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Case No: CO/345/2023 and CO/348/2023

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 4th October 2023

Before:

SIR DUNCAN OUSELEY
sitting as High Court Judge

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Between:

GEMMA WATTON	**Claimant in CO/345/2023**
- and -	
JONATHAN CAMERON	**Claimant in CO/348/2023**
-and-	
THE CORNWALL COUNCIL	**Defendant**
-and-	
THE ATLANTIC VIEW CREMATORIUM CONSORTIUM	**Interested Party**

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- -

Richard Ground KC and John Fitzsimons (instructed by **Bates Wells**) for **Ms Watton**
Richard Kimblin KC (instructed by **Bates Wells**) for **Mr Cameron**
Mr Sancho Brett (instructed by **Cornwall Council Legal Services**) for **Cornwall Council**

Hearing dates: 4-6 July 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 4 October 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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SIR DUNCAN OUSELEY

Sir Duncan Ouseley, sitting as a High Court Judge:

1. On 19 December 2022, Cornwall Council granted planning permission to the Atlantic View Crematorium Consortium for the construction of a crematorium, with associated buildings, access, landscaping and infrastructure on land to the west of the A39 in the open countryside at Poundstock, 3 miles or so south of Bude. As the name of the proposal suggests, it was to be within sight of the Atlantic Coast. The proposed crematorium would be one of the largest in the country, according to objectors, and an admittedly large one in the Council's language, in site area and building size. It was a controversial and unusual proposal.

2. Ms Watton, the Claimant in CO/345/2023 lives at Mill Barn, on higher ground, about 600m to the northwest of where the crematorium and associated buildings are proposed to be sited. She and her husband run a small holiday letting business there, with two of their three units facing south towards where the proposed buildings would be. She provided detailed, reasoned, well-informed letters of objection. Mr Cameron, the Claimant in CO/348/2023 lives at Fursewood with his wife, just at the very south of the development site, and on the south side of Widemouth Manor Road via which access would be gained from the A39 to the site. The site access itself is off the north side of Widemouth Manor Road, almost opposite their property. Mr Cameron, also objecting, instructed experts in relevant topics, notably planning, landscaping, and the need for and viability of the proposed crematorium; he presented their reports to the Council. This was a highly unusual degree of expert assistance for a local resident to deploy. Dr Knight, a local ecologist of distinction, also provided expert evidence in objection to the Council.

3. Mrs Watton and Mr Cameron bring separate claims; some of their grounds overlap but others are different; they adopt each other's submissions in the overlapping grounds. Their many grounds of challenge focus on the content and reasoning of the Officer's Report to the Council's Planning Committee which recommended that planning permission be granted. Permission was granted, subject to conditions, which are also challenged. The Interested Party, of uncertain legal status, did not appear; I shall call it the Consortium. One of its members owns the main part of the development site, i.e. the part which lies to the north of Widemouth Manor Road.

The decision-making context and process

4. Before dealing with the grounds of challenge, I should set the context and process for the decision.

5. The application raised a variety of issues, covered by a number of supporting documents. It was a full rather than outline application. By the time of the Committee meeting, the Council had received many objections, and letters of support too.

6. Mr Cameron submitted a report from Genesis Town Planning, to which was appended a separate expert's review of the Consortium's need case, with relevant appeal decisions, an expert's review of the Consortium's landscape and visual impact submission, and an expert's report on transport and highways. Mr and Mrs Cameron also wrote more personally in a letter of 14 November 2022, objecting to the amenity impact on their house of construction works, the use and appearance of the entrance to the crematorium site opposite their house, the traffic and lights they would

experience, and to the widespread impact of the proposal on the countryside and on views from their home. They also raised what they claimed was their ownership of land upon which the bus-stop and shelter on the south side of Widemouth Manor Road was to be constructed.

7. Mrs Watton wrote several letters of objection: her 33 page principal letter of objection, in March 2021, addressed with detailed reasoning the need and viability arguments raised by the Consortium, and referred to a specific possible alternative site; her letter of 4 April 2021 again addressed need, this time by reference to the Competition and Markets Authority, (CMA), Report of 2020 on the Funerals Market, which had considered the assessment of quantitative and qualitative need for crematoria, and referred to crematoria appeal decisions of the fairly recent past. Her letter of 6 June 2021 pointed out that the development would have an adverse effect on their holiday business because of its impact on views from that accommodation, which she invited the Council to come and see. This issue was again taken up, in a letter of 17 December 2021, in which she complained that there had been no visual assessment from her premises, or one other holiday letting business, which, with hers, would be the most affected. She thought that this was because these were residential properties, albeit with holiday lettings as a tourist business. Mrs Watton returned to these issues in a letter of 15 March 2022. This took critical aim at a site search appraisal carried out by Kivells on behalf of the Consortium, and at the Consortium's continued refusal to make an assessment of the visual impact on the main living rooms at Mill Barn, which were on the first floor of their house, and from the similarly arranged holiday accommodation; the landscaping works proposed included large mounding and ambitious tree planting in an exposed location. She also raised concerns about bats, in agreement with Dr Knight, a Chartered Environmentalist and more besides, with a longstanding academic and practical interest in bats, pointing to the conflict between lighting for safety and security, and the need of bats for darkness in the hedgerows. Mrs Watton also emailed each member of the Committee on 12 November 2022, with her detailed 30 page critique of the Officer's Report to Committee.

8. Dr Knight had objected to the proposal in his letter of 31 March 2021, covering environmental grounds as well as criticising the inadequacy of the Consortium's Ecology report in relation to the protection of bats, which were a protected species. After the County Ecologist had commented on the Consortium's report, he wrote on 7 July 2021 pointing out that the further survey data she had sought was inadequate in view of three rare bat species previously recorded on the site, and the impact on them of disturbance to hedgerows.

9. On 21 July 2022, the Council's Strategic Planning Committee met for a technical briefing by Officers, to examine the need for the development. It was attended, not just by the Committee members, but also by the Consortium's representatives and planning advisers, and by representatives of Poundstock Parish Council, which had instructed Genesis Town Planning for this purpose, and the local Councillor.

10. The Officer's Report had been prepared for the Strategic Planning Committee, the Committee, in September 2022, but the meeting was postponed to 17 November 2022. The Chairman told the meeting that all the Committee members had read the very large amount of correspondence which they had been sent. The documents sent, including the reports from the Claimants, were not appended to any Officer Report,

but were available for reading on the Council's website. The meeting, which lasted 2 hours, then proceeded with Ms Blacklock, the Principal Development Officer and principal author of the Report, presenting the Report, with visual aids. Mrs Watton, Mr Doyle, and a representative of the Genesis Planning, on behalf of Poundstock Parish Council, spoke against the application, as did a Councillor from another local Parish Council. They were asked questions by the Committee. Two were invited to speak on behalf of the Consortium, on need, and on landscape and visual impact; they too were asked questions. Members then spoke, officers responded to Members' questions and, following a full debate, the Committee voted by 7 votes to 4 in favour of granting planning permission. The Minutes record that "The reasons given by the Proposer for wishing to approve the application were as set out in the report and Committee update."

11. I shall have to set out considerable parts of the Officer's Report, including the additional reports, when dealing with the various grounds of challenge. But I set the scene for them with a short description of its structure and content. On the front page, it states that the application is not a departure from the development plan. A four page summary of the issues concludes:

> "It is considered by Officers that in this finely balanced case, the benefits of the proposal outweigh the identified harm and as such the application is recommended for conditional approval. All other matters raised have been taken into account... but none is considered of such significance as to outweigh the considerations that have led to the conclusion."

12. The main body of the Report commences with a description of the 5.8 hectare site and its topography, sloping downhill to the North West where the crematorium building would be, in the lowest part of the site. The site is said to be "within an undesignated landscape" but across the road from an Area of Great Landscape Value, AGLV. Most of the site was proposed as landscaped areas. There were two car parking areas, with 109 spaces. The crematorium building would be contained within, and screened from the rest of the site by, curved bonded walls, and the topography of the site would be utilised so that the buildings were single storey above ground level, and appeared as one building. The site would be open every day of the year to allow people to visit the memorial gardens. Services would take place generally between 09.30 and 16.30.

13. Policies were next, starting with the reminder that under s38(6) of the Planning and Compulsory Purchase Act 2004, decisions on applications for planning permission had to be taken in accordance with the development plan unless material considerations indicated otherwise. The relevant policies were listed.

14. The statutory consultation responses were then summarised; these included the objections from the Member for the electoral division for the site, and the Poundstock Parish Council. The views of the County Principal Landscape Officer were set out. The County Ecologist had no objection but recorded what conditions were required. Natural England had no objection. Non-statutory responses were not set out in the same way. Their "key points" were listed very shortly, without the numbers or names of those making the various points, and without reference to the level of detail and analysis which any had presented. Objecting and supporting comments were listed in the same way. The Consortium's case was then set out at some length starting with

what the Consortium said about the quantitative and qualitative need for the development, its location and site search. The "Assessment of Key Planning Issues" followed: they included the policy context, need and general locational considerations, the principle of development, landscape character and appearance, residential amenity, climate change, ecology, highways and access. No issue is taken with the identification of the key issues.

15. The Report discussed need and general locational considerations, including how the development would meet the proposed need. Under the heading "principle of development", the role of the proposed crematorium as a more convenient community facility than those existing at Bodmin and Barnstaple was considered, along with direct and indirect economic benefits. The size of site and the size of the crematorium building were also considered. That is a highly contentious area in relation to policy 5 of the Cornwall Local Plan. Savings in travel time and carbon emissions were also seen as a benefit, in an analysis also criticised significantly. The thinking behind the building design was set out; there would be two cremators, each with a flue or stack, the final heights of which were not yet known. It was said to be unlikely that a stack would need to be more than 2 metres higher than the building height, and a parapet 1.1 metres above roof height was proposed. That too was a contentious area in this case, especially as no photomontages from the Consortium showed any stack at all. Stack height was discussed later in the Report in connection with air quality, and the role of the environmental permit regime.

16. The next topic was the landscape character and appearance of the area, to which policy 23 of the Cornwall Local Plan was central. The Report repeated, contentiously, that the site was within an undesignated landscape. The extensive landscaping on site and the replacement of all the roadside boundary hedges were described, along with the general comment from the landscape officer that the Consortium had somewhat overestimated the speed at which tree planting was likely to become established in this exposed location. Impact on the setting of the nearby AONB and AGLV was dealt with, and on the undesignated area. Views from public roads, notably the A39, were described and assessed. The most significant change arguably would be travelling towards the site on Widemouth Manor Road.

17. The section of the Report on residential amenity included the contentious comment that private views were not a material planning consideration, and concluded that the development would not appear harmfully overbearing or dominant when viewed from residential properties and holiday accommodation sites in the area. The permanent loss of 5.8 hectares of grade 3b agricultural land was a negative aspect of the proposal. The section on climate change led to a challenge based on the weight given to the proposal that electric rather than gas powered cremators be used, but which was not required by any condition. There was also a challenge to the benefit claimed for the reduction of carbon emissions through shorter car journeys, without allowing for any of the longer car journeys involved, which were a significant part of the expected use of the crematorium. The analysis of the ecological effects was also said to be legally flawed. Tourism, drainage and the historic environment were all considered.

18. The next and notably short section of the report consisted of the response to objections. It was here that the Officer dealt in fairly short order with objections on the grounds of viability, and the siting of the access off Widemouth Manor Road rather than directly from the A39, both of which however would involve the crossing

of one lane of the detrunked A39. The lack of viewpoints from two specific dwellings, including Mrs Watton's at Mill Barn, was explained and justified.

19. There was also an Update Report setting out, in full, the objection of the Poundstock Parish Council, which pursued a variety of points, some overlapping with those of the Claimants. A later Addendum Report was also presented. It contained a number of updates. These dealt with other representations, notably for these purposes, a response from Mr Doyle relating to alternative sites, and the claim by Mr Cameron, not named in this Report, about his ownership of the land upon which the Consortium proposed a bus shelter. The Addendum Report said that all the land in question was publicly maintained highway. However, just in case any were owned by the Camerons, the relevant notice would be served on them**.** This Addendum report also contained an update on the site access details, emissions, and ecology, all with further draft conditions. The ecology part of the Addendum Report created one of the grounds of challenge. The draft conditions went through some changes before being finally settled. Planning permission was issued on 19 December 2022.

20. Before turning to the grounds of challenge themselves, I propose to tackle two issues which apply to a number of grounds: the nature of error in an Officer's Report which can lead to a quashing of a grant of permission, and the nature of the reasons which are required of a planning authority granting permission on the basis of the recommendation and reasoning contained in an Officer's Report, as here. These two do not fit into completely separate compartments. They are not contentious between the parties, but they need to be set out and the nature of the reasons required merits some further general consideration.

Quashing a permission based on errors in an Officer's Report

21. I start with the decision of the Court of Appeal in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, per Lindblom LJ with whom the Chancellor of the High Court and Hickinbottom LJ agreed:

> "41. The principles on which the court will act when criticism is made of a planning officer's report to committee are well settled. To summarize the law as it stands:...
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> (2) 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 County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.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 L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 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.
>
> (3) 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 District Council* [2016] EWCA Civ 795), or has plainly misdirected the members as to the meaning of a relevant policy (see, for example, *Watermead Parish Council v Aylesbury Vale District Council* [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 County Council* [2017] EWCA Civ 427). But unless there is some distinct and material defect in the officer's advice, the court will not interfere."

22. The principles were restated by Lindblom SPT, with whom Dingemans and Edis LJ agreed, in *R (Whitley Parish Council v North Yorkshire County Council and Another* [2023] EWCA Civ 92. I set them out as Mr Kimblin KC for Mr Cameron attached some importance to nuances which he contended could be lost in an unduly abridged version of the principles:

> "34. It is also worth recalling some of the basic principles that govern the making of a decision by a planning committee.
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> 35. First, the task of a planning committee is to exercise its own planning judgment, bringing to the decision the members' familiarity with local circumstances and relevant planning policies, in the light of the advice given by the authority's professional planning officers (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2; [2011] 1 WLR 268, at paragraph 36, and the leading judgment in this court in *Corbett v Cornwall Council* [2020] EWCA Civ 508, at paragraphs 65 and 66).

> 36. Secondly, the function of a planning officer when producing a report to the committee responsible for deciding whether planning permission should be granted for a proposed development is not to decide the fate of the proposal, but to provide to the members his or her own planning judgment and advice to help them in making the decision (see, for example, the judgment of Sullivan J., as he then was, in *R. (on the application of Mendip District Council, ex parte Fabre* [2000] J.P.L. 810, at p. 821). And if there is no evidence to the contrary, it may be assumed that when the committee has followed the officer's recommendation they have adopted the reasoning on which that recommendation was based (see the judgment of Lewison L.J. in *R. (on the application of Palmer) v Herefordshire Council* [2017] 1 WLR 411, at paragraph 7).
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> 37. And thirdly, the jurisdiction of the court in its supervisory role is to establish whether the authority's decision-making has been vitiated by any error of law (see the speech of Lord Keith of Kinkel in *Tesco v Secretary of State*, at p.764G-H**)**. The court will review the decision with realism and common sense, avoiding an excessively legalistic approach (see the leading judgment in this court in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, at paragraph 41). It will not focus merely on the precise phrasing of individual sentences or paragraphs in a planning officer's report, without seeking their real meaning when taken in context. Only if the effect of the report is significantly to mislead the members on a material issue will it interfere with the committee's decision (see *Mansell*, at paragraph 42). In considering that question, the court will read the report fairly, as a whole and with a reasonable degree of benevolence, not forgetting that it has been addressed to an audience of councillors familiar with local circumstances (see, for example, the leading judgment in *R. (on the application of Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404; [2016] Env LR 30, at paragraph 30; and the judgment of Lewison L.J. in *Palmer*, at paragraph 8)."

23. Mr Brett, for the Council, also emphasised the element of judgement for the Officer in deciding what needed to go into the Report, bearing in mind the potential for Committee members already to have significant background information about local circumstances, geography and policies, a contention derived from authority including *Fabre*, above, and *Oxton Farms, Samuel Smiths Old Brewery Tadcaster v Selby District Council*, [1997] EWCA Civ 4004. His ever-present response to the various grounds of challenge was that the Officer's Report, read as a whole, with sentences and phrases in context, was without significant error, and that the Claimants'

submissions invited an unrealistic and excessively legalistic approach, failing to read the Report as a whole, and its parts in context.

The standard of reasoning required.

24. The parties agreed that the reasons for this decision had to meet the tests set out in *South Buckinghamshire District Council v Porter (No.2)* [2004] UKHL 33, [2004] 1WLR 1953 by Lord Brown at [36], even though that case involved a statutory challenge, whereas the present case involves a decision by a local planning authority, on which there is no statutory duty to give reasons. Here, it did give reasons by expressly adopting the Officer's Report; those reasons therefore had to meet the requirements of *Porter*. Once given, obligatorily or not, the reasons can be examined for such legal error as they may reveal about the Council's decision-making. The parties disagreed about whether the *Porter* standards were met.

25. What is required by *Porter* is:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

26. The emphasis of the Claimants was on the second to fourth sentences. Mr Brett focussed on the fifth, sixth and eighth. He also relied on passages at [41] and [42] in which Lord Brown stated that the reasons required were those for the ultimate decision; and that, if the recommendation of the planning officer were accepted, the Report would be the source of the reasons, and there might be no need for more.

27. The issue of the standard of reasons required where the local authority has granted permission, rather than in a statutory appeal, was considered in *Dover District*

Council v CPRE Kent [2017] UKSC 79, by Lord Carnwath, with whom Lady Hale, Lord Wilson, Lady Black and Lord Lloyd-Jones agreed. In that case, however, planning permission was granted *against* the officer's recommendation, so the report could not have been the source of the reasons for the decision. Although the parties here are agreed on the duty and standard, I need to reach my own decision as to what the scope of the duty is, in the absence of direct authority on the point, and in the light of the qualifications in what Lord Carnwath said in *Dover CPRE*.

28. In *Dover CPRE*, Lord Carnwath approved the decision of the Court of Appeal in *Oakley v South Cambridgeshire District Council* [2017] EWCA Civ 71, [2017] P& CR 4, He said at [57 -59]:

> "57. Thus in *Oakley* the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision.
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> 58. This endorsement of the Court of Appeal's approach may be open to the criticism that it leaves some uncertainty about what particular factors are sufficient to trigger the common law duty, and indeed as to the justification for limiting the duty at all (see the perceptive analysis by Dr Joanna Bell: *Kent and Oakley: A Re-examination of the Common Law Duty to Give Reasons for Grants of Planning Permission and Beyond* (2017) 22 Judicial Review 105-113). The answer to the latter must lie in the relationship of the common law and the statutory framework. The court should respect the exercise of Ministerial discretion, in designating certain categories of decision for a formal statement of reasons. But it may also take account of the fact that the present system of rules has developed piecemeal and without any apparent pretence of overall coherence. It is appropriate for the common law to fill the gaps, but to limit that intervention to circumstances where the legal policy reasons are particularly strong.
>
> 59. As to the charge of uncertainty, it would be wrong to be over-prescriptive, in a judgment on a single case and a single set of policies. However it should not be difficult for councils and their officers to identify cases which call for a formulated statement of reasons, beyond the statutory requirements. Typically they will be cases where, as in *Oakley* and the present case, permission has been granted in the face of substantial public opposition and against the advice of officers, for projects

> which involve major departures from the development plan, or from other policies of recognised importance (such as the "specific policies" identified in the NPPF - para 22 above). Such decisions call for public explanation, not just because of their immediate impact; but also because, as Lord Bridge pointed out (para 45 above), they are likely to have lasting relevance for the application of policy in future cases."

29. In my judgment, the essential basis for this reasoning is the duty of fairness and the need to understand the basis of the decision: how the key issues were resolved in the light of the material before the decision-maker. What is required of that reasoning, in the interests of fairness and understanding, varies from case to case. I have concluded that, here, fairness and understanding the basis for the decision require, not just that reasons be given, but that they meet the *Porter* standard in relation to the reasons for the Council's conclusions on the principal important issues in controversy. I reach that conclusion because of the substantial controversies, the unusual nature of the development in this particular location, the support of expert reports on each side, the problematic debate over compliance with policies in the development plan, and the general acceptance by the Council of the Consortium's expert material.

30. That still leaves the question, applying *Porter*, of whether reasons have to be given for rejecting those responses from objectors which were supported by detailed reasoning and expert reports, which is where the parties, in my view, really parted company in their application of the *Porter* tests. Those reasons may not be apparent from the fact that contrary propositions have been accepted. Is it sufficient to say that the contrary propositions have been accepted, without saying why? Can legally adequate reasons be given for the conclusions on the principal controversial issues without some explanation of why the contrary views were preferred? In my judgment, and in the light of *Dover CPRE*, there should be a discernible answer to the question: why did the Officer, and the Council reject my or my experts' points on the principal, important issues in controversy? Otherwise, the level of reasoning may raise a serious issue as to whether material considerations and representations have been ignored or misunderstood. In my judgment, for legally adequate reasons to be given for conclusions on the principal controversial issues upon which consultees, statutory or non-statutory, have responded, a lawful and properly reasoned conclusion on the principal issues in controversy is likely to require at least some, albeit brief, express consideration of the principal points raised by the objector on those issues, and reasons why they were rejected. Otherwise, the objector will not know if his points have been understood and considered by officers and the Committee, and whether or not their consideration gives rise to an error of law. Objectors are also entitled to expect that their principal points will be presented, for consideration alongside the experts from the developer, which also enables the legal adequacy of the advice about the objections to be tested. This is where a Report may be flawed, significantly misleading or inadequate, on the basis of *Mansell*, as well.

31. Of course, the nature of an objector's important point and the way in which it was dealt with may be apparent from the nature of the debate and conclusions reached. The depth of reasoning may also depend on the nature of the opposing case put forward. Short or general objector comments are very different from opposing expert reports, equivalent in expertise, reasoning and detail to those which are preferred.

The reasons required are not reasons for reasons either, but reasons why the report concluded as it did, in the light of the evidence, on the principal controversial issues. Nor is it necessary for each objector's response to be separately responded to; it is the discernment and addressing of the principal points in issue which matters. This is a long way from requiring a reason for how each material consideration has been dealt with, which no duty to give reasons requires.

32. In this case, I am therefore in agreement with the parties that fairness required that the same standard of reasoning as would apply to an Inspector's decision, should apply to the reasons for the decision in this case, as set out in the Officer's Report and its later additions, and expressly adopted by the Council. I have thus also come to the same conclusion as did Fraser J in *R (Spedding) v Wiltshire Council* [2022] EWHC 347 (Admin), at [47], although I would not necessarily hold that the *Porter* standard was always required where reasons were or had to be given, applying *CPRE Kent*.

33. It follows, bringing together the two strands, that not merely must the Report avoid the sort of error described in *Mansell*, it must also furnish reasons for the conclusions that meet the requirements in *Porter*. Satisfying the former may also satisfy the latter in many cases, but not necessarily or always.

34. I now turn to the grounds of challenge, starting with those where the Claimants' submissions overlap. Mr Kimblin and Mr Ground adopted each other's submissions where they covered different aspects of the case. The main ground, and it is one to which other grounds relate in various ways, which I therefore take first, concerns need and viability. I shall not deal with reasons as a separate overall ground, but I shall deal with it, where I consider that an issue which merits its consideration arises. The issue cannot be grappled with unless a specific important and controversial point and the failure in reasoning have been identified. The principal controversial issues are those which the Council itself identified as the key issues and upon which it spent considerable time itself. For these purposes those issues are need and viability, the justification for development in this location, (policy 5), landscape and visual impact, (policy 23), and the ecology impact.

Need and viability: Mr Kimblin's and Mr Ground's ground 5

35. In its 2019 pre-application advice, the Council raised the question of the need for an additional crematorium and the suitability of the site geographically to meet any identified need and its accessibility in its countryside location. It required further research on the capacity of existing crematoria at Bodmin and Barnstaple, and qualitative need relating both to the industry "rule of thumb" that funeral corteges should be able to drive to their nearest crematorium within 30 minutes, at funeral cortege speed, equivalent to 18 minutes normal drive time, and to other factors such as delay at crematoria, and the availability of slots. The Consortium responded in 2021 with further reports, putting forward its case that there was a need for the crematorium and that it would be viable.

36. The Council did not instruct any independent expert to consider what the Consortium produced. Mr Cameron did produce expert material from Peter Mitchell Associates, in the form of a review of the Consortium's case. This review report was appended to the report of Genesis Planning submitted on Mr Cameron's behalf. Other objectors raised the same issues.

37. The site is 5.8 hectares. The crematorium building would be 1785 sq.ms in floor area. The site and building, it was agreed, would be very large among crematoria in England.

38. In the summary introduction to the Officer's Report, it said:

> "Officers consider that it has been demonstrated that there is a qualitative and a quantitative need for a new crematorium, to address the existing and future projected population of North Cornwall. The proposed crematorium would benefit approximately 56,000 people (Natural Catchment Area) by reducing their journey time to the nearest crematorium. With the projected population growth rates, the number of people likely to benefit is expected to increase to 61,600 by 2030 and 65,072 by 2040. It is accepted these figures are significantly less than the average 150,000 figure referenced in many appeal decisions (although this is not set in any legislation or policy); however, the proposal would address a not insignificant proportion of the identified need for north Cornwall.
>
> In terms of practical capacity issues identified at existing crematoria, those most positively affected would be Bodmin and Barnstaple, along with a small reduction to Plymouth. The proposal would assist in alleviating some of the identified current pressure at existing facilities, which in turn would lead to qualitative improvements for those living within these new natural catchment areas. This would become apparent in terms of availability of preferred times, reduced delays between death and funerals and congestion at crematoria resulting from facilities needing to reduce the slot times to meet demand. It is, however, noted that the submitted report sets out that even if the proposed development were to be constructed, Bodmin would be likely to be back to an operating level of 120% of Practical Capacity by 2030.
>
> In terms of the local residents within the catchment area of the proposed new site, the development would mean that approximately 28,500 people would for the first time live within the industry recognised 30-minute cortege drivetime of a crematorium, which would address over 23% of the current unserved population. They would also benefit from other qualitative improvements resulting from the availability of slots, reduced wait times and additional choice. As has been mentioned by some supporters of the scheme, there would also be more option in regard to more easily holding wakes within the local area to the deceased.
>
> Overall, the proposed development would lead to a reduction of travel times for the bereaved, leading to less distress, reduced emissions and the development of more localised provision which is considered to be more sustainable. It is Officers

> opinion that the qualitative need, and to a lesser extent the quantitative need of this development, are such that the proposed crematorium is, on balance, acceptable in this location."

