Neutral Citation Number: [2015] EWHC 3704 (Admin)

Case No: CO/74/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2015

Before:

MR JUSTICE OUSELEY

Between:

SIENKIEWICZ	**Claimant**
- and -	
SOUTH SOMERSET DISTRICT COUNCIL	**Defendant**
-and-	
PROBIOTICS INTERNATIONAL LTD	**Interested Party**

Gregory Jones QC & Jeremy Pike (instructed by **James Smith**) for the **Claimant**
Stephen Whale (instructed by **SSDC**) for the **Defendant**

Hearing dates: 3 and 4 November 2015

Approved Judgment

MR JUSTICE OUSELEY:

1. The Claimant lives in the small village or hamlet of Lopen in South Somerset. South Somerset District Council, the Defendant, granted planning permission on 28 November 2014 for the erection of a building for class B1, B2 and B8 uses at the former Nursery site at Lopen Head. Those classes are respectively office, light industrial and warehouse uses, most of the former Nursery site is allocated for employment uses in the South Somerset Local Plan which is part of the statutory Development Plan. Four buildings have been erected on it, two of which are owned and occupied by Probiotics International Limited, Probiotics, and on the part not allocated are substantial but unused Nursery greenhouses. That is the part of the former site for which planning permission was granted on 28 November 2014, and that grant the decision challenged.

2. There had been an earlier decision by the Council to grant planning permission on the identical application. This was successfully challenged by the Claimant and Lewis J quashed that decision but on one only of a number of grounds, [2013] EQHC 4000 (Admin). That ground was that a planning condition limiting occupation of the building to Probiotic was invalid. Lewis J rejected the Claimant's contention that the Council had failed to recognise the primacy of the Development Plan: it had and had concluded that the development was not in accordance with the Development Plan but other material considerations including the NPPF indicated that planning permission should be granted. Lewis J also rejected an argument that the Council ought to have concluded that the development was EIA development requiring environmental assessment under Schedule 1 or alternatively Schedule 2 of the EIA Regulations 2011, an argument repeated here in relation to Schedule 2.

3. The challenge this time is no less multi-faceted. It is said:

   i) That the Council erred in concluding that the development was in accordance with the Development Plan properly interpreted and in the light of the decision of Lewis J. The Council had misinterpreted the National Planning Policy Framework, NPPF, and had ignored relevant emerging local plan policies. The Council was inconsistent in its decision making in the application of Development Plan policies, and had ignored relevant decisions. It was said that the Defendant ought have referred the application to the Secretary of State under the Town and Country Planning (Consultation) England Direction 2009, on a point put differently from that previously raised before Lewis J. Permission was granted to argue those four grounds.

   ii) Permission was refused for the next two grounds, but they were before me on a renewed application for permission, to be dealt with as a rolled-up hearing. The Council had approached conditions wrongly. It failed to consider the need for conditions tying the development to Probiotics in view of the extent to which development was justified because of Probiotics needs; various tailpieces to 5 conditions permitting written variations were unlawful and did not achieve what they were intended to achieve in controlling the mix of development; informatives were written as if they were intended to be as effective as conditions but could not be. The Council ought to have provided a screening opinion that the development was EIA development under the EIA Regulations: it was admittedly a Schedule 2 development and in concluding

that it was not EIA development because it was not likely to have significant environmental effects, the Council had ignored cumulative impact. The officer reaching the contrary screening opinion had no authority to reach that opinion for two separate reasons including a want of signature to an email.

Grounds 1 and 2: failing to decide lawfully whether the development accorded with the Development Plan

4. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires the determination of a planning application to be made in accordance with the Development Plan "unless material considerations indicate otherwise". Although the interpretation of policy is for the Court, it is a planning judgment as to whether or not an application accords with the Plan and especially so where relevant Plan policies pull in different directions, which means that the judgment has to be reached by considering the Plan as a whole.

5. Lewis J considered the Officer's Report and Committee decision in 2013. It did not, in so many words, express a conclusion on whether the proposal accorded with the development plan as a whole. However, he concluded that, read as a whole and in context, the officer had advised that the proposal would not accord with the plan, which is why the officer had gone on to consider the various material considerations which indicated a determination which did not accord with the plan. In [27], Lewis J noted the submission of Mr Whale, then as now for the Council, that conflict with a policy did not necessarily mean conflict with the plan viewed as a whole. He continued: "in the present case, however, all the development plan policies to which reference was made indicate that the proposed development on this site (i.e. large scale business expansion in a rural area) would not be permitted." Mr Jones QC for the Claimant submitted that this passage showed that Lewis J had himself concluded that the proposal would not accord with the development plan, as part of his reasoning as to how the officer had reasoned the report; he judged that all relevant policies went the one way, so no exercise in planning judgment was really called for to reach that conclusion. The Council however decided in November 2014, following the quashing of 2013 permission, that that the development did accord with the development plan, without, contended the Claimant, any material change in policy or circumstance.

6. The first ground of challenge contended that the decision that the proposal accorded with the development plan, viewed as a whole, was not rationally open to the Council, and that neither officers nor members gave any reasons for reaching a decision so inconsistent with its previous one. The Council appeared also to have ignored the decision of Lewis J on this point.

7. The officer report for the Council committee in 2014 referred to the original approval of the scheme, quoting the reasons for the grant of permission in 2013 which included the following: "The scheme accords with Policy ST5, ST6, and EC3 of the South Somerset Local Plan, Policy 49 of the …Joint Structure Plan Review and to policy in the NPPF." It then referred to the grounds of challenge and to the fact that the challenge had been successful only on the ground challenging the terms of the condition linking the occupation of the building to Probiotics. It did not spell out the basis upon which the ground of challenge based on the development plan failed, namely that although the development did not accord with it, the Council rationally concluded that material considerations indicated a grant of permission.

8. The report set out for members the language of s38(6). Little weight was to be accorded to the Emerging Local Plan, ELP; the relevant policy framework was provided by the National Planning Policy Framework, NPPF and the South Somerset Local Plan 2006, SSLP, the relevant component of the development plan. A number of relevant policies were listed, but not all of them, submitted Mr Jones.

9. The consideration of the planning policies began with paragraph 28 of the NPPF, which states: "Planning policies should support economic growth in rural areas in order to create jobs and prosperity by taking a positive approach to sustainable new development. To promote a strong rural economy, local…plans should: support the sustainable growth and expansion of all types of business and enterprise in rural areas, both through conversion of existing buildings and well designed new buildings…." I also mention at this stage paragraph 215 in Annex 1 to the NPPF which states:

> "In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

10. This consideration of policies led on to policy ME4 of the SSLP, which provided: "Proposals for the small scale expansion of existing businesses (classes B1, B2 and B8…) outside defined development areas shown on the proposals map will be permitted provided that they satisfactorily meet the following criteria": that the proposal is needed and appropriate in its location, and existing buildings are reused where possible; if land is to be developed outside the curtilage of existing development, that additional land must be essential to the business; there should be no adverse effect on the countryside from the scale, character or appearance of the new buildings and no substantial additional traffic should be generated. ELP Policy 4 was set out: it is more positively disposed towards the expansion of existing businesses in the countryside.

11. I need to set out in full the report's discussion of the policies:

> "It is considered that saved policy ME4, whilst in general accordance with the thrust of the NPPF, is unnecessarily restrictive firstly in seeking to limit rural business expansion to small scale development and secondly in seeking to restrict such expansion outside development limits. This restrictive approach reduces its weight, whereas the Framework suggest a more permissive, impact focussed approach. Whilst ME4 requires a justification to be made for the development, para. 28 places no such obligation on applicants. Rather there is a need to consider proposals for rural economic development in light of the 'Golden Thread' of sustainability which runs through the Framework, the implication being that if a proposal is 'sustainable' an application specific justification is of less importance.
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> Whilst emerging policy EP4 seeks to facilitate rural business expansion, it also requires the need for the development to be

> justified, with the further requirement that businesses need to have been operating successfully for a minimum of 3 years and to be viable.
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> The applicant is a long standing local business that has been at Lopenhead for approximately 3 years and was located in Stoke-sub-Hamdon before that. Information submitted with the application and considered by the economic development officer show a need for the additional building to separate animal and human products as demanded by important markets for the applicant. It is accepted that there are good reasons why the applicant would want to expand at the existing site rather than move to a split site operation.
>
> Whilst EP4 is a draft policy within the emerging plan and as such is afforded little weight. As with saved policy ME4 it should be considered in the context of the permissive approach advocated by para. 28 of the NPPF.
>
> Accordingly the key issue for paragraph 28 is the sustainability of the development in which respect the NPPF outlines 3 dimensions to sustainable development – economic, social and environmental. On this basis it is considered that the principle of the expansion of this rural business on this site is acceptable subject to consideration of the sustainability of and impacts of the proposal."

