme (and here the relevant standing orders) it is members who make the decision not officers. Those members have to have sufficient

information to be able to make a lawful decision, see *R (Morge) v Hampshire CC* [2011] UKSC 2 and *CPRE v Dover* [2018] 1 WLR 108 at [62]. I have had a large number of decisions cited to me most of which simply involve applications of the legal principles summarised by Lindblom LJ in *Mansell* and by Lord Carnwath in *CPRE*, to the facts of particular cases. For example, in Carnegie the OR did include an assessment of the heritage impacts albeit a somewhat limited one, and what lay behind the report was a "thorough assessment" by the Interested Party. Therefore the factual background was very different from here.

53. Equally, there will be some issues in a planning context where members may be in a good position to make their own judgement even if the OR has little or no analysis of the relevant issue. An obvious example is visual impact where the members when shown plans and photographs may well be able to reach their own judgements. However, there will be other issues, and in my view this is one, where without fuller (or any) information members cannot "understand the issues and make up their minds" (*Morge* [36]) without further information. As Lord Steyn so famously said, context is all.

54. In my view the vice (and legal error) in this case is twofold. Firstly, the OR told members nothing about why, or on what basis, WM1 was met. It simply said that the Council's advisor (Ms Atkinson) had confirmed that the applicant had supplied sufficient information to demonstrate compliance. The members were therefore not in a position to make up their own minds, but equally were not in a position to reach a view as to the conclusion reached by Ms Atkinson. Secondly, when the background material is examined it is clear that Ms Atkinson had simply accepted Veolia's assertion that the site was chosen because of proximity to Veolia's depot, and "therefore allocated sites were not considered suitable". There was no investigation or even consideration of the suitability or availability of alternative sites. The officers accepted Ms Atkinson's advice and themselves asked no further questions.

55. Ms Atkinson's approach could either be characterised as a failure to apply WM1 lawfully, or a failure to carry out proper inquiries pursuant to the principle in *Tameside BC*, and set out so clearly by Lord Carnwath at [62] of *CPRE v Dover*. The core point is that the sequential test in WM1 cannot be satisfied by a simple acceptance of a developer's assertion that no other site is suitable, without some material to support that assertion, and a proper consideration of whether the assertion was justified. If the developer's assertion alone was sufficient then WM1 and the sequential test would be a wholly meaningless exercise devoid of purpose, because any developer could, and probably would, just say that they wanted their site because it met their requirements and therefore allocated sites were not suitable. In these circumstances the site selection hierarchy so carefully set out in the Waste Management policies in the WLP would have no effect. This error was then compounded by the fact that members were only told that the advisor had accepted the Development Plan had been complied with, without any of the requisite information. They were therefore not in a position to reach any view as to whether sufficient investigation had been undertaken.

56. I do not accept Mr Turney's argument that WM1 was not a critical policy and therefore it was correct to find compliance with the Development Plan as a whole. In my view

that is to misunderstand the role of the different policies in the planning analysis. This was not a *City of Edinburgh* type situation where different policies pulled in different directions. WM1 set out a site prioritisation hierarchy which needed to be undertaken properly before a wider planning balance was performed.

57. For these reasons I find Ground One made out.

58. In my view Ground Three is also made out. The clear statutory intention behind s.100D(5) of the LGA 1972 is to ensure that documents upon which the OR is based are open to be viewed by members of the public. It is in my view absolutely obvious that the OR is partly based on Ms Atkinson's advice, indeed I fail to see how it could not have been. Ms Atkinson's role was precisely to advise the Council on the issue of compliance with the Plan, and Mr Henry simply relied on that advice when writing the report. The fact that the advice was in part opinion does not remove it from the scope of s.100D(5), indeed quite the contrary, advice will often be the very thing upon which the OR is based.

59. I do not accept that this failure was not material. It is the very fact that Ms Atkinson's advice was so sparse in respect of the sequential test in WM1 which is important. If the Parish Council had known this they would have been able to say to the Committee that there was a lack of evidence that WM1 had been applied, and a proper inquiry had not been undertaken. The Parish Council were seriously disadvantaged in their presentation to the Committee by not having seen the background documents.

60. Further, proper compliance with s.100D is an important part of maintaining a transparent planning system, in which third parties can be properly informed as to why particular recommendations are being made. The failure to produce the advice from the Council's advisor was an obvious breach of this requirement.

61. I do not find that Ground Two is made out. The European Waste Codes were not referred to, contrary to the policy requirement. But the Council had all the relevant information and the Codes would have made no material difference to the information provided. There was no error of law in not referring to them.

62. I will quash the planning permission because I do not accept that the decision would inevitably or be highly likely to be the same. The proper application of the sequential test, after appropriate inquiries are made, is a critical step in the planning policy framework lying behind the determination of the application. Unless and until that policy exercise is gone through it is not possible to know what decision the Council will make.