Case No: CO/1458/2016

Neutral Citation Number: [2016] EWHC 2794 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2016

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

	THE QUEEN ON THE APPLICATION OF (1) BIRCHALL GARDENS LLP AND (2) TARMAC TRADING LIMITED	**Claimants**
	- v -	
	HERTFORDSHIRE COUNTY COUNCIL	**Defendant**
	- and -	
	(1) BP MITCHELL LIMITED **(2) WELWYN HATFIELD BOROUGH COUNCIL** **(3) EAST HERTFORDSHIRE DISTRICT COUNCIL**	**Interested Parties**

- -

James Maurici QC and Richard Clarke (instructed by **Nabarro LLP**) for the **Claimants**
William Upton and Emmaline Lambert (instructed by **Legal Services, HCC**) for the **Defendant**
David Forsdick QC (instructed by **Fladgate LLP**) for the **First Interested Party**
The **Second and Third Interested Parties** did not appear and were not represented

Hearing dates: 04/10/2016 and 5/10/16

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Judgment**MR JUSTICE HOLGATE :**

1.The Claimants apply for judicial review of the decision by the Defendant, Hertfordshire County Council ("HCC"), to grant planning permission on 4 February 2016 to the First Interested Party, B.P. Mitchell Limited ("BPM"), for an inert waste recycling facility (including associated stockpiling, maintenance infrastructure, access and landscaping) on land lying to the south of Birchall Lane, Cole Green, Welwyn Garden City, Hertfordshire. Permission to apply for judicial review was granted by Collins J on 6 May 2016.

2.The area of the application site is 10.57 hectares, of which 3.9 hectares would be occupied by the proposed development. The development area comprises two parts:

2.2 hectares which have been the subject of temporary planning permissions granted in 2006 and 2013 for inert waste recycling and land restoration and

1.7 hectares for proposed new works and stockpiling.

The application proposes that the existing temporary development be permanently retained. A substantial part of the remaining 6 hectares or so of the application site is proposed to be planted with additional woodland, particularly in the western, south-western, and southern parts of the site. BPM has operated the existing recycling facility and would operate the enlarged works.

3. The application site lies approximately 900m to the east of Welwyn Garden City and about 625m west of the A414, to which it is linked by Birchall Lane. The site lies in the Green Belt. Birchall Lane runs east-west along the northern boundary of the site.

4. The land to the north of Birchall Lane is farmland and the land to the south has been worked for sand and gravel extraction, then infilled with waste and restored for use as grazing land. The nearest property is a Grade 2 listed building, Birchall Farm, which lies about 200m to the north east.

5. The application site has been allocated in the Hertfordshire Waste Site Allocations Document July 2014 ("the WSAD") as being potentially suitable for a range of waste management uses, including the recycling of inert waste. The WSAD is a Development Plan Document which forms part of the statutory Development Plan for the area in which the application site is located.

6. According to the Glossary to the WSAD inert wastes are "wastes that do not undergo any significant physical or biological transformations when deposited in a landfill." That concept is similar to the more detailed definition of "inert waste" in Article 2 of the

Landfill Directive 1999/31/EC which adds:-

> "Inert waste will not dissolve burn or otherwise physically or chemically react, biodegrade or adversely affect other matter with which it comes into contact *in a way likely to give rise to environmental pollution or harm human health.* The total leachability and pollutant content of the waste and the ecotoxicity of the leachate *must be insignificant*, and in particular not endanger the quality of surface water and/or groundwater." (emphasis added).

7. The administrative boundary between East Hertfordshire District and Welwyn Hatfield Borough runs diagonally from north west to south east through the middle of the application site. Whereas HCC is responsible for mineral and waste planning, these two authorities are responsible for residential planning issues. To the north east of the site lies land which has been shown in the draft East Herts Local Plan as a "broad location" for the development of up to 1700 homes under policy EWEL 1. The feasibility of this proposal was to be "tested" through a subsequent Development Plan Document. Land to the south west of the application site is "assessed" under policy WGC5 of the draft Welwyn Hatfield Local Plan as being a potential location for 700 dwellings. Both drafts were produced for consultation. They had not yet reached the stage at which the plan would be submitted for statutory examination by an independent Inspector. It is common ground that these policies were emerging draft policies.

8. In 2015 the First Claimant, Birchall Gardens LLP ("BGL") became the owner of these areas of land to the north and south of the application site, potentially identified for residential development. The Second Claimant, Tarmac Trading Limited ("Tarmac") has entered into an agreement with BGL to promote the two areas of potential housing land as the Birchall Gardens Suburb.

9. Welwyn Hatfield Borough Council ("WHBC"), East Hertfordshire District Council ("EHDC") and Tarmac all made objections to the planning application made by BPM. The two authorities (respectively the Second and Third Interested Parties) were served with the Claim in this case but did not participate in the hearing.

10. I am grateful to all counsel for the clear and helpful submissions which they made.

11. This judgment is set out under the following headings:-

(i) Local planning policies;

(ii) The planning history of the application site;

(iii) BPM's planning application and the process followed by HCC;

(iv) Summary of the grounds of challenge;;

(v) Ground 1;

(vi) Ground 2;

(vii) Ground 3;

(viii) The Court's discretion where reasons in a screening opinion are inadequate.

(i) Local planning policies

HCC's policies

12. The Hertfordshire Waste Core Strategy 2011-2026 was adopted in November 2012. It forms part of the statutory Development Plan. Policy 6 of the strategy deals with applications for waste management facilities within the Green Belt. A proposal is required to demonstrate "very special circumstances" sufficient to outweigh the harm to the Green Belt together with any other harm identified. The policy lists a number of criteria which will be taken into account when assessing proposals within the Green Belt, including "site characteristics" and the need for development that cannot be met by "alternative, suitable non-Green Belt sites."

13. The WSAD was adopted by HCC in July 2015. The document has been prepared so as to be in conformity with the Waste Core Strategy. It identifies sites for waste management facilities "based on a process of site assessment and selection" (see paragraph 1.6). Paragraph 4.6 explains that the document identifies eight "Allocated Sites" which HCC considers to be the most suitable locations to manage the county's existing and future waste arisings during the plan period. The sites had been tested through HCC's site selection methodology. The Allocated sites included the application site on land off Birchall Lane. Paragraph 4.8 of the plan states that there were exceptional circumstances for the allocation of 5 Green Belt sites for waste management

purposes. The plan envisages that these sites would be excluded from the Green Belt by altering its boundary in local plans prepared by the relevant district councils. But it wasmade clear that "until that time, there would have to be a demonstration of very special circumstances in respect of any inappropriate development. Such very special circumstances would include the fact that allocation of the site for waste management purposes was deemed acceptable under the terms of" the WSAD.

14. Paragraph 4.10 of the WSAD explains that:-

> "The Waste Site Briefs for the Allocated Sites identify the types of waste management that could be appropriate on the Allocated Sites. An indication of size of facilities that could be appropriate is given in each of the waste site briefs. However, the size and nature of the development will still need to respect the characteristics of the sites and their surroundings. Particular considerations are noted in the Site Briefs."

It was also made clear that the allocated sites should not be developed

for any purpose other than waste management.

15. Policy WSA2 states that HCC will grant planning permission for waste management facilities located on the Allocated Sites and also on Employment Land Areas of Search identified on the inset maps of the Plan, provided that the development accords with relevant policies in the Development Plan. Policy WSA2 also requires decision-makers to take into account a number of matters including "iii. The Allocated Site specific requirements identified in the relevant waste site brief."

16. The Site Brief for the application site refers to its planning status as being "situated in the Metropolitan Green Belt on a site temporarily used for inert waste recycling and soil washing, in conjunction with the restoration of the historic landfill." The Brief indicates a range of potential uses of the application site ranging from anaerobic digestion and composting to inert waste recycling. The Brief states that small or medium or large scale facilities may be suitable on the site. Acknowledging that the temporary planning permission would expire in April 2016, the Brief stated that the site could become available for development within the first 5 years of the plan period, i.e. between 2011 and 2016.

17. The next section of the Site Brief listed "Key Planning Issues". The first point is that the site is "located away from a substantial number of sensitive receptors." Other matters include the location of the grade II listed building at Birchall Farm 200m to the north-east of the site, certain local wildlife sites, a grade II* registered historical park and gardens at Panshanger about 750m to the north-east of the site, the location of the site in

groundwater source protection zone 3, and the location of the site within the Green Belt. The "issues" section also referred to the fact that screening already exists along the northern boundary of the site fronting Birchall Lane and that a suitable access for HGVs has already been provided.

18. The final section of the Site Brief referred to "detailed assessments" which might be required. The Brief stated:-

> "Any future residential developments in the area will need to be considered in combination with any potential waste facility. Depending upon the proposed type of facility and where it would be located on the site, a detailed assessment of the potential impact on any future housing development may be required."

19. At the time when the WSAD was the subject of statutory examination, WHBC and EHDC were considering the possibility of making allocations for residential development on land to the north and south of the application site. In paragraph 50 of his report the examining Inspector said:-

> "If nearby land were to be allocated for residential development, there would be a potential tension with certain waste management proposals. However, matters are uncertain. In addition, depending on the nature of the proposed waste development, the brief would require a detailed assessment of the potential impact of waste proposals on any future housing developments. I would expect any unsatisfactory waste scheme to be rejected."

Draft East Herts District Plan

20. EHDC published its Preferred Options draft District Plan for consultation between 27 February and 22 May 2014. A subsequent report to the Council's Executive Panel explains that the consultation responses were not considered by the Council until some 2 years later on 21 July 2016. I note that Tarmac's representations in that consultation exercise included a plan in which the two potential housing allocations to the south-east of Welwyn Garden City are shown alongside the waste management allocation in the WSAD.

21. During the period when HCC were considering the planning application, leading up to the grant of planning permission, the relevant policy in this draft plan, EWEL1, read as follows:-

> "I) to meet long-term housing needs Land East of Welwyn Garden City is identified as a Broad Location for Development. East Herts Council will test through a Development Plan Document (DPD) the feasibility of Land East of Welwyn Garden City to accommodate around 1700 new homes and supporting infrastructure… Development shall not proceed until the adoption of the DPD.
>
> II) The DPD shall be prepared by the Council… working with key stakeholders including… Hertfordshire County Council…
>
> IV) Land to the East of Welwyn Garden City will remain within the Green Belt until such time as it may be brought forward for development through the adoption of the Development Plan Document by East Herts Council."

The Welwyn Hatfield Local Plan consultation draft

22. This draft plan was subject to public consultation between January and March 2015. Section 10 of the document dealt with Welwyn Garden City. Paragraph 10.1 stated that "this section identifies sites *with the potential to be allocated* for housing… in and around Welwyn Garden City." Site WGC5 was one of the areas identified as having such "potential". The policy stated:-

> "… If the site comes forward for development, a master plan will be prepared for the site and land within East Herts. In partnership with East Herts District Council… This will set …. the need for a buffer around the adjacent waste management facility."

