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Case No: CO/5684/2008 & 0510/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2009

Before:

Mr Justice Collins

- - - - - - - - - - - - - - -

Between:

	Capel Parish Council	Claimant
	- and -	
	Surrey County Council	Defendant

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(Transcript of the Handed Down Judgment of
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Mr Peter Village, Q.C. & Mr James Strachan (instructed by MacFarlanes LLP) for the Claimant

Mr Richard Drabble, Q.C. & Mr Richard Harwood (instructed by the Solicitor to the Council) for the Defendant

Hearing dates: 28 – 30 January 2009

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Judgment Mr Justice COLLINS :

1. There are two claims before me. The first is brought under section 113 of the Planning and Compulsory Purchase Act 2004 (the 2004 Act). It challenges and seeks to quash the

inclusion in the Surrey Waste Plan Development Plan Documents (DPDs) of a site known as Clockhouse Brickworks, Capel as one in respect of which planning permission can be granted for development involving waste disposal or recovery and specifically for thermal treatment, namely incineration, of waste. The DPDs in question were adopted by Surrey County Council (SCC) on 6 May 2008. The second is a claim for judicial review of three planning permissions granted by SCC on 9 December 2008 to enable an energy from waste facility to be constructed and put into operation on the site. That facility is commonly called an incinerator.

2. The claim for judicial review relies on a number of matters said to amount to errors of law in the process of reaching and in the terms of the decisions themselves. Ground 1 asserts that the decisions to grant permission were based upon unlawful policies in the development plan. It is apparent that, if the claimant succeeds in its s.113 claim, Ground 1 will be established and the planning permission must be quashed. Thus Sullivan J ordered that Ground 1 be 'rolled up with the pending [s.113] application'. He also directed that the judge hearing the s.113 claim should consider whether permission should be granted for judicial review. Since I have decided that the s.113 claim should succeed, it follows, as Mr Drabble Q.C. accepted, that I should grant permission for judicial review on Ground 1. I do so. I dispense with all procedural steps following such permission and quash the planning permissions. I need say no more about the claim for judicial review.

3. The village of Capel and the site are in the south of the county and in countryside away from the centres of population which are mainly in the north of the county. The nearest large town, Dorking, is some 6 or so miles away. SCC has encountered real difficulty in identifying suitable sites for dealing with waste in ways which involve processes other than disposal in landfill. It is recognised that there is a hierarchy, as it were, of methods of dealing with waste. These, in order of desirability, are re-use of material, recycling and composting, generation of energy and disposal. It is perhaps obvious that incineration will merely be a form of disposal unless its main purpose is the production of energy. Thus in order to place it above disposal in the hierarchy, there must be an ability to generate energy from whatever development may be permitted.

4. Although in countryside, the site in question, as its name indicates, contains a brickworks. There is existing consent for the extraction of clay until 2042 and the brickworks will continue to operate until the clay has been exhausted. The extraction of clay has resulted in voids and these have been landfilled, permission for which expired in December 2004. There is a condition that the land must be returned to its state prior to any development. That condition means that it is to be treated as a Greenfield site and it is upon that part of the site that it is proposed that an incinerator be built. It is also an SSSI, based on geological features, and is close to another SSSI which, as I understand it, comprises a wooded area. In addition, there is a colony of Great Crested Newts which needs to be protected and which would, it was contended, be disturbed by any proposed development.

5. The SCC's decision depended upon recommendations made by inspectors appointed by the

Secretary of State. As will become apparent when I set out the relevant statutory provisions, Section 20(1) of the 2004 Act requires that every DPD be submitted to the Secretary of State for independent examination. The Secretary of State must appoint a person (an inspector) to carry out that examination, the purpose of which is to determine in respect of the DPD:-

> "(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of DPDs;
>
> (b) whether it is sound." (s.20 (5)).

The inspector must make recommendations and give reasons for them (s.20 (7)). S.23 provides that the authority may only adopt a DPD in accordance with the recommendations of the inspector. Since the attack was on the inspectors' recommendations (there were two appointed since the hearings took place on days between 13 February and 24 September 2007 and the inspector first appointed was at one stage unable to continue on his own so that a second was appointed to assist him with some of the subsequent hearings: the report produced on 20 December 2007 was prepared and signed by both), I inquired whether the Secretary of State had been served with this claim. I was informed that that had been done and that the Secretary of State had decided not to take any part, no doubt being content to rely on the arguments presented by SCC in endeavouring to uphold the inspectors' decision.

