In his Post-Case Management Conference Note, the Inspector identifies that for relevant appeal decisions and judgments *"each must be prefaced with a note explaining the relevance of the Decision to the issues arising in the current Inquiry case, together with the propositions relied on, with the relevant paragraphs flagged up".*

Explanation Note:

CD13.20 - Judgment, Timmins and A W Lymm Limited v Gedling BC [2014] EWHC 654 (Admin)

Neutral Citation Number: [2014] EWHC 654 (Admin)

Case No: CO/9587/2013 & CO/9276/2013

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham

Date: 11/03/2014

Before :

MR JUSTICE GREEN

- -

Between :

1) Mrs Jean Timmins
2) A W Lymn (The Family Funeral Service) Limited

Claimants

Mr Justice Green:

1. Issues

1. Three issues arise upon this application for judicial review.

2.)LUVW ZKHWKHU SXUVXDQW WR WKH *UHHQ %HOW March 2012 National Planning Policy FUDPHZRUN ³1336´ all developments are

Westerleigh proposal entailed a total internal floor space of 536 square metres and the Lymn proposal entailed a total floor space of 555 square metres. These applications were the culmination of a series of earlier, unsuccessful, applications by other applicants for the development of a crematorium within GBC. The Westerleigh and Lymn applications came before the GBC Planning Committee on 8th May 2013.

9. In preparation for this meeting the planning officers of GBC had prepared three detailed documents all dated 8th May 2013. The first was an Introductory Report (hereafter "the Introductory Report") and addressed issues common to the Westerleigh and Lymn applications and conducted a comparative assessment of the two competing applications. The second and third Reports concerned the details of the Westerleigh and Lymn applications respectively (hereafter the "Westerleigh Report" and the "Lymn Report"). The Introductory Report is a 42 page report which covered both planning applications and addressed matters of commonality between the applications. Paragraph 3 to this report identified the two central issues. It stated:

> "3. The reason for reporting in this fashion is that Planning Committee needs to consider a number of common issues and reach a view on these before it is able to make either determination. The two most important decisions it must take are to determine:-
>
> i) Whether there is a need for crematoria services in the Borough and if so at what scale.
>
> ii) If this is a situation when, in determining the applications, alternatives to the proposals are a material consideration."

In section 7 of this report the planning officer advised the Committee of the options open to it. These were: (1) refuse planning permission for both crematoriums; (2) grant planning permission for both applications; (3) grant planning permission for one application and refuse the other (see paragraphs [119-127] of the Introductory Report). The report provided information to the Committee on the current proposals and the three previous proposals summarising in turn why each had been refused. It

10. The officers also concluded that there were no reasonable alternatives which had been identified which were capable of performing better in terms of planning policy and meeting the identified needs of the community than the two sites the subject of the Westerleigh and Lymn applications – see Report paragraph [118].

11. As observed above the Committee also had before it reports from the planning officers on the merits of the individual Westerleigh and Lymn applications. When the time came for the Committee to vote the position was hence that the officers were advising that in principle one or other of the applications should prevail. One application proposed a crematorium and cemetery; the other only a crematorium. VKRUW WKH RIILFHU¶V FRQFOXVLRQ in direct SWHG competition with each other of the gr9( )-25>4<004F0048004C1 gr9(oao8F8tl-0 1 509.38 NdT

> ” limited infilling in villages, and limited affordable housing for local community needs under policies set out in the Local Plan; or
>
> ” limited infilling or the partial or complete redevelopment of previously developed sites (Brownfield land), whether redundant or in continuing use (excluding temporary buildings), which would not have a greater impact on the openness of the Green Belt and the purpose of including land within it than the existing development.
>
> 90. Certain other forms of development are also not inappropriate in Green Belt provided they preserve the openness of the Green Belt and do not conflict with the purposes of including land in Green Belt. These are:
>
> ” mineral extraction;
>
> ” engineering operations;
>
> ” local transport infrastructure which can demonstrate a requirement for a Green Belt location;
>
> ” the reuse of buildings provided that the buildings are of permanent and substantial construction; and
>
> ” development brought forward under a Community Right to Build Order´.

21. The Defendant submits that the directions given by the Planning Officer to the Planning Committee in paragraphs 469, 470 of the Westerleigh Report (see paragraph [18] above)

26.