23. Initially the Claimants suggested that each of these draft local plan policies contains an allocation of housing land in the vicinity of the application site. However, it is plain, and indeed it became common ground during the hearing, that, at the time when HCC decided to grant the planning permission the subject of this challenge, neither of the two draft local plans contained any allocation of land for housing purposes. Instead the areas in question were simply treated as having potential to be allocated as housing land. Moreover, WHBC's draft local plan expressly envisaged that any housing allocation in this area would coexist with a waste management facility of the application site allocated in WSAD for that purpose and that any buffer zone needed around the adjacent waste management facility would be provided in the master plan *for the housing site*. It is therefore plain that in drawing up this draft local plan WHBC did not consider that the

housing capacity of the potential allocations would be harmed or compromised by the carrying out of waste management development on the Birchall Lane site allocated for that purpose. There is nothing in the draft local plan of EHDC to suggest that they were approaching the potential housing allocation differently in this respect.

24. The material before the court makes it plain that there would be a considerable separation between the application site and site WGC5 if allocated. Consequently, Mr James Maurici QC, who appeared on behalf of the Claimants, confirmed that the grounds of this challenge do not relate to the relationship between the application site and the potential housing allocation on land to the south within the area of WHBC. Instead, the arguments raised by the Claimants are only concerned with the relationship between the application site and the potential housing allocation EWEL1 to the north within the area of EHDC. Furthermore, he also confirmed that the issues raised in this challenge to the planning permission on the application site are only concerned with the *housing capacity* of the potential allocation under EWEL1 on land to the north and not with the principle of whether that area could be developed for housing *at all*.

(ii) The planning history of the site

25. In January 2006 HCC granted temporary planning permission on the application site for an inert waste recycling operation to produce secondary aggregates and soils for export together also with reclamation of existing derelict land. Condition 4 of the permission required the development to be completed within 7 years of the commencement thereof, including all restoration. The permission authorised development of only 2.2 hectares of land located within the eastern part of the current application site. Condition 6 required the provision of landscaping approved by HCC. Condition 10 restricted the hours of operation of the facility. Conditions 13 and 14 required the submission of details of the restoration plan for approval by the waste planning authority and their subsequent implementation. Condition 28 required measures to be taken to deal with the deposition of mud or other debris from vehicles leaving the application site. Condition 32 imposed controls on noise emitted from the site. Condition 35 required that "the operator shall at all times during the duration of the development ensure that areas outside of the boundary of the site are not affected by dust nuisance resulting from the operations hereby permitted."

26. On 12 April 2013 HCC granted a further temporary planning permission for the development previously authorised in 2006. Condition 3 required the development, including restoration to be completed by 12 April 2016. The permission contained very similar detailed controls to those set out in the 2006 permission. In accordance with the legislation then in force, the 2013 permission also contained a summary of HCC's reasons for its decision to grant. It was noted that the development constituted "inappropriate development" in the Green Belt and should not be permitted except in very special circumstances. Those circumstances were "the currently derelict condition and poor appearance of the land which harms the visual amenity of this part of the

Green-Belt, together with the wider benefits of achieving restoration of the site within a reasonable time scale." In addition, "the proposal provides significant long term benefits in terms of landscape and biodiversity related to the significant additional planting proposed". HCC concluded that on balance these matters constituted very special circumstances which clearly outweighed harm to the Green Belt and any other harm. Thus, it is plain that the object of the temporary planning permissions was to overcome the derelict condition and appearance of the area through a restoration scheme. The planning permissions granted by HCC in 2006 and 2013 did not involve any acceptance of a permanent waste management facility on the application site.

(iii) BPM's planning application and the process followed by HCC

The proposed development

27. The planning application was submitted on 14 May 2015. It was accompanied by a Planning Statement. Paragraph 2.2. explained that the company was operating on three Green Belt sites in Hertfordshire, namely Burnside, Bedwell Park Quarry and Birchall Lane. The company's lease at Bedwell Park was due to expire in December 2015 and therefore from that time the business would operate on just 2 sites, Burnside and Birchall Lane. BPM intended to concentrate its recycling of inert waste entirely on Birchall Lane and to complement the separate "ready mix" operation at Burnside.

28. At Birchall Lane BPM has operated a soil wash facility producing a range of recycled aggregates including sand and stone. It imports and processes waste soils from construction and demolition projects. In addition, waste concrete and trench arisings from utility works are brought to the site for processing. The materials are crushed into various sub-base products and then resold. Often such products are returned for re-use to the construction or demolition project from which they originated (paragraph 3.1). Most of the waste material recycled at the site is carried on BPM's own fleet of vehicles. This enables the business to achieve tonnage efficiencies that could not be achieved if the business were to rely on third parties to source waste and transport recycled aggregates (paragraph 3.2). At the time of the application about 250,000 tonnes of waste per annum was recycled at the site. The object of the proposal is to retain the existing facility and provide an extension to increase the throughput to 350,000 tonnes per annum (paragraph 1.5). BPM primarily serves customers who are based and/or undertaking projects in central Hertfordshire, focussed around Hertford, Welwyn Garden City and Hatfield. Therefore, the Birchall Lane site was said to be in an excellent location to serve this catchment area (paragraph 3.8).

29. The development carried out under the temporary planning permissions included a very small workshop and maintenance area which were unable to maintain and repair adequately the essential plant and vehicles needed for the business (paragraph 2.4). In addition, because BPM had to vacate Bedwell Park Quarry in December 2015 it would

no longer have the use of the maintenance and repair workshop there (paragraph 3.15). The company was also going to lose the space at that site for parking 10 HGVs and 5 trailers overnight (paragraph 3.20). Finally, the company required an increase in its stockpiling capacity in order to meet increased demand from the construction industry for recycled aggregates (paragraph 3.25).

30. The application proposed development within the existing temporary works area of 2.2 hectares essentially for the same facilities as already exist but in a much improved layout. The proposal included plant, a crushing area, a stockpiling area, weighbridges and a site office, two wheel-wash facilities and visitor car parking (paragraphs 4.5 and 4.6). Additional woodland planting was proposed at the northern end of this area in order to increase screening and containment, not only from Birchall Lane but also from residential development if an urban extension to the north of Birchall Lane were to go ahead (paragraph 4.7).

31. The application also proposed a new works area to the west of the existing area of approximately 1.7 hectares. It would include a maintenance repair workshop to replace the facility at Bedwell Park Quarry and to ensure that maintenance is carried out inside a building rather than in the open air. The new area would also include 14 HGV spaces to replace the facility at Bedwell Park Quarry and an additional stockpiling area to enable the business to maintain an increased supply of recycled aggregates throughout the year (paragraphs 4.8 and 4.12). Thus, the extension to the existing temporary works was proposed to be used mainly for additional stockpiling, parking of HGVs and the location of two buildings in which plant and machinery could either be stored or maintained. It was proposed that the existing operations under the temporary planning permissions involving the crushing and washing of materials imported to the site and stockpiling of the products would continue there. BPM also proposed extensive woodland planting throughout the northern part of the proposed new works area in order to increase screening and containment from the surroundings and any proposed urban extension to the north of Birchall Lane (paragraph 4.13).

HCC's screening opinion

32. Before the planning application was submitted on 5 February 2015 BPM's agents made a request for a screening opinion under Regulation 5 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011 No 1824) ("the EIA Regulations"). The request submitted to HCC provided information under the headings contained in schedule 3 to the 2011 regulations, namely characteristics of the project, location of development, and characteristics of the potential impact. Under the first heading the request stated:-

> "The proposed development will increase the operations area of the existing development site and will seek to increase the amount of waste recycling that could take place each year. Whilst

> there is likely to be a greater area of land take and additional traffic movement as a result of the development, the nature of the impacts of the development would be largely as existing and the degree of impact is unlikely to significantly change."

33. Under the heading "characteristics of the potential impact" the request made the common sense point that the nature and extent of the impacts could be well understood by reference to experience of the existing temporary facility.

34. HCC did not issue its screening opinion until 21 May 2015, by which time BPM's planning application had just been submitted. The decision was taken by an officer acting under delegated powers. He decided that there was sufficient information before HCC in order to determine whether EIA was required. He also decided that EIA was not required in this case because:-

> "It is unlikely the proposed development will cause any significant harm and therefore an EIA is not required. Significant harm is unlikely as only inert waste is to be imported, the development does not meet the size requirements in Schedule 2 and there are no particular sensitivities in the area."

Objections to the proposed development

35. A number of representations were submitted to HCC on the merits of BPM's planning application. In a letter dated 30 June 2015 WHBC objected to the application. The letter stated that "the uses on the application site, particularly noisy and dusty operations such as concrete crushing, are clearly not compatible with residential uses… if made permanent, the use on the site would prejudice the delivery of both East Herts and Welwyn Hatfield's strategic plans for housing growth by reducing the capacity of housing sites." The letter also referred to the policy in the WSAD indicating that a "detailed assessment" of the potential impacts on any future housing developments might be required, but the letter did not suggest that any such assessment would be required in relation to any subject other than noise and dust emissions.

36. East Herts District Council submitted their objection to the application by letter dated 25 June 2015. Under the heading "potential impacts of development on plan-making" the letter stated:-

> "The emerging master plan envelops the application site with residential properties, neighbourhood and other social infrastructure uses such as outdoor sports pitches and public open space. The uses on the application site, particularly noisy and dusty operations such as concrete crushing, are clearly not

compatible with residential uses. Whilst this is not a concern on the current temporary bases with the site being in a currently rural area there is significant concern that- if made permanent- the use of the site would prejudice the delivery of both East Herts and Welwyn Hatfield's strategic plans for housing growth by reducing the capacity of housing sites. The buffers and barriers required to minimise the impact on nearby residential properties may mean that a large area of proposed development land will not be suitable for residential and other forms of development, preventing the preparation of an effective master plan and making the most effective use of the site."

37. The letter also stated that the relationship between the application site and the proposed residential development was similar to that which had been rejected in BPM's Planning Statement when considering an alternative site located outside the Green Belt on an Employment Land Area of Search at Burrowfield, Welwyn Garden City.

38. Solicitors acting on behalf of Tarmac sent a letter of objection dated 16 June 2015. They too suggested that the proposed development would prejudice the delivery of long term strategic housing on the areas described in emerging policies by reason of detriment to residential amenity. It would appear from paragraph 2.13 of this letter that Tarmac's concerns, like those of the two district councils, related to potential impacts regarding noise, dust and disruption from vehicle movements and general activity on the application site. They did not advance more detailed reasoning or evidence in support of their objection.

39. Mr Maurici QC during the course of his submissions confirmed 3 points:-

i) At no stage before the application was considered by HCC's Development Control Committee did either of the local planning authorities or the Claimants or any other party suggest that the application should be subject to EIA;

ii) The objections were limited to the effects of the proposal on the application site as regards the amount of housing that could be provided under emerging policies rather than preventing the achievement of any strategic housing at all. The housing capacity of the potential locations for development might be constrained by a need to provide buffer zones within those sites;

iii) The size of any such buffer zone would be determined by the need to achieve acceptable levels of noise within residential areas. Buffer zones derived in that

way would also be sufficient to mitigate any other environmental consequences from the proposed development on the application site, such as dust emissions.

