



Neutral Citation Number: [2021] EWHC 1792 (Admin)

Case No: CO/384/2021

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**PLANNING COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 30 June 2021

**Before :**

**THE HON. MRS JUSTICE THORNTON DBE**

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**Between :**

**(1) VALERO LOGISTICS UK LIMITED**  
**(2) GREENERGY TERMINALS LIMITED**

**Claimants**

**- and -**

**PLYMOUTH CITY COUNCIL**

**Defendant**

**-and-**

**(1) HALO AVIATION LIMITED**  
**(2) LOUIS DULLING**

**Interested Party**

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**Mr Philip Coppel QC and Ms Olivia Davies (instructed by Burges Salmon LLP) for the**  
**Claimant**

**Mr Wayne Beglan and Mr Sam Fowles (instructed by Plymouth City Council) for the**  
**Defendant**

Hearing date: 19 May 2021  
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**JUDGMENT**  
**(Approved by the court)**

**The Hon. Mrs Justice Thornton:**

**Introduction**

1. The Claimants, Valero Logistics UK Ltd and Greenergy Terminals Ltd, challenge the decision of the Defendant, Plymouth City Council to grant planning permission for a development comprising a change of use from Class C3 residential use with permitted ancillary private helicopter use to commercial heliport at Victoria House, Cattedown Road, Plymouth, (“the Site”). The Defendant is the local planning authority for the Site. The Interested Party is the applicant for the planning permission.
2. The Claimants operate distilled fuel storage depots, the closest of which is approximately 125m away from the helipad. The depots are “establishments” regulated under the Control of Major Accident Hazards Regulations (SI2015/483) (‘the COMAH sites’) because of the intrinsic dangers to human health and the environment which the products handled and stored there present. Highly flammable fuel is regularly unloaded at a dock approximately 400 metres south east of the site and conveyed by over-ground pipes to the Claimants’ depots, where it is stored in above-ground tanks.
3. The Claimants challenge the decision on five inter-related grounds, as follows:

Ground 1 – the Defendant failed to consider a material consideration by not considering the risks posed by the development to the COMAH sites.

Ground 2 – the Defendant misunderstood the “fallback” position and, by relying on that misunderstanding, it skewed the process by which it made the decision.

Ground 3 – the Defendant acted irrationally by relying on the existence of other regulatory regimes in deciding to grant permission.

Ground 4 – the Defendant erred in law by granting permission to an application that conflicted with the development plan when no other material considerations justified such a decision.

Ground 5 – the decision was irrational.

4. The Claimants point to the potentially catastrophic consequences of a helicopter crashing onto highly flammable fuel and say that what unites the grounds is a decision-making process and decision that abdicates responsibility for the dangers created by the proposed development. In particular, the Defendant conspicuously failed to engage with the scale of the risk posed to the COMAH sites by commercially operated helicopters flying at low heights over large quantities of highly flammable fuel. To the extent the Defendant recognised any risk, it sought to off-load it onto the Civil Aviation Authority (CAA) even though the CAA did/does not have the mandate or the expertise to evaluate the consequences on the ground of crashing aircraft or to take land-based decisions accordingly. These remain the safety responsibilities of others including the Defendant who is said to have been, and remains, in denial about this.

**The Facts**

5. The Site measures 0.8ha in area and is 1.5kms south-east of the city centre of Plymouth. It is located in the southern part of Cattedown, an area characterised by heavy industrial

uses and operations. It is currently in residential use (Class C3). In addition to a house, the site has an asphalted area.

6. On 3 May 2001 a Certificate of Lawful Development Use was issued for a single residential property, ancillary garaging and storage and associated residential curtilage. On 5 June 2001, permission was granted for an extension to the garaging for use as private helicopter hangar.
7. Greenergy owns and operates its fuel storage depot approximately 100 metres to the north-west of the Site. It has 14 main fuel storage tanks with a capacity for 54 million litres of distilled fuel. Valero owns and operates its depot approximately 600 metres to the east of the Site. Its fuel storage depot has capacity of 54 million litres of distilled fuel. Both the distilled fuel and the vapours from the fuel are highly flammable. Greenergy and Valero each receive petroleum products from ships berthed at the tanker berth at Cattedown Wharf, approximately 400 metres south-southeast of the Site. Vessels are docked at the berth on average 2-4 times per week, for periods of around 24 hours. Each vessel typically holds 12,000-13,000 tonnes of fuel. During discharge, these vessels are approximately 32.4 metres (i.e. approx. 100 feet) above the waterline and protrude westerly over the jetty by around 80 metres.
8. The Interested party applied for planning permission on 20 May 2020 for a change of use to establish a commercial heliport on the Site to be known as “Plymouth City Heliport”. The application envisaged 2-3 commercial helicopter passenger landings per week subject to evening and weekend limitations. The flight paths submitted by the Interested Party would involve helicopters flying over the bow of vessels discharging fuel. Accordingly, the Interested Party submitted an agreement between it and the Harbour Commissioners providing for liaison prior to any commercial helicopter landings (referred to as a “deconfliction agreement”). It also submitted a specimen permission from the Civil Aviation Authority permitting landing and taking off for helicopters in a congested area. Correspondence with the Civil Aviation Authority was also provided.
9. On 12 June 2020, Greenergy submitted an objection to the proposed development. On 17 June 2020, Valero also submitted an objection. Both expressed concerns about the safety implications of the proposed development for the nearby COMAH sites.
10. The Planning Officer sent the Interested Party’s risk assessment and the proposed flight paths to the Civil Aviation Authority and sought its views.
11. The Planning Officer produced a report for the Planning Committee recommending the grant of planning permission, subject to planning conditions. The report concluded as follows:

*“...the proposal provides tangible betterment, ensuring flights are carried out in a structured and considerate way by an operator who is fully accountable to the Civil Aviation Authority. This should give adjacent site operators greater [sic] and perhaps reduce the risk to their operations and onsite emergency plans when compared against an unregulated and unrestricted domestic use which can operate in an ad-hoc way.*

*Whilst health and safety is covered by separate legislation, having a regulated facility rather than a domestic facility surely safeguards the surrounding operators, providing comfort that modern fleet and professional pilots are operating to the highest safety standards.”*

12. On 17 September 2020, the Defendant’s planning committee met to consider the application and resolved to grant planning permission for the proposed development, subject to the signing of a section 106 Agreement.
13. On 23 December 2020, the Defendant granted planning permission for the commercial heliport development of the Site, in the following terms:
 

*“Change of use from private helipad to commercial heliport, including demolition of existing private hangarage building and erection of new commercial hangarage building and associated works.”*
14. The grant of planning permission included 23 conditions. These included Condition 5 titled “Deconfliction with Cattedown Operators”. This condition had not been proposed by officers but was included by Committee members following the debate at the Planning Committee. It provides that before the first flight:
 

*“The development hereby approved shall not be brought into first use until the applicant (Halo Aviation) establishes a direct line of communication with the neighbouring COMAH sites in order to increase awareness of aircraft activity at the site. The applicant will attend the Cattedown Emergency Planning Forum meetings for the first 12 months of operation and as requested thereafter by Plymouth City Council’s COMAH officer or successor in title.*

*Reasons In the interests of promoting health and safety around the application site and promoting the safe flying conditions and avoid conflict with Policies DEV1, DEV2, and DEV20 of the Plymouth and South West Devon Joint Local Plan 2014-2034 (2019) and the National Planning Policy Framework 2019.”*
15. In addition, Condition 19, which had been proposed by officers, imposed a number of flight restrictions and procedures including:
  - a. limiting the flight paths to two, which will be mainly over water,
  - b. restrictions on flights in the evenings, weekends and bank holidays,
  - c. a maximum of 160 commercial helicopter landings at the site per year, save in emergency,
  - d. all commercial helicopter landings to be operated in accordance with Plymouth City Heliport & Cattewater Harbour - Deconfliction Agreement, dated 15 June 2020.