33. I draw support for the above conclusion from various authorities.

34. In particular in the recent judgment of HHJ Pelling QC in Fordent Holdings Limited v Secretary of State for Communities and Local Government [2013] EWHC 2844 (Admin) is on point and consistent with my conclusion. There the court was concerned with an application under section 288 Town and Country Planning Act ³7&3$´ IRU DQ RUGHU TXDVKLQJ a decision of a planning inspector appointed by the Secretary of State by which the inspector dismissed an appeal against a refusal of the Council to grant outlying planning permission for a change of use for a 9 hectare site located within the Green Belt from agricultural use to a caravan and camping site to accommodate up to 120 touring caravans and up to 60 tent pitches on a mixture of grass and hard standing together with the construction of a shop, reception and office building.

35. The inspector had concluded that the proposal would amount to an outdoor sports and recreational use which therefore, prima facie, fell potentially within the scope of paragraph 89 NPPF. The Secretary of State did not challenge this particular conclusion about the scope of paragraph 89 in the course of the proceedings: See

> development – the construction of new buildings – in the Green Belt is inappropriate unless one of the exceptions identified in WKH 3DUDJUDSK DSSOLHV 3DUDJUDSK GHILQHV ms of GHYHORSPHQW´ WKHUH UHIHUUHG WR DV DOVR D inappropriate. The effect of Paragraph 87, 89 and 90, when read together is that all development in the Green Belt is inappropriate unless it is either development (as that word is defined in s.55 of the TCPA) falling within one or more of the categories set out in Paragraph 90 or is the construction of a new building or building that comes or potentially comes within one of the exceptions referred to in Paragraph 89.

In paragraph 24 the Judge concluded that paragraphs 89 and 90 NPPF comprised FORVHG OLVWV RI FODVVHV RI GHYHORSPHQW WKDW by way of exception to the general rule and that there was no general exception for changes of use that maintained the openness of the Green Belt and did not conflict with the purposes of the policy of the Green Belt.

38. It may be of some relevance to the present case that the submissions which the Judge in Fordent accepted emanated from the Secretary of State for Communities and Local Government, who was the Defendant to the proceedings. This point was relied upon by the Claimants in the present case although the Defendant Council pointed out, no doubt correctly, that whatever the position of the Secretary of State in those proceedings, the law was for the courts to decide not for the Minister. See per Carnwath J in Wychavon DC v Secretary of State for Communities & Local Government [2008] EWCA Civ 692 para [31].

39. In short the conclusions I have arrived at are the same as those of the Judge in Fordent.

40. In Europa Oil and Gas Limited v Secretary of State for Communities and Local Government [2013] EWHC 2643 (Admin) the Claimant challenged the decision of the Inspector under section 82 TCPA 1990 refusing the &ODLPDQW¶V appeal against a refusal to grant permission by Surrey County Council to construct a site for the drilling of an exploratory bore hole for the purpose of testing for hydrocarbons and for the erection of associated security fencing and works. In the course of his judgment Ouseley J set out paragraphs 89 and 90 NPPF in terms making it clear that, in his YLHZ ERWK SDUDJUDSKV VHW RXW EDVLF SURSRVLW The manner in which the Judge described paragraphs 89 and 90 made it clear that it was, to him, uncontroversial that each paragraph started with a basic proposition then VHW RXW H[FHSWLRQV WKHUHWR , PDNH WKLV REVH arguments that, properly construed, the categories of activity which are capable of EHLQJ ³DSSURSULDWH´ in paragraphs 89 and 90 were to be treated as generic and not simply exceptions to a basic rule contained within the relevant paragraph. So for example it was submitted in the present case that properly interpreted paragraph 89 meant that both cemeteries and the provision of facilities therefore were to be deemed ³DSSURSULDWH´ DQG WKLV FRQFOXVLRQ DURVH TXL FRQVWUXFWLRQ RI the introductory part of paragraph 89. I do not accept this submission. I share the view of HHJ Pelling QC, and Ouseley J that paragraph 89 is concerned with new building and not with other types of development.

(v) The Kemnal Manor point

41. There is one other matter relating to case law which I should address. In the Introductory Report at paragraph 30 the Planning Officer stated:

> ³ %RWK DSSOLFDWLRQV DUH IRU LQDSSURSULD
> Green Belt. It should be noted that even if an application contains elements that on their own would be appropriate development (such as a cemetery), the Courts have held that the whole of the development is still to be regarded as LQDSSURSULDWH´

42. In support of this proposition the Planning Officer specifically cited (in a footnote) the decision of the Court of Appeal in Kemnal Manor Memorial Gardens Limited v First Secretary of State [2005] EWCA Civ 835. It was submitted to me in argument that the direction hence given by the Planning Officer to the Planning Committee was that they were still required to consider the entirety of the development (crematorium and cemetery) as inappropriate and apply thereto the very special circumstances test. I am unable to accept this submission for three reasons.

