

from the neighbouring local planning authority, the East Riding of Yorkshire Council (DL, para.9).

19. On 14 October 2011 the Council issued a negative screening opinion under the EIA Regulations in respect of the WSCP Application as it stood at that time. The Council expressly articulated this opinion as being given on "its understanding of the site environment and development proposal at the time of writing" (emphasis added) and it identified that the opinion was given "strictly on the basis of the information provided in the submitted application."
20. The Council's Planning Committee considered both applications on 29 March 2012. The Planning Committee resolved to refuse planning permission for the LM scheme and to grant permission for the WSCP scheme subject to completion of a s.106 agreement and referral to the Secretary of State.
21. The Council issued a decision notice dated 12 April 2012 refusing the LM Site Application. There were four reasons for refusal as follows:

1. "The proposal is not in accordance with an up to date development plan and the applicant has not demonstrated compliance with the requirements of the sequential approach set out in the National Planning Policy Framework.

Whilst the application site is edge of centre as defined in national planning policy, and would function as an immediate and logical extension to the town centre, it is considered that the site is not currently available for the proposed development or suitable for the type/mix of retail development proposed by this application. Furthermore, the applicants have failed to demonstrate to the satisfaction of the Council that the proposed development would be viable, and therefore that the scheme would be deliverable.

It is considered that an alternative site, located to the east of Wentworth Street and currently in use as a car park, is sequentially preferable to the application site on the basis that it is available, suitable and viable.

The application is therefore judged to have failed to demonstrate compliance with the sequential approach required by national planning policy.

2. The proposed development would result in the site's existing use as a livestock market ceasing. The livestock market is an important element of the local economy and the desirability of its retention in the local area is considered to be of such importance that a redevelopment proposal for the existing livestock market site should not be allowed until proper provisions are in place for the existing livestock market use of the site to be relocated. The application as submitted refutes this view and the applicants have not demonstrated that they would be willing to enter into a planning obligation that secured its relocation.
3. The application as submitted does not adequately demonstrate that the proposed development could proceed in a form which would be appropriate in design and layout terms; that key elements of the scheme will function well in the context of the surrounding built form and established urban grain in the area, will have due regard to the designated and undesignated heritage assets of the area; and will prevent any significant impact on the amenities of occupiers of properties on the eastern side of Victoria Road.

The proposed development is therefore judged to have failed to satisfactorily demonstrate that it would be in accordance with the provisions of the National Planning Policy Framework, which promotes high quality inclusive design and states that development should respond to their local context and be integrated into the existing urban form and built environment; and

which specifically seeks to preserve and enhance both designated and undesignated heritage assets that are the valued components of the historic environment.

4. The National Planning Policy Framework states that where a proposed development is likely to have a significant adverse impact on town centre vitality and viability planning permission should be refused. Furthermore, Policy E2 of the Yorkshire and Humber Plan - Regional Spatial Strategy to 2026 seeks to ensure that proposals for new development strengthen the role and performance of existing town centres, and Policy YH5 specifically seeks to enhance the vitality and viability of town centres.

There is a resolution to approve an application for a foodstore with a gross floorspace of 4,494m² (net floorspace of 3,086m²) as part of a scheme at Wentworth Street, Malton. Taking the impacts of the proposed development into account it is considered that in combination with this commitment the proposed development is likely to have a significant adverse impact on town centre vitality and viability, contrary to the provisions of the National Planning Policy Framework and Regional Spatial Strategy."

22. The inquiry into the Claimant's appeal under s.78 TCPA against the decision notice sat for five days on 11-14 and 19 September 2012. In the meantime, no decision notice was issued in respect of the WSCP Application. The inquiry heard detailed expert evidence on the four reasons for refusal, including retail evidence from the Claimant and from the Council's expert retail witness, Mr Mark Johnston, from Roger Tym & Partners. Roger Tym and Partners had provided retail advice to the Council both in respect of these planning applications, but also in respect of the Council's retail requirements in terms of plan development.
23. As the Inspector recorded in the DL, during the course of the inquiry the Council's witness conceded among other things that there had been "significant flaws" (DL para.23) in the way RDC had approached the LM Site Application in terms of the sequential approach. In light of those concessions, as well as the Claimant's evidence, it was clear that the related reasons for refusal could not be sustained and, in addition, the Council conceded that the WSCP resolution would have to be revisited by the Council in due course.
24. In a separate Costs Decision dated 29 October 2012, the Inspector ordered the Council to pay the Council's costs of the appeal incurred in relation to reasons for refusal 1 and 4.

Inspector's Decision Letter

25. The Inspector set out the main issues as follows:
 - i) whether the proposed development would accord with the sequential approach to town centre uses, and its effect on the vitality and viability of Malton town centre;
 - ii) whether development of the site should be dependent on the relocation of the existing livestock market;
 - iii) the effect of the proposed development on the character and appearance of the surrounding area, having regard to built form, urban grain, and designated and undesignated heritage assets, including nearby listed buildings and conservation area; and
 - iv) the effect of the proposed development on the living conditions of occupiers of properties on the eastern side of Victoria Road."