## **Legal framework**

### *Aviation*

16. The proposed heliport will be an “aerodrome” within the meaning of aviation legislation, including the Civil Aviation Act 1982, the Rules of the Air Regulations 2015 (2015/840) and the Air Navigation Order 2016 (2016/765). It will not be licensed by the Civil Aviation Authority as a “licensed aerodrome”/“national licensed aerodrome” under Art 212 of the Air Navigation Order 2016.
17. The Site is in a “congested area” of a city within the meaning of the Rules of the Air Regulations 2015 and the Air Navigation Order 2016. A congested area in relation to a city, town or settlement means any area which is substantially used for residential,

industrial, commercial or recreational purposes (Schedule I Air Navigation Order 2016). An aircraft must not take off or land within a congested area except at an aerodrome and in accordance with procedures notified by the CAA (Regulation 5 Rules of the Air Regulations 2015/840). The procedures are set out in the CAA's relevant guidance which provides that prior permission must be obtained before using an unlicensed site within a Congested Area (paragraph 7 CAP 793, App. D(7)).

#### *COMAH Sites*

18. The COMAH Regulations, which apply to the Claimants' fuel depots, proceed on the basis that major accident scenarios, even if unlikely to occur, should be prevented by site operators and mitigated by local authorities as far as possible:

*“Every operator must take all measures necessary to prevent major accidents and to limit their consequences for human health and the environment.”* (Regulation 5(1))

*“An operator or local authority which has prepared an internal emergency plan or external emergency plan must take reasonable steps to ensure that it is put into effect without delay if-*

*(a) a major accident occurs; or*

*(b) an uncontrolled event occurs which by its nature could reasonably be expected to lead to a major accident.”* (Regulation 16)

19. The role of Plymouth CC in preventing incidents relating to COMAH establishments is reflected in recital 23 to the Seveso III Directive (the EU Directive which the COMAH Regulations implement):

*“Local authorities have an interest in the prevention of major accidents and mitigation of their consequences and can have an important role to play.”*

20. Pursuant to this role, Plymouth CC is required to prepare, review, test and implement external emergency plans for upper-tier establishments, like the Claimants' depots, with the objective of:

*“containing and controlling incidents so as to minimise the consequences, and to limit the damage to human health, the environment and property.”* (Regulations 11(1)(a), 13(1), 14(1) and 16)

#### *Planning decision making and judicial review*

21. To succeed in a claim for judicial review, the Claimant must establish a public law error on the part of the decision-maker.

22. The decision whether planning permission should be granted is always a matter of planning judgment for the members of the local authority's planning committee, advised by planning officers, exercising their judgment to decide where the planning balance lies, based on material considerations. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court (Seddon Properties Ltd v Secretary of State for the Environment (1981) 42 P & CR 26). A legal challenge is not an opportunity for a review of the planning merits (Newsmith v

Secretary of State for the Environment, Transport and the Regions [2001] EWHC 74 (Admin)).

23. Section 70(2) of the Town and Country Planning Act 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. The applicable development plan is the Plymouth and South West Devon Joint Local Plan 2014-2034. For the purposes of the present matter the relevant policies are:

*PLY20: "Plymouth's waterfront will be renewed, enhanced and maintained as Plymouth's showcase and as a unique, sustainable and vibrant asset that drives the city's economic, cultural, social and environmental wellbeing.... By.... [u]sing development and technological solutions through the planning process in order to minimise the risk of hazardous installations at Cattedown port..."*

*DEV1: "Development proposals will be required to safeguard the health and the amenity of local communities";*

*DEV2: "Development proposals which will cause unacceptable on- or off-site risk or harm to human health, the natural environment or living conditions, either individually or cumulatively, will not be permitted";*

*DEV29: "Development will be required to contribute positively to the achievement of a high quality, effective and safe transport system in the Plan Area".*

24. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that: "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.
25. Where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a Claimant simply to say that the decision-maker did not take into account a legally relevant consideration. It is necessary for a Claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or that on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account (R(ClientEarth v Secretary of State for Business Energy and Industrial Strategy [2020] EWHC 1303 (Admin) at [99]).

#### *Planning Officer's Reports*

26. Planning Committees are to be given space to undertake their decision making process without undue interference by Courts criticising the advice of planning officers which is written for Councillors well-versed in local affairs and local factors, not for lawyers.
27. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. In summary:
- a. The reports are not to be read with undue rigour, but with reasonable benevolence. In considering the level of detail it must be borne in mind that they are written for councillors with local and background knowledge. Part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or

her report in order to avoid burdening a busy committee with excessive and unnecessary detail (Sullivan J in R v Mendip DC ex parte Fabre [2017] PTSR 1112, at 1120B).

- b. 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.
- c. 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 that 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.
- d. 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 (R (Mansell) v. Tonbridge and Malling Borough Council [2017] EWCA Civ 1314).

#### *Fallback*

28. In Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314, Lindblom LJ gave the following guidance about principles applicable to "fallback" development:

*"27. The status of a fallback development as a material consideration in a planning decision is not a novel concept. It is very familiar. Three things can be said about it:*

*(1) Here, as in other aspects of the law of planning, the court must resist a prescriptive or formulaic approach, and must keep in mind the scope for a lawful exercise of planning judgment by a decision-maker.*

*(2) The relevant law as to a "real prospect" of a fallback development being implemented..... in this context a "real" prospect is the antithesis of one that is "merely theoretical": para 20. The basic principle is that "for a prospect to be a real prospect, it does not have to be probable or likely: a possibility will suffice"... "fallback" cases tend to be very fact-specific"... The role of planning judgment is vital. ....:*

*"[it] is important ... not to constrain what is, or should be, in each case the exercise of a broad planning discretion, based on the individual circumstances of that case, by seeking to constrain appeal decisions within judicial formulations that are not enactments of general application but are themselves simply the judge's response to the facts of the case before the court."*

*(3) Therefore, when the court is considering whether a decision-maker has properly identified a "real prospect"*

*of a fallback development being carried out should planning permission for the proposed development be refused, there is no rule of law that, in every case, the "real prospect" will depend, for example, on the site having been allocated for the alternative development in the development plan or planning permission having been granted for that development, or on there being a firm design for the alternative scheme, or on the landowner or developer having said precisely how he would make use of any permitted development rights available to him under the GPDO. In some cases that degree of clarity and commitment may be necessary; in others, not. This will always be a matter for the decision-maker's planning judgment in the particular circumstances of the case in hand."*

*Reliance on other regulatory regimes*

29. Where a regulatory regime exists to deal with an issue raised by a planning application, it is open to a Local Planning Authority to place reliance upon the effective operation of that regime in determining an application for planning permission. However, the Local Planning Authority cannot simply ignore the issues in question. It must satisfy itself that the other regulatory regime is capable of regulating the relevant issues:

*"This decision is not carte blanche for applications for planning permission to seek to ignore the pollution implications of their proposed development and say "leave it all to the EPA", This decision simply recognises that whilst environmental pollution is a material consideration, so too is the system of authorisation under the EPA. So that in appropriate cases the planning authority or the Secretary of State may decide that they are satisfied that any remaining pollution concerns are capable of being dealt with by the EPA. It is for them to decide which cases are appropriate and which are not." Gateshead MBC v Secretary of State (1994) 67 P & CR 179*

*"[13] Unless the Secretary of State in a case such as this formed the view that excessive pollution could not be controlled from the development, it was appropriate to leave the matter to the regulator. Thus it would only be if, in a given case, either the material put before the Secretary of state was insufficient so that he could not form a proper view as to whether there was indeed the possibility of excessive emissions which could not be controlled, or he was persuaded that that indeed was the position, it would be appropriate to refuse planning permission. If the situation in any given case was that it appeared to him that the necessary controls could achieve the desired result, then it would be entirely appropriate for him to decide that he could grant the necessary consent... and leave to the regulator the control of the emissions."*



### **Grounds of challenge**

#### **Ground 1 – The Defendant failed to consider a material consideration by not considering the risks posed by the development to the COMAH sites**

