Neutral Citation Number: [2018] EWHC 382 (Admin)

Case No: CO/2806/2017

# IN THE HIGH COURT OF JUSTICE

# QUEEN'S BENCH DIVISION

# ADMINISTRATIVE COURT

# IN THE MATTER OF THE TOWN AND COUNTR Y PLANNING ACT 1990

# AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 1 March 2018

# Before:

**SIR WYN WILLIAMS**

**(Sitting as a Judge of the High Court)**

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# Between:

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|  | **THE QUEEN on the application of**  **CREMATORIA MANAGEMENT LIMITED** | **Claimant** |
|  | **- and –** |  |
|  | **WELWYN HATFIELD BOROUGH COUNCIL** | **Defendant** |

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**Mr Peter Goatley** (instructed by **Irwin Mitchell LLP**) for the **Claimant**

**Mr Robin Green** (instructed by **The Solicitor to the Defendant**) for the **Defendant**

Hearing date: 17 January 2018

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**Judgment Approved**

# Sir Wyn Williams:

1. The Defendant is the owner and/or occupier of the cemetery known as Welwyn Hatfield Cemetery (hereinafter referred to as “the Site”). On 3 May 2017, acting in its capacity as local planning authority, the Defendant granted planning permission for development on the Site in the following terms:

“Erection of a new chapel, machinery store and crematory, to include new car parking provision and enhanced landscaping following demolition of existing chapel, machinery store, lodge house and central colonnade.”

1. In these proceedings by way of judicial review the Claimant seeks an order quashing that planning permission. The Claimant argues that the Defendant acted unlawfully when granting the planning permission; two discrete grounds are advanced in support of that contention. The Claimant’s grounds are resisted with vigour by the Defendant. Before discussing and reaching conclusions upon each ground, it is appropriate to provide the context in which they are to be considered.
2. The Site comprises an area of land of 4.24 hectares. It lies within the green belt. It is described (uncontroversially) as being on the edge of open countryside. To the south and east of the Site there are fields. A park and ride facility is located to the west and there is residential development to the north. There are a number of buildings and/or structures upon the Site and within it there are plots for deceased persons who have been cremated as well as those who are to be buried. As is obvious from the terms of the planning permission, the Defendant wishes to demolish the existing buildings and structures and create a new crematorium.
3. The Claimant is the operator of a crematorium situated at Woollensbrook, Hertford Road, Hoddesdon, in the Borough of Broxbourne (hereinafter referred to as “the Broxbourne site”). This facility was in use prior to the grant of the planning permission which is the subject of these proceedings but, as I understand it, it has been in use for a comparatively short period of time. I do not know, precisely, the distance between the Site and the Broxbourne site but the evidence suggests that they are approaching 10 miles apart.
4. The planning application which led to the grant of planning permission on 3 May 2017 was supported by a number of documents. They were (i) a Planning Policy Statement; (ii) a Supplemental Planning Statement (iii) a Need Assessment and (iv) an Analysis of Potential Sites for a New Cemetery and Crematorium.
5. In advance of the decision to grant planning permission a detailed report was prepared for the Development Management Committee of the Defendant (the “planning committee”). This was the committee charged with making the decision upon the planning application. The author of the report was Mr Raphael Adenega n (see Trial Bundle page 142). Mr Adenegan addressed many issues in his report before recommending that planning permission should be granted subject to conditions. As I understand it, the planning permission granted on 3 May 2017 adopted all Mr Adenegan’s recommendations as to the appropriate planning conditions.

*Ground 1*

1. The Claimant alleges that the Defendant failed to consider the need for a screening opinion and/or failed to undertake such screening and record the same on its register of decisions. These failures are said to be in breach of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (as amended) (hereinafter referred to as “the 2011 Regulations”).
2. The term “screening opinion” is a term which appears in the 2011 Regulations. In regulation 2 it is defined as meaning “a written statement of the opinion of the relevant planning authority as to whether development is EIA development”. The same regulation defines “EIA development” as being development which is either “Schedule 1 development” or “Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location”. The references to Schedule 1 development and Schedule 2 development are references to Schedules 1 and 2 of the 2011 Regulations.
3. The relevant parts of regulations 4 and 5 of the 2011 Regulations are as follows:

“4.—(1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.