39. From the representations listed in the Report as against the proposal can be found "There is a need for a new crematorium, but this is the wrong location, alternative sites should be considered", "Questioning the figures provided in regard to Barnstaple's capacity", "Crematorium not financially viable", "...residents don't mind driving further to access [such] facilities...". Poundstock Parish Council said that the viability of the crematorium was in question.

40. The Consortium's case was then summarised in the Officer's Report, under the heading "Summary of submitted Need Assessment, Locational Assessment and Site Search Report". Its 21 paragraphs are quite a full summary of that case. Before I summarise that summary, I should point out that the references in it and elsewhere to "North Cornwall" are not references to any known administrative area, or to any area which has ever been defined on a map, or to any area which can be inferred from such references to the data drawn about it. The question of what it was, was raised in the Committee debate, but apart from the Officer saying, correctly, that it was not the former administrative area of North Cornwall, no further useful information was forthcoming. It appears to be an area of the Consortium's devising, which was never defined by it or the Council. If it meant something specific to the Council Officers, what it meant was never vouchsafed to anyone else, although the area had a very precise population of "approximately 122,832" outside a 30 minute drive time for any crematorium, producing which implies a geographically discernible population data base, with drive times somehow overlaid on it. It was left, in the meeting, as no more or less than the whole of "North Cornwall." It was not all of what was shown of Cornwall on the map at [58] of the Officer's Report.

41. The first topic in the Officer's Report, taken from the summary of the Consortium's case, was quantitative need, starting with drive times. At [57], the 30 minute Cortege Speed Drive Time, CSDT, is described. A map was included which showed the relatively small areas of north Cornwall within such a drive time of the proposed crematorium, and of the existing crematoria at Bodmin and Barnstaple, and Exeter, Torquay and Plymouth which lay to the east. This map indicated "that there is a very large geographic area in North Cornwall (estimated to encompass a population of around 122,832 people) which is well beyond a 30-minute CSDT for any of the existing crematoria (including those outside of Cornwall)." At [58], the Officer continued the summary saying: "The report sets out that approximately 1,107 cremations take place each year in North Cornwall, with bereaved friends and family (estimated at over 22,000 people based on average attendance levels) having the additional stress of travelling in a cortege for more than 30 mins."

42. Next, the Officer's Report dealt with the Consortium's case on the capacity of existing crematoria. The standard for quantitative capacity was 80% of Practical Capacity. On average pre-Covid, Bodmin, the closest crematorium for North Cornwall residents within Cornwall itself, had been operating at over 120% of its Practical Capacity; Camborne was at 93% and Truro, at 52%, was below Practical Capacity. Many in North Cornwall needed to utilise facilities in Devon or Somerset. In 2019, Barnstaple was operating at 54% only if it were wrongly assumed that both

its chapels were in use, Exeter was at 161%, Plymouth's two sites at 83% and 110%. Operating close to or above practical capacity could lead to extended delays to funerals, encouraging the use of slots outside core hours, reducing slot lengths to 30 minutes leading to congestion around the building and car park, all with negative effects on the quality of service.

43. The expected changes in population, as summarised from the Consortium's case were discussed next. The population of Cornwall was expected to grow from 527,000 to over 627,300 by 2030 and to over 662,000 by 2040. There was an industry guideline, "generally accepted within Appeal Decisions that the population any one crematorium should serve is 150,000. Given that the population will soon reach 600,000 the report sets out that there is a need for an additional crematorium to serve the residents of Cornwall." Death rates were also expected to increase far more than population growth. The Consortium's report therefore advised that when considering future capacity both projected population and death rates should be taken into account. On this basis, the existing facility at Bodmin was expected to be at 151% practical capacity by 2030 and at 175% by 2040. "The report sets out that the quantitative need without another facility would 'be extreme.'" Even with the proposal, it would be at 120% by 2030, and 140% by 2040.

44. The Officer's Report then looked at qualitative need, again from the Consortium's report, and summarised a number of statements made by local funeral directors, clergy and public about travel and wait times for services in Bodmin and Barnstaple: travel times usually in excess of an hour each way, a long and distressing time to follow a hearse, potentially prohibitive for elderly or disabled mourners; this reduced the number of time slots practically available to those residents, often leading to waits of two to three weeks for the ceremony. Such long delays excluded those whose faiths required a ceremony within days of death. Time slots were very difficult where cremation followed a local church service and affected the feasibility of a reception afterwards. Barnstaple Crematorium, because of its age and urban location, was not as attractive as Bodmin or Camborne. Bodmin Crematorium had more than the national average rate of direct cremations, where family did not attend, probably because of a lack of core hour capacity, and the length of journey required to get there. Delays there were increasing, and were on average longer than 3 weeks, a clear sign of inadequate practical capacity. The Consortium's report was also critical of the limited parking at Barnstaple Crematorium, the character and appearance of the building, its urban surroundings, and the limit on service times of 30 minutes, which meant that it was not satisfying the qualitative needs of its catchment.

45. The Consortium's report had concluded "that there is a quantitative and qualitative need for a new crematorium to serve North Cornwall." The reasons it gave were then set out:

> "69. The proposed crematorium would be the nearest facility for nearly 56,000 people (The Natural Catchment Area - NCA). Of this figure a total of 28,431 (or 23.15% of the unserved population of North Cornwall) would live within a 30-minute cortege drive time of it, which based on average attendances, would equate to nearly 5,000 local people each year not suffering from the stress of long journey in a cortege, which would otherwise be held at less convenient sites.

70. In addition, the NCA of the proposed crematorium, based on average deaths per year, cremation rates, and other factors, would be likely to generate around 504 cremations per year. Most of the population in the NCA - around 65% of it, is currently within the NCA of Bodmin, while 33% is in Barnstaple's NCA. The remainder is currently closest to Plymouth. The report sets out the proposed development would therefore reduce pressure on the existing facilities (particularly Bodmin) and as such assist in addressing both the existing and future quantitative and qualitative need in the area.

71. In regard to the number of cremations likely to be undertaken at the proposed site per year, the need report sets out that there is no agreed threshold number of cremations per annum by which a crematorium would be deemed viable. It does however refer to The Federation of Burial and Cremation Authorities Recommendations on the Establishment of Crematoria 2012 Report which states "Broadly speaking, crematoria undertaking 1000 or more cremations per annum are most likely to be viable, although there are a number of crematoria, mainly serving rural or island communities undertaking fewer than this...." It goes on to state that many applications and appeals refer to a threshold of viability being 900 commissions per annum. The report estimates the Natural Catchment Area (NCA) of the proposed development would generate 630 cremations per year by 2030 and 730 by 2040. It goes on to state that this qualitative need within the area which would in part remain would be likely to generate additional cremations from outside the NCA due to:

- Bodmin would still be operating close to Practical Capacity and the proposed development will therefore be able to provide better availability of slots at convenient times.

- Bodmin 's fees are stated as being among the highest in the country and the proposed crematorium would 'look to set their fees at a level closer to market norms'.

- Direct cremations.

- Qualitative issues with Barnstaple would likely result in a choice for the proposed new facility. Ease of access and simpler route planning.

The report states that 'based on the writer's experience as a developer and operator of crematoria... a realistic estimation of the number of cremations' the proposal would generate would be 1,130 by 2030."

46. The Officer's Report then considered the Consortium's Locational Assessment report. The latter had set out that the proposed site met all physical, legal and operational criteria; it was situated almost midway between Barnstaple and Bodmin, and was well placed to serve Bude, the main town in the area. There was no policy requirement for a sequential test and there had been no alternative proposals for a new crematorium to serve North Cornwall in the last 5 years. [77]: "Whilst consent was granted... in 1999 for a crematorium north of Holsworthy this has not been delivered and the subsequent development of a livestock market on adjoining land means that the site would no longer meet operational requirements due to issues of odour and noise." The proposed site, by contrast, said the Consortium, was "suitable, available and achievable." Further detail [78] had however been requested by Officers, and a search had been undertaken by Kivells, local estate agents. The locational criteria and associated mapping and response were on the planning register. "However, in summary, no available alternative sites were identified within the search area." I add here that the January 2022 Kivell's site selection report, based on areas identified by the Consortium as within the specified time/travel distances, and other of its criteria, merely reported that they were unaware, from searching their database or agency management system, or other sources of knowledge of any suitable land which was or was coming available, and had none on their books throughout the entire south-west which would currently provide for crematorium use.

47. The Officer's appraisal of this issue is contained in the Officer's Report between [89]-[107]. Paragraph 89 re-introduces the Consortium's need documentation, and only the Consortium's. Its appraisal continues under the heading "Need":

> "90. In terms of population, it is relevant to note that, as referred to in a number of objections to the proposals, there is a general industry guide accepted in appeal decisions that a population of approximately 150,000 would support a new crematorium. In this regard, the submitted report refers to the population for the whole of Cornwall and divides this by the number of existing crematoriums in Cornwall. Whilst this may be a useful benchmark, limited weight is given to this, as it is considered logical that this figure is intended to be an area of population which would be served by a new crematorium. Unlike many other counties, Cornwall has a dispersed population primarily due to its peninsula form. This view is considered to be consistent with a recent Competition and Markets Authority (CMA) Report (Funerals Market Investigation: Final Report 18.122.20) which refers to appeal decisions defining a quantitative need where a new crematorium <u>will be the closest crematorium</u> for between 136,000 and 171,000. Notwithstanding this, the submitted report sets out that there is an estimated current population in north Cornwall of approximately 122,800 that are outside of the industry standard drive time to existing sites and this large geographic area currently unserved is considered to be clearly apparent on the map submitted. [This refers back to the map earlier in the Officer's Report.] The population is forecast to grow by 9.9% by 2030.

> 91. In terms of capacity at existing crematoria, it is identified that Bodmin Crematorium is currently operating well in excess of its practical capacity (130% in 2019), as are many of the other crematoriums out of county used by Cornwall's residents. The pressure on the Bodmin facility and those in neighbouring counties will increase before the end of the Cornwall Local Plan Period (2030) and beyond as a result of increased population, an ageing population, increase death rates and an increased rate of preference for cremations."

48. The next paragraphs put some flesh on those points: total population growth in Cornwall: 570300 (2019), 627000 (2030), 663000 (2040); 65 and over: 144200 (2021), 179479 (2030). Death rates were also increasing, plus a steady increase in favour of cremations over burial.

49. The Officer's Report continued with qualitative need and drive times to a crematorium:

> "95. Consideration is also required of the length of time it takes residents of Cornwall to access these services, which primarily due to the current distances involved, is generally accepted as being mainly by car. The time it takes to access the nearest crematorium is one of the considerations in assessing quantitative need. In this regard a Competition Market Authority Report recently identified that appeal decisions have considered that an indicator of this aspect of qualitative need is evident when a population of between 59,000 and 95,000 would benefit from reduced travel time. The submitted report sets out that there is an estimated population of over 122,800 people in North Cornwall living outside of the 30-minute cortege drive time of existing crematoriums. Whilst 30 minutes is an industry 'rule of thumb,' a review of appeal decisions demonstrates that it has been acknowledged that in rural areas people are more accustomed to travelling further to access services and facilities and, as such, in some cases a journey time of up to 45 minutes is not considered unreasonable. It is evident however, that there are large areas of North Cornwall where even the 45-minute cortege drive time is significantly exceeded with some areas being in excess of an hour each way. This is considered to be demonstrated and reflected in comments of support included within the submission and those submitted by members of the public, members of the clergy and local funeral directors.
>
> 96. A reduction in travelling times and distance would be less distressing for the bereaved and would save fuel costs and carbon emissions. Reduced travel times would, in turn, enable more choice and options in terms of the use of local venues for church services, receptions/wakes and local accommodation for those travelling to the area to attend.

> 97. Provision of an additional facility would also provide more choice to residents of North Cornwall in respect of location and services, including more flexibility and availability of times and days and shorter waiting periods.
>
> 98. It is therefore Officers opinion, when taking into account the projected growth of population within the plan., the existing facilities practical capacity issues, death rates and increased choice for cremation and the extent of the population well outside of accepted cortege drive times, that Quantitative and Qualitative Need for a new crematorium to serve North Cornwall has been demonstrated."

50. The next issue to be tackled was how the proposed development would meet that identified need. For this purpose, I need to point out that the 30 minute cortege drive-time area is not the same as the Natural Catchment Area. The NCA may be smaller in places where a second crematorium is also within the 30 minute drive time area of the proposed crematorium, and is closer for some residents of that drive-time area; the NCA may be greater where no crematorium is within the 30 minute drive time area to the proposed crematorium, but the proposed crematorium is nonetheless closer than others to areas outside the 30-minute drive time area. The NCA looks at which crematoria are closer, even if the drivetime exceeds 30 minutes, or both are within it.

> "99... In regard to the proposed location, the submitted report sets out but the proposed crematorium would benefit approximately 56,000 people (Natural Catchment Area) by reducing their journey time to their nearest crematorium. With the projected population growth rates this is likely to grow to 61,600 by 2030 and 65072 by 2040.
>
> 100. It is accepted that these figures are significantly less than the lower end figure of 136,000 - 171,000 set out in the recent Competition Markets Authority report as demonstrating a quantitative need at appeal decisions. However, the proposal would address a not insignificant proportion of the identified need for North Cornwall. It is also relevant to note that whilst this figure provides a useful benchmark, it is not set out in any legislation, policy or guidance and that a number of schemes have been deemed acceptable where there was a lower population particularly in rural areas, with each application determined on its own merits.
>
> 101. In terms of the redistribution of natural catchment areas, it is evident from the maps [in the Report] that those most affected would be Bodmin and Barnstaple, along with a small reduction to Plymouth. The current population of the natural catchment area would generate in the region of 504 cremations a year. Figures provided by the applicant indicate that this would make available an additional 302 slots per year at Bodmin, which is operating over practical capacity (the remainder made up of 193 from Barnstaple and 9 from

> Plymouth). These figures will increase in time due to projected population growth and ageing population and the continued growth of choice of cremation over burial.
>
> 102. The proposal would therefore assist in alleviating some of the identified current pressures at existing facilities, which in turn would lead to qualitative improvements for those living within these new natural catchment areas.....It is, however, noted that the submitted report sets out that even if the proposed development were to be constructed, Bodmin would be likely to be back to an operating level of 120% of practical capacity by 2030.
>
> 103. In terms of the local residents within the catchment area of the proposed new site, the development would mean that approximately 28,500 people would, for the first time, live within a 30-minute cortege drivetime of a crematorium, which would address over 23% of the current unserved population. They would also benefit from other qualitative improvements resulting from the availability of slots, reduced wait times and additional choice. As has been mentioned by some supporters of the scheme, there would also be more option in regard to the practicalities of holding wakes within the local area to the deceased."

51. Locational considerations followed. The Report addressed concerns that the site would not be well-placed to serve the relevant population, reduced as it would be by its near coastal location. It was necessary to note the dispersed and rural population of the area, and the specific criteria required for crematoria sites by reference to neighbouring land uses and access, and, for example, the avoidance where possible of designated landscape and ecological areas. The site also had to be available. There was no planning policy requirement for a sequential site selection process to be submitted, nor had there been a comprehensive review of sites across North Cornwall. "106. [The submitted site selection report] is, however, considered useful in demonstrating the challenges posed in relation to site selection." There were no other planning applications proposed for crematoria in the area. The Council had to determine the acceptability of the application site on its own merits. It was available and deliverable; it was not known whether any other sites would be more or less harmful or accessible. It was arguably better to have local provision for cremation than to rely on a large central facility such as significant extension of the Bodmin crematorium. Any future crematoria applications would also have to be considered on their merits.

52. The Response to Objections is a short section at the end of the Officer's Report, running to 11 paragraphs of which 5 deal with need and viability; 2 of the 5, one of which is by far the longest, repeat the Consortium's case that the natural catchment area of the proposed development would generate 630 cremations a year by 2030, and 730 by 2040, with a repetition of the qualitative advantages also set out earlier; the Consortium's case was that a realistic estimate of the number of cremations would be 1130 by 2030. The need case and critique presented by objectors is not set out as such anywhere in the Report and certainly not in the Response to Objections section either.

53. In the Update to the Officer's Report, the objection from Poundstock Parish Council was set out in full. It raised the need for the development, seen as a community facility, as a key issue. It contended that the CMA Report required need to be shown. Quantitative need existed where 136,000 people would have the new crematorium as their nearest crematorium; here that need would be from 55,832 people yielding 504 cremations a year. Qualitative need existed where at least 59,000 people would for the first time have a crematorium within a 30 minute cortege drivetime; here 28,431 people would fall into that category, yielding 242 cremations a year (these figures are not cumulative here). The average number of cremations per crematorium, was rarely under 1000, according to the CMA Report, compared to the Consortium's estimate of 504 a year. Attempting to attract additional business from further away contradicted the Consortium's "aim to reduce travel time for mourners and impacts further on the environmentally sustainability of the proposal." Its case was based on hopeful assumptions. The CMA Report found little evidence that more choice meant lower consumer costs. The Consortium appeared to have accepted that a 45-minute drive time was more appropriate in the sparsely populated areas of Cornwall, where people were used to longer journeys for "higher order facilities and services", and alternative crematoria were available within a reasonable drive time. Barnstaple was only using one of its two cremators; the Consortium's case on Bodmin's capacity was based on estimates and assumptions. Qualitative need was subjective, and, quoting from an appeal decision: "convenience and accessibility...does not amount to a compelling need." No detailed site search process had been undertaken by the Consortium. There had been no more than a brief commentary on other locations with little material in support.

54. The Officer commented that additional representations had been submitted on behalf of the Parish Council by Genesis Planning, its planning consultants, which had been taken into consideration in the assessment of the application and matters addressed in the Officer's Report. The representations were on the planning register.

55. The Officer's Additional Report covered an objection dated 1 September 2022 from Mr Doyle, not named in this Report, who spoke at the meeting, as did Mr Bucknall for the Consortium, its "need" expert. Mr Doyle is referred to as "a member of the public who operates a company which delivers funerals throughout the UK and who also states that they also work as a site-finder for a crematorium operator (no company name is provided)." He commented that he thought a local need for a crematorium in North Cornwall/West Devon had been established; however he did not consider this to be the right location to meet it. Two sites were mentioned, at Holsworthy in Devon and at Launceston, (in both of which he was involved). "No specific details of either site are provided nor are Officers aware of any pre-application discussions having taken place. The sites are not known, nor is it known if these are suitable for such a development. As there are no planning applications submitted for an alternative scheme, it is considered that no weight can be given to this matter at this time." I add that Mr Doyle's objection said that there was intense competition for new sites between the main professional operators, but none, so far as he knew, were interested in the application site. He would be talking to the Consortium, if he thought it a suitable site for a profitable crematorium. The landowners had simply been trying to get development on this site, and this was their latest application. Although this was not the right location, it could prevent another being built in a better location.

56. At the meeting, the Planning Officer also answered questions. The population of North Cornwall outside the 30 minute drive time was similar to the lower end of the number in appeal decisions on quantitative need, of between 136,000 and 171,000. There was a difficulty in areas such as Cornwall, with a dispersed and rural population in addressing needs in the manner in which they could be addressed in other parts of England. "One of the key considerations is therefore whether the proposed scheme in this location would address a suitable level of the need that has been identified." It would only address a proportion of that quantitative need. It would benefit 56,000 within its natural catchment area, by reducing their journey time to the nearest crematorium. There was policy support for the provision of new community facilities. But there were negative aspects: it would not address the whole of the need; nearly 6 hectares of agricultural land would be lost; it was in a countryside location, 3 miles from the nearest town, and so had no pedestrian access, but bus stops were proposed and it was next to a major road. There were benefits, for local residents, in terms of reduced travel distances and times, with the associated reductions in carbon emissions. It would be a challenge to find a place in north Cornwall to meet all of the need. In a concluding answer to a question, she said that this was the only application before the Council, there was no other one to assess: "It does meet a degree of the need quantitatively and there is a qualitative need, which it would address too. So that's the crux of that discussion really, is about whether or not the harm of introducing this kind of development in the countryside location outweighs the benefits."

57. The Planning Officer responded to a question about site search, acknowledging that officers had asked for an alternative site assessment so as to have a scheme in the best location to meet the identified need. Therefore it was suggested that a wider area should be looked at. But the Consortium had "a slightly different approach" as "a local resident", and owner the land, which undoubtedly had an impact on the choice of site. It was not a national company; "it is what it is", and a decision had to be reached on what was before the Council.

Mr Kimblin's submissions on behalf of Mr Cameron

58. Mr Kimblin contended that, across a number of topics on which Mr Cameron had provided evidence, the Officer's Report had failed to refer to the fact that the Council had been sent these reports, had failed to recognise them as the work of specialists in their areas, had failed to identify their principal conclusions, and the extent to which they differed from the Consortium's evidence, and had failed to explain why the Council accepted the Consortium's case to the very large extent it did. The treatment of the objector's case was in stark contrast to the treatment of the Consortium's case, fully rehearsed, and used as the basis or reference point for the Officer's views, as if the objector's evidence had not been provided. This contention applied quite generally to the Claimants' material submitted by way of objection; it applied to the Mitchell Needs Assessment Report submitted in relation to this topic on behalf of Mr Cameron. The reason for the treatment of this material in this way was explained in the Council's Pre-Action Protocol response: the Mitchell Needs Assessment report was submitted as part of Mr Cameron's objection, and so the Planning Officer "did not consider it necessary or appropriate to refer to it specifically in the OR. As with all other objections, the issues raised by you, in reliance upon the Mitchell Review at the application stage, were included in the objections section of OR". This was neither

true nor fair, submitted Mr Kimblin; indeed it was unfair to all those who objected on need and viability grounds. Mr Ground, in his ground 9(iii), made similar points. In relation to need, he submitted that the Officer's Report failed to give proper, adequate and intelligible reasons for rejecting the Mitchell review or Mrs Watton's detailed objections, and had made three clear errors to which I come. The evidence from Mr Cameron's expert's review of the Consortium's need case is not referred to, even though much of it is an analysis of the implications of what the Consortium's Report itself says, rather than providing a directly opposed set of data.

59. It is necessary here to set out a little of what the Claimants had provided in relation to need. Genesis Planning, which submitted a report on behalf of Mr and Mrs Cameron in May 2021, was experienced in obtaining planning permission for crematoria; it had obtained permission for 17, and said that need was fundamental to the justification for any crematorium development. It summarised the objections starting with the absence of an established need. The Genesis Planning report also appended and summarised the Peter Mitchell review of the Consortium's need case on behalf of the Camerons: the Consortium's own case made clear that it had not demonstrated a sufficient need for this development.

60. I set out this summary:

> "It confirms that:
>
> - The Applicants Need Assessment suggests that the proposed crematorium will have a 30-minute drive-time catchment population of only **28,431** people and a 'natural catchment' population of only **55,832**.
>
> - Both these 30-minute drive-time and the wider 'natural catchment' populations fall very significantly below the levels of population held at appeal to define quantitative and qualitative need.
>
> - The Applicant's Need Assessment suggests that the proposed crematorium will undertake only **242** cremations per year from its 30-minute drive-time catchment population and only **504** cremations per year from its 'natural catchment' population. Both these thirty-minute drive-time and the wider 'natural catchment' cremations fall very significantly below the levels required for viable operation of a crematorium, as noted in the Competition and Market Authority 's Final Report [2020].
>
> - The additional 150 cremations per year, derived from diverting cremations from the natural catchments of neighbouring crematoria, is questionable and there is no evidence within the report to support this level of additional demand.

- The addition of 250 direct cremations per year originating from beyond the natural catchments of the proposed site and two other crematoria is speculative and cannot be relied upon to demonstrate that the proposed development would deliver a viable level of cremations. In any case, such direct cremations are completely irrelevant to serving the 'local need' for the proposed crematorium in Poundstock.

Successive appeal decisions have held that the two key elements to establish need for a crematorium are the intended catchment population and the proportion of that population within a 30-minute drive time of the proposed crematorium site. Those appeals have defined the accepted catchment population to be between 120,000 and 160,000 people, whereas the proposed site at Poundstock would only serve a catchment population of 55,832. This falls significantly below the level considered to justify a need. While it is accepted that rural areas may have more limited access to services, this should not outweigh in the planning balance the need to protect the countryside and avoid harm to the landscape from otherwise inappropriate development. It is for this reason that the quantifiable levels of need have largely been determined as a benchmark for establishing need in crematoria development.

Similarly, the Competition and Markets Authority (CMA) undertook a detailed review of the cremation industry in 2020, and as part of its findings, and through consultation with the industry operators, established alongside need the viability of crematoria is dependent upon cremation levels being between 800 and 1,000 cremations per annum. The proposed 242 cremations per annum, identified from the 30-minute drive time catchment population, fall significantly below the identified level of viability in the CMA report. Even if the natural catchment population is taken into account, this potentially could deliver up to 500 for cremations per annum, which is still significantly below the minimum level identified by the CMA.

Accordingly, not only is there a lack of need but the viability of the operation is questionable."

61. The Mitchell review at this stage was considering the figure of 504 cremations, as at 2019, from the natural catchment, on the Consortium's analysis, to which it added a further 400 made up of 150 diverted principally from Bodmin, and 250 "direct cremations" from outside the natural catchment areas not just of the proposed site but also of those of Bodmin and Barnstaple. For 2030, the Consortium added 25% to each figure, from ONS increase in death rate projections, to make 1130 cremations. The proposal was said by the Consortium to be viable at either level. The Mitchell review took issue with the assumption that the number of diverted cremations from those living closer to either Bodmin or Barnstaple would be at the level of 150, whilst

acknowledging that there would be some, particularly if the extra travel time were insignificant. The bulk of the extra cremations required for viability would be derived from direct cremations, on the Consortium's analysis. The number of direct cremations was not just irrelevant to meeting the local need, but was unreliable, because direct cremations were typically charged at about half the standard crematorium fee in an extremely competitive market. Direct cremations could go anywhere, because there was no necessary link between the location of the deceased and the place of cremation; no mourners were present. Some crematoria offered nationwide direct cremation services. Need, however, related directly to location, and involved providing capacity for sufficient people living within 30 minutes drivetime for funeral services at preferred times without undue delay.