12. The report next considered sustainability. The proposal would have a positive economic impact, creating extra rural employment opportunities; the development was not such that Environmental Impact Assessment, EIA, was required, and its impact could be dealt with in the normal way; the site was not in "the most sustainable of locations in terms of accessibility", public transport was poor and it was very likely that travel by private car would increase, but the travel patterns would not be very different from the existing. Mr Jones submitted that that would be contrary to Policy ST5, which was only referred to in the list of policies. The report's conclusion, on this aspect, was that "…considering the three elements of sustainable development in the round, it is not considered that the application should be refused on the basis that it is inherently unsustainable."

13. The justification for the proposal was considered next. "Whilst the NPPF places a greater emphasis on sustainability than policy ME4's need for an application specific justification, it is considered that regard should be had [to] the case advanced." Probiotics had relocated to the site in 2010; it and its exports had grown significantly. It needed additional space so that its animal welfare products could be manufactured separately from its human welfare products, a separation which many countries and customers to which it exported required. It would provide more site storage and additional office accommodation, and would employ an additional 50 people, taking its work force to 130. The existing buildings which it occupied could not accommodate these needs, nor could an extension to them, nor land within the allocated employment site. There were no reasonable grounds, commented the report, to doubt that case, or to assume an underlying speculative motive. (By that was meant

a motive on the part of the landowner or Probiotics to build for another occupier or use.) Accordingly, given the policy support for rural enterprise, the clear case advanced by Probiotics, and "the fact that this is not an inherently unsustainable proposal, the application falls to be determined on its merits."

14. The report concluded that there was no landscape objection to the proposal in view of the established adjacent development, nursery structures and existing uses in the location. The highway impacts were not unsustainable. A Travel Plan would be required to promote alternatives to the private car. Drainage could be dealt with by condition.

15. Next, the report referred to the judgment of Lewis J pointing out that it was only on the one ground relating to the condition that the decision had been quashed. The Council had not been found to have erred in its approach to the grant of planning permission, though the report did not say that Lewis J had taken its approach to be that the development did not accord with the development plan. The reasons for the grant of permission were an adequate summary. There was no basis for the challenge that the development was EIA development. In the light of that, the report advised that the key issues were: had there been any change of circumstances in relation to the unsuccessful grounds? Had any new issues been raised by local objectors? Did the permission need to be personal to the applicant?

16. The report then considered those questions. There had been no material change in the policy framework. The proposal was the same; the same application was still being considered. The objectors, which included the Claimant, had again raised the question of whether an EIA was necessary. The report said:

> "The Need for an Environmental Impact Assessment – Notwithstanding the continuing assertion that an EIA should be provided, the proposal has been thoroughly screened by both the local planning authority and the Secretary of State with the conclusion that a formal EIA is not required. This issue formed part of the legal challenge and it was concluded that there is no justification for a challenge.
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> [...]
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> Nevertheless it has been considered prudent to revisit the screening process.... This brings together all aspects of the proposal, the supporting information and the objector's concerns. It is concluded that:-
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> > ... Having very carefully scrutinised the relevant material, and reconsidered its original screening opinion, the Council considers that the proposed new building and its use is not likely to have significant effects on the environment whether looked at in isolation or cumulatively with other development."

17. There was no policy requirement for the permission to be made personal to the applicant, and, applying National Planning Policy Guidance, a condition limiting the occupation of a building to a limited company was inappropriate.

> "It is difficult to envisage how any impact resulting from the building would be mitigated in any different way by tying its occupation to either the applicant or another user of the adjoining site. The impacts on visual amenity, landscape, drainage, ecology etc. would not materially alter as a result of a change of occupier and technical changes would be picked up by other legislation, e.g. environmental permits, wildlife protection legislation. Obviously planning permission would be needed for any changes of use.
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> [...]
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> On the basis that the application is acceptable in planning terms it is considered that a personal condition is not justified in this instance and would serve no valid planning purposed and would be clearly contrary to guidance."

18. The report dealt with the availability of other sites. Probiotics had already invested significant sums on the existing site, and provided that there were no significant planning issues to warrant refusal, it made economic sense to expand on a site adjacent to its existing facility rather than to establish a new and second site elsewhere. "The NPPF specifically supports the sustainable growth and expansion of all types of business an enterprise in rural areas. It doe not require existing businesses to look, in the first instance, to other sites."

19. After considering other issues, the report concluded:

> "It is accepted that there are on-going concerns regarding the allocation of the adjacent site for employment uses and its subsequent development. Nevertheless this is now 'water under the bridge'; the site has been allocated and built out. The time for challenge to previous decisions is now long past.
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> The council is presented with a well-supported application for further substantial building on adjacent land to enable the existing user of the site to expand. The application falls to be determined on the basis of whether or not it complies with the saved policies of the 2006 local plan and the policies contained within the NPPF. Policy ME4 of the 2006 local plan only supports 'small scale' expansion of rural business, which is inconsistent with the NPPF, and as such its weight is reduced.
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> In light of the considerations set out above it is concluded that this is sustainable development that would have no significant adverse impact on landscape character, visual amenity, ecology, water quality residential amenity, the support of the best and most versatile agricultural land or ecology, nor would

> it have a severe impact on highways safety. The proposal is therefore recommended for approval."

20. It then recommended the grant of permission, setting out the summary of proposed reasons, which included that the development accorded with the development plan as a whole.

21. The minutes of the Committee meeting on 22 October 2014 record some further officer advice. The Area Lead was confident that the latest and fourth screening opinion for EIA was sound. In the light of information provided by the Claimant, the landscape impact of the proposal, whether considered individually or cumulatively with other site development, was not so significant that a formal EIA was necessary to deal with it. The Secretary of State had been contacted about the screening opinion.

22. The Claimant's lawyer had written a long letter on which Mr Whale had advised and his comments were read out. They included that the report had properly approached s38(6), identifying its effect and concluding that the proposal accorded with the development plan taken as a whole, before referring to the NPPF. The decision of Lewis J did not "fix for all time" the issue as to whether the proposed development was in accordance with the development plan, since the weight to be afforded to policies within it (such as ME4) may change with the passage of time or because of some other material consideration (e.g. consistency with the NPPF).

> "It was common for relevant development plan policies to pull in different directions with respect to planning applications. SSDC had to make a judgment as to whether the proposal was in accordance with the development plan taken as a whole. Officers judge that it was. Moreover, officers judged that the NPPF (an important material consideration) indicated that planning permission should be granted in any event."

23. On EIA, Mr Whale had advised:

> "Environmental Impact Assessment: SSDC concluded prior to the High Court proceedings that the application did not amount to EIA development. The Secretary of State agreed (twice). The Court rejected the challenge on this issue. SSDC had comprehensively reconsidered the issue afresh. It had considered the proposal in isolation and cumulatively. Officers remained of the view that the proposal did not represent EIA development."

24. The inappropriateness of a personal condition in relation to occupation of a building by a corporate body was emphasised by reference to further case law. The 2013 report had said that there should be a condition limiting occupation of the building to Probiotics because the Council was granting permission on the basis of acceptance of the need Probiotics put forward.

25. The Area Lead moved on to "the key consideration, the principle of development" saying:

"...that it was accepted that the site was outside of the existing allocation and outside any identified settlement in the saved Plan. However, it adjoined the allocated site and was a former horticultural site, and it was not considered to be objectionable in principle, subject to considerations as to scale and whether the other points as listed, were on balance acceptable.

In terms of sustainability it allowed for expansion of an existing employment site and an existing user on that site, providing rural jobs for people who live in the countryside. In terms of justification for the sustainability decision recommended to members, the applicant had provided clear evidence as to their on-going business plan, why they need to the additional works space. The applicant was a local company who had started in Stoke sub Hamdon and had moved to the site with a history of operating outside major settlements. No fundamental sustainability issues were seen that would prevent them continuing to do so on their new site.

In terms of justification the applicant had supplied all the evidence that SSDC could reasonably ask for to demonstrate that this was not a speculative application and was to meet the applicant's needs. It was not seen that, on the basis of consideration of those other issues, that a personal condition or any kind of personal limitation was necessary to make the development acceptable in planning terms because, going on to consider the landscape and visual issues, an objector's point that the development was fundamentally objectionable was not accepted. SSDC's landscape architect had looked at it in great detail. The site was already there and it had been accepted that it could be developed, permissions had been granted with conditions for landscaping.