43. First, the submission is simply inconsistent with the facts. There is no evidence to suggest that the Planning Officers or the Planning Committee applied the very special circumstances test to the cemetery part of the overall proposed development. On the contrary the documents show clearly that the test was applied exclusively to the crematorium part.

44. Secondly, the true meaning of paragraph 30 of the Introductory Report is evident from the judgment of the Court of Appeal in Kemnal. In that case the claimant had sought WR FKDOOHQJH DQ LQVSHFWRU¶V GHFLVLRQ UHIXVLQ a crematorium and cemetery in the Green Belt. The claimant contended that the inspector should have recognised that the cemetery, which constituted the largest part of the proposal, was appropriate development and that the only element of the proposal that was inappropriate was the crematorium. It was contended that because the major part of the development was appropriate that should be dispositive of the characterisation of the entire proposal, i.e. it should be treated as wholly appropriate. Keene LJ, not surprisingly, rejected this ingenious but counter-intuitive argument. He stated - in my view correctly - (ibid paragraph [34]):

> ³I would emphasise that a development is not to be seen as acceptable in green belt policy terms merely because part of it is appropriate. That would be the fallacy committed by the curate when tackling his bad egg´

45. 7KLUGO\ WKDW REVHUYDWLRQ PXVW LQ P\ YLHZ EH
´

appropriate) did not mean that the crematoria component of the proposal should likewise be treated as appropriate.

(vi) Conclusion

46. In conclusion for the above reasons the proposed change of use from agricultural land to a cemetery constituted a development which was *prima facie* inappropriate save insofar as it was justified by very exceptional circumstances. Further, it did not fall within any of the posited exceptions set out in paragraph 89 and 90. It necessarily follows from this conclusion that the Defendant¶V 3ODQQLQJ Officers erred in directing the Planning CRPPLWWHH WKDW D FHPHWHU\ ZDV DQ ³DSSUR I find as a fact (and it was not contended otherwise before me) that the Planning Committee accepted this advice and acted accordingly. See in relation to WKH UHODWLRQVKLS EHWZHH 5HSRUW DQG D &RPPLWWHH¶V GHFLVLRQ WKH REVHU *Siraj v Kirklees Metropolitan Council* [2010] EWCA Civ 1286 paragraphs [13]-[17] that where the members adopt a decision consistent with the Officer¶s Report and there is nothing to suggest the Committee disagreed with the Report it is reasonable to infer that the Committee accepted the advice.

47. I note that in his First Witness Statement on behalf of the Defendant Mr Nick Morley states, with commendable frankness, of the judgment in *Fordent*:

> ³+RZHYHU KDG *Fordent* been available at that time of writing the report, they would have gone on to consider whether the very special circumstances justified the approval of the cemetery as inappropriate GHYHORSPHQW´

Mr Morley is the Principal Planning Officer of the Defendant and was one of the team dealing with the application made by the Claimant and the Interested Party. I should also observe that the judgment in *Fordent* was delivered on 26th September 2013, some months after the Decision in this case so of course Mr Morley and his team did not have the benefit of sight of this judgment when they composed the Reports.

(vii) Materiality of the error of law

48. I must now

49. In the Westerleigh Report the Planning Officers recorded as one of the advantages which the Westerleigh proposal would bring:

> “The provision of a crematorium and a burial ground is better than just a crematorium alone. Having a cemetery for the burial and scattering of ashes on the same grounds as the crematorium means the bereaved can go back to somewhere peaceful to be close to their loved one, which would be appreciated.”