62. Mr Mitchell agreed that Barnstaple was operating in only one chapel, although a second had been opened in 2016. Since then, there appeared to have been no real increase in the annual 1500 or so cremations. This mode of operation was a deliberate choice by its operators who had told him that there was "insufficient demand and resources to warrant" operating the second.

63. Mrs Watton's objections made very much the same sort of points about need, with some more detail on appeal decisions, other crematoria, and the absence of applications for them when, if need existed as the Consortium contended, they might have been proposed. She also emphasised the problem of a coastal location for a crematorium, with its natural catchment area truncated by the Atlantic Ocean, and so less well placed to serve the North Cornwall catchment than a location further inland. She contrasted that location with others in coastal areas, which were in larger urban areas. She regarded Holsworthy as a sound location. Her 12 November 2022 response to the Officer's Report made some important points, not made before, so far as I can see, dealing with the planning consequences of a lack of viability in the proposal. Howes Percival, solicitors for Genesis Planning on behalf of Poundstock Parish Council, wrote to the Council on 15 November 2022, drawing attention, among other matters to the problem which an unviable development, if implemented, could create in terms of pressure for alternative development to be accommodated on site. This issue had been raised by the Parish Council and ignored in the Officer's Report.

64. I make some general observations here to explain how I am going to consider most of the need issues. Need is normally only relevant where there is harm identified. It is usually policy which makes a type of harm relevant, provides for its importance, and requires benefits or needs or circumstances, sometimes of a particular type, sufficient to outweigh the harm. Whether need has any further significance, outside specific policies, can only be answered in the light of conclusions on other material considerations. Harm may also be the residual harm which of itself was not enough to prevent a proposal breaching a policy, but which nonetheless still has to be taken into account. The remarks of the Planning Officer at the meeting, to the effect that the proposal met a degree of need, and that the crux of the issue was whether the harm of introducing that kind of development into the countryside location outweighed the benefits, rather illustrate the problem of the very general approach. However desirable and simple, that approach has long been superseded by the extensive policies in local plans, coupled with the duty in s38(6) Planning and Compulsory Purchase Act 2004. The specific policies need to be addressed according to their terms. Cornwall's Local Plan policies are specific to various topics and drafted in specific terms which require

interpretation by a court, albeit with a planning eye and understanding. That is not of itself legalistic or over-refined, but the approach which the planning legislative structure requires.

65. The terms of the policies are of importance. "Need" varies in scope and meaning from policy to policy; a general approach risks diverting attention away from its specific policy based consideration. Although I understand why the Report took "need" as a separate topic, because it relates to a number of different policies, this introduced weaknesses found when specific policies, and policy 5 in particular, came to be considered. "Need" varies here between the public interests, which can override harm to protected species, and the need which is required to warrant a countryside location for development which is inappropriate in scale for its location.

66. The adequacy of the reasoning, including the way in which the evidence on need submitted by objectors was dealt with, also has to be tested in the context of the specific policies to which need, or benefits, is relevant. One "need" related topic, almost completely ignored in the general analysis, but very relevant to policy 5, where it is barely considered, is the scale of the proposed crematorium in relation to what is considered to constitute "need". It is in the policy contexts that I consider what these general points made by the Claimants about need, and reasons, may signify.

Mr Ground's submissions for Mrs Watton

67. First, he submitted that the Officer's Report, at [90] and [99], had confused the Competition and Markets Authority, CMA, general definition of "need", i.e. where a new crematorium would be the closest for between 136,000 and 171,000 people, with the figure of 122,800 in "North Cornwall" which is the number of those who were outside the 30 minute cortege drive time of any crematorium. The correct figure for the need as defined by the CMA, those for whom the proposed crematorium would be the closest, was 56,000. That is its natural catchment area.

68. I accept Mr Brett's submission that Mr Ground is wrong in saying that the Report confused two different concepts in [90] and [99] relating to the figure of 122,800, the number who live outside the 30 minute cortege drive time of any crematorium, and the number who live in the natural catchment area, that is the area for which any particular crematorium is the nearest. In [90], 122,800 is stated to be the number of people in "North Cornwall" who live outside the 30 minute cortege drive time of a crematorium. I accept that the previous sentence in [90] refers to a quantitative need being shown where a new crematorium would be the nearest crematorium for a population of 136,000-171,000. I also accept that if the same metric were used in the next sentence, the figure would be 56,000, and not 122,800. The two sentences are not using the same metric. However, although the two might have been better distinguished, I do not consider, reading that section of the Report as a whole, that the two have been so confused as to be significantly misleading or inadequate; see, for example, [99 – 100] where the distinction is drawn and clear.

69. Mr Ground also submitted, as part of his attack on the use of the figure of 122,800, that it referred to *all* parts of Cornwall , and not just those parts of "North Cornwall" which were further than 30 minutes cortege drive time from a crematorium: Appendix K of the Consortium's Report referred to the figure of 122,800 as being those in "Cornwall" more than 30 minutes cortege drive time from a crematorium. It did not

refer to "North Cornwall". I accept Mr Brett's submission that Mr Ground is wrong in saying that the population of 122,800 represented the figure for the whole of Cornwall which lay more than 30 minutes cortege drive time from a crematorium. That is the truncated heading of one table in Appendix K of the Consortium's Report, but it is clear from the rest of the Report that the 122,800 figure relates to those in North Cornwall who were at present more than 30 minutes cortege drive time from a crematorium.

70. There is greater force in Mr Ground's next submission that the Report paid over much attention to the "need" figure of 122,800, which cropped up at [57] and [95] as well. The more important figure showed the limited extent to which this very large crematorium would meet the identified need figure. It would be only 23.15% or 28,431 of the 122,800 who would be brought within 30 minutes cortege drive time of a crematorium. Mr Brett denied that the figure of 122,800 was irrelevant. I accept that that low figure of 23.15% requires the 122,800 to be set out; in many ways it helps show how small the need met is. Mr Ground submitted that those low percentages should have been the focus of the Report. The Report referred to the CMA range of 59,000-95,000, [95], which, if benefiting for the first time from a crematorium within the 30 minute drivetime, indicated a qualitative need. OR [69] did make the points which Mr Ground contended were important. The same points as in [69] were also made in the meeting by the Planning Officer.

71. The question is whether the thrust of the Report was significantly misleading. I consider that it did indeed accentuate the positive and downplay the negative. However, the figure of 122,800 also serves to show how modest is the extent of quantitative and qualitative need which the proposal met, even allowing for growth in population and cremations. This 23.15% would yield only 242 cremations. 262 would come from the proposal's natural catchment area, that is from those for whom it would be the nearest crematorium i.e. the 56,000. The rest, to make up the 940, would be diverted from crematoriums which were nearer than the proposal, and direct cremations, which could be from anywhere, and could have gone anywhere instead. Those points were made. How those points are brought out is a matter for the judgment of the author; it might usefully have been differently emphasised, but I see no sufficiently significant error or misleading statement or omission to warrant quashing the decision.

72. I also consider that the Report glossed over the significance of how far below the conventional assessment of need, its natural catchment area, the proposal fell: 56,000 compared to 136-171,000. The reference to the difficulty of catering for the needs of a dispersed rural population is all very well, but this was a proposal for a building which could accommodate more than two cremators, concentrating crematoria facilities in one location on the western edge of the area of need. However, I cannot conclude that the Report was significantly misleading of itself on this topic, in view of the details which it included in [69], repeated in the meeting, and from which the limitations would have been apparent to anyone minded to explore them. It is not easy to show that a failure of emphasis is of itself misleading to such an extent that the reasons are inadequate and the report significantly misleading. And it is my task not to become embroiled in the controversy, but to recognise that failings, as the court may see them, do not of themselves give rise to errors of law. However, these failings matter more when the Report had to focus on need in the context of specific policies.

73. Second, Mr Ground submitted that the Officer's Report was in serious error when it referred, at [110], to the easing of the pressure at Barnstaple which the proposal would bring. He referred to what Mr Mitchell had to say, above. The problem was not too much pressure but too little demand and resources for the two chapels to open. Accordingly, the new crematorium would not ease pressure at Barnstaple, but exacerbate the lack of demand.

74. Mr Brett pointed out that supporters of the proposal noted the difficulty of attending cremations at either Barnstaple or Bodmin. The statement of Mr Mitchell, he submitted, was based on a single telephone call, and was hearsay. The additional benefit to mourners in reducing pressure, however caused, was relevant. In reality, the two experts agreed that the Barnstaple crematorium was over practical capacity for a single chapel crematorium, but was still operating as a single chapel crematorium. That is bound to lead to the sort of delays and difficulties of which supporters of the proposal wrote. That is not irrelevant. There is an obvious reason, however, for the second cremator and chapel not being used at Barnstaple, and the reason given to Mr Mitchell is the obvious one: it costs more than may be profitable to operate a second chapel and cremator when the number of cremations is below a certain threshold, which is not crossed merely because practical capacity is exceeded in the other. I do not find remotely persuasive Mr Brett's criticism of what Mr Mitchell had to say. I did not discern any evidence from the Consortium to contradict what Mr Mitchell said about the reasons why the second chapel and cremator were not in use. The Consortium's primary point was that Barnstaple operated over practical capacity, with the problems which that engendered, without assigning a cause to that.

75. However, the cause of the lack of use of the second cremator has to have a planning hook to make it relevant, just as the actual exceedance of practical capacity at Barnstaple is relevant to the benefits of the proposed new crematorium. The new crematorium would still provide some relief from the pressure at Barnstaple currently experienced. There was no evidence as to how close the second cremator there was to operation. There was some evidence that, with the proposal, there would be a reduction in the number of cremations there, but that the level would go back up again with population, death and cremation rates increasing, and some evidence that not all of the problems at Barnstaple would be significantly ameliorated by a second cremator there; indeed some might have been exacerbated. I do not consider, however, that this point is of itself of such significance that the unwarrantedly dismissive approach of the Council, and Mr Brett, to Mr Mitchell's evidence, shows a significant failure of reasoning on a principal issue in controversy, or a significantly misleading report. Taken by themselves, I do not accept therefore Mr Ground's need submissions, when considered under this head. I shall however return to those points and Mr Kimblin's general submissions about the legal adequacy of the reasons relating to need in the context of policy 5.

Viability

76. The only part of the objectors' case on need and viability which is set out in the Response to Objections dealt with viability:

> "213. Objections have been raised in regard to the scheme not being viable. Reference is made to the Federation of Burial and

> Cremation Authorities (FBCA) guidance (which is also referenced within the submitted Needs Assessment) and states that 'Broadly speaking, crematoria undertaking 1000 or more cremations per annum most likely to be viable.' However, it should be noted that this guidance goes on to state that 'there are a number of crematoria, mainly serving rural or island communities undertaking fewer than this...'
>
> 214. It is noted that the recent Competition and Markets Authority review, evidence submitted by operators of crematoriums suggests that 800 per annum could be viable, whilst another party suggested 600 per annum would be viable due to the current level of cremation fees. [Paragraphs 215-6 repeat the Consortium need case.]
>
> 217. Whilst the concerns in this regard have been considered and it is acknowledged that some of the assertions regarding additional cremations coming from outside of the natural catchment area are subjective, it is nevertheless considered that no such evidence has been presented to contradict the applicant's position in terms of viability. The development of the site in terms of its financial viability is ultimately considered to be a matter of commercial interest."

77. At the meeting, the Planning Officer was asked whether viability was a material planning consideration, to which she replied:

> "Yep. Viability to a certain extent to ensure that we wouldn't want to necessarily issue a planning permission which we didn't feel was viable. There is obviously an additional element here in terms of competition between varying aspects so you are going to get a slight difference of opinion in terms of what one company considers to be viable and what another might not."

78. The evidence about the number of cremations necessary for viability was inconclusive, as the paragraphs cited above show. The general figure of 1000 a year would be exceeded shortly before 2030 on the Consortium's estimate. The threshold of viability of 900 would be exceeded from the outset, although both of those figures required a contribution from diverted and direct cremations. Others put forward lower viability figures. It was not suggested that there was a need for provision for direct cremations, although there would be some qualitative advantage for diverted cremations. It was not suggested that the size of the facility proposed was needed to cater for them in order for the proposal to be viable and so able to cater for those in respect of which the local need had been identified. The Consortium's case, reported at OR [71], dealt with the range of cremations, it appears, for a single crematorium, in the context of viability. The Report of Mr Mitchell did not put forward different figures. Rather the objectors' position was that the Council should give much more weight to the problems which those figures demonstrated, than it gave to optimistic reliance on growth in population and demand for cremations, and diverted and direct

cremations. There could, by implication, be some years before even a single cremator crematorium reached viability. The Consortium's figures were "questionable."

79. I propose to take the issues in a different order from the parties, starting with the question of whether viability was a material consideration. I have no doubt but that it was capable of being material in this case, and in so far as materiality is for the Court, it was material. The second sentence of [217], about the planning relevance of viability, is the normal starting point for an assessment of its relevance, but it is not the end of the matter.

80. The planning issue which was said by Howes Percival, on behalf of Poundstock Parish Council, to arise from risks as to viability, was that the permission would be used as a foot in the door for some other development on the basis either that the principle of large scale development had now been accepted here, or that the building, if built, could be used for other purposes. Mr Ground's submission, under the descriptor of "white elephant", was that the development would be simply too large to be built or fully used. The relevant planning point was the risk that if not viable, the damage to the countryside and other interests would have occurred without even the benefits put forward by the Consortium being met. A "white elephant" would lead to pressure for other forms of use or development for which the pass would have been sold, the more so were the site even partly developed. If not developed at all, the principle of development would be said to have been accepted, and the very existence of a crematorium permission could be used to stymie other such proposals. It would not take much to commence the development to keep the permission alive. That issue had not been discussed by the Officer's Report at all.

81. Mr Brett submitted that the viability issue had been properly considered, that the Officer's response was the correct approach and no more was required; the planning system could cope with uncertainties of the sort which the Claimants feared, if further permissions were sought for a different use or development.

82. In my judgment, viability was material in this case. Viability was also raised by the Council as an issue from the outset, throughout and at the end. The risks are the obvious ones which Howes Percival and Mr Ground identified, which are the same or kindred points. This, moreover, was a very unusual form of development; it was an unusual use, in a very large building for that use for a dispersed rural population, with a truncated catchment area for that population to boot, set in the open countryside, and the limitations of its natural catchment area on its usage was put forward as a significant point by objectors. It was far from the usual form of commercial development by a commercial developer. There was no suggestion from the Consortium that a crematorium of this size was necessary for viability. The Planning Officer said at the meeting that the Council would not want to grant a permission which would not be viable. There must have been some planning thinking behind this observation, which is why the Report considered whether the crematorium would be viable and did so at some length.

83. Therefore the Report had to identify the planning risks associated with a lack of viability and proffer advice about them to Members. It also means that, if the question of materiality in this sense, rather than in the sense of weight, was for the rational determination of the Council, it had to be advised about what conclusions were open to them and why, so that a decision on materiality could be reached. The Report,

however, neither identifies any risks associated with uncertain viability, or discusses them, or advises the Members about the conclusions which were open to them; the planning risks of a lack of viability were not spelt out and considered. What instead Members received was the comment in OR [217]. The effect of that advice in the Report, that viability was normally a commercial matter, would have been that Members put viability and the risks of a lack of viability out of their minds, as immaterial in principle with no reason to adopt a different approach in this case. It is not enough on this sort of issue to say that Members had all the information which they could read. This means that the Officer's Report and Members failed to deal with an important issue in controversy: the planning implications of uncertain viability. These risks were relevant and had to be considered. It was wrong to say that the financial viability "is ultimately considered to be a matter of commercial interest."

84. This would not involve an error of law, however, if the Report and Members had lawfully concluded that there was no real risk of a lack of viability in the light of the material before it. But I am satisfied that it did not so conclude. I can find no such conclusion in the Report. Rather the issue is dismissed with the words above.

85. If it did reach a conclusion that there was no real risk of a lack of viability, it did not do so lawfully, or with legally adequate and intelligible reasons. The Report did not understand or provide reasons for the rejection of the objectors' evidence, as I now explain.

86. Mr Ground submitted that OR [217] was wrong that "no such evidence has been presented to contradict the applicant's position in term of viability." Mr Ground referred to the material from the Claimants and other objectors set out above. Mr Brett submitted that the Report was not saying that only the Consortium had dealt with viability; it was only saying that there was no evidence to contradict the Consortium's evidence. Mr Mitchell, the expert instructed by Mr Cameron, had only questioned its credibility in his critique of the Consortium's figures; the appeal decision cited was not evidence; his report was just his opinion. In those circumstances, the Council was quite entitled to prefer the Consortium's evidence, and reach the judgment it did. There was no misleading statement. It had addressed the concerns raised by Mr Mitchell by saying that some of the Consortium's assertions about the numbers from outside the catchment area were "subjective" and acknowledging that there had been concerns about viability. Members had received the lengthy discussion of the issue from Mrs Watton; and the Poundstock Parish Council objection, which adopted much of what Mr Mitchell had to say, was fully presented in the Update Report. Viability was also an issue which the Members considered with the oral presentations from Mr Doyle and Mr Bucknall, the Consortium's expert on this topic. This included the contention that the Consortium were a local business which would be more concerned about the quality of delivery than maximising profits, and did not require large numbers of cremations to meet operational costs.

87. The first issue raised therefore is the meaning of the Officer's Report in [217]. Mr Brett submitted that [217] meant that there was no evidence, and then, inconsistently, that it meant that there was no evidence which was considered to contradict the Consortium's evidence. I do not know what the Officer's Report meant or how what she said would have been understood. First, the Report may simply have been dismissive of the objectors' representations as not being "evidence", by contrast with the Consortium's "evidence." That would be consistent with at least part of Mr

Brett's submissions, that Mr Mitchell's Report was not evidence, although he treated the Consortium's Report as being evidence, and it would have been consistent with the generally dismissive tone of the Council's Pre-Action Protocol letters. But that meaning would have been significantly misleading. In my judgment, what Mr Mitchell had to say was incontrovertibly opinion evidence just as much as what the Consortium had to say was opinion evidence. Mrs Watton's representations were clearly opinion evidence in the sense in which that phrase would have been understood in the context of this Officer's Report; they contained cogently reasoned analysis and supportive material including appeal decisions, although she made no claim to be a professional expert.

88. Second, if the Report meant that there was evidence but it did not in fact contradict the evidence of the Consortium, that would have also been significantly misleading as to its purport and effect. It significantly undermined the Consortium's case, if accepted. Third, OR [217] does not say that there was evidence which took issue with the Consortium's evidence, but it was not sufficient to cause Officers to take a different view of the Consortium's evidence. "Such" does not relate back to a type of evidence and is mere surplusage. Even if relocated so that the sentence as amended reads "no evidence was presented such as to contradict...", that does not clearly mean that there was evidence but it did not persuasively contradict the Consortium's evidence.

89. Either way, OR [217] does not deal with what that other evidence was, or explain why it did not contradict what the Consortium had to say or significantly undermine it by emphasising other aspects. The objectors' evidence clearly raises serious questions, on the Consortium's own figures, about how the proposal can operate viably, even at the level of one cremator. It does not discuss viability with two cremators or with the full further capacity which the size of the single large building enables. All the need and viability evidence was related to the one cremator. The advantage of a building with scope for expansion to two was also recognised, but I cannot see where the viability of even a two cremator crematorium was considered. The possible cost of expansion to and viability of two was not separately discussed, notwithstanding the example of Barnstaple where demand exceeded the practical capacity of one cremator, without bringing the second on stream. No viability assessment was presented by the Consortium or considered by the Council, for the crematorium use of a building with the physical capacity to take three or four cremators, as it does by implication from the penultimate sentence of OR [111], and from the evidence of Genesis Planning.

90. The way in which the objectors' evidence was dealt with gives a seriously misleading overall impression of the evidence on viability upon which Members had to reach a judgment. If Officers had taken the view that the objectors' evidence provided no basis for seriously doubting the viability of the proposal, the Committee should have had a clear explanation as to why it did not, in view of the extensive debate and representations. This would have had to explain on what basis, as to timescale and capacity, that view had been reached, acknowledging the limited scope of the Consortium's viability analysis, little more than an analysis of the viability of a single cremator, in a building which could accommodate 3-4 times that capacity. The Officer's comment at the meeting that the Consortium was more concerned about quality of service than maximising profits, rather highlights the need to consider the

viability issue: this answer to concerns that there was no operator in support or signed up, suggests that commercial operators were not interested, and reinforces viability concerns because the planning permission was not personal to the Consortium, and any particular style of business which it might have.

91. In sum, I consider that the planning consequences of a lack of viability needed to be spelt out, and certainly those which the Planning Officer had in mind, so that Members would understand what risks the grant of or implementation of the permission, in whole or part, could be running. The various planning risks from it lacking viability as a going crematorium concern are clear and ought to have been considered and explained, and, as the Council said, need and viability was a key issue. The reasons and conclusions, if any, on the relevance and facts of viability are not intelligible. Even devoid of policy context, I regard that as a sufficiently significant omission or erroneous part of the Report as to make the decision unlawful. I quash the decision on this ground in respect of the way in which the issue of viability and its planning consequences were considered, conclusions reached and the objectors' evidence dealt with.

The interpretation of Policy 5: Mr Ground's grounds 6 and 7

92. Policy 5, which comes under the heading of "Business and Tourism", was seen as applying to the principle of development. Policy 5 sets out a series of different ways in which a continued supply of appropriate business space can be ensured. One only is relevant. It states that proposals for new employment land and uses in the countryside and smaller rural settlements should be "of a scale appropriate to its location or demonstrate an overriding locational and business need to be in that location such as farm diversification...". This, therefore, creates two alternative bases for permitting development in those locations: "appropriate in scale", failing which "overriding need."

93. The summary introduction to the Officer's Report said:

> "In terms of the principle of development, officers accepted that, given the provisions of the Cremation Act 1902, the siting of a crematorium within the countryside is acceptable in principle. Whilst there is no specific policy within the development plan for the provision of crematoriums per se, they are all considered to be relevant policies. The proposal, which is considered to constitute a community facility, and would create employment within the area is considered on balance to accord with policies 4 and 5 of the Cornwall Local Plan."

94. At [111] of the Report, the section headed "Principle of Development" explained:

> "In regard to policy 5, the development would provide 5 permanent jobs and 40 temporary jobs during construction. There would also be year-round indirect economic benefits resulting from generation of business for local businesses such as funeral directors, florists, gardeners and within the hospitality industry through booking of wakes and receptions

> and overnight accommodation for those travelling to attend a funeral. In regard to scale, the [FBCA] Report suggests that most operators aim for a site of at least 4 hectares (10 acres); it is noted that the FBCA recommends a minimum of two hectares (approx. 5 acres) per estimated 1,000 cremations per annum to provide sufficient space for the buildings, gardens, parking and circulation space. Whilst the proposed site is significantly larger than the minimum recommendations, the FBCA report goes on to state that 'the long-term needs of the area should be carefully assessed at the initial design stage and sufficient land acquired initially to allow for future expansion to accommodate any increased demand for service provision.' Whilst the site does encompass a large area, much of it is not proposed to be built on but would form natural green spaces and/or gardens and layout has been undertaken in order to locate the buildings at the lowest part of the site to minimise visual impacts. Furthermore, the building itself, whilst substantial, is set out such that it could accommodate additional cremators in the future if required and is not considered to be of such a scale to be inappropriate. On balance, given the identified existing and projected need and the extent of retained green space, the scale of the site is considered acceptable in this countryside location, in accordance with Policy 5 of the Cornwall Local Plan."

95. The Officer did not draw to the Committee's attention those parts of the Genesis Planning report which dealt with scale. The summary to the Genesis Planning report pointed out that:

> "The scale and extent of development which amounts to 1785 sqm is significantly larger than most crematoria. Given the identified lack of need, no justification has been provided as to why a building of the scale proposed is necessary. Most crematoria are between 400 sqm and 750 sqm. Not only is there insufficient need for the crematorium, but no business case in support of the proposal has been provided which is in direct conflict with Policy 5 of the Local Plan. No alternative site assessment has been carried out."

96. The most recent and largest Co-op crematorium was 720 sq.ms, for an anticipated 1050-1234 cremations a year. This showed the scale of development proposed to be:

> "significantly greater than is deemed necessary, and excessively ambitious for the proposed use and anticipated number of cremations. The consequential impact on the character and appearance of the area irrespective of the design approach, will be one of significant change which would be harmful. There is simply no justification for a building of the size proposed to serve the intended purpose or catchment population."

97. This building would be close to three to four times larger than normal for a viable crematorium or one with the throughput anticipated at Poundstock. This issue was not referred to in [111], save for the reference to the building being able to "...accommodate additional cremators in the future, if required..." , i.e. 2 or 3 more depending on the initial layout. There was no reference to this being a site large enough to be a Strategic Employment site, as defined in the text to policy 5, paragraph 4 of which refers to new land for business and tourism being identified through an assessment for Local Plan purposes, a process not undertaken here. Mr Ground submitted that the size of site, the quantity of built development, the changes to the landform, the rural location, 3 miles from Bude, and poorly served by public transport, meant that the only rational conclusion was that its scale was inappropriate in this location. There was no such assessment of appropriateness, and the need for it was significantly lower than the lower end of the 136,00 – 171,000 figure used to demonstrate a quantitative need in appeals. This part of Policy 5 contained a very stringent test in relation to development in the open countryside. Yet the Officer had not even considered the scale of the building or site in relation to any identified need.