[...]

The Area Lead referred to the previous decision and explained that members needed to be satisfied as to whether there had been any material changes in circumstance that justified a full reconsideration of this application and potentially a different decision. He referred to a lengthy report (and to his appended earlier officer's report by way of background) and said that it considered this in terms of all those points and there had been no fundamental changes in circumstance. The Area Lead did not believe a personal condition was necessary to make the application acceptable. He did not believe that there was a justification to withhold planning permission. The officer recommendation was for approval subject to the change to condition 12 to include floor plans (ground floor plan 004B and first floor plans 005A)."

26. After objectors including the Claimant had spoken, members were reminded, in response to the comment of one member, that they "must be under no illusion that their decision was a re-determination of the application and it was not just limited to looking at condition 08 (the personal condition). Members must consider all matters afresh again as outlined in the officer's report and as amplified by the Area Lead. He asked members to have a completely open mind in reaching their decision."

27. Members resolved unanimously to grant planning permission. The reason for the grant was:

> "Notwithstanding local concerns, and in light of reasonable mitigation measures in the form of landscape planting and the external treatment of the building, the benefits of the proposed development in terms of employment opportunities and the contribution to the rural economy stemming from the expansion of an established business on its existing site, would outweigh any visual or landscape impacts. The scheme, for which a reasonable justification has been made, will provide a satisfactory means of vehicular access and adequate drainage without detriment to ecology, residential amenity or water quality. As such the scheme accords with saved policies ST5, ST6, EC3, EP1, EU4, EC8, TP2 of the South Somerset Local Plan. It is in accordance with the Development Plan taken as a whole, notwithstanding policy ME4, and the policies contained within the NPPF."

28. I now have to set out the policies at issue other than ME4. Mr Jones pointed to two policies in the ST section of the SSLP, dealing with the pattern of development, and setting out a hierarchy of settlements and areas for development outside the larger towns, which, he submitted, were relevant, and pointed to the development conflicting with the SSLP. ST1 listed Rural Centres, which were focal points for local employment, community facilities and shopping; ST2 listed villages which "are, in principle, appropriate for development". Lopen was not among them. But, countered Mr Whale, the members knew where the site was, on the edge of Lopen. ST3 provided for what should happen outside the defined development areas of towns, rural centres and villages, that is to say in the area where the application site lay: there, "development will be strictly controlled and restricted to that which benefits economic activity, maintains or enhances the environment and does not foster growth in the need to travel." Apart from exceptional local housing need, development opportunities in such areas were extremely limited.

29. ST5 sets out "General Principles of Development". It is introduced by paragraph 2.75 on which Mr Jones placed some weight: "As well as satisfying the overall strategy for the pattern of development, the principle of new development will also be considered against a set of criteria intended to ensure that basic planning objectives are met and the overall quality of life and environment of the District is maintained." ST5 itself states "Proposals for development will be considered against the following criteria", which I summarise as promoting a pattern of land use and transport which minimises travel, makes effective use of land giving priority to urban land, nature and heritage conservation, local character, satisfactory access, flooding and pollution, and infrastructure. Mr Jones pointed out that the report appeared to accept that the

proposal was not located where it could minimise travel, and Mr Whale responded that this was the only realistic option, as the report explained, for the expansion of this existing business. ST6 sets out design criteria to be met by proposals for new development "otherwise acceptable in principle". The report addressed them.

30. ME 2 had allocated sites for employment development; one of these was the Lopen Nursery site where the existing two Probiotics buildings and another two had been developed, but the allocated land had not included the proposed development site, although it appears to have been part of the Nursery site when in use as a nursery. ME3 was also relevant, and not discussed in the report, but it supported the thrust of ME4, with which the proposal did not accord. ME3 provided that, in addition to allocated land, proposals for development for employment use would be permitted in the development areas of the settlements then listed; but they did not include Lopen. As Mr Whale pointed out, ME3 is in the same vein as ST2 and the location of the site was clear; the policy did not apply to the application. The SSLP commented that the original allocation at Lopen had been justified by the absence of an alternative site to meet the needs of local employment users, by which it meant small-scale employment opportunities for local people, and taking account of "the particular circumstances of this site". I do not know when the Nursery use ceased on the application site.

31. Policy EC1 referred to the need to protect best quality agricultural land, but members knew that this was a site upon which substantial and now unused Nursery buildings stood. Policy EC3 matters: "Outside development areas, development proposals which are otherwise acceptable will be permitted provided that they do not cause unacceptable harm to the distinctive character and quality of the local landscape", and should, I summarise, respect the character and landscape of the area. Mr Jones pointed out that this only applied where development was already otherwise acceptable outside development areas, as this application site was; and merely causing no unacceptable harm could not make the development acceptable in principle. Mr Whale replied that members had concluded that the development was acceptable in principle. In the same vein, Mr Jones submitted that TP5, not listed in the reason for the grant of permission, was also relevant: "Developments which are likely to generate significant levels of travel demand will only be permitted where they are currently accessible to a choice of means of transport other than the car...." He submitted that the report accepted, but not in so many terms, that this policy was not met.

32. No issue arose over EP1, noise sensitive development, EU4 adequate drainage and sewerage facilities, EC8, habitat protection or TP2 which required a Travel Plan. Mr Jones' contention was that they did not go to the principle of whether this employment use was acceptable in this location. They would have to be satisfied wherever the development took place. Development could not be said to accord with the development plan simply on the basis of satisfying the generally applicable normal development control requirements, while breaching those that dealt with the principle of development in the proposed location.

The Submissions on Grounds 1 and 2

33. Mr Jones submitted that the Council had failed to apply s38(6) of the 1990 Act correctly, and had misinterpreted the policies in the SSLP and NPPF. These points overlap. Policy ME4 of the SSLP was the principal relevant development plan policy.

The report had wrongly proceeded on the basis that, if it conflicted with the NPPF, ME4 should carry less weight on that account, whereas the approach required by s38(6) would have been that the proposal conflicted with the development plan, which would then have required a judgment as to whether material considerations indicated a determination which did not accord with it.

34. Mr Jones submitted that the Council had not given any explanation for its view that the proposal did accord with the development plan, in the light of its view of the position as Lewis J found it to be, and Lewis J's own conclusion that the development did not accord with the SSLP. All this had simply been ignored. There had been no change of policy or other circumstance which could be taken to explain the change of heart in relation to the same application. It did not even say that there had been a change of heart, whether such a position by itself would have been an adequate reason or not.

35. Contrary, moreover, to what the report said, ME4 was not inconsistent with paragraph 28 of the NPPF, because, like the NPPF, it encouraged sustainable rural economic development.

36. The report had failed to consider relevant policies properly: ME4, ST5 and 6, EC1 and 3, EP1, EU4, EC8, TP2 and ME/LOPE/1 of the SSLP, and it had failed to consider at all policies ME3, ST2 and 3, and TP5. It was not rational for officers to advise or for members to conclude that the proposal accorded with ST5 (i),(ii) and (iv), or ST6 (iv) and (v), or with EC3 (i) and (ii). The report acknowledged that the site was not "in the most sustainable" location. The four policies wholly ignored were relevant, indeed key, policies.

37. Mr Whale submitted that officers judged and members accepted that the NPPF meant that planning permission should now be granted, notwithstanding the restrictions in ME4, and by implication those in other SSLP policies in the same vein. It was lawful for the weight to be given to development plan policies to be affected by the subsequent NPPF, in deciding whether the proposal accorded with the development plan. Non-compliance with one criterion did not mean that a policy was not complied with. The s38(6) point was, in any event, immaterial since the decision whether to grant permission or not would have been the same, regardless of the stage at which greater weight was given to the NPPF and less weight to ME4. Mr Jones said that that point was not made in the report, or in other evidence. The Council's approach to the consistency of ME4 with the NPPF was a matter of planning judgment on which it had reached a reasonable conclusion: unlike the NPPF it restricted rural business expansion to small scale development within development limits. ME4 was extensively considered in the report. Lewis J's judgment "did not fix for all time the issue as to whether the proposed development was in accordance with the development plan." If necessary, he would argue that Lewis J was wrong in his conclusion on whether the proposal accorded with the SSLP, but he could not remember whether that was what he had argued before Lewis J or not; he had certainly not submitted that the policies of the SSLP all told in one direction, though that appears to be what Lewis J held. In any event, *King's Cross Railway Lands Group v Camden LBC* [2007] EWHC 1515 (Admin) showed that a change of mind on the part of an authority was not of itself unlawful. The ELP policies were raised by the Claimant, discussed in the meeting, and members were correctly advised about the weight to be given to them.