##### Submissions

30. The Claimants submit that the Planning Committee and the Committee failed to take reasonable steps to acquaint itself with the relevant information to properly assess the risk to the COMAH sites. The Committee had to have the correct measure of the risk. There are two elements to any risk assessment. Firstly, the likelihood of that risk occurring, the risk being the likelihood of a helicopter accident on take off/landing and secondly, the harm from that occurrence. Neither element was addressed by the Planning Officer or the Committee. The transcript of the committee meeting demonstrates the materiality and scale of the Committee's misunderstanding about risk. It is apparent that the Officer persuaded the more reluctant members out of their concerns about risk by explaining that the CAA had complete ownership of risk. It would have made a difference had the Committee been appropriately directed on risk. In addition, during the debate, the Officer incorrectly cited from the Interested Party's report that the risk of helicopter failure was 1 in 9 billion rather than 1 in a billion. The 1 in a billion figure must also be erroneous given the accident statistics in a CAA report on Onshore Helicopters. The officer's report failed at various points to explain the risk to the COMAH sites. The Committee appeared oblivious of the quantities of highly inflammable fuel involved. The analysis of risk had been superficial.
31. The Defendant submitted that the risks were analysed extensively by the planning committee, as is apparent from a review of the transcript. The discussion led to the imposition of a planning condition requiring the Interested Party and neighbouring COMAH sites to establish a direct line of communication. The Claimants construe risk assessment and minimisation too narrowly. Their case relies on the assertion that the risk to the COMAH sites cannot be accounted for unless specifically addressed. In reality, it can be and is addressed as part of a broader class of risks and minimised through technical and organisational requirements which reduce (effectively to nothing) the risk of a helicopter "falling from the sky". The Claimants are, in effect, seeking to hypercritically retest the merits of the proposed development. Their approach runs counter to the basic, well established, proposition that all the evaluations which fed into the decision making process were for the Council to make, subject to the constraint of unreasonable judgment (R v Mansell). Similarly, it was for the Council in the first instance to decide whether it had sufficient material to reach a decision.

##### Discussion

32. In my judgment the planning officer and the Committee took reasonable steps to understand the risks of the proposed development to the COMAH sites and afforded extensive consideration to the risks and their mitigation. This is apparent from a number of sources.

##### The Interested Party's risk assessment

33. The Interested Party submitted a risk assessment with the planning application. The scope of the assessment was described as *‘The associated risks to be considered will be those to the neighbouring sites from helicopter operations at Victoria House.’* The assessment went on to explain as follows:

*“5. Risks from the operation. Risks associated with operating helicopters commercially are mitigated in the following ways;*

- a. How the helicopter is operated*
- b. Who is operating the helicopter*
- c. What type and class of helicopter*
- d. Where the helicopter is flown*

*6. How. Since all commercial flights to and from the site must be flown by operators who hold both an AOC and a Congested Area Permission; they must be flown in accordance with Performance Class 1 flight profiles. This ensures that at all stages of flight, in the event of a single engine failure the helicopter is able to perform either a safe forced landing at the landing site or a diversion to a suitable landing area, using the remaining engine’s power.*

*7. Whom. All commercial flights must be flown by pilots who hold as a minimum Commercial Pilot’s Licence. In order to gain this, pilot’s must have completed at least 150 hours of flying training and at least 350 hours of theoretical knowledge training, with an Approved Training Organisation (ATO). Pilots must then complete 13 CAA exams before pass a skills test flight with a CAA examiner, in order to demonstrate all procedures and manoeuvres can be carried out competently on the relevant aircraft category 3.*

*8. Each different make and model of aircraft requires a further approved course of training to ensure they are familiar with the specific operating limitations and safety procedures before they are licensed to fly that aircraft commercially.*

*9. Commercial pilots must also pass further Operators’ Performance Checks (OPCs) with CAA approved Type Rating Instructors every 6 months to ensure they can still achieve the required standards of safe flying on a regular basis and has to complete a variety of annual training courses covering such subjects as Human Factors, First Aid and Firefighting.*

*10. What. All commercial helicopter flights operated to and from the Heliport will be twin engine aircraft, the manufacturers of which must design them in accordance with exacting certification specifications published by the Environmental Aviation Safety Agency (EASA). These Certification Specifications (CS) cover every design aspect from maximum weights of passengers, vibration limits, fuselage structural fatigue limitations, down to “Each removable bolt, screw, nut, pin or other fastener”<sup>4</sup>. They also include significant requirements for redundancy in terms of hydraulics, flight controls, fuel and electrical systems. Furthermore, all critical parts have specific limits on their risk of failure; a. Critical Parts – A critical part is a part, the failure of which could have a catastrophic effect on the rotorcraft, and*

*for which critical characteristics have been identified which must be controlled to ensure the required level of integrity. b. The failure of a critical part must be shown to be extremely improbable. This is defined as being less than 1 x 10<sup>-9</sup> chance of occurring per flight, i.e. a 1 in a billion chance.*

*11. To ensure continued airworthiness of these aircraft, manufacturers must also publish appropriate maintenance procedures and service intervals to be followed. All engineering must be carried out by a CAA-approved maintenance organisation.*

*12. Where. Precise flight path routings to and from the site will be promulgated to all users and strictly enforced. These can be seen at Annexe A and will also highlight to pilots the key areas to avoid. Therefore, even in the 1 in a billion event of a catastrophic failure, the aircraft's flight path will be laterally separated from all of the hazardous neighbouring sites and residential areas."*

#### The Planning Officer's report

34. The start of the Officer's report sets out the principle issues relating to the application, the first of which is said to be "*the relationship and impact towards the COMAH sites*". Officer advised members that the Health and Safety Executive had been consulted about the safety aspects of the development but their assessment was "*limited to a consideration of the risks to people at the proposed heliport facility from the major hazard sites in the area*".
35. The Officer went on to emphasise that safety was a matter for the Planning Committee:  
*"HSE's advice will not involve any consideration of the potential risks which the activities at the heliport may present to the major hazard sites. The HSE advises that this is a matter for the Council, the operators of the heliport and the major hazard sites to consider, concluding that if planning permission for the heliport is granted, it may be necessary for the operators of the major hazard sites to review their safety reports under the Control of Major Accident Hazard (COMAH) Regulations 2015."*
36. A specific section of the Officer's report considers the proximity of the development to the COMAH sites. It begins by explaining the geography:  
*"19. The application site is located in Cattedown, approximately 1.5km south east of the city centre and is characterised as being one of Plymouths principal industrial areas. The site is surrounded by a number of COMAH sites and these are identified on drawing '110 P1 - Helicopter Landing Site Approach Flight Paths'.*  
*20. A COMAH site is one that stores a sufficient quantity of dangerous substances to fall into the definition of an 'Upper Tier' or 'Lower Tier' site. Upper Tier establishments will hold greater quantities of dangerous substances meaning that additional requirements are placed on them by the Regulations. There are 48 named dangerous substances which include, but are*

*not limited to, flammable liquids, gasses and aerosols, explosives, oxidising liquids and solids.*

*21. The duties relevant to all sites are as follows:*

- Notification Hazardous Substances Consent (HSC)*
- Major Accident Prevention Policy (MAPP)*
- All measures necessary*

*22. Duties relevant to 'Upper Tier' sites include:*

- Prepare a COMAH safety report*
- Prepare and test an on-site emergency plan*
- Supply information to local authorities for off-site emergency planning purposes*
- Provide certain information to the public*

*23. There are a number of 'Upper Tier' or 'Lower Tier' sites in close proximity to the application site as follows with approximate distances and orientation:*

- Transco – 380m to the north*
- Greenergy – 100m to the southwest, 100m to the west and 200m to the north*
- Valero – 400m to the east*
- Origin fertilisers – 400m to the east*
- Above ground fuel lines – 100m to the west; 100m to the south; and between 200 and 380m to the east - Below ground fuel – 150m to the south east*

*24. In addition to these sites, plan 110 P1 also identifies a 'Fuel Bundle and Filling Point', referred to by the Cattewater Harbour Commissioners as the 'Cattedown West tanker box'. This is located at Cattedown Wharves and is used by tankers/vessels to unload fuels to the various storage facilities identified above."*