26. The Inspector's first issue related to RDC's reasons for refusal 1 and 4, above. Firstly, the Inspector noted at DL para.12 that "the Council's position changed somewhat on certain of these points, and on other matters included in the reasons for refusal, as the inquiry progressed", and referred to the Statement of Common Ground ("SoCG") submitted on the final day of the inquiry.
27. The Inspector then referred to retail assessments carried out on behalf of Council by Roger Tym and Partners ("RTP") in the period 2006-2011, the most recent of which, the Ryedale Retail Capacity and Impact Assessment Update ("RRCIAU") dated July 2011, was prepared to inform RDC's Local Plan Strategy (DL paras 13-19).
28. At para.21 of the DL, the Inspector turned to the sequential test (the subject of RDC's reasons for refusal 1) and summarised para.24 of the NPPF. He noted at para.22 that:
- "22. The RTP retail assessments referred to above have consistently taken the view that the LM site represents the most sequentially preferable opportunity in Malton. However, in the LM report to Committee, Officers adopted what the Council referred to at the inquiry as a "novel" application of the sequential test. As a result, the Planning Committee was advised that the WSCP site was preferable to the appeal site in PPS4 terms. A reading of the Committee Report reveals that this advice was based on the Officers' view that the appeal site was not suitable for the development proposed; could not be considered as currently available for the proposed development; and that the development proposed had not been demonstrated to be viable."
29. However, as the Inspector noted at para.23, "at the inquiry the Council's planning witness acknowledged that there had been significant flaws in the way this matter had been approached." Officers' application of the sequential test was, as the Inspector pointed out, incorrect, firstly because "there is nothing within the Framework, nor was there anything within PPS4, which requires a developer to apply tests of availability, suitability and viability". The Inspector recorded that there was "no dispute between the parties that the LM Site could accommodate the appeal proposal" (para.23), and then went on to compare the LM and WSCP sites, at para.24:
- "24. Moreover, an assessment of the site provided to the Council by RTP in the RRCIAU comments that a retail-led scheme would be viable at the site and could form a natural extension of the existing town centre. It considers that the site would be an ideal location for a development providing a small number of unit shops to attract the type of "high street" comparison retail outlets presently missing from Malton's offer. It further suggests that such units could potentially form part of a mixed-use development, described as possibly including a basket foodstore and/or residential/office uses, although a supermarket-only scheme is not advocated. The study also comments that the WSCP site is located about 160m to the north-east of the Town Centre Commercial Limits and is more suited to convenience rather than comparison retail development."
30. The Inspector set out a clear finding at para.26, which was then again repeated by way of contrast with the WSCP site at para. 32 with further reasoning:
- "26. Taking the above points into account it is my view that the LM site is the sequentially preferable site to accommodate the development proposed and that its development for such uses would be in line with guidance in the Framework. Moreover, no firm evidence has been placed before me to suggest conflict with any adopted development plan policy in this regard."
31. The Inspector noted that "the foregoing is all that is necessary in respect of a sequential assessment by a prospective developer" and that the other matters raised by the Council "are not appropriate matters for consideration in relation to

development management" (DL para.27). If the WSCP site had been assessed for its suitability for the development proposed, the Council's own planning witness accepted that "the WSCP site ought to have been considered unsuitable for comparison retail units in view of its separation from the town centre" (para.28).

32. The Inspector noted that the LM scheme would fully meet Malton's convenience needs up to 2021 and beyond (para.29).
33. The Inspector then recorded, at para.31, the Council's contrary case that "the design and location of the proposed [LMS] development are likely to be much less attractive to an operator than the WSCP scheme which the Council has resolved to approved." To this, the Inspector responded that, taking "the submitted evidence as a whole" (emphasis added), the WSCP site was sequentially less preferable than the LM site:

"32. However, whilst it is common ground that the grant of planning permission for a larger store on the WSCP site would make it more difficult for an operator to be found for the appeal proposal, this underscores the need and purpose of the sequential approach in seeking to promote and strengthen town centres. Despite the Officers' conclusion in the LM Committee Report, the submitted evidence as a whole, leads me to conclude that the WSCP site is a sequentially less preferable edge-of-centre site than the appeal site. Moreover, having visited both sites as part of my inspection I consider that a development on the WSCP site would have poorer pedestrian links to the town centre than the LM site, notwithstanding the fact that enhancement works to the connecting route are proposed."

34. It should be noted in respect of this paragraph that it is well-established that Inspectors' decisions of this kind are to be read as a whole and are written to an informed reader aware of the evidence presented to the inquiry and aware of the issues in dispute: see eg *South Buckinghamshire v Porter* (No.2) [2004] 1 WLR 1593, Lord Brown at [36]:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. **Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced.** A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision." [Emphasis added]

35. Moreover, it should also be noted that there was no subsequent challenge to the Inspector's decision by the Council in this regard, whether substantively or on the grounds of a failure to give proper, adequate or intelligible reasons. Had the Inspector's decision on this issue not been properly or adequately reasoned or otherwise been unintelligible, the Council would have been able to challenge the decision under s.288 of the 1990 Act.

36. The Inspector then went on, at paras 33-44, to consider the second aspect of his first issue, relating to the Council's reason for refusal 4. At para.34, the Inspector noted the Council's acknowledgement that, in light of the significant flaws in the way Officers had addressed the sequential test, members' resolution to grant planning permission for the WSCP scheme would have to be reassessed.
37. As the Inspector stated in para.36, the "S[tatement] o[f] C[ommon] G[round] indicates that the Council does not accept that the LM site forms a logical extension to the town centre, but this does not sit comfortably with its first reason for refusal, which quite clearly states a contrary view." The Inspector also observed that the Council's Local Plan Submission document noted "that the LM site has the ability, over time to form a logical extension to the town centre." The Inspector concluded that, having regard among other things to the retail advice consistently received by RDC from RTP as well as the good linkages that there would be between the LM Site development and the town centre, that the LM proposal would "strengthen and enhance the town centre, rather than adversely impact upon it" (para.37).
38. Finally, the Inspector returned to the issue of the way in which the LM scheme would operate when addressing the potential effects if the WSCP scheme was granted planning permission (paras 41-44). He reached a clear conclusion that the LM scheme would function "as a logical extension to the town centre" and would lead to an overall positive impact on the town centre of 24% compared to the situation if only the WSCP proceeded:
41. Finally on this issue, I briefly consider the scenario whereby the WSCP scheme is granted planning permission. The first point of note is that there is agreement within the SoCG that the cumulative scale of both the appeal proposal and the WSCP scheme would significantly exceed the retail capacity identified for Malton within the RTP 2008 Retail Study. In addition, the submitted evidence indicates that the WSCP scheme would draw trade from the town centre Morrisons store, which is currently over-trading. However, I accept that in resolving to grant planning permission for the WSCP proposal the Council considered that the overall impact on the town centre, including linked-trips, would be acceptable.
42. Nevertheless, trade would be drawn from the existing centre, and this impact would be increased if the appeal site was also granted planning permission. In such circumstances a judgement has to be made as to the overall extent of any impact, having regard to the specific details of the cases and the locations of the respective sites. In this regard it is of note that in asserting that the appeal proposal would result in harm to the vitality and viability of the town centre, the Council has not undertaken any specific assessment of this matter.
43. In contrast, the appellant has argued that although a greater impact on the existing town centre would arise if both the WSCP and the appeal proposal were to proceed, custom drawn to the LM scheme should be seen as contributing to town centre turnover, in view of the general acceptance that it would function as a logical extension to the town centre. Indeed the appellant argues that on this basis the appeal proposal would lead to an overall positive impact of 24%, compared to the situation if only the WSCP scheme proceeds.
44. I fully accept that such arguments have to be treated with some caution, in light of the view expressed by the Inspector and endorsed by the Secretary of State, in a call-in case in Stoke on Trent¹², that including edge-of-centre stores in assessments of "functional" centres could generate misleading conclusions. However, I am not persuaded that the particular circumstances

¹² Ref: APP/M3455/V/10/2122016

of that case, which related to a much larger centre and a different disposition and juxtaposition of foodstores, are directly comparable to the current situation which involves a relatively modest development immediately adjacent to an existing market town centre. On balance, and particularly having regard to the Council's aspirations for additional retail areas in the "northern arc", set out within the emerging LPS, I consider that the appellant's assessment of this matter is to be favoured."

