Neutral Citation Number: [2023] EWCA Civ 92

Case No: CA-2022-000329

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MR JUSTICE LANE
[2022] EWHC 238 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2023

Before :

SIR KEITH LINDBLOM
(SENIOR PRESIDENT OF TRIBUNALS)
LORD JUSTICE DINGEMANS
and
LORD JUSTICE EDIS

- -

Between :

THE KING
on the application of
WHITLEY PARISH COUNCIL — **Appellant**
- and -
(1) NORTH YORKSHIRE COUNTY COUNCIL
- and -
(2) EP UK INVESTMENTS LIMITED — **Respondents**

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- -

Richard Kimblin K.C. and **Howard Leithead** (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Jenny Wigley K.C. (instructed by **Head of Legal Corporate Services, North Yorkshire County Council**) for the **First Respondent**
Alexander Booth K.C. and **Ned Westaway** (instructed by **Pinsent Masons LLP**) for the **Second Respondent**

Hearing date: 23 November 2022

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Approved Judgment

This judgment was handed down remotely at 4:15pm on 3 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Senior President of Tribunals:

Introduction

1. The central question in this appeal is whether a county planning authority, when determining an application for planning permission for a project to extract pulverised fuel ash from a previously worked and partly restored site, was led into error by its planning officer's advice on the weight to be given to a development plan policy on the "Best Practicable Environmental Option". The relevant legal principles are fully established by authority in this court and above.

2. With permission to appeal granted by Lewison L.J., the appellant, Whitley Parish Council, appeals against the order of Lane J. dated 9 February 2022, dismissing its claim for judicial review of the decision of the first respondent, North Yorkshire County Council, to grant planning permission for the extraction and export of pulverised fuel ash from Lagoons C and D and Stages II and III of the Gale Common Ash Disposal Site and associated development, with improvement works to local roads. The second respondent is the developer, EP UK Investments Ltd..

The main issues in the appeal

3. Permission to appeal was granted on three grounds, which raise these issues: first, whether the county council failed lawfully to take into account, and apply, a relevant provision of the development plan, namely criterion a) in Policy 7/3 of the North Yorkshire Waste Local Plan (2006), because advice given in the planning officer's report to committee "fettered the discretion to give the policy whatever weight the decision maker considered appropriate"; second, whether the county council erred in law in failing to consider "alternatives" to the proposed development; and third, if an error of law is demonstrated, whether, under section 31(2A) of the Senior Courts Act 1981, relief should be refused because it is "highly likely" that the decision would not have been substantially different if the error had not occurred. As Lewison L.J. said when granting permission, the grounds in the appellant's notice which raise the first and second of those three issues "stand or fall together". And the third issue arises only if those grounds succeed. Lewison L.J. refused permission on another ground, which alleged a failure by the county council lawfully to apply the Government's policy for development in the Green Belt in paragraph 145 of the National Planning Policy Framework, published in February 2019, which was current at the relevant time ("the NPPF"). The officer's advice had been that the proposal was for "inappropriate development" in the Green Belt, which had to be justified by "very special circumstances", and this was "a question of planning judgment". In Lewison L.J.'s view that ground had "no real prospect of success". No attempt was made to renew it before us.

Policy 7/3

4. The North Yorkshire Waste Local Plan was adopted in 2006. Policy 7/3 was subsequently "saved" under the relevant statutory provisions. Headed "Re-working of Deposited Waste", it states:

> "Proposals to re-work deposited waste will be permitted only where:
>
> a) the proposals represent the Best Practicable Environmental Option; and
>
> b) re-working would achieve material planning benefits that would outweigh any environmental or other planning harm which might result."

5. Paragraph 7.17 in the supporting text states:

> "7.17 There may be instances where the re-working of deposited waste is required to resolve pollution problems or where changed economic circumstances support the re-use of deposited waste for example Pulverised Fuel Ash (PFA). In considering applications for the re-working of material there will be a need to balance the desire to encourage re-use of material and the impact that re-working the material will have on the site and the surrounding area. It is therefore necessary to establish that the proposal represents the Best Practicable Environmental Option. Developers will therefore be expected to demonstrate that they have carried out an appraisal of the options having regard to the social, environmental, economic, land use and resource impacts and that the scheme represents the best available option in the context of the policies of the Plan."

6. Other text in the waste local plan confirmed that the concept of "Best Practicable Environmental Option" was a guide to decision-making which had originated in the Government's Waste Strategy 2000, published in May 2000 (paragraphs 2.7 to 2.9). However, this was no longer a feature of national planning policy for waste when the county council came to make its decision on EP UK's application for planning permission. The National Planning Policy for Waste published by the Government in October 2014 did not refer at all to the "Best Practicable Environmental Option". In Appendix A it emphasised the need to drive waste management up the waste hierarchy, favouring proposals for "other recovery" – defined as waste serving "a useful purpose by replacing other materials that would otherwise have been used" – over disposal.

7. The NPPF stated that it "should be read in conjunction with the Government's … planning policy for waste" (paragraph 4). The Government's policy on the weight to be given to policies in development plans adopted before the publication of the NPPF was that "existing policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework", and "[due] weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)" (paragraph 213).

The council's decision to grant planning permission

8. The site of the proposed development lies in the West Yorkshire Green Belt. It had previously been used, under a planning permission granted in 1963, for the disposal of ash from the Eggborough and Ferrybridge "C" power stations. The depositing of ash

came to an end after the Eggborough power station closed in 2018. Restoration work then went ahead on parts of the site.

