

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2009

Before :

THE HONOURABLE MR JUSTICE WYN WILLIAMS

Between :

	THE FRIENDS OF BASILDON GOLF COURSE	<u>Claimant</u>
	- and -	
	BASILDON DISTRICT COUNCIL	<u>Defendant</u>
	- and -	
	BASILDON GOLF CENTRE LIMITED	<u>Interested Party</u>

Mr Jeremy Pike (instructed by **Messrs Tilbrook's Solicitors**) for the **Claimant**
Ms Galina Ward (instructed by **The Legal Services Department of the Defendant**)
for the **Defendant**
No appearance by or on behalf of the Interested Party

Hearing dates: 7 November 2008

Judgment

Mr Justice Wyn Williams :

1. The Defendant is the owner of the freehold interest in an area of land at Clay Hill Lane, Basildon in the County of Essex. For many years a golf course has existed upon the land. As I understand it, the course has been operated by the Defendant.

2. Some time prior to May 2005 the Defendant began considering the possibility of the course being operated by a commercial enterprise. A number of such enterprises indicated an interest. On 26 May 2005 the Cabinet of the Defendant met and considered a number of proposals. It resolved to approve what it described as a tender submission from the Interested Party and it authorised the Defendant's Manager of Corporate Property Services in consultation with the relevant Cabinet Member to approve the terms of a lease with the Interested Party.
3. On 7 April 2006 the Defendant and the Interested Party entered into an agreement for a lease of the land in question. By that date it was clear that the Interested Party proposed to make a planning application in respect of the land. I say that since the completion date specified in the agreement was defined as the date falling two months after the grant of planning permission to the Interested Party for its proposed development at the course.
4. On 22 March 2007 the Interested Party submitted a planning application. That application was submitted to the Defendant in its capacity as local planning authority.
5. The application so submitted was an application for full planning permission. The proposed development was described as:-

“Development of golf clubhouse, driving range, maintenance building, ancillary facilities and associated landscaping/ engineering work.”

6. The application was accompanied by a document entitled *“Design and Access Statement for Basildon Golf Centre”* together with a number of relevant plans. The Interested Party intended and the Defendant understood that some of the work described as engineering work involved remodelling areas of the course. That would involve the bringing on to the course waste material to be deposited thereupon.
7. It is also common ground that the Interested Party intended to develop the course in a more extensive way than was specified in the planning application. In summary, the Interested Party intended to undertake further remodelling of parts of the course.
8. The Document which accompanied the planning application records in its introduction that the proposals contained within the application were developed following consultation with council officers, councillors, planners, ecological groups, highways officers and other consultants. There is no reason to doubt that statement. Further, the Defendant, itself, commissioned an ecological assessment of the proposals which were being put forward by the Interested Party. In February 2007 the Defendant received a report, entitled *“Ecological Assessment Report”* from Entec UK Ltd, a company with the relevant expertise to provide such an assessment.
9. On the same day that the Interested Party submitted its planning application an officer of the Defendant produced a *“Screening Opinion”* (hereinafter referred to as *“an or the opinion”* (as appropriate). Such an opinion was a requirement of the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999

(hereinafter referred to as “the 1999 Regulations”) and its object was to consider whether an Environmental Impact Assessment (EIA) of the development was required. The officer in question was Mr Clive Simpson, the Manager of Planning Services, and he concluded that an environmental impact assessment was not required.

10. The Interested Party’s application for planning permission created opposition not least from many if not all of the persons who are now Claimants. Nonetheless on or about 15 October 2007 the Defendant granted conditional planning permission for the development which had been the subject of the Interested Party’s application.
11. In these proceedings the Claimants seek a quashing order in respect of that permission. They do so relying upon two discrete grounds although each ground contains a number of linked but nonetheless separate strands. Before dealing with each of the grounds in turn, I should record that the hearing of this challenge was unusual in procedural terms. First, it was unusual because I received oral evidence from Mr Simpson. As is very well known, oral evidence is a comparative rarity in judicial review proceedings. Nonetheless the Defendant did not object to the application made on behalf of the Claimants that Mr Simpson should give oral evidence and be cross-examined and I considered that there was no overriding objection to that course being followed. The second unusual feature was that it proved impossible to deal with both grounds of challenge during the course of the one day allotted for the hearing of the claim. In part, of course, that came about because a reasonably significant amount of time was taken up with Mr Simpson’s oral evidence. In any event the parties were content to adopt a suggestion made by me which was to the effect that the first ground of challenge should be the subject of oral argument but that the second ground should be dealt with by reference only to written submissions made on behalf of the Claimant and Defendant.