98. Although not a separate limb of Mr Ground's submissions under this head, there was a submission running through these two grounds, and associated with his reasons grounds, to the effect that the Officer had not drawn the Committee's attention, in this context, to the scale of development in relation to what was normal for crematoria with the number of cremations anticipated here or for the need identified here. The contentions from Genesis Planning were simply ignored, and so no reasons could be given for any conclusions reached on the contentious issue of scale.

99. There were two errors of interpretation of Policy 5.1(c) which Mr Ground identified. First, he submitted that the appropriateness of the scale of the development had been judged by the Officer by reference to its intended purpose, as opposed to its appropriateness in the location proposed for it. That was shown by the reference to the size of site recommended by the FBCA and the advantage of the scope for future expansion within the substantial building; it is that which made the scale of the building not inappropriate to officers, rather than some assessment of scale in relation to the particular countryside location and its topography. Second, the Officer appears to be referring to the second limb of policy 5.1(c), "overriding need", in the last sentence of OR [111] which refers to the need identified, existing and projected, and to a "balance", as does the summary. Yet she did not consider or draw attention to policy requirement that the need had to be so great as to "override" what must have been thought to be inappropriate development in terms of the proper application of the first limb of policy 5.1(c). If she was still considering the first limb, need and balance were not relevant. The Council's Pre-Action Protocol response to Mrs Watton stated that the second limb was not being considered; it was not necessary to consider it as the proposal was considered to come within the first limb; hence there was no consideration of need, which did not arise. Had the Planning Officer been considering "overriding need", the short report from Kivell's, the "Site Search Report", could not have demonstrated such a need; it was not and was never intended to be the sort of comprehensive assessment which the demonstration of overriding need required.

100. Mr Brett submitted that it was not to be expected that officers would often misinterpret their own policies, as Lindblom LJ said in *Corbett v Cornwall Council* [2020] EWCA Civ 508 at [66]. Policy 5 was a positive policy, containing four bases

on which new employment land and uses could be justified, only one of which had to be satisfied, and there was no priority between them. Policy 5.1 (c) contained alternative bases upon which it could be satisfied. It was understandable why crematoria needed a countryside location in view of the separation distances required by the Crematorium Act 1902.

101. Mr Brett submitted that the Report did consider in OR [111] whether the scale of the development was appropriate to its location, as Mr Ground had submitted was the test; it said that the building was not of such a scale as to be inappropriate, and that "the scale of the site is considered acceptable in this countryside location…" (the latter was significantly qualified however by reference to the extent of the need, and the extent of the green space on site). Mr Brett submitted that it was also relevant, under policy 5.1(c), to consider whether the scale of the development was appropriate for the purpose to which it was to be put. Both those relationships had been considered. But even if the scale of development in relation to its purpose was irrelevant to policy 5.1(c), it would still be a relevant factor in the decision that the size of the building would allow for expansion as the need for cremations grew.

102. Policy 5.1(c) did not require an assessment of needs as the scale of the development had been adjudged to be appropriate for the location; however, locational and business needs and benefits had been made out, as OR [111] said. All this should be read with OR [199] which, in the context of "Imperative Reasons of Overriding Public Interest", in the ecology context, concluded that the overriding reasons in the public interest included the identified need for a community facility, and other economic benefits. Needs did not require an examination of alternative sites; none had come forward anyway, as elaborated in OR [105-7]. Mr Brett submitted that both limbs of policy 5.1 (c) had been considered; he was silent about the Pre-Action Protocol letter.

103. These conclusions were all, Mr Brett submitted, a rational exercise of planning judgment, and not made irrational by the generally rather smaller size of other crematoria as described by Genesis Planning. What mattered was the judgment about the appropriateness of the scale of the building for the location; the Report recognised that the site was significantly larger than the FBCA minimum recommendation of two hectares for 1000 cremations a year, and that most operators opted for a site of at least four hectares. The FBCA report advice was that longer term needs be considered and future expansion allowed for. It was not necessary for the Report to refer to the evidence of Genesis Planning; those references were sufficient acknowledgement of the relatively large scale of development proposed. One site and one development proposal could not usefully be compared to another. If the decision in relation to the first limb of policy 5.1 (c) were satisfied, it did not matter if there were an error in relation to the second limb. The landscape had been addressed in OR [124-142].

104. In my judgment, OR [111] contains very significant errors of interpretation, and is wholly inadequate in analysis and advice on a key policy and on a principal important issue in controversy.

105. There are two limbs to policy 5.1(c), and I accept that only one needs to be satisfied. The need for and benefits of the development are not part of the first limb. The first limb requires only that the development be of a scale appropriate to its location. This does not, properly interpreted, encompass consideration of the scale of the

development in relation to its purpose, or to the needs or benefits it is thought to bring. That may be a material consideration under the second limb of policy 5.1(c) and to an "overriding location and business need to be in that location". It may be a material consideration outside the scope of the Plan policies, but it is not relevant to policy 5.1(c), first limb, which contains no provision for a balance to be struck. The locational and business need, relevant to the second limb, is however of interpretative value in relation to the meaning of the first limb. The appropriateness of the development, building and all else, cannot be judged appropriate to its location if it requires the meeting of a locational or business need to justify its scale in that location. Need is required to override harm. The essence of the first limb is that developments appropriate in scale to the location are harmless and need no justification or a decision-making balance; otherwise, limb two falls for consideration. The example of farm diversification, given in the policy to illustrate the scope of policy 5.1(c) second limb, is useful not just for the latter, but to indicate what is not covered by the first limb - that is harmful development, of which even farm diversification by way of holiday accommodation appears to be one.

106. I could not find a sentence in [111] which clearly and correctly addresses the first limb; every single one is shot through, as is the whole paragraph, with consideration of benefit, need, scale of development in relation to the need, balance, and justification for the community facility. OR [111] starts with some economic advantages of the proposal, which are not relevant to the first limb, and are only relevant to policy 5.1 (c), if ancillary benefits from meeting a need are within the second limb. It considers the scale of this development in relation to FBCA advice, crematorium practice and longer term needs. OR [111] acknowledges that the site covers a large area and explains that much of it would not be built on. Where that left forming "natural green spaces and/or gardens", the extent of car parking and other hard surfacing, the cut, fill and tilt for ground remodelling to provide for visual screens and planting, is unclear; the layout had been designed to minimise the visual impact of the substantial crematorium building. That is not and does not purport to be the language of a conclusion that the development would be appropriate in scale to its location, and that is not where any such conclusion is drawn. Still less is it a conclusion that there would be no harm.

107. The conclusion is in the next two sentences: the substantial building "could accommodate additional cremators in the future if required and is not considered to be of such a scale to be inappropriate." Taken by itself, that sentence is clearly addressing scale in relation to the need for or advantages of a crematorium in this location, a limb 2 and not a limb 1 point. Any doubt is removed by the context of the paragraph up to that point, read as a whole, which includes need or benefits at all assessment stages. The concluding sentence reinforces that point. It refers to "the scale of the site" being acceptable; it is difficult to know what that is driving at. If it meant the scale of the built development in relation to the site of the development, it would be wide of the scope of limb 1; indeed the building is not the only aspect of the development to which scale is relevant. If it meant the scale of development in relation to the need and advantages identified, it would not be within limb 1 on any view. It would involve a considerable rewrite to make that mean the scale of development in relation to location. The site here is of the size of a strategic employment site in the Plan, as Mr Ground pointed out. Any doubt is removed by the introduction to the last sentence which carries out a balancing exercise, which is no

part of limb 1, and does it by reference to the need for the development, and extent of the land which is not developed at all, or is engineered to conceal the building and provide a planted ambience. The needs have no relevance to limb 1. It is a balance which implies that there would be harm, which is also not what limb 1 contemplates.

108. Any conclusion that the development did not breach limb 1 would involve a serious misinterpretation of that limb. Indeed, on the findings of the Report, it would be irrational. The obvious implication is that the Officer found that there would be harm, scarcely a surprising conclusion. Mr Brett is taking a few words from the last sentence, out of their context in the sentence and paragraph and putting them to work to achieve a result which they cannot possibly do. *Mansell* does not permit such an approach; it is not a one way street.

109. Mr Brett, however, submits that it does not matter if the interpretation of one limb is wrong; provided that the conclusion in relation to the other is lawful, the Report would be correct in saying that the development would accord with it. That is correct. He did not take issue, however, with Mr Ground's point that the Council's Pre-Action Protocol response to Mr Cameron had said, at [32], that the Council had relied only on the first limb in the Report: "Where the scale of development is considered appropriate to its location, there is no need to move onto the second limb." There was no suggestion that, nonetheless, the Report had done so. Although that section is headed "Failure to consider whether an alternative site assessment was necessary", the position taken about what the Report said is clear in relation to the second limb of policy 5.1(c). Although the Pre-Action Protocol letters may not be determinative of the issue, I approach these two letters, with their particular role in the legal process, on the basis that they would be accurate, reflecting the careful consideration of instructions taken from the client department. Their content was never disavowed. At the very least, if the lawyer and those instructing her can so misunderstand the Report, the Members may very well also have grasped the wrong end of the stick. They certainly did not receive adequate advice about this key policy.

110. The Pre-Action Protocol letter [32] also states that the Cornwall Local Plan does not require sequential testing in countryside locations, as if that were an answer. This reinforces my conclusion that the need limb was not considered because the proposal was thought to fit within a misinterpretation of limb 1. No sequential or alternative site testing would then be required. That would not be the position if harm were found, since the necessity for a development in a particular location obviously brings in a consideration of alternatives, with or without some sequential preference approach.

111. Paragraph [30] of that letter contains the observation to the effect that the claim of an error of interpretation of policy 5 was wrong: the claim focussed too narrowly on one policy of the Cornwall Local Plan. The response that that the CLP had to be read as a whole is true, but it was not said that that helped the interpretation of policy 5, nor does it. It was not said that policy 4 operated as some kind of implicit exception to policy 5. The point it made was that policies 4 and 5 could be in competition; the one could be breached in the interests of the other, necessitating a balance. It was not said that the location of the community facility was harmful but necessary, nor did the Report. The advantage of the provision of a community facility is relevant to policy 4, perhaps to policy 5.1(c) limb 2, but not to limb one of policy 5.1(c). This too is no answer to the claim that limb 1 was considered, albeit erroneously. At all events, it

confirms the hopeless tangle that the Report has got into, in its purported interpretation of policy 5.

112. I have concluded, however, all that notwithstanding, that I have to consider whether, unintentionally or not, the Council considered and reached a conclusion that the proposal accorded with policy 5.1c via its second limb. If that were the position, I would have to consider whether I could or should quash the decision on the grounds of a misinterpretation of policy 5 limb 1, because the error in relation to its interpretation might have been highly unlikely to lead to a different outcome.

113. However, I do not think that limb 2 could have been considered or a lawful conclusion reached on it, or legally adequate reasons given for any conclusion which it may have reached on it. First, that limb is couched in quite specific language: an overriding *need* has to be found, of a business nature, and it has to be a need *to be in that location*. The need has to override the harm, which also has to be identified, and only then can the necessary balance be struck. These policy requirements are simply not addressed in terms in [111]. I find it difficult to accept that the policy has been addressed without consideration of its specific wording, especially where that wording is deliberately restrictive, and the justification somewhat unusual. I appreciate all the cautionary words in *Mansell* and other cases about how Officer's Reports should be read. This, however, was an obviously important policy; it is not unduly legalistic or lacking in common sense to expect its specific terms to be addressed, if the Officer has had its proper meaning in mind. The purpose of s38(6) means that the language of policies matters, and it is not overly demanding for an Officer's Report to have to address the express terms of the very policy which it is considering, rather than to provide some general but inaccurate nod to different but vaguely similar wording.

114. Second, the Report at [111] does not refer back to the need for a crematorium as considered in the preceding three paragraphs, [108-110], dealing with community facilities. That general need may or may not have been in mind in [111] but it is not included in the list of justifications for this location. Need for the crematorium is taken into account later in [111], but in the context of scale, which is not the issue in limb 2. The "scale" it is referring is the scale of the site, which means the scale of the development site in relation to the development, rather than its scale in relation to the countryside location; (see the third sentence of [111]); this is a further error. The need, moreover, has to be for that business to be in that specific location. This is not a case where the proposal would relate to any existing use on the site. It is not a case where an expansion of an existing crematorium is proposed, or another carpark, or other mourner facilities. Indeed, it is not a proposal by an operator or with an operator explaining the need for this crematorium in this location. So far as the evidence goes, the proposal originates in the land ownership of the site, not in a search by an operator. The Consortium's alternative site report came later in the planning process.

115. In considering the "overriding need" for this development in this location, under policy 5.1 (c) limb 2, it would be necessary to consider the limited extent to which it met the identified need. This would not just be a question of the Members remembering to refer back to earlier passages from which that could be worked out. This was something which they should have been reminded of expressly at this juncture, so that they could see to what extent the identified need was actually was being met. This should have included the points made by Genesis Planning, and Mr

Mitchell, about the low level of identified need which was being met, in a building which was so very large. The Report would then have had to address why those arguments failed to show that there was no need, or none for the proposal. It is in the context of this aspect of policy 5 that the limitations of the consideration of need has its real bite.

116. Moreover, not all the anticipated cremations qualified as "need" or needed in this location. The ability of the proposed location to serve the catchment area within which the need is said to arise would need to be considered; its location is distinctly odd in view of the proximity of the Atlantic Ocean, which truncates the catchment area to the west. The Officer did not set out what she was accepting as "need" relevant to this policy. That is not necessarily the same as the general advantages of a crematorium somewhere of that size. If limb 2 were being considered, the Committee should also have been reminded that the diverted and direct cremations were not part of the "need" analysis, and should be ignored in determining the relevant need to go into the balance.

117. The scale of the development proposed in relation to the need it met, and the justification for the scale of future expansion capacity to four cremators would have had to be addressed, in rather more than the very general terms used in the Report: why would two cremators not suffice for future expansion? This would have required the Officer to consider the scale of a building for four cremators and the scale of the need being met with just one or even two. There was no need case presented for a building which could hold four cremators. The general references to scope for expansion also needed to address why a building for four was to be built now, and built in the light of the questions raised about the viability and need for even one. The problem at Barnstaple should have been addressed here, and the cause ascertained given the silence of the Consortium's evidence about that, and the positive and realistic claim by Mr Mitchell. The Report does not examine either why the possible need for future expansion to which it refers, creates a need for the full development now, (all external facilities and the single large building) rather than a need for scope for expansion should need arise. The question is not simply whether a crematorium has to be in the open countryside, which the location of crematoriums currently serving north Cornwall shows is not the case. The limitations of the Kivell Report, about which objectors gave evidence, would have had to be addressed, and why that showed that there was no other site in North Cornwall, how far that had been affected by the current ownership of the site, the size of site searched for, and for what scale of development. This policy did not permit the simple answer that this proposal was the only one before the Council, and that no others were currently proposed. All these are factors which I would expect to see specifically addressed were locational need being considered under limb 2.

118. Third, the need referred to in [111] at the start relates to indirect economic benefits. The "overriding needs" have to be for development in this location, and to be met by development on this site. The farm diversification illustration indicates the sort of close locational relationship which requires to be addressed. The indirect benefits are not to be met on site but at unidentified facilities which exist somewhere else. Assuming, however, that the locational *need* can be enlarged by the indirect off-site economic benefits of meeting the need, those indirect benefits would accrue from any other location in the natural catchment area or indeed in North Cornwall. The

employment benefits are largely temporary, and would feature in any built development. It would be surprising if the few jobs on site, beneficial though they are, were sufficient to justify development under policy 5.1(c) limb two, as they would be the accompaniment of this development anywhere, or any other development. Policy 5.1(c) is not a general employment land policy, but clearly requires something more. All those points required to be addressed. They do not advance the case for the need to be met on this site. Fourth, I am unpersuaded by the "cut and paste" approach of Mr Brett, that the answer to the consideration of need in policy 5.1c at [111] could be found in [199]. There is no such cross-reference in either section of the Report. It asks for over-much indulgence, and rather highlights the absence of cogent answer within [111].

119. I have concluded therefore that there was no consideration of limb 2. If there was, it was based on a seriously deficient analysis of the issues which arose in relation to it, and in the reasons for whatever conclusion it did reach on the policy or upon the objectors' expert evidence. If it were intended to consider limb 2, the consideration failed to address, and bring specifically to Members' attention, important weaknesses in the need case, the need for the scale of development, and the need for it to be in that location.

120. The decision is quashed on the ground that there were overall serious errors in the consideration of policy 5.

Policy 27 and need-related benefits: travel times and associated savings: Mr Kimblin's ground 6

121. I take this issue next as it draws on aspects of the need arguments. Mr Kimblin's Ground 6 took two points, drawn from the "need" arguments in the Consortium's case and relied on in the Officer's Report for conclusions about sustainability, the extent of emissions savings and climate change. They are essentially the same points, one relating to diverted and the other to direct cremations, which make up 150 and 250, respectively, a year of the estimated 904 cremations at the proposed crematorium, as at 2019. On those topics, he submits that the Report was seriously misleading, or contained a serious omission.

122. I have already quoted the overall need conclusion, in the summary introduction to the Officer's Report, that the proposed development would lead to a reduction of travel times, reduced emissions and a more sustainable localised provision. It continued:

> "In terms of policy 27, the proposed development would result in a significant reduction in the distance and length of time travelling to existing crematoriums for a large proportion of local residents. Reduced distances also have benefits in reducing carbon emissions and addressing climate change, which is considered to be a positive environmental benefit to be weighted in the planning balance."

123. Under the heading of "Principle of Development", the Officer's Report considered, among others, Policy 27 of the Cornwall Local Plan. At [112], it said this:

> "Policy 27 sets out that major development should be located so that the need to travel will be minimised and the use of sustainable transport modes can be maximised. In terms of minimising travel, the proposed development would result in a significant reduction in the distance and length of time travelling to existing crematoriums for a large proportion of local residents. Reduced travel distance also has benefits in reducing carbon emissions. The table below sets out an example of approximate reductions, comparing the closest current crematorium to that proposed…"

124. The table below referred to 5 towns: Bude, Holsworthy, Kilkhampton, Camelford and Launceston. It compared the distance and drive time to the proposed crematorium from each compared to the distance and drive time to the presently nearest crematoria, Bodmin and Barnstaple. The distance and time savings generated a calculation of carbon dioxide emission savings. No issue is taken with the calculations shown in that table. However, neither the table or text referred to the effect of the 150 cremations diverted from outside the Consortium's catchment area or the 250 direct cremations. Whether or not the figures for direct and diverted cremations are reliable or advance the Consortium's case on need or viability is not the point here. This emissions benefit was specifically identified among the bullet points in the "Balance of Considerations" slide at the presentation to Members at the Committee meeting which resolved upon the grant of permission.

125. Mr Kimblin's contention was that they failed to deal with those who would travel further to the Consortium's development than they currently did to go to Bodmin or Barnstaple, which is precisely how the 150 is derived; they would generate an increase in distance travelled, time taken and carbon dioxide emissions. The 150 diverted cremations were not from within the catchment area of the proposal, or of Bodmin or Barnstaple's catchment areas. It was possible that some direct cremations might not go so far afield at present, that some of the 250 would generate a reduction in time, distance and emissions, if they were to go to the proposed Poundstock crematorium. But all or some of the 250 might now travel further to go to the Poundstock crematorium for a direct cremation than they otherwise would have done, bearing in mind the location of current direct cremation facilities, and the price competition which would be the primary factor in the choice of location for a direct cremation, in which no mourners would be there to draw comfort from the surroundings. There was not merely no calculation of that drawback in distance and emissions; there was no mention of its existence, even as a negative factor to be considered.

126. The same calculation, described as a "crude example", is to be found in the Officer's Report at [184] under the heading of "Climate Change". The Council's Climate Change Emergency Development Plan, intended to become part of the Cornwall Local Plan, is at a stage which means that "positive weight" can be given to proposals which comply with it. As with policy 27, it is all emissions benefit, with no mention or calculation of emissions disadvantages. Precisely the same error, submitted Mr Kimblin, affects the conclusion of compliance here, and the positive weight which could be given to the proposal. Mr Kimblin pointed out, in this context, that the summary conclusion of the Report was that the case was "finely balanced".

127. Mr Brett submitted that the Report, in [71], had addressed the issue of those coming from outside the natural catchment area of the proposed crematorium. That is correct, but it does not address the actual or potential adverse emissions and climate change consequences, nor do [215-217], to which he also referred me. The adverse or potentially adverse emissions consequences are not addressed in those paragraphs, even by a general comment. That is not their context. True it is that OR [2] refers to the objection from Poundstock Parish Council which is summarised as saying that trying to attract cremations from beyond the natural catchment area, contradicted the aim of reducing travel time, and affected the environmental sustainability of the proposal. Mr Brett submitted that Members would have read the rest of the Report with that in mind; no more needed to be said. They would have understood that there were disadvantages created by diverted or direct cremations travelling further than they would otherwise done. I do not accept that contention. Those objections were not approved of or adopted in the Officer's Report, either in general or specifically in relation to emissions and climate change; there was not even a reference to them in the context of the asserted emissions and climate change benefits. The benefits merited appraisal and Officer comment; but the contrary effects did not find a mention in the Officer's consideration of the issue. The more obvious conclusion is that the objection was wrong or irrelevant or negligible, in the Planning Officer's view. It is simply and seriously misleading however to identify emissions benefits, and to be silent about the existence and significance of emissions disadvantages, or to leave them to be discovered in some other paragraph to which they have no relevance or signpost.

128. Mr Brett suggested that nothing could be calculated in respect of direct cremations because no one knew to where they would otherwise have travelled, or whether for a greater or lesser distance. I understand that suggestion, just as I understand the basis for Mr Kimblin's suggestion that there would have been an increase in emissions and travel distance from direct cremations. I cannot say whether evidence of how calculations of direct cremations were done with estimates of origins and destinations, would not have proven the suggested difficulties to be so great as to prevent any useful estimates at all, even if not comparable to those which attended the calculation of benefits, rough though they were said to be. That would still have meant that a cautionary note should have been sounded. But I cannot accept Mr Brett's suggestion as an answer; it is not a submission of law and does not amount to evidence. There was no comment to the Committee that there could be climate change and emissions disadvantages in relation to direct cremations, but for reasons given, they could not be quantified in the same way that benefits could be quantified, even crudely or as an example or an approximation, or even in some rougher way. There was no evidence, discussion or even mention of the difficulty of undertaking any calculation, at a commensurate or any usable level of crudity, as those with which the benefits analysis was conducted and with which the Committee were favoured.

129. There was no mention at all of the fact that there would be an adverse effect from diverted cremations, which could be significant, and that this would have to be taken into account in off-setting the claimed advantage. It was not suggested by the Report that these disadvantages would not occur. Mr Brett did not provide any reasons as to why the increase in emissions from diverted cremations from closer crematoriums could not be quantified. Nor, if this were the Officer's position, did the Officer say that this off-set could not be calculated for want of the most basic information for any

assessment. This omission is not made good by the Report at [217] saying that some of the Consortium's assertions regarding further cremations from outside the natural catchment area were "subjective". That was not put forward as a basis for saying that no calculation could be done on the basis of what the Consortium claimed, as with the benefits.

130. In my judgment, this Report was significantly misleading in relation to these benefits; it set them out in detail without so much as a mention that that the emissions and climate change benefits were overstated because of the diverted cremations, all from longer distances than previously. It was also significantly misleading because all or some of the direct cremations could be from longer distances than would have been the case without the proposal, even if neither could be calculated to a useful extent.

131. There ought to have been a significant caveat about reliance on this benefit. The recommendation was "finely balanced" as the introduction to the Report said. The existence of these benefits, as set out in the Report, was often prayed in aid as part of the benefits without this material qualification, not least in the discussion of bats and overriding reasons of public interest. I cannot say that if that error had not occurred that the result would have been highly likely to have been the same.

132. The decision is quashed on that ground.

Policy 23 on the natural environment: Mr Ground's and Mr Kimblin's ground 2

133. Three points arise under this head: Mr Ground contended that the Report failed to reach a conclusion on whether the development complied with Policy 23 of the Cornwall Local Plan, in the light of the adverse effects which the Officer found the proposal would have on the natural environment. This was a principal issue in controversy, and reasons would be required for any conclusion reached on it. His second point concerned what was said to be the failure of the Report to consider the height of the emissions stack in the context of landscape and visual impact; it was considered only in the context of public health and the dispersal of emissions. Mr Kimblin contended that the Officer's Report was significantly misleading in treating the whole site as falling outside any designated landscape area, whereas part of it, on the south side of Widemouth Manor Road, where the bus shelter was to be placed, was within an Area of Great Landscape Value. I take these points in turn.

Policy 23: interpretation and compliance:

134. This policy, headed "Natural environment", commences with a general policy:

> "1. Development proposals will need to sustain local distinctiveness and character and protect and where possible enhance Cornwall's natural environment and assets according to their international, national and local significance."

135. There then follow further policies applying to various landscapes: Cornish landscapes generally, AONB, the Heritage Coast and Areas of Great Landscape Value, AGLV. Policy 23 also includes general policies for biodiversity and geodiversity, and more specific policies for habitat conservation for designated European, national and local sites, and for priority species and habitats. There is a general policy on avoidance of,

and on mitigation and compensation for, adverse impacts on all those interests. Policy 23.2 applying to Cornish landscapes generally, states:

> "2. Development should be of an appropriate scale, mass and design that recognises and reflects landscape character of both designated and un-designated landscapes. Development must take into account and respect the sensitivity and capacity of the landscape asset, considering cumulative impact and the wish to maintain dark skies and tranquillity in areas that are relatively undisturbed, ..."

136. Policy 23.2(b) adds this in respect of AGLVs:

> "Development within the Heritage Coast and/or Areas of Great Landscape Value [AGLVs] should maintain the character and distinctive landscape qualities of such areas."

137. I note here policy 23.3(d), which applies to priority species, and policy 23.4 on avoidance and mitigation. Policy 23.3(d) is in line with the Habitats Directive and Regulations:

> "Adverse impact on European and UK protected species... must be avoided wherever possible (i) subject to the legal tests afforded to them, where applicable (ii) otherwise, unless the need for and benefits clearly outweigh the loss."