6. Section 15 of the 2004 Act requires a local planning authority to prepare and maintain a scheme to be known as a local development scheme. The scheme must inter alia specify which documents are to be local development documents (LDDs) and DPDs, and must be prepared in accordance with 'such other requirements as are prescribed' and must be submitted to the Secretary of State 'at such time as is prescribed or as the Secretary of State (in a particular case) directs': s.15 (2) (c) and (3) (a) and (b). Section 16 requires a county council to prepare and maintain what is known as a minerals and waste development scheme (MWDS), to which (with some exceptions which are not material for the purposes of this claim) section 15 applies as if it were a local development scheme. (S.16 (1), (2) and (3)). Section 17 provides for the identification of LDDs, which can only be such if adopted by the council and approved by the Secretary of State. An LDD is a DPD if it forms part of the development plan (s.37 (3)) and a policy contained in it will prevail in the event of any conflict. The importance of DPDs is to be found in s.38 of the 2004 Act which provides that the development plan is the DPDs taken as a whole which have been approved or adopted (s.38(3)) and by 38(6) that:-

> "If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

The importance of this in a plan led system which the Planning Acts impose is obvious.

7. Section 18 of the Act requires the authority to prepare what is labelled a statement of community involvement, namely a statement of the policy as to the involvement of persons who appear to the authority to have an interest in matters relating to development in this area. This cannot be adopted unless an inspector so recommends and so has to be considered by the inspector. (See ss.18 (1), (2), (4) and (6).

8. Section 19 is of some importance. It dealt with preparation of LDDs. I use the past tense because it (and indeed other relevant sections of the Act) has been amended by the Planning Act 2008. But I have to consider the Act as it applied at the material time and so in its unamended form. Section 19(2) sets out a list of matters to which the relevant authority must have regard in preparing a LDD. These include:-

> (a) national policies and advice contained in guidance issued by the Secretary of State.
>
> (f) the community strategy prepared by the authority.
>
> (h)any other LDD which has been adopted by the authority.
>
> (j) such other matters as the Secretary of State prescribes.

The authority must also (s.19 (5)):-

> "(a) carry out an appraisal of the sustainability of the proposals in each document;
>
> (b) prepare a report of the findings of the appraisal."

And regulations may provide for the preparation of other documents and for their contents (s.19 (6).

9. Mr Village submits that the provisions of the Act show that the development plan documents which include LDDs or DPDs forming part of the adopted policies, must themselves be sound. The system now in place requires the policies to be independently examined and approved or otherwise by an inspector. Unless they have gone through this process, they cannot be relied on as a development plan and so will not be able to be given the status indicated by s.38 (6) of the Act. That submission is clearly right and that is a reason why the planning permissions cannot survive the successful challenge to the adoption of the policies including Clockhouse Brickworks as one appropriate for the relevant waste disposal purposes, in particular incineration or what the jargon describes as energy from waste (EfW) or thermal treatment of waste.

10. Some additional requirements have been prescribed in regulations. Those are the Town and Country Planning (Local Development) (England) Regulations 2004 (SI 2004 No. 2204). Regulation 6(1) provides, so far as material:-

> "The descriptions of document prescribed for the purposes of s.17 (1) (a) which must be specified as LDDs in a local development scheme are –
>
> (a) any document consisting of statement of –
>
> (i) the development and use of land which the local planning authority wish to encourage during any specified period ….
>
> (ii) any environmental, social and economic objections which are relevant to the attainment of the development and use of land maintained in paragraph (i);
>
> (iii) the authority's general policies in respect of the matters referred to in paragraphs (i) to (iii)."

The documents referred to in 6(1) are referred to as a core strategy (6 (3)). Regulation 7 provides:-

> "Documents which must be DPDs are –
>
> (a) core strategies …
>
> (c) any other document which includes a site allocation policy."

Regulation 3(1)(b) provides that (with immaterial exceptions) they apply to a minerals and waste development scheme as if it was a local development scheme and references to a local planning authority include references to a County Council within the meaning of s.16(1) of the 2004 Act.

11. The Secretary of State has issued guidance in the form of PPS 12 to which regard must be had in accordance with s.19 (2) (a) of the 2004 Act. The guidance was amended in June 2008 because, as will become apparent, it contained a materially inaccurate statement amounting to an error of law. But the inspectors applied the guidance as it existed at the time. They cannot be criticised for that, but it has in my judgment meant that the particular

recommendation cannot stand.

12. PPS12 sets out, as the introduction states, the Government's policy on the preparation of LDDs which will comprise what it calls the local development framework. Paragraph 1.3 sets out the aims. It provides:-

"Local development frameworks are intended to streamline the local planning process and promote a proactive, positive approach to managing development. The key aims of the new system are:

i. Flexibility. Local planning authorities can respond to changing local circumstances and ensure that spatial plans are prepared and reviewed more quickly than development plans under the old system;

ii. Strengthening community and stakeholder involvement in the development of local communities. Local communities and all stakeholders will be involved from the outset and throughout the preparation of local development documents.

iii. Front loading. Local planning authorities should take key decisions early in the preparation of local development documents. The aim will be to seek consensus on essential issues early in the preparation of local development documents and so avoid late changes being made;

iv. Sustainability appraisal. To ensure that local development documents are prepared with the objective of contributing to the achievement of sustainable development;

v. Programme management. The efficient management of the programme for the preparation of a range of local development documents in accordance with the local development scheme; and

vi. Soundness. Local development documents must be soundly based in terms of their content and the process by which they are produced. They must also be based upon a robust, credible evidence base.