9. EP UK submitted its application for planning permission in May 2019. It sought permission for the extraction of about 23 million tonnes of pulverised fuel ash in several phases over a period of 25 years, with an estimated maximum annual extraction of one million tonnes. The material would be extracted from parts of the site not yet restored, using existing infrastructure. EP UK's Planning Statement stated (in the "Executive Summary") that pulverised fuel ash "can be used in a range of construction activities …", and is "classed as a recycled/secondary aggregate, the use of which is supported in principle by planning policy at national and local level", and (in paragraph 8.14) that "its use is generally viewed as more sustainable and environmentally beneficial than extracting primary aggregates from new greenfield sites or importing material from abroad, in accordance with Policy 7/3 of the North Yorkshire Waste Local Plan".

10. In the environmental statement prepared under the Town and Country Planning (Environmental Impact Assessment) Regulations 2017, section 4.8, "Consideration of Alternatives", said the "[reasonable] alternatives to the Proposed Development that have been considered" were "Do Nothing", or "a similar development at an alternative location", or "an alternative development at the Gale Common Ash Disposal Site" (paragraph 4.8.1). In the "Do Nothing Alternative" the "opportunity to extract PFA for beneficial use as a secondary aggregate would not be realised and the construction industry would either have to source PFA from other sites or imports, or continue to use primary aggregates" (paragraph 4.8.3). As for "Alternative Locations", it said that "[the] opportunities for a similar development at an alternative location are limited by the availability of PFA deposits" (paragraph 4.8.5). EP UK only had control of two sites where pulverised fuel ash had been deposited – the application site and a site in the north-east of England. But "the quality of ash available at that alternative site does not meet the same specification and therefore cannot be utilised for the same markets as the ash from Gale Common" (paragraph 4.8.6). But there was "sufficient UK demand for PFA to justify the proposed extraction operations from the Gale Common Ash Disposal Site as well as continued extraction undertaken by others at alternative UK sites" (paragraph 4.8.7).

11. The parish council's objection to the proposed development was presented in a report prepared by KVA Planning Consultancy, dated 11 September 2019. The report stated four reasons for the objection (in paragraph 2.1): first, "[the] detrimental impact of the proposals on the surrounding landscape and countryside"; second, that "[the] proposals do not meet the required tests set out in the NPPF in relation to Green Belt"; third, "[noise] impacts from the proposals"; and fourth, "[the] detrimental impacts from the proposed transportation routes and highway safety implications". It did not suggest, however, that planning permission ought to be refused for the lack of an assessment of "alternatives", or because the "Best Practicable Environmental Option" had not been considered under criterion a) of Policy 7/3 in the waste local plan. Amplifying the fourth reason given for the objection, it said (in paragraph 4.37):

> "4.37 WPC acknowledge that the applicant has considered using existing waterway and railway infrastructure during the development process for the application and welcome the suggested condition 11 set out in section 6 of the applicant's PS, however, believe that this should be extended to include

> relevant rail authorities in line with policy. Furthermore, WPC consider that it would be beneficial for the MPA to require the applicant to review transportation matters as a whole after every 5 years of operation by way of this condition. This would include assessing the viability of pumping ash slurry back to Eggborough Power Station for transhipment, an operation that the operator indicated to WPC that they would be willing to consider if at all possible. The methods in which materials and produce are transported are going to be required to go through a transition in the next few years in order to adapt in order to combat climate change. A condition requiring a review of transportation matters at regular intervals during any operation with a long-term project life is considered sensible."

12. In December 2019 EP UK submitted its Transport Alternative Options Report, which proposed measures for reducing and managing the effects of traffic generated by the development on local roads. These included a commitment to an annual review of alternative transport options once exports of pulverised fuel ash from the site had exceeded 100,000 tonnes a year.

13. The application for planning permission came before the county council's Planning and Regulatory Functions Committee for determination on 17 November 2020. The committee had received a report on the proposal**,** prepared by a planning officer, the Corporate Director – Business and Environmental Services, and a supplementary report, both recommending that planning permission be granted. The officer's report was introduced at the meeting by the Head of Planning Services. The clerk of the parish council and several other objectors addressed the meeting, in opposition to the application. Representatives of EP UK spoke in support. The minutes record a lengthy debate of the planning merits of the proposed development, including its likely effects on the environment. They do not, however, refer to any discussion of criterion a) in Policy 7/3 of the waste local plan, or of the "Best Practicable Environmental Option". The committee's "Legal Adviser", who was present at the meeting, advised only that "the eventual destination of the product was not a material planning concern and should not be taken into consideration". A "proposal to defer consideration of the application … to allow further investigation of alternative transport methods and routes …" was moved, but defeated on the Chairman's casting vote. A "proposal to approve the application" was then moved. Five members voted in favour, five against. But, again on the Chairman's casting vote, the committee resolved to accept the officer's recommendation. Following the completion of an agreement under section 106 of the Town and Country Planning Act 1990 planning permission was duly granted on 29 April 2021.

The planning officer's report

14. The planning officer's report runs to 99 pages. It deals at length with the planning merits of the proposed development.

15. In section 4 of the report, "Consultations", the officer recorded the main points in the parish council's objection to the proposal (paragraphs 4.37 to 4.42).

16. In section 6, "Planning policy and guidance", under the heading "The Development Plan", she reminded the committee that "[section] 38(6) of the Planning and Compulsory Purchase Act 2004 ["the 2004 Act"] requires that all planning authorities must determine each planning application in accordance with the planning policies that comprise the *Development Plan* unless material considerations indicate otherwise" (paragraph 6.1). She then identified the documents comprising the development plan (paragraph 6.2).