138. This is reinforced by policy 23.4 which states that:

> "Development should avoid adverse impact on existing features as a first principle and enable net gains by designing in landscape and biodiversity features and enhancements, and opportunities for geological conservation alongside new development. Where adverse impacts are unavoidable they must be adequately and proportionately mitigated. If full mitigation cannot be provided, compensation will be required as a last resort."

139. The relevant parts of the introductory summary to the Officer's Report include the first of the repeated comments about the lack of landscape of designation covering the site, upon which Mr Kimblin's ground 2 is in part founded:

> "The site is located within the countryside within an undesignated landscape. There are, however, a number of designations in the wider area; these include Designated Areas of Great Landscape Value (AGLVs), just being located across the road (and to the Southwest) from the proposed access) approx. 450m from the proposed building); the edge of the Heritage Coast also extends up to the south side of the Widemouth Road (across the road from the site access and extend southwards; and the Cornwall Area of Outstanding

> Natural Beauty (AONB) is located approx. 1.2km (0.7 miles) to the south-west of the site."

140. The development was acceptable in the countryside in principle because of the requirement in the Crematorium Act 1902 for a separation between the crematorium buildings and residential properties of 200 yards.

141. In the main body of the Report, what was said under the heading "Design", at [121], merits noting in this context for its description of the changes which would appear:

> "121.Whilst it is acknowledged that the development of agricultural fields would inevitably alter the character and appearance of the site; by virtue of its positioning, design and form, use of materials and proposed landscaping Officers consider that the proposed crematorium building would not appear harmfully dominant, intrusive or incongruous within its setting and, as such, it is not considered to be harmful to the character and appearance of the area so as to warrant refusal on this ground. Similarly, the extent of proposed landscaping, base in regard to the cutting into the site to provide 'ha ha's' and the fill and tilt of the landform to screen the access roads and parking and the retention and provision of new hedges and soft landscape planting, is such that the associated access drive, hard standing areas (car parking, service area and footpaths), memorial and ornamental gardens, drainage features and landscaping would not appear harmfully incongruous, exposed or an over development of the land upon which they would be built."

142. The design of the proposed development was considered to be of a high-quality and to have been developed using a landscape led approach according with policies 2 and 12 of the Cornwall Local Plan.

143. The section of the Report dealing with "Landscape Character and Appearance of the Area" set out policy 23, and described the topography of the site, falling south to north and east to west, with its lowest point in the north-west. At [127], the Report repeats the wording of the paragraph from the introduction set out above. The site was within the "Bude Basin" Landscape Character Area, LCA, where land use was "predominantly agricultural with improved grassland and pasture a significant amount of which is permanent pasture on valley floors and some arable. On the coast and along the A39, agricultural diversification and tourism pressures have resulted in a proliferation of holiday campsites and caravan parks on formerly agricultural land." One of the most distinctive features was the medium scale field pattern with hedgerows. The LCA was an area of two distinct land uses "with the busy coastal strip and the town of Bude under pressure from recreation and the tourist trade and the inland areas of farmland with tranquil intimate valleys. Preservation of the tranquillity would appear to be a major objective together with keeping the visual impact of the holiday development to a minimum."

144. The Officer's Report referred to 1978 guidance from the Department of the Environment to the effect that crematorium sites should achieve a sense of quietness

and seclusion; woodland or parkland settings or areas of undulating ground with good natural features and mature trees would enable the establishment of a 'good natural setting'. The Report continued:

> "In this case, the site is clearly not naturally screened by woodland or set in a parkland setting. However, the applicants set out the landscape led approach, which with changes in form and extensive landscaping, along with the retention and framing of the sea views from the chapel and grounds will provide the required sense of enclosure and calm."

145. The detail of the landscaping and planting proposals were then set out. Various changes had been made at the suggestion of Officers. [134] concluded however:

> "Notwithstanding these amendments, Officers are in agreement with the Landscape Officer's comments that the LVIA somewhat overstates the speed at which the tree planting is likely to establish in this location."

146. The discussion of landscape impact followed. Officers considered that the LVIA was "somewhat over optimistic" in concluding that the effect on the AONB would be 'negligible beneficial' on completion of the landscaping and 'slight beneficial' after 15 years; instead their view was:

> "...that on completion it is more likely to be a neutral impact, it is nevertheless considered that there would be no material adverse impact and that the proposal would conserve and enhance the setting of the AONB."

147. Heritage Coast and AGLVs were considered next in [136]. Officers agreed with the LVIA that the development would have negligible impact on views from the AGLV. Although they considered "somewhat optimistic" its conclusion that the overall effect on the setting of the AGLV and Heritage Coast would be "slight beneficial" on conclusion and "slight/moderate beneficial" 15 years later:

> "...it is nevertheless considered that there would be no adverse impact on the character and amenity of AGLV and Heritage Coast, and the setting of both would be conserved."

148. The undesignated surrounding area was dealt with in [137-139]:

> "137. In terms of the undesignated surrounding area, notwithstanding the proposed extensive landscaping and tree planting, the proposal would remain partially visible from some relatively close up public areas; the most notable two are considered to be from the Widemouth Manor Road and the A39. In terms of the Widemouth Manor Road, the new site access would be clearly visible and there would be fleeting views for users of the Road from the West, as they round the bend next to Higher Widemouth Farm before descending. From here, the upper sections of the crematorium building are likely

to be partially visible below the skyline with the traffic of the A39 and a number of residential properties East of the A39 behind it along with the dwelling Furzewood would to the immediate East.

138. In terms of the A39, as a result of the road being at a level above the application site and the proposed level changes and creation of 'ha-ha's, views to the sea over the top of the development would remain to users of the A39. Views of the top section of the stone- faced side elevations and the very top of the rear of the crematorium building roof and Porte Cochere will be visible as users of the road pass by the site. The proposed extensive tree planting, the new planted Cornish hedge bank along the entire length of the eastern boundary of the site with the road and the retained and new proposed dividing hedges will in time provide further mitigation in filtering these views. However, as previously noted, given the exposed elevated position of this site, it is considered that the establishment of the tree planting may take longer than is suggested within the LVIA.

139. The proposed development would introduce a permanent new built element and associated activity within the current field system changing the land use and altering the character of a small part of the [Bude Basin LCA.] Given the design of the proposed building, siting of it within the natural dip in the landscape, use of natural sandstone and green roofs in the external materials and the proposed cut and filled to provide 'ha-ha's, it is considered that significant efforts have been made by the applicants to minimise and mitigate for any landscape and visual impacts. Notwithstanding this, the proposal would result in a significant increase in activity at the site over and above that existing and would be visible from a relatively small number of public vantage points; the most significant change arguably being apparent when travelling towards the site on the Widemouth Manor Road. There would also be a change to the appearance of the site and some reduction in sea views from the A39. Overall, officers are of the view that the proposal would result in a minor adverse visual impact, reducing to a neutral impact upon establishment of the proposed planting. However the surrounding landscape is considered to have capacity to accommodate such a change within landscape features without disturbing the current typical landscape character of the area.

140. In conclusion... it is considered that although landscape character and visual impact is undoubtedly a key consideration with regard to the proposed development, the landscape and visual impact is not considered by officers to be of such significance so as to warrant refusal of the application on this

> ground. Nevertheless, this impact will need to be considered in the balance of all other material considerations."

149. In the Response to Objections, the Report said at [222]:

> "In regard to concerns raised regarding visual and landscape impacts and a submission of a Landscape Assessment on behalf of an objector, as set out in earlier in the report, officers are not wholly in agreement with the conclusions of the submitted LVIA (particularly in relation to the length of time it is likely to take for the planting to establish). Officers consider that the potential impacts of this development as seen from different viewpoints is a matter of judgement."

150. Mr Brett referred to [194], in a different section of the Report, headed "Ecology", which he said should be read as covering all relevant aspects of policy 23, to show that a conclusion had been reached on policy 23, and that, with the Landscape and Ecological Management Plan, the proposal was judged to accord with policy 23:

> "194...Subject to such conditions the proposal is considered to accord with policies 23 and 25 of the CLP and guidance contained within ...the NPPF... and the requirements of the Conservation of Habitats and Species Regulations 2010."

151. The first question is whether the Officer's Report did reach a conclusion on whether the proposal accorded with the landscape policies within policy 23. No conclusion on whether it complied with policy 23 as a whole could be reached without determining that. I accept Mr Ground's contention that the Officer's Report does not express any conclusion that the proposed development complies with the landscape parts of policy 23. The most obvious place to find such a conclusion would be in [140]. It says that it is the conclusion to the subsection "Landscape Character and Appearance of the Area." It acknowledges that landscape character and visual impact is a key consideration but, and I repeat:

> "...the landscape and visual impact is not considered by officers to be of such significance so as to warrant refusal of the application on this ground. Nevertheless, this impact will need to be considered in the balance of all other material considerations."

152. This passage does not say that the impact needs to be balanced within policy 23, nor does it identify with what such impacts could be balanced within policy 23, nor is that obvious; indeed there is no reference to a balance within policy 23.1 and 23.2. There are by contrast such references within policy 23.3 and 23.4. The impact is of such a degree as to warrant consideration as to whether to refuse permission because of it, not of a degree to warrant consideration of whether policy 23 was breached. The balance is to be struck with "all other material considerations." That refers either to a balance between policy 23 which was breached and other development plan policies with which the proposal accorded, or a balance between the development plan, with which as a whole the development did not accord, and other material considerations.

Either way, the language contradicts any contention that the Report concluded that the proposal accorded with policy 23, in its landscape components.

153. Mr Brett's suggestion that the question of compliance was answered by the conclusion in [194] grasped at a straw. Read in context, that paragraph is dealing only with "Ecology", and relates to those parts of policy 23 which relate to ecology. It is not an out of context, tangential reference to the conclusion on the important and controversial landscape aspects of policy 23, left over from the landscape section [140], for later discovery through this passing reference. Reading the Report as a whole, the importance of which Mr Brett emphasised, does not mean that odd sentences can be plucked out of their context and put to hard labour in a different one. This submission rather highlights the absence of a statement that the proposal accorded with the landscape parts of policy 23 which were under consideration in OR [140]. If the Report meant that policy 23 was complied with, in its landscape parts, a conclusion which would have required some hard reasoning, it is extraordinary that it was not set out in [140]. The fact that reference was made in [194] to the "Landscape and Ecological Management Plan" merely shows that the one plan covered both topics. The reference to policy 23 is wholly explicable in the context of ecology and cannot be made to carry the significance which Mr Brett sought to place on it.

154. Moreover, compliance with the ecology part of policy 23 cannot have meant that the policy as a whole was complied with, even though there was non-compliance with the landscape part. If that had been the Officer's approach, and it was not Mr Brett's' submission that it was, that reasoning ought to have been spelt out for the benefit of Members, so that they could reach a judgment on that point. It is far from clear that such a conclusion could rationally have been explained, in view of the relative importance of the landscape and ecology issues here, and the two separate parts of the policy.

155. I have also found that the Report was generally quite explicit where the development was assessed to have accorded with Plan policies: [111] the location of business and employment development; [114] the principle of development, and local plan policies; the two considered in that section are policies 5 and 27; [122] design policies 2 and 12; [165] and [173] public health and protection policies 12,13 and 16; [177] residential amenity policy 12 (there is no express statement of accordance but that conclusion is obvious from [174] and [177]); [194] and [203] ecology in policy 23; [208] and [210] drainage and flood risk in policy 26 (again there is no express statement of accordance but that conclusion is obvious from those paragraphs). Historic environment and tourism are subject of policies in respect of which no conclusion is expressed but again the text of the Report clearly implies a conclusion that no objectionable impact was made out. In [147] accessibility under policy 27: access by bus was adequate, but pedestrian and cycle access was poor, and a "negative aspect" to be considered in the planning balance; this, by itself, is quite unclear. However, [147] should be read with [114], where the principle of development was said to accord with policies, of which one of the two there considered was policy 27. [180-182] agricultural land: similar language was adopted in relation to the loss of grade 3b agricultural land where the policy protected higher grade land than 3b, and as the loss of 5.8 hectares of agricultural land was not adjudged to be significant in scale, no consideration was then required of the possible use of land of a grade lower than 3b. The latter is more probably than not a conclusion

that the policy on agricultural land was not breached. So, the general language of the Report does not support a conclusion that OR [140] was expressed in the sort of language which, expressly or by obvious or even probable intent, was used elsewhere to signify accordance with policy. I regard it as significant that on the key and controversial issue of landscape impact, no clear conclusion was expressed that the proposal accorded with the relevant policy. No such conclusion is even reasonably probably implicit, as I shall come to.

156. The Council therefore reached no conclusion on a principal issue in controversy, and on an important component in the decision under s38(6) as to whether the proposal accorded with the development plan read as a whole. Members received wholly inadequate advice about a key policy.

157. The essence of Mr Ground's next submission was that the landscape parts of policy 23 had been misinterpreted. He submitted that the consequences of the Officer's conclusion that there would be an initial minor adverse visual impact, reducing over time to neutrality, meant that the Officer ought to have concluded that the proposal breached policy 23. Any harm, however minor, or short-lived, would breach it. The Officer's approach misinterpreted the policy. It was not enough to say that any harm needed to be considered in the balance, as did OR [140]; the breach of policy should have been identified; *R (Wilkinson) v South Hams DC* [2016] EWHC 1860 (Admin) at [21-22] Hickinbottom J. There was no scope for a balance to be struck within the landscape part of the policy, between harm and non-landscape benefits, although the terms of the ecology parts did contemplate a balance in the ecology context. Mr Ground's contention was that, in reality, on a true reading of the Report, and on a proper interpretation of policy 23, the implicit conclusion was or ought to have been that policy 23, in its landscape part, was breached, and the explicit advice ought to have been given that it was. But the Report failed to provide that advice, and was significantly deficient and misleading in that respect.

158. Mr Brett submitted that policy 23 did not mean that any impact on the landscape would of itself involve a breach of the policy. There could be benefits which outweighed the harm, consistently with the policy. The material parts of the policy had been carefully considered, as the extracts from the Officer's Report made clear. There was a limited and minor impact, addressed by conditions; the landscape had the capacity to absorb the changes without disturbing its character. The settings of the AONB, AGLV and Heritage Coast would be conserved. The development was of an appropriate design, scale and mass; it respected the designated and undesignated landscapes, their sensitivity and capacity. Thus, the purpose of policy 23 would be achieved. These were all matters of planning judgment.

159. I accept Mr Ground's submissions. Mr Brett's submissions assumed that a conclusion was reached that the proposal accorded with policy 23. If so, they still involved a misinterpretation of the policy. The text of the landscape parts of policy 23 are quite clear. There is no scope for such a balance to be struck within the policy. The balance which the Report advises can only be a balance between a breach of the policy, and either other policies in the development plan or between a breach of the development plan and other material considerations. There was no suggestion that a balance could be struck between the two parts of policy 23. That, of itself, is a significant error, which warrants quashing the decision.

160. An examination of the actual consideration of the relevant topics within policy 23.1 and 23.2 rather supports my conclusion that no decision was reached that the proposal accorded with policy 23, and rather shows that the implicit conclusion, on a proper interpretation of the policy in the light of the analysis of impact, was that this part of policy 23, at least, was breached. The introduction simply says that the separation requirements of the Crematorium Act means that a countryside location is in principle acceptable; whatever may be thought of such a conclusion in the light of the location of other crematoria, it is not a conclusion that the development complies with or breaches the relevant policy, 23. OR [121] deals with design, and although under the heading of "Design", design is also a topic relevant to policy 23.2, and I must bear in mind Mr Brett's reminders that the Report is to be read as a whole. The development of agricultural fields, according to OR [121] would inevitably alter the character and appearance of the site, by virtue of its position, design and form, materials and landscaping. The building "would not appear harmfully dominant, intrusive or incongruous within its setting and, as such, it is not considered to be harmful to the character and appearance of the area so as to warrant refusal on this ground." Whatever that may signify in relation to policy 12, it does not suggest that there would be no harm. That language, just quoted, does not support the notion that policy 23.1, which requires more than the avoidance of harm, could be complied with, nor that policy 23.2 could be thought to be met: "appropriate", "recognise" and "respect" are positive, and are not the words of avoidance of harmful dominance, intrusion or incongruity, let alone of harm insufficient to warrant refusal. The extent of the proposed landscaping, (cut, fill and tilt), hardstanding, drives, new hedgerows and soft landscaping "would not appear harmfully incongruous, exposed or an over-development...." Those changes to the landscape do not suggest a development compliant with policy 23. I appreciate that that was not the policy there under consideration, but those factors are relevant to understanding the consideration of the natural environment, and the positive requirements of policy 23, which then arose.

161. At OR [135], the proposal would not lead to any material adverse effect on the AONB, and would conserve and enhance it. At [136], there would be no adverse effect on the character and amenity of the AGLV and Heritage Coast and their setting would be conserved. The proposal would be visible from a number of places in or on the edge of the undesignated landscape, which would be mitigated over time by planting, although it would take longer than the Consortium suggested in view of the exposed and elevated position of the site; [137-138]. At [139], the development "would introduce a permanent new built element and associated activity within the current agricultural field system, changing the land use and altering the character of a small part of the [Bude Basin Landscape Character Area]." Although significant efforts had been made to minimise and mitigate landscape and visual impacts, there would be a significant increase in activity at the site, and further built form would be introduced into the landscape. These would be visible from public viewpoints. "Overall, officers are of the view that the proposal would result in a minor adverse visual impact, reducing to a neutral impact upon establishment of the proposed planting. However, the surrounding landscape is considered to have capacity to accommodate such a change within landscape features without disturbing the current typical landscape character of the area." This then leads into [140].

162. What is clear from these paragraphs is that there would be quite extensive changes to the character of the area, and a degree of visual harm. This is a policy which is

positive in intent by contrast with negative policies to avoid harm; this distinction was apparent from *R (Corbett) v Cornwall Council* [2020] EWCA Civ 508, at [39]. Policy 23 was not merely concerned with preventing or minimising harm or striking a balance between harm and benefit. In *Corbett*, the policy to prevent harm was in a saved policy for a different part of Cornwall. I was not referred to any similar policy for this part of Cornwall, but policy 23 cannot be interpreted as performing such a role. There is no discussion at all of the language of policy 23.1, which is concerned explicitly with sustaining, protecting and enhancing the character of the natural environment. The Report does not suggest that the impact is so slight as not to disturb policy 23.2. Nor do I see any discussion in the Landscape Character section of the Report of the scale and design "recognising and respecting" the undesignated landscape area's character; OR [121] does not discuss that, and in so far as it does, it implies that the proposal fails that test. OR [139] does not discuss that either. The capacity of the landscape is a further element of the policy in 23.2, and the conclusion on capacity uses different language from the policy it relates to, and may or may not be a conclusion that it is met. Maintaining tranquillity cannot have been met because of the significant increase in activity. The Report reads as though it is considering a harm based policy, and concluding that the harm is minor and so according with a different policy.

163. I am satisfied that, even if Mr Brett is right that the Report concluded that the landscape parts of policy 23 were complied with, the interpretation of the policy was also seriously flawed, as its application to the analysis carried out of the nature and degree of the consequences of the development demonstrates; the Report treated it as a policy for the avoidance of significant harm. It is not. The language is quite clear and is positive in its requirements. Additionally, if the policy were properly interpreted, it is difficult to see how a decision that the policy was complied with, on the Council's analysis of the consequences, could be rational. Far clearer reasoning, with explicit attention to the language of the policy would have been required to sustain such a decision. One needs to bear in mind, when considering whether a Report is seriously misleading, that the question of what a policy means is a question for the Court, interpreting it purposively, and with its planning intent and sense well in mind. With its relationship to the duty in s38(6) as well, issues cannot be reduced to simple questions of balance between harm and benefits: the analytical framework is more demanding than that.

164. Finally, on this part of ground 2, I turn to the issue of reasons. Landscape and visual impact was one subject of the planning report from Genesis Planning, on behalf of Mr Cameron, to which was appended a landscape and visual impact expert report; it was covered at some length as well in Mrs Watton's objection. They came to a different conclusion from both the Consortium and the Officer, about the degree of impact and whether the proposal complied with policy 23. Mr Ground submitted that the Officer's Report had not mentioned this different, detailed and expert analysis from objectors. The Report had just compared the Consortium's view with that of Officers instead of including the fundamentally different view from the experts for the objectors. Mr Brett submitted that there was no need for the Report to refer to the views of the landscape consultant's Report submitted on behalf of objectors, including Mr Cameron, as an appendix to the Genesis Planning report. The Officer's Report had addressed the substance of the points, and it was not necessary to refer to every representation. The document had been sent to every Committee Member. The

Officer's Update Report had set out in full the objection from Poundstock Parish Council, which included its landscape and visual impact objections.

165. Reasons may be inadequate where the Report leaves the informed reader in genuine doubt as to what conclusion was reached on any particular issue of significance, or as to why it was reached in the light of the principal arguments or evidence presented on behalf of those whose arguments were not accepted. They may not know whether their arguments were considered, or why they were rejected. In so saying, I am applying the reasoning which I have set out earlier on the nature of the duties to give reasons in a local authority decision accepting the recommendations of an Officer's Report.

166. I consider that the Report contains wholly inadequate reasons for any decision that the proposal complied with policy 23. The issues which the policy, on its own terms gives rise to, required to be addressed, regardless of any objectors' evidence. For the reasons given earlier in this section, I do not know whether any conclusion was reached that policy 23 was complied with; and if such a conclusion can be extracted from the Report, I do not know why that conclusion was reached. I reach that conclusion based on the terms of the policy and the description of the consequences of the development in the Report. For those purposes, it does not matter what conclusion was reached about the evidence from Genesis Planning nor how the Poundstock Parish Council letter was considered. If I am wrong that no conclusion was reached that the proposal accorded with policy 23, or wrong that such a decision would have involved serious misunderstandings of the policy, I would have quashed the decision for the inadequacy of the reasons as to how either conclusion had been reached.

167. If I were satisfied that the Council had decided that policy 23 was complied with, and satisfied of the lawfulness of the reasoning as to why, it might not be necessary to consider the fairness of the way in which the Report dealt with the Genesis Planning Report or the Poundstock Parish Council letter. *Oakley v South Cambridgeshire DC* and *CPRE Dover* do not hold that the duty to give reasons requires reference to be made to specific objections, if it is clear that they have been considered, and it is clear from the conclusions that the Report disagreed with them, and why. Some conclusions adverse to specific objections may not be susceptible to refined analysis, and whether or not a development preserves or fails to preserve the character of the landscape may be one of them. Whether further analysis is required depends on the issues. I am cautious about imposing duties on a local authority to deal with objector's representations as if the issues were being dealt with at a planning appeal.

168. I was taken to the representations from Poundstock Parish Council, which identified the points being made, and which are essentially similar to the Claimant's Report. The fact that the representations of Poundstock Parish Council were fully set out in the Update Report to Committee makes it unlikely that Members ignored them. I was not taken to any particular issue which had been ignored, as opposed to issues where there was plainly a difference of view. It is reasonably clear, on the analysis of landscape effects in the landscape section of the Report, that the Report simply disagreed with the Parish Council's assessment. I do not regard that sort of disagreement as requiring greater exposition or reasoning. I was not taken to any issue where there was a difference of view which required further analysis, for the reasoning of the Committee to be understood in relation to the objectors' representations. The errors of

interpretation might have been avoided if the objector's representations had been set out and answered, but that does not make the reasons deficient. It might have been sensible for the objectors' views to have been distinctly appraised and responded to, but the absence of that sort of appraisal does not show here that the reasoning was legally inadequate, or that the Report was seriously misleading about what objectors said.

169. The decision is quashed on this first part of ground 2. It is quite impossible to say that, without that error, the decision would have been highly likely to have been the same.

The duty in s38(6) Planning and Compulsory Purchase Act 2004: Mr Ground's ground 3

170. This well-known duty provides:

> "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."

171. This statutorily mandated approach requires the planning authority, at some stage, in taking the decision, to reach a conclusion as to whether the development does or does not accord with the development plan; see for example, *City of Edinburgh Council v Secretary of State for Scotland* [1997] UKHL 38, [1997] WLR 1447 Lord Clyde, and *R(Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878, [2015] 1WLR 2367, Richards LJ at [26-28]. Richards LJ introduced what Lord Clyde said in the former, saying that s38(6) had introduced a priority to be given to the development plan in the determination of planning matters, and then citing what Lord Clyde said at 1459D-1460C:

> "[Lord Clyde] In the practical application of section [s38(6)] it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And

> having weighed those considerations and determined these matters he will require to form his opinion on the disposal of the application ….
>
> But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. ... The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate."
>
> "[Richards LJ] 28. ...It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan."

172. What is important is that the decision-maker has considered and reached a conclusion on the s38(6) approach or framework, rather than the manner in which he may or may not have spelt it out or the stage at which he does so. The question is also not whether the proposal accorded with all the policies of the development plan, and breached none, but whether the proposal accorded with the development plan as a whole. This a matter of planning judgment, with varying weight to be given to policies depending in part on how significant they were to the proposal, to the plan and the degree to which it accorded with or breached plan policies, and their objectives.

173. It may not be necessary for the planning authority to express a conclusion on each plan policy which is relevant to the decision, but it cannot perform its s38(6) duty without reaching a lawful conclusion on whether the proposal accords with the significant plan policies. Here, policies 5 and 23 were the key policies on two key issues.

174. Mr Ground submitted that the Officer's Report ought to have shown what conclusion was arrived at and why, with an answer relating to each policy of importance which it considered. It had reached no conclusion on whether the proposal complied with policy 23.

175. The section of the Report headed "Principle of Development" did not contain an answer in relation to whether the proposal accorded with the development plan as a whole. This states in its conclusion at [114]:

> "In conclusion, Officers consider that there is a need for a new crematorium. The proposed development would not serve the whole identified quantitative need; however it would address a proportion of it and would address qualitative need for the residents within the natural catchment area of the proposal. It would also assist in addressing some of the qualitative need resulting from existing crematoriums, which serve the North Cornwall population, running over practical capacity. The site is located within the countryside and comprises grade 3B agricultural land; however, due to occur constraints associated with the Cremation Act, it is generally accepted that such developments cannot be accommodated within settlements. The site is more divorced from any settlement than might perhaps be preferable. However, it is conveniently located in close proximity to one of the main highway routes through North Cornwall and is on bus routes. On balance the principle of development is therefore considered to be acceptable and in accordance with local planning policy and national guidance."