Noise Report

40. The planning application was accompanied by a noise report prepared on behalf of the applicant. HCC took the view that there were two deficiencies in that report. First, it did not consider the impact of the proposed development on any future housing which might result from emerging policies. Second, it did not address noise emissions from waste operations being carried out under the temporary planning permissions. Consequently, HCC commissioned an independent noise report by Acoustic Associates. This was produced in September 2015, but was not available to the planning officers when they prepared their report for the Development Control Committee. However, its contents were subsequently summarised for the members by the officers who attended the meeting. The Claimants now complain that that summary was significantly misleading, a matter to which I return below.

41. The report assessed noise emissions from the proposed development using three standards, BS4142: 2014, amenity levels recommended by the World Health Organisation for "serious annoyance" and noise levels within dwellings recommended in BS8233. As regards amenity areas within the closer parts of potential residential areas, the report concluded that the predicted noise levels from the proposed development on the application site would exceed the WHO threshold of LAQT 55dB. However, the report added that such levels are already exceeded in any event because of road traffic noise on Birchall Lane and that these levels exclude the effect of simple mitigation such as garden fencing (paragraph 6.3.2). As regards internal noise, the report concluded that noise levels within dwellings would be likely to exceed the levels recommended in BS8233 for living rooms with open windows. Once again, however, the report stated that as with amenity areas, such levels would be exceeded in any event due to road traffic noise alone, if the effect of simple mitigation is disregarded (paragraph 6.3.3). The Claimants place particular reliance upon the assessment carried out by the independent experts under BS4142 in relation to noise from the waste recycling operations. The report concluded that the predicted range of noise rating levels expressed in LAEQ would be greater than the existing background noise levels such that impacts up to "significant adverse impact" could be expected. However, that conclusion also disregarded the effect of any mitigation measures such as bunds or fences.

42. As regards mitigation, the report advised that given the number of noise sources, their level and geographical distribution, it would be difficult in practice to introduce noise mitigation measures at the noise source. Accordingly, the report considered mitigation solely at the potential new dwellings. It stated that there are two effective strategies which could be employed if residential development were to go ahead and that some measures would be necessary even in the absence of BPM's operations in order to protect occupiers of potential housing areas from the noise of passing traffic on Birchall

Lane. One strategy involves the placing of "barrier blocks" in which the physical structure of a continuous building shields other parts of the development from noise. Thus, it was suggested that on the northern site a row of terraced houses or flats could be located as a barrier block with less noise-sensitive rooms on their south façade (e.g. toilets, hallways, utility rooms). The second strategy suggested was the use of noise barriers such as fencing constructed to an appropriate height.

43. Paragraph 2.5 of the report concluded that:-

> "It is likely that these excessive levels can be reduced to acceptable levels in amenity areas and within dwellings provided recommendations in section 3 are followed."

Those recommendations related to the mitigation measures already summarised. The report continued:-

> "2.6. Assuming that these are adopted it is likely that the noise impact for future residents will be as a worst case at or below the Lowest Observed Adverse Effects Level.
>
> 2.7. There is a planning proposal by BP Mitchell Limited to change the inert waste processing on site… which includes the construction of two large buildings. This is unlikely to cause a significant increase in the noise emissions from the site."

44. It is important to note the acceptance by Mr Maurici QC that these conclusions embraced all three of the assessment methods used by the independent consultant. Mr Maurici relies in particular on a part of the Report's Summary (page 2) which stated that:-

> "It [the assessment] concluded that noise from the site is at a level which is likely to have a "significant adverse impact" on the local residents when assessed *using the most relevant standard*. However it is likely that mitigation measures could be taken to reduce noise at the proposed residencies to acceptable levels and recommendations are given on how to do that" (emphasis added)

45. It is common ground between the parties that the "most relevant standard" there referred to was BS4142 and that the conclusions in the report took into account the effect of noise on residents of the potential housing areas in the emerging planning policies.

46. It is also important to note the remaining conclusions in the Report's Summary:-

> "Though noise from the waste recycling facility is significant

> over the proposed residential sites, the dominant noise will be from road traffic on [Birchall Lane]. Mitigation measures would be likely for any residential development close to the road, even were BP Mitchell not operating at their site. A secondary aim of the assessment was to assess the likely impact of a proposed change to the inert waste recycling on the site. This concluded that overall noise emissions are unlikely to increase significantly from the site as a result of that proposal, which was also the conclusion drawn by BP Mitchell's consultants."

47. Thus it is plain that the expert instructed by HCC correctly assessed the noise implications of BPM's proposal for permanent development on the basis that the base line position is one in which the existing temporary facilities ceased to operate. It is also important to note that, although the key environmental objection raised by the two local planning authorities and by Tarmac against BPM's proposal concerned the consequential reduction in the housing capacity of the potential housing allocations, no information was supplied by any of those parties to assist HCC to appreciate the extent to which that capacity would be reduced or affected in any event, even in the absence of BPM's proposed development, by virtue of traffic on the existing Birchall Lane.

Officers' report to HCC's Development Control Committee

48. The Chief Executive and Director of Environment of HCC provided a detailed report on the merits of BPM's planning application to the Development Control Committee meeting on 24 September 2015 ("the officers' report"). In paragraph 2.9 they advised:-

> "Any future development on land north of Birchall Lane as envisaged in the East Herts District Plan Consultation would need to provide appropriate buffer zones including appropriate mitigation and landscaping. There is no evidence that the waste management use of the site would prejudice the strategy to deliver the housing led growth in emerging local plans or unduly restrict the potential of the land in the vicinity of the site to deliver the quantum of the proposed development in the Development Plan documents, which are at an early stage and are yet to go through the pre-submission and examination stages of the Development Plan process."

49. Section 7 of the report contained a very detailed summary of all the representations

which HCC had received on the application, including those made by WHBC, EHDC and by Tarmac. No complaint is made as to the adequacy of the analysis of those representations.

50. Paragraphs 9.37 to 9.43 of the officers' report dealt with the emerging proposals for housing allocations to the north and south of the application site. Paragraph 9.38 summarised policy EWEL1 of the preferred options consultation draft for the East Herts District Plan and policy WGC 5 of the draft Welwyn Hatfield Local Plan. Paragraph 9.39 drew the attention of the Committee once again to the objections raised that the proposed development "may be prejudicial to the potential of both sites to deliver the numbers of houses envisaged in the respective local plans." In that context paragraphs 9.40 to 9.41 reminded the Committee of the contents of the site brief in the WSAD relating to the allocation of the application site for waste management purposes. It is important to note that paragraph 9.41 specifically reminded members that:-

> "The site brief states 'any future residential developments in the area will need to be considered in combination with any potential waste facility. Depending upon the proposed type of facility and where it would be located on the site, a detailed assessment of the potential impact on any future housing development may be required.' The application does not include any form of detailed assessment of the potential impact upon future housing."

51. Thus the Committee was expressly informed that in some instances a detailed assessment of impact on future housing development might be necessary and that in connection no such assessment had been made for this particular application. It is therefore impossible to suggest that this consideration was not firmly placed before the members for their consideration.

52. This section of the officers' report concluded by advising the Committee that:-

> "9.42 The emerging plans are at an early stage. The Welwyn Hatfield Local Plan Consultation document was subject to public consultation between 23 January and 19 March 2015. The submission for examination is planned for Spring/Summer 2016. The East Herts Local Plan Preferred Options Document underwent public consultation from February to May 2014 the next stage of consultation submission is planned for early 2016. 9.43 The plans include draft proposals and preferred options within the emerging local plans can be given no great weight given the early stage of their preparation."

53. The Claimants do not criticise the approach taken by HCC to the evaluation of the emerging policies. Between paragraphs 9.49 and 9.56 the officers summarised the benefits of the proposal as regards sustainable waste management. It pointed out that in 2008 construction and demolition waste arising in the county amounted to 1,382,000 tonnes. By 2010 in excess of 100,000 tonnes of inert material was recycled across the county. However, at that stage some 105,000 tonnes of such material was being disposed of to landfill. The majority of the inert waste managed at the application site would be diverted from landfill. Consequently "the capacity of the site to manage inert demolition and excavation waste represents a significant proportion of inert waste generated within the county" (paragraph 9.52). "The operation currently diverts approximately 90% of material from landfill, supporting the waste hierarchy which favours recovery over disposal to landfill. The proposal would also assist in the recovery of secondary and recycled materials which is preferable to extraction of primary materials" (paragraph 9.53). In paragraph 9.55 the report concluded:-

> "The proposed development provides the opportunity for a significant proportion of inert waste generated within the county to be recovered within the county- material that may otherwise be landfilled thus helping to push waste up the hierarchy. The proposal would provide the opportunity for waste generated within Hertfordshire to be treated as close as practicable to its origin - material which may otherwise be exported from the county - thus assisting self-sufficiency in the management of inert waste within the county".

54. In the concluding section of their report the officers advised the Committee that the application represented inappropriate development in the Green Belt and therefore could not be permitted except in very special circumstances. Very special circumstances could not exist unless potential harm to the Green Belt by reason of inappropriateness and any other harm was clearly outweighed by other considerations. The officers referred to the waste management benefits of the proposal and to the allocation of the application site in the WSAD. They advised that those benefits, together with the lack of suitable alternative sites located sufficiently far away from populations, constituted the very special circumstances that clearly outweighed the harm to the Green Belt and any other harm in this case. The Committee resolved to grant planning permission for the proposed development, subject to it being referred to the Secretary of State and his not calling the application in, and subject also to the imposition of conditions and the entering into of a defined legal agreement.

55. The planning permission was granted on the 4 February 2016.

(iv) Summary of the grounds of challenge

56.The Claimants submit:-

Ground 1

The screening opinion was unlawful, and the planning permission granted on 4 February 2016 should be quashed, because HCC failed to comply with its obligation under Regulation 4(7) of the 2011 Regulations to give clearly and precisely its full reasons for its opinion that the proposed development does not constitute EIA development;

Ground 2

(i) HCC wrongly interpreted and/or failed rationally to apply the WSAD by not requiring a detailed assessment of the impact of the proposed development upon future housing on the sites referred to in draft policies of EHDC and WHBC;

(ii) HCC acted in breach of the duty of fairness by taking into account the Noise Report by Acoustic Associates dated September 2015 without making the document available beforehand so that representations might be made by the Claimants and others;

Ground 3

(i) HCC misinterpreted and/or failed rationally to apply Green Belt policy in the National Planning Policy Framework ("NPPF") and in policy 6 of the Hertfordshire Waste Core Strategy. In particular, HCC's assessment that the development could not be accommodated on an alternative site, the Burrowfield site, was internally contradictory or irrational;

(ii) In considering air quality impact, HCC took into account an immaterial consideration, namely a baseline which assumed the retention of the existing facility, whereas that facility was only authorised by a temporary planning permission due to expire in April 2016, and should therefore have been treated instead as part of the proposed development for which a permanent consent was being sought.