Conclusions on Grounds 1 and 2

38. There are errors in the Council's approach to these issues. First, the Council clearly did adopt in 2014 a different approach to the development plan from that which Lewis J concluded it was adopting in 2013; it now concluded that the proposal did accord with the development plan. It succeeded before Lewis J, whether because of Mr Whale's advocacy or the judge's perspicacity, on the basis that it had concluded lawfully that the proposal did not accord with the development plan, but that material considerations had indicated a different determination. Indeed, it seems to me that Lewis J, in the penultimate sentence of [27] above, is reaching that conclusion partly because he saw all the SSLP policies to which the report referred as telling against the proposal; these included ST5 and 6, and EC3. This conclusion of itself, and what it said for the Council's previous position, were material considerations for the Council when it came to consider its decision again.

39. Yet the report simply ignored the conclusion of the judge, and the basis upon which the Council had succeeded on ground 1. It did not consider whether it was in fact now adopting a different stance, and if so why. It may not have even realised that it was doing so. The report reads, notably under the heading "Changes in Circumstance" as though nothing has changed. The report merely identified that Lewis J considered that it had not adopted an unlawful stance on the SSLP and its relation to the NPPF, which was true but only part of the story. It was significantly deficient in that respect because it did not alert members to the fact that a contrary course was now being urged on them. It did not consider whether there was a binding decision that the true interpretation of the policies meant that the proposal could not be judged by planners to accord with the SSLP, absent a change of circumstance. Nothing said to the members or read out to them deals with this. Mr Whale's submission that the judgment did not fix for all time whether the proposal accorded with the plan, since the weight to be accorded to policies might change, does not begin to deal with this point, nor did any of his other submissions. The decision of the Council was unlawful for failing to take into account those material considerations.

40. Although the Council's stance on whether the proposal accorded with the development plan is clearer than it was before Lewis J, and it is clear that the Council now does consider that the proposal accorded with the development plan, the basis for that view is regrettably unclear. The report's analysis does not involve any explanation of how the proposal accords with all or some of the relevant policies of the SSLP, or whether there are any which tell in different directions. Nor is there any express overall conclusion in relation to accordance with the development plan, save in the reason for the grant. Indeed, it is not so very different from the previous report.

41. The issue is whether the proposal can reasonably be regarded as in accordance with the development plan read as a whole? The report, discussing ME4 which is the crucial policy, treats it as unnecessarily restrictive in the light of paragraph 28 of the NPPF, in confining its application to small-scale expansion. This reduces the weight which the report considers should be given to it. That suggests that the proposal was not in accord with it, though the criteria for small scale expansion, if the proposal had been small scale, seem reasonably to have been thought to be met. ME3 in effect precedes and underlines the limited scope for economic development outside allocated sites or development areas; again it is concerned to avoid increasing traffic

where sites are not well served by public transport by only permitting small scale developments.

42. ST5 sets out criteria at least some of which were considered in the report under the heads of "Sustainability" and "Landscape and Visual Impact"; they are not considered in sequence, although there was a considered overall view in the report that the proposal was sustainable. There is scope for debate about how far the proposal would meet the criterion for minimising travel. Nor is ST5 set in the context of the settlement policies, which in ST3, dealing with the least favoured area for this sort of development, says that development in this sort of location should be strictly controlled to that which benefits economic activity (which this proposal does) maintains or enhances the environment (which would be debatable) and does not foster growth in the need to travel (which the proposal would). ST6 sets out criteria for development which is acceptable in principle; there is scope for debate about the point at which a development becomes acceptable in principle, since ST6 ought to apply to it, even if it does not satisfy the policies in the plan, but is otherwise meritorious. But satisfaction of ST6 cannot make the development of itself "acceptable in principle." The same point is true of EC3. TP5 appears not to have been met, in the light of the report's comments on the use of the private car. Compliance with the various ordinary development control policies do not go to the principle of development in this location.

43. While I accept that conflict with one policy does not mean that the proposal cannot accord with the development plan as a whole, and that policies may pull in different directions, and I also accept that the judgment on that issue is one of planning evaluation and not one for the Court, I have difficulty in seeing how the policies, properly interpreted, permit of the conclusion which the Council reached. The report appears to accept conflict with the principal policy directly in point, ME4, as is inevitable since this is not small –scale development, as is acknowledged in the discussion of ME4, and again in the conclusion. The fact that the criteria are or may be met, does not mean that the premise for the application of the criteria is met, although that may diminish the weight to be given to the conflict. ME3 underlines my point but is not a separate point. The ST policies have the same effect. They do not pull in a different direction, but underline the limitations on development in this location for employment, traffic generating purposes. I can see, but I am not clear that this is how the point was reasoned, that the combination of need and lack of impact beside large buildings on allocated land, might make a development acceptable in principle, even though in conflict with the locational policies of the plan. I can see that the bulk, but not all of the criteria in ST5 and 6, are met. The principal issue, locational principle apart, but reflecting it, is the lack of public transport for employee journeys, to which a broad approach has been taken by the Council in the "Sustainability" section. The resolution of that issue would have been much easier if the Council had addressed the relevant policies in an orderly fashion. But that reasoning has not been provided, nor was the case argued that way by Mr Whale. I am not prepared to conclude that the decision that the proposal accorded with the development plan was rational on the basis of a proper interpretation of the policies and of ME4 in particular. I cannot see what policy the proposal complied with which weighed against ME4, which was not complied with, so as to enable it to be said that the proposal accorded with the development plan read as a whole. This it appears to me is what Lewis J also concluded. The decision was unlawful for that reason too.

44. My reading of the report is that the Council concluded that the proposal accorded with the development plan on the basis that the crucial policy, ME4, should be given less weight because it was not wholly consistent with paragraph 28 of the NPPF. That is not a lawful approach. Although the report set out s38(6), it muddied the waters from the start by referring to the reduced weight to be given to ME4 in the light of paragraph 28 of the NPPF. The conclusion reflects the same muddying of the waters as between accordance with the development plan and the effect of the NPPF. The NPPF is but another material consideration; it may mean that conflict with the development plan is to be given less weight, but it cannot bear upon whether the conflict exists in the first place. This was an unlawful approach.

45. If it had been a lawful approach, reading ME4 so as to comply with paragraph 28 of the NPPF, I would have regarded the decision that the proposal accorded with the development plan as lawful, in the absence of other error. It would have meant compliance with the main policy against which any aspects of non-compliance in relation to traffic generation could be set in an overall planning judgment. Certainly, the overall analysis of the issues and the conclusion on the factors themselves is a reasonable one. The attack is on the structure provided to that analysis. The report emphasises, as do the minutes of the meeting, that the proposal was considered acceptable in the light of its purpose, the assistance which it would give to the local rural economy, location next to the industrial estate, the buildings on the former nursery site, the lack of impacts, and the satisfaction of general development control criteria.

46. I do not accept Mr Jones contention, in so far as material, that ME4 and paragraph 28 of the NPPF are materially consistent. They are to some extent consistent but not in these circumstances. The NPPF is positive, supportive, welcoming, not restricted to small scale expansion or business. It focuses attention on sustainability, and that was fully considered by the Council. For some developments, ME4 and the NPPF would lead to the same conclusion but not for others, and this is one for which the Council can reasonably conclude that paragraph 28 makes a very substantial difference. Paragraph 215 also means that where there is a significant inconsistency, as the Council could and did reasonably conclude there was in relation to this proposal, significantly less weight should be given to conflict with the development plan. The proposal would not conflict with ELP policy EP4, on the Council's analysis of the issues, since the restrictions have been much diminished and it does not appear to conflict with the NPPF. But the limited weight given by the Council to ELP policies cannot be criticised in law. I deal later with the argument about consistency.

47. Mr Whale stated that the errors to which I have referred, if errors they were, were of no significance since the Council would have reached the same decision in any event. That was in reality a submission about discretion. The meeting was told that officers judged the NPPF to be an important material consideration, which indicated that planning permission "should be granted in any event." I also acknowledge that when Lewis J held that the Council had properly concluded that the development did not accord with the development plan, he went on to hold that its decision that permission should be granted was flawed only by the personal condition. That is to say, it could have lawfully granted permission, having concluded that the proposal did not accord with the plan.