39. The Inspector therefore adopted the Claimant's assessment of the LM scheme as one which should be treated as a functioning part of the town centre for the purposes of assessing retail impact.
40. The remainder of the DL dealt with the Inspector's remaining three main issues and other matters, before concluding at para.82 that the appeal should be allowed.

Redetermination of the WSCP Application

41. As noted above, following the concessions made by the Council during the course of the inquiry, the Council accepted that its resolution to grant planning permission for the WSCP scheme would have to be reassessed.
42. On 19 November 2013, Nathaniel Lichfield & Partners ("NLP") on behalf of GMI submitted revised documentation for the WSCP Application.
43. In contrast to what the Council's solicitors have now stated in their response to the Claimant's letter before claim, the Claimant's resident agent was told on 18 April 2014 by Councillor Raper, who was the Chairman of the Council's Planning Committee when the WSCP Application was last considered by the Council in March 2012, that GMI had provided the Council with a list of possible consultants that it had identified to provide retail advice to the Council. In consequence, the Council instructed consultants England & Lyle from that list to prepare a report on the WSCP application (dated February 2014) and it appointed surveyors DTZ to advise it on the viability of both the LMS and WSCP scheme (dated 11 February 2014).
44. NLP submitted a further letter dated 13 February 2014 purporting to deal with the LM Site as a potential alternative site for the WSCP scheme. GVA on behalf of the Claimant submitted representations by letter dated 11 March 2014. DTZ submitted an advice by email dated 17 March 2014. The Claimant submitted a letter of representation dated 25 March 2014 with information from the supermarket operator Booths as to its interest in the LM Site, followed by a further letter from Booths to the Claimant dated 1 April 2014. GVA submitted further representations by letter dated 31 March 2014. In response to these documents, the Council obtained a further letter advice from England & Lyle dated 9 April 2014 and NLP submitted a letter dated 16 April 2014.
45. In its letter dated 9 April 2014 England & Lyle: (1) persisted in a view which it had expressed that the LM Site and WSCP were "sequentially equal", without dealing with the Inspector's contrary finding and reasoning; (2) continued to treat the LM scheme as one which should be assessed as "edge-of-centre", ignoring or not dealing with the Inspector's conclusion that the LM scheme was one which should be treated as a functional part of the town centre for retail impact purposes; and (3) assessed the impact of the WSCP scheme as giving rise to a trading impact of 16% on a foodstore in the LM scheme (which would clearly be a significant impact), yet specifically advised the Council that: "This is a matter of competition with a store located outside the town centre, not a town centre impact, not a material planning consideration."; (4) treated the issue of potential development on the LM Site as a matter which was governed by the attitude of Booths in respect of the convenience floorspace element, rather than the attitude of the Claimant in respect of the viability of developing the LM Site as a whole; but advised that "[i]n any event, the Livestock Market scheme is not a 'town centre' investment scheme in NPPF terms. It is an 'edge-of-centre'

development opportunity. The NPPF test in paragraph 26 is concerned with impact on investment "In a centre or centres in the catchment area of the proposal."

46. In its letter of 11 February 2014, DTZ contended that the LM Site would fail to attract a food store operator for the consented outline planning permission which the Inspector had granted on appeal and contended that the LM scheme would require redesign before being of interest to either Booths or Aldi in view of the shape and size of the site. By contrast, it considered that the WSCP "whilst close to Malton's commercial town centre boundary, lacks prominence, has poor access and is dislocated from the existing retail area in the town centre." It contended that the proposed store on WSCP would compete with the existing Morrisons store in terms of size, car parking provision and petrol filling station. It suggested that it was inferior in terms of prominence and quality of access for customers and service vehicles but in a strong market these shortcomings could be overcome by the size of store, enabling a broader retail offer to be provided compared to the main existing competition, together with plentiful customer parking and a petrol filling station.
47. The Council failed to carry out any updated screening of the WSCP Application, or obtain a screening direction from the Secretary of State, pursuant to the EIA Regulations notwithstanding that by the time of redetermination: (1) the Council itself recognised that there had been a material change in circumstances since the last time that the Council had considered the WSCP application¹³; and (2) the LM scheme had been granted planning permission since the time of the last screening opinion and the previous screening opinion had necessarily not taking into account the potential cumulative effects of that scheme with the WSCP; (3) the Council had subsequently adopted its Core Strategy. Among other things, Policy SP7 of the Core Strategy provided that: "Current commitments account for the quantitative food convenience retail to 2026. Should any commitments fail to come forward, any additional convenience floorspace will be directed to Malton"¹⁴; (4) FME had (notwithstanding DTZ's view) been able to secure interest in the LM Site from Booths, but FME had confirmed that it would not proceed with its investment if the WSCP scheme were to be granted planning permission.
48. Notwithstanding the clear contrary findings of the Inspector, the Council officers also followed the assertions made by England and Lyle that the WSCP site was not sequentially less preferable than the LM Site. This contention was advanced in the officers' report on the proposal for a Committee meeting on 24 April 2014. This report, which should be read as a whole, set out their recommendation that planning permission should be granted for the WSCP proposal. In broad terms, section 1 described the WSCP application. Section 2 sought to set out the relevant policy framework. Section 3 described consultation responses. This included the views expressed by England & Lyle such as the claim (contradicting the Inspector's finding): "The LM Site is not sequentially preferable to the WSCP site; the sites have equal sequential status." It also contained England & Lyle's retail impact appraisal which was based on treating the LM Site as "sequentially equal" and which failed to treat the LM scheme as one which would function as part of the town centre (again contradicting the Inspector's finding). Section 4 referred to publicity and representations received on the proposal. Section 5 referred to GMI's assessment. Section 6 then set out the Officers' purported appraisal. Under the heading 'Town Centres and Retailing', the Officers sought to deal with the "sequential test" at paragraphs 6.21-6.38 and then "impact considerations" at paragraphs 6.39-6.86. The officers then purported to deal with "Economic Considerations" at paragraphs 6.87-6.92.
49. In these sections, Officers variously misdirected members in a number of fundamental respects:

¹³ See for example paragraph 1.8 of the Officer's report to Committee for 24 April 2014

¹⁴ See for example paragraph 2.11 of the Officer's report to Committee for 24 April 2014

- 49.1 Although the Officers' rightly conceded that the LM Inspector's appeal decision was a "material consideration and must carry significant weight", the Officers inexplicably misdirected members that the Inspector's conclusion as to why the Livestock Market was sequentially preferable to the WSCP "is not fully reasoned other than pointing to poorer pedestrian links"¹⁵. As the Inspector's DL reveals, particularly when read in the way that the law requires, the Inspector's decision was fully reasoned and was unequivocal in its finding as to the sequential preference of the LM Site. There was therefore no basis for the Officers' basic misdirection of members. Moreover, this fundamental misdirection became the erroneous springboard for the Officers' purported adoption of England & Lyle's inconsistent claim that the two sites were "sequentially equal"¹⁶. Neither this claim by England & Lyle, nor the Officers' adoption of it, purported to deal with the contrary reasoning of the Inspector or the importance of consistency with such a finding.
- 49.2 The Officers' purported to adopt the review of the retail impact assessment of the WSCP proposal expressed by England & Lyle¹⁷. This proceeded on the basis that the LM scheme was to be treated as "edge-of-centre" and therefore any impact upon it was not a material consideration¹⁸. There was no identification of the Inspector's specific finding that the LM scheme was one which ought to be treated as a functional part of the town centre for the purposes of a retail impact assessment. The Officers did not direct members to that finding, let alone did they purport to deal with it in terms of consistency or reasoning. To the contrary, all that Officers did was refer to the Local Plan Strategy document which had identified that the LM Site had the ability, once developed, to form a logical extension to the town centre. In this respect, the Officers sought to suggest that the WSCP also had the ability to form an extension to the town centre¹⁹. There is a conspicuous absence of any attempt to deal with the Inspector's clear findings about the LM scheme (in contrast to the WSCP site), let alone to apply those findings as a matter of consistency.
- 49.3 The Officers' report claimed that the impact of the application on the LM Site would be "fully considered" within the Committee report²⁰. However, the subsequent retail impact assessment was based upon impact upon the other parts of the town centre, ignoring the Inspector's conclusion that the LM scheme would function as part of the town centre drawing 24% trade into that town centre²¹. The impact assessment conducted by the Officers ignores this contribution that the LM scheme would make. Indeed, when returning to deal with "Impact on Planned Investment in Centres", the Officers refer to the LM scheme, but then repeat the same error by stating (in contradiction of the Inspector specific finding about the LM scheme) that the LM "lies to the northern edge of the defined Town Centre Commercial Limits and is not therefore in-centre, which is a pre-requisite of the impact test contained at paragraph 26 of the NPPF". To compound matters, the officers then state "In any event, the Livestock Market is a sequentially equivalent site to WSCP."
- 49.4 When purporting to deal with the effect on the LM scheme, the Officers sought to deal with the interest expressed by Booths and the conflict that it represented with the DTZ advice they had received; the Officers referred to the Claimant having stated it would be unlikely to bring forward the LM scheme if the WSCP were granted planning permission²². However, as to the former, the Officers bizarrely appeared to have concluded that Booths would still proceed because they had not stated explicitly that they would not (and notwithstanding the DTZ advice they had received). As to the latter, the Officers suggested that the Claimant's statement should be "treated with a degree of caution" because Booths had not explicitly stated that they would not proceed. This in itself was a clear misdirection as the Claimant's position as to the

¹⁵ See paragraph 6.28 of the Officer's report

¹⁶ See paragraph 6.29 of the Officer's report

¹⁷ See paragraph 6.44 of the Officer's report and following

¹⁸ See eg paragraph 6.45 of the Officer's report in particular

¹⁹ See eg paragraph 6.45 of the Officer's report in particular

²⁰ See eg paragraph 6.45 of the Officer's report

²¹ See eg paragraph 6.59-6.68 of the Officer's report

²² See paragraph 6.75 and 6.76 of the Officer's report

viability of the LM scheme as a whole was not one which was determined by the attitude by Booths. The viability of the LM scheme (which consists of both convenience and comparison floorspace) depends upon the viability of the scheme as a whole and the impact of the WSCP on it²³. However, quite apart from these basic mis-directions, the officers concluded paragraph 6.77 by repeating their advice that as the LM Site is not 'in-centre' and it is sequentially equivalent to WSCP: "the planned investment within the Livestock Market is not therefore conferred policy protection" and "any impact on investment in the Livestock Market would not form reasonable grounds for refusing planning permission for the WSCP proposals". This in itself is a further serious misdirection; it is clear that the impact on the LM Site is capable of being a ground of refusing planning permission given the importance of such investment; in any event, the Officers once again ignored or failed to deal with the Inspector's express findings in this regard. The same errors are then repeated in the 'Economic Considerations' section at paragraphs 6.87-6.90 of the report.

50. On 24 April 2014, the Council's Planning Committee reconsidered the WSCP Application and resolved to grant planning permission based on that report written by officers of the Council and advice given orally by the Council's solicitor as referred to in the minutes of the Planning Committee. The meeting was controversial. Four members of the ten member Committee voted for a motion proposing to refuse planning permission. However this motion was lost and so the four members then left the Committee. It was only the remaining six members of the Committee that then voted for the resolution to grant planning permission.
51. The application was referred to the Secretary of State who did not call it in (having regard to his policy on call-ins) and on 12 September 2014, the Council issued the Decision Notice now under challenge.
52. On 14th October 2014 Pinsent Masons LLP, solicitors acting on behalf of the Claimant, sent a pre-action protocol letter before claim to solicitors for the Defendant, copied to solicitors for the Interested Party, inter alia inviting the Council to consent to an order quashing the Decision on the grounds of its unlawfulness. By responses received on 20th October 2014, the Defendant and Interested Party declined to agree to such a quashing order and have taken issue with the grounds of claim as set out in those letters. The thrust of the responses appears to be based on a general attempt to characterise the legal challenges that have been specifically identified as mere challenges to planning judgments. This is misconceived. The Claimant has identified a number of serious and basic legal errors in the approach that the Council adopted, including some fundamental misdirections by Officers to the Committee. It is significant that these errors have not been correctly characterised or dealt with in these purported responses.