(v) Ground 1 – erroneous or inadequate reasoning for the screening opinion

Statutory Framework

57. Regulation 2(4) of the EIA Regulations provides that planning authorities shall not grant planning permission for 'EIA development' without having taken environmental information into consideration, defined as including an environmental statement meeting the requirements of Schedule 4.

58. 'EIA development' is defined by regulation 2 as including "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location."

59. Schedule 2 development is defined as:

> "…development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where –
>
> (a) any part of that development is to be carried out in a sensitive area; or
>
> (b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development"

The present proposal was not located in a "sensitive area" as defined in regulation 2.

60. Schedule 2 development includes "installations for the disposal of waste" (table 11(b), column 1). The column 2 threshold criteria are:

> "(i) The disposal is by incineration; or
>
> (ii) The area of the development exceeds 0.5 hectare; or
>
> (iii) The installation is to be sited within 100 metres of controlled waters."

In the present case the development area exceeded 0.5 ha.

61. To determine whether an application is EIA development, applicants may request that the planning authority adopts a screening opinion under regulation 5(5). In addition, where an application is made and it appears to the planning authority that the application is a Schedule 2 application (i.e. development of a description mentioned in Column 1 of Schedule 2 exceeding any threshold or criterion in Column 2), a screening opinion must likewise be adopted. The screening opinion will assess whether the Schedule 2 development is likely to have significant effects on the environment, and so constitute EIA development.

62. Regulation 4(6) provides that where a planning authority has to decide whether a schedule 2 development is EIA development, that is whether it is likely to have significant effects on the environment, the authority must take into account such of the selection criteria in schedule 3 as are relevant to the development. Schedule 3 requires regard to be had to "the characteristics of the development", "the environmental sensitivity of geographical areas likely to be affected by the development", and "the potential significant effects of development…in relation to [criteria previously set out in schedule 3]". The schedule contains more detailed criteria under each of these three headings.

63. A "screening opinion" means "a written statement of the opinion of the relevant planning authority as to whether development is EIA development" (regulation 2).

64. Under the predecessor regulations, the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (SI 1999 No. 293), where a screening opinion was adopted to the effect that development constitutes EIA development (a "positive screening opinion"), that opinion had to be "accompanied by a written statement giving clearly and precisely the full reasons for that conclusion" (regulation 4(6)). But neither the 1999 Regulations nor the European legislation upon which they were based (going back to Directive 85/337), imposed an express obligation to give reasons where the authority decided that the development was *not* EIA development (a "negative screening opinion"). In relation to EU legislation the European Court of Justice decided in Mellor v Secretary of State for Communities and Local Government (C75/08) [2010] PTSR 880 that (paragraph 61):-

> "In the light of the foregoing, the answer to the first question is that Article 4 of Directive 85/337 must be interpreted as not requiring that a determination that it is unnecessary to subject a project falling within Annex II to that directive to an EIA, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the

> relevant information and documents in response to the request made."

65. However domestic law was altered in 2011 by regulation 4(7) of the EIA Regulations which provides that:-

> "Where a local planning authority adopts a screening opinion under Regulation 5(5), that opinion "shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion."

This requirement applies to both "positive" and "negative" screening opinions.

Legal principles

66. It is common ground that the analysis in paragraph 20 of the judgment of Moore-Bick LJ in R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157 continues to apply to the screening process under the 2011 Regulations (Mackman v Secretary of State for Communities and Local Government [2015] EWCA Civ 716; [2016] Env. L.R. 6 at paragraph 7). A screening opinion does not involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include environmental factors. Nor does it include a full assessment of any identifiable environmental effects. It includes only a decision, almost inevitably on the basis of less than complete information, as to whether an EIA needs to be undertaken at all. The court should not impose too high a burden on planning authorities in relation to "what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment."

67. The issues of whether there is sufficient information before the planning authority for them to issue a screening opinion and whether a development is likely to have significant environmental effects, are both matters of judgment for the planning authority. Such decisions may only be challenged in the courts on grounds of irrationality or other public law error (R (Jones) v Mansfield District Council [2003] EWCA Civ 1408; [2004] Env L.R. 21 (paragraphs 14-18 and 52-55 and R (Noble Organisation Ltd) v Thanet District Council [2005] ECWA Civ 782; [2006] Env. L.R.8 paragraph 30).

68. Mr. Maurici QC confirmed that it is accepted by the Claimants that in the present case HCC did adopt a screening opinion and that there is no public law challenge to the authority's judgment on the adequacy of the information available to it for the purposes of deciding that the development was unlikely to have significant environmental effects. Mr. Maurici QC made it plain that he was not arguing that the only rational response for the planning authority was to have issued a positive screening opinion. It was legally permissible for HCC to issue a negative screening opinion in the circumstances of this case.

Whether the officer misunderstood the size threshold

69. The first ground of challenge raised by the Claimants is that the screening opinion contains a legal misdirection, namely that the proposed "development does not meet the size requirements in Schedule 2". In this case the relevant size requirement was that the development area should exceed 0.5ha (see paragraph 60 above). It plainly did (see paragraphs 30-31 above). The Claimants submit that the officer who issued the screening opinion, acting under delegated powers failed to appreciate that the threshold for schedule 2 development was only 0.5ha and was therefore exceeded in this case. They also rely upon his answer to question (5) on HCC's standard form for a screening opinion, which indicated that the proposal did not meet the threshold.

70. I agree with Mr Upton for HCC and Mr Forsdick QC for BPM that this was simply a slip in the filling in of the form and was not an error of any substance whatsoever. Mr. Maurici QC correctly accepted that the level of detail required in a screening opinion depends upon the context of the application (paragraph 55(ii) of skeleton and see also Mackman at paragraph 20). Indeed, in another part of his argument he relied upon the content of BPM's request for a screening opinion dated 5 February 2015 in order to submit that the request contained a legal error which had tainted the officer's decision to issue a negative opinion (see paragraph 60 of the skeleton).

71. Here the application and request were accompanied by drawings which plainly showed the area of the existing development to be permanently retained and the new extension. The request for a screening opinion clearly stated that the relevant threshold in schedule 2 was 0.5ha and that the proposal was for development exceeding that threshold. The request then went on (a) to argue that the proposal did not exceed the "indicative threshold" in the Planning Practice Guidance ("PPG") on the screening of schedule 2 proposals and (b) to present reasons as to why it was unlikely that there would be significant environmental effects.

72. In the screening opinion the officer referred to his assessment that the proposal would be unlikely to have significant effects on the environment, an exercise that he only needed to undertake on the basis that the development qualified for screening under schedule 2. If he had truly thought that the 0.5ha threshold was not exceeded, then he would not

have gone on to assess environmental effects. I acknowledge that in his "conclusion" the officer did say that the development "does not meet the size requirements in schedule 2". But the language used in a screening opinion should be read no more critically than a decision letter. It should be read in a straightforward way as a document addressed to parties familiar with the issues (South Bucks D.C v Porter (No. 2) [2004] 1 WLR 1953). In my judgment the officer's conclusion should reasonably be understood as responding to the request for a screening opinion and therefore as referring to the "indicative" guidance in the PPG on the circumstances in which schedule 2 applications may be treated as "EIA development", and not as referring to the formal threshold in the EIA Regulations for determining whether development falls within schedule 2. I am reinforced in that view by other parts of the conclusions which stated that an EIA was not required because it was unlikely that the proposed development would cause any significant harm, and "significant harm is unlikely as only inert waste is to be imported … and there are no particular sensitivities in the area."

73. Mr. Maurici QC sought to challenge this approach by arguing that the officer also misapplied the relevant part of the PPG. Column 3 of that guidance gives "indicative values" "intended to help determine whether significant effects are likely". But the guidance adds "when considering the thresholds, it is important to also consider the location of the proposed development." "In general, the more environmentally sensitive the location, the lower the threshold will be at which significant effects are likely." Column 3 refers to:-

> "Installations (including landfill sites) for the deposit, recovery, and/or disposal of household, industrial and/or commercial wastes where new capacity is created to hold more than 50,000 tonnes per year, or to hold waste on a site of 10 hectares or more. Sites taking smaller quantities of these wastes, sites seeking only to accept inert wastes (demolition rubble etc) or Civic Amenity sites, are unlikely to require Environmental Impact Assessment."

The key issues given in column 4 include scale of the development and the nature of the potential impact in terms of discharges, emissions or odour.

74. Read in the context of a screening assessment of environmental effects, it is plain that the officer's conclusions referred to the PPG rather than to the threshold in Schedule 2. The officer had well in mind the proposal to import only inert waste. Plainly the area proposed for operational development was substantially below the 10ha indicative value and that conclusion was reinforced by the officer's judgment that "there are no particular sensitivities in the area."

75. However, Mr Maurici QC submitted that the officer misapplied the PPG, and so should not be treated as having that document in mind rather than the threshold in Schedule 2 of the EIA Regulations, because he did not deal explicitly with the proposal to increase

capacity to 350,000 tonnes a year, substantially in excess of the 50,000 tonnes a year criterion.

76. I see no merit in this argument. The reference to 50,000 tonnes a year is only an indicative value and is qualified by the final part of column 3. Not only sites taking smaller quantities of waste, but also sites taking inert wastes are unlikely to require EIA. The officer did not consider the inert nature of the waste in isolation. He also had well in mind the judgments he had made about the lack of sensitivities in the area and the unlikelihood of significant harm being caused. It should also be remembered that these conclusions were reached in the context of the submissions in the letter requesting a screening opinion which had explained why significant effects would be unlikely (see below). In my judgment this was not a case where there was any need for the officer to comment specifically on the 50,000 tonnes a year guideline given the other factors in play and which were referred to in the screening opinion.

77. Furthermore, it cannot be inferred that the officer failed to have regard to this particular part of column 3 of the PPG. The *application* of that guideline value could only be challenged in this court on the grounds of irrationality (Tesco Stores Ltd v Dundee [2012] PTSR 983 at paragraph 19). Given that the Claimants do not challenge the rationality of the decision to issue a negative screening opinion, it cannot be said that that opinion was inconsistent with a *rational application* of the 50,000 tonnes a year guideline value. There is therefore no basis for inferring that the officer's reasoning must have been directed at the threshold in Schedule 2 and not the indicative guidance in the PPG, read as a whole. For these reasons, this first criticism of the screening opinion must be rejected.

Legal principles on the duty to give reasons

78. The positive obligation to give reasons for a negative screening opinion is a requirement of domestic law, not EU law. In the present case no "Mellor request" for reasons was made and so EU law is not engaged (R (Lee Valley Regional Park Authority) v Epping Forest District Council [2015] EWHC 1471 (Admin); [2016] Env LR. 8 para. 51).

79. If a screening opinion is inadequately reasoned in breach of regulation 4(7) a challenge to a decision by the Secretary of State would fall under section 288(1)(b)(i) of the Town and Country Planning Act 1990 and so a claimant would not have to demonstrate under section 288(5)(b) that his interests had been substantially prejudiced thereby. Nonetheless, matters going to the absence or presence of prejudice would be relevant to the issue of whether the court should exercise its discretion by quashing the decision (Mackman at paragraph 23). Although section 288 does not apply to the present type of challenge, I see no reason why as a matter of principle the approach should be any different in an application for judicial review against a screening opinion of a local

planning authority.

