



Neutral Citation Number: [2014] EWHC 2259 (Admin)

Case No: CO/1932/2013

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 9 July 2014

**Before :**

**Mr Justice Lindblom**

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**Between :**

**The Queen (on the application of Charles Jones)**

**Claimant**

**- and -**

**English Heritage**

**Defendant**

**- and -**

**(1) City of York Council**  
**(2) Persimmon Homes Plc**  
**(3) Hogg Builders (York) Limited**

**Interested**  
**Parties**

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**Mr Ian Dove Q.C. and Mr James Corbet Burcher (instructed by Richard Buxton Solicitors)**  
**for the Claimant**

**Ms Emma Dring (instructed by Sharpe Pritchard) for the Defendant**

Hearing date: 22 May 2014  
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**Judgment Approved by the court**  
**for handing down**

## **Mr Justice Lindblom:**

### *Introduction*

1. In the early autumn of 1066 three major battles were fought on English soil. The first took place on 20 September at Fulford near York, the second on 25 September at Stamford Bridge, and the third on 14 October at Hastings, where the army of King Harold II was overcome by the invading forces of William, Duke of Normandy. At Fulford the Anglo-Saxon earls, Edwin, Earl of Mercia, and Morcar, Earl of Northumbria, tried and failed to repel an invading Norse army under Harald Hardrada, the king of Norway. Harold took his army on a forced march north to confront and defeat the Norsemen at Stamford Bridge, and then went south again to resist the Norman invasion. He was killed at Hastings, his army routed, and William seized the throne of England.
2. The claimant in this claim for judicial review, Mr Charles Jones, is a historian and archaeologist who has devoted much time and energy over many years to finding the site of the Battle of Fulford. He is the author of a study entitled “Finding Fulford – The search for the first battle of 1066” (“Finding Fulford”), published in January 2011, in which he argues that the battle was fought on land now known as the Germany Beck site. He challenges two decisions of the defendant, English Heritage: first, the decision it made on 23 November 2012 refusing to designate the Germany Beck site as the location of the Battle of Fulford on its Register of Historic Battlefields; and secondly, its decision, on 19 July 2013, in which it reviewed but refused to change its original decision.
3. I granted permission for the claim to proceed at an oral hearing on 7 April 2014.

### *The issue for the court*

4. There were originally eight grounds in the claim. Most of them have now been abandoned. Ground 1 survives, together with the related argument on the review decision which is said to be part of ground 7. The crucial issue is whether, in making each of the two decisions challenged by Mr Jones, English Heritage misinterpreted and therefore misapplied its own guidance in the Designation Selection Guide: Battlefields, which it issued in April 2012.

### *Background*

5. The Germany Beck site is an area of farmland between the River Ouse and Mitchells Lane in Fulford, about two miles to the south of the city of York, with a watercourse – the beck – running along its southern side.
6. On 9 May 2013 the first interested party, the City of York Council (“the City Council”), approved reserved matters for a development of 655 dwellings on land including the Germany Beck site under an outline planning permission originally granted on appeal in May 2007, after a public inquiry held in 2006. That development is proposed by the second and third interested parties, Persimmon Homes, and Hogg Builders (York) Limited. The reserved matters approval was challenged by Fulford Parish Council in a claim for judicial review (*R. (on the application of Fulford Parish Council) v City of York Council* [2013] EWHC 3924

(Admin). That claim was dismissed and permission to appeal was refused by the Court of Appeal on 21 May 2014.

### *The battlefields register*

7. The battlefields register is part of the National Heritage List for England, a database of all nationally designated heritage assets. It was created in 1995, under section 33(5)(d) of the National Heritage Act 1983 (“the 1983 Act”). Section 33(5)(d) provides a general power for English Heritage to do such things as it thinks “necessary or expedient” in the exercise of its general functions. Section 8C of the Historic Buildings and Ancient Monuments Act 1953 provides that English Heritage may “compile a register of gardens and other land situated in England and appearing to [it] to be of special historic interest”.
8. There were originally 43 battlefields on the register. There are now 46. These include the sites of the Battle of Stamford Bridge and the Battle of Hastings, and only one site of a battle earlier than Fulford – the Battle of Maldon, which was fought in 991. The entry for each site in the register includes a map which delineates the land considered to comprise the area within which the battle was fought.

### *The 1995 leaflet*

9. When the battlefields register was established English Heritage published a leaflet explaining the criteria it had applied in the selection of the sites it had designated. The leaflet says that a panel of experts had considered, first, “whether the fighting constituted a battle rather than a lesser level of engagement”, and secondly, “whether or not the extant evidence, physical or documentary, defined the geographical area within which the battle took place”. It said that the “reliability of the detailed evidence for each battle was ... considered”, and then:

“Where the evidence of documents, archaeology, topography and landscape history were sufficient, the outer reasonable limit to the area within which the bulk of the fighting took place has been defined as the battlefield area. In those cases where the general location of the battle was known but where the evidence did not allow a boundary to be drawn, we have added the engagement to an appendix to the Register as the ‘site of’ a battle. A small number of battles cannot even be located generally, and these will not be included on the Register until further evidence emerges.”