17. On Policy 7/3 of the North Yorkshire Waste Local Plan the officer said this (in paragraphs 6.19 and 6.20):

> "6.19 With respect to the "saved" policies of the North Yorkshire Waste Local Plan (adopted 2006) Policy 7/3 Re-working of Deposited Waste is the relevant one. This states that proposals to re-work deposited waste will be permitted only where the proposals represent the Best Practicable Environmental Option; and re-working would achieve material planning benefits that would outweigh any environmental or other planning harm that might result.
>
> 6.20 Paragraph 7.17 accompanies that Policy within the Waste Local Plan. It includes the need to balance encouraging re-use, with the impact that re-working would have on the site and its surroundings, and so it should be demonstrated that the proposal was the Best Practicable Environmental Option available in the context of the policies of the Plan. However, whilst the Best Practicable Environmental Option was national waste policy in 2006, it is not part of the National Planning Policy for Waste (2014). Hence, it is not considered that part a) of this policy can be given any weight in determining this application. However, it is considered that, because part b) relates to the consideration of whether the benefits of re-working of a deposited waste outweigh any "environmental or other planning harm", then moderate weight can be given to this policy. This is because the compliance with through [sic] consistency with NPPF paragraph 170 principle e) for determining planning applications and NPPF paragraph 180 regarding taking into account the effects of a development, the sensitivity of an area and the proposed mitigations."

18. Later in the same section the officer acknowledged that "[the] Government's ambition set out in the NPPW includes that positive planning plays a pivotal role in delivering the country's waste ambitions through delivery of sustainable development and resource efficiency, including by driving waste management up the waste hierarchy" (paragraph 6.84). Elsewhere, she referred to the support for the use of secondary aggregates from disposal as an alternative to land-won primary aggregates in Policy M11 of the draft Minerals and Waste Joint Plan published in November 2016 (paragraph 6.42), and for moving waste management up the hierarchy in the Planning Practice Guidance issued by the Government in March 2014 (paragraph 6.101).

19. In section 7 of the report, "Planning Considerations", the officer again reminded the committee of the duty in section 38(6) of the 2004 Act (paragraph 7.1). Under the heading "Principle of the proposed development" she mentioned again (in paragraph 7.2) that the relevant policies of the development plan included Policy 7/3 of the North Yorkshire Waste Local Plan, and went on to say this (in paragraph 7.5):

> "7.5 Policy 7/3 of the North Yorkshire Waste Local Plan is a saved policy and, whilst the supporting paragraph 7.15 of that policy states the County Council will continue to fully encourage and support the use of ash waste products. The use of the ash has to [sic] weighed relative to the impact that such re-working will have on the site and the surrounding area. There is also no longer a requirement in national waste planning policy to establish whether a proposal represents the *'Best Practicable Environmental Option'* so, as stated in paragraph 6.20 above, no weight can be given to part a) of Policy 7/3. However, in considering the balance between use of the waste and points relating to "environmental or other planning harm", moderate weight can be given to part b) of Policy 7/3. … Furthermore, … the NPPW supports the use of material that can replace other materials that would otherwise be used, such as in this case the use of PFA as a substitute for primary-won aggregate. The representations received, regarding this application, from firms that use PFA indicate that there is an existing and potential demand for the material as an alternative to land-won aggregates that would be in accordance with the principle of Policy M11 of the emerging MWJP."

20. The officer emphasised that conclusion in a later passage (paragraph 7.11):

> "7.11 The proposed increase in the volume of PFA available for export from Gale Common would contribute to the 'waste' recovery as envisaged in Appendix A of the National Planning Policy for Waste (NPPW). It would also serve the environmental objective envisioned within NPPF paragraph 8 by minimising waste by extracting the PFA in order for use as a secondary aggregate, thereby reducing the need for the extraction of naturally occurring resources, in the form of primary minerals."

21. In a sub-section headed "Highway matters", the officer referred to EP UK's proposed funding of the installation of a signalised crossing on the A19 close to the Whitley and Eggborough Community Primary School in a section 106 agreement, and other initiatives that would "potentially … address the cumulative impacts of the development on the road network particularly in Whitney …". She concluded that there was "insufficient justification for refusal of the development on grounds relating to highway safety and residual cumulative impacts on the road network", and that "the proposal would not prejudice highway safety" (paragraph 7.40). Potential "alternatives" for transporting the material from the site were considered (in paragraphs 7.41 and 7.42):

> "7.41 There are several existing block making plants, including those at Great Heck, which are within 5.5 kilometres of Gale Common. The applicant considers that it is more sustainable to supply the material direct to the market rather than to build a new block making plant at Gale Common. As part of the application details, the applicant has given consideration to the potential alternatives to the transport of the material from the site, including direct connection to the M62, alternative road routes and the use of a pipeline, conveyor, canal barge or rail sidings at this stage of the project. The Applicant considers that, where a customer is less than 30 miles by road from the site, the most viable transport method will be by road based on the double handling of