The need to include consideration of access issues is identified in Paragraph 1.12. Under the heading 'The Core Strategy' Paragraph 2.9 provides:-

"The core strategy should set out the key elements of the planning framework for the area. It should be comprised of a spatial vision and strategic objectives for the area; a spatial strategy; core policies; and a monitoring and implementation framework with clear objectives for

> achieving delivery. It must be kept up-to-date and, once adopted, all other development plan documents must be in conformity with it. The core strategy should normally be the first development plan document to be produced, except where the local planning authority has up-to-date saved policies (see paragraphs 5.3-5.5) and where the priority in the local development scheme is the preparation of an area action plan or other development plan document.
>
> And all DPDs must be 'subject to rigorous procedures of community involvement, consultation and independent examination to test the soundness of the document ….'' (Paragraph 2.7).

13. Mr Village submits that it is implicit in Paragraph 2.9 that the core strategy should come first and should be submitted to an inspector before the further documents which will deal with specific allocations and particular development control are produced. The sense of that is obvious. If the core strategy is not sound in any respect, it will be impossible to produce a site specific DPD which is itself sound to the extent that it accords with an unsound core strategy. Unfortunately, SCC chose not to follow this course and so the inspectors had to deal with the whole of the Surrey Waste Plan (SWP), both strategy and allocation, at the same time. They were unhappy with this. At one stage of the examination they indicated that they might report on the Core Strategy separately, but in the end they decided to treat the whole SWP as having three functions, as Core Strategy, Waste Development and Waste Development Control DPDs. In paragraph 1.8 of their report, (paragraphs in the report will hereafter be referred to as IR and the relevant number) they criticise SCC's approach in that it was not prepared in accordance with the requirements of the scheme. In particular, strategic and non-strategic material was not readily distinguishable (IR 2.2). But because of the 'urgency to adopt a set of coherent policies to redress long running uncertainty in planning for the management of waste in Surrey' and in order to avoid delay, they decided to 'continue with a single process of independent examination of the SWP'. (IR 2.3).

14. PPS12 makes clear that there must be early and continuing involvement of those likely to be affected by DPDs in the process of preparing them. The process must 'include consideration of all the alternative options derived from the development of the evidence base, the authority's awareness of local issues, the views of stakeholders and community involvement'. (Paragraph 4.2). The paragraph concludes:-

> "Key decisions on the spatial strategy should be taken at the earliest possible stage to allow for full community involvement and sustainability appraisal."

In MWDs, the core strategy may be equated to the spatial strategy. While the language may be less than ideal and is permeated by jargon, the approach advocated is apparent. And Paragraph 4.3 underlines the importance of 'front loading', namely community

involvement, in dealing with site allocations so that all who have a real interest have had a say on the suitability of any sites put forward.

15. Paragraph 4.24 is most important. It provides as follows:-

> "The presumption will be that the development plan document is sound unless it is shown to be otherwise as a result of evidence considered at the examination. The criteria for assessing whether a development plan document is sound will apply individually and collectively to policies in the development plan document. A development plan document will be sound if it meets the following tests:
>
> Procedural
>
> i. it has been prepared in accordance with the local development scheme;
>
> ii. it has been prepared in compliance with the statement of community involvement, or with the minimum requirements set out in the Regulations where no statement of community involvement exists;
>
> iii. the plan and its policies have been subjected to sustainability appraisal;
>
> Conformity
>
> iv. it is a spatial plan which is consistent with national planning policy and in general conformity with the regional spatial strategy for the region or, in London, the spatial development strategy and it has properly had regard to any other relevant plans, policies and strategies relating to the area or to adjoining areas;
>
> v. it has had regard to the authority's community strategy;
>
> Coherence. Consistency and effectiveness
>
> vi. the strategies/policies/allocations in the plan are coherent and consistent within and between development plan documents prepared by the authority and by neighbouring authorities, where cross boundary issues are relevant;
>
> vii. the strategies/policies/allocations represent the most appropriate in all the circumstances, having considered the relevant alternatives, and they are founded on a robust and credible evidence base;
>
> viii. there are clear mechanisms for implementation and monitoring;

and

ix. the plan is reasonably flexible to enable it to deal with changing circumstances."

The numbered tests are each specifically considered in the inspectors' report and their overall view is that they are all met, subject to a number of modifications of a relatively minor nature.