Relevant Law

General principles

53. Section 70(2) TCPA requires a local planning authority to determine an application for planning permission with regard to the provisions of the development plan and any other material considerations.
54. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that, if the determination is to be made with regard to the development plan then it must be made in accordance with the plan unless material considerations indicate otherwise.
55. Construction of planning policy is a matter of law for the court: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13; (2012) 2 P&CR 162.

²³ Moreover, the Claimant confirmed in its letter of 23 April 2014 that it would not proceed with the LM scheme investment in the town centre if the WSCP scheme proceeded

56. What constitutes a material consideration is a matter of law for the courts. Whilst matters falling within the planning judgment of the LPA can only be challenged on grounds of irrationality (Tesco Stores Ltd v SSE [1995] 2 All ER 636; [1995] 1 WLR 759), that judgment must be exercised having regard to all material considerations and without having regard to irrelevant considerations.
57. A planning authority must be particularly scrupulous about evaluating a planning application in the correct policy perspective when it, itself, has an interest in another capacity in the success of the application: see William Morrison Supermarkets Plc & Anor, R (on the application of) v Teesside Development Corporation [1997] EWHC Admin 481 (16 May 1997) Sedley J (applying Steeple v Derbyshire County Council):
- "98. There are, however, two factors of importance which qualify these propositions. The first is that a planning authority must be particularly scrupulous about evaluating a planning application in the correct policy perspective when it itself has an interest, in another capacity, in the success of the application (see Steeple v Derbyshire CC (1985) 1 WLR 356 at 388-389 per Webster J). This applies to all planning authorities, but especially to one which does not distribute its functions among different committees. The second is peculiar to urban development corporations which, unlike elected local authorities, are entitled to meet behind closed doors and without prior or subsequent publication of their agenda materials or minutes, and which are composed of individuals who (although their probity and experience are not in doubt) do not have to submit themselves periodically to the public for re-election as commissioners. In this situation, with no ready means of public scrutiny of this decision-making process and no public verdict on their decisions, the obligation resting on an urban development corporation to take a scrupulously objective approach to planning applications is very real."

Consistency with previous planning decisions

58. It is trite law that like cases should be decided alike. The Officer's Report to Committee rightly noted (at para.6.28) that in this case significant weight should have been given to the Inspector's decision, although it is not a binding precedent.
59. On a subsequent planning application, "a previous planning decision is a material consideration if it is legally indistinguishable": R (Midcounties Co-operative Ltd) v Forest of Dean District Council [2014] EWHC 3059 (Admin) at para.5(viii). Where a planning decision-maker disagrees with a previous decision, he must weigh the previous decision and give reasons for departing from it. See North Wiltshire District Council v Secretary of State for the Environment (1993) 65 P&CR 137 at p.145:
- "To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."
60. Where the previous decision relates to the point of principle at issue in the new decision, the new decision-maker must "grasp the intellectual nettle of the disagreement" and give adequate reasons for the decision. See Dunster Properties Ltd v First Secretary of State [2007] EWCA Civ 236; (2007) P&CR 515 at para.23:

"In my judgment, notwithstanding Miss Olley's submission to the contrary, Mr Mead did not adequately perform his obligation to give reasons for this decision in respect of his refusal to follow the basis of the earlier appeal decision which was a material consideration. In this respect it seems to me that by declining to comment, other than to refer to his own reasons already expressed, Mr Mead appears not to have faced up to his duty to have regard to the previous decision so far as it related to the point of principle as a material consideration. An omission to deal with the conflicting decision, as in the North Wiltshire case, might have been sufficient in itself. But Mr Mead's last sentence in para.8 suggests that he has not grasped the intellectual nettle of the disagreement, which is what is needed if he is to have had proper regard to the previous decision. Either he did not have a proper regard to it, in which case he has failed to fulfil the duty to do so, or he has done so but has not explained his reasons, in which case he has not discharged the obligation to give his reasons."

Officers' reports to planning committees

61. The proper approach to officers' reports to a planning committee exercising delegated planning functions of the LPA was recently set out by Hickinbottom J in R (Zurich Assurance Limited, t/as Threadneedle Property Investments) v North Lincolnshire Council [2012] EWHC 3708 (Admin) at [15] (cited in Midcounties at [5]), as follows:

"(i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.

(ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently:

"[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).

(iii) In construing reports, it has to be borne in mind that they are addressed to a 'knowledgeable readership', including council members 'who, by virtue of that membership, may be expected to have a substantial local and background knowledge' (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes 'a working knowledge of the statutory test' for determination of a planning application. (Oxton Farms, per Pill LJ)."

Grounds of Claim

62. The Claimant submits that in its determination of this planning application, the Council erred in law in a number of fundamental respects.

Ground 1: The Sequential Approach

63. In purporting to apply the sequential approach to the assessment of the WSCP scheme as compared with the LM scheme, the Council failed to take into account the importance of consistency with the Inspector's conclusions in dealing with the LM Site appeal.