In paragraph 96 of the Introductory Report set out at paragraph [9] above in relation to the Planning Officers overall conclusion on “Need”, it is recorded that the decision

bring forward developments at that part of the planning permission which relates to the cemetery. Such an obligation will be completed in advance of the forthcoming hearing. In the

(ix) Relevance of witness statement evidence

55. I have not in the above analysis had regard to the Witness Statement evidence of Mr

Openness of Green Belt	Local impact on openness	Local impact on openness partly mitigated by demolition
Landscape (Landscape Character)	Slight Adverse	Moderate Adverse
Landscape (visual impact)	Slight adverse	Moderate adverse

64. It waV VXEPLWWHG WKDW WKH UHIHUHQFH WR D ³ORFD
the OIILFHU¶V DQDO\VLV LQ WKH UHVSHFWLYH FRPPLWW
ZLOO EH SHUFHLYHG LQ WKH ³ORFDO´ ODQGVFDSH % the concept of local impact on intrinsic openness is misconceived in principle. The impact on Green Belt openness occurs from physical development. It can never properly be characterised, RU PLQLPLVHG DV ³ORFDO´ , and it has the same intrusive effect on openness whether perceived locally or from afar 7KH FRQFHSW RI ³O LPSDFW´ reflects the erroneous mixing up of how the development will be perceived visually (so giving rise to perceived local effects), rather than a proper assessment of its effect on openness.

(c) ([DPSOH 3ODQQLQJ 2IILFHU¶V 2UDO $GGUHVV to Members of the Planning Committee (8 May 2013)

65. The third example relied upon by the Claimants relates to part of the Officers oral address to the Committee The notes for that oral address (reflecting the presentation by the Planning Officer) were disclosed by the Defendant. The Claimants submitted that no advice was given to the Committee as to the difference between openness and visual impact. On the contrary, the address included specific direction by the Planning Officer to the Committee members on the comparison exercise he considered should EH DSSOLHG ZKHQ FRQVLGHULQJ ³2SHQQHVV RI *UHH

³Comparison

Openness of GB;

W[esterleigh]; Regarding the impact on the openness of the GB, the scale of development and parking is considered to be proportionate. Proposal uses contours and layout, including the footprint of the bldg and its location within the site to minimise impact. Not unduly prominent on ridgeline. Therefore local impact on openness. It should be noted that the cemetery element of the proposal does not conflict with the GB.

L[ymn]; overall similar local impact on openness. Strength here is that there are already buildings on site, which already

VXEPLWWHG LW WKHUHIRUH FDQQRW KHQFH EH DUJ
was intended to be more compendious and somehow incorporated (separate) advice
RQ µ9LVXDO LPSDFW¶ ,Q UHVSHFW RI WKH Proposal HVWHUQ
uses contours and layout, including the footprint of the [building] and its location
within the site to minimise impact". 7KH DGYLFH LV the impact on DFFRUGLQJO\ V
openness is minimised or mitigated because of the way that the development will be
VHHQ YLVXDOO\ (TXDOO\ WKHUH LV D UHIHUHQFH unduly
prominent on ridgeline" ZKLFK WUHDWV DQ HIIHFW XSRQ RSHQ so by
YLVXDO SHUFHSWLRQ 7KHUH LV WKHQ D UHIHUHQF
already referred to, reflects the basic error in approach.

(iii) Analysis: The relationship between openness and visual impact

67. I start the analysis of this issue by considering two questions of principle. First, is the visual impact of a development a relevant factor to be taken into account in considering its openness? Secondly, what are the correct questions for a planning authority to ask itself in relation to the connection between a building and its visual impact?

68. 7KH SRLQW RI GHSDUWXUH LV WR GHILQH ³RSHQQHVV
the essence of the Green Belt is its openness. This is plain from the NPPF paragraph 79 which provides:

> "The Government attaches great importance to the Green Belt.

Hence openness and visual impact are different concepts; yet they can nonetheless relate to each other. The distinction is subtle but important.

74. Any construction harms openness quite irrespective of its impact in terms of its obtrusiveness or its aesthetic attractions or qualities. A beautiful building is still an affront to openness, simply because it exists. The same applies to a building this is camouflaged or rendered unobtrusive by felicitous landscaping.

75. In Heath & Hampstead (ibid) the Judge found that the Officers report, which had been adopted by the planning committee, was significantly flawed because he came to a conclusion about the materiality of the difference between the old 2 story building and the new 3 story building by reference to visual perception. This was wrong said the -XGJH EHFDXVH ZHUH LW WR EH FRUUHFW Heath by a LW ZRXOG thousand cuts. I have referred to this above (at paragraph [30]) but the quotation from the judgment is worth setting out in full:

> 37. The planning officer's approach can be paraphrased as follows:
>
> > The footprint of the replacement dwelling will be twice as large as that of the existing dwelling, but the public will not be able to VHH YHU\ PXFK RI WKH LQFUHDVH´
>
> It was the difficulty of establishing in many cases that a particular proposed development within the Green Belt would of itself cause "demonstrable harm" that led to the clear statement of policy in paragraph 3.2 of PPG 2 that inappropriate development is, by definition, harmful to the Green Belt. The approach adopted in the officer's report runs the risk that Green Belt or Metropolitan Open Land will suffer the death of a thousand cuts. While it may not be possible to demonstrate harm by reason of visual intrusion as a result of an individual - possibly very modest - proposal, the cumulative effect of a number of such proposals, each very modest in itself, could be very damaging to the essential quality of openness of the Green Belt and Metropolitan Open Land.
>
> 38. Turning to paragraph 6.8.5, the question was not whether the "loss" of Metropolitan Open Land as a result of this particular development was "significant". Again it would be extremely difficult in many cases to demonstrate that a "loss" of Metropolitan Open Land or Green Belt as a result of a particular proposal would be "significant". It is precisely this danger that the policy approach in paragraph 3.2 of PPG 6 is intended to avoid. The question was whether the replacement dwelling was materially larger, not whether it was no more visually intrusive from the Heath. The report simply failed to JUDSSOH ZLWK WKDW NH\ TXHVWLRQ´

76. The key question therefore in my view is whether visual impact can properly be taken into account in assessing very special circumstances. As to this I can see no reason

> "The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to polices must be taken in the context of the general thrust of the inspector's reasoning. A reference to a policy does not necessarily mean that it played a significant part in the reasoning: it may have been mentioned only because it was urged on the inspector by one of the representatives of the parties and he wanted to make it clear that he had not overlooked it. Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the relevant policy or proposed alteration to the policy." (Page 8).

81. 2 I I L F H U V¶ reports must therefore be read as a whole, in their entirety, and a judgment formed as to whether they actively risk misleading the planning committee or are otherwise unfair in an overall sense: See e.g. R v Selby District Council ex parte Oxton Farms [1997] EB 60 (CA) per Pill LJ and per Judge LJ; and, R v Mendip DC ex parte Fabre (2000) 80 P&CR 500.

82. It also needs to be borne in mind that the Officers' report is not the Decision of the Planning Committee itself. It is guidance to them which includes advice and recommendations. In the absence of detailed reasons from the Planning Committee itself a Court can prima facie assume that the guidance, advice and recommendations contained within that report were accepted: See paragraph [46] above. However, sometimes the notes of the Planning Committee will themselves be available and can be assessed: see e.g. Heath & Hampstead (ibid) paragraphs 39 et seq. In this connection the Courts have recognised that the members of Planning Committees are well versed in the issues that relate to their locality and come to the decision they are required to take with local knowledge and understanding. They can also, as a collective, be treated as having some experience in planning matters: See e.g. per Sullivan J in Fabre (ibid) at page 509. It is not therefore to be assumed that every infelicity of language or expression [illegible] description of the relevant test will necessarily have exerted any material impact upon the Committee even in respect of reports that are accepted by the Committee. To conclude otherwise would mean that even if the decision of the members was taken in an altogether impeccable manner with experienced members directing themselves perfectly, their decision would nonetheless be at risk of being quashed because the Officers report contained infelicities or ambiguities which the Committee had recognised and ignored.

83. ,Q WKH SUHVHQW FDVH WKH 3ODQQLQJ &RPPLWWHH reasons. It is consistent with WKH 2IILFHUV¶ 5HSRUWV $UJXPHQ XWKDA

would rarely be material, though he\alR SRLQWHG RXW WKDW WKH\ P
EDODQFHG´ FDVH 7KH MXGJH VWDWHG DV IROORZV L

> ³ ,W LV LPSRUWDQW WKDW WKH QHHG WR HVW
> very special circumstances, not merely special circumstances in Green Belt cases is not watered down. Even if it cannot be categorised as perverse, this decision is so perplexing on its face that it is of particular importance that the Inspector should be seen to have applied the correct test in Green Belt policy terms. I fully accept that there will be many cases where the underlying merits of the decision are relatively obvious, so that the court can safely ignore what might be regarded as infelicities in drafting. It may be obvious in the great majority of cases but it would make no difference whatsoever to the eventual conclusion on the merits whether the true test was whether one factor was outweighed by anotherET 0 1 144.02 55ET 0-k (e)003003

of course it should not be overlooked in this context that by far and away the dominant considerations for the Committee were the two questions of ³need´ and alternative sites. The issue of the impact of visual mitigation upon openness was, in my view, very much a tertiary consideration, at best.