16. The first sentence of Paragraph 4.24 incorporates the error of law. There is no presumption of soundness. In *Blyth Valley BC v Persimmon Homes (Nth) Ltd & Others* [2005] EWCA Civ 861 the Court of Appeal considered the role of an inspector and whether soundness could be presumed. It noted that PPS12 had been amended so that the offending sentence had been removed and there had been substituted:

> "The starting point for the examination is the assumption that the local authority has submitted what it considers to be a sound plan."

Counsel in that case accepted that the inspector had an inquisitorial role and was entitled to find that a policy was unsound even if there was no convincing evidence to that effect from an objector. In paragraph 40, Keene LJ, who gave the only reasoned judgment, said this:-

> "For my part, I find it difficult to accept that the two versions set out above have the same meaning, but that probably does not matter. The appellant accepted orally that the inspector has a role which is at least in part inquisitorial and Mr Porten conceded that the inspector could reject a policy without there being evidence from objectors that it was unsound. It seems to me that the inspector in the present case was misled by the wording of PPS 12 as it then stood into applying a true presumption of soundness of the kind which is found elsewhere in the 2004 Act in section 38(6), where a particular result to follow "unless material considerations indicate otherwise." That is not what section 20(5) is providing for when soundness is being investigated. It is couched in neutral terms and its effect is more appropriately reflected in the later version of PPS 12. The Secretary of State does not seek to defend any presumption of soundness when a policy is being considered at an independent examination. Thus it may in a sense be understandable that the inspector adopted the approach he did, but in my judgment he was wrong to do so and that error in his approach to the issue under section 20(5) also vitiates his recommendation on policy H4."

17. It was therefore incumbent on the inspectors to consider for themselves whether the policies were sound. Thus they would have not only to consider any specific points made

by objectors but also any material matters which could indicate unsoundness. This would, in relation to specific allocations, include consideration of whether the process whereby the sites were chosen and others said to be more appropriate rejected was satisfactory. Equally, in the context of this case where it was accepted that Clockhouse Brickworks was by no means ideal – quite the contrary since an incinerator on a Greenfield site in the countryside was obviously likely to be regarded as an undesirable development – the inspectors' consideration should have required a rigorous examination of any suggested alternative sites and of whether in reality an incinerator alternative to landfill was achievable. This is apparent from the fact that the sites other than Clockhouse Brickworks for the construction of an incinerator were in the Green Belt. In addition, in dealing with site specific alternatives, PPS 12 by paragraph 2.15 emphasises the need for a 'robust and credible assessment' of the suitability of the site, its availability and its accessibility for the particular uses or mix of uses.

18. The right to apply to this court is provided for in s.113 of the 2004 Act. It provides the only way to challenge a relevant document (s.113 (2)). Section 113(3) is in the usual form. It states:-

> "A person aggrieved by a relevant document may make an application to the High Court on the ground that –
>
> (a)the document is not within the appropriate power;
>
> (b) a procedural requirement has not been complied with."

If the court is satisfied that a relevant document is to any extent outside the appropriate power or that the interests of the applicant have been substantially prejudiced by any procedural failure (s.113 (6)), it may quash the relevant document wholly or in part (s.113 (7)). The policies under attack will not have been within the appropriate power if the recommendation made by the inspectors which led to its incorporation in the relevant document was itself legally flawed.

19. The policies in question are first in what is to be regarded as the Core Strategy. That notes (Paragraph A5) the availability of void space for landfill and that Surrey has for some years dealt with waste from London as well as exporting some of its own waste. It identifies the requirement of the Waste Framework Directive that wastes should be disposed of 'as close to the source of waste as possible'. That only relates to disposal: recovery by means of reclamation, recycling or extraction of value from the waste is not covered by this principle. Reference is made to the Waste and Emissions Trading Act 2003 under which authorities will suffer financial penalties for each tonne of waste landfilled in excess of the allowance set by the Government. This obviously drives the need to find means of dealing with waste other than landfill or disposal. In relation to location of waste facilities, a relevant policy is CW5. Priority is to be given to 'the reuse of

previously developed, contaminated, derelict and disturbed land, redundant farm buildings and their curtilages, mineral workings and land in waste management use, before Greenfield sites and Green Belt sites'. Paragraph B39 provides:-

> "Mineral workings and land in waste management use may also provide appropriate locations for development of new or enhanced waste management facilities. It is recognised that this action is likely to extend the life of the mineral working or waste management activity, including landfill sites. Whilst this will result in some negative impacts, these would be outweighed by the benefit of achieving sustainable development in the longer term. Many of these sites have supporting infrastructure established (including transport network, access and landscaping). In allowing development of waste management facilities, such as recycling or materials recovery, more efficient use of the trips being made to the site can be realised; and rather than all the waste being disposed of, it can instead be processed so that only the residual waste is disposed of."