37. The Officer then turns to consider mitigation to the safety risks presented to the sites:

*"25. The flight paths have been modified from the pre-application submission, reducing from three paths to two. Comparatively these significantly reduce the proximity to flying between the COMAH sites with the approach/take-off routes almost exclusively over water to minimise impact. However, and given the location of the application site it would be virtually impossible to avoid flying over one of the identified sites.*

*26. The Westerly Path initially heads west from the site immediately flying over the South West Coast Path and part of the Greenergy site before entering the Cattewater. The path then turns southwest over Mt Batten Breakwater and into the sound then turning south to avoid Drakes Island.*

*27. The Easterly Path initially heads south flying over an underground pipeline and adjacent to the Cattedown West tanker box. Once over the Cattewater the path heads in an easterly direction over Laira Bridge and across the Plym Estuary."*

38. This section of the report concludes as follows:

*“28. Paragraph 45 of the NPPF states that “local planning authorities should consult the appropriate bodies when considering applications for the siting of, or changes to, major hazard sites, installations or pipelines, or for development around them. As already noted, the Health and Safety Executive (HSE) have been consulted and the advice to the Local Planning authority is that the HSE does not advise against the development in this location.*

*29. Officers note that had the HSE’s advice been ‘advise against’ then the principle of the development would have been unacceptable. However, and based on the advice above it is therefore necessary to consider the existing use of the site and the proposed used to determine if the risks of the proposed development are substantial when considered against the Development Plan and the NPPF.”*

39. The report then considers the risk presented by the proposed flight path over the bow/deck of a discharging tanker and the proposed mitigation in the form of an agreement establishing prior communication between the Interested Party and the Harbour Commissioners so as to avoid conflict between the incoming helicopter flights and vessels:

*“30. The Cattewater Harbour Commissioners (CHC) are the Statutory Harbour Authority for the Cattewater Plymouth and were consulted as the flight path will be over their water. Whilst the CHC note that military aircraft also use the river as an approach to the Citadel on an infrequent basis the proposed flight path transits in front of ‘Cattedown West tanker box’, highlighting that the tanker box extends to the west from the edge of the west wall. This would mean that with a vessel sat on the berth the proposed flight path would flying over the bow/deck of a discharging tanker (80m overhang).*

*31. Officers understand that there is an average of 6-12 ships discharging at the jetty per month, with the duration of a discharge being approximately 24 hours (Greenery LOR). This means that there will be times where there is no conflict when the berth is vacant, unlike some of the other surrounding COMAH sites which have been avoided which are static and pose a hazard continually.*

*32. Notwithstanding, the CHC highlighted that there could be instances where the arrival of a Helicopter coincided with the Pilotage of a vessel which could cause safety concerns. The reason for this is that as a helicopter conducts its final descents and approaches, this is also the most critical point of a pilotage, where the vessel is manoeuvring to/from its berth.*

*33. The CHC advise that large vessels are tidally constrained so flexibility from the vessels schedule isn’t often available therefore a form of communication prior should be established so no conflict exists between the two safety critical evolutions, a matter raised by representations from adjacent site operators. In*

*response to the comments made that applicant has produced a 'Deconfliction' agreement which the CHC has confirmed is acceptable. This sets up a line of communication between the applicant and the CHC to prevent unnecessary conflict between incoming helicopter flights and vessels."*

#### The Planning Committee discussion

40. The Planning Officer introduced the application and highlighted some of the key issues.

In doing so he referred specifically to the COMAH sites:

*"As the application proposes two dedicated flight paths. Two are required to make sure the heliport remains operation safe during different weather circumstances. The flight paths are the pink paths. You can see we have an east north path and a west southerly path. The application site is located within the Cattedown industrial area and is surrounded by lower and upper COMAH sites as set out in the report. These are identified with the different colours. I have attached a key there which we can go through if members wish. As the landing area is set back from the foreshore, helicopters will need to traverse some of these COMAH sites, either on arrival or take off however, as you can see both flight paths are almost exclusively overwater to reduce impact and to enhance safety. This was supported by the Civil Aviation Authority when we discussed this with them.*

*The applicant has provided a risk assessment which will need to be submitted to the Civil Aviation Authority for approval to obtain the necessary permissions to land in this area which is classed as a congested area. The risk assessment takes account of the surrounding land uses and landmarks and has adopted a twin engine aircraft policy which results in much safer operations. Officers note that historical flights were operated by single engine aircraft which will no longer be permitted on the applicants risk assessment should permission be granted for safety concerns."*

41. The second Councillor to speak after the Officer's introduction raised the question of the risks presented by the presence of the nearby COMAH Sites:

*"The area we're talking about today, actually really is very high risk. You've got very nearby, what you saw on pictures just now petroleum tanks. All around the area you've got, if you drive around which we did quite a few times, you see a lot of the pipes go through the area which contain, gas, fuel, all sorts go through there. It is a potential time bomb which could happen.*

*.... given the location of this application, it'd be virtually impossible to avoid flying over one of the identified in brackets highest risk sites, namely 'blast zone'. Present operators in the area have to work under what's called a COMAH which is a Controlled Major Accident Hazards Regulations 2015. Has this been taken into consideration? Quite clearly it seems to be that it hasn't."*

42. A representative from Valero spoke emphasising the safety risks:  
*“The health and safety HSE recognises a major accident at the site could prove fatal with environmental impacts felt not just in this community but potentially abroad also... The committee might be surprised to hear that it is amongst these hazardous sites that the applicant wants to construct a commercial heliport with flight paths drawn over at least one of the hazardous sites and a shared jetty)... Simply put, the consequences of a helicopter related crash or other incident around the application site could be catastrophic and entirely outside of Valero’s control. It would however be something the Council would have a statutory responsibility to both plan for and respond to under COMAH. The Buncefield explosion still looms large in public consciousness. It’s understandable that so many local residents have expressed concern in making this decision today, the committee must answer to them.”*
43. A representative from the Interested Party addressed the safety concerns:  
*“Firstly, safety, ultimately what we’re trying to do is aim to professionalise flying operations up at Victoria house, commercial aviation, quite rightly second only to the nuclear industry in terms of regulatory safety oversight as commercial helicopter pilots we take our responsibilities incredibly seriously. We’ve had a stated policy of engagement with the CAA throughout, who have no concerns over our ability to operate safely to the site. On top of this already stringent legislation we’ve also self-imposed specs sheets), and to further address these concerns. Firstly, as stated all commercial helicopter flights will be restricted to twin engine aircraft, able to operate to the highest safety class. Performance class one, which actually guarantees a safe landing at any stage of the flight in the event of engine failure. And secondly, we’ve also seen tightly regulated those flight paths approach and departure routes to further reduce any exposure to the neighbouring site and reduce noise to a minimum.”*
44. During the subsequent debate a Councillor raised further concerns and questions about safety:  
*“MC: Thank you very much Chair. My question is actually about the siting of the heliport and the flight path. Councillor Rennie’s points in his reference to the explosions that we saw recently. There was a huge tragedy and it made a big impact on me. The fact that the avionic regulators are regulating the internal safety standards of the airport and then the conduction of the helicopters, any fall from one of these helicopters, any pilot error that could cause a crash, without regard to engine failure, there’s many things that can cause a crash, could be catastrophic. When you’re looking at odds and probabilities you’re rolling the dice. And even if it’s one in a million chance, if you have over 360 flights, you’re rolling that dice 360 times. So, I’d like to hear a*

*little bit more about the safety assessment. The risk assessment of the location of the proposed site.”*