### *The selection guide*

10. The “Introduction” to the selection guide says that the criteria adopted by English Heritage in 1995 when it established its battlefields register “defined what battlefields were, and those factors which might lead to specific battlefields being deemed to be of special historic interest”. The selection guide is said to be “a refinement of those original criteria”, which, it says, “have not changed”. It “provides “greater clarity, and an acknowledgment of the insights which battlefield archaeology is now affording us”.
11. In the section headed “Historical Summary” the selection guide says that “[our] understanding of military practice and the details of particular battles tends to be less the

older the battle is”. It says that “[secure] and substantial archaeological evidence has yet to be retrieved from any English battlefield before the fifteenth century and thus we have to rely on documentary sources, such as the Anglo-Saxon Chronicle or contemporary illustrations, to gain a picture of warfare in earlier periods”. It adds that “[this] comparative scarcity of knowledge of earlier periods of conflict is reflected in the *Register* entries, most of which deal with engagements in the Middle Ages and during the Civil Wars of the mid seventeenth century”.

12. In its commentary on the period from pre-history to the Norman Conquest the selection guide says that for battles in this period “the quantity and character of evidence are seldom sufficient to locate sites securely”. For the Battle of Maldon “[good] written evidence ... survives in the form of a poem *The Battle of Maldon*, which is full of topographical allusion ...”. The selection guide goes on to say this about the three battles of 1066:

“The evidence provided by the construction of Battle Abbey combines with detailed documentation to provide a clear location for the site of the Battle of Hastings (East Sussex) in 1066. Of the other great battles in that year, the site of Stamford Bridge (East Yorkshire) is designated but the precise location of the third, Fulford (North Yorkshire), has been open to debate.”

13. For the period of the English Civil War in the 17<sup>th</sup> century 23 major engagements had been “securely located” – more than half of the original entries on the register.
14. The part of the selection guide headed “Principal Designation Considerations” begins by saying that “[if] the site of a battle is to merit registration it has, notwithstanding any other claims, to have been an engagement of national significance, and to be capable of close definition on the ground”. The two criteria, “Historical Significance” and “Location”, are then explained. It is common ground in these proceedings that the Battle of Fulford meets the criterion of “Historical Significance”, which is said to be “[the] most important factor”.
15. As to “Location” the selection guide states:

“To be registered, a battle’s location must be securely identified. The nature of warfare is such that boundaries to an area of conflict are rarely precise. However, for inclusion in the *Register* the area where the troops drew up, deployed and fought while in battle formation must be capable of definition on the ground, and a reasonable boundary to this area must be defined. It is generally the case that the earlier a battle, the less the precision can be offered in terms of where fighting took place; nevertheless, it remains a requirement for designation that a battle can be placed within a specific and particular topographical location with a fair degree of probability.

Events taking place beyond this area of engagement often had a dramatic influence on the outcome and significance of a battle. It was typically in the pursuit and ‘execution’, after battle formations had collapsed, that the greatest numbers of troops were killed or captured. Similarly, the location of camps, formal acts of surrender, related actions such as the attack on baggage trains or mass graves, can all be significant elements in the understanding and appreciation of the battle. Locations such as these, if demonstrably of special interest, can be included in the designated

area where they can be identified on the ground, even if at some remove from the battlefield itself.

For the purposes of clarity, *Register* entries will generally use existing land boundaries to provide a clear definition of the extent of the battlefield area.

Battlefields which fail to meet these criteria, as well as sites of other types of conflict, may still warrant recognition and appropriate protection through identification on Historic Environment Records, local lists, and in planning policies.”

16. Several “Other Designation Considerations”, which “may add to the likelihood that a battlefield merits registration ...” are set out and explained: “topographic integrity”, “archaeological potential”, “documentation”, “military innovations”, “biographic associations” and “commemoration”. The advice on “topographic integrity” says that that “[sites] will generally be registered unless their interest has been seriously compromised by subsequent changes in land use or development”.
17. As to the revision of the register, the selection guide refers to five “candidates for designation” which had been considered when the register had originally been drawn up but “for which there was insufficient evidence to allow the battlefield boundary to be drawn with any certainty” and a further eight sites “where the battlefields no longer survived sufficiently intact to warrant designation or conservation measures ...”. But, it says, “[where] new evidence emerges for the location of a battle, or a case is made to reconsider the significance of an engagement, English Heritage may “reassess the case for designation, guided by the criteria set out in this document and by its advisory panel”.
18. Under the heading “Planning Protection for Registered Battlefields” the selection guide paraphrases government policy in paragraph 132 of the National Planning Policy Framework (“the NPPF”), which includes battlefields among “designated heritage assets of the highest significance” and says that “[substantial] harm to or loss of” such heritage assets “should be wholly exceptional”.