64. 64. As identified above, the Inspector reached the clear and unequivocal conclusion that the LM Site was sequentially preferable to the WSCP site for the reasons he set out in his DL (see in particular paragraphs 21-32).
65. As a matter of principle, it was incumbent on the Council to apply the conclusion consistently to its own assessment or, alternatively, if purporting to reach a different conclusion, to provide adequate reasons for doing so: see *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&CR 137; *Dunster Properties Ltd v First Secretary of State* [2007] EWCA Civ 236; (2007) P&CR 515).
66. The Council failed in this regard because the Planning Committee was significantly misdirected and misled by the Officer's Report to Committee which suggested that the Inspector's conclusion that "the WSCP site is a sequentially less preferable edge-of-centre site than the appeal site" (DL, para.32) "is not fully reasoned other than pointing to poorer pedestrian links"²⁴. There was no logical or rational basis for this misdirection and it is incapable of being a reason for departing from the Inspector's decision, let alone an adequate reason.
67. The Inspector's decision was fully reasoned in DL paragraph 21-32 and there was no basis for directing members to the contrary. The Inspector analysed the merits of the LM Site in terms of its relationship with the existing town centre, the size of that site and what it was proposed to accommodate and the ideal nature of the location for providing both smaller unit comparison shops in conjunction with the convenience food-shopping as part of mixed-use development immediately adjacent to the existing town centre. This was then further cemented by the poorer pedestrian links to the WSCP site and the Inspector's own site visits to the area to confirm these. Because of this misdirection, the Officers' report pays no regard to the Inspector's reasoning and his adoption of the evidence from the Claimant, as well as the conclusions that were expressed by RTP (the Council's own advisers at that time) to the same effect which was part of the evidence before the Inspector. Moreover, it is clear that DTZ in its own report in 2014 were adopting a very similar view.
68. Moreover, the Inspector's reasoning was not confined to the "poorer pedestrian links" of the WSCP site to that of the LM Site as expressed in DL.32. This was part of the Inspector's finding, but this ignores the Inspector's adoption of the other evidence. But the Officers' report is clearly erroneous in implicitly suggesting that this particular finding would not, of itself, be sufficient and full reasoning for a conclusion that a site is sequentially inferior in any event. Given that one of the fundamental aspects of site location is its pedestrian links with the town centre (in order to promote linked trips), it is clearly misleading for officers to imply that a finding in this regard would not constitute full reasoning.
69. This error was fundamental. The Officers misdirected members about the Inspector's decision and his reasoning. Moreover, the claim made by England & Lyle that the two sites were sequentially equal is then used as the basis for assessing the WSCP scheme. The England & Lyle claim is similarly repeated without dealing with the Inspector's reasoning to the contrary, or recognising the importance of consistency in planning decisions on an issue of this kind.
70. Neither the Council's pre-action protocol response letter nor that of the Interested Party grapples with this error and the misdirection given to members. Save to repeat uncontroversial principles, it is significant that neither the Council nor the Interested Party address the specific misdirection given to members that the Claimant has identified, nor do they attempt to defend the direction as correct (see responses on Ground 1 in the respective letters). It was a direction which fundamentally misled the Committee about the Inspector's reasons for his findings. Therefore the only attempted justification given for departing from the Inspector's decision was based on a misdirection as to the Inspector's reasons. The attempted justification was

²⁴ See Officer's report paragraph 6.28

incapable of amounting to a reason for departing from the Inspector's decision and the important principle of consistency in planning, let alone an adequate one.

Ground 2: The LM Scheme as a Functional Part of the Town Centre

71. Further or alternatively, in considering and assessing the retail impact of the WSCP scheme on the town centre, the Council singularly failed to take into account or apply the Inspector's conclusion at DL paras 42-44 that the LM scheme should be treated as one which would function as part of Malton town centre once completed.
72. The Council consequently failed to recognise the Inspector's express conclusion that the LM scheme ought to be treated as one that would have an overall positive impact of 24% in terms of drawing trade to the town centre.
73. The Council and its advisers ignored this conclusion of the Inspector and/or failed to apply this conclusion as a matter of consistency. Alternatively, if they had been purporting to depart from the Inspector's conclusion, they failed to provide any reasons for doing so: see again North Wiltshire District Council v Secretary of State for the Environment (1993) 65 P&CR 137; Dunster Properties Ltd v First Secretary of State [2007] EWCA Civ 236; (2007) P&CR 515).
74. There is no recognition of the Inspector's finding in the report, let alone any attempt to distinguish it or deal with its consequences. At paragraph 6.45 the Officers refer to the Local Plan Strategy which refers to a mere "ability" for the LM Site, once developed, to form a logical extension to the town centre. The Officers go on to claim that the WSCP had the potential to form an extension to the town centre. However what the Officers conspicuously fail to deal with is the fact that the Inspector in his DL had expressly accepted the Claimant's position (in fact one which was essentially supported by RTP in its own analysis) that the LM scheme **would** function as part of the town centre and therefore the LM scheme ought to be treated in this way for the purposes of the retail impact assessment.
75. Accordingly, the assessment of the retail impact of the WSCP scheme on the town centre was flawed by this glaring omission in the analysis. Thus in treating the LM scheme for all purposes as purely an "edge-of-centre" scheme the Council seriously misapplied the Inspector's contrary finding, or failed to provide reasons for departing from it. The Officers and the Council consequently failed to consider the impact of the WSCP on the town centre with the LM scheme forming part of that town centre.
76. Again, it is significant that the responses from the Council and the Interested Party do not grapple with the point. Both parties appear to accept that this finding of the Inspector was not identified anywhere in the report or advice given to the Committee. It clearly was omitted. The Council attempt to allege that it is another facet of Ground 1, but that in itself reveals a disturbing lack of appreciation of the Inspector's specific finding and the failure to deal with it. The Inspector not only found that the LM scheme would function as part of the town centre, but that it should therefore be treated as part of the town centre for retail impact purposes. The Council has failed to recognise this at all in its impact assessment and even now appears to misunderstand the significance of the finding in its response in saying: "Inspector Wildsmith actually saw the Estate site as an edge-of-centre site. It still is. There is no question at all of the Members having been misled." This simply ignores the whole of the Inspector's detailed and reasoned analysis, and its consequence for retail assessment, in DL paragraphs 42-44.
77. By contrast, the Interested Party seeks to rely on its own Updated Retail Assessment and the England & Lyle review of that assessment as having assessed impact on the town centre whether the LM Site is considered "edge of centre" or as part of the town centre, but (a) this clearly does not address the failure to take into account the Inspector's specific findings that the LM scheme should be treated as part of the town centre for retail impact purposes; (b) it does not begin to represent a reason for

departing from the Inspector's finding as required by the principles expressed in North Wiltshire; and (c) it is clearly factually misconceived as neither the Updated Retail Assessment nor the England & Lyle assessment treat the LM scheme as part of the town centre for retail impact purposes and simply ignores the fact that England & Lyle advised the Council that the effect on the LM scheme was an immaterial planning consideration.

