Neutral Citation Number: [2017] EWCA Civ 152

Case No: C1/2016/1235

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
H.H.J. WAKSMAN Q.C.
[2016] EWHC 624 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2017

Before:

Lord Justice Patten
and
Lord Justice Lindblom

Between:

Watermead Parish Council	**Appellant**
- and -	
Aylesbury Vale District Council	**Respondent**
- and -	
Crematoria Management Ltd.	**Interested Party**

Mr Richard Kimblin Q.C. (instructed by **Schwab & Co Legal Services**) for the **Appellant**
Ms Clare Parry (instructed by **HB Public Law**) for the **Respondent**
Mr David Elvin Q.C. and Mr Alex Goodman (instructed by **Clarke Willmott LLP**) for the **Interested Party**

Hearing date: 22 November 2016
Further submissions received: 22, 28 and 29 November 2016

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Judgment Approved by the court for handing down (subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. In this appeal it is contended that two policies in the National Planning Policy Framework ("NPPF") were unlawfully dealt with by a local planning authority in determining an application for planning permission for a crematorium. The two policies are the policy for development in "areas at risk of flooding" and the policy for the "presumption in favour of sustainable development".

2. The appellant, Watermead Parish Council, appeals against the order dated 4 March 2016 of H.H.J. Waksman Q.C., sitting as a deputy judge of the High Court, dismissing its claim for judicial review of the planning permission granted by the respondent, Aylesbury Vale District Council, on 18 June 2015 for the construction of a crematorium and car park on land at Watermead, on the northern outskirts of Aylesbury. The applicant for planning permission was the interested party, Crematoria Management Ltd., the operating company of Westerleigh Group Ltd., a developer of crematoria and cemeteries. I granted permission to appeal on 16 August 2016.

The issues in the appeal

3. There are two main issues for us to decide. The first is whether the district council misunderstood NPPF policy for development in "areas at risk of flooding", in particular the policy for the "sequential test" in paragraphs 100 to 104, and failed to attend to the policy lawfully (ground 3). In resolving this issue we must consider whether we should take into account evidence in a witness statement of the district council's planning officer, Mr Michael Denman, who was the author of the committee report which recommended the grant of planning permission (ground 1). The second issue is whether the district council correctly understood and lawfully applied the policy for the "presumption in favour of sustainable development" in paragraph 14 of the NPPF (ground 2). By a respondent's notice, Crematoria Management contends that if any error of law is found in the district council's decision in either or both of those respects, the court should, in the exercise of its discretion, decline to quash the planning permission.

NPPF policy for development in "areas at risk of flooding"

4. In section 10 of the NPPF, "Meeting the challenge of climate change, flooding and coastal change", paragraph 99 says that "Local Plans should take account of climate change over the longer term, including factors such as flood risk …", that "[new] development should be planned to avoid increased vulnerability to the range of impacts arising from climate change", and that "[when] new development is brought forward in areas which are vulnerable, care should be taken to ensure that risks can be managed through suitable adaptation measures …". The policies with which we are concerned here are in paragraphs 100 to 104:

   > "100. Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk, but where development is

necessary, making it safe without increasing flood risk elsewhere. … Local Plans should apply a sequential, risk-based approach to the location of development to avoid where possible flood risk to people and property and manage any residual risk, taking account of the impacts of climate change, by:

- applying the Sequential Test;
- if necessary, applying the Exception Test;

…

- using opportunities offered by new development to reduce the causes and impacts of flooding; …

…

… .

101. The aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding. The Strategic Flood Risk Assessment will provide the basis for applying this test. A sequential approach should be used in areas known to be at risk from any form of flooding.

102. If, following application of the Sequential Test, it is not possible, consistent with wider sustainability objectives, for the development to be located in zones with a lower probability of flooding, the Exception Test can be applied if appropriate. For the Exception Test to be passed:

- it must be demonstrated that the development provides wider sustainability benefits to the community that outweigh flood risk, informed by a Strategic Flood Risk Assessment where one has been prepared; and
- a site-specific flood risk assessment must demonstrate that the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

Both elements of the test will have to be passed for development to be allocated or permitted.

103. When determining planning applications, local planning authorities should ensure flood risk is not increased elsewhere and only consider development appropriate in areas at risk of flooding where, informed by a site-specific flood risk assessment following the Sequential Test, and if required the Exception Test, it can be demonstrated that:

- within the site, the most vulnerable development is located in areas of lowest flood risk unless there are overriding reasons to prefer a different location; and
- development is appropriately flood resilient and resistant, including safe access and escape routes where required, and that any residual risk can be safely managed, including by emergency planning; and it gives priority to the use of sustainable drainage systems.

> 104. For individual developments on sites allocated in development plans through the Sequential Test, applicants need not apply the Sequential Test. Applications for minor development and changes of use should not be subject to the Sequential or Exception Tests but should still meet the requirements for site-specific flood risk assessments."

A footnote explaining the requirement for "a site-specific flood risk assessment" in paragraph 103 (footnote 20) says that such an assessment is required for, among others, "proposals of 1 hectare or greater in Flood Zone 1", and "all proposals for new development (including minor development and change of use) in Flood Zones 2 and 3". A footnote to the second sentence of paragraph 104 (footnote 22) states:

> "Except for any proposal involving a change of use to a caravan, camping or chalet site, or to a mobile home or park home site, where the Sequential and Exception Tests should be applied as appropriate."

5. The Planning Practice Guidance ("PPG"), first issued by the Government in March 2014, includes a section on "Planning and Flood Risk". Under the heading "What is the general planning approach to development and flood risk?", paragraph 7-001-20140306 states that "[the NPPF] sets strict tests to protect people and property from flooding which all local planning authorities are expected to follow", that "[where] these tests are not met, national policy is clear that new development should not be allowed", and that "[the] main steps … are designed to ensure that if there are better sites in terms of flood risk, or a proposed development cannot be made safe, it should not be permitted". In a section on "The sequential, risk-based approach to the location of development", under the heading "What is the sequential, risk-based approach to the location of development?", paragraph 7-018-20140306 says that "[the] general approach is designed to ensure that areas at little or no risk of flooding from any source are developed in preference to areas at higher risk", and that "[the] aim should be to keep development out of medium and high flood risk areas (Flood Zones 2 and 3) and other areas affected by other sources of flooding where possible". Guidance on the sequential test is given in a section on "The aim of the Sequential Test", in which paragraph 7-019-20140306 states:

> "The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. The flood zones as refined in the Strategic Flood Risk Assessment for the area provide the basis for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding). Where there are no reasonably available sites in Flood Zone 1, local planning authorities in their decision making should take into account the flood risk vulnerability of land uses and consider reasonably available sites in Flood Zone 2 (areas with a medium probability of river or sea flooding), applying the Exception Test if required. Only where there are no reasonably available sites in Flood Zones 1 or 2 should the suitability of sites in Flood Zone 3 (areas with a high probability of river or sea flooding) be considered, taking into account the flood risk vulnerability of land uses and applying the Exception Test if required."

A later section, on "Applying the Sequential Test to individual planning applications", explains in paragraph 7-034-20140306, under the sub-heading "Who is responsible for deciding whether an application passes the Sequential Test?":

> "It is for local planning authorities, taking advice from the Environment Agency as appropriate, to consider the extent to which Sequential Test considerations have been satisfied, taking into account the particular circumstances in any given case. The developer should justify with evidence to the local planning authority what area of search has been used when making the application. Ultimately the local planning authority needs to be satisfied in all cases that the proposed development would be safe and not lead to increased flood risk elsewhere."