* 1. The events referred to in paragraph (1) are—
     1. the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or
     2. the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development.”

Regulation 5 provides:

5.—(1) A person who is minded to carry out development may request the relevant planning authority to adopt a screening opinion.

…..

(5) An authority shall adopt a screening opinion within 3 weeks beginning with the date of receipt of a request made pursuant to paragraph (1) or such longer period as may be agreed in writing with the person making the request. ”

1. Regulation 7 provides:

“7. Where it appears to the relevant planning authority that—

1. an application which is before them for determination is a Schedule 1 application or a Schedule 2 application; and
2. the development in question has not been the subject of a screening opinion or screening direction; and
3. the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,

paragraphs (4) and (5) of regulation 5 shall apply as if the receipt or lodging of the application were a request made under regulation 5(1).”

1. There is no suggestion in this case that the development proposed in the planning application was EIA development because it fell within the ambit of Schedule 1 of the 2011 Regulations. Further, as a matter of fact, there was no request to the Defendant, as local planning authority, to adopt a screening opinion as to whether or not the development proposed was EIA development because it fell within Schedule 2. None of the documents submitted in support of the planning application suggested that the development was EIA development. The application was submitted on the basis that it did not constitute EIA development and that there was no need for a screening opinion upon that issue.
2. In these proceedings the Claimant contends that the development proposed is within Schedule 2 to the 2011 Regulations. This Schedule is in the form of a Table which is concerned with 13 different types of development. Column 1 of the Table contains the description of the 13 particular types of development with which the Table is concerned. Column 2 sets out applicable “thresholds and criteria” which must be satisfied before the development described within column 1 can be categorised as Schedule 2 development. The Claimant submits that the development under consideration in this case is properly to be categorised as an “infrastructure project” (column 1 Box 10) in that it constitutes an “urban development project” (column 1 Box 10 (b) which “includes more than 1 hectare of urban development which is not dwellinghouse development” – see Box 10 column 2 as amended by the Town and Country (Planning) (Environmental Impact Assessment) Regulations 2015.
3. On the basis of the pleaded case and the evidence adduced before me there are two central issues in relation to ground 1. First, as a matter of fact, did the Defendant, as local planning authority, consider whether there was a need for a screening opinion under the 2011 Regulations? Second, if the need for such an opinion was considered as a matter of fact, as the Defendant contends, was its conclusion that no such opinion was necessary unlawful?
4. The Claimant contends, correctly, that there is no contemporaneous document in existence which shows that the Defendant considered the need for a screening opinion. However, Mr Adenegan has made a witness statement dated 4 July 2017 (i.e. after the commencement of these proceedings) in which he sets out the process which was undertaken both before and immediately after the planning application was made. It is as well to set out his evidence in full.

“4. Prior to the submission of a full planning application the applicants put in for a pre-application advice from the Local Planning Authority as a way to ascertain the acceptability of the proposal before the submission of a full planning application. As part of the process, officers had an onsite meeting with the applicants and their agents in October 2016 where the information/details submitted were analysed and discussed. The discussion took the form of an EIA screening having regard to the criteria listed in Schedule 3 (Regulations 5(4). It was considered at this meeting and subsequent discussions that an EIA scoping exercise may or may not be required subject to the reports/statements submitted with the full application.

5. In my assessment and consideration of the planning application for the new crematorium at the Cemetery House, South Way, Hatfield I considered whether the proposal was an Environmental Impact Assessment (EIA) development. After careful consideration of the criteria that trigger the need for an EIA as contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (as amended) and the submitted supporting statements/information for the application, I concluded that the proposal is not an EIA development, and as such there was no requirement to submit an environmental statement. My conclusion is premised on the interpretation of the Regulations illustrated below.