80. In the Lea Valley Regional Park case Dove J identified at paragraph 71 two purposes of the obligation to give reasons: first, to enable a participant to understand why a negative screening opinion has been issued so that representations might be made to the Secretary of State in an attempt to persuade him to come to the opposite conclusion (e.g. regulation (4)(8) of the EIA Regulations), and second, so that a participant can see whether the screening opinion was tainted by a public law error and a legal challenge may be brought. Mr Maurici QC accepted that in the present case the first purpose was not engaged.

81. It is a striking feature that throughout HCC's processing of the planning application the Claimants never suggested that the proposal constituted EIA development or commented on the correctness of the negative screening opinion or the reasons given for that decision. The screening opinion was issued on 21 May 2015 but the planning application was not considered by the Development Control Committee until 24 September 2015. At that stage the Committee passed a resolution to grant permission subject (inter alia) to the Secretary of State being given an opportunity to call the matter in for his own determination. The Secretary of State did not intervene and the permission was not issued until 4 February 2015. During that further interval the Claimants still did not query the screening opinion or suggest that the reasons given by the officer had effectively prevented them from understanding that decision so that they could make representations thereon. The Claimants showed no sign whatsoever of being interested in, let alone concerned by, the fact that the application had not been subjected to EIA.

82. Accordingly, Mr. Maurici QC accepted that this challenge is based solely upon the second purpose of the obligation to give reasons, to which the principles laid down in Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153, 168 and South Bucks D.C. v Porter (No. 2) [2004] 1 WLR 1953 apply. Thus, the burden lies on the Claimants to show that the shortcoming in the reasons stated "is of such a nature that it may well conceal" a public law error. It is for the Claimants "to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and otherwise free from any flaw in the decision-making process which would afford a ground for quashing the decision" (see Save). Lord Brown summarised the position in South Bucks at [2004] 1 WLR 1964D-E in the following terms:-

> "Reasons can be briefly stated. The degree of particularity required depending *entirely* on the nature of the issues falling for decision. The reasoning must not give rise to a *substantial doubt* as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference *will not readily be*

drawn." (emphasis added)

83. Mr Maurici QC emphasises that the obligation in regulation 4(7) if the EIA Regulations is to give "clearly and precisely the full reasons" for the opinion and to do so in a written statement accompanying the opinion. But he does not deny that in relation to regulation 4(7) the Courts have continued to apply certain of the principles laid down in cases dealing with the earlier legislation.

84. Thus, in line with Save and Porter the principle remains that the level of detail required in a screening opinion depends upon the complexity, or otherwise, of the issues to be considered in the instant case, so that the test is whether the reasons given are adequate in relation to the particular application before the authority. Accordingly, in some cases it is acceptable for the reasoning to be brief (see Mackman at paragraphs 20 to 21). It is also necessary for the court to have in mind the legal context. The planning authority is not issuing a decision letter in a planning appeal which needs to resolve "the principal or important controversial issues", but is issuing a screening opinion for the narrower purpose identified in Bateman and Mackman (see paragraph 66 above).

85. In judging the adequacy of stated reasons, for example whether it is likely that a particular factor not expressly mentioned in the reasons was disregarded, the context in which the screening opinion was prepared is relevant (Mackman at paragraph 10). That context includes any request for a screening opinion (Bateman) at paragraph 22).

86. Certain of the submissions in this case sought to compare the reasons given by the officer with reasons given in other cases which had been judged to be either adequate or inadequate. But as Sales LJ pointed out in Mordue v Secretary of State for Communities and Local Government [2016] 1 WLR 2682 at paragraph 27, the relevant principles in relation to the giving of reasons are well established and it is sufficient to take the court to the reasons given in the instant case to assess them in the light of those principles, without any need for exegetical comparison with reasons given in relation to other planning decisions. That is to be discouraged.

87. Mr Maurici QC submitted that the reasons given must relate to the main criteria under Schedule 3 of the EIA Regulations, drawing upon R (Perry) v Hackney LBC [2014] EWHC 3499 (Admin); [2015] JPL 454 at paragraph 183. But Schedule 3 is applied by regulation 4(6), which only requires the planning authority to take into account such of the selection criteria in that schedule as are relevant to the development. This application of relevant criteria depends upon the judgment of the planning authority. Where the authority deals with only some of the criteria listed in Schedule 3 (or in the PPG), it should not be inferred without more that it has disregarded other criteria, in the absence of some positive indication in the reasons actually given to that effect (Mackman at paragraphs 12 to 13 and Mordue at paragraph 28).

The Claimants' criticisms of the adequacy of the reasons

88. Mr Maurici QC submitted that the reasons given in the screening opinion were inadequate because they failed to deal with the following matters:-

(i) The location of the proposed development;

(ii) The additional processing and stockpiling of recycled materials, the vehicle maintenance building, additional vehicle movements and the consequent effects upon air quality and noise levels;

(iii) Key planning issues in the Site Brief contained in the WSAD;

(iv) The effects of the proposal upon future housing developments on land to the north and south of the application site.

It is also submitted that no reliance should be placed upon the developer's letter requesting a screening opinion because it used an incorrect baseline, namely the existing development authorised by a temporary permission expiring in April 2016. I consider that point next.

The request for a screening opinion

89. The letter dated 5 February 2016 argued that an EIA was not required for the following reasons:-

> "**a) <u>Characteristics of the Project</u>**
>
> The proposed development will increase the operations area of the existing development site and will seek to increase the amount of waste recycling that could take place each year. Whilst there is likely to be a greater area of landtake and additional traffic movements as a result of the development, the nature of the impacts of the development will largely be as existing and the degree of impact is unlikely to significantly change.
>
> There are expected to be changes to current working practices on site as a result of the development, as the development site will be re-planned to create a safer, purpose planned site that can enable best practice waste recycling techniques to be implemented.

b) Screening

The proposed development would be for waste recycling on a site that exceeds 0.5 hectares and therefore the site is technically an urban development project for which EIA could potentially be required. However it should be noted that the site does not fall within a Regulation 2(1) environmentally sensitive area and, as set out in the indicative threshold schedule of the current Planning Practice Guidance on EIA Schedule 2 screening, "sites seeking only to accept inert wastes…are unlikely to require Environmental Impact Assessment".

Notwithstanding the above, for completeness, I write to you to request a Screening Opinion from the County Council in its role as waste planning authority as to whether an Environmental Impact Assessment is necessary in this instance.

c) Location of Development

The proposal site lies to the east of Welwyn Hatfield in the Metropolitan Green Belt. Significantly however, the site does not fall within a Regulation 2(1) environmentally sensitive location.

The site is allocated for waste development in the newly adopted Hertfordshire Waste Site Allocations DPD and accordingly, the application is for a development that is considered to be potentially suitable in the adopted Development Plan for the area.

d) Characteristics of the Potential Impact

The applicant has been mindful of the criteria which should be considered in paragraph 3 of schedule 3 of the EIA Regulations 1999:

i) *The extent of impact*: The extent of the impact is local with limited surrounding residents who could have views over the development area. The topography change is considered to be slight and the effects are likely to be negligible upon long distance views and not significant in this regard.

ii) *Transfrontier nature of the impact*: This is not considered relevant in this case.

iii) *The magnitude and complexity of the impact*: The magnitude and complexity of the impact is considered to be modest. The development would result in permanent development in this location and a restoration that will reflect the permanent nature of the development. However, the likely visual impact of the proposal is

small, with enhanced landscaping to conceal the extent of visual impact from Birchall Lane at the site entrance. Accordingly, the magnitude and complexity of the development is well understood at this stage and is considered to be not significant.

iv) *The probability of the impact*: The probable impact from the proposed development is considered to be negligible to the local area. The extent of the impact can be easily understood, as the development seeks an increase to an existing waste recycling development and a modest intensification of the existing transport impact. The proposed additional landscaping at the entrance of the site is considered to be of benefit to the area and therefore the probability of the impact is considered to be not significant.

v) *Duration, frequency and reversibility of the impact*: The development would be permanent, but the permanence of the development reduces uncertainty over waste recycling in accordance with the fundamental principles of the waste hierarchy. The permanence of the development will provide certainty to facilitate the completion of the restoration of an environmentally damaged site.

In respect of the above, and in accordance with the Regulations, I would be grateful if you would undertake the necessary assessments and confirm whether an Environmental Assessment is required for the proposed development. It is my belief that an EIA is not required in this instance given my assessment of the relevant criteria."

90. The following key points should be noted about this request for a screening opinion:-

(i) The letter addressed in a coherent manner relevant criteria in Schedule 3;

(ii) The letter acknowledged that the proposal lies within the Green Belt, but is allocated for waste development in the WSAD. That applied to the whole of the development proposal. The letter also acknowledged that the development would become permanent. The request did *not* ignore the temporary nature of the existing permission for the development already carried out;

(iii) The context for the references in the letter to increases in the operations area, capacity for waste recycling and traffic movements, was BPM's argument that development carried out under the temporary permission enabled its effects to be easily understood for the purposes of assessing the permanent development *as a whole*, in contrast to a proposal which

has not yet been experienced at all. Read properly, the letter did not suggest that the screening opinion should assess only the effects of increased development or activity;

(iv) The nature of the impacts of the *whole* of the permanent development would be "largely as existing" and "the degree of impact is unlikely to significantly change." The probable impact from the proposed development on the local area would be negligible. The likely visual impact would be small. There would be a modest intensification in traffic impact.

Reading the request fairly and as a whole, the criticism that an incorrect baseline was employed is untenable.

The screening opinion

91. The screening opinion did not go through each of the detailed criteria in Schedule 3. But HCC's form cross-referred to that schedule and to guidance from the Secretary of State (in the former circular 02/99). It is proper to treat the opinion as a reaction to the request dated 5 February 2015 which did go through relevant criteria in Schedule 3. There is nothing in the reasons given by HCC which might positively suggest that those criteria, or any relevant part thereof, were disregarded by the decision-maker. As a matter of substance the reasons given, albeit succinct, applied the main headings in Schedule 3 and certain of its more specific criteria as regards "characteristics of development" (size and nature of waste), "the location of the development" in relation to any sensitivities in the surrounding area, and "the characteristics of the potential impact" (the unlikelihood of any significant harm).