Ground 1

12. Regulation 3 of the 1999 Regulations prohibits the grant of planning permission in respect of an EIA application unless the local planning authority has first taken into account the necessary environmental information. An EIA application is defined to mean an application for planning permission for EIA development. EIA development means development which either falls within Schedule 1 to the 1999 Regulations or it is development within Schedule 2 and is likely to have significant effects on the environment by virtue of factors such as its nature size or location.
13. The Interested Party did not submit an environmental statement at the time it submitted its planning application. As I have said, however, the Defendant, through Mr Simpson, produced an opinion which considered the issue of whether or not such an environmental statement was necessary.
14. It is common ground between all the parties that Mr Simpson needed to address his mind not just to whether the application before him was such that an environmental statement was necessary. He also needed to consider whether or not the application taken together

with the further development which was contemplated at the golf course required the provision of an environmental statement. (see **R vSwale BC ex parte RSPB** [1991] 1 PLR 6. The case for the Claimants is that Mr Simpson considered only whether or not the application before the Defendant fell within the Schedule to the Regulations and, therefore, he erred in law in his approach to whether or not an environmental statement was required.

15. The opinion produced by Mr Simpson is succinct. Nonetheless, in my judgment, it is clear from its terms that it constitutes a consideration not just of the planning application itself but also the further and future development contemplated at the golf course. In my judgment the first paragraph of the opinion is capable of no other interpretation. I quote:-

“This screening opinion relates to proposals to carry out alterations to Basildon Golf Course. The proposals comprise the provision of a golf driving range and new clubhouse and associated landscaping and engineering works. The associated works will involve the importation of inert material to remodel areas of the existing golf course by creating landscaped, bunds and mounds. The development is to be undertaken in two phases and the first application deals with only with the first phase. A subsequent application will be submitted for the remodelling of the remainder of the course. However, in accordance with the Regulations this screening opinion will consider the impact of all the proposed works”.

16. Notwithstanding the detailed and persuasive submissions of Mr Pike in my judgment this paragraph is capable of only one meaning namely that. Mr Simpson was considering not just the application before him but rather the overall development at the golf course.

17. If support for this interpretation of the paragraph is necessary it can readily be obtained from a later paragraph within the opinion. As will become apparent one of the controversial aspects of the development at the course is the importation of waste onto site so as to provide material for the remodelling of the course. In the opinion Mr Simpson wrote:-

“In this case the inert material is being brought to the site to create the landscaped mounds and not as a waste of operation. The total amount inert material to be brought to the site will be less than 50,000 tonnes per year for all phases of the development.”

The phrase “*for all phases of the development*” naturally and sensibly refers to all the development anticipated to take place at the golf course as opposed to the development specified in the particular planning application. That is especially so when the phrase is read in the context of the opening paragraph of the opinion as set out above.

18. I appreciate that Mr Pike has available to him a forensic point which is not without some significance. In the Defendant’s response to the letter before claim it stated:-

“.....I have enclosed a copy of the Screening Opinion. The Screening

Opinion sets out the Council's views as to whether an Environmental Impact Assessment would be necessary in relation to the first phase of the Development. It concludes that an Environmental Impact Assessment would not be required. I trust that this now deals with this head of challenge”.

19. It is not for me to speculate about why the Defendant's letter is written in the terms quoted. I have received no evidence on the point from the author and, in all probability, it would not be appropriate to receive such evidence.
20. The plain fact is that I regard the terms of the opinion to be clear and unambiguous and, to repeat, the terms are such so as to make it clear that Mr. Simpson considered all aspects of the proposed development at the course.
21. In the Skeleton Arguments and during the course of the oral hearing there was a significant debate about whether or not evidence from Mr Simpson was admissible in order to ascertain whether or not he had considered all phases of the development. In the light of my conclusion upon the meaning of the opinion the debate is rendered futile. On balance, however, I would have been prepared to receive evidence from Mr Simpson as to the meaning of the opinion. In my judgment, the issue as to the meaning of the opinion only became “live” as a consequence of the letter written by the Defendant in response to the letter of claim. In those circumstances it seems to me to be permissible for the author of the opinion to clarify what he meant. The evidence is legitimate elucidation and, therefore, admissible. (see **B v LD Merton [2003] EWHC 1689 (Admin) para. 42**).
22. I turn to the other bases upon which the Claimants submit that the Defendant erred in law in relation to its opinion. The Claimants first submit that the Defendant (in the person of Mr Simpson) could not lawfully have come to a decision on the question of whether an environmental statement was a necessary requirement for the development as a whole since it simply did not have sufficient information to make that judgment.
23. It seems to me that the principles upon which I should act in resolving this issue emerge clearly from the decision of Ouseley J in **Younger Homes (Northern) Limited v Secretary of State [2003] EWHC 3058 (Admin)**:

“59.....The principal point which emerges from the authorities cited is that the question of whether a local planning authority has sufficient information in order to be able to reach a proper judgment on its screening opinion is a matter for the relevant decision maker whose view is challengeable only on normal judicial review grounds. It is very much a matter of planning judgment, which depends on the facts of the given case. It may not therefore be very persuasive to take the circumstances of one caseand to try to use it as a measure by which other cases had been judged.