………”

1. On the basis of Mr Adenegan’s evidence it is clear that consideration was given as to whether a screening opinion was necessary and whether the development under consideration was EIA development. Mr Goatley, on behalf of the Claimant, did not invite me to reject Mr Adenegan’s evidence notwithstanding no contemporaneous written record of what had occurred was produced. In my judgment, that was a proper stance for the Claimant to take. There is no firm evidential foundation which begins to suggest that Mr Adenegan’s evidence was erroneous let alone untruthful. It follows that although no written record exists I am satisfied that the Defendant, through its duly authorised officer, Mr Adenegan, considered whether a screening opinion was necessary and whether the development constituted EIA developme nt. Further, it is clear that Mr Adenegan concluded that no screening opinion was necessary and that the development in question was not EIA development.
2. Following the extract from paragraph 5 of Mr Adenegan’s statement set out above he summarised a number of the provisions of the 2011 Regulations including the Table within Schedule 2. He then continued:-

“6. In my assertion based on the foregoing I considered that the closest applicable part of the criteria set out in Schedule 2 of the Regulation is that of 10(b) which deals with urban development projects relating to construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas. The proposal is for a crematoria, and as such not an urban project/development. This is because according to the Cremation Act, 1902 as amended and affected by the Cremation Act, 1952 “no crematorium shall be constructed nearer to any dwelling- house than 200 yards” (183m). This in my opinion would be difficult to achieve in an urban area but rather in a semi- rural, rural or semi- urban setting. In this case the proposed development is not in an urban area, is not of an urban nature (it sits within a designed parkland landscape) and would not have a significantly urbanising effect on the local environment. My assessment of the scheme by way of screening is that the proposal was not EIA development for the purposes of these Regulations.

7. In any event, contrary to what is alleged in the Claimant’s statement of facts and grounds (“CSFG”), none of the thresholds for urban development projects in Schedule 2 was met.

For the avoidance of doubt, the applicable thresholds and criteria were as follows:

1. The development includes more than one hectare of urban development which is not dwellinghouse development; or
2. The development includes more than 150 dwellings; or
3. The overall area of the development exceeds 5 hectares.

Accordingly, the proposed development was not an urban development project; but even if it was, it did not meet any of the thresholds that would render it Schedule 2 development. There was therefore no need for me to adopt a screening opinion.”

1. The phrase “urban development project” is not defined within the Regulations. Within column 1, Box 10, of the Table the phrase includes “the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas”. It is not suggested that the phrase “urban development project” is limited to these types of development and I have no difficulty in accepting that the types of development set out in Box 10 are illustrative only. How then is the phrase to be interpreted and applied?
2. Detailed guidance in relation to that issue is to be found in the decision of the Court of Appeal in *R (Goodman) v London Borough of Lewisham* [2003] Env. L.R. 28. The relevant facts were these. The Claimant was a resident affected by the proposed redevelopment of a site having an area of 5540 m² for the construction of a warehouse and self-storage blocks. He sought judicial review of the Defendant’s grant of planning permission for the development on the grounds that the local planning authority had erred in determining that the development did not require an environmental impact assessment. The basis of his claim was that the proposed development constituted an “urban development project” within predecessor regulations to the 2011 Regulations. At first instance the judge found that the local planning authority had been entitled to conclude that the proposed developme nt was not an urban development project – it could not be said that its decision on that issue was irrational or perverse and, accordingly, the claim was dismissed.
3. The Claimant’s appeal to the Court of Appeal was allowed. The leading judgment was given by Buxton LJ with whom Brooke LJ and Morland J agreed.
4. Buxton LJ first analysed the process which must be undertaken by a local planning authority when the possibility exists that a planning application ma y be regarded as Schedule 2 development. He said this:

“[7] The first question for a planning authority is, therefore, to determine whether the application before it is a "Sch. 2 application": that is, in terms of the definition …. whether the development falls within the descriptions and limits set out in Sch. 2. Although the application becomes a Sch. 2 application by decision of the authority; and does not thereafter become an application for EIA development unless the authority further so decides; the authority cannot avoid the implications of the application being for EIA development simply by not taking the preliminary decisions at all…... The authority is bound to enter upon consideration of whether the application is for Sch. 2 development unless it can be said that no reasonable authority could think that to be the case…”