Paragraph 7-035-20140306, under the heading "When should the Exception Test be applied to planning applications?", says that "[the] Exception Test should only be applied … following application of the Sequential Test". The meaning of ""minor development" in relation to flood risk" is explained in paragraph 7-046-20140306, which refers to three types of "minor development", namely: "minor non-residential extensions", which are defined as "industrial/commercial/leisure etc. extensions with a footprint less than 250 square metres"; "alterations", which are defined as "development that does not increase the size of buildings, [e.g.] alterations to external appearance"; and "householder development", such as "sheds, garages, games rooms [etc.] within the curtilage of the existing dwelling, in addition to physical extensions to the existing dwelling itself …".

Crematoria Management's flood risk assessment

6. The proposed crematorium would be built on land adjoining a disused ski slope to the west of Watermead Lake. The River Thame flows through the site. When the district council granted planning permission there was a two-storey restaurant on the site, and a car park with parking for 145 cars. The restaurant and car park were largely in Flood Zone 3, the ski-slope in Flood Zone 1. The restaurant was to be demolished, and the crematorium constructed about 800mm above ground level, entirely in Flood Zone 1. The number of car parking spaces would be reduced from 145 to 70, all in Flood Zone 3. Crematoria Management contended, therefore, that the development would alleviate the existing risk of flooding – both on the site itself and on neighbouring land.

7. On 5 February 2014 Crematoria Management produced their Preliminary Flood Risk Assessment, prepared by their consultant engineer, Mr Clive Onions of Clive Onions Ltd.. In section 7, "Policy", it referred to paragraph 104 of the NPPF, stating:

> "Section [sic] 104 of [the] NPPF refers to changes of use and states that these should not be subject to the Sequential Test or Exception Test, which replaces the requirements of Table 3 in the [technical guidance for the NPPF]."

The Preliminary Flood Risk Assessment was sent to the Environment Agency for their comments. In a letter to Mr Onions dated 2 April 2014 they said this, under the heading "Sequential Test":

> "The proposal is for a demolition and rebuild, which does not constitute a change of use. We understand that the built development will be located on the slopes of the hill mostly in Flood Zone 1 but partly within Flood Zone 3 and the access roads will be formed on the low lying land (Flood Zone 3b). Therefore, in compliance with national planning policy, the Sequential Test will need to be discussed with Aylesbury Vale District Council at the earliest possible opportunity.

> We agree that this is classified as 'less vulnerable' development in the Technical Guidance to the NPPF and should the Sequential Test be passed, the build [sic] development would be appropriate in Flood Zone 3a providing the FRA demonstrates that it would not be at an unacceptable risk of flooding and will not increase flood risk elsewhere."

8. When the application for planning permission was submitted to the district council, in May 2014, it was accompanied by a report prepared by Westerleigh, entitled "Site search for a new Crematorium for the Aylesbury" [sic] and dated March 2014. This referred to an independent report prepared in April 2007 by John Silvester Associates on behalf of the Chilterns Crematorium Joint Committee, which had been trying to find a suitable site for a new crematorium to serve Aylesbury. The joint committee had considered seven possible locations. Since 2007 it had considered another 10. The site search report said that Westerleigh had been "investigating potential sites in the Aylesbury area since 1998", and that "[a] total of some 40 sites were looked at …". Details were given of "the 24 sites closest to Aylesbury" that had been "reviewed". The report went on to say that "[a] large number of sites were discounted due to the unknown future location of housing development in and around Aylesbury and the existence of options for residential development on the various sites", that "a number of sites were discounted due to the route of HS2", and that "[in] reaching the decision to enter into negotiations to acquire the Riviera Restaurant site there was a clear recognition that this site fulfilled the aims of the NPPF to effectively use land by reusing previously developed land in preference to greenfield sites wherever possible".

9. The application for planning permission was also accompanied by the Flood Risk Assessment and Drainage Strategy, dated 30 May 2014, which had been prepared by Mr Onions. In section 1, "Introduction", the Flood Risk Assessment and Drainage Strategy said that the district council had "identified a need" for a crematorium and that "no other suitable sites have been found". Section 7, "Policy", stated that "[the] Environment Agency Flood Map shows the site as mainly within Flood Zone 3, with the hill in Flood Zone 1 …", and that "the northern part of the site is in Flood Zone 3a, and the eastern part (car park) is in Flood Zone 3b"; that, under the technical guidance for the NPPF, the proposed crematorium was "less vulnerable" development, appropriate in Flood Zone 3a, and was to be "located on the north bank cut into the hill partly in Flood Zone 3 and mostly in Flood Zone 1 …"; and that the car park would "remain on the east side of the site in Flood Zone 3b, but rearranged to allow better and safer integration of the access road and parking". It then said this:

> "Section [sic] 104 of [the] NPPF refers to changes of use and states that these should not be subject to the Sequential Test or Exception Test, which replaces the requirements of Table 3 in the [technical guidance for the NPPF]. The Agency does not consider this as a change of use, because it is the site not the building being reused, but it is considered to be relevant by the Developer, since there is such a dramatic benefit to the river bank conditions with the removal of the restaurant, which would not occur if this scheme was not to proceed."

A description of the proposal followed. The "proposed redevelopment [would] improve flood storage, [would] not significantly affect flood flow characteristics and [would] therefore not cause increased flood risk elsewhere", and "[run-off would] be attenuated to greenfield rates or less". So "[the] overall proposal would therefore be described as 'betterment'". In section 14, "Conclusions & Recommendations", under the heading "Need", it was said that the district council "has a stated need for a crematorium, and sites

are not easy to find". Under the heading "Policy", it was contended that "[this] change of use, and the category of use, is in harmony with the aims set down in the NPPF".

10. In a letter to the district council dated 26 June 2014 the Environment Agency objected to the proposed development, but also indicated how their concerns could be overcome. They had three objections: first, the Flood Risk Assessment and Drainage Strategy failed to provide a suitable basis for assessing flood risks arising from the development; secondly, it had not been demonstrated that NPPF policy for conserving and enhancing biodiversity had been complied with; and thirdly, the proposed buffer zone to the River Thame was inadequate. When Crematoria Management sought to address the objection on flood risk, the Environment Agency at first maintained that "without sufficient flood plain compensation, the proposed development will lead to a reduction in floodplain storage in the area and an increase in flood risk offsite" (in a letter to the district council dated 29 July 2014). But after more work had been done by Mr Onions they were able to withdraw that objection (in a letter to the district council dated 20 August 2014). They later withdrew the other two, and suggested the conditions that they would want to see imposed on a grant of planning permission (in letters to the district council dated 30 September 2014 and 29 October 2014).

11. The parish council objected to the proposed development in a letter to the district council dated 3 July 2014. It had a number of concerns. One of them was that the development would cause an "increased risk" of flooding to properties in Watermead. The parish council pointed out that "[it] is noted within the response from the Environment Agency that a sequential test needs to be carried out".

How did the district council deal with NPPF policy for development in "areas at risk of flooding"?