45. The Planning Officer responded as follows:

*“Perhaps I'll just share my screen again to get the useful site plan up front. If we just go around the site. The site is here highlighted in red is Valero's fuel storage and highlighted in green here is Greenergy. These are the two upper tier sites. Where you have the little green dashes here, they actually reflect fuel tankers that may be waiting to collect fuel before going off on deliveries. In terms of the risk assessment, the applicant is required to undertake a risk assessment of their operations and have this approved by the Civil Aviation Authority before they are given the permission or the necessary licences to operate out of this site. Just to give members some sort of comfort, if, planning permission was granted, they would still need to secure additional certification, based on their risk assessments that the Civil Aviation Authority have to approve. I think Jonathan touched on that in his presentation and it's set out in the report. In terms of our statutory obligation as a planning authority we are required to consult the Health and Safety Executive, which we have done, and that is set out in the National Planning Policy Framework. The advice provided by the HSE, is that they do not advise against this development, i.e., It's not that they don't object and it's not that they don't support. They are saying, they do not advise against this development taking place. The Civil Protection Unit of the Council have been consulted. Their remit is not to provide a formal opinion, support or object to an application. I've just set out the statute obligation which is to maintain the on and off site risk management of our particular site, that being Cattedown, Millbay and Devonport Dockyard. In this particular instance I spent quite a lot of time liaising with the officers and their informal view and this refers back to the fall-back position is that we currently have a situation in Plymouth where we have a dwelling with a lawful ancillary helicopter usage, with no regulation, landing in these sites, and before us, we have an application for a highly regulated commercial professional operation to remove the potentially risky scenario that Mr Rafferty highlighted in his presentation. So in terms of the risk assessment that we've undertaken, we've reviewed the risk assessment that has been provided. We are not risk assessment experts. We take the advice from the HSE which is that they do not advise against. One of the main things that's been provided in the risk assessment is that the parts of the helicopter have to be proven to one in 9 billion chance of failure. That's not one in 1 million not one in 10,000,001 in 9 billion chances of failure, which is a significant number. The reason they use twin engine aircraft is if one fails, the other one, means that they can land safely. We've taken that into account the current use of the site. I've been provided with the registration and the model type*



*of the previous user's helicopter which was a single engine, in which case if, If that were to continue that engine fail, then the chance of a disaster is perhaps more likely than in this particular proposal."*

46. The Chair of the Committee sought clarification about the fall back:

*"[Chair]: I think the thing to bear in mind is that at the moment, if we don't pass this. If we refuse it. What we're saying is, you can have unlimited flights in any direction using any form of aircraft.*

*[Planning Officer]: That is the situation that we have formed from a legal basis. This has been reviewed heavily by our legal department and the situation is, if planning permission weren't granted in this situation, the lawful land use would remain a private dwelling with the ability to land fly and store a helicopter of their choosing. Because it was established through a lawful development certificate rather than through a planning permission, we don't have any specific controls in terms of number of flights, hours of use, where they travel, whether they just sort of circle around the city, we don't have any of those sort of controls.*

*Chair: I would have thought that having some control, having some regulation is the better option of having it, or having totally zero regulation and control.*

*Planning Officer: That was one of the informal views of the Civil Protection Unit. One of their roles is to work with the COMAH sites. In terms of their on-site and risk assessments. The very fact that you would have a heavily regulated heliport would potentially reduce the risk rather than an ad hoc private scenario. That was their view."*

47. Another Councillor followed up with his concerns:

*"[Councillor]: Yes. I'm certainly at a loss on this. This is something we've not come across before. Where the risks involved, not to do with a building or anything, it's the use of that development in the widest possible sense. In terms of helicopters flying backwards and forwards and Mr Rafferty from Valero, he sounded very concerned, which concerns me. I think, with Chris answering. Councillor Corvid's questions, my level of anxiety has come down a bit. The thing is, I'm still going to be asked to make a decision which part of it is to do with risk and safety. I'm slightly baulking at the idea that I say yes, I'm fine with the development, I think I'm okay with the levels of noise I don't think that they're going to be an issue for me in terms of blocking it, but I'm just nervous about the area, within the city that has so many dangerous areas that I'm putting my name to this.*

*[Chair]: I'm not sure that's what we're doing. We are putting our trust in people who are eminently more qualified than, I hope I'm*

*not being rude, than anybody on the committee. I would caution us, and it's not just helicopter flights. We do this all the time with drains and heights of walls and so on.*

*[Councillor]: I am well aware that there are experts that have been looking at this and that is something I am going to have to weigh against my natural disposition to step back from this because I feel that the risks... when I look at the Health and Safety Executive, they have not advised against it but what they have said is that they're advising us in terms of the safety of the people of the development in relation to the dangers that surround them. So it's the dangers to the development and not the danger of the development to those areas. It's a bit back to front for me. Chris, on the Health and Safety Executive, the way you've written it, are they two separate kind of decisions that they've come to? One is they think the risks are acceptable to everybody else and also, they think that the risk to the development is okay but that the other people might have to revamp their disaster plans to take account of the development that's there? If you see what I'm saying? I'm not explaining this very well. I apologise. The Health and Safety Executive, have they commented on the risk of the development and the helicopters to the sites, the danger sites and then also commented on the danger to the development from those sites. So, two separate things. In which case, if they say, I'm fine with the risk of the helicopters flying in and out to those sites, who am I to say no, I disagree with them.  
..."*

48. One of the Councillors queried whose responsibility it is to assess the risks to which the Defendant's lawyer replied:

*"Under the COMAH regs, we have to consult the competent authority. Quite often it's the HSE and the Environment Agency. They can act jointly and as you can see, they have both commented on the application. As a planning authority, we seek their technical advice about the risks which Chris has done. We then have to balance that as a planning authority. I know we say this quite a lot and it does come down to planning judgement and how you balance the risks as you see them against the other planning considerations. As Chris has already said, you have to take into account what the competent authorities are telling us which they have and then any other risk assessment that may have come forward through that process. So, it is, as I say, down to planning judgement and weighing up all the planning considerations, together, to see whether you're either for or against the application based on that."*

49. Later the discussion moved to the protection of the COMAH Sites which culminated in the imposition of an additional condition (Condition 5) requiring the Interested party to establish a direct line of communication with the surrounding COMAH sites:

*“[Councillor]: Thank you Chair. I have two points to ask about. I found it really helpful to see the flight path. When this was first sort of published, that was one of the things I looked at. I was just wondering how these helicopters are going to access the site so I understand that they're essentially using that existing flight path but there's obviously this deviation isn't there, correct me if I'm wrong Chris, off that flight path and then across the fuel depots and then back out again. Given that kind of reality and having read some of the responses from both residents but also some of the businesses around, there is this concern about where it crosses over those industrial sites and also the ships that the tankers and things like that are more there as part of that work. I couldn't see any sort of condition in terms of communicating ...*

*Okay, so I guess my question then is whether there's any grounds for us to do any sort of, I suppose communication condition where, You know, because I noticed the Harbour Commission's response related to kind of having tankers in situ being refilled and things. Now they also say though that they're on a kind of as and when they come in schedule but is there any way we condition something where, just some sort of consideration needs to be given to that because I understand there's two flight paths and they're weather dependent but is there any condition, we might not be able to but I just felt it was worth...*

*...I mean with the stakeholders that are actually impacted by having a helicopter from a safety perspective fly over. So if that is where they're filling up from the tankers but also the tankers that come alongside the Cattewater as well that the helicopters are essentially flying over. Now I appreciate the probability of any of this is miniscule because it's already that flight path however, I'm just wondering whether that would mitigate some of the concerns of the community and businesses nearby. ....*

50. Final questions before the vote were asked specifically about Valero/Greenergy:

*“Councillor: .....Can I just ask Chris about the concerns reference the flights over Greenergy? If we grant this today, the Civil Aviation essentially is the authority that will not grant these flight paths that the landings and take off provided that risk assessment comes back and says that risk is of an acceptable nature in that flight path. That's the first question.*

*CK: That's absolutely correct. They could get planning permission but that doesn't mean they can fly until they've satisfied the Civil Aviation Authority.”*

51. At the end of the discussion a Councillor who had previously expressed concerns stated as follows:

*“[Councillor]:... I just want to make it clear now that having heard the arguments that I'm actually in favour of this. I think the Health and Safety Executive have not come down against it. I'm also reassured that the Civil Air Authority will be monitoring the activities going on via the Air operator's licence. I think there are quite stringent rules that they put in place. Just one thing, though. 27th of October, 2018, as a Leicester City fan. You will know that an Augusta helicopter dropped out of the sky right beside the King Power statue. I just want Maddie to remember that helicopters do drop out of the sky. With the routes over the Sound and water, I don't think that is going to be a problem. I will support.”*