60. *What was said in [R(Jones) v Mansfield District Council [2003] EWHC Civ 1408] is particularly apposite: the planning authority must have sufficient information to be able to reach the relevant conclusion; it is not necessary that all uncertainties be resolved or that a detailed and comprehensive assessment*

be made of impacts at the screening opinion stage. That stage cannot turn into something equivalent to the environmental statement itself. An understanding of where the uncertainties lie and the likely range of those uncertainties may be necessary in order to be satisfied that the development is not likely to have significant environmental effects. The nature and range of the uncertainties may make it impossible to reach the conclusion that development is not EIA development. Equally, it is possible to have sufficient information for reaching a decision on the screening opinion, even though there are uncertainties and further surveys are required for the final decision on the development permission..... It may well be possible in any given case to conclude that it is unlikely that uncertainties will be resolved in such a way as to yield a significant environmental effect. The availability of standard conditions or other straight forward and obvious remedial measures may well bite on that conclusion as well.

61.

62. Indicative material can assist in judging whether the range of uncertainties is so great that a planning officer has insufficient knowledge to judge whether there are likely to be significant environmental effects or whether there are some site layouts or designs for which it can be said that they would be likely and then likely to have significant effects. The planning officer will also be able to make a judgment about the degree to which standard conditions can at that stage be envisaged as sufficient to make unlikely those developments layouts or components which would be likely to have significant environmental effects.”

24. With these principles firmly in mind I turn to deal with the salient points in this case. I deal firstly with the terms of the opinion itself.
25. It is clear from the opinion that Mr Simpson anticipated that the further development to which he had to have regard was the re-modelling of the remainder of the course. He considered whether that development (together with the development described in the planning permission) constituted development within Schedule 1 or 2 of the 1999 Regulations.
26. Mr Simpson correctly concluded that no Schedule 1 development was proposed. Mr Simpson next considered whether any of the types of development specified in Schedule 2 were the subject of the planning application or the further development. He identified two potential categories as those which he needed to consider.
27. The first category identified was development consisting of “*installations for the disposal of waste.*” Such development falls within Schedule 2 if (i) the disposal is by incineration or (ii) the area of the development exceeds 0.5 hectare or (iii) the installation is to be sited within 100 metres of any controlled waters.
28. In the instant case there was no suggestion of disposal on site of waste by incineration

and, further, there was no suggestion of waste being installed within 100 metres of any controlled waters. The focus of any concern, therefore, was the area upon the golf course upon which waste might be deposited.

29. In relation to this issue Mr Simpson considered Circular 02/99 entitled “*Environmental Impact Assessments*”. Under the heading “*Installations for the disposal of non-hazardous waste*” the Circular contains the following guidance:-

“A36. The likelihood of significant effects will generally depend on the scale of development and the nature of the potential impact in terms of discharges, emissions or odour. For installations (including landfill sites) for the deposit, recovery/or disposal of household, industrial and/or commercial wastes (as defined by the Controlled Waste Regulations 1992) EIA is more likely to be required where new capacity is created to hold more than 50,000 tonnes per year or hold waste on a site of 10 hectares or more. Sites taking smaller quantities of these wastes, sites seeking only to accept inert wastes (demolition rubbles etc) or Civic Amenity sites, are unlikely to require EIA.”

30. In his opinion Mr. Simpson quoted part of this guidance and concluded:-

“The inert material is being brought to the site to create landscaped mounds and not as a waste operation. The total amount of inert material to be brought to the site will be less than 50,000 tonnes per year for all phases of the development.”

31. On that basis Mr Simpson concluded that the proposed development was not development within Schedule 2 of the 1999 Regulations.

32. In my judgment a fair reading of Mr Simpson’s opinion thus far is that he considered there to be two bases upon which the proposed development was unlikely to fall within Schedule 2. One was that the material to be brought onto the golf course was inert waste. The second reason was that the total amount of material would be less than 50,000 tonnes per year for all phases of the development.