Ground 3: Misdirection on Planned Investment

78. Further or alternatively, the Council committee members were also misdirected about what would happen on the LM Site if the WSCP were granted planning permission.
79. The Claimant had explained in its letters to the Council dated 25 March 2014 and 23 April 2014 why the Claimant's position was that it would not bring forward the LM scheme if the WSCP proposals were approved and this would result in a significant impact on the town centre.
80. At paragraph 6.76 of their report, the Officers misdirected the Committee that the statements in the 25 March 2014 letter "should be treated with a degree of caution" on the basis that Booths had stated that whilst they were "very concerned", they had not explicitly stated that they would not proceed with a store on the LM Site were the WSCP proposals to be approved. The Council officers suggested that on this basis there was no reason to suppose that further investment in comparison shopping would not follow the development of a Booths store which would act as a catalyst.
81. Leaving aside the fact that there was no basis for belittling or side-lining Booths' own concern in this way, this direction fundamentally failed to appreciate the difference between what Booths might wish to do and what the Claimant would be able to do in such a situation. The Claimant's decision that it would not proceed was based on the viability of the LM scheme as a whole, regardless of Booths' intentions. The Council officers either ignored, or simply misdirected both themselves and the Committee about, the impact of the WSCP scheme threatening both the economics of any potential agreement with Booths, but also in any event rendering the investment in construction of the LM scheme by the Claimant (with both its convenience and comparison shopping units) simply unviable.
82. In its pre-action protocol response, the Council compound this error, as well as that error identified in Grounds 1 and 2, by stating that Booths are apparently still in negotiation with the Claimant and maintaining their interest in the site and by setting out its position that: "the Estate's site does not merit the protection from competition afforded to a town centre". The Claimant's challenge is to the grant of permission to the WSCP site because that permission has been unlawfully granted in the circumstances. Its aspirations for the LM Site continue to be based upon that challenge. The Claimant has stated it would not proceed with the LM scheme investment if the WSCP is consented. The Council continue to conflate the position of Booths (which is only an interest in the food store element of the LM scheme) with progress in the LM scheme as a whole. Once again, the Council's response reveals a disturbing lack of appreciation of the situation. Moreover, the Council repeats the same error of approach here that the LM Site "does not merit protection", notwithstanding the Inspector's findings which the Council does not deal with. By way of fallback the Council also says that the members were made fully aware of the Claimant and Booths' position, but that, of course, is to ignore the advice that was given to members by the Officers in the report which is under challenge which misdirected members as to the Claimant's position.
83. The Interested Party seek to suggest that the Claimant's position is "self-serving" and the issue was one of a "panoply" of planning considerations before the Committee. Again, this sort of response fails to grapple with the erroneous advice given by the Officers about the Claimant's position that represents the serious misdirection which is challenged.

84. It should also be noted that the Interested Party's impact assessment suggested that in the "most likely scenario" the LM scheme would not come forward, but the alternative scenario it considered was on the basis that the LM scheme would come forward over a longer period to 2023. These assessments are inconsistent with any claim that there would be sufficient capacity for both schemes before then and the Interested Party's assessments were at odds with what was suggested in paragraph 6.76 of the Officers' report that the Claimant's position that it would be unlikely to bring forward the LM scheme should be 'treated with a degree of caution'. The Interested Party's own retail consultants had proceeded on the basis that the most likely scenario would be that the LM scheme did not come forward. The notion now advanced by the Interested Party that the Claimant's statement was self-serving is patently at odds with its own professional advice as to the likely outcome of WSCP being granted permission.

Ground 4: Legal error that Impact on LM Scheme not a material consideration

85. Further or alternatively, the Council was misdirected in any event that the trading impact of the proposed store at WSCP on the LM scheme was not a material planning consideration at all. This misdirection was given on the basis that the LM scheme was not "in-centre"²⁵. It was reflected in the advice given repeatedly by Officers, for example at paragraphs 6.69 and 6.77 of the Report
86. This was a serious misapplication of the Inspector's conclusion that the LM scheme should be treated as a part of the town centre (as set out in Ground 2 above), as well as the fact that it had been common ground at the LM inquiry that the grant of planning permission for the WSCP scheme would make it more difficult for an operator to be found for the LM scheme.
87. Once again, the pre-action protocol responses received either gloss over the error that has been identified, or wilfully misunderstand it. The Council asserts that the Claimant's permission was "treated as a material consideration throughout the Report", but this does not address the error identified. England & Lyle specifically advised the Council that the impact of the WSCP proposal on the LM scheme was not a material consideration: see England & Lyle letter dated 9 April 2014 and the extract quoted in paragraph 45 above. Neither the Council nor the Interested Party deal with this. This advice was before the Committee and formed the basis of the Officers' report and assessment. To suggest that the Claimant's proposed ground of challenge is a "contrived reading" of the Officers' report (see Interested Party's response), when that report was purporting to agree with England & Lyle's advice is bizarre. Moreover, the Interested Party's response appears to be an acceptance that if there had been advice that the impact of the WSCP scheme on the LM scheme was not a material consideration, it would have been wrong; yet there was such advice from England & Lyle as identified in paragraph 45 above. Moreover, the England & Lyle consultant was present at the Committee meeting.
88. By contrast, the Council in its response goes on to say that "planned investment in the Estate's site was not afforded policy protection as it was not, and is not, a town centre site and while if developed it could function as a town centre site the same is true of the GMI site". This does not deal with the England & Lyle advice that the impact was therefore "not a material consideration". But it also embodies the same key error in Ground 2. The Inspector had, of course, found that the LM scheme should be treated as a town centre scheme when applying Government policy on retail impact and the Council is continuing to ignore this finding in its response, and certainly failing to provide any reasons for departing from the Inspector's finding.
89. Moreover, even if the LM scheme were not treated as in-centre for these purposes (inconsistently with the approach of the Inspector), there was no basis for alleging that the impact on the LM scheme was an immaterial planning consideration, or that

²⁵ See Committee report at para 6.77 and England and Lyle Letter dated 9 April 2014 'Retail Impact'

impact on the LM scheme was not capable of being a reason for refusal planning permission.

90. The LM scheme represented consented development that the Inspector had identified was of positive benefit to Malton town centre. The potential adverse impact on such a development affecting its viability was self-evidently a material planning consideration. The Council should have been directed to take into account but were erroneously directed that it was not material and therefore failed to do so.

Ground 5: Failure to Comply with Environmental Impact Assessment Duty

91. Further or alternatively, the Council failed to comply with its obligations under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("**EIA Regulations**") to consider whether or not the development being considered in 2014 should have been the subject of an Environmental Statement.