52. It is clear from the above that the Planning Officer and Members recognised that the risks to the COMAH sites from a helicopter crash were a principal issue in their consideration of the planning application. Extensive consideration was given to the risks and their mitigation including: how the helicopter is operated (under regulatory controls imposed by the CAA); who operates it (professional pilots); type and class of helicopter (Performance Class 1); and where the helicopter is flown (precise flight paths to and from the Site, mainly over water and strictly enforced). In addition, the Members ensured direct communications between the Site Operator and COMAH sites (as well as the Harbour Commissioners) prior to flights. The Committee understood correctly that it must exercise its judgment to assess the risks of the proposal having taken account of the views of the HSE and Civil Aviation Authority. The planning judgment reached was that the current ancillary ad hoc private helicopter use from the Site was less safe than the increased regulation over and greater professionalism of, commercial flying operations from the Site.
53. The Claimants criticise the Committee's understanding of risk analysis but they construe risk assessment and minimisation too narrowly to assert that the risks to the COMAH sites cannot be accounted for unless specifically addressed. This is to ignore the broader set of technical and organisational mitigation to reduce the risk of a helicopter crash. The Claimants submit that the Defendant should itself have gone to the helicopter accident statistics and done its own risk assessment to test the 1 in a billion chance of catastrophic helicopter failure set out in the Interested Party's risk assessment but, as the Planning Officer said during the debate, the Planning Committee are not specialist risk assessors. The Committee heard representations from Valero on the safety risks at the Committee meeting. The Claimants' submissions seek to hypercritically retest the merits of the decision. It is correct to say that the officer erred in reporting the risk of failure to the Committee as 1 in 9 billion not 1 in 1 billion. The risk was however correctly reported in the Officer's written report. It is well established that the reports of Planning Officers must not be subject to hypercritical analysis. The same must apply with even greater force to the oral discussion at a Committee meeting where an officer is responding on his feet to questions from members without the luxury of contemplation allowed for in the production of a written document. It is apparent from a review of the transcript of the whole meeting that the Officer and Committee members understood (and were concerned) about the nature of the risks posed by the proposed development to the COMAH sites and further understood that it was ultimately a matter of planning judgment as to whether the risks and mitigation measures (general helicopter technical and organisational requirements, as well as specific COMAH site requirements and regulation by the CAA) were acceptable. They formed the view that they were

acceptable, which was a view they were, in my judgment, entitled to come to on the evidence before them.

54. Ground 1 fails.

**Ground 2 – The Defendant misunderstood the “fallback” position and, by relying on that misunderstanding, it skewed the process by which it made the Decision**

Submissions

55. The Claimants submit that the characterisation of the fallback position in the Officer’s report was wrong. The true fall back position was a theoretical unlimited private use and enjoyment of the helicopter ancillary to lawful residential use. The existing use is not unrestricted and unregulated. The relevant permitted development right is restricted to 28 days per year (Town and Country (General Permitted Development) (England) Order 2015 Schedule 2 Part 4, paragraph b)). Moreover, land within the curtilage of a building does not benefit from the right. Victoria House has extensive curtilage and the site as a whole is only 0.8 ha. The site plan appears to show the helipad within the curtilage of a building. Accordingly, the fall back position is based on permitted development rights which do not exist and Members were therefore misinformed.
56. The Defendant objected to the introduction of the curtilage argument for the first time during the hearing. It raised factual issues which the Defendant was unable to respond to and should not be permitted. Moreover, the Council’s characterisation of the fallback position should be considered in the round. The planning judgment of the Officer which was accepted by the Planning Committee was that the proposed development gave the Council the opportunity to exert greater control over helicopter activities at the Site than formerly. This was because the proposed development (1) represented a “professionalisation” of helicopter use from the site, (2) the Interested Party propose to operate only helicopters of the highest performance class, and (3) the planning process offers the opportunity for the Council to impose conditions on the helicopter activity at the Site, including the number of flights, flight paths, and times of flights.

Discussion

57. The Officer identified the fall back position as follows:

*“6. The site was granted a lawful development certificate (LDC) in 2001 establishing the use of the site for residential purposes (Class C3) with permitted ancillary private helicopter use. As it was established through an LDC no restrictions have been imposed, meaning helicopters in a private capacity can use the site without control in terms of frequency, time of day or flight path. Permission was later granted for a dedicated helicopter hanger.*

....

*16. In the event that planning permission is not be [sic] granted then the fall-back position is that the site could revert to its current status which is a residential dwelling with ancillary helicopter use (unrestricted and unregulated).*

*17. Whilst it is possible that the site could become occupied solely as a dwelling with no aviation activity, it is also reasonable to presume that this is a unique opportunity for an individual to occupy and utilise the site in a private capacity, perhaps in a*

*more intense way than what is being proposed by Halo Aviation. 18. Therefore, and in the context of the 'fall-back' position debate, it is the officer's view that a reasonable amount of weight should be given to comparing the intensity of the current private use vs. the proposed commercial use in coming to a decision."*

58. The Claimants are correct that the permitted development rights are restricted to 28 days a year but this point had been put before the Planning Officer by the Interested Party in its Planning Statement:

*"7.32. Permitted development rights also exist for the use of land for not more than 28 days in total in any calendar year under The Town and Country Planning (General Permitted Development) (England) Order 2015 ("The Order") Part 4 (Temporary buildings and uses) Class B – temporary use of land.*

*7.33. It is therefore within the applicant's ability to operate the proposed use for a period of no more than 28 days each year. There would be no such restriction on the frequency or timings of flights during the permitted 28 days.*

*7.34. These permitted development rights also form part of the fallback position as the helipad (not the building(s)) could be used on a commercial basis for up to 28 days."*

59. This particular restriction must be seen in context, as must the Claimants submission that there is no real prospect of private use at a similar frequency to that in a commercial operation. The quantity of flying was not the key issue or benefit in terms of regulation. The Officer's report explains that '*the application seeks consent for 160 commercial landings equating [sic] 2- 3 a week which the applicant suggests is a comparable amount to the previous residential use of the site'* ([44]) (The Claimants referred to witness evidence from a nearby resident who said he had never witnessed a flight but did not suggest any error of fact in regard to the information provided by the Interested Party). The broader planning judgment reached by the Officer and accepted by the Committee was that the proposed development offered the Defendant (together with the CAA) a greater opportunity to regulate: flight paths, altitude, specific landings; type of helicopters; timings and professionalism of pilots as compared with the (private use) fallback.

*"Heliport Regulations, Betterment and Economic Opportunities: 60. Officers are acutely aware that in the first instance this is an unusual site for a residential dwelling and to have unregulated helicopter use does raise health and safety concerns. Many of the letters of representation highlight concerns over placing such a use adjacent to so many hazard sites; however it is important to remember that with or without a consent, helicopters will still be able to land at this site. The HSE has already provided its position on the proposed development, and whilst Health and Safety is a very important matter this is covered by separate legislation. Notwithstanding, officers are of the view that the*

*proposed use does would in fact provide significant benefit to the local area from a Health and Safety perspective.*

...

*63. However, the applicant has highlighted that although the heliport will be unlicensed, it must be “CAA approved and regulated site” similar to numerous other heliports around the county. Furthermore, Halo Aviation operates under a CAA Air Operator’s Certificate which has held the appropriate authorisation to land at congested sites for some 10 years or more. Additionally, commercial helicopter operators require the granting of an Air Operator’s Certificate (AOC) to be legally authorised to conduct their specific operations. These operators must adhere to stringent organisational and operational requirements and come under the direct oversight of the CAA as the competent authority for the UK. The applicant has provided written evidence from the CAA which does not throw into doubt the proposed use of the site as a commercial heliport.*

*64. The applicant proposes to operate twin engine modern aircraft, a condition of the above CAA Air Operators Certificate which will need to be maintained to be considered ‘airworthy’ in accordance with relevant legislation. All aircraft will be flown by professional pilots.*

...