*Mr Jones’ application for the inclusion of the Germany Beck site in the battlefields register*

19. On 13 October 2011 Mr Jones submitted to English Heritage his application seeking the inclusion of the Germany Beck site as the site of the Battle of Fulford in the battlefields register. In his application he relied on his conclusions in “Finding Fulford”.
20. The work which lay behind the preparation of “Finding Fulford” had begun in 1999. It was partly funded partly by the Heritage Lottery Fund. English Heritage and the York Archaeological Trust took part in it. It included metal detecting and archaeological investigation of the land, and discussions between Mr Jones, the City Council and Persimmon Homes’ archaeological consultants, MAP Archaeology.
21. “Finding Fulford” runs to more than 300 pages of closely printed text. It records in very full detail Mr Jones’ research, archaeological investigations and his conclusions. It begins, in chapter 1, with a discussion of relevant documentary sources, including the Anglo-Saxon Chronicle, and the Heimskringla composed by Snorri Sturluson in Iceland in about 1230, which provides a detailed account of the battle. There are several different translations of

the Heimskringla, which have given rise to some differences of opinion between Mr Jones and English Heritage on the relevant topographical features, the positioning of the troops on either side, and the course of the battle. Mr Jones also considers the local landscape as it is today (chapter 2), the landscape as it was in 1066 (chapter 3), the archaeological finds (chapter 4), the military strategy and tactics likely to have been used on either side (chapter 5), and possible alternative sites (chapter 6).

### *The Battlefields Advisory Panel*

22. On 2 February 2012 English Heritage's Designation Team Leader for the North of England, Mr Nick Bridgland submitted his report on Mr Jones' application to the Battlefields Advisory Panel. He acknowledged that although the location of the battlefield "in the vicinity of Fulford" was not questioned, the precise location had been debated. The documentary evidence was not "as reliable as for Stamford Bridge or Hastings". He went on to say that "Germany Beck has been identified as the most likely location by a number of historians but the evidence has not been seen as conclusive" (paragraph 4.3). In his "Conclusions" he said that "[on] the grounds of probability Germany Beck appears to be the most likely location for the battle", that "[Mr] Jones' interpretation of the course of the battle is plausible and is the best fit for the surviving evidence" (paragraph 5.1), and that "... a reasonable boundary could be identified focusing on the line of the Germany Beck" (paragraph 5.2). In view of the planning history of the site English Heritage was "considering responding to the request to Register with advice which recognises that Germany Beck is likely to be the location of the Battle, but that, given the planning situation, refrains from adding the site to the Register" (paragraph 5.4).
23. The Battlefields Advisory Panel agreed with Mr Bridgland's assessment that, on the balance of probabilities, Germany Beck was the site of the Battle of Fulford. The minutes of its meeting record that "members felt very strongly" that the site should be added to the register despite the planning situation, "in the hope of securing more effective mitigation strategies".

### *The Consultation Report*

24. On 14 June 2012 English Heritage issued its Consultation Report on Mr Jones' application. The Consultation Report said that the suggestion that Germany Beck was the ditch across which the battle had been fought on the bank of the River Ouse was "based upon a balancing of a variety of information and a consideration of the most likely location on this basis". There were "no other identified sites between York and Riccall which provide such advantages to checking an approaching army." The fact that the site was "also in the vicinity of Fulford and fits the Norse accounts further supports this as the most likely location for the battle." Although the local topography had been greatly changed since 1066, the "valley of the Germany Beck, the focus of fighting still remains clearly legible cutting across the line of the road". The absence of archaeological material from the battle did "not disprove the location of the battle". A map was included in the report, which showed the "area under consideration", which was "focused on the Germany Beck as the location of the main fighting and excludes built up areas" and included other land which still had "a sense of openness".

25. English Heritage received responses to consultation from Mr Jones supporting the proposed designation, and, in opposition to it, from the City Council's Archaeologist, Mr John Oxley, and MAP Archaeology on behalf of Persimmon Homes. In his observations on the Consultation Report Mr Oxley said that "[the] point at issue is whether the historical and archaeological evidence is sufficiently robust to allow the site of the battle to "be securely identified" and thus allow the "close definition" of the site of the battle – in other words to be able to draw a line on a map around a parcel of land where it can be securely stated that the battle took place". He said that when the inquiry into Persimmon Homes' appeal was held in 2006 "English Heritage did not consider that there was sufficient evidence to warrant designation of the Germany Beck site as the site of the Battle of Fulford". Whilst the City Council had supported the work of Mr Jones and the Friends of Fulford Battlefield as "an exemplar of multi-disciplinary investigation, research and public engagement carried out by a community group", Mr Oxley's conclusion was the same as he had stated in his evidence to the inquiry in 2006 – that "the literary, historical and archaeological evidence is such that the site of the battle cannot be securely identified and therefore it is not possible to draw a polygon that will closely define the site of the battle". In his view the site shown on the map provided with the Consultation Report "[did] not merit designation either in whole or in part".