33. Mr Simpson now acknowledges that his assessment that the total amount of inert material to be brought onto the course would be less than 50,000 per year for all phases of the development was erroneous. He further acknowledges that the total amount of waste to be brought on to the course in respect of the development as a whole was 312,000 cubic metres and that the phase of development subject to the application for planning permission would generate 120,000 cubic metres. He makes these admissions in the witness statement which he made for the purposes of these proceedings on 24 October 2008 (his third witness statement). To this extent, as Mr Pike points out, the opinion contains an error and Mr Pike further submits that the error is obviously material.

34. I accept that the error in question was capable of being material in the assessment which Mr Simpson made to the effect that the development did not fall within Schedule 2 of the

Regulations. However, as I have said, Mr Simpson concluded that the development was within Schedule 2 not just on the basis of his estimate of the amount of material to be brought to site. He also based his conclusion upon the fact that the material was inert. On that issue, as I understand it, there is no suggestion that he made a mistake.

35. It seems to me that Mr Simpson was perfectly entitled to reach the conclusion that the bringing of inert material onto the golf course was not an operation which was likely to require EIA. The fact that he also erroneously concluded that less material was to be brought to site than was actually the case cannot, in my judgment, vitiate his first conclusion.
36. In the light of the foregoing analysis, therefore, the opinion contains a valid reason for the conclusion reached that no EIA was required.
37. That, of itself, does not necessarily mean that Mr Simpson had sufficient information before him upon which to make a proper planning judgment.
38. The information which was taken into account, according to Mr Simpson, is set out in paragraphs 10 to 14 of his witness statement dated 13 May 2008. Am I entitled to have regard to that witness statement in deciding upon whether that information was available to Mr Simpson and taken into account by him when composing his screening opinion? In my judgment the answer to that question is yes. I say that essentially for the reasons advanced by Ms Ward in paragraph 30 of her written Skeleton Argument. The issue now under consideration was raised for the first time after the issue of proceedings. There is no obligation to refer in the opinion itself to all of the information relied upon or, indeed, to identify each and every one of the documents considered (see **R(Anderson) v York CC [2006] ENVLR 11** at paras. 34-36).
39. On the basis of Mr Simpson's witness statement it is clear that he took into account the following material in reaching the view expressed in the opinion. First, his discussions with representatives of the Interested Party; second, information gained on visits to other golf courses operated by the Interested Party or its associates and his assessment of the environmental impact of work carried out at those courses. Third, and importantly, a plan which showed all of the proposed alterations to the golf course in the instant case. Fourth the detail of the work which was to be carried out during the first phase of the development and all of the documents accompanying the planning application and fifth the ecological report to which I have referred together with two earlier studies of wildlife on site covering the entire golf course. Accepting, as I do, that Mr Simpson had those sources of information and also took them into account in reaching his decision it does not seem to me to be possible to conclude that his view that he had sufficient information to form a proper planning judgment about all phases of the development was irrational or unreasonable in the **Wednesbury** sense. Accordingly, in my judgment, this ground of challenge must fail.
40. The opinion was written on 22 March 2007. Following receipt of the planning application the Defendant invited observations from a number of consultees. One such consultee was

Natural England. The relevant part of its response was as follows:-

“Proposal: 0700373/Full Construction of new clubhouse and maintenance shed and development of a golf driving range”

Thank you for consulting Natural England on the above proposal

...we consider that this proposal in isolation will not have a significant effect on the interest features of Basildon Meadows SSSI. However, we are aware that this application linked to the developer’s aspirations to develop a much larger area of the golf course. The impact of this larger scale of the development, including the proposals within the current application, would be likely to result in significant adverse impact upon Basildon Meadows SSSI.. These impacts would include significant hydrological change as a result of landscaping and air pollution impacts caused by increased road traffic”

The letter goes on to state that Natural England would object to the wider two-stage development.

41. Mr Pike on behalf of the Claimants, submits that this representation, coming as it did, from the statutory adviser on nature conservation matters should have been taken into account by the Defendant in relation to its decision that the development scheme as a whole did not require EIA. It was not taken into consideration at the time the opinion was written – self evidently given that the consultation response from Natural England had not been received. Mr Pike submits, however, that the representation from Natural England as to the effect of the wider scheme and, by implication, the need for EIA in relation to that wider scheme, was a consideration of such materiality that the Defendant should have addressed its mind to the point after receipt of the response. He submits that a reasonable local planning authority would have concluded in light of that representation that EIA was required in relation to the scheme as a whole. Alternatively, he submits at the very least that the Defendant erred in law in failing to consider whether, in the light of the letter from Natural England, its earlier opinion remained correct.
42. Two decisions at first instance militate against the suggestion that the Defendant should have considered the opinion afresh in the light of the response from Natural England. In **R (Fernback) v Harrow LBC [2002] EnvLR 10** the local planning authority adopted a screening opinion that proposed development was not development requiring an EIA under the 1999 Regulations. About a year later it granted planning permission for the proposed development. Local residents challenged the legality of the planning permission and one of the grounds advanced was very similar to the ground now under consideration. The Claimants in **Fernback** maintained that additional material had become available to the council at the time of its decision to grant planning permission which ought to have caused it to consider whether the development was EIA development and, further, to conclude that it was and that therefore it was precluded by the 1999 Regulations from granting permission in the absence of an environmental statement. Those submissions were the subject of vigorous debate before Richards J (as he then was) who set out his conclusions