*66. All flights will need to follow strict flight paths set out in the approved plans. Furthermore, flights will need to be carried out in accordance with the ‘Deconfliction’ agreement to avoid conflict with fuel vessels adjacent to the site.*

*67. In comparison, any helicopter usage associated with the dwelling would have no such requirement. It would not need to gain CAA approval or meet other legislative requirements that a commercial operation would. Private aircraft are not held to the same safety/maintenance standards and pilots are unlikely to have the same level of experience and training. The lack of current restrictions imposed on the site means private helicopters can land or take-off at any time of the day and as many times as they like, and do not have specific landing procedures. They could also fly at any altitude on any flight path they choose without recourse posing potential social and environmental issues. It is perhaps these previous activities that have resulted in concern amongst residents about future use.*

*68. In acknowledging that this is an unusual location there are clear benefits in changing the use of the site that should actually provide comfort to residents and adjacent COMAH operators. Officers consider this is accurately set out in Appendix 13. Whilst the Councils Civil Protection department are only required to comment on health and safety matters, they have indicated informally to officers that the proposal would provide benefit in terms of on and off site risk management. The operation of the*

*site as a commercial heliport would be more tangible and accountable for its operations compared to the current private/recreational use permitted. In officers view this proposal safeguards the area from ad-hoc unregulated use.”*

60. The Officer’s report does not mention the 28 day restriction on permitted development rights but part of a planning officer's expert function in reporting to the committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail. (Sullivan J in R v Mendip DC ex parte Fabre [2017] PTSR 1112, at 1120B). For the reasons set out above it was unnecessary detail in the context of the broad planning judgment reached in relation to the (private use) fallback.
61. The Claimants’ oral submissions about curtilage did not feature in their Statement of Facts and Grounds or in skeleton argument. At the hearing the Claimants pointed to a paragraph in the planning objection by Valero to the effect that *‘it is not clear that the Applicant is correct in its assertion that there is a permitted development right ...The Site Plan provided by the Applicant seems to show the helipad within the curtilage of the building labelled ‘Unit B’*. The Defendant was justified in complaining that it was in difficulties responding to the point at the hearing because it required factual inquiry. The extent of the curtilage of a building is a question of fact and degree and primarily a matter for the Defendant subject to the formal principles of public law. It may depend on physical layout; ownership past and present and the use or function of the land and buildings, past and present (Challenge Fencing Limited v Secretary of State for Housing Communities and Local Government [2019] EWHC 553 (Admin)). It is not a matter that the Court can be expected to determine for itself. The Courts are entitled to expect judicial proceedings to be conducted with a high level of procedural rigour and be prepared to take robust decisions not to permit grounds to be advanced if they have not been properly pleaded. The requirement for procedural rigour extends to the proper pleading of cases so as to identify formally, clearly, concisely and precisely the points being raised (R(Talpada) v SSHD [2018] EWCA Civ 841 at [68] (Singh LJ); Keep Bourne End Green v Buckinghamshire Council [2020] EWHC 1984 (Admin) at [37] (Holgate J)). Accordingly, I am not prepared to allow this argument to be advanced. In any event it was essentially a speculative submission. The highest the Claimants could put their case in this respect was a Site Plan which ‘seems’ to show the helipad within the curtilage of a building (the point made in Valero’s objection) and the reference to ‘generous curtilage’ in the Officer’s report (at paragraph 7).
62. Ground 2 fails.

**Ground 3 – The Defendant acted irrationally by relying on the existence of other regulatory regimes in deciding to grant permission**

**Submissions**

63. The Claimants submit that there is a regulatory shortfall in the CAA’s ability to regulate the site because the aerodrome would be unlicensed. It was incumbent on the Planning Committee to understand the regulatory shortfall and consider its significance. The first step was for the Defendant to identify those regulatory matters that would be regulated by the CAA if the heliport was licenced but which the CAA would not now have responsibility for. Having worked out the regulatory shortfall the Defendant should have undertaken an evaluation of the risks and recognised they were its responsibility and not for the CAA. Neither step was taken by the Defendant. Had the Planning Committee



done so it would have decided that there were at least 6 matters that it needed to consider for itself including: 1) whether the proposed aerodrome was safe for use by aircraft having regard to the physical characteristics of the aerodrome and its surroundings; 2) whether the applicant was competent to operate a commercial heliport in such an environment; 3) whether unrestricted drone flights present an unacceptable risk; 4) the existence of a variety of other regulatory controls imposed by the CAA on licenced aerodromes including weight restrictions; 5) the need to issue any safety directives and 6) the need for an aerodrome traffic zone. These amounted to a significant collection of safety issues which were not addressed in the Officer's report or during the Committee discussion. Instead the Committee laboured under a misapprehension that the CAA would regulate all relevant matters. It is apparent that some of the misgivings of Committee members were assuaged on this basis.

64. The Defendant submitted in response that the proposed development will be in a Congested Area. This means the CAA has a power to directly control the take-off and landing of aircraft, including the passage of aircraft over the above ground pipes and near ships. The Interested Party will be required to seek permission from the CAA before performing any take-off or landing operations. The (future) decision as to whether or not to grant such permission will be approached following a detailed risk assessment taking into account, amongst other things, the site location and surroundings. It is clear from communications from the CAA that the identification of risks is intended "*first and foremost*" to protect third parties. The Planning officer was therefore right to advise, during the meeting of 17 September 2020, that "*even if planning permission is granted, [Halo] will still need permission from the CAA*". This was the advice from the CAA itself. There was no requirement for the Committee to have before it all the material that might be used to support an application to the CAA before it could take a view about the CAA's functions.

### Discussion

65. The Interested Party included correspondence with the CAA in its planning application, in which the CAA stated as follows:

*"The UK Civil Aviation Authority (CAA) oversees and regulates civil aviation in the UK, the regulations are set by the European Aviation Safety Agency (EASA). The EASA regulations allow an aircraft to land and taken off within a congested area however the UK CAA have taken a stricter view than EASA. An operator must obtain the permission of the CAA prior to landing and taking off from a congested areas.*

*Should an operator have a requirement to land in a congested area they would initially apply to the CAA giving details of the landing site and a detailed risk assessment. The CAA would review the application and risk assessment and if necessary contact the operator for further information. Once the CAA has received all the necessary information and were happy the flight could be conducted without any risk to third parties on the ground or paying passenger on the aircraft they would issue a permission. There may be some conditions attached the permission, an example shown below:*

*This Permission is granted subject to the following conditions:-*

- a) throughout all flights pursuant to this Permission the helicopter shall be operated in accordance with Performance Class 1;
- b) flight pursuant to this Permission shall be solely for the purpose of landing at and taking-off from the site at.....; and
- c) flight pursuant to this Permission shall only be undertaken with the agreement in writing of the owner of the site and with the prior knowledge of the local police authority.
- d) flight pursuant to this Permission shall be conducted in accordance with procedures contained in the document..... attached to the email submitted to the CAA on.....

*Initially the permission is given to an operator on a case by case basis. Once the operator has the experience and procedures in place and can demonstrate competency to the CAA they would be able to apply for the long-term permission which would be valid for one year.*

*Although the CAA gives the permission the operator/helicopter pilot must ensure they can and do conduct the flight safely without any risk to third parties on the ground and passengers on the helicopter. The CAA also remind the operator to minimise nuisance because of noise and to avoid overflying hospitals, schools and other sensitive areas.*

*From the details I have seen so far with regards the landing site at Victoria House Cattedown Plymouth I see no legal reason why a permission would not be granted.” (underlining is Court’s emphasis)*

66. The Planning Officer sent the Interested Party’s Risk Assessment and flight paths to the CAA and sought its views. In an email exchange a representative from the CAA explained as follows:

*“(a) I cannot comment on the planning application itself. I can however briefly outline the process for obtaining a permission to land in a congested area. When a landing site is in a congested area the operator is required to apply to the Civil Aviation Authority (CAA) for a take off and landing permission, this permission can be for a specific one off flight or to cover the operator for up to one year (long term permission). The long term permission is only issued to established operators who have a proven process for conducting these flights safely.*

*(b) On application we would need details of the landing site location and a risk assessment, the risk assessment should cover all aspects relevant to landing at the site for example location, surroundings, surface, weather, aircraft performance and any*