87. Secondly, in the paragraphs complained of there are it is true - some suggestions that the Officer did treat visual impact as a part or component of the single concept of openness. However, read more roundly it seems to me that this criticised text is fairly to be described as nothing more than infelicitous drafting and that the pith and substance of the exercise being referred to by the Officer is the very special circumstances weighing exercises that I have referred to above. I have no doubt that the paragraphs criticised could be better phrased. But the distinction being drawn is a subtle ± albeit important - one and drafting lapses must not be seen in and of themselves as warranting the setting aside of the Decision unless the error is sufficiently serious as to warrant that result i.e. risks misleading the Committee or results in an overall unfairness. See authorities cited at paragraph [81] above. In context I do not consider that the errors of drafting come close to meeting this standard. I turn now to consider the actual drafting infelicities. They include the following expressions:

a) ³« the level of traffic activity which would be generated would not have any undue impact on the openness of this part of the Green Belt´ (Westerleigh Report paragraph 467);

b) ³given the nature of the proposed use, its extent and the fact that it would be screened by existing and proposed hedgerows , it would preserve the openness of the Green Belt´ (Westerleigh Report paragraph 470 in relation to the cemetery);

c)

in dealing with the application the authorities worked with the applicant in a positive and proactive manner. This obligation arises in two circumstances. First, where planning permission is granted subject to conditions (cf Article 31(1)(a)). Secondly, where planning permission is refused and where the notice is required to state clearly and precisely the full reasons for refusal (cf Article 31(1)(b)). Article 31(1)(cc) states:

> '(cc) Where sub-paragraph (a) or (b) applies the notice shall include a statement explaining how, in dealing with the application, the local planning authority have worked with the applicant in a positive and proactive manner based on seeking solutions to problems arising in relation to dealing with the SODQQLQJ DSSOLFDWLRQ«

This sub-paragraph was added by the Town and Country Planning (Development Management Procedure) (England) (Amendment No. 2) Order 2012/2274, 1st

(iii) The statement made by GBC in the decision letter

95. In the present case, in purported compliance with this requirement, the Notice of Planning Permission XQGHU WKH KHDGLQJ ³1RWHV WR $SSOLF statement:

> ³3ODQQLQJ 6WDWHPHQW The Borough Council has worked positively and proactively with the applicant in accordance with paragraphs 186 to 187 of the National Planning Policy)UDPHZRUN´

(iv) The challenge to the statement

96. The Claimant, Lymn, challenges the adequacy, and hence lawfulness, of this statement upon the basis that it simply purports to record, as a matter of elementary fact, that the Council did

disclosure statement intended to satisfy the public that the decision making process had been operated in good faith and without bias and avoiding conflicts of interest

100. The difference between the two can be demonstrated by reference to the facts and matters asserted by the Claimant. The Claimant suggests that there was a bias or discrimination in favour of Westerleigh in the decision making process. I emphasise that I have formed no view whatsoever about the merits of this allegation. Nonetheless, if Article 31 had as a purpose the demonstration of probity, propriety, good faith and absence of conflicts then the statement might need to address a range of issues of a materially different nature to a statement designed to show simply that the authority was proactive, encouraging and generally open for business.

(vi) Conclusion on breach

101. I turn now to consider whether, applying these principles, the statement in the notice was adequate. In this regard there are a number of points to make. First, it is apparent that the form adopted by the Planning Officer was intended to reflect the advice given

Claimant cannot point to any substantial prejudice caused by the incomplete statement and that any remedy ordered by this Court should be limited to making good the deficiency in the statement. As to this the Defendant submits that Mr Morley has now provided material to further explain the steps taken so that, albeit with the benefit of hindsiJKW QR ODFXQD H[LVWV LQ WKH 'HIHQGDQW¶V U WKH +LJK &RXUW LV QRW D SURSHU IRUXP IRU WKH D challenge the refusal upon an appeal before an inspector appointed by the Secretary of State.