12. The application for planning permission was considered by the district council's Strategic Development Management Committee at its meeting on 10 December 2014. The officer's report recommended that the application "be deferred and delegated with a view to APPROVAL subject to receipt of satisfactory amended information". The committee accepted that recommendation. The parish council then, in a letter dated 18 December 2014, asked the Secretary of State to call in the application for his own determination. In doing so, it did not refer to NPPF policy for development in "areas at risk of flooding". On 27 January 2015 the Secretary of State served a holding direction. In subsequent correspondence with the district council the Environment Agency said they were satisfied with the flood compensation measures proposed (their letter to the district council dated 6 February 2015), and with the proposed replacement road bridge across the River Thame (their letter to the district council dated 23 February 2015). In a letter to the district council dated 19 March 2015 the Secretary of State said he had decided not to call in the application. On 13 May 2015 the parish council made further representations to the district council opposing the development, again not referring to NPPF policy for development in "areas at risk of flooding". On 18 June 2015 the officer recorded in a delegated report the considerations that had arisen since the committee's resolution in December 2014, including the parish council's further representations. Attached to the planning permission granted on that day were a number of conditions, including three that secured measures to mitigate flood risk (conditions 9, 10 and 17).

13. In his report to the committee for its meeting on 10 December 2014 the officer had drawn the members' attention to the parish council's objection, including its "flooding concerns"

(paragraph 6.1 of the report). The parish council's letter of 3 July 2014 was appended to the report. The officer referred to the Environment Agency's response to consultation (paragraph 7.1). The Environment Agency had found "[the] proposed replacement bridge … acceptable in principle", but drawings showing the design of the bridge would have to be submitted for approval "as part of the flood compensation details submission" (paragraph 7.2). Buckinghamshire County Council had not objected to the proposal, but had "suggested that further flood mitigation areas should be provided as the proposed flood mitigation areas are already within areas which are subject to flood from surface water and fluvial flow" (paragraph 7.10). The officer noted that one of the matters raised in the 350 representations received on the application was that the site "is within the flood plain and is regularly flooded …" and that if the development "includes raising the level of the land, this may increase flooding risk to Watermead houses" (paragraph 8.1).

14. In section 9 of the report the officer set out his evaluation of the planning merits. Under the heading "The Development Plan", he said that "[development] proposals are to be considered in the context of policies within the NPPF which sets out the presumption in favour of sustainable development at paragraph 14" (paragraph 9.3), and that there were "no policies in [the Aylesbury Vale District Local Plan] that deal specifically with crematoria" (paragraph 9.4). He explained that "[the] need for a new crematorium to cater for the growth needs of the town and the district [had been] identified at the LDF consultation stage in 2007", that "[a] site to the north of the town was indicated to be the preferred option, to provide the optimum distribution of facilities having regard to the existing provision to north ([Milton Keynes]) and south (Amersham)" (paragraph 9.6). In a passage dealing specifically with relevant policies in the NPPF, he quoted the policy for the "presumption in favour of sustainable development" in "decision-taking" in paragraph 14 of the NPPF (paragraph 9.12). He considered the question "Whether the proposal would constitute a sustainable form of development and consideration of any adverse impacts against the benefits" in 46 paragraphs, under a series of headings corresponding to relevant sections of the NPPF (paragraphs 9.16 to 9.61). When considering NPPF policy for "[promoting] healthy communities", he reminded the committee that planning permission had recently been granted for a crematorium at Bierton, on "a site that also scores well in terms of location, and in terms of accessibility and sustainability". He acknowledged that there was "likely to be a need for only one crematorium in this area …", but added that "commercial competition is not a matter for the planning authority, and the need for crematoria is a matter to be determined by the operators of those facilities". He went on to say that it was "not appropriate … for an application to be refused on the basis that there is a current proposal, or a recent approval, for a similar development on an alternative site", that it was necessary for decisions to be "made on the basis of the merits of each case", and that "[if] this process is to result in two approvals, it would be for the promoters of each scheme to decide whether or not to proceed with the approved development" (paragraph 9.39).

15. Under the heading "Meeting the challenge of climate change, flooding and coastal change", the officer said, in paragraphs 9.40 and 9.41:

> "9.40 The NPPF at Section 10, "Meeting the challenge of climate change, flooding and coastal change" advises at paragraph 99 that new development should be planned to avoid increased vulnerability to the range of impacts arising from climate change. When new development is brought forward in areas which are vulnerable, care should be taken to ensure that risks can be managed through suitable adaptation measures. Paragraph 100 recommends a sequential, risk-

based approach to the location of development to avoid, where possible, flood risk to people and property.

9.41 A Flood Risk Assessment was submitted with this application. The site is adjacent to the River Thame, within an area liable to flood. Initially, the proposal gave rise to objection from EA, however following a lengthy process of negotiation, the developers have amended the scheme to satisfy EA requirements in relation to flood risk (both on the site and elsewhere) and ecology. The proposal relates to an already developed site, and therefore a sequential assessment is unnecessary. Subject to amendments and additional information as recommended by EA, it is considered that the proposal would not give rise to increased flood risk. This is considered a neutral factor in the planning balance. However, in view of the fundamental importance of the flood risk issue, it is considered that the amended details of the flood compensation scheme, along with the addendum to the FRA, should be submitted and agreed prior to approval of the application."

16. The delegated report prepared by the officer on 18 June 2015 acknowledged that it was "likely that the car park serving the crematorium will be flooded to a greater or lesser degree, on a frequent basis during winter months", noted that at the committee meeting in December 2014 Crematoria Management had "stated that the crematorium would not operate when the car park is flooded", and concluded that "[a] condition should be imposed to ensure that at such times the crematorium is not allowed to operate". The officer recalled the advice given in paragraph 9.41 of the December 2014 committee report:

> "The report states (para 9.41) that [the Environment Agency] had indicated that the proposal is acceptable in principle in terms of flood risk both on site and elsewhere. It is noted that the site is an already developed site, and the proposal would not give rise to increased flood risk. The issue of the car park flooding at certain times of the year was addressed in debate at the meeting. The potential for the parking associated with the proposed use to be subject to flooding does not give rise to a new issue, but it is considered having regard to the changed character of the use, a condition to require the submission and approval of a scheme to regulate parking at times of flooding could be justified. This is not a new issue: the issues of flooding and parking were considered in detail by the Committee."

Did the district council deal lawfully with NPPF policy for development in "areas at risk of flooding"?

17. In his judgment, H.H.J. Waksman Q.C. acknowledged that "the [Environment Agency] considered that the sequential test should be done because the development was not a change of use", but, having said as much in their letter of 2 April 2014, "took the point no further". Crematoria Management had relied on the "betterment" which would be achieved by the proposed development, and the planning officer had "obviously had that in mind" in the advice he gave the committee in paragraph 9.41 of his report. The officer "was not saying … that the development was minor development or merely change of use …", but that "… a sequential test was not required or appropriate because of the existing development at the site …" (paragraph 53 of the judgment). The judge said that "[if the officer] had supposed that there was an <u>actual</u> exception [to the sequential test in NPPF policy] for prior developed sites, along with minor development and change of use, that

would be an error, but clearly in context he was not saying that" (paragraph 59). He continued (in paragraph 60):

> "60. … I agree that if all the [report] had said was that the sequential test was unnecessary because on a site specific basis the flood risk would be sufficiently mitigated and would not increase flood risk elsewhere, that would be to put the cart before the horse. It would assume the sequential test has been applied in favour of development, and one goes to the next stage. But that is not the point, or certainly not the main point made by the [report] on the sequential test in paragraph 9.41, clarified, insofar as necessary, by [Mr Denman's] witness statement. The main point is tied to the fact of and the comparison with, the existing development and the scale of the new development, its relevant size and the fact of betterment."