176. Mr Brett submitted that it had reached a decision on the point, which was that the proposal accorded with the development plan, and indeed with all of its policies. He only had the bald "No" in relation to departure to support that submission. The Council, in its Pre-Action Protocol response to Mrs Watton at [16-17], notwithstanding the taking of instructions and care required of such letters, was unable to say whether it had concluded that the proposal did or did not comply with the development plan.

177. If it is evident from the Officer's Report that the Council concluded that all significant material policies were complied with, I would accept that it would have reached the decision that the proposal accorded with the development plan. But that is far from evident. No conclusion is reached in the analysis of the landscape parts of policy 23 as to whether they were breached or not. There are plenty of indications in the text of the analysis that it was not, nor was thought to be, complied with. A specific conclusion on this issue was required, and if compliance with policy 23 was found and based on the compliance with the ecology policy part, specific reasoning on that would have been required. The bald "No" to the question of whether the proposal was a departure from the plan, did not answer the question of whether there were any policies with which the proposal did not accord. This policy is central to the consideration of the proposal. Its application, and the effect of its breach on the accordance of the proposal with the development plan was a principal issue in controversy.

178. Moreover, if there were a conclusion that policy 23 was not breached, that conclusion was based on a serious misinterpretation of the policy, or on an unstated and unreasoned, and perhaps irrational, conclusion that compliance with the ecology parts was sufficient to mean that the breach of the landscape parts did not prevent non-compliance with the policy as a whole. The s38(6) conclusion would still be flawed, because it would have been arrived at on the basis of a misinterpretation of a relevant policy.

179. I accept that the Council concluded that the proposal accorded with policy 5, the key policy on another key issue. However, its conclusion was flawed, because it was

based on a serious misinterpretation of the policy. The real policy cannot therefore have been taken into account in the assessment required for a lawful decision under s38(6).

180. Separately or in combination, these failures suffice to show that the Council did not reach a lawful decision on the s38(6) duty. That conclusion is reinforced by the errors in the interpretation of policy 27. Compliance with that policy was not considered on the correct interpretative basis.

181. For those reasons, the decision is quashed on this ground as well.

Ecology and bats: Mr Kimblin's ground 3 and Mr Ground's ground 8

182. The first issue raised under this head by Mr Kimblin is that as a species of bat, protected under retained EU and UK law, was to be disturbed, derogation from that protection had to be considered, but the analysis of the issues to which potential derogation gave rise were not considered in the manner required by law. Second, he submitted that the language of Condition 11 failed to achieve its intended objective. That failure was compounded by a tailpiece which undermined the intended protection, albeit that it could be severed. But severance would not address the major faults in the condition.

183. Mr Ground contended that the Consortium's ecologist's response to concerns raised by the County Ecologist, which were not published on the Council's website, ought to have been placed there under s100D(4) of the Local Government Act 1972 which sets out what background papers have to be made public. The consequence was unfairness to the Claimants, and other objectors, as Mrs Watton would have sought the comments of Dr Knight, as a bat expert, and she and he would have presented those comments to the Committee. Dr Knight wished to take strong issue with the Consortium's response.

Mr Kimblin's more general submissions about the approach to derogation:

184. I start with the relevant legislation. EU Council Directive 92/43/EEC, the Habitats Directive, provides at Article 12, dealing with the protection of species, that Member States should take the measures requisite for establishing a system of "strict protection" for the species listed "in their natural range, prohibiting: ...(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration." (It remains applicable through the Conservation of Habitats and Species (Amendment) (EU Exit) Regulations S.I.No.2019/ 579.) Article 16 states:

> "Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, member states may derogate from the provisions of articles 12...: (c) in the interests of public health and safety or for other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment...".

185. Regulation 42 of the Conservation of Habitats and Species Regulations 2017/1012 lists those protected species in Annex IV(a) to the Habitats Directive which have a natural range in Great Britain. These include all species of horseshoe bats. Reg 9 provides separately for the different functions of Natural England and local planning authorities. Natural England is the competent authority for the purposes of Reg 9(1) which is required to exercise its functions "so as to secure compliance with the requirements of the Directives." A local planning authority under Reg 9(3) "... in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions." Commission Guidance on the Habitats Directive advised that derogations should be a last resort, and the derogations provisions should be interpreted narrowly, covering precise requirements and specific situations. DEFRA Guidance explains that the test of "imperative reasons of overriding public interest" (commonly shortened to "IROPI") comprises three concepts. "Imperative" implies necessity for the permitted reasons. "Overriding" meant that interest served outweighs the harm, giving due weight to the protection of the species, and the "public interest" is a public good, at national, regional or "even" local level. Alternatives are those which deliver the same overall objective, but they had to be considered "objectively and broadly": they could include alternatives delivered by another person, or in a different place, or of a different scale or size.

186. After ascertaining that there are no feasible alternative solutions, a decision that IROPI exist, having conducted the balancing exercise between the public interest of the proposal and the impact on the protected species, is challengeable on the usual public law grounds. In *R (Wilkinson) v South Hams DC* [2016] EWHC 1860 at [37], Hickinbottom J pointed out at [37] that the task of the planning authority was different from that of the competent national authority, Natural England: its task was only to have regard to the requirements of the Directive:

> "In considering this the courts have emphasised that this burden on the authority is not unduly onerous. That is unsurprising, given that the development cannot proceed without Natural England in fact granting an appropriate EPS Licence; and, if it does proceed without that licence, despite having planning permission for the development, then there is a criminal sanction."

187. Lindblom J in *R (Prideaux) v Buckinghamshire County Council* [2013] EWHC 1054 (Admin), [2013] EnvLR 32, at [96] summarised the upshot of *R(Morge) v Hampshire County Council* [2011] UKSC 2, [2011] Env LR 19, saying:

> "If a proposed development is found acceptable when judged on its planning merits, planning permission for it should normally be given unless in the planning authority's view the proposed development would be likely to offend article 12(1) and unlikely to be licensed under the derogation powers."

188. Lindblom J also pointed out that Commission Guidance was guidance and not law. The language of the Directive and Regulations, and jurisprudence provided the law. The law did not require, nor did the guidance, a comparative assessment of the

possible effects of each suggested alternative on the protected species, nor did it mean that a licence had to be refused if a less harmful alternative could be found.

189. I turn now to the Officer's Report, where the summary introduction says:

> "In regard to ecology, surveys demonstrate that a number of species of bat including priority species utilised the site for commuting and foraging. No roosts were identified on site. It is considered that subject to the securing of appropriate mitigation measures via planning condition there would be no significant adverse impact on protected species. No objections are raised by the Council's Ecologist. In terms of Biodiversity Net Gain, given the extent of the proposed landscape planting and creation of new hedgerows, the proposal significantly exceed the policy requirement of 10%, demonstrating 118% on site net gain in habitat and a 42% on site net gain in hedgerows. This is considered to be a positive aspect of the proposal in the planning balance. The provision of the proposed measures would be secured via planning condition."

190. I add here that the proposal, in fact, would involve the removal of all the hedgerows along the site frontages to the A39 and Widemouth Manor Road, and their replanting except where access was taken off the latter.

191. The Officer's Report noted that Natural England, a statutory consultee, had no objection. I observe that that comment is not the whole story; Natural England stated that it had no objection in these terms: "Based on the plans submitted, Natural England considers that the proposed development will not have significant adverse impacts on statutorily protected nature conservation sites or landscapes." But those were not the issue here; the issue concerned protected species. Natural England's consultation comment about protected species was no more than that "Further general advice on the consideration of protected species... is provided at Annex A." Annex A said no more than that Natural England had produced standing advice, to which a hyperlink was provided, "to help planning authorities understand the impact of particular developments on protected species. We advise you to refer to this advice. Natural England will only provide bespoke advice on protected species where they form part of a SSSI or in exceptional circumstances." The Committee was not informed of the true and limited scope of this absence of objection.

192. The Officer's Report continued, saying that the County Ecologist had no objection, but had commented: "A good assemblage of bat species commute and forage within the site and therefore there is a need to ensure there is no light spill onto the hedgerows and these dark corridors are maintained." The County Ecologist added this in relation to bats:

> "The bat lighting plan 3, shows the hedgerows will be kept dark, yet there are buildings and car parking areas in proximity to these, please can additional information be provided on the measures the applicants/build will need to take to ensure there is no light spill onto the hedgerows. H2 is of particular concern.

> A Lux level of no more than 0.5LUX is the accepted maximum level. These details can be addressed through condition."

193. The Report then contains the County Ecologist's summary of the issues to be covered by conditions, including a focus on minimising light spill during construction, a strategy to ensure hedgerows were maintained as dark corridors, and following the recommendations of the ecology and bat reports.

194. In the main body of the Report, [188-203], the Officer referred to the statutory obligations, Local Plan policy 23 requiring the conservation, protection and where possible the enhancement of habitats, the Consortium's Ecological Impact Assessment and protected species surveys for bats, among others. Those had been updated "during the course of the application following the initial comments from the ecologist."

> "192. Six species of Bat were recorded as using the site (commuting and foraging); four of which are priority bat species (soprano pipistrelle, greater horseshoe, long-eared bat and Noctule). However the activity levels were low and no evidence of roosts were found within the site. The report identifies the potential for impact resulting from the construction and operational phases of the proposed development. Mitigation measures proposed include replacement of any lost hedgerow habitats; avoidance of light spill onto hedges; the provision of roosting opportunities within the design of the structure; enhancement of an existing shed in the western margin of the site to provide a bespoke bat house; and a lighting plan.
>
> 193. The report found that habitat within the site supports occasional nesting bird species and other species for foraging and feeding and as such recommends enhancement opportunities in regard to the hedgerows and existing ditches within the site.
>
> 194. An Ecology Mitigation and Enhancement Plan (EMEP) has been submitted by the applicant which incorporates the recommendations of the initial Ecology reports. A condition is proposed to secure the final details of the EMEP as part of a Landscape and Ecological Management Plan and to ensure it reflects the additional survey work undertaken. A condition is also proposed in regard to securing a sensitive lighting scheme for the site. Subject to such conditions the proposal is considered to accord with policies 23 and 25 of the CLP and guidance contained within ...the NPPF... and the requirements of the Conservation of Habitats and Species Regulations 2010.
>
> 195. Objections have been received in regard to the robustness of these submitted Bat surveys and further detail on this will be provided to the committee in an update to this report."

195. The Report turned from species to sites. The site did not lie within or adjacent to a statutory site of nature conservation importance. A screening opinion under the Habitats Regulations showed that a stage 2 assessment was not required. The Landscape and Environmental Management Plan was thought sufficient "to ensure appropriate measures are in place throughout the construction phase and to ensure accordance with the recommendations of the Ecology report." There was a net gain on site of 118% in habitat and a 42% net gain in hedgerows. "The provision of the proposed measures can be secured via planning condition, and this is considered to be a positive aspect of the proposal in the planning balance."

196. The disturbance of species required the consideration of derogation under the Habitats Regulations. I set out what the Report said under the overall heading "Derogation Tests":

> "198. The surveys have identified that bats and nesting birds may be affected by this application. In accordance with Article 12 of the EU habitats directive, when adopting a precautionary approach, if there is likelihood that 'disturbance' may occur which in this case there is, the derogation tests must be undertaken as follows.
>
> 199. Reasons for overriding public interest. There are a number of benefits that the proposal would generate for the local communities and the surrounding area. These include the provision of a community facility where there is considered to be an identified need, additional employment, supporting the local businesses and associated economic benefits.
>
> 200. No Satisfactory Alternative. The site is not within any designated ecological habitat or landscape. The degree to which alternative sites are more or less ecologically sensitive is not known and is therefore not material to this assessment. The site is available and deliverable.
>
> 201. Maintaining a Favourable Conservation Status (FCS). In order to assess whether the FCS test is met with regard to bats and nesting birds, the Council must be satisfied that a sufficiently detailed mitigation strategy is in place. The mitigation measures outlined, above, and detailed in the assessment can be conditioned to further strengthen ecological provisions within the development. It is considered that a Favourable Conservation Status can be maintained.
>
> 202. The conclusion reached is that the information submitted does provide satisfactory mitigation and it is considered that this mitigation satisfies the duty placed on the Local Authority in context of the relevant legislation on habitat and species protection.
>
> 203. Subject to incorporation of ecological mitigation and management in line with the recommendations of the submitted

> ecological reports, it is considered that (a) the impact on ecology is low; and (b) this application satisfies the statutory derogation tests. The Council's Ecologist has reviewed the surveys submitted and raises no objections in terms of their content or findings."

197. The Update on ecology explained, by reference to OR [195] that objections had been received about the robustness of the Consortium's bat surveys and conclusions. A detailed response to the concerns had been provided by the Council Ecologist and placed on the website. The Update continued:

> "Of the concerns raised one required further consideration, namely that the updated ecology report identified that the southern hedgerow should be retained as a dark corridor (as it is a commuting corridor used by a single or small number of greater horseshoe bats). However the landscape master plan hadn't been updated to reflect this and shows it being replaced with a new hedge to allow for the access and the bus shelter near the hedge which may result in additional lighting in the vicinity of the hedge. Further information was therefore sought, and a proposed mitigation strategy was submitted as an addendum to the ecology report. This sets out that the new hedge on the southern boundary will be constructed and planted prior to the commencement of any other development on site, which would (as set out in the submitted strategy) 'enable bats to become familiar with the new southern flight route and provide for continued bat use of the southern commuting route.' In addition, a temporary hazel hurdle screen would be erected along the length of the hedge to shield it from light spill from car headlights etc until the hedge has become established and lighting proposed would be low level bollard lighting which would be illuminated only during operating hours.".
>
> The Council's Ecologist had subsequently commented: 'The hedgerow is mature and does not contain gaps and one of its ecological functions will be the provision of habitat for a range of invertebrates, which would act as a potential foraging source for bats.
>
> The greater horseshoe bats (one of which has been recorded commuting/foraging along this hedgerow line) are faithful to their commuting/foraging routes, and the loss of the hedgerow or part of the hedgerow could result in impacts to the bats which use this commuting and foraging corridor.
>
> It is reasonable to assume that light spill from the proposed bus stop can be controlled through a planning condition, so as to ensure the newly planted hedgerow and retained sections of the hedge are maintained as a dark corridor during bat activity season.

> However, whilst it is reasonable to assume there will be an impact to the bat commuting and foraging routes as a result of the loss of a section of hedgerow, in the medium to longer term, it is also reasonable to assume that with the proposed landscaping plan, the site will act as a new source of prey availability with the creation of a variety of different habitats to include ponds, what grassland, scrub and wooded areas, which will support a range of different invertebrates and there is the potential to see an increase in levels of bat activity across and within the application site.'
>
> As such, Officers are of the opinion that sufficient information/survey work has been provided to determine the impact of the proposed development on protected species and their habitats. Whilst the loss of hedgerows, particularly that of the southern hedgerow is a negative aspect of the proposal it is considered that suitable mitigation and replacement hedgerows can be provided and that suitable mitigation measures could be secured via planning condition [now condition 11] to ensure the replacement hedge is retained as a dark corridor.
>
> The conclusions of the Derogation test, and that the development would maintain the Favourable Conservation Status of Bats, remain as set out in paragraph 198 to 203 of the original report."

198. Mr Kimblin's submissions started from the agreed point that a derogation was required. The harm had to be identified, first. The harm to protected species then had to be balanced against the reasons of public interest in the proposal, which had to be "imperative" and "overriding" if the harm were to be permitted to occur. That exercise did not feature in OR [199], which focused only on "benefits". Nor did it address the need for the reasons to be "imperative"; that significant word did not feature. The issue had to be thoroughly examined according to EU Commission guidance. The Report failed to distinguish between what were mere benefits to the local area and "imperative reasons of overriding public interest". The way in which the decision was arrived at had to be recorded, and reasoned adequately, but there was no stated decision that the public interest did override the harm. The overall planning balance was not a sufficient basis for such a decision; a particular balance had to be struck between harm to the protected species and the public interest, such that it could be seen that it was imperative that the latter override the former.

199. The decision was also wrong in law because it referred to designated habitats, which is immaterial to the issue of protected species. It was irrational in stating that alternative sites were immaterial because their sensitivity was unknown, erroneously relying on a lack of information. It did not consider alternative forms of development, on this site which would involve access off the A39, saving the southern hedge where the access was proposed off Widemouth Manor Road.

200. Mr Brett submitted that the Officer's Report contained no error in its consideration of derogation. The Report had balanced harms and benefits. No specific statement that the benefits were seen as sufficient to override the harm; that was the obvious

inference from the Report read as a whole, including the judgment that the development satisfied the derogation tests and, in the Update, would maintain the favourable conservation status of the protected species. It did not matter that no explicit balance was to be found in OR [199], or [192], which summarised the benefits of the proposal which had been spelt out in earlier part of the Report: a local community facility meeting an identified need, employment, support for local businesses and associated economic and other benefits, adumbrated in the summary introduction to the Report. The harm had been properly identified and spelt out. The benefits were a matter of planning judgment, as was the weighing exercise between them and the harm. There were also relevant benefits to the protected species. There was nothing of significance in the omission of the word "imperative" in the heading to the discussion of reasons of overriding public interest. There was no reason why the benefits identified could not amount to IROPI; that was a matter of planning judgment. The Council was entitled to consider that it had enough information to determine the impact on the species; the Update reported that conclusion. Members had also had training on ecological matters and legislation, and had to consider derogation issues frequently.

201. The principal question, in my judgment, is whether the Officer's Report adopted an unlawful approach to the assessment of the derogation issues. A precautionary approach was required by Article 12 of the Directive, because surveys had identified that bats and birds may be affected. The Council therefore "must" consider derogation; OR [106]. It is important, however, to remember for these purpose that the duty on the local planning authority under Reg 9(3) is not the same as that placed on Natural England, under Reg. 9(1), as *Morge* and *Prideaux* make clear. Its duty is to have regard to the requirements of the Directive. It is not intended to be an unduly onerous duty. It is not the competent authority for the purposes of securing compliance with the Directive; that is Natural England. If the proposal is judged acceptable in planning terms, it should only be refused if the local planning authority considers that the proposal offends against Article 12 of the Directive and would be unlikely to be licensed by Natural England.

202. The Committee reached no such conclusions. In my judgment that was not irrational or based on some erroneous approach. The Report, with the Addendum Report on ecology, shows a careful consideration, with expert assistance from the County Ecologist, of the surveys, the impact of light and loss of hedgerows, on the behaviour and activities of protected species. The species, and the nature of the risks to them, are identified. The positive advantages from the proposal from an ecology point of view are identified, including in relation to hedgerows. None of that is at issue. The Report properly directs the Committee's attention to the need to consider derogation, and in doing so has had undoubted regard to the Directive.

203. The Committee had to consider satisfactory alternative sites for crematorium use. This needs a little analysis. However, I cannot conclude that it was wrong in law for the Report to say that other sites were immaterial in this respect because their sensitivity was unknown. One might cavil at the word "immaterial", but a more wisely worded conclusion that they could be given no weight in this context would have reflected the Officer's view. The statement itself that their sensitivity was unknown is correct; the criticism was that the Council ought itself to have assessed them for comparison purposes. Alternatives, mooted by objectors, were not proposed with any ecological

comparisons. If the Council had to undertake such work, on the basis of fairly limited material from objectors, it would have been a task which, for true comparison, would have required equally detailed surveys, a firm site layout but without an operator to undertake that task, and consideration of practicable mitigation measures. Consideration of derogation under the Habitats Regulations, by a local planning authority, does not, in my judgment, require it to go through such an exercise for itself in respect of alternatives suggested at the level of detail, or with the prospect of advancement, with which those raised here were suggested. There was no developer pleading its case for a specific alternative to this site, accompanied by equally detailed information and assessment, with which a comparison could be made, leading to a choice between the two. In practice, the need to seek information about alternatives will be affected by the assessment of the degree of harm done to the ecological interest on the site proposed. Given the assessment of the degree of harm, and in the light of the mitigation measures, I cannot conclude that the Council, as a matter of law, ought to have examined the other sites suggested.

204. I accept Mr Brett's submission that the reference to designated ecological sites is not an error of law, and is a point which the Officer was at least entitled to bring to the Committee's attention, when considering whether there was a satisfactory alternative. An alternative would also have to avoid such designations. It was not raised in diminution of the significance of the harm to bats. It was not relevant to consider the harm which another form of development on the site might occasion to bats.

205. The Report concluded that a sufficiently detailed mitigation strategy was in place for it to assess whether the current favourable conservation status was met with bats and nesting birds. The Report was thus able to conclude that the two precondition tests were met.

206. The Committee could then consider whether there were "IROPI". This was the focus of Mr Kimblin's submissions: the overall planning balance, taking all factors together, was not the place where the balance envisaged under the Directive had to be struck; yet when considering the Directive, there was no reference to the balance being struck as required between harm to protected species and the "IROPI" benefits. I do not accept that analysis. Where the potential for harm is identified, the derogation is allowed where there is no satisfactory alternative and the favourable conservation status is maintained, both of which were rationally concluded to have been met here, provided then that there are "IROPI". The balance is effectively struck by the reasons being judged to be overriding, necessarily of the harm. Although the issues were considered in a different order from that which the Directive sets out, the Report in [199] summarised the public interest benefits, which by obvious implication were considered to fall within the category of at least "overriding public interest".

207. Whilst the benefits may be debateable, and their categorisation as "IROPI" even more so, that is not an irrational conclusion; it is one to which the Officer and Committee were entitled to come. Having come to that conclusion, it is clear that the relevant balance has been struck, as those reasons are treated as overriding in the public interest. I can see no other sensible or fair reading of the Report and Addendum. The Addendum in particular needs to be read with the main Officer's Report because, in concluding that OR [198-203] remained sound, she also took into account the potential to see an increase in bat activity across the site, with new prey availability and habitat creation.

208. The inaccurate or incomplete understanding of the significance for protected species of the absence of objection from Natural England does not amount to a significantly misleading part of the Report, so as to create a legal error. There was no objection, but there had been no consideration of the protected species issues either. No reference was made to any such supposed consideration. It is difficult to see what would have been added by clarification to the effect that Natural England had expressed no views either way about protected species, and that for the time being that was for the Council to consider. The Council had considered it. The issues were thoroughly ventilated between the Consortium, the County Ecologist and Planning Officer, with the benefit of evidence from objectors. The result would inevitably have been the same. I give some weight in that conclusion to the fact that derogation issues were not a novelty for this Committee.

209. Taken by itself, this ground of challenge would fail. However, if I am correct in my judgment that the benefits in relation to climate change were misleadingly overstated, because the disadvantages were ignored, that would mean that the "IROPI" assessment was flawed and the balance wrongly undertaken. S31(2A) Senior Courts Act 1981 requires me to refuse relief "...if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred." I would not apply s31(2A) to save the decision. For that reason, this ground also succeeds.

Condition 11 and Mr Kimblin's submissions

210. I should refer first to condition 3, which deals with the construction phase. It provides that development (including site clearance) shall not commence until a construction environment management plan has been submitted to and approved in writing by the Council. This plan has to include details of mitigation measures proposed to "minimise" any light spill on hedgerows throughout the construction period. Condition 11 states that no works in connection with the installation of any lighting of the development and associated bus shelters shall commence until a detailed lighting scheme for all external lighting of crematorium buildings, parking, access and bus shelters and all associated grounds (and any internal lighting which may result in light spill) have been approved by the Council. "The lighting shall be designed to minimise sky glow, light overspill onto the surrounding hedgerows and habitats, neighbouring land and the wider landscape." A further provision prevents the development being brought into use before such a scheme has been approved.

211. The condition continues:

> "The lighting scheme shall include (but not be limited to) details of location, siting, lux levels and design specifications of the lighting and any design features of the bus shelter associated with the proposed lighting. The lighting scheme shall reflect the recommendations set out within [various reports submitted on behalf of the Consortium, including the proposed mitigation strategy to address the removal of the southern hedge within its Ecology Report addendum]. The development and associated bus shelters shall thereafter be constructed and completed in accordance with the approved details prior to first use and retained as such without alteration.

No further external lights shall thereafter be installed without the further written approval of the Local Planning Authority."

212. I have italicised the tailpiece to the condition, which is the subject of separate submissions dealt with later. Mr Kimblin submitted that condition 11 failed to secure the mitigation which was agreed to be necessary to maintain the favourable conservation status of the protected species. First, it was imprecise and unenforceable in its language of "designed to minimise", which would not ensure the constraint of the development to achieve the strict protection required by the Directive, and created uncertainty over whether the favourable conservation status would be maintained. "Minimise" could permit harm to protected species, contrary to what the Committee understood it to be permitting.

213. Mr Brett contended that the condition met policy and legal tests. I agree that it is sufficiently precise to be enforceable, relates to the planning application, and is in one sense not unreasonable.

214. But, second, the major question raised by Mr Kimblin is whether condition 11 does what the Report represented it would do. If it does not, then a variety of legal errors arise: the Report would be significantly misleading; a material factor would have been ignored, namely the true effect of the condition; it would be irrational to impose such a condition rather than one which did what was promised. In both conditions 3 and 11, the language used in the conditions is of lighting "designed to minimise" light overspill. The recommendations of various reports have to be "reflected" in the design plan. However, the Report and County Ecologist's advice is much more specific, and provides the basis upon which the various conclusions in relation to derogation and "IROPI" were reached. The County Ecologist advised that a Lux level of no more than 0.5 Lux was the acceptable maximum to ensure that there would be no light spill on the hedgerows. This was to avoid continued detriment to foraging and commuting protected species. At OR [194], the need for a sensitive lighting plan was identified again, to accord with policies and with the Habitats Regulations. The Addendum Report on ecology twice refers to the need to ensure that the hedgerows are maintained as dark corridors and that that was the purpose of condition 11, and condition 3.