### *The Advice Report*

26. On 22 November 2012 the Battlefields Advisory Panel met to consider the case for the inclusion of the Germany Beck site as the site of the Battle of Fulford in the battlefields register. Mr Bridgland submitted a report, in which, at paragraph 4.3, he acknowledged that the arguments in favour of the Germany Beck site had been "set out most thoroughly in "Finding Fulford"", but also observed that there were "some flaws in the research, some of the findings had been overstated and, methodologically, evidence is advanced to support the Germany Beck identification rather than this identification emerging logically from the evidence". The minutes of the meeting record the conclusion of the Battlefields Advisory Panel that "while Germany Beck was a strong candidate for the location of the battle, there was no firm evidence to this effect and there were potential alternative locations which had not been fully examined". The panel supported a decision not to designate the area around Germany Beck as the site of the Battle of Fulford.

27. On 23 November 2012 English Heritage's Designation Team considered a report, the Advice Report, which recommended against designation of the Germany Beck site on the battlefield register. The Advice Report recorded the responses to consultation. The Consultation Report was attached to it as Annex 1.

28. The "Assessment" in the Advice Report referred to the criteria and considerations in the selection guide. It refers to the selection guide, which, it says, "sets out that there are two fundamental criteria for inclusion of a particular battle [on the battlefields register]: historical significance and the ability to define a location". The other considerations mentioned in the selection guide are said to be "secondary".

29. The analysis begins with this:

"Debate surrounding the Battle of Fulford has focused on the identification of the site of the fighting. Owing to this lack of certainty the battlefield was not included in the

Register when it was established in 1995. For many later battles the focal point of fighting is clearly documented, and the landscape is sufficiently unaltered, so that the area fought over can be traced on the ground with great accuracy. However, with battles as early as Fulford, such certainty is rare. The Battlefields Selection Guide recognises this stating that “It is generally the case that the earlier a battle, the less the precision that can be offered in terms of where fighting took place; nevertheless, it remains a requirement for designation that a battle can be placed within a specific and particular topographical location with a fair degree of probability.” Accordingly, the only battlefield on the Register which predates Fulford, the Battle of Maldon (991), was identified on the basis of landscape analysis in the light of the fragment of Old English poetry known as “The Battle of Maldon”. By matching what is known of the terrain of the C10 coast near Maldon to the account of the battle, the Causeway to Northey Island has been identified as the site of the battle. However, there is no archaeological evidence to support this and other candidate sites have been proposed although less convincingly.”

30. The report notes that the association of the Battle of Fulford with the Germany Beck site “seems to have been first made in the middle of the C20 so we are unable to adduce place-name evidence in support of the location”. It refers to the “extensive archaeological investigation”, of the land on which development is proposed, and concludes and that this is “a site which has not been confirmed by archaeological remains but, similarly, cannot be disproved by their absence”.

31. The next matter considered is the documentary evidence:

“All evidence for the battle, therefore, rests on a small number of documentary sources dating from the late C11 to the early C13. There are some characteristics of the battle which are generally accepted; the battle was fought on the banks of the River Ouse, south of York in the vicinity of Fulford with a marsh nearby. The Anglo-Saxon earls prevailed at the start of the battle before Harald Hardrada, whose banner was close to the river fought a successful counter attack, resulting in a great loss of life as men fled, some drowning in the river or marsh. However, debate persists about the formation of the battle in relation to the marsh and any dyke. Indeed, differing translations of the Heimskringla (written in Old Norse c.1230) describe differing relationships between watercourses and the troops. ... The critical difference [between Samuel Laing’s translation of 1844 and the 1966 translation by Magnus Magnusson and Hermann Palsson] is that, according to Laing, the troops were aligned along a dyke which presumably drained in the Ouse, while according to Magnusson and Palsson, the troops were arrayed between the river and a dyke. The former conforms well to the Germany Beck identification, the latter less so. However, it is also worth bearing in mind that the Heimskringla was written 150 years after the events in a foreign country and accuracy of detail was not an overriding imperative in its production. A level of caution needs to be exercised in claiming that this source either proves or disproves the identification of Germany Beck as the site of the battle.”

32. The report then goes on to discuss the military strategy and tactics:

“Where the Germany Beck identification gains most support is when considering the “inherent military probability” of the site; how the site relates to the decisions that an experienced and reasonable military commander might make. Germany Beck cuts



across the [moraine] ridge which the modern A19 follows towards York. Any approach to York from Riccall, where the Norse forces landed, is likely to have followed this route. No other similar breaks adjacent to the River Ouse exist elsewhere in the vicinity of Fulford. This gives Germany Beck a strategic value for checking the advance of the invading army. With the river to the West and softer, marshy ground to the East, this location appears to be the most sensible place for Earls Edwin and Morcar to draw up their troops. However, any assessment of inherent military probability requires assumptions about the mindset of the Anglo-Saxon earls and the resources available to them.”

33. These several themes are then brought together:

“In considering these three issues relating to location together, we reach a position that archaeological investigation has not proved the identification of Germany Beck as the site of the battle, one way or the other; that the documentary sources for the site have sufficient ambiguity in them that, while Germany Beck is a plausible candidate, it is not conclusive; and that Germany Beck remains the most desirable place for the Anglo-Saxon earls to draw up their troops adjacent to the river and in the vicinity of Fulford. While Germany Beck remains the most likely candidate for the site of the Battle of Fulford, it is not possible to say that it has been securely identified. The Battlefields Selection Guide is clear that historical importance and secure identification of the site are essential criteria for inclusion on the Register. While Fulford was clearly a battle of sufficient historical importance, significant ambiguity of the evidence for the site remains.”