92. The WSCP scheme was a Schedule 2 development which exceeds the screening threshold of 0.5 hectares for "urban development projects". The Council had previously issued a negative screening opinion in 2011 based on the assessment of the WSCP development as it then stood. That was at a time when the application was expressly being considered by the Council on the basis that there was only room for one retail supermarket scheme in Malton town centre. There was therefore no prospect of any cumulative impact arising from the WSCP scheme taken with the LM scheme to affect the Council's screening opinion.

93. By contrast, by the time that the Council came to reconsider the WSCP proposal in 2014, the LM scheme had been granted planning permission on appeal and the Council itself had acknowledged that this change of circumstances required it to re-determine the planning application. In addition, the Inspector had made the findings he did about the correct approach to the LM scheme. Notwithstanding this, there was a complete failure to reconsider the out-of-date screening opinion and, in particular, whether or not any cumulative impacts of the proposals, or any impact on the LM scheme and investment in the town centre, required an Environmental Statement. Given that the Council itself had recognised that there was no capacity for the scale of this combined convenience and comparison shopping floorspace until 2023 and the potential conflict with Policy SP7 of the Local Plan Strategy, it is obvious that such impacts should have been treated as potentially significant impacts justifying an Environmental Statement for the benefit of the public and proper decision-making.

94. The Council's pre-action protocol response is significant as it is based on a further error of law as to the requirements under the EIA Regulations 2011. By way of explanation for not carrying out a further screening opinion exercise, the Council rely on Regulation 8(2) of the Regulations to argue that the Council considered that the "information already before them" was adequate to assess the environmental effects of the development. This is expressed as the Council's view and therefore should reflect the Council's decision-making process.

95. However, Regulation 8 of the EIA Regulations which is relied upon as the justification for not requiring further information provides as follows:

"8.— Subsequent applications where environmental information previously provided

(1) This regulation applies where it appears to the relevant planning authority that—

(a) an application which is before them for determination—

(i) is a subsequent application in relation to Schedule 1 or Schedule 2 development;

(ii) has not itself been the subject of a screening opinion or screening direction; and

(iii) is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations; and

(b) either—

(i) the original application was accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations; or

(ii) the application is for the approval of a matter where the approval is required by or under a condition to which planning permission deemed by section 10(1) of the *Crossrail Act 2008* is subject.

(2) Where it appears to the relevant planning authority that the environmental information already before them is adequate to assess the environmental effects of the development, they shall take that information into consideration in their decision for subsequent consent.

(3) Where it appears to the relevant planning authority that the environmental information already before them is not adequate to assess the environmental effects of the development, they shall serve a notice seeking further information in accordance with *regulation 22(1)*."

96. Regulation 8, including Regulation 8(2), only applies where the requirements of Regulation 8(1) are satisfied, as Regulation 8(1) makes clear.

97. Regulation 8(1) is identifying a subsequent application in respect of a Schedule 2 development where that development previously supported by an "environmental statement". The classic example of this is a reserved matters application made pursuant to a previously granted outline planning permission. The reserved matters application, seeking approval for reserved matters pursuant to a condition imposed on the outline planning permission, is the relevant "application" before the Council for determination under Regulation 8(1). If that "application" has not been the subject of any screening opinion or direction and is not accompanied by its own Environmental Statement, but the "original application" (ie the outline planning consent) was the subject of an Environmental Statement, then Regulation 8(2) entitles the Council to rely upon the "environmental information" in the Environmental Statement when granting the outline planning permission in appropriate cases.

98. This has no relevance or application to the circumstances here. The Council was not considering a new application where the original application was the subject of an Environmental Statement. The Council is considering an old planning application, where its screening opinion was originally made in 2011 where circumstances and the assumptions on which that opinion was based have materially changed, and there has been a complete failure to consider any fresh screening opinion in light of those changed circumstances.

99. The Council's pre-action protocol response has therefore exposed that the Council's decision on whether to undertake any fresh screening opinion was taken pursuant to Regulation 8 of the EIA Regulations 2011. This approach involves a basic misapplication of Regulation 8 of the 2011 Regulations and a further legal error in itself. Accordingly, the Council's stated decision-making process in the pre-action protocol response demonstrates that the Council has misapplied the EIA Regulations 2011 and any purported reassessment of its original screening opinion was taken on this erroneous basis.

100. In light of this, the Interested Party's response is also meaningless as it does not reflect the Council's decision-making explained in the Council's pre-action protocol response. However, quite apart from this, neither the Council's response nor the Interested Party's response deals with the change in the assumptions that underpinned the 2011 decision that have occurred.

Ground 6: Statutory Duty towards Conservation Areas

101. Finally, and further or alternatively, the Council failed to apply its specific statutory duty under s.72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 to pay special attention to the desirability of preserving or enhancing the character or appearance of that area. Indeed, the Officer's Report to Committee only advised members on the existence of s.66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 regarding the special duty in respect of listed buildings²⁶, but no such advice was provided regarding the effect s.72 of the Act which relates specifically to effects on Conservation Areas. This was notwithstanding that the WSCP lies within the setting of a Conservation Area and concerns about the effects of the proposal on the Conservation Area were being identified. This is conspicuously unbalanced given that the Council had previously sought to refuse the LM scheme on heritage impact grounds and FME had gone to considerable lengths to ensure that the design of its proposal preserved the heritage assets in the area.

Remedy

102. The Claimant seeks:
- 102.1 A declaration that the Decision Notice is unlawful on any or all of the grounds set out in this Statement of Facts and Grounds;
- 102.2 An order quashing the Decision Notice;
- 102.3 Further or other relief as the Court thinks fit;
- 102.4 Costs.
103. The Court is respectfully requested to grant the application for judicial review and grant the relief sought.

Dated: 23 October 2014

PETER VILLAGE QC

JAMES STRACHAN QC

JAMES POTTS

Statement of truth

The Claimant believes that the facts stated in this Statement of Facts and Grounds are true. I am duly authorised by the Claimant to sign this statement.

Full name: Matthew Charles Baker

Signed: 

Position / Office Held: Partner / Solicitor

Name of Claimant's solicitor: Pinsent Masons LLP

²⁶ See paragraph 2.3 of the Officer's report and 6.114-6.117