215. The underlying issue is whether condition 11, and the same would be true for the construction phase under condition 3, achieves that purpose when there is no maximum Lux level specified, and where there would be scope for what "minimises" light overspill to vary once operational factors were taken into account, including the needs or convenience of visitors, staff, and the hours of operation in darkness. The minimised level need not be the absolute minimum achievable, but rather could have some other practicalities taken into account, leading to a maximum light level over 0.5 Lux, with more light overspill than the grant of permission envisaged. There is nothing in the Report or Addendum Report to suggest that it was acceptable for the County Ecologist's "acceptable maximum" not to be achieved by the condition.

216. Mr Brett's response to this was that if the lighting plan did not meet the condition, then the condition could not be satisfied. It was for the Council to decide that and not the Consortium. That is fine so far as it goes, but that is not very far. It does not address the question of what level of lighting in the plan would comply with the condition, which is what the issue really is. Mr Brett's response was not that the

various reports, the recommendations of which the submitted lighting plan only had to reflect, showed that the maximum 0.5 lux level was in reality incorporated into the condition's requirements for the lighting scheme. Such an argument could not succeed. The condition, he submitted, was suitable in the context of the low "potential" impact on protected species. I found troubling, in this context, the contention that the potential impact was in any event low, which rather suggested that the level which was "minimising" for a low impact was not the same as the level which was "minimising" for a higher impact. There was no absolute level to be achieved; rather there was some leeway or a range which could fit within "minimising."

217. I am satisfied that the Report read, as a whole and in context, with a fair and not unduly legalistic approach, was based on the achievement by conditions of the maximum acceptable Lux level of 0.5 Lux, recommended by the County Ecologist, so as to "ensure", the word used more than once in the Report, the continuation of dark corridors in the hedgerows for the protected species. I am also satisfied that that is the basis upon which the planning judgment as to satisfaction of the derogation tests was based, as well as being the basis upon which compliance with Local Plan policies 23 and 25, so far as applicable to darkness and light spillage, was assessed. I accept that that is a level which the Council, on application under Condition 11, could seek to impose. I am less satisfied, in the light of Mr Brett's submissions, that that is the level which it would seek to impose. I am not satisfied that it is obliged to impose that light level as a maximum. It is clear to me that a lighting plan which did not specify or achieve that maximum could also fall within the scope of that condition, and that the Council could not refuse it consent. If it did, it could not, or at least might very well not, successfully maintain that refusal on appeal. It would be argued, plainly rightly, that the Council had deliberately not put in the specific maximum of 0.5 Lux, and could not now insist on it via the more flexible language of "minimising".

218. Although I intend, as I shall come to, to sever the tailpiece from Condition 11 in any event, its known existence would support the contention that a more flexible lighting scheme was envisaged as a possibility. It would have been different if the maximum Lux level had been specified, and governed any further lighting. But that is not what has happened.

219. This condition therefore yields an error of law in the decision, independent of any others in that, perhaps unintentionally, the aim of the Report, and the premise for the conclusion, on protected species and other policies, has not been achieved by the condition which was intended to achieve them. The Report did not point out this problem. The decision to grant permission was not made on the basis upon which permission was in fact granted; so a material consideration, namely the true effect of the condition was ignored. This condition is not severable from the permission. The permission therefore falls to be quashed. It seems to me also that condition 3 suffers from the same problem, rather than rescuing the position, although it was not the focus of the arguments for the Claimants. I add, lest the condition be further considered by the Council, that a factor which is also omitted from the array of conditions is any limit of the hours of operation or construction in darker evenings.

Condition 11 and its tailpiece:

220. Mr Kimblin submitted that the condition was unlawful because its effect would be to permit an increase in external lighting. This would increase the harmful effect on bats, beyond what the Committee and Officer had appraised; and the prescribed means of determining the acceptability of development, which affected protected species, would be short-circuited or circumvented by this procedure. Mr Kimblin accepted that the tailpiece could be severed; Mr Brett concurred, were that to be necessary to save the lawfulness of the permission. Mr Kimblin referred to my decision in *R (MidCounties Co-op Ltd v Wyre Forest DC* [2009] EWHC 964 (Admin) [66-82], where I severed an unlawful tailpiece, and submitted that the tailpiece to condition 11 was akin to the one I had held unlawful and had severed in that case. I agree that there is a likeness in the failings of each tailpiece. Although this decision is being quashed, I would sever this tailpiece in case this goes further, because whatever the sensible intentions behind it, it permits an increase in light from the approved scheme, without any criteria by which to judge it, and is yet further contrary to the basis upon which permission was granted, and without the necessary consideration of the basis for further derogation. This is not necessarily a provision for minor variations, although it could be used that way; were that all that was intended, it should have been spelt out, within the maximum acceptable Lux limit. Severance of the tailpiece, however, would not save the condition from its other unlawfulness.

The Addendum Report on ecology: Mr Ground's ground 8

221. On 24 August 2022, the County Ecologist responded to the Consortium's answer to her earlier consultation comments; further information was required about the maintenance of a dark corridor along the southern site boundary to Widemouth Manor Road. The Consortium provided its further comments, in an Additional Ecology Report, AER, on 8 September. The County Ecologist emailed the Council's Planning Officer with her own response to that, which is contained verbatim in the Addendum Report to the Committee. This Addendum Report was on the Council's website, but not the Consortium's AER, although the Addendum Report contained the County Ecologist's response to it. Ms Blacklock explained that the Consortium's AER, received by the Council shortly after 8 September 2022, "should" have been placed on the Planning Register, which would have made it available on its website; by oversight, it was not placed there until 19 December 2022, the date of the decision notice. She pointed out that there were 246 or so documents on the Register, and a further 473 representations or consultee responses. "Should" in this context reflected, not the admission of a legal obligation, but what ought to have happened in line with the Council's practice.

222. Mrs Watton's witness statement sets out what she and Dr Knight would have said about the Consortium's AER, had it been on the website. The relevant part of the Addendum Report is set out above. The document which it is submitted should have been publicly available is the document referred to as "a proposed mitigation strategy submitted as an addendum to the ecology report", the AER, from which part is set out in the Addendum Report.

223. The response which Mrs Watton says would have been made by Dr Knight, is contained in her witness statement. The Consortium's AER was disclosed to Mr Cameron as part of the Council's litigation disclosure in January 2023. He passed it on; she sent it to Dr Knight, seeking his views, as an expert and as one who had previously objected to the proposal. Dr Knight MA PhD has specific bat expertise as

a former Chairman of the Avon Bat Group, Natural England Bat Warden and long-term Natural England Bat licence holder. He let Mrs Watton have his views. They expressed regret that he had not seen this document before the Committee meeting. He said that the Consortium's bat ecologist had made "a shockingly incorrect statement concerning bats and the impacts of lighting," when saying that over the winter period bats were 'in hibernation and consequently there will be no/negligible impact'. He explained:

> "Bats do not go into a deep hibernation, they go into torpor, which means that they will wake up and feed regularly throughout the winter, especially if it is mild (which is often the case for Cornwall). I cannot comprehend that a bat ecologist could make this mistake. Either they are being deliberately misleading or very much mistaken. I cannot understand why the Council Ecologist did not pull them up on this - has the Council Ecologist definitely seen this document?"

224. I accept Mrs Watton's evidence that had the Consortium's AER been uploaded to the planning portal when it was sent to the Council, she would have made further representations and encouraged others to do so. Her comments would have been along the lines she set out from Dr Knight. I expect that Dr Knight would also have made them.

225. S100D(1) Local Government Act 1972, LGA 1972, provides that:

> " If and so long as copies of the whole or part of a report for a meeting of a principal council are required... to be open to inspection by members of the public or are required... to be published electronically –
>
> (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,
>
> (b)...in England 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..."

226. Subsection (5) explains what a background paper is. It states:

> "(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."

227. S100D is applied to proceedings in committee by s100E LGA 1972.

228. Mr Ground accepted that the mere fact of a failure to disclose information strictly in accordance with that duty would not of itself necessarily require the quashing of any decision made at a relevant meeting. It would be necessary to consider the significance of the failure having regard to the purpose of the duty; *R(Kinsey) v Lewisham LBC (No.1*) [2021] EWHC 1286 (Admin) by Lang J, at [103], and I agree with what she said. He submitted that, although the Consortium's addendum ecology report was not published online, it was relied upon to overcome the concerns of the County Ecologist, and members of the public were prejudiced by being unable to comment on or to put in evidence to contradict the effectiveness of this mitigation, newly described.

229. Mr Ground may have overstated, to a degree, the role which the Consortium's AER was intended to play. But it did address a concern of the County Ecologist which required further consideration. The document led to the County Ecologist's comments in the Council's Addendum Report section on ecology, which noted the potential for an increase in the levels of bat activity on the site, with the increase in prey availability and creation of different habitats, and which also led to the Officer's Report expressing the view that Officers had sufficient information and survey work to determine the impact of the proposed development on protected species and habitats. Her conclusions at OR [198-203] remained sound.

230. Mr Brett's principal point was that the document did not come within the scope of s100D(5) because the Officer's Report was not based to a significant degree on the Consortium's Addendum but was based on the County Ecologist's response, which was published in full before the Committee meeting. I agree with that analysis. Even if it could fall within s100D(5)(a), it would not fall within (b), and both parts of s100D(5) have to be satisfied. The County Ecologist may have relied on it to a significant extent, albeit that her task was one of appraisal rather than reliance, but the Officer preparing the Report relied on the County Ecologist. S100D is not intended to require the listing and publication of papers which are at one or more remove from those directly relied on in the Report to committee.

231. Mr Brett also submitted that the failure, if failure it was, was not significant. The public had a considerable amount of material on the bat and protected species issue before the production of the Addendum Reports; they had the County Ecologist's comments in full, and the Officer's appraisal of her report. The consultation and public participation process did not involve rounds of representations in response to every document submitted by an applicant. I do not accept all of that argument. If the document ought to have been on the website, there would have been a response from Ms Watton and Dr Knight, criticising the treatment of torpor as if it were hibernation. This arose because lighting during hours of darkness in winter coincides with daytime activity; the impact of that on those which sleep the winter through would be understood to be markedly less than on those which hunger arouses to wake and forage. I cannot judge how that point would have played out, but I cannot agree that it did not relate to an important point in the decision-making process, and Dr Knight is

an expert in these matters. However, this ground fails because there was no breach of s100D.

The asserted benefit in the choice of electric cremator: Mr Kimblin's ground 7

232. The Consortium proposed to use electric rather than gas fired cremators which would significantly reduce NOx emissions, which could easily be fitted with selective catalytic reduction (DeNOx), and would provide the opportunity to use renewable electricity. OR [160] commented:

> "As such, it is considered that there are a number of benefits to the use of electric cremators compared with gas. It is, however, noted that the final choice of cremators could change and would usually be determined within the environmental permit process, but as this does not yet consider NOx emissions, it is considered appropriate and necessary in this instance when taking a precautionary approach and in order to future proof development to secure final details via use of a planning condition in line with the Environmental Protection Officer's comments. Such a condition would ensure that suitable measures are in place in regard to NOx emissions such as the choice of cremators, stack height, abatement technologies and DeNox."

233. Condition 15 requires planning authority approval of the type and specifications of the type of cremator, "gas or electric", before construction proceeds beyond damp proof level.

234. The focus of Mr Kimblin's submission was that the Officer's Report treated as a climate change benefit that which the condition had failed to secure. OR [184] under the heading "Climate Change" referred to its Climate Emergency Development Plan Document, submitted for Examination in Public, which provided new policies and additional detail on existing policies "to address the climate and biodiversity emergencies." Its policies could:

> "be given some weight, where there are no unresolved objections. This means that positive weight may be given to proposals that comply with their requirements, and some policies which extend our existing local plan policies may support refusal, but the policies are not yet robust as a sole reason for refusal at this stage.
>
> 185. Objections have been raised in regard to the climate change impacts resulting from the development, both in terms of the cremators and production of car trips...[The proposal would not lead to an increase in cremations, but would re-distribute them geographically]. It is also relevant to note that unlike older existing sites (such as Bodmin) modern crematoriums are required under the permitting regime to include abatement equipment and that, as such, any reduction in the number of cremations taking place at these older

> facilities would be likely to result in environmental and climate change benefits overall. It is also noted that it is proposed to use electric rather than gas powered cremators, which significantly reduces carbon emissions and offers the opportunity for the use of renewable energy."

235. Mr Kimblin submitted that [185] showed an error of significance in the Officer's Report, in stating that the proposed development would significantly reduce carbon emissions, would use renewable energy and be a benefit over the present situation. The use of electricity was not part of the application; its use was not required by condition, nor was the use of renewable energy required by condition. None of the alleged climate change benefits were secured by condition. The Committee could not lawfully take account of benefits which it did not then secure by condition.

236. Mr Brett submitted that the Report had not told Members that the cremators would be electric. It went no further than was accurate, which was that the Consortium proposed to use electric cremators, which would yield savings in carbon emission, but that that was not a final or guaranteed position. Condition 15 reflected that uncertainty.

237. I accept Mr Brett's submissions. OR [160] is clear that there had been no commitment to using electric cremators, and that gas cremators could be used. That is reflected in the condition. Although the final sentence of [185], in the absence of some such words as "would if used" after "which" in the second part of the sentence, might usefully have been more precise, that sentence in [185] read with [160] does not leave any real doubt as to what the position was.

238. This ground is dismissed.

The impact of longer distance views on private properties including holiday lets: Mr Ground's ground 1

239. Mr and Mrs Watton's family home, Mill Barn, combines their own living accommodation, the main daytime rooms of which are on the first floor so as to enjoy the views east across the valley and down over where the crematorium building would be, with accommodation used as three holiday lets, two of which also enjoy outward views over the development site. Mr and Mrs Watton raised these issues with the Council. Mill Barn is not the only property so affected. Quinceborough Farm, and holiday cottages to the north-east of the site, were affected in south westerly views.

240. The Council's Principal Landscape Officer provided a consultation response to the proposal in June 2021. It expressed concern about the reliance on ground modelling and planting to create the required screening and ambience for "the sensitive visitors to the crematorium, on this elevated exposed site adjacent to a busy strategic highway." The crematorium buildings were proposed at the lowest part of the site to the northwest. She also asked that:

> "...as well as Quinceborough Farm, a further visual assessment is carried out from Mill Barn to the west at approximately 0.6km from the nearest site boundary. This property like Widemouth Farm has a direct view of the development site,

> particularly the northern area where the buildings will be located. I would be grateful if both these additional viewpoints could also be prepared with 1 year and 15 year photomontages."

241. Mr Ground attributed significance to the fact that this expert considered it relevant to have the visual effects on those properties properly assessed.

242. The Officer's Report dealt with residential amenity at [174 -179]. Policy 12 of the Cornwall Local Plan required developments to protect individuals and properties from: "overlooking, unreasonable loss of privacy, overshadowing, overbearing impacts, unreasonable noise and disturbance." It did not therefore give protection to outward views, from residential properties, at least not directly. The Report identified some of the closest properties, which included Quinceborough Farm and its holiday cottages, some 315m north of the proposed crematorium buildings, and Fursewood, 420m south of the proposed buildings, but immediately across the road from the proposed site access, and Higher and Lower Widemouth Farms dwellings and holiday cottages, about 650m west of the proposed buildings. Mill Barn is among the latter. All dwellings and holiday accommodation were well beyond the 200 yard minimum distance between crematorium buildings and residential dwellings required by the Cremation Act 1902. The impact on Quinceborough was considered in the section of the Report on residential amenity. That considered whether the impact would be "harmfully overbearing or dominant when viewed from residential properties and holiday accommodation." It concluded, in that context, that the impact would not be harmful. The Members had been advised, in connection with an objector's LVIA, that the potential impact of the proposal from different viewpoints was "a matter of judgment."

243. The Report commented:

> "177. Whilst it is acknowledged that part of the development would be visible from a number of these properties, private views are not a material planning consideration. Due to the distances involved, use of natural materials on the proposed buildings and the existing and proposed landscaping of the site, it is not considered the proposed development would appear harmfully overbearing or dominant when viewed from residential properties and holiday accommodation sites in the area.
>
> 178. Given the separation distances no concerns are raised by officers in terms of overlooking, privacy or loss of light."

244. The Officer returned to the topic in her Response to Objections:

> "221. Objections have been received in relation to the lack of viewpoints in the LVIA from Quinceborough Farm and holiday cottages to the North of the site and the dwelling Mill Barn within Lower Widemouth Farm to the West. It is noted that following these objections, the Council's Landscape Officer did request that additional viewpoints be provided from these

> properties. These have not been submitted as the applicants consider that private views are not a concern for LVIA's, but rather are a matter of residential amenity. Officers are in agreement in so far as private views are not a material planning consideration. Representative views have been provided from public viewpoints including from the Widemouth Manor Road adjacent to Higher Widemouth Farm (a relatively short distance to the South of Mill Barn which has a similar view of the site). In regard to Quinceborough Farm this has been considered in the residential amenity section of this report in regard to overbearing impact. [No further work had been done because the dwelling faced north and the cottages there looked inwards around the courtyard].
>
> 222. In regard to concerns raised regarding visual and landscape impacts and a submission of a landscape assessment on behalf of an objector, as set out earlier in the report, officers are not wholly in agreement with the conclusions of the submitted LVIA (particularly in relation to the length of time which is likely to take for the planting to establish). Officers consider that the potential impacts of this development as seen from different viewpoints is a matter of judgement."

245. Mr Ground submitted that the Officer erred in law in simply dismissing the impact on the views from residential properties as immaterial, unless they involved overlooking, unreasonable loss of privacy, overshadowing, or overbearing impacts. Rather, protection of a view or private amenity was capable of being a material consideration. This meant that the Committee in effect disregarded all effects on private views other than those considered under the heading of residential amenity; they were not immaterial in law, and the Committee did not decide how much weight, if any, that factor was to receive. Mr Brett's principal submission was that the Officer's Report had not said that private views were incapable of being a material consideration; he accepted that they could be material considerations in certain cases. It was, he said, "a general rule" that they were not material; only in rare or exceptional cases could they be material. The Report was saying that protection of these private views were not in the public interest and therefore they were not material, as a matter of legitimate planning judgment, in this case. This gives rise first to a question of what the Officer's Report meant.

246. I do not accept Mr Brett's submission. In both [177] and [221] the Officer states, quite baldly, with no qualification or reference to the circumstances of this case, that "private views are not a material planning consideration." In context, she was quite clearly not treating them as an aspect of residential amenity; private views from the residential properties, save to the limited extent that they might be covered indirectly by the topics specified in the policy on residential amenity, were not considered in that section of the Report. Views or aspects of outlook outside the scope of that section were treated as legally irrelevant. I cannot see those paragraphs as contemplating that such views could constitute a material consideration but that, in this case, they could rationally be judged not to be material. The aspects of impact considered on Quinceborough Farm are those in the residential amenity policy. They

do not include the aspect of residential amenity raised here: longer distance views enjoyed by occupiers of the property. The reference to the impact of the proposal from various viewpoints being "a matter of judgment", a comment which covers those aspects of visual impact which the Report did consider to be relevant planning considerations, cannot be read as converting the earlier and repeated firm advice about what was not a material planning consideration into advice that their materiality was a matter of judgment for the Members in the circumstances of this particular case. It is not an uncommon error either for the statement that there is no private legal right to a view to be taken to mean that such a view is not one for consideration in a planning system which is concerned with the use and character of land in the public interest.

247. Ms Blacklock's witness statement pointed out that Mrs Watton had said in her letter of 12 November 2022 sent directly to Committee Members that she accepted that private views were not a material planning consideration, but that in the context of residential amenity, the Consortium had been asked to provide viewpoints from the residential properties requested by the Council's Landscape Officer, but had not done so. It is clear to me that in context, and read as a whole, Mrs Watton's letter was treating the view from her home as an aspect of residential amenity which had not been properly assessed, and that she contended that a proper assessment required a visual impact assessment.

248. Ms Blacklock also said that the location of Mill Barn, and the cluster of nearby dwellings, was often referred to in the meeting, on the slides which were shown, and a public viewpoint, 190m closer to but also on high ground looking south over the site, was shown. There were no views from Mill Barn; longer distance views were considered from public viewpoints near to Mill Barn. This however is consistent with the views from public viewpoints in that area being relevant, as they are, rather than suggesting that the private views near such public viewpoints were material.

249. The next question is whether, on that interpretation of the Officer's Report, there was an error of law. Both advocates relied on the decision of Mr Robin Purchas QC, sitting as a Deputy High Court Judge, in *Wood-Robinson v Secretary of State for the Environment* [1998] JPL976. I consider it useful to take a more recent analysis of the question: the decision of Lane J in *R (McLennan) v Medway Council* [2019] EWHC 1738 (Admin), is also a useful reference point for earlier decisions, including *Wood-Robinson*. *McLennan* concerned the materiality of the overshadowing of solar panels on a private dwelling; it was held irrational for the council to exclude the consequential reduction in the generation of green energy as a material consideration, even though the immediate impact was a private financial one, and the reduction to the overall public benefit in generating green energy was, taken as a single case, very small.

250. At [32], Lane J said that the distinction between what was material, in a particular planning context, and the weight, if any, which can be given to a material consideration was well-known. In the planning context, Lindblom J in *Cala Homes (South) Ltd v Secretary of State for Communities and Local Government* [2011] EWHC 97 (Admin), [2011] 1 P&CR 22 had collated the useful citations:

> "29. The law has always distinguished between materiality and weight. The distinction is clear and essential. Materiality is a

question of law for the court; weight is for the decision-maker in the exercise of planning judgment. Thus, as Lord Hoffmann stated in a well-known passage of his speech in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759; (1995) 70 P. & C.R 184 (at p.657G-H):

'This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State.'

So long as it does not lapse into perversity, a local planning authority is entitled to give a material consideration whatever weight it considers to be appropriate. Under the heading *"Little weight or no weight?*" Lord Hoffmann observed (at p.661B-C):

'…If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy (as in *Safeway Properties Ltd v Secretary of State for the Environment* [1991] JPL 966) precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it.'

30. Thus, in appropriate circumstances, a local planning authority in the reasonable exercise of its discretion may give no significant weight or even no weight at all to a consideration material to its decision, provided that it has had regard to it.

31. What is capable of being a material consideration for the purposes of a planning decision? This question has on several occasions been considered by the courts. The concept of materiality is wide. In principle, it encompasses any consideration bearing on the use or development of land. Whether a particular consideration is material in a particular case will depend on the circumstances (see the judgment of *Cooke J. in Stringer v Minister of Housing and Local Government* [1970] 1 W.L.R. 1281; (1971) 22 P. & C.R. 255 (at p.1294G)). In the context of development plan-making and development control decision-taking, the test of materiality formulated by Lord Scarman in his speech in *Westminster City Council v Great Portland Estates Plc* [1995] A.C. 661; (1985) 50 P. & C.R. 20 (at p.669H to p.670C-E) is whether the consideration in question "serves a planning purpose", which is one that "relates to the character and use of land"."

251. Lane J continued at [33]:

> "In Wood-Robinson v Secretary of State for the Environment and Wandsworth London Borough Council [1998] JPL 976, Robin Purchas QC, sitting as a Deputy Judge, dismissed an application to quash the decision of a planning inspector who had dismissed an applicant's appeal against the refusal to grant planning permission for the erection of a two storey house. The inspector held that the weight to be given to compliance with development plan policies was outweighed by the undesirable effect the development would have on residential amenity. The applicant contended that the reference to residential amenity in the inspector's decision letter was based on the loss of purely private views from neighbouring dwellings, which it was said was not an issue that was relevant to the public interest.
>
> The following passage from the judgment is of particular relevance:-
>
> 'Whether a consideration is capable of being a relevant or material consideration for planning purposes is a question of law for the court. … It is, however, difficult, if not impossible, definitively to resolve the question of relevancy or materiality, as it were, in a vacuum without reference to the facts of the particular case. As a starting point, I accept that the exercise of planning control should be in the public interest. It is not concerned with the creation or preservation of private rights as an end in itself (see Salmon J in *Buxton v Minister of Housing and Local Government* ... and Lord Scarman in *Westminster City Council v Great Portland Estates Plc* ...
>
> I do not, however, accept the distinction in principle that Miss Ellis sought to draw between the effect on the use of land through overlooking or overshadowing and that through deprivation of outlook or aspect. The guiding principle seems to me to be in each case whether the private interest in question requires to be protected in the public interest. In that sense detriment to the amenity of residential user through overshadowing or overlooking is far more likely to be something to be resisted in the public interest than interference with a view. Whether or not protection of a view or private amenity is, in the circumstances of the case, in the public interest would be for the decision-maker to determine. Generally, no doubt, that decision would take into account the number of properties or persons whose view or amenity would be affected and to what degree. I respectfully accept, and adopt, the guidance in the judgment of Cooke J in [Stringer v Minister of Housing and Local Government [1971] 1 All E.R. 65] that:-
>
> 'The public interest … may require that the interests of the individual occupier should be considered. The protection of the

> interests of individual occupiers is one aspect, and an important one, of the public interest as a whole'."

252. I agree with what Lane J and Mr Purchas said in this context. I am not concerned here with the occasional relevance of personal circumstances. The aspect of residential amenity at issue here is not personal or peculiar to either the Wattons or the Camerons. Although it affects them, it does so as an aspect of the residential amenity which would be enjoyed similarly by any other person who lived in those properties. They did not rely on some personal attachment to the view which was peculiar to them. It is no different in principle from any other aspect of private residential amenity, which a person living in a house may enjoy while there, including both personal privacy and protection from overbearing development. I draw attention particularly to what Mr Purchas said, in the penultimate paragraph in the citation from Lane J, when he rejected the distinction between overlooking and outlook. This may have been a source of error by the Officer and was reflected in Mr Brett's submissions on the first point.