1. Buxton LJ next considered how the court should approach the issue of whether the development was an “urban development project”. At paragraph 8. he expressed himself as follows:

“8. In the present case, the only serious contender for a category of Sch. 2 development under which the application might fall is para 10(b) of the Schedule: infrastructure projects that are urban development projects. These are very wide and to some extent obscure expressions and a good deal of legitimate disagreement will be involved in applying them to the facts of any given case. That emboldened [the local planning authority] to argue, and the judge to agree, that such a determination on the part of the local authority could only be challenged if it were *Wednesbury* unreasonable. I do not agree. However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgment. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions, the concept of reasonable judgment, as embodied in *Wednesbury,* simply has no part to play. That, however, is not the end of the matter. The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions might be legitimately available. That approach to decision making was emphasised by Lord Mustill, speaking for the House of Lords, in *R v Monopolies Commission, ex p. South Yorkshire Transport Ltd* [1993] 1 WLR 23, at p32G, when he said that there might be cases where the criterion, upon which in law the decision has to be made,

“may itself be so imprecise that different decision- makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational.”

9. That is the decision as to whether the development is a Sch. 2 development. If the authority concludes that it is such, it then has to go on and decide whether that Sch. 2 development is also an EIA development, by determining whether it is likely to have significant effects on the environment by virtue of factors such as its nature, size or location. That is an enquiry of a nature to which the *Wednesbury* principle does apply, and I understand Sullivan J, to have so held in *R (on the application of Malster) v Ipswich Borough Council* [2002] PLCR 251 [61].”

1. Before me, there was a great deal of debate about paragraph 8 of the judgment of Buxton LJ. Reduced to its essentials, however, Mr Green for the Defendant submits that the whole of paragraph 8 constitutes the *ratio decidendi* of *Goodman* and is binding upon me*.* Mr Goatley submits that the *ratio* of the decision ends half way through paragraph 8 and that the part of the paragraph which follows the words “That, however, is not the end of the matter” constitutes *obiter dicta*.
2. I cannot accept that Mr Goatley is correct in his analysis of paragraph 8. It seems to me to be clear that the whole paragraph is central to the reasoning of the learned judge and it provides the basis for the actual decision in the case. My view is reinforced by a short passage from paragraph 13 of the judgment. This paragraph falls within that part of the judgment which is under the sub-heading “The decision in this case”. At paragraph 13 Buxton LJ observed:

“"Infrastructure project" and "urban development project" are terms of wide ambit, perhaps more easily understood by those versed in planning policy than by mere lawyers, and attracting the observations of Lord Mustill quoted in paragraph 8. above.”

1. Given my conclusion that paragraph 8 constitutes part of the *ratio* of *Goodman*, I am bound by it unless it has been overruled either expressly or impliedly by later authority of the House of Lords or Supreme Court.
2. Is that the effect of the decision of the Supreme Court in *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983? In this case Asda Stores Ltd submitted an application for planning permission to build a superstore on the outskirts of Dundee. The local structure and development plans provided for a sequential approach to site selection for new retail development which meant that large out of centre retail development would only be acceptable when it could be established that no suitable site was available, in the first instance, within and, thereafter, on the edge of a city, town or district. Tesco objected to the proposal on the basis that there was a suitable site within a local district centre. Despite the objection, planning permission was granted. Tesco sought to quash the planning permission on the ground that the planning authority had misinterpreted the development plan. The claim for judicial review failed and all appeals, including the appeal to the Supreme Court, were dismissed.
3. The leading judgment in the Supreme Court was given by Lord Reed. Having stated the long-established principle that a local planning authority must proceed upon a proper understanding of the development plan, he continued:-

“18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority was required to proceed on the basis of what Lord Clyde described as “a proper interpretation” of the relevant provisions of the plan. We were, however, referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act [a reference to the Town and County Planning (Scotland) Act 1997] of much of their effect, and would drain the need for a “proper interpretation” of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision- making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836 ), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean. ”

1. Lord Reed then considered the meaning of the word “suitable”. At paragraph 21 he said:

“21. A provision in the development plan which requires an assessment of whether a site is “suitable” for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word “suitable”, in the policies in question, means “suitable for the development proposed by the applicant”, or “suitable for meeting identified deficiencies in retail provision in the area”, is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed.”