20. CW5 provides:-

> "Sites will be allocated, and proposals for waste facilities on unallocated sites will be considered in accordance with the following principles:
>
> (i) priority will be given to industrial/employment sites, particularly those in urban areas, and to any other suitable urban sites and then to sites close to urban areas and to sites easily accessible by the strategic road network;
>
> (ii) Priority will be given over greenfield land to previously developed land, contaminated, derelict or disturbed land, redundant agricultural buildings and their curtilages, mineral workings and land in waste management use;
>
> (iii) Areas of Outstanding Natural Beauty, Areas of Great Landscape Value, and sites with or close to international nature conservation designations should be avoided; and
>
> (iv) The larger the scale of development and traffic generation, the more important is a location well served by the strategic road network or accessible by alternative means of transport."

21. Policy WD2 deals with the identification of specific sites under the general heading 'Recycling, Storage, Transfer, Materials Recovery and Processing Facilities (Excluding

Thermal Treatment). One such site is Clockhouse Brickworks. Thermal treatment facilities are dealt with in Policy WD5. Paragraph C23 makes the point that the proposed development will need to recover energy and not simply be a means for waste management. WD5 provides:-

> "Planning permissions for development involving the thermal treatment of waste will be granted provided:
>
> (i) the waste to be treated cannot practically and reasonably be reused, recycled or processed to recover materials;
>
> (ii) Provision is made for energy recovery;
>
> (iii) The proposed development is at one of the following sites, as shown on the Site Boundary Maps:
>
> Clockhouse Brickworks, Capel
>
> Charlton Lane, Shepperton
>
> Martyrs Lane, Working
>
> Land adjacent to Trumps Farm, Longcross
>
> Land at former airfield, Wisley
>
> Provided the development proposed meets the key development criteria and where very special circumstances can be demonstrated in accordance with the provisions of Policy CW6 for Development in the Green belt."

The two policies, WD2 and WD5, are under attack. The claim particularly identifies WD5.

22. It seems to me that the erroneous application of the presumption of soundness provides the correct starting point. If it has tainted the relevant conclusions, they cannot stand. Since the error cannot be gainsaid, relief should follow unless the court is persuaded that it would not have had any effect on the decision reached. Mr Drabble argues that it is clear from the inspectors' findings that, albeit they made an understandable error in applying the presumption, they made positive findings as they should have done in relation to the matters considered following particular reference to the presumption.

23. The inspectors refer to the presumption in four separate paragraphs and clearly had it in mind in their approach to their task of assessing soundness. That that is so is clear from IR1.3 where they say:-

> "Our role is to consider the soundness of the submitted DPDs against each of the Tests of Soundness set out in PPS12. In line with national policy, the DPDs are presumed to be sound unless they are shown to be otherwise by evidence considered during the Examination. The changes we specify in this binding Report are made only where there is a clear need to amend the document in the light of the Tests of Soundness."

Mr Drabble submitted that the evidence before the inspectors from the SCC showed that there had been a substantial exercise carried out to make an informed assessment of suitable sites and to reject those which were unsuitable. That may be so, but the inspectors were not entitled to assume that that had been done correctly, particularly where the evidence given on behalf of the claimant questioned on plausible grounds whether the exercises had indeed been satisfactory. Mr Drabble asserted in his defence that the inspectors had not placed a burden of proof on any party nor had they found the policies to be sound in the absence of evidence either way. Since they had made it clear that evidence must persuade them that the DPDs were unsound, they adopted an approach which disabled them from carrying out their correct function which was to assess for themselves whether a policy was sound whether or not any evidence was put before them which might persuade them that it was sound. Only if it is apparent that their conclusion would have been the same if they had adopted the correct approach can relief be refused. As will be seen, the inspectors were critical of the lack of information in certain respects but were able to find that notwithstanding this the policy should be upheld. It is difficult to see that the presumption of soundness played no part in the conclusions reached.

24. There were further specific references to the presumption. In dealing with Test 2 (Statement of Community Involvement) the inspectors record evidence before them of complaints about the process adopted which it was said had discouraged proper community involvement. In IR 2.18, the inspectors say this:-

> "Returning to the basic terms of Test 2 and beginning with the essential presumption of soundness, there must be convincing evidence of how the SWP fails to comply with the SC1 [Statement of Community Involvement]. Whilst expressed public disquiet must be taken seriously, it is inevitable that full community involvement places a considerable onus on participants to respond at the several prescribed stages. The fact that this may be 'inherently difficult, especially upon introducing the new system, is not by itself evidence that it is failing."

In IR 2.20 they express their satisfaction that all aspects of the SWP were 'widely and properly publicised in accordance with the SC1 and Government guidance and that, at the conclusion of the Examination, no party has been denied proper involvement in the

process or a fair hearing.' Mr Drabble submits that that shows that the presumption referred to in IR 2.18 played no part in the ultimate decision. If that is so, it is difficult to follow why the inspectors found it necessary to begin with the presumption. It is in the circumstances impossible to be satisfied that the presumption was not at all relevant in enabling them to conclude as they did in IR 2.20.