> material that would be required in order to use barge or rail transport. The use of a pipeline, conveyor, canal barge, or rail sidings has been ruled out by the Applicant initially because of, amongst other things, the level of capital expenditure required. Together with lack of flexibility and general complexity at the current stage of the project, with no contracts having been signed and delivery destinations unknown, or whether an existing railhead/wharf already exists at the customer's location. There is no existing wharf or rail connection at Gale Common and any such new facility would itself require an application for planning permission.
>
> 7.42 As stated above, the Applicant is nonetheless, committed to further evaluating the potential for future development of alternative transport methods depending on customer contracts and locations. Therefore, if output was to rise above 100,000 tonnes per year, the Applicant's study would assess comparative costs and economic benefits across road/rail/canal as well as the environmental benefits of using sustainable modes … in order to determine feasibility. … Theoretically, such a study may conclude that there are no feasible alternative means of transport. At the end of June 2020 the Applicant reiterated that the road use for all exports be viewed as the worst-case scenario. The Applicant['s] commitment was to establish alternatives, where possible, including the use of waterborne transport where that were achieved sustainably, but that any permission should allow flexibility to use road transport, where it is not possible to use rail, water or other such methods. The undertaking of this assessment is a matter to secure via an appropriately worded planning condition. That could also include a requirement for the implementation and review of the most sustainable mode of transport as time progresses (see Condition 19 below in Section 9.1) when the potential destinations and contracts are more clear and realistic but with the inclusion of a trigger for the review when export[s] reach 100,000 tonnes per year."

22. Under the heading "Cumulative impacts and consideration of alternatives", the officer said this (in paragraph 7.141):

> "7.141 With regard to the consideration of alternatives, as described in paragraph 7.3 above PFA is a secondary aggregate and is now in limited supply direct from few coal-fired power stations in the country and therefore its extraction for use from a previous PFA deposit does receive policy support as described in paragraph 7.6 above. In addition, during the consideration of the application the Applicant has moved from the position of not looking at reviewing the viability of transporting PFA using modes other than road transport until 400,000 tonnes per year was exported, to a position of agreeing to submit within 12 months of the commencement of the development a written Sustainable Mineral Transport Plan."

23. In section 8 of the report, "Conclusion", the officer yet again reminded the committee of the duty in section 38(6) of the 2004 Act (paragraph 8.1). Members would "need to bear in mind … the relative weight to be attached to the policies in the *'Development Plan'* relevant to this proposal against that which is laid down within national policy" (paragraph 8.2). The proposal complied with a number of development plan policies.

Policy 7/3 of the North Yorkshire Waste Local Plan, the officer said, "supports proposals that facilitate the supply and use of secondary aggregate as an alternative to primary land-won aggregates, such as from PFA" (paragraph 8.4). There was a "planning balance to judge between the supply of the PFA as a contribution to the economy via the supply of secondary aggregate" and several impacts (paragraph 8.5). Under policy for the Green Belt "[the] extraction of PFA is a 'mining operation', and very special circumstances do exist because of the potential that the PFA has as a source of secondary aggregate, and that outweighs any potential harm to the Green Belt because of inappropriateness, and any other harm resulting from the proposal" (paragraph 8.6). The arrangements for traffic, if secured by a section 106 agreement, would comply with plan policies relating to "highway safety" (paragraph 8.7). Striking the balance, the officer concluded (in paragraph 8.8):

> "8.8 Taking account of all the material considerations it is considered that on balance … the benefits of using the PFA as a secondary aggregate outweigh the negative aspects associated with the development being inappropriate in the Green Belt. Amenity safeguards can be put in place via planning conditions and obligations to ensure that the intensity of any impacts, longevity and cumulative impact that the development would have on the amenities of local residents in the vicinity of the site, regarding hours of operation, noise or dust emission, visual impact and regarding traffic are effectively mitigated and controlled."

The judgment in the court below

24. In reaching a recommendation to a committee, said Lane J., a planning officer "must inevitably form their own view on the weight (if any) to be given to planning policies". It was "perfectly permissible" for an officer to "express the view that … he or she has decided that no weight "can be given" to the policy concerned" (paragraph 125 of the judgment). That happened here. The officer's report "gave a perfectly sustainable reason why no weight was to be given to the principle of Best Practicable Environmental Option". And it was "entirely fanciful" to think the members were being told "anything other than that this was the view of the professionally-qualified officer charged with making the overall recommendation to the Committee". The report was "not telling them anything that was factually or legally incorrect" (paragraph 126). To accept that instead of writing "can be given any weight" in paragraph 6.20 of the report, and "no weight can be given" in paragraph 7.5, the officer ought to have said "should not be given any weight" and "no weight should be given" would be to "depart significantly from the established case law on the proper interpretation of officer's reports" (paragraph 127). These conclusions were reinforced by the officer's use of the expression "it is not <u>considered</u> that" in paragraph 6.20 (the judge's emphasis). This was "unquestionably the language of someone expressing their own professional judgment …". Although the word "considered" was not used in paragraph 7.5, that paragraph expressly referred back to paragraph 6.20 (paragraph 128).

25. As for the criticism that the officer did not consider "alternatives", the judge said that "alternative proposals only fall to be considered in "exceptional circumstances"" (see *R. (on the application of Mount Cook Land Ltd.) v Westminster City Council* [2003]

EWCA Civ 1346). It was "plainly rational" for the officer "not to have regard to any particular alternative". No such alternative had been raised by the parish council apart from the suggestion that "alternatives might be explored to transporting the PFA from the site by road", which had been analysed in detail in paragraphs 7.41 and 7.42 of the officer's report (paragraph 131).

26. There was therefore no need to consider section 31(2A) of the Senior Courts Act 1981. But in any event the judge was "fully satisfied" that the errors complained of "could have been addressed by minor changes" to the officer's report, and it was "highly likely that the result would have been the same" (paragraph 153).

Was the committee misled in its application of Policy 7/3?