1. Neither *Goodman* not the observations of Lord Mustill in the *Monopolies and Mergers Commission* case were cited in *Tesco Stores Ltd* nor were they referred to in the judgements of their lordships. That is hardly surprising. *Goodman* is a decision about the proper approach to regulations and the *Monopolies and Merger Commission* case is concerned with the interpretation of primary legislation; *Tesco Stores* is concerned with the proper approach to the interpretation of planning policy.
2. That said, I do not consider that there is any tension between the approach to statutory interpretation set out in *Goodman* and the approach in *Tesco Stores Ltd* as it relates to the interpretation of planning policy. Buxton LJ in *Goodman* proceeds on the basis that the interpretation of a regulation is a question of law to be determined by a court. Lord Reed, in *Tesco Stores Ltd*, considers that planning policy must be interpreted objectively and the ultimate arbiter of its meaning is the court. He explicitly accepts, however, that the language of policy statements may often be framed in terms which requires the exercise of judgment when the words are applied to given facts. It is obvious that many planning policies are couched in terms which are wide in their ambit or even obscure in their meaning which, inevitably, means that a degree of judgment will be involved when a decision maker is called upon to apply the policy statement in a particular context.
3. Since judgment is necessarily involved in applying words of a planning regulation or policy which has an imprecise meaning there will be occasions when different decision makers confronted with the same factual circumstances will apply the statutory provision or policy statement differently. That is a common feature of the decision making processes in this field of law but that does not mean, as Mr Goatley submits, that the world of “humpty dumpty” prevails. It is simply an acknowledgment of the difficulties inherent in decision making when the words to be applied by the decision maker are imprecise.
4. In my judgment paragraphs 8 and 9 of *Goodman* constitute or form part of its ratio. *Tesco Stores Ltd* did not overrule the ratio of *Goodman* either expressly or impliedly. Accordingly, I am bound to follow paragraphs 8 and 9 of the decision in *Goodman*.
5. The phrase “urban development project” cannot be given a precise meaning. I agree with the observations made by Buxton LJ at paragraph 13 of his judgment in *Goodman* – see paragraph 23 above. However, it does seem to me that at its core the development must be urban in character. The standard dictionary definition of the word “urban” is “in, relating to or characteristic of a town or city”. I do not suggest that the phrase “urban development project” should be defined strictly by reference to this dictionary definition. It does, however, provide a useful starting point. Without doubt, however, a variety of factors will usually be relevant to an assessment of whether development is to be characterised as urban. It would be wrong to seek to lay down an exhaustive set of criteria by which to assess whether a project constitutes urban development. No doubt, such factors as its nature, size, location and the use to which it will be put are likely to be relevant in most cases. However, I cannot stress too much that this is not intended to be an exhaustive list of factors by which to make the relevant judgment. It is simply meant to be an acknowledgment or an indication that a variety of factors will usually need to be considered in any given case before a judgment is reached. It should not be forgotten, too, that it will sometimes be the case that factors under consideration will themselves be imprecise.
6. In the light of the preceding paragraph and the legal analysis which preceded it I have reached the conclusion that Mr Adenegan did not act unlawfully when he determined that the development of the Site for which planning permission was sought did not constitute an “urban development project”. His reasons for so concluding are set out in paragraph 6 his proof of evidence – see paragraph 16 above. He was entitled to conclude and rely upon his assessment that the development was not in an urban area, that it was not of an urban nature when looked at as a whole and that it would not have a significantly urbanising effect on the local environment. In my judgment those factors properly led him to conclude the permission was not being sought for an urban development project.
7. If I had been the primary decision- maker I would not have relied upon the Cremation Act 1902 as part of my process of assessment. However, I cannot say that this was an irrelevant consideration and, in any event, the pleaded case against the Defendant does not allege that reliance upon that statutory provision, of itself, rendered the decision unlawful.
8. It must follow that ground 1 fails. However, I cannot leave this ground without reference to a further point which was debated before me. In his proof of evidence at paragraph 7 Mr Adenegan explained that he had also considered whether the thresholds and criteria set out in column 2 of Schedule 2 were met even though he had concluded that the development proposed for the Site was not to be regarded as an urban development project. His view was that none of the thresholds and criteria could be met; in particular, the development did not include more than 1 hectare of urban development. This conclusion is challenged by Mr Goatley.
9. In support of the submission that the development proposed for the Site includes more than 1 hectare of urban development reliance is placed upon the witness statement and exhibits produced by Mr Peter Greenwood, a chartered architect who has analysed the plans which accompanied the planning application and “identified those parts of the site which are intended to be physically developed as part of the proposal pursuant to the planning permission, whether by way of built development, demolition, landscaping, highway works or other operational development.” Mr Greenwood’s evidence is that the sum of the areas of those parts is 1.21 hectares.
10. Mr Green did not object to Mr Greenwood’s evidence being admitted before me. He submits, however, that when Mr Greenwood’s evidence is properly analysed it does not support the conclusion that the proposed development included more than 1 hectare of urban development. He points to the fact that the total area of 1.21 hectares includes areas in which buildings/structures and built features currently on the Site are to be demolished; it also includes areas which would be the subject of landscaping.
11. My task is to interpret the phrase “urban development” in the context in which it appears in the Table and to apply it to the form of development proposed by the Defendant. I have reached the conclusion that the phrase is not apt to include the built areas which are to be demolished, especially since those areas are in substantial part to be replaced with new built areas. In the context of this case, at least, the phrase “includes more than 1 hectare of urban developme nt” might be capable of describing new built areas (including hard surfaces) but would not be capable of describing the demolition of existing structures which are being demolished because they will be rendered redundant or unsightly by reason of the build ing of new structures. If the principal demolished areas are removed from Mr Greenwood’s calculations the “urban development” cannot exceed 1 hectare. Further, and in any event I have considerable reservations about whether the landscaping of the Site could constitute “urban development”. Since it is unnecessary to do so, however, I do not propose to rule upon that issue definitively.