In the judge's view, the district council was entitled "to consider … whether the sequential test is really necessary where it is analogous to a case of minor development …" (paragraph 61). He went on to say (in paragraph 62):

> "62. The short point can be expressed in another way. If the proposed development goes elsewhere, [i.e.] there was another site which was preferable under the sequential test, then the flood risk at the proposed site constituted by the restaurant would remain as well. If the development proposed, on the other hand, stayed on that site the flood risk would be mitigated overall. And it would lessen the extent of development in flood risk areas. This is precisely the sort of case where a common sense view, applying planning judgment of flood risk policy, should allow for an exception to be made. It cannot be attacked as irrational or wrong in principle, and in context I think that the reasoning behind it is clear enough."

18. The judge found it possible to distinguish this case from *R. (on the application of the Environment Agency) v Tonbridge and Malling Borough Council* [2006] 2 P. & C.R. 29, on the basis that the main issue there, as he saw it, had not been whether a local planning authority could lawfully decline to apply the sequential test, but whether the sequential test had in fact been performed (paragraph 63). In this case, he said, the district council was not contending that, "as a matter of law, … whenever there was a previous developed site, the test had no application", but rather that "for specific reasons relating to this site and the unusual circumstances pertaining to it, … it was proper to disregard the test as being unnecessary" (paragraph 64).

19. The relevant passages in the judgment of Lloyd Jones J., as he then was, in *Tonbridge and Malling Borough Council*, which seem to me to be very much in point here, were these (in paragraphs 52, 67 and 68):

> "52. So the Council was … maintaining that the sequential test [in PPG25, "Development and Flood Risk"] can have no application in reality to the redevelopment of existing sites because it is beyond the Council's control. However it is now accepted by the Council that this is incorrect as a matter of law and that it is a misconception that PPG25 and the sequential test in PPG25 apply only to greenfield sites.
>
> …

> 67. There is in any event a more fundamental flaw in the process by which the Committee arrived at its decision to grant planning permission in this case. It gives rise to a further reason why I am unable to conclude the Committee may be taken to have applied the sequential test. Reference has been made above to the opinion held by the Council that the sequential test in PPG25 applies only to applications for the development of Greenfield sites and has no application to previously developed land where there are historic use rights. This view was propounded by the Council in the Urban Capacity Study. It is now accepted by the Council that that view is erroneous … . There was no attempt in the hearing before me to justify that previously held view.
>
> 68. However, it is clear that at the date of the grant of the planning permission with which we are concerned that erroneous view was held by the planning officials within the Council. Accordingly, they considered that the sequential test was simply not applicable to the decision before the Planning Committee in relation to this site. … ."

20. For the parish council, Mr Richard Kimblin Q.C. submitted that the district council had misunderstood and failed to apply NPPF policy for the sequential test. Under that policy a sequential assessment was required in this case, but had not been carried out. The purpose of applying the sequential test, as the NPPF makes clear, is not to compare the existing risk of flooding with the risk of flooding after the development has been carried out, but to direct development away from areas where the risk is highest, always subject to the developer demonstrating that his development is "necessary". In this case there was no doubt that policy for the sequential test applied. The proposal was for development in an area "at risk of flooding". Some of the development would be within Flood Zone 3a and 3b – the highest category of flood risk. Not only that; as the district council had accepted, flood compensation measures would be necessary for it. The site had not been allocated for the development of a crematorium in the development plan through the application of the sequential test. And the proposal was not for "minor development" or for a change of use. In their letter to Mr Onions dated 2 April 2014 the Environment Agency had made it clear that in their view the sequential test applied to the proposed development, and was a matter for the district council as local planning authority to deal with. They were right. The withdrawal of their objection depended on their being satisfied with the proposed flood compensation measures. But satisfying them that those measures were adequate and effective was not to discharge the sequential test. Under NPPF policy, the flood compensation works had no bearing on the requirement for the sequential test to be applied. They would fall to be considered under the exception test, which is a separate exercise. Mr Kimblin submitted that the judge's conclusions – based largely on the concept of "betterment" – did not recognize this.

21. Ms Clare Parry, for the district council, and Mr David Elvin Q.C., for Crematoria Management, defended the judge's conclusions. Ms Parry submitted that "[the] essential reasoning in the officer's report was that a sequential test was not required because the site was already developed" (paragraph 38 of her skeleton argument), but also that the district council was "entitled in principle to decide in [its] planning judgment not to apply a sequential test …" (paragraph 53). Mr Elvin submitted that the district council was free to depart from NPPF policy for the sequential test if there was good reason to do so. There was nothing in the officer's report to suggest that he had misinterpreted or misapplied the policy. His advice in paragraph 9.40 of the report shows that he understood it to be, as Mr Elvin described it, a "locational selection policy". But his advice in paragraph 9.41 was that the

sequential test did not need to be applied in this case, and that advice was amply justified. The proposal complied with the objectives of NPPF policy. There was already development on the site. The increase in floor space was less than would amount to "minor development" as defined in the PPG. The scheme had been designed to concentrate built development in Flood Zone 1, the part of the site at lowest risk of flooding. Far from increasing the risk of flooding, the proposed development would achieve "betterment" by reducing flood risk to an acceptable level, both on the site and on adjacent land – as the Environment Agency had accepted. If the development were to go ahead somewhere else, that benefit would be foregone. All of this had to be seen against the background of Westerleigh's site search report and the search for sites carried out by the Chilterns Crematorium Joint Committee. As a matter of planning judgment, the officer's view was reasonably open to him. The committee was entitled to act on the advice he gave, and not to follow NPPF policy for the sequential test. Plainly, it accepted that in the circumstances there was no need for a sequential assessment of alternative sites. The parish council had not argued that the officer's view was *Wednesbury* unreasonable, or his reasons inadequate.

22. The law that applies to planning officers' reports to committee is well established and clear. Such reports ought not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge (see the judgment of Baroness Hale of Richmond in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2, at paragraph 36, and the judgment of Sullivan J., as he then was, in *R. v Mendip District Council, ex parte Fabre* (2000) 80 P. & C.R. 500, at p.509). The question for the court will always be whether, on a fair reading of his report as a whole, the officer has significantly misled the members on a matter bearing upon their decision, and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way – for example, by failing to draw their attention to considerations material to their decision or bringing into account considerations that are immaterial, or misinforming them about relevant facts, or providing them with a false understanding of relevant planning policy – that the court will be able to conclude that their decision was rendered unlawful by the advice they were given (see the judgment of Sullivan L.J. in *R. (on the application of Siraj) v Kirklees Metropolitan District Council* [2010] EWCA Civ 1286, at paragraph 19, citing the familiar passage in the judgment of Judge L.J., as he then was, in *R. v Selby District Council, ex parte Oxton Farms* [1997] E.G.C.S. 60). Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer's recommendation, they did so on the basis of the advice that he or she gave (see the judgment of Lewison L.J. in *Palmer v Herefordshire Council* [2016] EWCA Civ 1061, at paragraph 7).

23. Here the officer's reference to "sequential assessment" in paragraph 9.41 of his report must of course be read in its context. As one can see from paragraph 9.40, he was clearly conscious of the policies in paragraphs 99 and 100 of the NPPF. He did not refer explicitly to the policies in paragraphs 101 to 104, but in my view nothing turns on that. In paragraph 9.41 he mentioned the Flood Risk Assessment and Drainage Strategy, the fact that the application site was "within an area liable to flood", and the Environment Agency's objection on grounds relating to "flood risk" and "ecology". His advice was that, subject to the amendments and the provision of further information sought by the Environment Agency, the proposed development "would not give rise to increased flood risk", but that, "in view of the fundamental importance of the flood risk issue", it was still necessary for amended details of the flood compensation scheme and an addendum to the Flood Risk Assessment and Drainage Strategy to be approved before planning permission could be

granted. That is the context in which one finds the sentence in which the officer referred to "sequential assessment":

> "The proposal relates to an already developed site, and therefore a sequential assessment is unnecessary."