27. Mr Richard Kimblin K.C., for the parish council, concluded his argument on the appeal with the contention that this was an "important planning decision which has a huge impact locally" (paragraph 33 of his skeleton argument). There were "other options", which "would not include an average of 266 two-way HGV movements … past … dwellings and [the] primary school every day for the 25 years of the development". If such a decision was to be made, particularly in a case where the decision rested on the chairman's casting vote, it should be "on the basis of an accurate statement of the key policies and principles" (paragraph 34).

28. On the application of criterion a) in Policy 7/3 of the waste local plan, Mr Kimblin submitted that the inconsistency of a development plan policy with subsequent national planning policy does not of itself, as a matter of law, justify the view that "no weight can be given" to the plan policy. That, however, was the effect of the advice given to the county council's committee on this important provision of the development plan. The officer misled the members. Their discretion to give whatever weight they chose to this element of policy was fettered. The officer effectively told them it had been removed as a material consideration by the subsequent national policy for waste, which did not refer to the "Best Practical Environmental Option". From the language of paragraph 6.20 of the report, including the use of the word "Hence" to link the critical two sentences, it was clear she was advising the members it was not open to them to give any weight to criterion a) in Policy 7/3 – because this was what national policy dictated. The error was significant, submitted Mr Kimblin, because Policy 7/3 was the development plan policy specifically relevant to proposals for re-working deposited waste, including deposits of pulverised fuel ash. The judge had failed to see this.

29. I cannot accept that argument. It depends on a misreading of the officer's report. And it does not reflect a true application of relevant principle.

30. It seems sensible to begin with some basic propositions bearing on the determination of an application for planning permission under the statutory scheme.

31. First, the performance by a planning decision-maker of the statutory obligation in section 38(6) of the 2004 Act, though it entails priority being given to the development plan, may result in national planning policy outweighing that priority. Some provisions of the plan "may become outdated as national policies change" (see the speech of Lord Hope of Craighead in *City of Edinburgh Council v Secretary of*

State for Scotland [1997] UKHL 38; [1997] 1 W.L.R. 1447, at p.1450C-D, and the speech of Lord Clyde at p.1458C-F).

32. Secondly, the weight to be given to any material consideration, including material considerations arising in the development plan itself or in national planning policy, is always for the decision-maker alone to determine as "a question of planning judgment", subject only to the court's intervention on public law grounds. Allowing scope for the exercise of its own supervisory jurisdiction on a *Wednesbury* basis, the court must remember that, in a planning decision, weight is always a matter for the planning decision-maker (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-G).

33. And thirdly, the weight which may lawfully be given to a material consideration extends, at the bottom of the scale, to "no weight at all". If "the decision to give that consideration no weight is based on rational planning grounds", the planning authority is "entitled to ignore it" (see the speech of Lord Hoffmann in *Tesco v Secretary of State*, at p.784B-D).

34. It is also worth recalling some of the basic principles that govern the making of a decision by a planning committee.

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

36. Secondly, the function of a planning officer when producing a report to the committee responsible for deciding whether planning permission should be granted for a proposed development is not to decide the fate of the proposal, but to provide to the members his or her own planning judgment and advice to help them in making the decision (see, for example, the judgment of Sullivan J., as he then was, in *R. (on the application of Mendip District Council, ex parte Fabre* [2000] J.P.L. 810, at p. 821). And if there is no evidence to the contrary, it may be assumed that when the committee has followed the officer's recommendation they have adopted the reasoning on which that recommendation was based (see the judgment of Lewison L.J. in *R. (on the application of Palmer) v Herefordshire Council* [2017] 1 W.L.R. 411, at paragraph 7).

37. And thirdly, the jurisdiction of the court in its supervisory role is to establish whether the authority's decision-making has been vitiated by any error of law (see the speech of Lord Keith of Kinkel in *Tesco v Secretary of State,* at p.764G-H**)**. The court will review the decision with realism and common sense, avoiding an excessively legalistic approach (see the leading judgment in this court in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] PTSR 1452, at paragraph 41). It will not focus merely on the precise phrasing of individual sentences or paragraphs in a planning officer's report, without seeking their real meaning when taken in context. Only if the effect of the report is significantly to mislead the members on a material issue will it interfere with the committee's decision (see

Mansell, at paragraph 42). In considering that question, the court will read the report fairly, as a whole and with a reasonable degree of benevolence, not forgetting that it has been addressed to an audience of councillors familiar with local circumstances (see, for example, the leading judgment in *R. (on the application of Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404; [2016] Env. L.R. 30, at paragraph 30; and the judgment of Lewison L.J. in *Palmer*, at paragraph 8).

38. In this case, as is clear from the officer's report, she had firmly in mind throughout that in making its decision on the application for planning permission the county council was statutorily obliged by section 70(2) of the 1990 Act to have regard to the development plan and any other material considerations, and by section 38(6) of the 2004 Act to determine the application in accordance with the plan unless material considerations indicated otherwise. Her planning assessment faithfully reflected the statutory obligation in section 38(6). She reminded the committee of that obligation several times: at the beginning of section 6, "Planning policy and guidance", at the beginning of section 7, "Planning considerations", and again at the beginning of section 8, "Conclusion". It cannot be suggested, therefore, that the members failed to understand how the law required them to approach the application of the provisions of the development plan and other material considerations in their own assessment of the planning merits of the project before them.