92. In considering the various criticisms made by Mr. Maurici QC, it is necessary for the Court to keep in mind not only the limited scope of the screening exercise and the limited range of proposals for which EIA is necessary, but also the experience gained of the facility operating under the temporary permission and the arguments presented in the request dated 21 February 2015 (including the substantial areas of additional landscaping proposed). The only impacts which the Claimants say ought to have been specifically dealt with in HCC's reasoning are noise from on-site operations and HGVs leaving the site and dust from on-site operations. As the Court of Appeal pointed out in Loader the issue is not whether the proposal might have environmental effects which could influence the determination of the planning application, but whether any such effects are significant so as to justify subjecting the application to the EIA process. This is not a case where it is suggested that there were any material uncertainties about the proposal or its effects. I note that the planning application had been submitted prior to the issuing of the screening opinion. The officer's reasoning as a response to the screening request which had explained why the impacts would be insignificant for the purposes of EIA,

taking into account experience of the temporary development, was legally adequate. His conclusion that it was unlikely that the proposed development would cause "any significant harm" is not challenged as irrational and, in my judgment, does not give rise to any "substantial doubt" as to whether (a) the officer took into account both noise and air quality issues relating to all aspects of the development or (b) HCC committed any other public law error.

93. I reach essentially the same conclusion in relation to the Claimants' allegation that the reasoning failed to deal with key issues raised by the Site Brief in the WSAD. In their submissions to the court the Claimants referred to the Grade II listed building, Birchall Farm, 200m to the north east of the application site, the grade II* registered historic park and garden of Panshanger 750m to the north-east of the site and neighbouring areas of land with ecological designations. The Court has not been shown any specific material before HCC to suggest that the proposed development would be likely to have any adverse effect upon any of these receptors at all, let alone a significant effect triggering a requirement for EIA. It is not suggested, for example, that the substantive decision to grant planning permission is flawed on these grounds. In these circumstances, the officer's conclusions that "there are no particular sensitivities in the area" and that "it is unlikely the proposed development will cause any significant harm" cannot be faulted. There is no legal justification for requiring reasons to have been given dealing specifically with each of these matters. Merely pointing to potential effects does not engage a duty to give reasons in relation to each such matter. The Claimants have failed to show that there is any substantial doubt as to whether HCC made a public law error with regard to issues raised in the Site Brief.

94. The Site Brief also stated that dependent upon the type of facility proposed and its location, a detailed assessment of the effect upon any future housing might be required. That statement falls to be considered in the challenge under ground 2 below, but here the issue is whether that effect upon the emerging proposals for housing development (i) was a subject which HCC was obliged to take into account when issuing its screening opinion and (ii) if so, whether HCC was required to deal with that matter in its express reasons accompanying that opinion. Issue (i) arises because HCC and BPM raise that as a preliminary point before dealing with this further aspect of the Claimants' challenge to the adequacy of the reasons given.

95. Under the heading "characteristics of development" schedule 3 of the EIA Regulations refers to "the cumulation with other development", HCC and BPM both rely upon Commercial Estates Group Ltd v Secretary of State for Communities and Local Government [2014] EWHC 3089 (Admin); [2015] JPL 350 in which the High Court refused permission to apply for judicial review of a negative screening direction on the grounds of a failure to have regard to cumulative development, namely a sustainable urban extension proposed in a draft core strategy, the examination of which had been suspended because of concerns raised by the Inspector as to the "soundness" of the plan (a matter which could have precluded its eventual adoption – see sections 20 and 23 of

the Planning and Compulsory Purchase Act 2004). Reference was made to EU and DCLG guidance that "cumulative impact" includes "…reasonably foreseeable actions together with the project." The Court refused to grant permission to apply, deciding that it was not arguable that the Secretary of State had acted irrationally by disregarding the draft allocation for the reasons he gave, namely that the core strategy had not yet been approved and, given its status, it was not "reasonably foreseeable" as a development that "would occur".

96. Mr Maurici QC relied upon the conclusions of the Inspector on the Examination of the WSAD (paragraphs 49-50) together with the Site Brief as showing that the development the subject of the draft allocations is "reasonably foreseeable".

97. Ultimately, this was a question of degree and a matter of judgment for the planning authority. The circumstances in the Commercial Estates case, and also in R (Littlewood) v Bassetlaw D.C. [2008] EWHC 1812 (Admin) to which I was also referred, are fact sensitive. The same is true of the present case. On the arguments I have heard it would not be appropriate for me to attempt to elaborate on the EIA Regulations or the Guidance. In the present case the issue should be considered as the draft local plans stood when HCC issued its screening opinion. As I have explained previously, neither of the two local plans proposed to *allocate* the land in question for housing. They were simply referred to as areas with the *potential* to be allocated for housing in a subsequent development plan document and remaining to be tested through that future process (see paragraphs 7 and 21-23 above). I do not consider that draft emerging policies of this nature, which refer to "potential" rather than allocation, could qualify as "cumulative development" falling within Schedule 3. I therefore agree with the submission of HCC and BPM that it follows that this issue did not have to be taken into account in the screening decision and therefore could not be the subject of a "reasons challenge".

98. However, in case I am wrong on that last point, I will assume that the draft potential housing policies were a material consideration for the screening decision and address the question whether, by failing to include any express reasoning on that subject in its decision, HCC acted in breach of regulation 4(7). In the officer's report to the Committee meeting on 21 September 2015 little weight was attached to the emerging housing policies in the draft local plans. That judgment cannot be impugned in this Court. There was no logical reason to ascribe any greater weight to the draft housing policies a few months earlier when the screening opinion was issued. For the purposes of regulation 4(7) the issue was whether the proposed development might have significant environmental effects in relation to future housing allocations so as to justify a requirement for EIA at this stage, albeit that the draft policies have little weight and even then refer only to potential housing areas and not allocations. When the issue is seen properly in context, it is clear that HCC was not obliged to refer expressly to this topic in its decision in order to provide legally adequate reasoning. The absence of any explicit observation on this matter does not raise a substantial doubt as to whether the screening

decision involved any public law error.

Conclusions on ground 1

99. For the above reasons I have reached the firm conclusion that the reasoning given in the screening opinion was, in the context of this case (including the request received by the authority), legally adequate and the challenge must be rejected.

100. However, for completeness I will consider whether, if I had concluded that HCC failed to give adequate reasons for its screening opinion, the grant of planning permission should or should not be quashed in the exercise of the court's discretion. This is best considered after I have dealt with grounds 2 and 3.

(vi) Ground 2

Ground 2(i) – Misinterpretation or irrational application of development plan policy

101. In Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 (at paragraphs 18 to 21) the Supreme Court held that:-

(i) The proper meaning of a planning policy is a matter of interpretation for determination by the courts;

(ii) However, a policy is not to be construed as if it were a statutory or contractual document;

(iii) Many policies are framed in language the application of which to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their judgment can only be challenged on the grounds that it is irrational.

102. Mr Maurici QC submits that on a proper construction of the Site Brief for the application site in the WSAD a detailed assessment of the potential impact of a waste management facility is required, unless such an assessment is unnecessary given the *type of facility* proposed or its *location* within the site. He complains that the only reason why HCC did not require a detailed assessment in this instance is that it treated the housing proposals as being at a very early stage, which is a separate issue going to the weight to be attached to any impact and not to be elided with the separate and prior question whether to require a detailed assessment in the first place. He sought to draw support for his construction of the site brief from paragraph 50 of the Inspector's Report on the

examination of the WSAD (see paragraph 19 above). He added that when that report was published in spring 2014 the proposals for the housing development were at an even earlier stage.

103. I do not accept that HCC misconstrued the Site Brief. The WSAD does not prescribe that a detailed assessment is always required. Rather it states that such an assessment *may* be required. Not surprisingly the WSAD allows HCC to reach a judgment on whether it should require a detailed assessment to be provided and, if so, the nature and extent of any such assessment. The Brief indicates that the making of that judgment may be affected by the type of facility proposed and its location, without restricting to those factors the range of considerations which may be taken into account. For example, the *scale* of any facility might also be relevant. However, on the Claimants' construction, the planning authority ought to insist upon a "detailed assessment" being provided even if, as here, (1) the draft plans and the proposed planning policies were both at a very early stage, (2) the suggested allocation remained to be tested through a subsequent development plan document (policy EWEL 1), (3) the proposals would require substantial alterations to Green Belt boundaries which had attracted objections and (4) the policies were to be treated as having little weight for other planning purposes.

104. Accordingly, I do not think that the Claimants' construction is a sensible or proper interpretation of the Brief. It is no less unreasonable when, as in the present case, the object of the detailed assessment would simply be to ascertain the extent to which the housing capacity of an emerging proposal might be reduced. Indeed, the use of the term "detailed assessment" would suggest that the brief is referring to a housing proposal at a rather more advanced stage so as to enable such an assessment to be carried out meaningfully.

105. Even if the Claimants' construction of the Brief were to be treated as correct, so that it could not be said that a "detailed assessment" is unnecessary simply because of the "little weight" given to an emerging housing policy, the question of what detailed assessment should be provided would still remain a matter of judgment for HCC, ie. as to how much information it required in order to assess the application by BPM. That judgment could only be challenged on grounds of irrationality (see R (Khatun) v Newham LBC [2005] QB 37 paragraphs 34-5; R (Faraday Development Limited) v West Berkshire Council [2016] EWHC 2166 (Admin) paragraphs 132 to 134).

106. Here HCC did determine what information should be provided in order to assess BPM's application. In particular, the officers decided that the noise assessment provided by BPM was inadequate and commissioned an independent assessment (see paragraph 40 above). It has not been suggested that HCC acted irrationally by not requiring any further noise assessment going beyond the scope of that report. These matters are important because of the Claimants' acceptance during the hearing that the noise issue would be determinative as to the nature and scale of any buffer zone to protect the amenity of occupiers of the potential residential development to the north of Birchall

lane, and hence the housing capacity of that land. No material has been put before the Court to demonstrate that HCC acted irrationally as regards the extent of the information it obtained in order to assess the planning application.

107. But the Claimants also submitted that HCC acted irrationally in a different way, namely by accepting the advice of their officers that there was "no evidence" that the proposed inert waste recycling facility would unduly restrict the potential housing development (paragraph 10.10 of report to Committee). I utterly reject this criticism. First, I accept the submissions of Mr. William Upton (who appeared on behalf of HCC) and of Mr. David Forsdick QC (who appeared on behalf of BPM) that no *evidence* was submitted to HCC by EHDC, WHBC or Tarmac or by any other party, to show that the housing capacity of potential land north of Birchall Lane would be "unduly restricted." Their representations merely made brief assertions on that point without producing any supporting material which could have been assessed by HCC (eg. to show the scale of any claimed reduction in housing capacity and the basis for that assessment).

108. Consequently, the Claimants' skeleton (paragraph 81) seeks instead to rely upon the noise report commissioned by HCC to undermine its "no evidence" conclusion. In particular, the Claimants rely on the breaches of WHO standards and BS4142 together with the need for mitigation measures on the housing site, such as close-boarded garden fences and "barrier blocks". However, when the noise report by Acoustic Associates is read fairly and as a whole, it is plain that HCC was advised that the dominant source of noise affecting land to the north for residential development would be traffic on Birchall Lane unconnected with BPM's proposal and therefore that such mitigation would be needed on that land in any event, even if BPM's proposal were not to be approved. At no stage have the Claimants, or EHDC or WHBC, sought to challenge the conclusions of HCC's noise experts or the officers' reports, whether at the Committee meeting, or even subsequently during the gap between that meeting (24 September 2015) and the grant of planning permission (4 February 2016), or in any witness statement before the Court (see the allegation of unfairness under Ground 2(ii) below).