48. Although the decision was flawed in the ways I have held, I am not prepared to quash the decision on that basis, for a number of reasons, but the primary one is this. The fundamental issue in the planning decision was the relative weight to be given to the SSLP, and ME4 in particular, as the central applicable policy, and to paragraph 28 of the NPPF. Whichever way that issue was tackled, and at whatever stage in the reasoning, the Council was entitled to conclude that ME4 was not consistent with paragraph 28 in its application to this proposal, and that, whether because of paragraph 215, or otherwise, it was entitled or obliged to give ME4 less weight than it otherwise would. Its decision was that it would give less weight to ME4, and decisive weight to paragraph 28. That is entirely a matter for its planning judgment. It was wrong to give ME4 reduced weight on that account when considering whether the proposal accorded with the SSLP as it was irrelevant to that issue; but it would have been fully entitled to give it exactly that same reduced weight as it did and to give paragraph 28 the same decisive weight as it did, when considering whether material considerations indicated a determination otherwise than in accordance with the development plan. And the decision would have been exactly the same, the same reasoning would have been deployed, no additional factors would have been brought into play. That is clearly the balance that it intended to and did strike. The analytical framework would have been different, but its legal correctness, as I judge it, could not logically have affected its output.

49. I am reinforced in that view by the fact that when the Council did conclude that the proposal was not in accordance with the plan but granted permission, as the judgment of Lewis J held it had, it came to that decision without error of law. That also means that the error of the Council, in not taking the judgment of Lewis J into account in relation to whether the proposal accorded with the development plan, also should not lead to the quashing of the decision. Had the Council taken it into account and decided that it ought to adopt the same approach, the result would have been a grant on the basis found lawful by Lewis J. If the Council had said that it had changed its mind about whether or not the development accorded with the plan, and now thought that it did, it would have been in the same position as now.

50. Although Mr Jones said that certain policies were not listed or taken into account, as part of his argument that the proposal could not accord with the development plan, the ones not listed, notably ST1 and 2, do not really add to the argument. The crucial one was ME4; the others reflect or support its restrictions, and to the extent that they do, they would also, for these purposes, be subject to the NPPF in their application to rural economic development. I am not deciding this issue on the basis that if the decision were quashed the outcome would inevitably be the same, since the ELP is now as I understand it adopted or close to adoption. It might work out differently; it might not. ELP4 and SS2 might pull in different directions. It is just that all the errors are immaterial to the actual decision which was made.

51. I am not reaching any general conclusion about the effect which the correct analytical structure may have on a planning decision, and how the factors which indicate a decision not in accordance with the development plan may weigh. S38(6) has a clear purpose and should be complied with. But this case has quite distinct features: (1)the way in which the decision on whether or not the proposal accorded with the plan was affected by the weight given to the NPPF as opposed to the plan policy, whereas that weighing process, a perfectly proper approach and one which the Council was

entitled to make decisive, comes later; (2) the analytical error did not cause any relevant factors to be omitted; (3) the correct analysis had already been undertaken and had lead to the same result, upheld by Lewis J. I also add that Mr Jones mentioned that the Departure Direction would have applied, a point not raised before Lewis J. No such Direction was placed before me and I note that the Direction I consider in Ground 4 removed without replacing as such the earlier specific Departure Direction.

Ground 3: inconsistency with other decisions

52. This was Mr Jones' ground 4, but I take it here, as it follows on more naturally. Mr Jones submitted that policy SS2 of the ELP had been successfully used by the Council to defend refusals of planning permission on appeal. It ought to have considered those decisions expressly but did not do so. It was acting inconsistently in its decisions. SS2 would have told against the development proposed here, as the employment opportunities would not have been commensurate with the scale of Lopen, or increased its sustainability. SSI laid out the settlement strategy, in which rural settlements would be considered as part of the countryside to which national countryside protection policies applied, except where SS2 applied. SS2 permits development in rural settlements but "strictly controlled" and limited to that which provides employment opportunities appropriate to the scale and character of the settlement and increase its sustainability. Mr Jones cited two Inspector decisions in July and November 2014 one on a single dwelling and the other for thirty dwellings in which, in dismissing the appeal from the Council's refusals of planning permission, the Inspectors said that policy SS2 of the ELP could be given significant weight as it had not been, and I quote from the most recent, "subject to substantial objection... and is broadly compatible with the criteria for assessing sustainable development put forward in the [NPPF]." Mr Whale submitted that they were all distinguishable.

53. The issue which such an argument raises is either that a material consideration has been ignored, or that, in the absence of explanation, there has been an arbitrary decision, presumably the one adverse to the Claimant's interest. I do not accept that there is a duty on the Council to give reasons for distinguishing other decisions which are said to be inconsistent. In *North Wiltshire DC v Secretary of State for the Environment* (1993) 65 P&CR 137 at 145 Mann LJ held that a previous planning decision is a material consideration if it is legally indistinguishable. If the decision-maker is to depart from it, reasons must be given. *R (Midcounties Co-Operative Ltd) v Forest of Dean District Council* [2014] EWHC 3059 (Admin), applied that approach to a judicial review of the decision of the local planning authority. I disagree with that. *North Wiltshire DC* was a statutory challenge to an Inspector's decision, to which the statutory duty to give reasons applied, as were *Dunster Properties Ltd v The First Secretary of State* [2007] EWCA Civ 236, [23], and *Fox Strategic Land and Property Ltd v SSSCLG* [2012] EWHC 444 (Admin). The cases which refer to such a duty are those dealing with decisions of the Secretary of State to whom an explicit duty applies, but not even then, a duty to give reasons explaining what he has made of every material consideration. No such duty exists for local planning authorities. The relevant arguments would be the ones I have identified. The reasons duty on a Council, not subject to a statutory duty to give reasons, save at that time by way of a summary of reasons for the grant, cannot be greater than that on the Secretary of State, who is subject to a statutory reasons duty. The risk is that, absent reasons, a

court will the more readily conclude that a material consideration was ignored or that an arbitrary decision was reached; but that does not create a duty to give reasons for any conclusion reached on those earlier decisions as considerations material to the later decision. And on the *North Wiltshire* decision, the duty only arises where the decision is indistinguishable; it is not a duty to distinguish decisions.

54. In argument, neither of the two Inspectors' decisions dealt with employment development. Neither ME4 or ELP4 fell to be considered. SS2 adds nothing obvious to the argument about them, so as to make it material nor does the absence of reference to it in the report show some unlawful inconsistency.

55. On Mr Jones' next supposedly inconsistent decision, I could gain nothing from the fact that the enclosure of saw pit and storage areas and replacement buildings was referred to, in the grant of permission by the Council, as consistent with ME4 and the NPPF, or with ST3. It is not difficult to see that for some proposals, refusal or grant would be consistent with both. I see no case that that decision was material to the determination of the proposal, or that one or other decision must be unlawful because of necessary inconsistency and hence arbitrariness. More noteworthy is the role of rural employment.

56. I was also referred to: (1) the decision of an Inspector agreeing in September 2014 with Mr Noon that a housing development of up to 110 dwellings on the edge of Crewkerne, reliant on the private car, would not meet the sustainable transport objective of the NPPF or ST5; (2) an Inspector dismissing an appeal in July 2014 against the refusal of planning permission for a single isolated dwelling in the countryside on the grounds that ST5 would not be met; (3) evidence from the Council in an undecided appeal that a site on the periphery of Wincanton for housing would not be sustainable because of its expected extensive private car use; (now allowed I was told), (4) the Council's refusal in May 2014 of planning permission for a dwelling consolidating sporadic development in the countryside on the grounds that it would breach the NPPF and policies ST5 and 6; (5) the recommended grant of permission for four industrial units on the site of a former quarry in the open countryside; it "did not strictly conform" with the SSLP or ELP, but the shortfall in employment land in the area, and the social and economic merits of the scheme meant that those policies were outweighed, the proposal generally accorded with the objectives of sustainable economic development in the NPPF and was therefore considered acceptable.

57. I do not see those as material considerations or necessarily inconsistent. The first four deal with residential development and do not give rise to employment policy issues, which were crucial here. They are not material, and certainly, even applying *North Wiltshire*, could not call for reasons for what is said to be an inconsistent approach. The Council took employment factors into account in reaching its broad conclusion on sustainability. This is therefore consistent with the fifth decision above, the only one of the five which did involve employment uses.