39. It is also clear that the committee was well aware of the fact that Policy 7/3 of the North Yorkshire Waste Local Plan was in play as one component of the development plan, and that it was a policy of specific relevance to the proposed development because it dealt with proposals to re-work deposited waste, including – as paragraph 7.17 stated – pulverised fuel ash. Several references were made to the policy in the report, to its requirements and to its relevance – notably in paragraphs 6.19 and 6.20, where the officer provided the committee with her advice on the relevant provisions of the development plan and the appropriate weight to be given to them, and in paragraph 7.5, where she dealt with the principle of the proposed development. Any suggestion that the officer in advising, or the committee in deciding, failed to have regard to that policy would therefore be untenable. Mr Kimblin did not submit otherwise.

40. As is also common ground, it was open to the officer in providing her advice, and the committee in making its decision, to give Policy 7/3 as a whole, and criterion a) in particular, such weight as she, and it, thought fit. This was a matter for the officer's planning judgment, and, in the light of her advice, the committee's. Such an exercise of planning judgment is not for the court to revisit, except on *Wednesbury* grounds. And as I have said, it is not, in principle, irrational for a planning decision-maker, when applying planning judgment, to give a material consideration, including a material consideration arising in development plan policy, no weight at all. To do so is within the scope of lawful and reasonable decision-making. This is not to say, of course, that it will always be lawful and reasonable to do that, but only that this will depend on the terms of the policy in question and the particular circumstances in which it has to be applied.

41. None of that is in issue here. In the course of argument Mr Kimblin disowned any suggestion that, in the circumstances here, it would have been irrational for the officer, and in turn the committee, in the exercise of planning judgment, to give no

weight to criterion a). His submission was, essentially, that the officer had led the members to think they were actually debarred from exercising their own planning judgment in fixing the amount of weight to give to criterion a) and the requirement for it to be established that the proposal represented the "Best Practicable Environmental Option". This was an error of law, he argued, because it misstated the legal effect of subsequent national policy on an inconsistent local plan policy which had been saved and remained extant.

42. Thus Mr Kimblin's argument here is a narrow one. It is essentially that the officer's report, on its proper interpretation, was significantly misleading on a material matter, contrary to the principles referred to in *Mansell* (at paragraph 42(2)). The report, it is argued, induced, or may well have induced, an error of law by the committee. The error was to regard criterion a) in Policy 7/3, with its requirement for an assessment of the "Best Practicable Environmental Option", as if, in law, it could not be given any weight as a material consideration.

43. Making that argument good requires Mr Kimblin to persuade us that the contentious passages in the officer's report must be read or are liable to be read as he invited us to read them. If he cannot do that, and we prefer instead the interpretation of those parts of the report put forward by Ms Jenny Wigley K.C. for the county council and Mr Alexander Booth K.C. for EP UK, the argument fails, and with it the appeal.

44. In my view, on a straightforward understanding of what the officer said in giving the advice she did, both taken in its immediate context and on a fair reading of the report as a whole, the argument advanced by Mr Kimblin is not correct. The judge's conclusions to this effect are sound.

45. The contentious passages in the officer's report belong to a series of paragraphs in which she considered the relevant policies of the development plan. The relevance of Policy 7/3 is confirmed at the beginning of paragraph 6.19, where the committee was also reminded that the waste local plan was adopted in 2006. The terms of the policy and of the supporting text in paragraph 7.17, including the requirement in criterion a) of the policy for a demonstration of the "Best Practicable Environmental Option", are accurately referred to both in paragraph 6.19 and in paragraph 6.20. When the officer came in paragraph 6.20 to consider the content and effect of criterion a), and the weight to be given to it, if any, she began with the word "However", and then referred to the change in circumstances since the adoption of the waste local plan. She alerted the committee to the fact that the concept of "Best Practicable Environmental Option" was no longer part of current national policy in the National Planning Policy for Waste, published in 2014, unlike the national policy which had obtained when the waste local plan was adopted in 2006. The next sentence of paragraph 6.20 starts with the word "Hence". The clear effect of that word was to show that the officer was relying on what she had said in the preceding sentence as an explanation of the advice she then went on to give. The advice itself was that "it is not considered that part a) [that is, criterion a)] of this policy can be given any weight in determining this application". The remaining part of the paragraph, beginning with the word "However", which pointed to the contrast with what has been said about criterion a), addresses the application of criterion b). The advice here was that "moderate weight can be given" to that criterion in the policy, for the reasons given.

46. The officer's subsequent advice in paragraph 7.5 of the report expressly referred back, in the third sentence of that paragraph, to the advice already given in paragraph 6.20. And it is consistent with that earlier advice. The officer told the members that there was "no longer a requirement in national waste planning policy to establish whether a proposal represents the '*Best Practicable Environmental Option*' …". The linking word "so" has the same effect as the word "Hence" in paragraph 6.20. There is then a cross-reference to paragraph 6.20, to remind the committee of what had been said there. And the advice itself is the same: "no weight can be given to part a) of Policy 7/3". The fourth sentence of paragraph 7.5 repeated the advice on criterion b) at the end of paragraph 6.20, that "moderate weight can be given" to that provision.

47. In both of those passages of her report the officer was unmistakeably providing to the members her planning advice on the weight to be attached to Policy 7/3, and to each of its two criteria, in the making of their decision, and the advice she gave was based on her own planning judgment. The advice given is consistent and unequivocal – that in her opinion no weight could be given to criterion a), but moderate weight could be given to criterion b). And the reason stated for the advice is intelligible and logical: that in the case of criterion a) the concept of "Best Practicable Environmental Option" was no longer a feature of relevant and up-to-date government policy published since the adoption of the waste local plan, and had no place in a planning assessment conducted in accordance with that policy; but that in the case of criterion b) the balancing of benefits on the one hand and environmental or other planning harm on the other was still a relevant and necessary exercise.