34. The “Conclusion” of the Advice Report was this:

“Having considered all the available information, the site at Germany Beck should not be added to the Register of Historic Battlefields as the location of the Battle of Fulford.”

The recommendation was therefore against designation. The “Reasons for Designation Decision” said that Germany Beck should not be added to the battlefields register as the site of the battle of Fulford, “for the following principal reason”:

“Location certainty: While Germany Beck remains to be the most likely location for the Battle of Fulford, the documentary and archaeological evidence is insufficiently conclusive to make this a secure identification.”

35. At the very end of the Advice Report is a note headed “Further Comments” provided by English Heritage’s Head of Designation, Emily Gee, which states:

“This case has been carefully considered and while it is compelling in some regards the archaeological and documentary evidence does not overall amount to sufficient grounds on which to designate.”

36. The Designation Team accepted the recommendation in the Advice Report, with the consequence that the Germany Beck site was not added to the battlefields register as the site of the Battle of Fulford.

### *The review decision*

37. On 18 January 2013 Mr Jones requested from English Heritage a review of its decision, contending that numerous errors had been made when it was taken. English Heritage's Designation Review Committee met to consider this request on 2 May 2013. At that meeting one of the members of the committee, Professor Morris, observed that the case put forward for the Germany Beck site did not meet the "evidential tests" required, nor did it "dismiss all other candidates". It recommended that the Germany Beck site should "not be registered at the present time". This recommendation was said to be "based on the recognition that, while [the site] has strong claims and is almost certainly in the correct district, the evidence is insufficient". The committee also recommended that, although the site did not meet "the test for registration at this point", there was still a need for "further investigation" to be undertaken "during the planning process".
38. The Review Assessment was issued on 19 July 2013. It had been carried out by Dr Joseph Flatman, English Heritage's Head of Central Casework and Programmes, Designation Department.
39. In response to "Claim 3", which was Mr Jones' contention that evidence had been ignored in the Designation Report, the Review Assessment said that "the [archaeological] data provided is not yet understood well enough to give a reasonable degree of certainty", and that "a difference of interpretation over archaeological evidence" was not considered to be a sufficient basis for granting the request for a review. A detailed analysis of "specific aspects of this evidence" – "battlefield recycling debris", "landscape evidence" and "metalworking evidence" – followed.
40. In response to "Claim 5: 'Failure to follow the process set out in the Designation Selection Guide for battlefields'", the Review Assessment stated:
- "Response: EH considers that the original designation assessment, and this assessment of Mr Jones registration review request, to have followed the process set out in the Designation Selection Guide. We do not consider this issue to be sufficient grounds to grant the request for a review."
41. In a section headed "Additional response comments" the Review Assessment said that the Designation Review Committee had "noted that the work done thus far had been enterprising but relied largely on analysis of terrain and of the saga evidence, and on assumptions about some finds". It said that the "location of any battlefield before the age of gunpowder weapons presents a large challenge", and then this :
- "Assessed now, in the light of the criteria laid out in the *Designation Selection Guide: Battlefields*, the DRC considered the case for Fulford to lack sufficient security of location. The case was not regarded as 'wrong', but as insufficient in the light of the kinds of evidence that need to be provided for registration under the criteria laid out in the *Designation Selection Guide: Battlefields*. The DRC noted that while unsuitable for meeting the tests for registration at this point, this does not remove the desirability for further investigation at the appropriate standards, which the Committee would hope to see during the course of development in line with planning conditions."

42. The “Conclusion” of the Review Assessment stated that English Heritage did “not consider any of the points raised to be sufficient grounds to grant the request for a review”. It confirmed the conclusion in the Advice Report that “while Germany Beck remains the most likely location for the Battle of Fulford, the documentary and archaeological evidence is insufficiently conclusive to make this a secure identification”. This conclusion remained correct despite the evidence submitted by Mr Jones in his request for a review. It was “fully in line with” the selection guide. No other conclusion would be compatible with English Heritage’s “national approaches”. The Germany Beck site would therefore not be re-assessed for designation “at this time”.
43. That conclusion was repeated in English Heritage’s letter of 19 July 2013 to Mr Jones, in which it told him that none of the points raised in his request for a review was considered to be “sufficient grounds to reconsider the site for designation”.