*Ground 2*

1. I can deal with this ground much more succinctly. It is common ground that it was necessary for the Defendant to demonstrate that there was a need for the development proposed on the Site given its location in the Green Belt. On behalf of the Claimant, it is submitted that need was not established because the need assessment undertaken on behalf of the Defendant did not take account of the capacity of the Broxbourne site.
2. As I have said the Defendant submitted a written need assessment in support of the planning application (“the Need Assessment”). Within the Executive Summary set out at the beginning of the document the following sentence appears

“The partially constructed crematorium in Broxbourne has also been factored into the analysis”

1. Within the body of the document there are a number of references to the Broxbourne site all suggestive of the proposition set out in the Executive Summary. Despite these references it became clear during the hearing that the Need Assessment had not, in fact, “factored” the capacity of the Broxbourne site into the analysis of need.
2. During his oral submissions Mr Green submitted that the capacity of the Broxbourne site was irrelevant given the methodology adopted in the Need Assessment. He conveniently summarises that methodology and the conclusions reached in paragraph 20 and 21 of his skeleton argument. No useful purpose would be served in setting out the substances of those paragraphs because, as Mt Green points out, the Claimant does not argue in the detailed facts and grounds supporting this claim that the methodology adopted by the Defendant was irrational or perverse or otherwise unlawful.
3. The ground as pleaded so far as relevant is as follows:-

“39 At the time the decision was taken the Claimant’s new facility at Broxbourne had recently opened. That facility had the ability to accommodate circa 1,200 cremations per annum.