105. For their part, the Claimant, Lymn, submits that the provision of an explanation by Mr 0RUOH\ FRQVWLWXWHV ex post facto rationalisation which should not be permitted: see Lanner Parish Council v The Cornwall Council, and Coastline Housing Limited [2013] EWCA Civ 1290 at paragraphs [59] et seq; R v Westminster City Council ex parte Ermakov [1996] 2 All ER 302 at [315h] per Hutchison LJ. Further the Claimants submit that the statement in the Notice is from the planning officer not from the Council and that, accordingly, the explanation given by Mr Morley as to the steps that were taken cannot constitute a statement by the Council which would, of my320( )-994 necessity, have had to have been adopted in accordance with the planning procedure at the time of the decision. Further, it is stated that, in any event, the explanations given by Mr Morley indicate that the proactive and positive steps that affected his approach to the Westerleigh application included the provision of a new cemetery as part of that application. It is stated by Lymn that had it known that the provision of a cemetery was not only viewed as an appropriate development but also something that the planning officers treated as having merit then Lymn would have been able to pursue this option itself either on the propos 36 B ite or on ao(ther)5( )-49s(it)e as to t for a cemetery any perceivld nee Fally

grat decra(or)181(y)20( )-796(r)-6(e)4plie] nbly

cemetery constituts sunc
of(is)629(c)4(a)4the 36(a)e] TJ ET BT 1 0 0 12704.89 53..61 Tm [(l2)3( )539(h)-9(a)4(ve)4( )5-9(de)4(c)4(d)-

is not a ca re it is apprp 36(ria)5the to decereer to aa decision ce46( )4-9whhich

seems to me that in the absence of a clear nexus between the breach and the Decision it would be wrong (disproportionate) to assume that every breach of the article necessarily justifies a quashing remedy.

ii) No clear obligation on planning authorities to engage in positive / pro-active engagement: No express obligation is imposed upon planning authorities to engage in proactive engagement with applicants. Nothing of that sort is found in the relevant legislation. There is for example no statutory obligation upon planning authorities to “approach decision making in a positive way” to use the language of paragraph [illegible] NPPF or to “work proactively with applicants to secure developments that improve the economic, social and environmental conditions of the area”.

6. The admissibility of after the event evidence by the Planning Authority

(i) The different uses of after the event evidence

109. There is one final matter that loomed large in submissions that I should deal with. Lymn objected strenuously to the service and admissibility of witness statement evidence by Mr Morley on behalf of the Defendant. They submitted that his evidence was an attempt to re-write history and plug errors in the various planning reports submitted to the Planning Committee. There is no black and white rule which indicates whether a court should accept or reject all or part of a witness statement in judicial review proceedings. A witness statement might serve a number of purposes. First, it might make admissions in pursual of the duty of a public authority to act with candour and openness. Secondly, it might

> 52. However, if that is wrong, the question whether the statement elucidates or contradicts the reasoning in the decision letter, and so is admissible or inadmissible on Ermakov principles, can only be resolved once the decision letter has been construed without it. To the extent that a Court concludes that the reasoning is legally deficient in itself, or shows an error of law for example in failing to deal with a material consideration, it is difficult to see how the statement purporting to resolve the issue could ever be merely elucidatory. A witness statement would also create all the dangers of rationalisation after the event, fitting answers to omissions into the already set framework of the decision letter, risking demands for the Inspector to be cross-examined on his statement, and creating suspicions about what had actually been the reasons, all with the effect of reducing public and professional confidence in the high quality and integrity of the Inspectorate.
>
> 53. Inspectors could be required routinely to produce witness statements when a reasons challenge was brought or when it was alleged that a material consideration had been overlooked, since the challenging advocate would be able to say that, in its absence, there was nothing to support the argument put forward by counsel for the Secretary of State, when there so easily could have been, and he must therefore be flying kites of his own devising. This is not the same as an Inspector giving evidence of fact about what happened before him, which can carry some of the same risks, but if that is occasionally necessary, it is for very different reasons.

114. ,Q WKH SUHVHQW FDVH , KDYH QRW KDG UHJDUG W Ground 1 save insofar as Mr Morley has made an admission as to the fact that he did not have the Fordent judgment available to guide him as of the date of the Reports or his oral advice to the Committee (see paragraph [47] above). This admission did not however influence my analysis of Ground 1 which is essentially a question of law. Equally, I have decided Ground 2 on the basis of the contemporaneous documents not the Witness Statement evidence. On Ground 3 I have taken account of 0U 0RUOH\¶V evidence (See paragraph 107(vii) above) but it was not in any way decisive to my reasoning.

7. Overall conclusion

115. In conclusion:

i) The applications succeed on Ground 1. The Decision is quashed and remitted to be taken again.

ii) The applications fail on Ground 2.

iii) The Lymn