24. How should one read that sentence? It is clear that the officer was of the view that in this case there was no need for a sequential assessment to be carried out. But did he simply mean that a sequential assessment was not required by NPPF policy because the site was "already developed"? Or did he mean that although NPPF policy normally required a sequential assessment for a proposal such as this, notwithstanding that the site was "already developed", a departure from the policy was in his view justified? And if it was the latter, what justification did he give for that departure from policy?

25. Without any help from Mr Denman's evidence in his witness statement of 22 December 2015, I would read the disputed sentence in paragraph 9.41, in its context, as meaning that NPPF policy for the sequential test, properly construed, did not apply to the proposed development, because the policy does not require a sequential assessment to be undertaken for the redevelopment of an already developed site. There is no suggestion in paragraphs 9.40 and 9.41, or anywhere else in the officer's report, that the members were being invited to depart from NPPF policy for the sequential test, or that a possible basis was being put forward for doing so if this was the course they chose to take.

26. I see no reason to think that the officer did not mean exactly what he said. He did not say that NPPF policy for the sequential test applied to the proposal, but that in his view the policy should be departed from – in effect, disapplied – in the particular circumstances of this case, and for the particular reasons he gave. His advice was that the sequential test in NPPF policy did not apply in this case because the proposal was for a site that already had development on it. The site was "already developed", and "therefore", he said, a "sequential assessment is unnecessary".

27. The other advice the officer gave in these two paragraphs of his report was not, as I read it, put forward as a justification for departing from, or disapplying, NPPF policy. Paragraph 9.40 merely summarizes the policies in paragraphs 99 and 100 of the NPPF. And the rest of the advice in paragraph 9.41 is not about the sequential test. It is about other aspects of the policies in paragraphs 102 and 103 of the NPPF – which are explicitly separate from and additional to the sequential test: the Environment Agency's "requirements in relation to flood risk (both on the site and elsewhere) and ecology" and the need for "amended details of the flood compensation scheme" to be submitted and agreed before planning permission could be granted. The officer did not say that this was – or was in effect – a proposal for "minor development" or for a change of use, within the scope of the policy for exemptions from the sequential test in paragraph 104 of the NPPF. Nor did he rely on the concept of "betterment" as a justification for departing from the policy. What he said was that the proposed development "would not give rise to increased flood risk", and that he considered this to be "a neutral factor in the planning balance". Nor again did he rely on the assessment of need and the content and conclusions of Westerleigh's site search report.

28. If my understanding of the advice the officer gave on the sequential test is correct, I think that advice was not a true reflection of government policy for development in "areas at risk of flooding" in paragraphs 99 to 104 of the NPPF. The sequential test is distinct from, and is to be applied prior to, the exception test, which involves a different exercise (see paragraphs

4 and 5 above). The aim of the sequential test, as paragraph 101 explains, is to "steer new development to areas with the lowest probability of flooding". Where it applies, it involves an assessment of the availability of "sites appropriate for the proposed development in areas with a lower probability of flooding". It is required not only for "new development" proposed on sites which have not previously been developed but also for "new development" on land that is already developed (see paragraphs 52, 67 and 68 of Lloyd Jones J.'s judgment in *Tonbridge and Malling Borough Council*, quoted in paragraph 19 above). And it is not said to be inapplicable to development that would reduce flood risk. The Government provided expressly for exemptions from it, in paragraph 104. There is a general exemption for developments "on sites allocated in development plans through the Sequential Test", and two specific exemptions – for "minor development" and for "changes of use". None of those exemptions applied here. It follows that if – as I think – the officer's advice in the fourth sentence of paragraph 9.41 of his report was that under NPPF policy a sequential test was unnecessary in this case because the proposal was for "an already developed site", that advice was based on a misinterpretation of the policy. This was an error of law.

29. Even if my understanding of the disputed sentence in paragraph 9.41 is incorrect, I would still conclude that officer's advice on the sequential test was flawed. A local planning authority is, of course, free to depart from national planning policy, even policy as basic as this. But if it does that, it must do so consciously and for good reason – as Lloyd Jones J. observed in *Tonbridge and Malling Borough Council* (in paragraph 32 of his judgment). I do not think that was done here.

30. Apart from the disputed sentence, the advice the officer gave in paragraph 9.41 was not, as I read it, directed to the sequential test, but rather to the exception test and, in particular, the acceptability of the proposed flood compensation scheme. It explains why he was able to conclude that the proposal satisfied a different part of NPPF policy for development in "areas at risk of flooding" – the part relating to "flood risk" before and after a proposed development is in place. But if he were saying, in effect, that the proposal should escape one part of the policy simply because it satisfied another, which it also had to satisfy in any event, I do not think that could have been an adequate basis for departing from the policy. Something more would logically be required. If that was "betterment", for example, or the fact that the increase in floor space was less than would amount to "minor development" under paragraph 104 of the NPPF and the relevant guidance in the PPG, or some other factor, one would have expected the officer to identify it explicitly as a consideration justifying a departure from policy. But he did not do that. I think the advice he gave in paragraph 9.41, even if it was intended to provide the committee with reasons for departing from the policy for the sequential test, would still have been misleading on the sense and effect of NPPF policy for development in "areas at risk of flooding". If, however, the only justification he was suggesting for a departure from the policy was that the proposal was for "an already developed site", I cannot see how this, on its own, could be a proper reason for departing from a policy that applies to sites which are developed as well as to sites which are not.

31. Either way, therefore, the advice the members were given on NPPF policy for the sequential test was in my view defective in law. It follows that I disagree with the judge's conclusion on this ground of the claim.

Mr Denman's witness statement

32. Should that analysis be revised in the light of Mr Denman's evidence in his witness statement? The judge was persuaded to take that evidence into account. Mr Kimblin submitted to us that he was wrong to do so, Ms Parry and Mr Elvin that he was right. Mr Kimblin relied on the decision of this court in *R. v Westminster City Council ex parte Ermakov* [1996] 2 All E.R. 302, followed, in a planning case, in *R. (on the application of Lanner Parish Council) v Cornwall Council and Coastline Housing Ltd.* [2013] EWCA Civ 1290 (see, in particular, the judgment of Jackson L.J., with which Rimer and Lewison L.JJ. agreed, at paragraphs 59 to 65). He argued that Mr Denman's witness statement was not admissible to make good the advice given in the committee report, and that in any event the evidence it contains in some respects contradicts that advice. Ms Parry and Mr Elvin submitted that the judge was acting well within his discretion in admitting the evidence. The witness statement did not set out to correct any errors in the report, or provide essential reasoning that it lacked, or contradict the advice it contained. It merely elucidated the advice in the report (see, for example, the judgment of Stanley Burnton J. in *R. (on the application of Nash) v Chelsea College of Art and Design* [2001] EWHC 538 (Admin). To allow the district council to rely on it would not be to permit "a public authority … to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached" – as Jackson L.J. put it in his judgment in *Lanner Parish Council* (at paragraph 64).

33. Mr Denman's witness statement runs to 30 paragraphs. The first 18 relate to the Environment Agency's response to the proposal and the district council's determination of the application for planning permission. The remaining 12 are devoted to explaining the advice in paragraphs 9.40 and 9.41 of the committee report.