*The proper interpretation of the selection guide and its application in this case*

44. On behalf of Mr Jones, Mr Ian Dove Q.C. submitted that the two decisions under challenge depended on English Heritage’s interpretation and application of the policy and guidance in its selection guide. English Heritage did not purport to apply any other policy or guidance.
45. Mr Dove argued that the guidance on “Location” in the selection guide must be read as a whole, and with a “purposive approach”. When English Heritage is presented with an application for the designation of a battlefield site “within a specific and particular topographical location”, it must assess whether this was the location of the battle applying the test of a “fair degree of probability”. In doing this, it must have regard to the date of the battle. When that first stage of the exercise has been completed, English Heritage can then go on to the second stage, the drawing of a “reasonable boundary” on the ground, using “existing land boundaries” if that is possible. The final step, to complete the secure identification referred to in the first sentence of the first paragraph of the guidance on “Location”, is the fixing of the boundary on the map. To begin with the question of whether the location has been “securely identified”, as English Heritage now maintains, is therefore to approach the exercise in the wrong way.
46. Mr Dove submitted that English Heritage demonstrably failed to understand and apply the guidance in the selection guide correctly. The Battlefields Advisory Panel had considered the “Location” test met, on the basis of the material presented to them and Mr Bridgland’s advice in his report. This was no more than a reflection of the view English Heritage had held for a long time – that the Germany Beck site was the most likely location for the battle, and that, as Mr Jones had shown in “Finding Fulford”, there are no realistic alternatives. In this case the “fair degree of probability” requirement was met.
47. The assessment in the Advice Report betrayed a wrong approach, muddling the “fair degree of probability” test with other considerations such as “lack of certainty” and evidence being “not conclusive” and “insufficiently conclusive to make this a secure identification”. The case for designation was not distinguished from the circumstances in which the site of the Battle of Maldon was designated. The archaeological evidence was seen as being at worst neutral. The documentary sources – which had been thoroughly dealt with in “Finding Fulford” – did not militate against designation. There was no significant difference between the accounts of the battle in the Anglo-Saxon and Norse sources. The Heimskringla neither

proved nor disproved the identification of the Germany Beck site as the battlefield, the two translations referred to in the Advice Report diverging only in the detail as to the deployment of the Norse troops. And the “inherent military probability” of the Germany Beck site was acknowledged to be the factor from which its designation gained “most support”.

48. Mr Dove submitted, finally, that the same incorrect approach is to be seen in the review decision. The Review Assessment introduced a test of “reasonable degree of certainty”, which is not to be found in the selection guide. It asserted that English Heritage had followed the process set out in the selection guide, but only compounded the errors in the Advice Report.
49. For English Heritage Ms Emma Dring submitted that in both of the decisions under challenge the guidance in the selection guide was correctly understood and applied, and that this is plain from the advice provided and followed on each occasion. Because English Heritage was not able to conclude that the location of the Battle of Fulford had been “securely identified”, which was the relevant test, it did not have to determine whether a boundary to the battlefield could be drawn with “a fair degree of probability”. The approach taken was consistent with the guidance, not a departure from it. There was no error of law.
50. I cannot accept Mr Dove’s argument. Ms Dring’s submissions are, in my view, correct.
51. The relevant principles of law are familiar and not controversial. If policy or guidance is to be properly applied it must be correctly understood by the decision-maker. The proper interpretation of planning policy and guidance is ultimately a matter for the court (see the judgment of Lord Reed in *Tesco v Dundee City Council* [2012] UKSC 13, at paragraphs 17 to 19 and 21). A decision based on a misunderstanding of a policy document falls to be quashed unless the court is satisfied that the error would have made no difference to the outcome (see the judgment of Glidewell L.J. in *Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1991) 61 P. & C.R., 343, at p.354).
52. The context for the application of those principles in this case is the making of two decisions in each of which English Heritage had to exercise a judgment. The question on which it was exercising its judgment was one on which different views could reasonably be held. It was deciding whether to add to the register of battlefields a further entry, having considered all of the relevant material before it and guided by the advice it was given by its officers. Both the initial decision and the subsequent review of it involved making a judgment as to whether a particular area of land should be formally designated as a historic battlefield, thus gaining a status which would be likely to bear on future development control decisions relating to it. This was akin to the exercise of a planning judgment, the kind of judgment with which the court will interfere only on public law grounds and never simply on the basis of a disagreement with the outcome itself.
53. Whether the decision was right is not for the court to consider. It was certainly not irrational. It was plainly a decision open to English Heritage, within the range of reasonable judgment. The fact that the view taken by the Battlefields Advisory Panel at its meeting in February 2012 was not reflected in the final and decisive exercise of judgment by the Designation Team in November 2012, the fact that the Consultation Report said what it did, and the fact that as the process ran its course there may have been changes of mind about the strength of the case for designating Germany Beck as the site of the Battle of Fulford,

do not make the formal decisions themselves unreasonable in the *Wednesbury* sense. In making each of those two decisions English Heritage took into account the available archaeological evidence, the relevant documentary materials, the considerations of military strategy and tactics, and the representations made both for and against designation, including the analysis, discussion and conclusions contained in “Finding Fulford”. And I do not think that there can be any complaint that the reasoning in the Advice Report, on which the decision not to designate was based, or in the Review Assessment, on which the review decision was based, was other than clear and complete.