109. It is convenient at this point to deal with a further complaint made by the Claimants. It was submitted that the officers' summary to the Development Control Committee of the noise report by Acoustic Associates as set out in "slide 7" (see Mr Dempster's first witness statement) significantly misled the members (Samuel Smith Old Brewery (Tadcaster) v Selby D.C. (18 April 1977)). Mr Maurici QC submitted that although the slide summarised the outcome of the independent noise assessment applying the noise standards set by WHO and in BS 8233, it failed to refer to the outcome of applying what the authors of the noise report described as "the most relevant standard", that is BS 4142. But this criticism is entirely hollow. The advice to HCC was that with noise mitigation, which would be necessary in any event because of traffic on Birchall Lane, all three of the technical standards, including BS4142, would be satisfied. Slide 7 did advise members about the need for noise mitigation within housing land located to the north of Birchall Lane. It is therefore impossible to suggest that the Development Control

Committee was misled about the content of the independent noise report.

110. For all these reasons I reject the Claimants' various complaints under ground 2(i).

Ground 2(ii) – breach of the duty to act fairly

111. It was suggested in the Grounds of Claim and in supporting evidence for the Claimants that HCC had acted unfairly by relying upon the noise report by Acoustic Associates, which was produced after the publication of the officers' report for the Committee meeting, without giving the Claimants and others an opportunity to comment on that report. Mr Maurici QC did not press this point during his oral submissions. He was right not to do so. There is nothing in it.

112. In paragraph 6 of his first witness statement Mr Joseph Thomas (a planning consultant acting for Tarmac) states that he met Mr Chay Dempster (a planning officer of HCC) at the housing sites on 15 September 2015. He accepts that Mr Dempster showed him plans produced by Acoustic Consultants showing "the impacts of noise geographically" but complains that he was no provided with the written report. Mr Dempster points out in his first witness statement that Mr Thomas was aware that HCC was obtaining the report but he did not ask to see a copy. In his second witness statement Mr Thomas does not contradict that point and he accepts that he was shown the noise contour maps to be appended to the report when issued. The only point Mr Thomas says the Claimants would have made had they had sight of the noise report relate to the appropriateness of the mitigation proposed and its financial impact (see paragraph 8 of his first witness statement).

113. But the Claimants have produced no evidence to show that they would have relied upon an expert assessment to contradict the advice received by HCC that road traffic is the dominant source of noise so that the mitigation measures within the housing land to the north of Birchall Lane would have been needed in any event. As I have already noted above, there has been a good opportunity for the Claimants to do this not only after the Claim for judicial review was issued, but also during the period before the planning permission was granted, in order to persuade HCC to reconsider the issue.

114. There is no such concept as a technical breach of natural justice or of the duty to act fairly. Procedural unfairness, even if established, does not give a claimant a remedy in the courts unless he also shows that he has thereby suffered material prejudice (see the authorities considered by Ouseley J in R (Midcounties Co-operative Limited v Wyre Forest D.C. [2009] EWHC 964 Admin at paragraphs 94 – 96 and 104 to 105 and also George v Secretary of State (1979) 77 P & CR 689, 695 and Hopkins Developments Ltd v Secretary of State for Communities and Local Government [2014] PTSR 1145 at paragraphs 49 and 62). Even assuming that HCC was obliged to disclose the report to

the Claimants (a point which I am not willing to accept on the limited submissions advanced by the Claimants), the Claimants have failed to show any real prejudice at all and must therefore fail on this complaint in any event.

115.For all these reasons all of the various arguments under ground 2 must be rejected.

(vii) Ground 3

Ground 3(i) – Misinterpretation or irrational application of Green Belt policy

116.Paragraphs 9.28 to 9.36 of the Officers' Report explained why there were no suitable alternative sites, in particular sites in non-Green Belt locations, for the proposed waste recycling facility. Paragraph 9.35 rejected the site at Burrowfield which has an area of 4.44ha. The primary concern was the proximity of residential development immediately to the south. The report stated:-

> "The impact on the residents here would be unlikely to be acceptable in terms of noise, dust, and disruption from vehicle movements and general activity on the site."

The Claimants submit that these conclusions were irrational because they are "internally contradictory" to the conclusion reached by the HCC on the impact of BPM's proposal on potential housing development to the north of Birchall Lane. Of course, this complaint assumes that there is no material distinction between the two locations.

117.Quintessentially these were matters of planning judgment for HCC; they are not matters for the Court. The starting point is that the officers' report was addressed to a committee with substantial local and background knowledge (R v Mendip DC ex parte Fabre (2000) 80 P & CR 500, 509). It is reasonable to assume that the Committee would have been aware that the residential development near the Burrowfield site is *existing*, three-storey development with living accommodation overlooking the site. The dwellings face directly onto a roundabout opposite the site. It was a matter of planning judgment for HCC to determine that the impact on residential amenity by locating the recycling facility on the Burrowfield site would be unacceptable. Irrationality is a high hurdle for the Claimants to surmount (see e.g. R (Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74 at paragraphs 6 to 11) and in this instance I see nothing irrational about HCC's judgment. Indeed, given the circumstances to which I have referred, HCC's conclusion is hardly surprising.

118.Logically, HCC's conclusion that there need be no undue detriment to the housing capacity of land north of Birchall Lane involves no inconsistency with their conclusions rejecting the Burrowfield site as a suitable alternative. First, the question here was concerned with

the effect on *housing capacity* of land, not whether the same (or a similar proposal) at an alternative site would have an unacceptable effect upon the amenity of *existing* residential development. Second, the answer to the question raised by BPM's proposal is that the housing capacity of land to the north would not be significantly affected in view of the noise effects of traffic on Birchall Lane and the mitigation measures that would therefore be required within any housing allocation in any event. Self-evidently, these considerations did not arise at Burrowfield. For all these reasons I reject the challenge under Ground 3(i).

Ground 3(ii) – Incorrect baseline for the air quality assessment

119. Mr Maurici QC submits that the Air Quality report in support of BPM's application used an incorrect baseline, namely the effects of the development authorised by the temporary planning permission which expired in April 2016, and HCC's decision was reached on the same basis, thus failing to take into account the air quality effects of BPM's proposal for permanent development taken as a whole.

120. What matters here is how the issue was approached in the officers' report and hence by HCC. Paragraph 9.75 stated that an air quality assessment had been undertaken and went on to say that the assessment "was widened to include existing dust emission sources involved with the operation." The officers then identified the various techniques that can be used to control dust emissions on-site and concluded that subject to those controls being in place, "the operation of the site in its *expanded form* should not give rise to unacceptable levels of air pollution affecting the living conditions of existing and potential future residents in the vicinity of the site." Thus, it is plain that HCC directed itself correctly by reference to the air quality effects of the proposed permanent facility taken as a whole, without "scoping out" effects attributable to operations authorised by the temporary permission. Indeed, that is entirely consistent with the approach taken by HCC to noise impacts.

121. Finally, Mr Maurici QC sought to apply the same line of argument on "incorrect baseline" to emissions from the 170 HGV movements a day generated by the totality of the proposed development. Mr Forsdick QC demonstrated that all appropriate information for reaching a view on air quality was placed before HCC. In particular, the 170 HGV movements a day generated by the BPM proposal compare to the 14,395 vehicle movements a day on Birchall Lane, of which 1539 are HGV movements (paragraph 9.60 of the officers' report). Paragraphs 93 to 94 of the Defendant's skeleton explains why this was not a case where an air quality assessment was required in any event. Mr Maurici QC confirmed that that is not disputed. Applying well-established principles summarised in paragraphs 11(vi) and (vii) of R (Nicholson V Allerdale B.C. [2015] EWHC 2510 (Admin), there was therefore no need for the officers to go into the effects of the extra 170 HGV movements a day on air quality in their report to the Development Control Committee. In particular, there is no reason at all to think that HCC's officers adopted an incorrect baseline for considering air quality, inconsistently with the correct

approach taken by HCC on all other issues, notably noise impacts where it explicitly rejected the incorrect baseline used by BPM's consultant.

122.For all these reasons Ground 3(ii) must be rejected.

(viii) The Court's discretion where reasons in a screening opinion are inadequate

123. In paragraphs 57 to 99 above I rejected the argument under ground 1 that the reasons given for the negative screening opinion were legally inadequate or otherwise flawed. But at paragraph 100 I said that I would return to the question of how I would have exercised the court's discretion on the grant of relief if instead I had concluded that HCC's reasoning had been inadequate as contended by the Claimants. At this stage it is necessary to take into account the fact that all other challenges to the decision to grant planning permission have been rejected.

124. I have already explained that the Claimants made no representations before the planning permission was granted that the proposal be subjected to EIA. Nor did they question the adequacy of the reasons given for the screening opinion so that they might make representations to persuade the Secretary of State to issue a positive screening direction. Accordingly, on the Claimants' case before the court the only prejudice which they might raise through inadequacy of reasons would be their inability to determine whether HCC's screening decision was vitiated by a public law error.

125. At this stage it is necessary to remember that the court is dealing with the adequacy of reasons for a screening decision, not a substantive decision to grant planning permission (i.e. on a planning appeal). In the latter case the error could have potentially affected the decision on whether or not to grant planning permission. But how would the matter stand in the present case if the reasons for a negative screening decision were to be treated as legally inadequate?

126. By section 31(2A) of the Senior Courts Act 1981 the High Court must refuse to grant relief on an application for judicial review if it appears to the court highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred (subject to section 31(2B)). In the present case "the conduct complained of" is a failure to give adequate reasons for the screening decision, so as to raise a substantial doubt as to whether a public law error was made in that decision. So the issue raised by ground 1 under section 31(2A) is whether, if adequate reasons for the screening decision had been given, it is highly likely that the outcome would not have been substantially different for the Claimants. But the Claimants do not seek merely to have the screening decision quashed. At this point in time there would be no point in doing so. Instead they ask for the planning permission to be quashed. This raises practical and legal questions about the stage at which the Claimants have raised

their challenge to the adequacy of the reasons for the screening decision.

127. In R (Burkett) v Hammersmith LBC [2002] 1 WLR 1592 the issue was whether the grounds for challenging a planning permission first arose on, and hence the time limit in CPR 54.5 stated to run from, the date on which the decision notice granting that permission was issued, or whether those grounds first arose on the earlier date in that case when the authority resolved to grant permission subject to the completion of a section 106 agreement. In that case the application was for EIA development and the challenge alleged that the environmental statement was legally inadequate through failing to address contamination issues (paragraphs 21 to 22). The House of Lords held that because a resolution to grant planning permission may not result in an actual grant of permission, there was no *obligation* on a claimant to launch proceedings until a permission had in fact been issued and time did not begin to run until that date.

128. In R (Catt) v Brighton and Hove City Council [2007] EWCA Civ 298; [2007] Env. L.R. 32 the Court of Appeal held that a screening opinion has the status of a decision which may be challenged by judicial review "and that may be the appropriate course in some situations." But that opportunity to challenge the screening opinion does not affect a claimant's right to challenge the subsequent grant of planning permission (paragraph 49).