253. On that basis, the Report contains a clear error of law. Two aspects of it are quite clear. First, the impact, including the visual impact of the proposal on private residences and holiday accommodation was considered in the section on residential amenity; no harm was thought to arise, and there is no challenge to those conclusions as far as they go. That section however did not consider any impact which fell below or differed from harmful overbearing or dominance, overlooking privacy or loss of light. Second, the loss of the views currently enjoyed as part of the residential amenities was not assessed in that section or any other section of the Report. It was thought relevant to report on nearby views from publicly accessible viewpoints, and to include the views enjoyed from cars on the A39 or Widemouth Manor Road, the former of which would have been principally views from the private space of a moving car. There is therefore a point which was not assessed: the impact on residential amenity from the effect of the proposal on longer distance views currently enjoyed.

254. These longer distant views were not legally immaterial as private views, as *Wood-Robinson* and *McLennan* make clear. Muddle often arises from a simplified and often false distinction between public and private interests, based on the correct legal proposition that it is not the function of the planning system to protect private rights as private rights, or simply because they are private rights. The converse is not correct either: the fact that there is, absent a covenant, no private right to a view over another's land, does not mean that it is irrelevant in planning considerations either. The question is: what is the public interest in the protection of a view or outlook currently enjoyed by the occupier of a private house? The distinction between shorter and longer views is material, as the consideration of private residential amenity shows; that was a consideration of closer views from private houses under the headings of dominance, overbearing, light. The consideration of outlook and view may be related to the nature of the private view: it may be of a tranquil nature as might be beneficial for a private nursing home; calming views and atmosphere experienced by private individuals may be relevant to the planning of a crematorium, whether privately or publicly operated. The impact on holiday homes may have a local indirect economic effect, as prayed in aid of the development of the crematorium. But their materiality does not require some personal factor; they are

material because they are an aspect of residential amenity, which cannot be simply distinguished with a bright line, from the other aspects of private residential amenity considered in the Report.

255. It would not have been unlawful to consider the longer distance views, beyond the scope of those topics considered in the residential amenity section of the Report. It was unlawful to say that they were legally immaterial and could not lawfully be considered, as I have found the Officer meant and would have been understood as saying. A material consideration was therefore ignored because the Report regarded those views as incapable of being material. It was not assessed and then regarded as irrelevant or of no weight.

256. What does that all signify? Applying the approach of Lord Hoffmann in *Tesco,* as cited above, it is important to distinguish between materiality and weight. A consideration may be relevant, "material" in that sense, but it does not have to be given any weight; there is no contradiction between holding a consideration to be material and giving it no weight. It would not have been unlawful for the Officer and Committee to have concluded that it would give those longer distance impacts, relevant though they were, no or negligible weight in the circumstances of this case, notably because of distance, mitigation measures and in some instances orientation of the property. Lord Hoffmann's approach is no different in effect from the more convoluted approach of asking whether a consideration which is capable of being material in a case, is in fact material. If, upon analysis, it is rationally concluded not to be material, the effect is the same as rationally giving it no weight as a material consideration.

257. Although I am satisfied that the Report contains an error of law in this respect, I consider it highly likely that, directed properly in law, the advice would have been that no weight should be given to those views, rather than that they should be accorded some very modest weight in the overall balance, although that too would have been a lawful approach. The Officer would have advised that the various slides shown to the Committee, gave an adequate impression of the views from residential properties, including Mill Barn, and that the Committee had enough information to reach a conclusion as to whether or not they accepted such advice. That would have been a conventional approach to such views, and nothing exceptional had been identified about the views or circumstances to lead to a different approach here. There was no policy support to give them weight. Few were affected. They would add nothing to contradict the acceptability of the views from public viewpoints. The need for consistency of approach would store up problems for other cases if these views were to be given even modest weight here. The views of the landscape officer called for no special reasoning. I am satisfied that that is what the Committee would have been advised, that it would have accepted such advice, and would have regarded that as the same in practice as the advice which they did in fact accept. Accordingly, I decline to quash the decision on this ground, in the light of s31(2A) of the Senior Courts Act 1981. If the error had not been made it is highly unlikely that the outcome of the decision would have been different.

The extent of the undesignated area of the site: Mr Kimblin's ground 2

258. It is not in issue but that the AGLV extends up to the southern side of Widemouth Manor Road, and that the proposed bus shelter on the southern side of the road, across from the site entrance, is within that designation. The land to be used for the bus shelter is within the application site red line, defining the area within which permission for development is sought.

259. Mr Kimblin pointed out that the front page of the Officer's Report, explained that one reason why the application had come before the Committee for decision, was "the impact on the landscape including the adjacent AONB and AGLV". The AONB, however, was adjacent at 0.7 miles distance, and the AGLV was not adjacent to the site; part of the site was actually within it. The Officer's Report twice stated that the site was in an undesignated landscape; I have set out earlier the passage from the introductory section of the Report, which was repeated, in the same terms, in [127]. There was no reference in the Report to the fact that one part of the development, one of the two cantilevered and lit bus shelters with associated tactile paving slabs and kerbing at the entrance to the crematorium grounds, would be in the AGLV, either in the Landscape Character and Appearance section or in the Highways and Access section, or elsewhere. Nor was there any assessment of it in the AGLV context; the bus shelter was simply a public accessibility point. Mr Kimblin submitted that it was not enough for Mr Brett to rely on the Poundstock Parish Council's objections, as summarised in the Report, which referred to the buffer zone of the AONB, "within the [AGLV]", or later to the crematorium being "within" an AGLV, or to suppose that Members knew the precise boundaries of the AGLV thereabouts. This meant that the application was assessed in the Officer's Report and by the Committee on a significantly erroneous basis. The avoidance of designated landscapes was a locational consideration for the site search, and was treated by the Officer's Report as a factor showing the difficulty of finding sites, and therefore justifying the use of this site for a crematorium.

260. Mr Brett riposted that that misunderstood the limited purpose of that passage, which was simply identifying the difficulties of finding a site away from residential areas, which was not in a designated landscape. He principally submitted, however, that this ground was based on an unfair and unduly legalistic reading of the Report; what was required was not a flawless Report but one which was not significantly misleading. Members could be taken to be familiar with local designations anyway. Reading the Report as a whole showed that Members were advised that the AGLV extended up to the southern side of Widemouth Manor Road, and that there would be a bus shelter, with associated facilities there. It was a matter of planning judgment as to whether that piece of development meant that the site of the crematorium development extended into the AGLV. The extension of the development into the AGLV was "de minimis", and could be brought about under non-planning statutory powers anyway.

261. I do not accept the contention that whether the crematorium development was described as extending into the AGLV was a matter of planning judgment, unless it was made clear that there would be development to the south of Widemouth Manor Road. Still less do I accept that the issue can be wished away as "de minimis", and thus ignored. Nor does the fact that it could occur under the exercise of other statutory powers make it irrelevant to the development which was the only basis for the possible exercise of those powers. In the context of the decision to set out a description of the boundaries of the AGLV, with the description of the development,

it is not open to the Council to submit that the Members would have known where the boundaries were, and by implication would have realised that part of the development was proposed in it. Nor is it sufficient for the Officer to rely on what the Poundstock Parish Council said, in view of the general rejection of its representations.

262. However, I regard the description of the basis for the call-in as ambiguous at best, and certainly not as favouring the Claimant in this respect, when read with the relevant Member's fuller objection. There was AGLV adjoining the development on any view, and this part of the OR was only a general summary. I am far from sure that the bus shelter was the basis of the concern being addressed, rather than the location of the built development and the landscape changes, close to and visible from the AGLV.

263. However, what is important to my mind is that in OR [2], repeated in [127], Members were told that the AGLV extended to the south side of Widemouth Manor Road, in the words that the AGLV "was located across the road from the proposed access." The site was also defined in OR [1] as bounded by Widemouth Manor Road to the south. The language of the "site" is used in the Report to refer to the main part of the site, north of Widemouth Manor Road on which all is situated, apart from the bus shelter and its associated facilities on the southern side of the access. From a reading of the Report as a whole, with the plans, it is also sufficiently clear, from [147] that there would be a bus shelter on the southern side of the road. The obvious inference is that that would be in the AGLV. There is no specific consideration in the Report of the visual or landscape impact of the southern bus shelter or indeed of the site access as a whole, on the AGLV. The site entrance is considered in relation to the undesignated area, in [137], making the obvious point that the new site access, which must include the bus shelters, would be clearly visible from Widemouth Manor Road.

264. From this I conclude that there was no significant error in the Report, and that the Committee was not significantly misled in relation to whether the southern bus shelter component of the development was proposed on the south side of Widemouth Manor Road, and in the AGLV. The position could have been spelled out more precisely, but that does not amount to legal error.

265. Besides, it is difficult to see that the consideration in the Report of the impact of the southern bus shelter would have been any different had it been described specifically as being in, but on the edge of, the AGLV and undesignated land. It had no significant effect on views other than from the road itself; even if that shelter had been thought by Members to be within undesignated land, that comment would have been the same and would not have involved views from the AGLV. There is no mention of any part of the site access when the impact on the AGLV, of the development sited in the undesignated area, is considered in [136]. There was no error in the Report, and I reject this part of ground 2.

The stack and emissions and condition 15

266. Even if error there had been, I consider that the outcome would have been the same, or at least it is highly likely that it would not have been different, if the asserted error had not occurred. S31(2A) Senior Courts Act 1981 would require me to refuse relief in those circumstances.

267. The essence of Mr Ground's contention was that the visual assessment in the Officer's Report had failed to consider the height of the emissions stacks.

268. The Report said this in the "Design" section of the Report at [119]:

> "One of the aspects requiring careful consideration in the design of crematoriums is that of the chimney stack/flue and associated plant. In this case, the submission sets out that it is proposed the lodge building roof would incorporate the two cremator flues, two bypass flues and two coolers behind a [parapet wall] and therefore within the silhouette of the building. The final height of the stacks/flues is not yet known (as this is determined as part of the environmental permit regime and would need to be evaluated in regard to NOx emissions - see air quality section); however it is noted that the parapet level is proposed as 66.15 AOD, with the remainder of the roof being 65.05 AOD. which would allow for a flue height of approx. 1.1m (without projecting above the wall). The FBCA guidance 2019 states that 'Generally, for new crematoria with abatement plant, it is unlikely that the calculated stack height would need to be more than 2 metres higher than the building height.' As such, whilst there is potential for part of the flues to protrude above the parapet, given the positioning of the area of the roof on the building and the location of the building within the site, it is considered unlikely that these would be significantly visually prominent or detract from the design of the overall development".

269. The stack height modelled for emissions purposes was 6m from ground level at the crematorium building. Stack height was further considered in the "Public Health and Protection" section of the Report. OR [159] stated that emissions of NOx were not at present controlled under the environmental permit regime, but were likely to be controlled under it after the conclusion of a current review of that regime. New measures were likely to include abatement measures for new crematoria and retrofitting on existing ones and:

> "there may be the need for stacks/flues to be increased in height. In advance of any changes to the current permitting scheme, the LAU [Local Authority Unit in DEFRA], have suggested that the LPA consider this at planning stage, particularly in areas of poor air quality, which is not the case in this area...."

270. The detailed guidance behind this is set out in DEFRA's Crematorium Process Guidance Notes 2012. The current lack of NOx data has led to the inclusion of a requirement for monitoring in the updated guidance. The LAU said:

> "We can then review the data in some years to determine the measures that can be put in place; this may well involve fitting NOx appointment for new crematoria and retrofitting for existing sites. So at the moment, we have not included a

> requirement for operators to fit NOx abatement... some equipment providers have started to provide a NOx abatement option [which was] quite limited at the moment....Note that while currently, NOx isn't a requirement under the environmental permit the stack height needed for adequate dispersal is affected by NOx emissions.... it is possible that once we have sufficient information to determine an ELV [emissions limit value] for NOx your operator may need to reassess their stack height which might require them to increase the stack height."

271. Condition 15 reads:

> "No development/works above damp-proof course level shall commence until details of the cremators and any proposed associated abatement to be installed have first been submitted to and approved in writing by the Local Planning Authority. The details to be submitted shall include but not be limited to:
>
> - the number, type (gas or electric) and model with specification sheets of all cremators;
>
> - emissions details for the proposed cremators; details of any proposed additional abatement;
>
> - a detailed quality assessment for but not limited to NOx... to confirm the stack height in line with National Government 'Risk assessments for your environmental permit' 2022 guidance...."

272. The reason for the condition was: "To ensure that adequate measures are put in place to minimise the impact of development on air quality, as such emissions are not currently included within the permitting regime and in accordance with policies 13, 16 and 23 of the Cornwall Local Plan Strategic Policies 2010 to 2030 and guidance contained within paragraphs 174 and 186 of the National Planning Policy Framework 2021 [NPPF]." Policy 23 covers the natural environment; policies 13 and 16 cover design standards, and health and wellbeing. Paragraph 174 of the NPPF broadly speaking deals with the natural environment, including landscape and countryside issues, while paragraph 186 deals with pollution and air quality.

273. The 1978 guidance from the Department of the Environment dealt with stack height at paragraph 48. In 1990 it warned that this advice might be out of date in places, but nonetheless might still be useful. Subject to local conditions, the stack should generally be at least 12 metres high and should not be less than 3 metres higher than the highest part of the associated building to reduce the likelihood of flue gases being caught in down-drafts.

274. Mr Ground submitted that the Officer's Report did not consider the landscape or visual impact of the stack above the parapet wall. The Report accepted the possibility that the height of the two stacks might have to increase over the general height of 2m above building roof height, with the consequence that more than 0.9m

might protrude above the 1.1m parapet wall. How much, if at all, would depend on the emissions modelling. The final height of the stack was not known. However, there had been no visual or landscape assessment or presentation of the potential range of heights. The photomontages assumed that, unusually, the stacks would not protrude above the parapet at all. Moreover, the topography of the site had been ignored on this issue. The viewpoint from the A39 took a height of 67.123m AOD, which, whether that height was that of some lying on the road or standing up beside it or seated in a car, as to which the LVIA was silent, was nonetheless higher than the building height of 65.05m AOD, and the usual stack height of 2m, which would be 67.05m AOD. Condition 15 did not, however, limit the stack height to that assessed, and would control stack height by reference to emissions criteria, and not landscape assessment; that pass had been sold. No adequate reasons were given for that approach.

275. Mr Brett submitted that the Officer's Report made it clear that there was no final stack height fixed but that, on the latest FBCA guidance, it was unlikely to be more than 2m above building height, and therefore unlikely to be more than 0.9 m above parapet height, even if, as was itself unlikely, it projected above the wall at all. The last sentence of OR [119] contained the appraisal that this unlikely exceedance would not be "significantly visually prominent or detract from the overall design of the development." That was a lawful planning judgment. Mr Ground's points about elevated viewpoints were not points of law. Condition 15 controlled the stack height by reference to National Guidance. The Report had accepted that there were uncertainties and that the height would be controlled by condition applying Government Guidance.

276. In my judgment, OR [119] informs the Committee (i) that the stack height is unlikely to exceed the wall, if at all, by more than 0.9m, (ii) that a protrusion of that extent was not significant, and (iii) the control of stack height would not be a matter for landscape impact, were the unlikely to happen, but it would ultimately be a matter for emission control, when built and possibly later if it were built before changes to the NOx regime were brought in. The Report makes it clear that the control of stack heights, is not landscape based, but emissions based. The only point which can be made is that the Committee did not consider the potential, albeit unlikely, height which the stacks could reach in compliance with that condition. It is not unlawful for that state of uncertainty to exist, and for the decision in such a state to be controlled by emission needs and not landscaping. The impact was assessed of an exceedance up to 0.9m. The risk of an exceedance was assessed. It was not a legal requirement that for the maximum possible height to be assessed and the maximum acceptable in visual or landscape terms to be controlled by planning condition. The Committee was aware of the chance, and of the insignificant effect of a 0.9m protrusion, and the unlikely extra would have to have been significant enough to have altered that conclusion. That was lawful, and although its merits are debateable in planning terms, the judgment was for the Committee. It did not have to give priority to the emissions control height over planning consequences, but it was not unlawful to do so.

277. The Committee cannot be said to have ignored what could be seen from the higher viewpoints such as the A39, which has to be taken to have been included in the overall visual assessment of the impact of the protruding stacks. The fact that no photomontages showed any stacks at all is a matter for planning comment, and

judgment as to how useful that would have been. The omission was pointed out by objectors, and is clear enough from the photomontages.

278. This aspect of ground 2 of is dismissed.

The ownership of the bus shelter land: Mr Kimblin's ground 1

279. Mr Cameron claimed in an email to Committee Members on 7 November 2022, a few days before the Committee meeting on 17 November, that he owned the land upon which the southern bus shelter at the crematorium site entrance was proposed. This was the first time he raised the issue. Ms Blacklock, the Council's Case Officer, provided a witness statement in which she explained what happened. She had already examined the Transportation Mapping System, as part of her case assessment, in order to establish that the areas proposed for the bus shelters were publicly maintained highway verge. She was sent the email from Mr Cameron, claiming ownership of the southern bus shelter land, on 14 November, and asked the Highways Department to check the position again. It did so and confirmed the position to be as she had concluded it to be. The Local Land Charges (Highways) Officer also identified the mapping system as the place to search. This issue was then dealt with in the Addendum Report to Committee which stated:

> "An objection has been received in regarding the ownership of land across the road from the entrance of the site where it is proposed to install a bus shelter; the objector has stated that this area includes land in their ownership and that no notice has been served on them. In terms of the deliverability of the bus station, this area is publicly maintained highway land and as such the works proposed can be installed as part of a section 278 agreement."

280. It commented that notice would be served on this objector before the actual grant of permission if the Committee agreed, and had resolved to grant permission. That notice was served, as belt and braces, as Ms Blacklock put it, because of the "indication" of ownership from Mr Cameron. Ownership was not debated before the Committee; the Council took the view that the land was highway land. There was no suggestion of any uncertainty about that, nor consideration of any potential planning implications of either uncertainty in ownership, or of ownership by a committed objector to the proposal being proven.

281. Condition 7, dealing with highway and related matters, states:

> "No development hereby permitted shall commence until access and highway improvement details, which generally reflect those depicted on [an identified plan], have been submitted to and agreed in writing by the Local Planning Authority. This shall include details of:
>
> - The site access, including (but not limited to), proposed levels, visibility splays and design specification; and

> - Highway improvements including provision of footways, tactile drop kerb crossing point and the provision of two bus stops including shelters.
>
> Thereafter the development shall be completed in accordance with the agreed details prior to use of the development and shall be retained as such thereafter. No obstruction shall be permitted within the approved visibility splays."

282. The key plan upon which Mr Kimblin relied is the plan part of a Stopping Up Order from 2005, which stopped up, as highway, part of the verge of Widemouth Manor Road, from outside the previous dwelling, partly on the site of what is now Fursewood, up to the A39 junction. The effect of the Stopping Up Order was to cause the part of the land over which highway rights had been established to revert to the adjoining ownership, here Mr Cameron. The Land Registry plan preceded the Stopping Up Order, and as Mr Brett pointed out, s60 Land Registration Act 2002 provides that the title plan does not determine the exact ownership boundary line.

283. The Council appears to have been unaware of this Order, until February 2023, when, following receipt of the Pre-Action Protocol letter, the Local Land Charges Officer found it and forwarded it to Ms Blacklock. Overlaying the plan attached to the Order and the Council's mapping system still showed that the area of land in question was public highway, said Ms Blacklock. She produced the overlay in her witness statement. The Council and its Highways Department still maintain that the bus shelter is on land shown as highway verge in its mapping system, and not as part of the highway stopped up.

284. Although Mr Kimblin initially put his case on the basis that the Council had made a mistake of fact as to the ownership of the land required for the bus shelter, it did not take long for analysis of the various plans to make it apparent that this point could not be advanced under the heading of a mistake of fact as a mistake of law, as in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49 at [63], for a variety of reasons. Not the least of these was the need for the "fact" to be "established", in the sense that if the point had been drawn to the attention of the decision-maker, the correct position could have been shown by "objective and uncontroversial evidence."

285. I do not intend to go through the various plans and what they do and do not show. There are problems with the differing map bases, and changes which have occurred at Fursewood since the bases were prepared, (Fursewood is a replacement dwelling different in size, layout and location in part, and the location of a wall to the road frontage may be different.) The Council do not accept that it is uncertain. As I saw it, however, the material was not clear and indisputable either way. To me, the area of the highway land stopped up in 2005, and the area proposed for the bus shelter might or might not be the same. More importantly, this challenge to the decision of the Committee is not the forum to resolve the issue over the extent of the Fursewood and highway ownership, as Mr Brett submitted. I lack the evidence and the procedural means to resolve it. Mr Brett submitted that if there were encroachment on to Mr Cameron's land, it was negligible, and final details of the location of the bus shelter had to be resolved under the agreement between Council and Consortium under s278

Highways Act 1980. I cannot resolve this de minimis argument without trespassing on what is not my function here.

286. Mr Brett also submitted that the Council had adequately considered the issue of ownership and was under no duty to investigate it further. I do not consider, in so far as that point was pursued by Mr Kimblin, that the Council failed in some duty of consultation or investigation, in the light of the lateness of the claim being made, its continued uncertainty, and the investigations to which Ms Blacklock attests, both in considering the application and after the claim of ownership was made.

287. Mr Kimblin next submitted that, although a Grampian condition was a commonplace, preventing development until any part proposed on land which was not controlled by the applicant, at the time of the grant of permission had been completed, that solution was not recommended in the National Planning Practice Guidance where there were no prospects at all of the action being performed within the time-limit imposed by the permission. That was the position here, he submitted, as Mr Cameron would not permit the land he owned to be used for any crematorium related purpose. Difficulties of implementation were capable of being a material consideration, where they had planning consequences. Of themselves, they were not relevant. The lawful approach to an application, where the applicant did not control all or part of the application site, was set out by Lord Keith in *British Railways Board v Secretary of State for the Environment* [1993] 3 PLR 125, [1994] JPL 32, HoL, at [38]:

> "The function of the planning authority was to decide whether or not the proposed development was desirable in the public interest. The answer to that question was not be affected by the consideration that the owner of the land was determined not to allow the development so that permission for it, if granted, would not have reasonable prospects of being implemented. That did not mean that the planning authority, if it decided that the proposed development was in the public interest, was absolutely disentitled from taking into account the improbability of permission for it, if granted, being implemented. [He instanced competition between two sites for a single desirable development, only one of which would be granted permission.] But there was no absolute rule that the existence of difficulties, even if apparently insuperable, had to necessarily lead to refusal of planning permission for a desirable development. A would-be developer might be faced with difficulties of many kinds, in the way a site assembly or securing the discharge of restrictive covenants. If he considered that it was in his interests to secure planning permission notwithstanding the existence of such difficulties, it was not for the planning authority to refuse it simply on their view of how serious the difficulties are."

288. Mr Kimblin submitted that the difficulties created by the Mr Cameron's actual or possible ownership were material here, because if part of the land in question were owned by Mr Cameron, condition 7 could not be fulfilled, and the proposed agreement under s278 Highways Act 1980 could not be used to enable construction of so much of those works as required to be on his land. This meant that the proposal

could not be implemented as permitted. Condition 7 would not prevent works being approved, and commenced, but they could not be completed as required. Indeed, the development could be almost completely constructed and still be unusable. A redesign or relocation of the access, or omission of the south side bus shelter, could then follow, with the development becoming significantly different from that now assessed and permitted; the Council would have sold the pass to development of a crematorium on the site. At the very least, the uncertainty about the ownership position had planning implications, risking such an outcome, which the Committee should have been advised about and considered. Proven ownership by Mr Cameron would have made the situation yet more difficult for the Council. Either way, this material consideration had been ignored. In my judgment, the highest the point can be put is that there is uncertainty, and that that may have the sort of planning consequences which Mr Kimblin put forward. I do not propose to take that issue further because of the next response which Mr Brett made.

289. Mr Brett submitted that, whoever was right or wrong about the ownership of the land in question, the powers in s4 Local Government (Miscellaneous Provisions) Act 1953 would suffice to bring about the construction of the bus shelter, without his agreement. Of course, the Council would have to decide to use those powers against an unwilling landowner and quite possibly with the destruction of a wall, but its power, if determined to do so, was not in dispute. S4(1) provides:

> "Subject to the following provisions of this Act, a local authority may provide and maintain in any highway within their district which is comprised in the route of public service vehicles, or on land abutting on any such highway, shelters or other accommodation at stopping places on the route for the use of persons intending to travel on such vehicles."

290. S5 of the 1953 Act provides for the limited circumstances in which the landowner's consent was required. None applied here.

291. Whether or not the Report could or should have been more refined in its analysis of the position on the basis of possible uncertainty over ownership, and that could arguably have amounted to an error of law, is all irrelevant. The powers in s4 of the 1953 Act are quite clear. If the local authority were authorised to carry out those works, as s4 provided for, an agreement under s278 Highways Act 1980 would be effective to permit the Consortium to carry out those works. The s278 agreement would not be finalised until the final details under condition 7 had been worked out on the application to "discharge" it.

292. Mr Kimblin had contended in his Skeleton Argument that this section did not apply to land which had been stopped up highway, and it was not a general power to acquire land without paying compensation. He did not pursue this particular line. Nor would that have been consistent with the statutory wording, which applies to any land "abutting on any such highway", and Widemouth Manor Road is "such a highway". S4 is not a power of acquisition, nor did Parliament provide for compensation for its compulsory use. The compulsory deprivation of the rights in land, to that extent, and without compensation could, however, give rise to discretion arguments before the Council, and arguments under Article 1 Protocol 1 to the ECHR about the

compatibility of s4 of the 1953 Act with the ECHR. But those arguments could not defeat the determined exercise of the s4 power.

293. Therefore, whether or not the land belonged to Mr Cameron, and whether or not uncertainty had been considered, the Committee would have been advised that the development could for certain still be brought about by the exercise of statutory powers. There were therefore no planning issues, in my judgment, for the Council to deal with arising out of that ownership uncertainty, even if resolved in favour of Mr Cameron, nor were there any issues which required a redraft of condition 7.

294. If there were an error by the Council in its treatment of the ownership issue, which I do not consider that there was, it had no effect on the outcome of the decision, because of the existence of the statutory power in s4 of the 1953 Act. I would have refused relief under s31(2A) of the Senior Courts Act 1981.

295. This ground of challenge must fail.

Overall conclusion

296. This decision is quashed.