34. In paragraph 8 of his witness statement Mr Denman says that "at no stage have [the Environment Agency] advised [the district council that] a sequential test is necessary in this case or raised any objection to the development on the basis of the absence of a sequential test". In paragraph 19 he says:

> "The report … indicates that a sequential assessment is unnecessary as the site is already developed. I did not deal extensively with the question of whether a sequential test is required because this was not an issue raised by any of the objectors and [the Environment Agency] had not raised an objection on this basis. …".

and, in paragraph 20:

> "It did not seem to me that the NPPF specifically anticipated the situation before me, which was a case where there was an existing development on a site which was causing harm in flooding terms, and a proposed development which would reduce the flooding harm caused. It did not seem to me that having regard to the aims of the NPPF it was intended a Sequential Test should be required in this situation."

He says he was "supported in this view by the fact that in [his] judgment the development proposed was closely analogous to 'Minor Development'" (paragraph 21). He says that the "reference [in the PPG's definition of "minor development"] to minor non-residential extensions was particularly relevant"; that "the increase in enclosed footprint between the size of the Riviera restaurant and the size of the proposed crematorium was less than 250

square metres"; and that the fact that the restaurant "could be extended by 250 square metres in flood zone 3 without any requirement for a sequential assessment" (paragraph 23). He says he based his judgment that a sequential test was not required on what he "considered to be the aims of the NPPF", taking into account a number of factors: that the site was already developed; that the existing building – the restaurant – was entirely within Flood Zone 3 and would be replaced by the crematorium building on higher ground within Flood Zone 1; that the works within Flood Zone 3 would be minor changes in ground level, the replacement bridge over the River Thame, and compensation works to mitigate the impact of ground-raising within the flood plain; that both the restaurant and the crematorium were development in the "Less Vulnerable" category (paragraph 24a to d); that the Environment Agency were satisfied by the proposed compensation measures (paragraphs 24e and g); the definition of "minor development" in the PPG (paragraph 24f); and the fact that the Environment Agency "did not express the view that a sequential assessment should be carried out" (paragraphs 24g and 29). He says he did not accept the argument that a sequential assessment was unnecessary because the proposal was a "change of use", and emphasizes that the report "states that the proposal relates to an already developed site" (paragraph 25). Between the committee's decision to approve the proposal on 10 December 2014 and the grant of planning permission on 18 June 2015, "[none] of the objectors raised any concern about either the need for a sequential test or about the application of the presumption in favour of sustainable development" (paragraph 28). Finally, says Mr Denman, he "would assume that if [the Environment Agency] considered that a sequential test was required they would make that very clear to [the district council]" (paragraph 29).

35. As the authorities show, the court should always be cautious in admitting evidence which, in response to a challenge to a grant of planning permission, elaborates on the advice given by a planning officer in his report to committee – the more so when it expands at length on the advice in the report, or even differs from it. This is not simply because an attempt to reinforce the advice given in the report may only strengthen the argument that the advice fell short of what was required, or was such as to mislead the committee. It is also for the more basic and no less obvious reason that the committee considered the proposal in the light of the advice the officer gave, not the advice he might now wish to have given having seen the claim for judicial review. Of course, evidence in a planning officer's witness statement cannot correct an error of law in the assessment of the proposal on which the committee relied when it made its decision. In some cases, however, it can shed useful light on the advice he gave to the members in his report.

36. I do not think the judge was necessarily wrong to admit the evidence in Mr Denman's witness statement, though his decision to do so was perhaps generous to the district council. It is true that the evidence does not seem to contradict the advice given in paragraphs 9.40 and 9.41 of the report to committee. However, it does add a good deal to that advice. It thus demonstrates how much might have been said to the members about the sequential test when they had the proposal before them, but was not in fact said. It introduces a number of considerations that do not feature in the report, including the concept of the development being beneficial in that it would "reduce the flooding harm caused" – the concept of "betterment". But so far as I can see, it does not purport to justify a departure in this case from NPPF policy for the sequential test. If it had purported to do that, it would have been differing from, or contradicting, the advice given in the report. Like the advice in the report, however, it seems to be based on an interpretation of the policy as being inapplicable where the proposal is for development on a previously developed site. So in my view, even if this is admissible evidence in the claim for judicial review, it does not negate the conclusion that

the advice in paragraph 9.41 of the officer's report is flawed by a misdirection on NPPF policy for the sequential test. If anything, it confirms that conclusion.

37. I conclude therefore that the appeal is good on ground 3.

NPPF policy for the "presumption in favour of sustainable development"

38. The "Ministerial foreword" to the NPPF declares that "[the] purpose of planning is to help achieve sustainable development". In the part of the NPPF under the general heading "Achieving sustainable development", paragraph 6 says that "[the] policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system".

39. In a section headed "The presumption in favour of sustainable development", paragraph 11 reminds decision-makers that section 38(6) of the Planning and Compulsory Purchase Act 2004 requires applications for planning permission to be determined in accordance with the development plan unless material considerations indicate otherwise. Paragraph 14 states:

> "14. At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> …
>
> For decision-taking this means:
> - approving development proposals that accord with the development plan without delay; and
> - where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
>   - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>   - specific policies in this Framework indicate development should be restricted."

Footnote 9 applies to the clause "specific policies in this Framework indicate development should be restricted", both in the part of the policy relating to "plan-making" and in the part relating to "decision-taking". It states:

> "For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and <u>locations at risk of flooding</u> or coastal erosion." (my emphasis).

Footnote 10 applies to the phrase "For decision-taking this means". It states:

> "Unless material considerations indicate otherwise."

How did the district council deal with NPPF policy for the "presumption in favour of sustainable development"?

40. In his report to the committee for its meeting on 10 December 2014 the officer advised the committee that "the proposal would constitute a sustainable form of development for which there are significant benefits, in terms of reducing overall travel times and distance and the delivery of an acknowledged local requirement", that it "gives rise to economic and social benefits", that "overall the adverse impacts … do not significantly and demonstrably outweigh the benefits" (paragraph 1.1 of the report), and that "on balance having regard to the NPPF as a whole and all relevant policies of [the Aylesbury Vale District Local Plan] it is considered that the adverse impacts would not significantly and demonstrably outweigh the benefits that would be derived from this proposal" (paragraph 1.2).

41. I have already referred to the some of the advice the officer gave when tackling the question "Whether the proposal would constitute a sustainable form or development and consideration of any adverse impacts against the benefits" (see paragraph 14 above). At the end of his report, under the heading "Planning balance and conclusions", he said, in paragraphs 9.62 and 9.63:

> "9.62 In this context, paragraph 14 of the NPPF requires that where the development plan is absent, silent or relevant policies are out of date, planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies of the NPPF taken as a whole.
>
> 9.63 It is considered that the proposal would constitute a sustainable form of development for which there are significant benefits, in terms of reducing overall travel times and distance and the delivery of an acknowledged local requirement. The proposed development gives rise to economic and social benefits. In terms of adverse impact these are in relation to the impact on the character of the site, the adjacent land and the settlement character of Watermead. These are weighed in the planning balance and it is considered this is a balanced judgment, but overall the adverse impacts of the proposal do not significantly and demonstrably outweigh the benefits."

The advice in paragraph 9.63 was replicated, almost verbatim, in the officer's delegated report of 18 June 2015.

Did the district council deal lawfully with NPPF policy for the "presumption in favour of sustainable development"?