129. There can be no doubt that where a screening opinion is considered to be unlawful, for example on grounds of irrationality or because the EIA Regulations have been misinterpreted, then a claimant is entitled to seek judicial review without waiting for the authority to decide whether or not to grant planning permission. Indeed, such an application was made in the Commercial Estates case. On the other hand, as Catt makes clear, a claimant is entitled to challenge the legality of a screening opinion in a judicial review directed at the grant of planning permission.

130. But the question here has nothing to do with the settled principle that time for challenging a planning permission does not start to run until that permission is issued. Instead, it is concerned with the application of section 31(2A) where a claimant successfully challenges a screening opinion for inadequacy of reasoning, not in an application to quash that decision, but in an application to quash the subsequent grant of planning permission.

131. If in an application to quash a planning permission the court were to hold that the planning authority's screening decision not to treat the proposal as EIA development was irrational (or perhaps vitiated by a misconstruction of the EIA Regulations), the likely outcome if that "misconduct" had not occurred would have been that the proposal would have been treated as EIA development. On that basis the normal consequence would be that the planning permission would have to be quashed because it was granted in breach of regulation 3(4), namely a failure to take "environmental information" (including an

"environmental statement") into account before granting that permission.

132. But in the present case the situation is different. The Claimants complain of a failure to give adequate reasons for the screening decision so as to enable them to see whether *that decision* was vitiated by a public law error. So it follows that if adequate reasons had been given the Claimants would have been able to identify any such error, if indeed one had been committed. But the Claimants' case on this point is rather narrow. They have accepted that the negative screening decision was not an irrational one for HCC to have arrived at. Moreover, the Claimants have not argued that there is a substantial doubt arising from HCC's reasoning as to whether it *took into account an irrelevant consideration*. In the present case the inadequacy of reasoning could only have related to a possible failure *to take into account a relevant consideration*. Where the challenge to the reasoning of a screening decision is so narrow how are section 31(2A) and the Court's general discretion to grant relief to be applied?

133. On the Claimants' case if adequate reasons had been given in accordance with Save and South Bucks it might have been able to obtain the quashing of the screening direction because of a failure to take into account a rational consideration. But it does not follow from the Claimants' case that the grant of planning permission would also be vitiated. First, if further reasons had been given at the time of the screening decision, it may have been apparent that the authority had not left any relevant consideration out of account. Second, even if it had, and the screening decision had to be retaken, it does not follow that the outcome would have been any different. The authority might still have concluded that the proposal did *not* involve EIA development. This is important in a case where the Claimants do not argue that the only rational response for the planning authority was to treat the application as relating to EIA development. In such a case it does not follow that the ensuing planning permission would have been vitiated by virtue of regulation 3(4) of the EIA Regulations.

134. Next, it is to be noted that this is not a case where there was a failure by the authority to give *any* reasons for its decision. It is well-established that an inadequate statement of reasons may subsequently be elaborated, but not contradicted, in a letter or witness statement supplied by the authority, at least where that subsequent statement sets out reasons which were in the mind of the decision-maker at the time of the decision. If there is a real issue as to whether the reasoning was contemporaneous with the decision, and if it is necessary for the court to resolve that issue in order to decide how its discretion to grant relief should be exercised, then it *may* be appropriate for the court to order cross-examination if genuinely *necessary* in the interests of justice (see e.g. R v Westminster City Council ex parte Ermakov [1996] 2 All ER 302; R (Jedwell) v Denbighshire County Council [2015] EWCA Civ 1232; [2016] PTSR 715; [2016] EWHC 458 (Admin); [2016] Env. L.R. 24).

135. In the present case HCC filed a written statement by Mr. Brian Owen, Team Leader – Development Management at HCC. Before the hearing took place the parties agreed that

this statement should not be admitted and so I have disregarded it. However, the Claimants did not contend that I should also disregard paragraph 20 of HCC's response dated 26 February 2016 to the Claimants' pre-action protocol letter. That provides "further detail" as to HCC's reasons for issuing the negative screening opinion. It has not been suggested that these reasons were not contemporaneous with the decision. There was no application to cross-examine a representative from HCC on that or on this material in HCC's response to the pre-action protocol letter. These circumstances are quite different from the situation in R (Goodman) v Lewisham LBC [2003] EWCA Civ 140; 2003 Env. L.R. 28 (see paragraph 14) where the original decision of the authority did not involve *any* assessment of environmental impact because it had erroneously treated the proposal as falling outside the scope of Schedule 2 development.

136. The reasoning set out in the letter dated 26 February 2016 included the following points:-

(i) Neighbouring ecological sites are unlikely to be significantly impacted by the proposed development;

(ii) The proposal would not impact the Grade II listed buildings or their settings;

(iii) The site has been previously worked and therefore is unlikely to contain any significant archaeological interest;

(iv) Great crested newts, a European protected species, had already been translocated. Because the proposal contains continued protection of this species it is unlikely that there will be any significant impacts;

(v) Because the proposal is to handle inert waste it is unlikely that there will be any significant impacts upon groundwater. The site is in flood zone 1 and unlikely to be flooded. Measures have been included to ensure that run-off is not a problem;

(vi) The site is not within any air quality designated zone. Although the site is likely to generate dust and fumes e.g. from processing activities, stockpiles and from transport, these impacts are local and, taking into account the measures to be employed, would be unlikely to be significant;

(vii) "The proposal would generate vehicle movements on the local highway. The previous planning permission considered these, the

proposed increase would be within capacity on the highway and the impacts would not be likely to be significant."

(viii) "The processing of waste by the plant proposed, by internal transport, placing of inert waste and local reclamation and transporting waste to the site are activities that will generate noise. The nearest dwellings to the site are separated by and close to a road. Noise may affect the dwellings at Birchall Farm and a smaller number of dwellings and controls may be necessary. However, these impacts are unlikely to be significant".

137. In their written and oral submissions, the Claimants made two criticisms of this elaboration of HCC's reasons in its letter of 26 February 2016. First, it is said that point (vii) in paragraph 136 above shows that the Council was still incorrectly treating the development authorised by the temporary planning permission as part of the existing baseline. I disagree. In the usual way HCC was assessing whether the *total* amount of traffic on the local highway would fall within its capacity, taking into account both traffic generated by the whole of the development proposed on the application site and all other traffic on the road. The total projected traffic on the highway, comprising the traffic generated by the temporary development (which would now be permanently authorised), the "proposed increase" from the development, and all other traffic, would not cause the capacity of that highway to be exceeded.

138. The Claimants' second criticism is that the reasons given in the HCC still fail to address the impact of the proposal on the potential housing sites. Assuming for the sake of argument that this was a factor which HCC was obliged to take into account in its screening decision, I do not consider that there is any substance in this complaint. On the Claimants' own case (a) their concern about the waste recycling scheme is limited to its effect upon the housing capacity of land to the north of Birchall Lane and not whether that housing development may proceed at all; and (b) that effect is determined primarily by noise impact. As to air quality, HCC concluded that the effects would be very local and that mitigation measures would ensure that impacts would be unlikely to be significant. The passage in HCC's response to the pre-action protocol letter assessed noise effects on the nearest existing dwellings to the site which are close to Birchall Lane. The letter also expressly had regard to the possible development of new housing in the vicinity of Birchall Farm, stating that "a smaller number of dwellings and controls may be necessary, however these impacts are unlikely to be significant." Moreover, the independent noise assessment carried out for HCC confirmed that the proposed development would not increase the buffer zone required to deal with traffic present on Birchall Lane which is unrelated to the proposed development.

139. Accordingly, if the elaboration set out in the letter of 26 February 2016 had accompanied the screening opinion issued on 21 May 2015 the suggestion that inadequate reasons had been given would have been utterly hopeless. I therefore conclude that even if the

screening opinion had been quashed because of the inadequacy of the reasons which accompanied that decision, it is inevitable that HCC would have issued a further screening opinion with more detailed reasoning to the effect that EIA was unnecessary.

140. Furthermore, it should be noted that this is not a case where the Claimants have been able to identify any inadequacy in the information before HCC upon which the decision to grant permission was based or any flaw in the making of that decision. The factors upon which the Claimants rely when criticising the reasons given for the screening decision (noise and air quality) were all taken into account by HCC when it decided to grant permission. In each instance the authority was satisfied that there would be no significant impact. The reasons given in HCC's response to the pre-action protocol letter do not differ materially from the Council's actual assessment of the two factors relied upon by the Claimants when the Committee resolved to grant planning permission. That assessment is not "new". In these circumstances it is plain that the decision to grant planning permission would inevitably have been the same even if any *assumed* breach of regulation 4(7) of the EIA Regulation had not occurred. The suggestion that inadequacy of reasoning in HCC's screening decision raises a substantial doubt as to whether it took these factors into account is entirely artificial and hollow.

141. For these reasons even if, contrary to the view I have previously reached the challenge to the adequacy of the reasons for the screening opinion had succeeded, I would have refused to quash the planning permission granted on 4 February 2016, applying Simplex GE (Holdings) Ltd v Secretary of State for the Environment (1988) 57 P&CR 306; R (Smith) v North Eastern Derbyshire PCT [2006] 1 WLR 3315; and section 31(2A) Senior Courts Act 1981). I should add that no reasons of "exceptional public interest" have been advanced by the Claimants under section 31(2B).

142. I am reinforced in this conclusion by two further considerations. First, as the letter requesting a screening opinion pointed out, the development operated under the temporary planning permission had in practice resulted in no significant impacts. The brief anecdotal comments at the Committee meeting referred to in paragraph 4.2.4 of Mr Wintersgill's second written statement, when seen in the context of all the other material before HCC, could not possibly have led the Council to conclude that EIA was justified in this case. Second, the allocation of the site in WSAD had been subject to Strategic Environmental Assessment, which lent some support to the view that the recycling of inert waste (as opposed to a composting operation) would be unlikely to have significant effects.

Conclusion

143. For the above reasons the claim for judicial review is dismissed.

Costs

144. There is no dispute that the claimant must pay the costs of the Defendnat and that the capping provisions in CPR 45.43 apply. The only issue is whether, given that there are two Claimants those costs should be capped at £10,000 as the Claimants maintain, or £20,000, as the Defendant submits it is entitled to. The issue was discussed in R (Harris) v Broads Authority [2016] EWHC 799 (Admin). It is accepted that I have power to impose a cap of £10,000 for each claimant. Although the case was conducted in the same way as if there had been only one claimant, that is not the only consideration. The CPR is aimed at achieving access to environmental justice for *each* claimant at a relatively inexpensive cost. In this case each of the claimants had a separate interest in the subject matter and wanted to be a participant in the litigation, no doubt to ensure that their interests were adequately protected and taken into account in the case put forward. I also bear in mind the scale of the litigation and the considerable costs to which the Defendant has been put. In my judgment the fair and proportionate outcome in the exercise of the court's discretion is to order each Claimant to pay £10,000 towards the Defendant's costs. In the context of this case that fully meets the objective of the Convention.