25. The next specific reference is in IR 3.21. This is in a section of the Report dealing with the decision of SCC to delete three of the five locations in WD5 from the policy after it had been submitted for examination. That decision was based on the view that the Habitats Directive Assessment was not entirely satisfactory and further work was needed. The inspectors recognised the force of the arguments that there were aspects relating to the effects of EfW installations which might need further assessment. But in 3.21 they said:-

> "Conversely, there is nothing to say that waste development at sites allocated by policy WD5 would not entail advanced thermal applications other than EfW incineration. Beginning with the requisite assumption that the submitted SWP is sound, we take the view that the potential range of technology type permissible under Policy WD5 casts doubt on the justification of [the proposed change] to delete three sites from policy WD5 purely on the grounds related narrowly to EfW plants and cited in the ….. HDA [Habitats Directive Assessment]."

26. While I recognise that the conclusion reached that the three sites should not be deleted is not of central importance in the grounds relied on by the claimant, nonetheless the assumptive approach was wrongly applied and was used to avoid the need to reach positive conclusions on the relevant matters.

27. Finally, and perhaps most importantly, IR 3.36 repeats the presumption. This is the first of a number of paragraphs dealing with the approach to be adopted to site selection and the criticisms levelled at the process adopted. IR 3.36 reads:-

> "It is noteworthy that the long process of sequential selection has arrived at a schedule of allocated waste sites in the submitted SWP that are often in the rural Green Belt and close to Natura 2000 sites of the Thames Basin Heaths, subject to the highest level of protection to their integrity. However, that in itself does not mean that the selection process is flawed. Given the presumption that the SWP is sound, there must be persuasive evidence that the SWP, the SA and other evidence supporting them are faulty. This is questioned in certain general respects."

In IR 3.42 reliance is placed on inter alia 'the almost total absence of omission sites' in support of the lack of substantial evidence that different sites would have been substituted even if everything which should have been done had not. The erroneous approach cannot be glossed over. It was clearly regarded as material by the inspectors and must have

influenced them when they came to consider the individual sites which had been selected, some of which were limited to WD2 but omitted, it was said by the claimant wrongly, from CW5.

28. One site within WD2 was Copyhold Works, Redhill. This site had been rejected as appropriate for inclusion in CW5. While in the Green Belt, it contained a number of derelict buildings including the tall towers of former works and development limited to the footprints of the existing buildings, which did not have to be restored so as to qualify as greenfield and would not, as the inspectors found in IR 4.59, be likely to have any greater impact on the openness of the Green Belt. In IR 4.60, in dealing with its suggested suitability above Clockhouse, the inspectors said:-

> "Representations are made that this site should also be allocated in Policy WD5 for thermal treatment facilities, on grounds that it better meets the criteria of Policy CW5 than Clockhouse Brickworks, Capel, including that the site is closer to the major sources of waste. This option was rejected on grounds that a thermal facility would have the greatest visual impact of all sites considered, with any waste development requiring the highest standards of design. Therefore, while there was limited early SA consideration, no HDA for thermal treatment has been undertaken for thermal treatment by SCC. No SA or HDA has been undertaken by any respondent proposing this change. In the circumstances, it is not appropriate to recommend including this site in Policy WD5, notwithstanding its compliance with many of the locational criteria of Policy CW5."

29. It is said that the inspectors ought to have considered for themselves whether the rejection by SCC was appropriate and, if necessary, required a site assessment and HDA to be carried out. This was particularly important since SCC's own witness had accepted that an incinerator on the Clockhouse site would be unsuitable on visual impact grounds. The presumption was clearly regarded as material in avoiding the need to go behind SCC's assessment that, despite its compliance with many of the locational criteria of Policy CW5, the Copyhold site's rejection should not be reconsidered.

30. The inspectors deal with Clockhouse Brickworks in IR 4.29 to 4.47. Since there was much evidence about it and focus on it in the examination, it is not at all surprising that the report deals with it at some length. Although the site itself (which includes the brickworks) covers some 44.6 hectares, the proposed incinerator will be constructed on what is a relatively small area of the site amounting to little more than 5 hectares. This is known as Area 2, which had been subject to a permission for tipping waste. That permission had, as I have indicated, expired in December 2004 and there was a condition of restoration of the land. Thus it has properly to be regarded as a greenfield site. That the inspectors accepted in IR 4.32.

31. At the examination, it was accepted that SCC had considered the various possible sites on the basis of a report entitled Site Assessment Report 2A. SCC had also not enforced the restoration condition pending the outcome of the examination. In 2A the site is described thus:-

> "An operational site involving brickworks, clay extraction and non-inert landfill, which is due to finish in Spring 2004. The site is split into two planning units. Hanson operates the brickworks a day void. Surrey Waste management operates the existing landfill."