48. Read sensibly in context, and without undue benevolence, these two passages of the report clearly embody the giving of planning advice, informed by planning judgment. Like the judge, I do not think it can realistically be suggested that the officer was doing anything other than this, or that the members could have thought that she was. In paragraph 6.20 she used the expression "it is not considered that" to make it clear that she was giving advice which represented her view on the question of weight. She did not need to repeat that expression in paragraph 7.5, which explicitly took the members back to paragraph 6.20. What she considered, as a matter of planning judgment, and what she advised the members to accept, as a matter of planning judgment, was that, for the reason she gave, no weight should be given to criterion a) in Policy 7/3. Whether the committee accepted that advice was for it to decide.

49. The nature of the advice is also relevant. It was advice on the "weight" to be attached to material considerations intrinsic in a policy of the development plan. And such questions are, fundamentally, for the planning decision-maker. On criterion a) in Policy 7/3, the essential question was whether there was now any justification for requiring an assessment of "Best Practicable Environmental Option" as that criterion provided, despite the removal of such a requirement from more recently published national policy. If any weight was to be given to that provision in the development plan, notwithstanding the deliberate change in government policy, the absence of such an assessment would have counted against the proposal in the ultimate planning balance undertaken in the performance of the section 38(6) duty. Unlike many issues that a planning authority may have to decide, this was not a question which admitted of a wide range of possible answers. It called for a planning judgment on a single and simple question: whether or not, in the circumstances, to give any weight to the policy criterion requiring an assessment of "Best Practicable Environmental Option". Either

weight should be given to that criterion or it should not. This was not the kind of judgment that would have to be made, for example, on the weight to be given to the need for, or the benefits of, a proposed development or to its various effects on the environment. The county council would either have been justified in insisting on an assessment of "Best Practicable Environmental Option" being performed in this instance or it would not. The committee was entitled to expect clear advice on this question, as a matter of planning judgment. The officer gave it. The committee evidently agreed with it. And the advice itself was in no way misleading, let alone significantly so.

50. As for the wider context of the officer's report read as a whole, Ms Wigley and Mr Booth were right to emphasise the use of the expressions, in the passive voice, "it is considered that" and "it is not considered that", and also the phrase "can be given", when the officer was attributing weight to a particular consideration – as she was in paragraph 6.20. Such language appears repeatedly throughout the report, including a number of passages where the officer was expressing her view, and advice, as a matter of planning judgment on the weight to be given to particular material considerations in policies of the development plan, whatever this might be within the spectrum from no weight to full weight. There are several references of that kind. Thus, for example, in paragraph 6.22, the officer said "it is considered that the [Selby District Core Strategy Local Plan] can be given full weight as the relevant policies to the determination of this application are still in accordance with the relevant parts of NPPF 2019". In paragraph 6.43, when considering Policy DO1 of the Minerals and Waste Joint Plan, she said that "as the subject of this report relates to the supply of alternatives to land-won primary aggregates it is considered that moderate weight can be given to this policy". And in paragraph 6.47, when dealing with Policy DO5, she said "it is considered that limited weight can be given to this Policy until it is demonstrated through the Main Modifications consultations that the major objections to this policy regarding consistency issues with the NPPF are resolved". It is consistent with the obvious sense of those and similar references in the officer's report to regard her observations in paragraphs 6.20 and 7.5 on the weight to be given to criterion a) of Policy 7/3 as the articulation of her planning advice based on the exercise of planning judgment.

51. There is no reason to think that in giving her advice on that question the officer was departing from the territory of planning judgment and venturing into the realm of planning law, or that the members could have supposed that she was. She did not purport to give legal advice or to state any proposition of law. She cited no case law in support of what she said. Her conclusions are not formulated as guidance on a matter of law. There is no indication that she believed she was telling the members what they were, or were not, legally empowered to do. She did not tell them that it was legally impermissible to give any weight to criterion a) of Policy 7/3, nor could this have been inferred from what she said. She did not frame her advice as excluding or limiting the committee's freedom to exercise its own planning judgment on the question of weight. And I would reject any suggestion that her language was infelicitous or ambiguous. It was the kind of language a planning officer may be expected to use in giving planning advice. She might have stated her advice differently. She might have said "should be given" rather than "can be given". But she did not have to do so. Her advice was clear as it stood.

52. I conclude, therefore, as did the judge, that in paragraphs 6.20 and 7.5 of the report, the officer was doing what planning officers usually do in their reports to committee. This was not legal advice. It was rational planning advice based on the officer's lawful exercise of planning judgment, nothing more and nothing less. The members could not have thought otherwise.

53. Lastly, there has been no suggestion that the officer failed to provide the committee with a fair and sufficient summary of the parish council's objection. And it is to be noted that the representations made on behalf of the parish council by its planning consultant did not complain that the county council had failed to require from EP UK an assessment of the "Best Practicable Environmental Option". Nor, in fact, did they make any reference to Policy 7/3 of the North Yorkshire Waste Local Plan.

Did the committee err in failing to consider "alternatives"?