54. In my view the guidance in the selection guide was both properly understood and properly applied in this case. There was no error of law in either of those two respects.
55. One must remember that the guidance was not drafted with the precision one would expect to see in a statute, and it should not be read as if it had been. It was written, and is clearly intended to be applied, as a collection of principles and advice to guide the exercise of judgment in individual cases when proposals for the designation of additional sites are presented to English Heritage, and to promote decision-making which is sound, consistent and reasonably predictable. It was produced by English Heritage to aid its own decision-making in this area, under the very broadly drawn statutory power – in section 33(5)(d) of the 1983 Act – to do what it thinks necessary or expedient in performing its general functions. It was clearly intended to continue the approach to designation adopted by English Heritage when the battlefields register was set up in 1995. It was based on the criteria in the 1995 leaflet, which, as it says, it did not seek to alter but to clarify.
56. One should keep in mind throughout the purposes for which the selection guide was produced. If the guidance is properly applied, it will prevent sites being added to the battlefields register that ought not to be there, it will lead to appropriate protection for designated battlefields being provided under relevant planning policy – now in the NPPF, previously in PPG15 and PPS5 – and it will serve to promote their conservation and a recognition of their significance in English history. These purposes of the selection guide, though not expressed in exactly the way that I have put them, are readily apparent in the principles and advice it sets out. I think they support the view that only sites demonstrably worthy of designation are intended to achieve that status.
57. The construction of the selection guide contended for by English Heritage through Ms Dring’s submissions is, I believe, clearly right. It is the literal construction. And it also has the benefit of being consistent with pragmatism and common sense. The interpretation of the guidance on “Location” for which Mr Dove contended would, in my view, distort the meaning of that part of the selection guide, and cannot be reconciled with a sensible reading of the document as a whole. It would weaken the test of “a battle’s location” having to be “securely identified” in a way that the authors of the guidance plainly did not intend.
58. There are four things to be noted about the part of the guidance which appears under the heading “Location”.
59. First, there are, as one might expect, two main considerations: the location of the battle and a definable area within which the fighting took place. This reflects the corresponding part of the 1995 leaflet. It makes good sense. Unless the location of the battle can be ascertained, the secondary exercise of seeking to define on the ground a boundary to the area where the armies were deployed and engaged with each other cannot sensibly be

performed. And even if the battle's location can be identified with sufficient confidence, designation will still not be possible unless a reasonable boundary for the battlefield can be defined on the ground. The advice given about other considerations bearing on the designation decision, including "topographic integrity", seems consistent with this understanding of the guidance on "Location".

60. Secondly, as Ms Dring submitted, the requirement for the "battle's location" to be "securely identified" is paramount. It is not merely a description of the outcome of the designation process. It governs the judgment which has to be made about the location of the battle. The use of the adverb "securely" is deliberate. It echoes the use of the same word in earlier passages of the guidance, such as the phrases "sufficient to locate sites securely" (in the context of Roman and pre-Norman Conquest battles) and "securely located major engagements" (in the context of battles of the English Civil Wars in the mid-17<sup>th</sup> century). It stresses the need for English Heritage to feel sure enough of the battle's location before attempting to define the boundary of the battlefield in that location "with a fair degree of probability". As Ms Dring submitted, in its context here the word "securely" means "[without] risk of error; certainly" (Oxford English Dictionary, Second Edition (1989)). It is accompanied by the imperative "must". The location of the battle "must be securely identified". Designating battlefields on a basis any less certain than that would be inconsistent with the approach taken by English Heritage when it set up the battlefields register, contrary to the aims of designation, and liable to harm the credibility of the register itself.
61. Thirdly, if the requirement for the boundary of the battlefield to be drawn with "a fair degree of probability" is, as it seems, less demanding than the requirement that the location of the battle must be "securely identified", that is not surprising. Placing the battle "within a specific and particular topographical location" – which the guidance says must be done "with a fair degree of probability" – is the secondary task of defining the boundary of the area within which the fighting actually occurred, not the primary task of fixing the location in which the battle was fought.
62. And fourthly, the guidance does not relax its requirements either as to "Historical Significance" or as to "Location" when they are applied to medieval or earlier battles. The requirements for designation are always the same and will be applied with the same rigour regardless of when the battle was fought. One can see that this is so when one reads the guidance on "Location" in the context of the whole of the selection guide, including the observations it makes about the difficulties of locating battles in "earlier periods of conflict", the comment that for battles before the Norman Conquest "the quantity and character of evidence are seldom sufficient to locate sites securely", and the narrative which follows in the "Historical Summary".
63. I do not accept that either of the two decisions challenged in this claim betrays any failure by English Heritage to interpret the selection guide accurately, or to apply it appropriately to the facts of the case in hand. The judgments made on each occasion were, in my view, wholly in line with the approach to designation decisions indicated in the guidance.
64. As the parties agree, documents such as the Advice Report and the Review Assessment are not to be read in an overly legalistic way, but with a reasonable degree of benevolence, especially where – as here – they are concerned with the evaluation of evidence against general criteria of proof and the making of discretionary judgments. Their main purpose is

to provide advice to the decision-maker, and if that advice is followed they are likely to demonstrate the basis for the decision itself. But unless they show some obvious error or omission they will not expose the decision to the risk of its being struck down by the court.