The land classification is recorded thus:-

> "The site is on land classified as agricultural grades 3 & 4. However, the site is situated within land that has been subjected to mineral extraction and subsequent landfill."

Nowhere was it recorded that, because of the restoration condition, Area 2, where the incinerator was to be built, had to be regarded as a greenfield site. This was an error in the process of assessment of its suitability. The inspectors record the general criticism on the process of site selection in IR 3.41. They conclude:-

> "Broadly … the sequential consideration of whether a site is properly defined as Previously Developed Land (PDL), operational mineral working or greenfield etc will be taken into account at project level with respect to the criteria of CW5, applying to all proposals whether on allocated sites or not."

By 'project level' they meant when an application for planning permission was made.

32. Mr Village submits that this was erroneous. CW5 is a policy which sets out the criteria to be used in site allocation, which in turn were considered in reaching WD2 and WD5. Thus the 'project level' stage is in reality that to be undertaken in choosing specific sites. An error in identifying the nature of a site, in particular whether it was greenfield or previously developed, is of considerable importance. The problem was to an extent created by the submission of the core strategy and the site specified allocations at the same time, but the inspectors should have made their own assessment having regard to the flaw in that undertaken by SCC. Their conclusion in IR 3.42, which I have already cited, is no answer to the criticism made by Mr Village. SCC's errors could have undermined the whole process of identification of suitable sites and certainly it was necessary in my view for the inspectors to look at the whole process afresh.

33. The site lies under the flight path to Gatwick Airport. In IR 4.35 the inspectors record the issue raised before them. They say:-

> "Area 2 lies, for all practical purposes, beneath the flight path to Gatwick Airport and there is no dispute that the vortices shed by passing aircraft on final approach would descend to the ground at some place determined by factors such as wind speed and atmospheric conditions. However, there is differing interpretation of photographic evidence of this submitted by objectors."

In IR 4.37 they say that they 'find it surprising that this phenomenon was not investigated in the site assessment process'. They continue:-

> "However, we do not find the evidence now before us conclusive either way. Furthermore, it is reasonably to be expected that the grounding of an EfW emission plume would be simulated in dispersion modelling undertaken for any project specific EIA and PPC application, on which the issue of permits would depend. On this basis, we conclude that there is insufficient evidence to delete the allocation on health grounds from either policy WD2 or WD5."

34. Mr Village submits that this shows an erroneous application of the presumption of soundness. Whether or not that is so, Mr Drabble submits that the inspectors' approach was not wrong since such issues would inevitably be dealt with if any application for permission were made since an EIA would be required. While I recognise that it is not appropriate in the examination carried out by the inspectors to go into great detail, an issue such as this, which would, if established, show that the site was unsuitable should be subjected to careful consideration. It would not be right for it to be within WD5 if inevitable damage to health would occur and the inspectors were in my view correct to express surprise at the lack of investigation in the site assessment process. Mr Drabble says that the point is a bad one since when the application for planning permission was made the tests showed and the Environmental Agency agreed that the concerns about health risks from the vortices were not established. But that is not a complete answer since, as Mr Village correctly points out, the purpose of requiring an inspector to consider site assessment at the stage in question is to enable there to be an independent consideration of important issues. SCC has been satisfied since, but SCC is not independent. It seems to me that there was a failure by the inspectors to ensure that the issue was properly considered so that, if they were persuaded that air quality would be adversely affected, the site could be deleted.

35. In this context and in dealing with site allocations generally, it is important to remember that Test 7 in PPS 12 requires that they are 'founded on a robust and credible evidence base. The inspectors concluded that a small number of sites had to be excluded to achieve compliance with Test 7, but that overall 'the SWP and its land allocations are founded on a robust evidence base that now includes the requisite statutory assessments which would not have altered the selection of particular sites.' It is not entirely clear precisely what the inspectors mean by this, since the evidence base, to be robust, should have included all that

was needed and the word 'now' suggests that it may not have done. However, in reaching their conclusion the inspectors wrongly applied the presumption of soundness and that tainted their whole approach.

36. It was recognised that there were potential traffic problems in that the access road, the A24, was possibly inadequate. Access is an important factor in considering suitability – PPS 12 refers specifically to it. In IR 4.38 the inspectors deal with it thus:-

> "The existing brickworks access from the A24 is evidently adequate to serve waste development generating up to an additional 90 HGV movements a day, equal to that permitted in connection with the landfill permission. There is no realistic prospect of the A24 Horsham-Capel improvement scheme coming forward in the foreseeable future, nor of any significant physical improvement to the existing road network. It is unclear whether the established daily limit of 90 HGV movements could be increased. The capacity of the access and local roads to serve one or more types of waste development remains uncertain, given there may also be an ongoing restoration requirement involving the importation of waste material. We are satisfied however, that this matter could be addressed in a project specific TIA. Nevertheless, it does raise concerns regarding the overall throughput capacity of any waste development and the degree of opportunity for co-location of facilities."