*other areas that may be relevant. The operator would need to mitigate against these risks before a permission was issued.*

*(c) If a long term permission was issued the operator would be expected to update their risk assessment at regular intervals to address the changing landscape and environment.*

*(d) The flight path document would be something I would expect from an operator who was applying for a permission. It appears they have taken into consideration the environment and elected to approach and depart over the water minimising the risk to third parties on the ground. We would expect to receive a risk assessment from each operator who does not have a long term permission and wants to fly in and out of the site, a generic risk assessment prepared by one company would not be acceptable for other companies to use. It is for each company/operator to assess the risks and mitigate for them." (underlining is Court's emphasis)*

67. It is apparent from the extracts above that the CAA will consider both surroundings and risk to third parties when deciding whether to grant permission for take off/landing at the Site. This aspect of regulatory control was reflected in the Officer's Report. He recognised that the site would not be a licenced heliport [62] before going on to state that

*"63. However, the applicant has highlighted that although the heliport will be unlicensed, it must be "CAA approved and regulated site" similar to numerous other heliports around the county. Furthermore, Halo Aviation operates under a CAA Air Operator's Certificate which has held the appropriate authorisation to land at congested sites for some 10 years or more. Additionally, commercial helicopter operators require the granting of an Air Operator's Certificate (AOC) to be legally authorised to conduct their specific operations. These operators must adhere to stringent organisational and operational requirements and come under the direct oversight of the CAA as the competent authority for the UK. The applicant has provided written evidence from the CAA which does not throw into doubt the proposed use of the site as a commercial heliport."*

68. Moreover, the Officer's position is consistent with the relevant legislation and guidance.
69. The aerodrome will be located in a Congested Area. An aircraft must not take off or land within a congested area except at an aerodrome and in accordance with procedures notified by the CAA. Prior permission must be obtained from the CAA (CAP7931) Whilst CAP7931 (and other relevant CAA guidance) does not have statutory status, its terms show how the CAA will approach the exercise of its powers. This includes:

#### CAP 793 Safe Operating Practices At Unlicensed Aerodromes

##### *"5 Obstacles*

*5.4 If the aerodrome does not feature in any aeronautical publications, a procedure should be developed whereby visiting pilots are warned of hazards prior to arrival. A requirement to*

*obtain prior permission before landing will facilitate such hazard warning by allowing visiting pilots to be briefed. Such information may also be usefully included on the aerodrome's website, if one exists.*

CAP 1864 CAA Onshore Helicopter Review Report, p48

*“The operating environment*

*13.19. There is anecdotal evidence that a significant amount of ad hoc charter is at relatively short notice and therefore the operational control procedures referred to earlier are particularly important...”*

*“Off Aerodrome Landings*

*13. 22 The helicopter’s key attribute of being able to operate from sites other than aerodromes is made easier in the UK than in some other European countries. Fundamentally the site must be safe in terms of aircraft performance and risk to third parties; additionally, the land owner’s permission is required. These requirements are the operator’s responsibility. However, in the UK there is a requirement that off-aerodrome landings within a congested area require permission from the CAA.*

*13. 23 Most operators are well versed in the specific requirements for ensuring that a landing site is suitable*

*....*

*16.9 Permissions and Exemptions may be applied for and granted if the CAA is satisfied that a mitigated and acceptable level of safety has been assured. For those sites which are in congested areas and which require permissions from the CAA, unless the operator can show that there is no third-party risk in the event of a power unit failure, such permissions will be conditional upon the aircraft being operated to Performance Class 1. Thus, in most cases, Class 1 performance is the required norm.* (underlining is Court’s emphasis)

70. In addition, the CAA has regulatory reach through article 101 of the Air Navigation Order 2016 which requires flights which carry fare paying passengers, such as those to be operated by the Interested Party, must be carried out by an organisation with an Air Operator Certificate which certifies that the operator is competent to secure that aircraft operated by the holder on such flights are operated safely. Air Operator Certificates granted by the CAA certify that the holder is authorised to perform commercial air transport operations in accordance with: a) The holder's operations manual; and b) Annex V to Regulation (EU) 2018/1139 and its implementing acts. The Interested Party has held an AOC Certificate for 10 years.

71. The Claimant's case was based on the proposition that the aerodrome will not be licenced by the CAA and the CAA can only grant a licence if it is satisfied as to a number of matters, including that: the aerodrome is safe for use by aircraft, having regard in particular to the physical characteristics of the aerodrome and of its surroundings (Article 208 & 212 of the Air Navigation Order 2016). However, it is apparent from the analysis above that the CAA will consider the surroundings and risks to third parties in the Congested Area permission as described above.
72. The Claimants also submitted there was a misunderstanding between the CAA and the Planning Officer and the CAA had not appreciated that the aerodrome was unlicensed and OR thereby inadvertently led the Committee astray. I cannot accept this submission. The Courts have recognised the need for judicial restraint where the issue under scrutiny falls within the particular specialism or expertise of the defendant public authority. In R(Mott) v Environment Agency [2016] EWCA Civ 564 Beatson LJ observed that "*a regulatory body such as the [Environment] Agency is clearly entitled to deploy its experience, technical expertise and statutory mandate in support of its decisions, and to expect a court considering a challenge by judicial review to have regard to that expertise*" (§63). The CAA is the UK's statutory regulator for aviation. Its representative was provided with details of the proposed flight paths and the Interested Party's risk assessment. The CAA had previously corresponded with the Interested Party about the proposed development. There is no evidence before the Court to persuade me that the CAA had or might have misunderstood the clear regulatory distinction between an unlicensed and licensed aerodrome.
73. The Claimants submitted that the CAA had not been presented with any information as to the possible consequences of a helicopter accident occurring on a COMAH site but the Court was told in response that the CAA had been given the maps with the COMAH sites marked on them. In any event, however, this is not the relevant test. The question is whether the regulator in question is capable of regulating the site. For the reasons explained above, the CAA can regulate the site in due course and the Defendant had properly satisfied itself that this was the case.
74. Ground 3 fails.

**Ground 4 The Defendant erred in law by granting permission to an application that conflicted with the development plan when no other material considerations justified such a decision**

Submissions

75. The Claimants submitted that the Officer's report does not adequately address the safety aspects of a helicopter crashing onto highly inflammable fuel. The possible consequences of a helicopter crash are catastrophic, as set out in the HSE's public information record and Valero's COMAH safety report. The promotion of health and safety is a key feature of the development plan as is clear from Policies PLY20; DEV1; DEV2; and DEV29. Despite this the officer's report did not focus on the safety aspects of these policies and the planning judgment reached as to safety was therefore flawed.
76. The Defendant submitted that the Claimants were impermissibly rehearsing the merits of the application, which were for the Defendant alone. It was entitled to conclude that the Proposed Development does not conflict with the policies identified by the Claimants.

Discussion

77. The Officer reached a planning judgment, accepted by the Committee, that the proposal would 'provide significant benefit to the local area from a Health and Safety perspective'

[60]. It would not therefore conflict with the relevant provisions of the development plan relied on by the Claimants. For the reasons canvassed in the discussion on grounds 1 – 3 above, this was a planning judgment that the Officer (and Committee) were entitled to come to on the evidence before them. No error of law arises.

78. Ground 4 fails.

### **Ground 5 – the Decision was irrational**

#### **Submissions**

79. The Claimant submitted that the decision to grant permission to an on-demand, commercial helicopter operation whereby helicopters will fly at a low height over millions of litres of fuel at the most dangerous point in their flights was so unreasonable that no reasonable LPA properly informing itself of the harm resulting from a crashing helicopter would have made it.

80. In my judgment this ground offers nothing new beyond the issues raised by Grounds 1-4. It is well established that the threshold for an irrationality challenge is high. The Committee considered the risks, how they might be mitigated, and weighed these against the benefits of the Proposed Development. For the reasons set out above in the discussion of Grounds 1 - 4, I am satisfied that the Defendant reached a conclusion that lies well within the band of reasonable responses.

81. Ground 5 fails.

### **Final Conclusion**

82. The claim for judicial review is dismissed.