65. The analysis in the “Assessment” section of Advice Report began correctly – with “the two fundamental criteria” for judging whether a battlefield should be included in the battlefields register – “historical significance” and “the ability to define a location”. It led to the conclusion that the Germany Beck site had not been “securely identified” as the location of the battle. The last paragraph of that section of the report referred to the two “essential criteria” for a site’s inclusion on the battlefields register as “historical importance” and “secure identification of the site”. The first of those two criteria was met. The second was not. The Battle of Fulford was “a battle of sufficient historical importance”. But although Germany Beck remained “the most likely candidate”, there was still “significant ambiguity” in the evidence supporting it as the location of the battle, and it was “not possible to say that it has been securely identified”. This conclusion flowed from the judgments reached on the three main considerations “relating to location” – archaeological investigation, documentary sources and “inherent military probability”. Although the Germany Beck site was still seen as having been the “most desirable place” for the Anglo-Saxon earls to draw up their troops, the evidence from archaeological investigation was inconclusive, and the documentary sources ambiguous – in particular on the question of whether the battle was fought across a ditch or between the river and a dyke. The reasons for the designation decision given at the end of the Advice Report make it plain that the case for designating Germany Beck as the site of the battle failed because “the documentary and archaeological evidence is insufficiently conclusive to make this a secure identification”.
66. The basic judgment here is unmistakable. It was that the location of the battle had not been “securely identified”. It is expressed in language which corresponds exactly to that of the selection guide. It was a judgment in no way contrary to the guidance, but wholly consistent with it.
67. The conclusion that the Germany Beck site was “the most likely location” for the battle does not mean that this site was considered more likely than not to be the location of the battle. Nor does it mean that the location of the battle has been “securely identified” as being that site. It only means that, at the time when the assessment was made, the site was regarded as more likely to be the location of the battle than other sites were. That on its own is not necessarily enough for a secure identification. And in this case it clearly was not. There is nothing inconsistent between finding that a site is the most likely location of a battle and concluding, nonetheless, that it has not been “securely identified” as the location. I agree with the observations to the same effect in the judgment of H.H.J. Behrens in the Fulford Parish Council case (in paragraph 31 of his judgment).
68. The view that Germany Beck was “the most likely candidate for the site of the Battle of Fulford” was not arrived at in the light of a full appraisal of alternative locations in the Advice Report, or in the preceding stages of the designation process. Mr Bridgland confirms in his witness statement (at paragraph 36) that English Heritage had not undertaken a comparison between the case for designating the Germany Beck site and the case that might be made for other possible locations of the battle. When the Advice Report was prepared other possible locations had not been fully examined, and this remained so at the time of the review decision. This was not a fault in the process, but simply a fact. As Ms

Dring submitted, the judgment as to the location of a battle which is required by the selection guide is not a comparative one. It is not about the relative merits of competing sites in a contest from which one might emerge as more likely to be the location of the battle than the others. It is about the site actually being considered. A strong enough case must be made for that particular site if English Heritage is to be satisfied that the location of the battle has been “securely identified”. In this case that was not done. Unfortunately for Mr Jones, his theory that the Germany Beck site was the location of the Battle of Fulford was not convincing enough to persuade English Heritage that this basic and inescapable test in its own guidance had been met.

69. So this was not a case in which English Heritage had to go on to consider whether a reasonable boundary for the battlefield could be established with “a fair degree of probability”. Such an exercise would have been called for if the location of the battle had been “securely identified”, but that had not been possible. In the circumstances the assessment did not have to be taken any further than it was. There would have been no point in trying to define a battlefield boundary within an area of land which had not been “securely identified” as the location of the battle.
70. The same essential points apply to the review decision as well. They need not be repeated at length. The Review Assessment came to the same conclusion as the Advice Report. Again, and even in the light of the additional information presented by Mr Jones, English Heritage’s judgment was that the location of the battle had not been “securely identified”. The Designation Review Committee considered the case for the designation of the German Beck site to be lacking in “sufficient security of location”. The documentary and archaeological evidence was still “insufficiently conclusive”. Like the outcome of the previous process, the decision is unimpeachable in a claim for judicial review. As before, the crucial judgment was arrived at through an entirely conventional and correct use of the guidance in the selection guide. As is plain from the Review Assessment, English Heritage brought the guidance to bear on the whole of the material now before it. Unquestionably in my view, the guidance was, once again, both properly understood and properly applied.
71. It follows that both of the decisions challenged by Mr Jones are impeccable as a matter of law, and the claim must therefore fail. This will be disappointing for Mr Jones. He is surely to be admired for the work he has done over many years in seeking to find the site of the Battle of Fulford – no easy task for a battle that was fought almost 1,000 years ago. He may be right in his belief that the battle was fought at Germany Beck. But the court’s task in these proceedings has not been to decide whether his conclusion in “Finding Fulford” is sound, but only whether the refusal of English Heritage to add the site to its battlefields register was legally flawed. And in my view there was no error of law.

### *Conclusion*

72. For the reasons I have given the claim is dismissed.