58. Mr Jones also submitted that a decision of an Inspector in August 2013, dismissing an appeal against the refusal by a different local planning authority of planning permission for industrial development, and sent by the Claimant to the Council before the meeting in October 2014, was a material consideration. That is not a realistic submission; it does not consider the same policies. Even if they are along the same

lines, it is not for every Council to consider every other decision made by other Councils, even neighbouring ones, on issues which resemble that which it had to consider. There can be no basis for alleging unlawful inconsistency either.

59. Accordingly, I reject this ground. On examination, there is nothing in it.

Ground 4: The Town and Country Planning (Consultation) (England) Direction 2009

60. This was Mr Jones' ground 3, but it comes more logically here. Article 9 of this Direction, made under s77 of the Town and Country Planning Act 1990 and Article 10 of the General Development Procedure Order 1995 requires the local planning authority to consult the Secretary of State, if it is not minded to refuse planning permission for a type of development to which the Direction applies. The Secretary of State can then decide whether to issue a direction for example, calling it in for his own decision. . I also note that this Direction has superseded the 1999 Departure Direction.

61. One type of development to which the Direction applies is "development outside town centres", defined by Article 5 of the Direction as follows:

> "(1) For the purposes of this direction, "development outside town centres" means development which consists of or includes retail, leisure or office use, and which –"
>
> (a) is to be carried out on land which is edge-of-centre, out-of-centre or out-of-town; and
>
> (b) is not in accordance with one or more provisions of the development plan in force in relation to the area in which the development is to be carried out; and
>
> (c) consists of or includes the provision of a building or buildings where the floor space to be created by the development is:
>
> (i) 5,000 square metres or more; or
>
> (ii) extensions or new development of 2,500 square metres or more which, when aggregated with existing floor space, would exceed 5,000 square metres.
>
> (2) In calculating the area of existing floor space for the purposes of development referred to in paragraph 5(1)(c)(ii) this shall include retail, leisure or office floor space situated within a 1 kilometre radius of any part of the same type of use to be comprised in the proposed development...."

63. The Secretary of State had not been consulted under this Direction. Mr Jones submitted that he should have been consulted since, although the development itself was somewhat below 5000 sq ms, it exceeded 2500 sq ms, it included office floorspace, was out of town, did not conform to the development plan, and fell within sub-paragraph 5(1)(c)(ii). It fell within that sub-paragraph because the floorspace

proposed was 3558 sq ms, which included an element of office floorspace, and so the whole qualified for consideration. If the total of 3558 sq ms was aggregated with all the floorspace on the Lopen Nursery site, which also included some office floorspace, and indeed it could all be used for B1 if the occupier so chose, the total floorspace was over 5000 sq ms. The relevant floor area of the existing buildings, A C and D, was 4188.8 sq ms of which the rating records showed 735 sq ms to be office floorspace, and none to be retail or leisure. There was no relevant floorspace in building B. Mr Jones however could not show that the total existing floorspace in office use amounted to the difference between 3558 sq ms and 5000 sq ms; (in reality there was no retail or leisure floorspace to consider). Mr Whale submitted that even if the proposal did not conform to the development plan, that sub-paragraph did not apply to it, since "the existing floor space" as defined, which could only be found within the existing development on the Lopen Nursery site, required account to be taken only of retail, leisure or office floorspace, and of floorspace actually used for those purposes, and did not include the total existing floorspace, used for whatever purpose. On that basis, the office floorspace, which was all that mattered, did not amount to sufficient to take the total proposed floorspace plus existing office floorspace over 5000 sq ms.

64. The difference between the parties is quite narrow: does "existing floorspace" mean all existing floorspace or only so much of it as is in retail, leisure or office use? In my judgment, the answer is plainly that it is only so much of the existing floorspace as is in use for any of those three purposes, and is in existing use. This point was taken before Lewis J perhaps with a different facet to the argument. He rejected it; [32]. I agree with him and what he says about actual use. The purpose of (c) (ii) is to enable aggregations of floorspace actually in certain types of use, to be considered with the whole of the proposed floorspace if such a use was proposed in part. It is looking at the actual position and not to what could be done without permission.

65. Mr Jones sought assistance from the decision of Sales J in *R (Lady Hart of Chilton) v Babergh DC* [2014]EWHC 3261 (Admin). This is misconceived. The issue in that case was whether the Direction applied where the total proposed floorspace exceeded 5000 sq ms but considerably less than that was for office use. The issue here, aggregation with existing floorspace did not arise. Sales J held that on the issue before him the ordinary meaning of the words of the Direction were clear. Where "development which consists of or includes retail, leisure of office use, and which … 5(c) consists of or includes the provision of a building… where the floorspace to be created by the development is : (i) 5000 square metres or more…" meant that the total of the proposed floorspace was relevant, once more than a de minimis area of floorspace for one of those three uses was included. The words "consists of or includes" were clear. There was no linguistic justification for confining the relevant proposed floorspace to that which consisted of retail, leisure or office floorspace.

66. The language of paragraph 5(2) is equally clear in setting a different basis upon which existing floorspace is brought into account. It is plain that the calculation is not intended to cover all floorspace, regardless of its actual use; the language would have been very simple if that had been intended. It is the calculation in (2) which includes one or more of the three types of floorspace, and that reflects the fact that all three may be proposed for the new building. Taking this case as an example where only office floorspace is proposed of the relevant three uses, the aggregation only occurs in

respect of office floorspace within one kilometre radius of that of type of floorspace in the proposed development. The aggregation does not include any retail or leisure floorspace within one kilometre. If retail floorspace were also proposed, a one kilometre radius would have to be drawn from the proposed retail element. The existing retail floorspace within that radius would also have to be aggregated. That is the only way to give meaning and effect to the tailpiece to the definition of "existing floorspace".

67. This language, which concerns the specific retail, leisure or office floorspace within one kilometre of "any part of the same type of use to be comprised in the development", is very telling. It matches office floorspace to office floorspace, retail to retail. This language does not include the whole floorspace of the existing buildings in which some office or retail uses were being undertaken, and stands in contrast to the broader approach to the 5000 sq ms of the proposed development. Such an intention would have generated quite different language, akin to that in the definition of "development outside town centres". So precise a focus on the particular part of the proposed development which was the office floorspace, would not sensibly underlie a calculation which included the whole of any building, within a one kilometre radius in which there was a more than de minimis area of office floorspace, such as a block of flats over a ground floor which included a solicitor's office use to the front. There is every reason for a different approach to aggregation, from that adopted when considering the proposed buildings as a whole.

68. This ground is dismissed.

Ground 5: Conditions

69. Mr Jones' first argument concerned a condition which had not been imposed. He submitted that the Council ought to have imposed a condition tying the occupation of the proposed building to the occupation of the two adjacent buildings already owned and occupied by Probiotics. At present, there was nothing to stop the new building being sold to or occupied by some other body. The owner had not sold the land for the proposed development to Probiotics. Probiotics had not been offered the existing building B; it might not be offered this building. Both in 2013, when the Council considered that a personal condition was required because of the basis of grant, and in 2014 when it considered the importance to Probiotics of expanding on site, the particular circumstances of the occupier were taken into account as important factors, yet there was nothing to prevent some other occupier using the building. There was no link at all. This was also relevant to traffic generation, as the uses generate different flows and yet no planning permission would be required to change from one use to the other.

70. Mr Whale submitted that the members were clearly aware that no personal condition could be imposed. They were aware that there was no link by condition between the permission and occupation by Probiotics. They were also aware that Probiotics was a local business, already on the adjacent site, with a need, and on any view was a very likely occupier. The proposal would also provide rural employment opportunities even if Probiotics were not the actual occupier in the end. The impacts and sustainability issues would be much the same.

71. In my judgment, Mr Jones' argument depends on the extent to which it can be said that the occupation of the proposed building by Probiotics was crucial to the grant of permission and then, if so, whether or not, in the circumstances, it was irrational to grant the permission without some form of tied occupancy condition, or whether it showed that the Council had ignored the risk that Probiotics would not occupy the building.

72. As to the first, it is clear from the report that a very important part of the justification for the development was not that a speculative building would advance the rural economy without any great harm, but that there was an existing employer on site which needed it, and which would lead to further rural employment. Part of the justification under paragraph 28 of the NPPF was to help such businesses, and part of the reason why ME4 was felt too restrictive was that it assisted only small scale expansion of businesses. The nature of the positive economic effect related to the extra jobs calculated on Probiotics' figures. The "justification" for the proposal concerned Probiotics' needs, and that is referred to in the reasons for the grant of permission. The reference to the proposal being "acceptable in planning terms" and so a personal condition was not justified, does not imply that the proposal would have received permission for a purely speculative building, regardless of any known or potential occupier.