1. Whilst paragraph 10.59 of the officer’s report refers to this new crematorium at Broxbourne, it makes no reference to its quantitative capacity, its qualitative features or the ability of that new facility to meet the need for a crematorium in the Council’s district either now. Or at any relevant point in time in the future. This is a material omission.
2. In consequence, the council members were neither fully informed or were, in consequence misled as to the need for a crematorium of the type proposed and/or at this time”
3. In fact the pleaded case is not entirely accurate. Paragraph 10.59 of the officer’s report does indeed refer to the Broxbourne site. However, contrary to the pleaded case, the reference appears in a sentence which identifies a number of crematoria “in the area” and which are said to be “close to their maximum capacity”. Far from making no reference to its quantitative capacity the officer’s report advises members that the Broxbourne site was close to its maximum capacity.
4. The Defendant acknowledges that the reference to the Broxbourne site being close to its maximum capacity is erroneous. However, Mr Green submits that this error “did not in any way affect the findings of the needs assessment” – a reference, no doubt, to the Need Assessment which supported the planning application.
5. I am prepared to accept that the error in Mr Adenegan’s report did not impact upon the methodology deployed in the Need Assessment. However, that is not the point. Paragraph 10.59 appears in the section of his report which identifies “considerations which weigh in favour of the development”. Between paragraphs 10.54 and 10.60 Mr Adenegan considers a number of issues relevant to whether a quantitative need for the development exists. A substantial part of his analysis is, without doubt, concerned with the Need Assessment. However, there can be no doubt, too, that paragraph 10.59 is concerned with the capacity of existing facilities including the Broxbourne site. On any fair reading of this paragraph the members of the planning committee are being told that all relevant existing crematorium facilities are either close to their maximum capacity or near full capacity. In my judgment, the effect of this paragraph is that members were being advised that a factor to be taken into account and which supported the grant of planning permission was that existing facilities were inadequate, in terms of capacity, to meet the need for crematoria in the area.
6. Given the way in which the report of Mr Adenegan is written I do not accept that the capacity of the Broxbourne site was an irrelevant consideration. Further, I am satisfied that the effect of paragraph 10.59 was to significantly mislead the planning committee about a material consideration. There is no suggestion that the error made in the report was corrected at the meeting at which the planning application was decided. Accordingly, following *Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council 1997 WL 1106106*, I conclude that the Defendant’s decision to grant itself planning permission for the development on the Site was vitiated by legal error.
7. I acknowledge that the basis of my decision on this ground is, to an extent, at variance with the pleaded case. However, I do not consider this gives rise to an injustice. The nub of the Claimant’s case was always that the Defendant failed to take into account a material consideration, namely, the capacity of the Broxbourne site to meet what was said to be the need for a crematorium upon the Site. In essence that is what I have found since it is acknowledged that the true capacity of the Broxbourne site to meet the need for a crematorium was never assessed.
8. I turn, finally, to section 31(2A) of the Senior Courts Act 1981. I must refuse the quashing order which is sought if it appears to be high likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. In this case I must assess whether it was highly likely that planning permission would have been granted if the erroneous information about the capacity of the Broxbourne site had not been placed before the members.
9. My recollection is that I did not rule out the possibility of further submissions being made about how section 31(2A) should be applied once the parties knew of my conclusions upon the substantive issues. Accordingly, the Defendant may, if it chooses, put in further short written submissions which must be served upon the Claimant’s advisors by 12 noon Wednesday 28 February 2018. I should make it clear, however, that my strong provisional view is that section 31(2A) of the 1981 Act cannot avail the Defendant in this case and that I should make a quashing order.
10. Notwithstanding the view I expressed in the preceding paragraph, I received short written submissions from Mr Green and submissions in reply from Mr Goatley. I am simply not persuaded that I can say that had the material error not occurred it is highly likely that the decision as to the grant of planning permission would have been the same. The prospect that the Broxbourne site had spare capacity was or at least may have been a factor of some significance, potentially, given the fact that this was a proposed development in the Green Belt. Accordingly, I grant the quashing order sought.