54. Mr Kimblin's argument on this ground largely depended on the previous ground being sustained. He submitted that the judge went wrong in two ways: first, because he relied on a flawed analysis of the advice the committee was given on Policy 7/3, and secondly, because he found that the consideration of "alternatives" was not required by the development plan in this case – because criterion a) of Policy 7/3, according to the officer, could not be given any weight. He argued that this was an "exceptional" case, in which alternatives did have to be considered. Such an exercise was required by the development plan, in Policy 7/3, and was thus inherent in the performance of the decision-maker's duty under section 38(6) of the 2004 Act. Where large-scale and long-term development was proposed, which was "inappropriate development" in the Green Belt, the alternatives would have included not merely proposals for the re-working of deposited waste but also the possibility of extracting minerals outside the Green Belt. An assessment of the "Best Practicable Environmental Option" here would have involved consideration of alternatives to the proposed excavation of restored land, with its effects on the Green Belt, its visual impact and the traffic generated on local roads over a long period. It might have extended beyond options put forward by consultees.

55. Again, I consider Mr Kimblin's submissions mistaken. My conclusions on the previous issue are also relevant here. But there are three points to add.

56. First, the basis on which Mr Kimblin founded his argument on this issue – as on the previous one – was the requirement to identify the "Best Practicable Environmental Option" in criterion a) in Policy 7/3. The thrust of the argument here is that there was an unlawful failure on the part of the county council to discharge that requirement. But this goes nowhere once it is accepted, as I have concluded, that criterion a) in Policy 7/3 was rationally and lawfully given no weight in the making of the decision, so that there was then no need under that policy for any consideration of alternative sites or proposals to be undertaken. No other policy of the development plan, including policy for development in the Green Belt, is said to have required any consideration of alternatives. Nor did Mr Kimblin submit there was any such requirement in national planning policy. Government policy for development in the Green Belt did not state that "very special circumstances" to justify planning permission being granted for such proposals as this, as "inappropriate development"

in the Green Belt, would only exist in the absence of a suitable alternative site that was not in the Green Belt.

57. Secondly, in the circumstances of this case and in view of the planning officer's assessment of the planning merits of the development proposed, with which the committee agreed (see paragraphs 14 to 21 above), there was no legal requirement for the county council to take the exceptional course of identifying and considering "alternatives" to the application site and proposal. The opposite conclusion cannot in my view be reconciled with the reasoning of this court in *Mount Cook*, on which the judge relied (see the judgment of Auld L.J., at paragraphs 30 to 36), or with subsequent relevant authority (see the judgment of Carnwath L.J., as he then was, in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P. & C.R. 19, at paragraphs 17 to 28, and the leading judgment in *Lisle-Mainwaring and Secretary of State for Communities and Local Government v Carroll* [2017] EWCA Civ 1315, at paragraphs 34 to 42). This is not to say that the committee could not lawfully have engaged in a wider assessment of alternative sites and proposals than it did, but only that it was not legally obliged to undertake such an assessment. In this case the existence and merits of such alternatives were not "so obviously material" as to "require direct consideration" (see the judgment of Lord Carnwath in *R. (on the application of Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] UKSC 3; [2020] PTSR 221, at paragraphs 29 to 32; and the judgment of Lord Hodge and Lord Sales in *R. (on the application of Friends of the Earth Ltd.) v Heathrow Airport Ltd.* [2020] UKSC 52; [2021] 2 All E.R. 967, at paragraphs 116 to 121).

58. Thirdly, the county council did not ignore the possibility of alternative proposals being brought forward to meet the need for pulverised fuel ash, and alternative means of carrying out the proposed operation at the application site. The environmental statement contained a "Consideration of Alternatives", including the "Do Nothing" option and "Alternative Locations" (section 4.8). The Transport Alternative Options Report envisaged a review of "alternative transport options" once contracted exports went above 100,000 tonnes a year. In her report the planning officer considered the possibility of the material being transported otherwise than by road (paragraphs 7.41 and 7.42), and, under the heading "Cumulative impacts and consideration of alternatives", stressed the policy support for the extraction of pulverised fuel ash as a secondary aggregate (paragraph 7.141). She did not set out to present the members with a comprehensive assessment of real or hypothetical alternatives to the proposal they actually had to consider. And as I have said, this was not in the circumstances a legal defect in the county council's decision-making. One might add that it had not been any part of the parish council's objection to the proposed development, or – it seems – any other objector's, that EP UK had failed to consider alternative sites and proposals generally, or any particular alternative. None have been referred to in these proceedings, either in this court or, as I understand it, below. It is not the court's task to speculate about the possible existence of such sites or proposals. Of course, the parish council may still raise the argument it now does, after the event, in challenging the county council's decision to grant planning permission. But the argument is wholly lacking in substance.

59. In my view therefore, in agreement with the judge in paragraph 131 of his judgment, it was perfectly rational and lawful for the officer, and the committee, not to have regard to "alternatives" beyond the consideration which was given to that question.

Section 31(2A)

60. It follows from my conclusions on the previous two issues, if my Lords accept them, that we do not have to consider the duty in section 31(2A) of the Senior Courts Act 1981, which requires the court to refuse relief "if it appears … to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". Bearing in mind the caution that has been sounded by this court about the risk of "straying … into the forbidden territory of assessing the merits …" (see the judgment of the court in *R. (on the application of Plan B Earth) v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, at paragraph 273), I think it is at least arguable that in the circumstances here, in particular the absence of any alternative site or proposal, it would have been highly likely that the committee's decision would have been the same even if the alleged legal errors had occurred. But that question, as I say, is academic.

Conclusion

61. For the reasons I have given, I would dismiss the appeal.

Lord Justice Dingemans:

62. I agree.

Lord Justice Edis:

63. I also agree.