73. As to the second, I do not accept that the Council were rationally required to impose such other conditions as they could, to tie the occupation to Probiotics. The issue was addressed, including a tie to occupation of the existing Probiotics buildings. Such conditions would not alter the impacts. The traffic generation might be different but other conditions were regarded as dealing with that adequately. The assessed pattern of travel did not relate to Probiotics' staff as such, but covered all the employees on the Nursery site. The building was seen as acceptable in planning terms. If it were built, and Probiotics were unable to occupy it, for whatever reasons, the Council clearly contemplated as acceptable, and it was for their judgment, that some other employer would occupy it, and it is difficult to see what benefit there would be then in a tying condition. If it were not built, neither harms nor benefits would arise. If it were built but not occupied at all, it is difficult to see what a tie could achieve, but against that risk, there was an existing employer on the adjacent site, with a clear need for this development, who was promoting it. All this the Council clearly had well in mind in reaching its decision. The position was further discussed in the meeting: Probiotics had supplied all the information reasonably required to show that this was not a speculative application. I do not accept Mr Jones' first argument.

74. Condition 13 gave rise to a different but related argument: it provided "The development hereby approved shall be carried out in accordance with the following approved plans: … 3030/PL-004B Floor Plan, 3030/PL-005 A Floor Plan." The description of the proposal in the report said that the scheme would provide for 1322 sq ms of B1 office space, 1322 sq ms of B2 production space and 914 sq ms of B8 warehouse storage. But there was no condition to control a change in the mix of uses after the initial construction of the development. That, submitted Mr Jones, had been the intention behind condition 13, but it was clearly ineffective for that purpose. The Council had intended that permission be granted on the basis that the mix of uses would be controlled but permission had actually been granted without that control; a material consideration had been ignored. The building could be used for a varied mix

of uses of just one, not the mix on the basis of which Probiotics' application had been assessed. Such a condition would have been a further means of tying the occupation of the building to Probiotics' use, and was relevant to the traffic justification.

75. I see no evidence that the purpose behind the condition relating to the floor plans was to tie the mix of uses to those in the application. I agree that it is extremely unlikely to be capable of achieving that, and that suggests to me as well that that was not its purpose. The report and minutes do not give such an impression. The reason for the condition is not very informative, but its vagueness does not suggest that it had as its aim which Mr Jones attributes to it. So I am not persuaded that the Council had this clear aim, which was not realised by the language of the condition. It was merely some very basic form of control of the floor plans. The question of whether there should have been a condition fixing the mix of uses is a different one. This was not discussed either in the context of helping to assure occupation by Probiotics, or restricting change to the mix of uses. The Council had given adequate thought already to whether some form of occupancy tie was required and had rejected it, so that could not have been a reason behind the condition. I do not accept that any error of law has been shown in this contention by Mr Jones.

76. Mr Jones' next argument related to the conditions which were imposed on the grant of permission. Those relevant to this point were numbered 2,6,10 and 11. The four shared the same allegedly objectionable characteristic. They required prior approval by the Council of respectively materials, external lighting, replacement of trees and plants which died within five years of planting with trees and plants of similar size and species, and details of levels across the site, including internal floor levels. Each condition enabled the approved details to be altered if the Council agreed in writing. The precise language varies from condition to condition; nothing turns on those variations. To illustrate it, Condition 11 dealing with levels ends: "Once approved such details shall be fully implemented unless agreed otherwise in writing by the local planning authority." Mr Jones submitted that this power to vary the previously approved details meant that the development could assume a completely different appearance from approved on the first approval of details. This sort of tailpiece was void; he relied on a judgment of mine in *R (Midcounties Co-Operative Co Ltd) v Wyre Forest DC* [2009] EWHC 964 (Admin).

77. That judgment has its virtues, but relevance here is not one of them. The condition primarily at issue there, condition 6, would have permitted the development, on the basis of a written approval, and without a fresh planning application, to exceed in retail floorspace what had been applied for, consulted upon, assessed and permitted. That is not the position here. The other condition,4, was not a condition reserving detailed matters for later written approval, but was a condition permitting variations in what was already approved as part of the permission itself. That is not the position here either. The conditions here are quite conventional conditions, requiring approval of matters of detail. Even if all of these were reserved matters requiring approval in the strict sense applicable to an outline permission, the application for that approval does not require consultation, nor once approved is there a bar on further applications for approval. There is no formal procedure for approval of details reserved for subsequent approval, but which are not strictly reserved matters. There is no reason why such an approval should not be capable of variation, for which approval is sought in a manner which is not significantly different from that in which the original

approvals will be sought. This does not change the obligation to provide something which has been approved. The development will still be the same development. Once the building is built, changes may or may not require planning permission, but that will depend in the usual way on the general planning law. There is nothing remotely unlawful about these conditions.

78. Mr Jones' inexhaustible ingenuity lead to a yet further argument, in consequence of the language of the three informatives: he submitted that their imperative language showed that they should have been conditions instead. They relate to the discharge of foul or contaminated drainage from the site into other waters, oil and chemical storage tanks, and adherence to the findings and recommendations of the Protected Species Survey. The language of one suffices to illuminate the point:

> "You are reminded that there should be no discharge of foul or contaminated drainage from the site into either groundwater or any surface waters, whether direct to watercourses or via soakaways/ditches. Prior to being discharged into any watercourse, surface water sewer or soakaway system, all surface water drainage from parking areas and hardstandings should be passed through trapped gullies with an overall capacity compatible with the site being drained."

79. I cannot accept that argument. An informative may be imperative in tone but it is still not a condition, and these were obviously not conditions and were never intended to be. One purpose of informatives, which it appears ought to be better known, is to remind the developer that there are other obligations to be complied with, policed by bodies other than the local planning authority: the Environment Agency for discharges to watercourses and drainage; the Health and Safety Executive for hazardous chemicals, and Natural England for wildlife matters. This is alluded to in the report. That is the reason, I judge, why these informatives are what they are and not conditions; it is not spelt out because it is obvious. Mr Jones did not address whether the informatives could lawfully be conditions at all, or if lawful conditions, whether they could be imposed conformably with national policy guidance on conditions. I very much doubt it.

80. This ground fails, in all its facets.

Ground 6a: The need for Environmental Impact Assessment

81. Mr Jones' main point under ground 6 was that the screening decision, that no Environmental Impact Assessment was necessary, was itself unlawful. He contended that the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 SI No. 1824 had not been complied with. He did not repeat the argument that this was a Schedule 1 development.

82. It is clearly a Schedule 2 development. The existing four buildings on the former Nursery site constitute an industrial estate development project within paragraph 10 "infrastructure projects" of Schedule 2. The proposal comes within paragraph 13 (b) of Schedule 2 as "any change to or extension of an [infrastructure project] where that development is already authorised [or] executed." But the development would not become Schedule 2 development unless "the development as changed or extended

may have significant adverse effects on the environment". The alternative way in which a change might become Schedule 2 development, namely that thresholds or criteria in column 2 of the Schedule 2 of the table to Schedule 2 were met or exceeded by the change or extension itself, did not apply.

83. Schedule 2 development is "EIA development" if it is "likely to have significant effects on the environment by virtue of factors such as its nature, size or location". The screening opinion here was the Council's decision on whether this Schedule 2 development was indeed EIA development. By regulation 4, it had to take into account relevant selection criteria for Schedule 2 development in Schedule 3 which include in paragraph 1(b) "the cumulation with other development". This is where Mr Jones focused his argument.

84. The Council's first opinion in February 2012 concluded that no EIA was necessary. This led to the Claimant's application to the Secretary of State's National Planning Casework Unit. This, on 13 April 2012, also concluded that no EIA was necessary. Its officer thought that the building would have an incongruous appearance especially when taken in combination with the existing development, but for various reasons did not regard the landscape effects or visual intrusion as significant. He also rejected the view that the cumulative traffic effects would be likely to be significant. The Claimant thought this did not deal with various issues adequately, including cumulative impact. Her solicitors wrote to that effect, but the Secretary of State, responding on 31 August 2012, came again to the same decision: he had not looked at the effect of the extension in isolation, "particularly with respect to the visual impacts of the development, noise and light pollution and traffic impacts."