42. The judge was presented with two distinctly different interpretations of the policy in paragraph 14 of the NPPF. The district council and Crematoria Management contended that "where [, as here,] there is a restrictive policy contained in the NPPF in relation to the development in question, because it is a flood risk area, then the presumption does not initially apply because otherwise it would run counter to an effective presumption running against the development under that restrictive policy". But "if and when that policy is applied, or it does not need to be applied, then the outcome is still in favour of development, the restrictive policy having [done] its work, … [the] presumption in favour of development resurfaces and can be applied" (paragraph 45 of the judgment). The parish council, on the

other hand, contended that "where it is a development to which a restrictive policy applies[,] then … the presumption in favour of development goes and is lost forever" (paragraph 46). The judge favoured the interpretation urged on him by the district council and Crematoria Management (paragraphs 46 and 47). But here, in his view, the presumption gave rise to "no freestanding point of challenge" (paragraph 48). As he said (in paragraph 49):

> "49. If [the district council] acted lawfully with regard to the sequential test question, it did not act unlawfully by applying the presumption in the way that it did in the passages already referred to, particularly in the beginning and at the end of the [report]. If, on the other hand, [it] acted unlawfully in connection with the sequential test, then the presumption could not resurface, but all that does is to provide a further ground of unlawfulness."

43. Mr Kimblin submitted that the judge's understanding of the policy was wrong. The district council had misdirected itself by applying the presumption in favour of sustainable development to this proposal. Because the proposal was for development on a site at risk of flooding, and therefore subject to a restrictive policy in the NPPF, the effect of the second limb of the policy for "decision-taking" in paragraph 14, read with footnote 9, was to withhold the presumption. Mr Kimblin relied on the judgment of Coulson J. in *Forest of Dean District Council v Secretary of State for Communities and Local Government and Gladman Developments* [2016] EWHC 421 (Admin) – handed down, as it happens, on the same day as judgment was given in this case (4 March 2016). Coulson J. was dealing there with the policy in paragraph 134 of the NPPF, which says that "[where] a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal …". He concluded that this was one of the specific policies in the NPPF which indicate situations where the presumption in paragraph 14 of the NPPF "does not apply and where, instead, development should be restricted" (paragraph 25 of the judgment). In this case, submitted Mr Kimblin, the judge's interpretation of the policy in paragraph 14 was contrary to Coulson J.'s analysis, and a "counter-intuitive" reading of the words of the policy. The purpose of the provision for "specific policies" of the NPPF that "indicate development should be restricted" was simply to "carve out a limited number of exceptions to the presumption in favour of sustainable development" (paragraph 52 of Mr Kimblin's skeleton argument).

44. Ms Parry and Mr Elvin supported the judge's interpretation of the policy. It is not right, they submitted, to construe the policy as meaning that the "presumption in favour of sustainable development" does not apply merely, for example, because part of a site on which development is proposed is within Flood Zone 3. NPPF policy for development in "areas at risk of flooding" does not say that development should be restricted – in the sense of being regarded as unacceptable in principle or liable to be denied planning permission – merely because it is proposed within a particular flood zone. Nor does NPPF policy for the Green Belt indicate that development, even "inappropriate" development, is unacceptable simply because the site is in the Green Belt. Even in the case of development which may or may not have an effect on a European site, as defined in regulation 8 of the Conservation of Habitats and Species Regulations 2010, the restrictive policy in paragraph 119 of the NPPF does not, in any sense, restrict development which is found not to require "appropriate assessment". Whether a policy indicates that proposed development should be restricted will always involve a planning judgment, having regard to the facts and circumstances of the proposal in question and the terms of the relevant policy in the NPPF. In this case, said Ms Parry and Mr Elvin, there was no basis for denying the proposal the presumption in favour

of sustainable development. There was nothing unlawful in the officer's advice that the proposal was for "a sustainable form of development" with "significant benefits", and that those "significant benefits" were not "significantly and demonstrably" outweighed by any "adverse impacts". And the officer did not identify any specific policy in the NPPF indicating that in the particular circumstances of this case, the proposed development should be "restricted", however that word is understood.

45. Though the parties are distinctly at odds on the meaning of the policy in paragraph 14 of the NPPF, I do not think our decision on this appeal requires us to resolve what the correct construction actually is, and I would prefer to leave that question to an appeal in which it does have to be resolved. As a question of policy interpretation, it will be, in the end, a matter for the court (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 19). It is an obviously important question. Does the exception for "specific policies" in the NPPF which "indicate development should be restricted" simply require a relevant restrictive policy to be in play if the presumption is to be shut out? Or does it require the restrictive policy, once identified, actually to be applied before the decision-maker can ascertain whether the presumption is available to the proposal being considered? How is the presumption intended to work? This is an issue of some significance for the operation of the planning system in England. It has already been the subject of discussion at first instance (not only in this case and in *Forest of Dean District Council*, but also, for example, in *Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 571 (Admin), *Wychavon District Council v Secretary of State for Communities and Local Government* [2016] EWHC 592 (Admin), *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 2973 (Admin), *Trustees of the Barker Mill Estate v Test Valley Borough Council* [2016] EWHC 3028 (Admin) and *Thorpe-Smith v Secretary of State for Communities and Local Government* [2017] EWHC 356 (Admin)). Because it arises from planning policy produced and published by the Government, and because it bears on decision-making not only by local planning authorities but also by the Secretary of State and his inspectors, it is, I think, an issue on which this court would undoubtedly benefit from having submissions on behalf of the Secretary of State. This is not to suggest that the court might adopt an interpretation of planning policy urged upon it by the author of that policy if it is not the correct interpretation. It is simply to recognize the advantage the court would have in being told what the Secretary of State understands his own department's policy to mean, and how he intends it to operate, not least because he is the minister responsible for overseeing and managing the planning system in this country.

46. I should add that on 7 February 2017, since the hearing of this appeal, the Government issued its White Paper, "Fixing our broken housing market" (Cm 9352), in which it has taken the opportunity to propose amendments and clarifications to NPPF policy where it has seen the need to do so. It has stated its intention to amend the policy in paragraph 14 of the NPPF (in paragraphs A38 and A39 of the Annex). The proposed changes to the policy have no bearing on this appeal, and I see no need for us to seek the parties' submissions upon them.

47. Essentially for the reasons given by the judge in paragraph 49 of his judgment, I do not think that the lawfulness of the district council's decision on Crematoria Management's proposal turns on the true interpretation of the policy in paragraph 14 as it stands (see paragraph 42 above). In his assessment of the proposed development under the heading "… Whether the proposal would constitute a sustainable form of development and consideration of any adverse impacts against the benefits", ending in the conclusions in paragraphs 9.62

and 9.63 of his report, the officer identified no "specific policies in [the NPPF]" that in his view "[indicated] development should be restricted". Indeed, he did not specifically address the question of whether, in this case, there were any such policies, and whether, for that reason, the "presumption in favour of sustainable development" did not apply. Mr Kimblin's complaint goes to the advice in paragraphs 9.40 and 9.41 of the officer's report and its potential implications for the presumption – because NPPF policies for "locations at risk of flooding" are included in the examples given in footnote 9 to paragraph 14. If, contrary to my conclusion on ground 3, the officer proceeded on a correct understanding of NPPF policy for development in "areas at risk of flooding" when advising the committee that a sequential assessment was unnecessary because the proposal was for an already developed site, it would seem to follow that he made no error in not identifying that policy as a relevant restrictive policy under paragraph 14. But if he erred in his understanding of NPPF policy for the sequential test in the way I have concluded he did, it follows that he was not in a position to advise the committee whether or not this was a policy which, in a relevant sense in this case, indicated that "development should be restricted". The policy in paragraph 14 of the NPPF could not then be lawfully applied. This, therefore, is a second error of law, flowing from and compounding the first. And that must be so, in my view, regardless of whether the exercise required by the policy in paragraph 14 of the NPPF is simply a matter of identifying a relevant restrictive policy – as Mr Kimblin submitted – or involves that restrictive policy actually being applied to the proposal in hand – as Ms Parry and Mr Elvin contended. However the policy in paragraph 14 is construed, ground 2 of the appeal must then succeed. This is simply a consequence of the officer's error in advising the members, in effect, that the proposal was outside the scope of NPPF policy for the sequential test.