Again, this approach is consistent with an application of the presumption of soundness. The inspector ought to have required evidence and reached conclusions, particularly as the capacity of the local roads remained uncertain in being able to serve one or more types of waste management. Subsequent evidence in the planning application is said to show that there would be sufficient capacity. That has not been independently tested and in any event in relation to such an important aspect the inspectors should have made their own findings and should, if necessary, have required the requisite evidence to be produced. It might have shown that waste management either at all or beyond a particular limit or of a particular type was not suitable so that the plan could make that clear.

37. No assessment of nature conservation had been carried out. This was significant because of the proximity of a SSSI and the presence of Great Crested Newts, a protected species. The inspectors concluded that the newts could be catered for but that they be considered when any application for development was made. No particular assessment was at the stage with which this claim is concerned required, save that it had to be shown that the issue had been considered by SCC in putting forward its plans. There was evidence that it had. While this criticism, if it stood alone, would not persuade me to intervene, it also is consistent with the application of the presumption. It may be that without the presumption the inspectors would have gone into the question of nature conservation in greater detail.

38. The inspectors concluded that despite some defects, the site should be retained in WD2

and WD5. In IR 4.45 and 4.46 they said this:-

> "4.45 Against this however is the evidence of need for waste management sites, including for thermal treatment, the availability of the allocated site itself, and its broad compliance with national and regional policy in terms of its being an active mineral working.
>
> 4.46 In our view, none of the matters raised amount to an objection in principle, although all will need full assessment in connection with any planning and PPC applications."

The reference to its being an active mineral working is unfortunate since it suggests that the inspectors may have failed to place the necessary emphasis on its being a greenfield site. The mineral workings would gradually disappear with a need to restore. They said that, although any development would only be likely in Area 2, the whole site should be included in case the newt issue influenced the precise location of any development. While there must be matters of detail which can be left to be dealt with on an application for permission, I am persuaded that Mr Village is right in his submissions that the matters raised by him to which I have referred did require resolution by the inspectors and could have led to exclusion of the site from the plans.

39. Mr Village submitted that what he labelled the proximity principle had not been properly taken into account. There was much argument about whether it still exists and, if so, its extent. It is, however, common ground that it applies only to disposal and not to recovery. It requires that disposal takes place as near as possible to the source of waste. It is obvious that Clockhouse Brickworks is far away from the main source of waste. Incineration is capable of amounting to recovery but only if the generation of energy is the primary purpose of the incineration.

40. If the proximity principle should have been taken into account, there is considerable force in Mr Village's criticisms of the way in which the inspectors dealt with it. But I think there is a short answer to the main thrust of the criticism. The policies WD2 and WD5 refer specifically to other methods of dealing with waste than disposal. Thus any application for other than recovery should fail since it would not be in accordance with the plan.

41. The inspectors record in IR 3.13 an acknowledgement that the SWP 'is not generally presumptive about the type of waste technology that would be appropriate for any of the allocated sites'. Thus, they say "any attempt to identify whether a particular site is the most 'proximate' to its potential waste source would be spurious in our view". This approach cannot be valid for policy WD5 since the technology is specified. However, since the type of EfW must focus on the energy production so that it can properly be regarded as recovery, proximity may be less relevant. However, the inspectors seem to have thought that a process which did require proximity was contemplated in which case their approach

was flawed. And their assertion in IR 3.13 that a key element of PPS 10 (the guidance relating to waste treatment) to enable waste to be disposed of in one of the nearest appropriate installations had been met was only valid if it was assumed that nowhere closer was possible. Furthermore, the whole of their approach is on the basis that there must be incineration somewhere in Surrey. That assumption is not accepted by the claimant: an unsuitable site cannot be regarded as appropriate. Rather the possibility of incineration must be reconsidered. If the proximity principle is applicable, as the inspectors believed it was, their approach to it is in my view flawed as Mr Village submits.

42. I am conscious that I have not dealt with every point raised by Mr Village. As I have said, the crucial error was to apply the presumption of soundness. I have explained why I cannot accept Mr Drabble's submission that it did not affect the inspectors' ultimate recommendations. I do not in the circumstances think I need to deal specifically with all the matters raised. What I have said suffices to require me to allow this claim.

43. The inclusion of Clockhouse Brickworks in WD2 and WD5 must be quashed. I am aware that this may affect the overall validity of the SWP particularly as the inspectors' view was that the sites proposed were only just sufficient to meet the waste management needs, especially as most were in the Green belt and so subject to the usual planning constraints applicable to any development in the Green Belt. However, subject to any arguments counsel may wish to raise, I think that the consequential effect of quashing is a matter for SCC to deal with as it thinks appropriate.