85. The most recent opinion by the Council of 15 October 2014 set out the array of materials considered. There had been a site visit. The first issue concerned Schedule 1 and so is not directly relevant to the arguments now pursued, but I note that the proposal was considered for that purpose on its own and cumulatively with the buildings already occupied by Probiotics. In relation to Schedule 2, and accepting that the proposal fell within Schedule 2 in relation to which the issue was whether it was likely to have significant effects on the environment, the officer commented : "Having very carefully scrutinised the relevant material, and reconsidered its original screening opinion, the Council considers that the proposed new building and its use is not likely to have significant effects on the environment whether looked at in isolation or cumulatively with other development." It repeated that point in the overall conclusions.

86. Box 27 on the checklist to the August 2014 screening pro forma completed by Mr Noon sets out what must be considered in relation to cumulative effects. He wrote that the factor to be considered was "cumulative impact of Lopen Head site as a whole" and adjudged it to be of "localised significance only". He had had the benefit of a landscape report from the Council's landscape architect in July 2014, commenting on the report presented on behalf of the Claimant. He disagreed with what the Claimant's report said about cumulative impact, saying that he saw "insufficient increase in built form that is likely to generate "significant" additional effects ...."

87. The 2014 Officer Report reminded the Council that it had already concluded that no EIA was necessary, and that the matter had been raised with the National Planning

Casework Unit who twice reached the same conclusions that the proposal was not EIA development. This was set out more fully in the first report. It had been objectors who had written to the Secretary of State raising a variety of reason as to why an EIA was required. A further screening opinion had been requested which again concluded that the impacts of the development were not such as to require EIA.

88. Mr Jones submitted that cumulative impact had to be tested in two ways: first, the additional impact of the new building had to be considered, taking the existing buildings as the baseline, in effect allowing them to reduce the impact of the proposed building; second, the impact of the proposed building together with the impact of all the development which would be changed or extended by the proposal, existing buildings A-D on the Lopen Head site, had to be considered, because none of it yet had been subject to EIA. It would be different if there already had been an EIA; the extension could then have been considered under his first test This meant that the Council needed to consider whether the five buildings together were likely to have significant effects on the environment.

89. The officer had erred in his consideration of this issue since he had focussed only on the proposed new building and on the additional effects, marginalising them, notably in relation to landscape impact. The officer had acknowledged before the first permission was granted that the buildings would have a significant landscape impact. He had ignored the second necessary approach.

90. I reject these arguments. It is true that the officer did not apply that second test; he would have been wrong to do so. The first test may not do the requirement full justice either. The statutory language is clear. Applied here, the question is "May the Nursery site, (A-D) as changed or extended by the proposal, have significant adverse effects?" The answer cannot be that it does because the buildings, as unchanged and unextended, did or may have done so, even though the new building is utterly insignificant. The assessment would then be of a development already permitted and lawfully constructed, and in relation to which the highest degree of current significant impact from existing and approved buildings would be irrelevant to the question to be asked. The fact that there has not been an earlier EIA is wholly irrelevant to the question which now has to be asked, but the fact that Mr Jones needs to qualify that second test in that way shows it to be untenable. The question is directed at the effect of the change, whether that is the effect of the change alone, or whether that has some other effect on other permitted development.

91. Mr Jones' reliance on R *(Baker) v Bath and North East Somerset Council* [2009] EWHC 595 (Admin), [2010] 1 P&CR 4 is misplaced. The principal issue in the case was whether or not the earlier domestic Regulations of 1999 had properly transposed the Directive. Collins J concluded that they were deficient in certain respects, which meant that the Council had not considered whether a screening opinion was necessary, when there were issues which required screening. At least one issue was whether there was a cumulative impact to be examined where permission at site A would intensify the use and impact of site B some distance away, although the facts are not altogether clear. The head note encapsulates the two relevant passages from the judgment of Collins J at [44-45]:

> "The court clearly was able to disapply a particular provision of the Regulations if that provision was inconsistent with the

> Directive which it purported to implement. It was necessary to look at the effect of any modification on the project or on the development, and to see whether the whole, as modified, had or was likely to have other effects which needed to be taken into account and could require an EIA, albeit that they did not fall themselves within the criteria which had been adopted b the Member state. It was plain beyond any peradventure that it was not appropriate, in the light of the jurisprudence of the European Court of Justice and the purpose behind the Directive, to regard only the modification itself and not the effect on the development as a while of any such modification to it."

92. Collins J referred, [45], to an ECJ judgment in support of this approach, *Ecoligistas en Accion-Coda v Ayuntamiento de Madrid* [2008] C-142/07. This concerned the problem of environmental assessment of a ring road, split up into various sections. The Directive was not to be circumvented by failing to take account of cumulative impacts in such a situation: the project should not escape assessment when the sections, taken together, were likely to have significant effects on the environment.

93. The Madrid ring road and *Baker* waste cases support my conclusion: the effect of any one section of the ring road is to make the traffic heavier on the other sections or to bring them into use; the effect of that use is relevant to cumulative effect because it alters the way in which other development is used. The grant of permission for waste processing at one site added to the transport and processing of decomposing waste at another site. The cumulative impact was relevant. Here, the visual and landscape effect of the new building is minimised by its location in relation to the existing large buildings, and it does not alter the way in which they are used. That is relevant to cumulative impact, although reducing it. That was considered. This ground is not arguable.

Ground 6b: Delegation

94. There is no challenge to the principle that the power to make decisions on screening opinions under the Environmental Impact Assessment Regulations can be delegated to officers and officers can sub-delegate that power to other officers; section 101 Local Government Act 1972. In 2005 the Council delegated authority for decisions on screening opinions to the Development Control Manager, now known as Assistant Director (Economy). Nothing turns on these name changes. The power to sub-delegate from one officer to another resolved upon in 2006 by the council requires this further delegation "to be in writing, dated and signed by the officer delegating the authority" and identifying the post to which the functions had been delegated. Copies are to go to the Democratic Services Manager.

95. On 15 June 2010 the AD(E) sent a memorandum by email to David Norris, Development Manager, and Adrian Noon "Area Leads" and others saying,

> "Under the terms of Section 6 of the Council's adopted Scheme of Delegation I hereby authorise you to carry out, on my behalf, the functions allocated to you in the attached delegation table."

Underneath was typed "Simon Gale, Assistant Director (Economy)".

96. Mr Jones' first point is that the email was not "signed". Signing required something more than the typing of the name; how much more he could not say: handwriting would suffice; he was unsure about an electronic or facsimile signature. What had been done was simply not enough and Mr Noon had no authority to make the screening opinion decision as he had done.

97. It is not hard to see why this point is within a ground for which permission to apply for judicial review was refused. In simple language, that name at the bottom of the memorandum is a signature for the purposes of section 6 of the scheme of delegation, and has been accepted as such by the Council, which has conducted its business on the basis of the continued effectiveness of the memorandum. When the Council used the word "signed", it understood that email existed and that officers would use it to communicate with each other and especially with more than one at one time, that the email provided the record, that the requirement for a signature was to confirm that it was the AD(E) for the time being who gave authority and not someone else without authority, false use of the AD(E)'s name, which was not suggested to have occurred, would readily be detected. On Mr Jones' argument even if Mr Gale had typed his name himself, it would not suffice.

98. What Mr Jones next submits is that there was a new scheme of delegation in 2011 which replaced the 2005 scheme, the memorandum of 2010 could not survive the demise of the 2005 scheme, and in the absence of a further memorandum after 2011, only Mr Woods had authority to make a screening opinion decision as that had been expressly retained in the new scheme. I could not detect any merit in this point either. As Mr Whale explained, supported by the evidence of Ms Watson the Council's solicitor, the 2011 scheme was not a sweeping away of all that went before. It was a gathering up of all the changes and a re-publication of the scheme as changed. There had moreover been no change in the delegation to the AD(E) or in the power in the AD(E) to sub-delegate this function to other officers. The Council has continued to operate on the basis of the 2010 memorandum. They saw no need then for any further memoranda. Nor do I.

99. Besides, it is very hard to see that the Council did not adopt the view in its decision on the grant of planning permission that no screening opinion under the EIA regulations was necessary. And whether, strictly ratification of an unauthorised position, if the screening opinion decision itself is lawful. I would refuse to quash the grant of planning permission in the exercise of my discretion on the basis. The alleged error could have made no difference whatsoever. This ground is not arguable.

Conclusion

100. Accordingly, I refuse relief and dismiss this application. I refuse permission to argue grounds 5 and 6.