Discretion

48. Developing the argument foreshadowed in Crematoria Management's respondent's notice, Mr Elvin submitted that if we were to find the grant of planning permission unlawful, we should in the exercise of our discretion – in accordance with section 31(2A) of the Senior Courts Act 1981 – decline to quash the planning permission. If the district council had taken the decision lawfully, it is highly unlikely that it would have refused planning permission for any reason relating to NPPF policy for development in "areas at risk of flooding", or for any other reason. It is "highly likely" that its decision would then have been no different, and, if taken again, would now be no different. The Environment Agency was entirely satisfied with the proposal. The Secretary of State did not call in the application for his own determination. The development would achieve significant "betterment" by reducing the risk of flooding both on the site and on neighbouring land. There was nothing to suggest that if the sequential test were now applied, the proposal would fail it. The conclusions of Westerleigh's site search report had not been disputed. No suitable alternative site had emerged since. And the parish council had not suggested any site which it said was sequentially preferable under NPPF policy for development in "areas at risk of flooding". In the "Aylesbury Crematorium, Cane End Lane, Bierton, Aylesbury[:] Assessment of Need", published by the Chilterns Crematorium Joint Committee in May 2015, the need for a second crematorium at Bierton had been accepted, the planning permission originally granted for that site in October 2014 having been quashed by the court in March 2015 (*R. (on the application of Westerleigh Group Ltd.) v Aylesbury Vale District Council* [2015] EWHC 885 (Admin)). Another significant consideration here, Mr Elvin submitted, was that the parish council had failed to act in a timely way. Its challenge went to the officer's advice in his report to the committee for the meeting in December 2014. It need

not have waited until planning permission was eventually granted, in June 2015, before raising the complaints now pursued in these proceedings (see the judgment of Lord Carnwath in *R. (on the application of Champion) v North Norfolk District Council* [2015] 1 W.L.R. 3710, at paragraph 63, and the judgment of Cranston J. in *R. (on the application of Corrie) v Suffolk County Council* [2015] Env. L.R. 5, at paragraph 70). Crematoria Management had been caused considerable prejudice by this delay – as is explained by its then Development Director, Mr Adrian Britton, in his witness statement dated 1 September 2015 and its present Development Director, Mr Stephen Bucknell, in his dated 5 October 2016.

49. I cannot accept that argument, for three reasons.

50. First, one must acknowledge the significance of the district council's errors of law. The defects in the decision-making here were not insubstantial – such as a lack of full reasons for otherwise legally sound advice in an officer's report to committee. I have concluded that the district council's committee was misdirected on the meaning and effect of NPPF policy for the sequential test, an important element of national planning policies for development in "areas at risk of flooding" (see paragraphs 28 to 31 above). The importance of those policies is plain both in the section of the NPPF where they are set out and in paragraph 14, which establishes their connection to, and implications for, the "presumption in favour of sustainable development" (see paragraph 47 above). It is also plain in the passages of guidance in the PPG to which I have referred (see paragraph 5 above). Before deciding whether to comply with the sequential test policy or to depart from it, and, if departing from it, with what justification, a local planning authority must recognize the true ambit of the policy. Here the officer's advice to the committee, which the committee must be taken to have followed, did not do that. It is, of course, understandable that Mr Elvin should point to the benefits of the proposal in reducing flood risk both on the application site and on neighbouring land, to the fact that the Environment Agency was, in the end, fully satisfied with the mitigation measures put forward, to the district council's acceptance of the need for a second crematorium in addition to the one approved at Bierton, to the fact that no alternative location had emerged from the search for suitable sites, and to the decision of the Secretary of State not to call in the application. But such considerations cannot cure the unlawfulness inherent in a misdirection as to the meaning and effect of relevant national planning policy.

51. Secondly, I do not think we can say that the errors of law were inconsequential. Responsibility for implementing the sequential test policy in the NPPF lies squarely with the local planning authority, not with the Environment Agency, let alone with the court. It was – and is – for the district council, as local planning authority, to consider whether the policy, properly understood, should be applied in this case or not; and if not, why not. Considerations such as those on which Mr Elvin relied, especially "betterment" of the kind that this proposal seems likely to achieve, might in a particular case – and might here – provide a justification for dispensing with a sequential assessment, or for concluding that a proposal is acceptable despite its conflict with the policy. If the district council's committee reconsiders Crematoria Management's proposal and applies the sequential test to it in accordance with NPPF policy for development in "areas a risk of flooding", it may conclude in the light of an up to date sequential assessment – as distinct from the kind of site search undertaken thus far – that there is no sequentially preferable alternative site, and that the proposal therefore complies with the policy for the sequential test. If there has been no other material change of circumstances, it may also conclude, once again, that the proposal earns the "presumption in favour of sustainable development" under the policy in paragraph 14 of

the NPPF, or that even without the aid of that presumption it should be approved. But these are matters of fact and planning judgment for the district council as local planning authority, directing itself as it should on the relevant planning policies – not for the court in the exercise of its discretion as to the granting of relief. With this in mind, I do not think it can be said either that the same outcome would have been "highly likely" if the decision had been taken lawfully, or, as Mr Elvin submitted (in paragraph 39 of his skeleton argument), that it would be "highly unlikely" to be different if the planning permission is quashed and the district council is given the opportunity to consider the application again. Contrary to Mr Elvin's submission (ibid.), there is, in my view, a "realistic prospect" that the decision on re-determination would be different.

52. A similar conclusion was reached by Lloyd Jones J. in *Tonbridge and Malling Borough Council* – albeit in somewhat different circumstances (see paragraphs 76 to 82 of the judgment). When reaffirming its decision in the light of the claim for judicial review, the local planning authority had been advised that there were no suitable alternative sites in the same or a lower category of flood risk, though that conclusion had not been accepted by the Environment Agency. And in that case the authority had joined the interested party in urging the court to exercise its discretion not to quash the planning permission. The district council has not done that here.

53. Thirdly, I understand the contention that the financial and commercial interests of Crematoria Management will be prejudiced if the planning permission is now quashed, and that this should weigh heavily with the court in the exercise of its discretion to withhold a remedy. But in my view the prejudice here, even when added to the submission that in the particular circumstances of this case the district council could quite properly choose either not to comply with NPPF policy for the sequential test or to depart from it, does not outweigh the imperative of a lawfully taken decision (see the judgment of Maurice Kay L.J., with which Patten L.J. and Sir Stanley Burnton agreed, in *R. (on the application of Holder) v Gedling Borough Council* [2014] EWCA 599, at paragraphs 29 to 31). The parish council referred to the need for a sequential assessment in its initial objection in July 2014. This was not a new concern raised only after planning permission was granted in June 2015. Crematoria Management has continued with the construction of the development since permission to appeal was granted. In doing so, it will no doubt have weighed the commercial risk. In any event the court can assume, and would certainly expect, that in these circumstances the district council will not delay in re-determining the application for planning permission in the light of our decision.

54. I conclude therefore that we should not exercise our discretion against granting relief.

Conclusion

55. For the reasons I have given, I would allow this appeal.

Lord Justice Patten

56. I agree.