at paragraph 50 of his judgment. I quote:-

“50. I can express my conclusions as follows:

(i) The fundamental provision in the 1999 Regulations is the prohibition in Regulation 3 on the grant of permission pursuant to an EIA application without taking into consideration the relevant environmental information. The other provisions of the Regulations should be read in such a way as to ensure that the planning authority is not required to grant permission without consideration of the relevant environmental information if it considers that the development is an EIA development and the Secretary of State has not taken a contrary view.

(ii) The screening provisions in Part II provide a procedure for determining whether a development is an EIA development and therefore whether an application is an EIA application. They are not, however, expressed to lay down an exhaustive procedure and specify the extent to which they are determinative for the purposes of the Regulations. By regulation 4(1) – (3) a planning authority’s screening opinion to the effect that a development is EIA development (a positive screening opinion) is determinative in the absence of a contrary screening direction by the Secretary of State. A screening opinion to the effect that the development is not an EIA development (a negative screening opinion) is not said to be determinative even in the absence of a screening direction by the Secretary of State. By contrast a screening direction by the Secretary of State is said to be determinative either way, i.e. as to whether development is or is not EIA development. It seems to me that the difference as between the position of the planning authority and that of the Secretary of State cannot be explained simply by the overriding nature of the Secretary of State’s screening direction, since that consideration applies equally to positive as to negative screening of opinions. In my view the regulations have left deliberately open the possibility that the planning authority, having given a negative screening direction, may subsequently determine that the development is nonetheless an EIA development.

(iii) There is, however, no power to adopt a further screening opinion in the absence of a request from the proposed developer. The procedure is for an opinion to be adopted in response to a request under regulation 5, with a possibility of a request to the Secretary of State under regulations 5(6) and 6 for a screening direction if the planning authority fails to adopt an opinion or adopt a positive opinion. The Secretary of State is also given the express power by Regulation 4(7) to make a screening direction without a request. Existence of that express power tells very strongly against the implications of the corresponding power for a planning authority to adopt a screening opinion without a request.

(iv) Regulation 7(1) does not apply where a negative screening opinion has already been given.

(v) Regulation 7(2), however, can apply whether a negative screening opinion has already been given. Since the negative screening opinion is not determinative, it is open to an authority to form the view that an application before it is an EIA application notwithstanding an earlier negative opinion, and to notify the Applicant that an environmental statement is therefore required. A change of mind would be at risk of challenge on ordinary public law grounds in the absence of good reasons for it (although the applicant would have the alternative avenue of requesting a screening direction from the Secretary of State). But in an appropriate case a change of mind might be justified by change in circumstances since the date of a screening opinion.....

(vi) By Regulation 7(3), however, any notification under Regulation 7(2) must be made within three weeks from the receipt of the application or such longer period as may be agreed in writing with the Applicant.....

(vii) Whether or not I am right in relation to the applicability of Regulation 7(2), the power of the Secretary of State under Regulation 4(7) to make a screening direction without any request from the developer provides a fallback position, as I think all parties accepted. It means that, if the Council took the view its negative screening opinion was no longer appropriate, it was at least open to it to seek the making of a screening direction that the development was EIA development.

(viii) Accordingly the negative screening opinion was not necessarily the end of the matter. One way or another the council did have the power to do something about it if, in the light of further information, it took the view that the development was after all an EIA development.

(ix) I do not consider, however, that the Council was under any **duty** to consider the matter further. The matter had already been given express consideration at the time of adoption of the screening opinion. There was no express duty under the Regulations to reconsider it at the time of determining the planning application, and in my view there is no need to imply such a duty: the circumstances differ from those in which an implied duty of Secretary of State was found in *Barkeley v Secretary of State* [2000] WLR 429H -430D. Further there is no request by anybody for the matter to be reconsidered, nor any suggestion that the development was after all an EIA development. The circumstances were not materially different from those at the time of the negative screening opinion. If the matter was as obvious as the Claimants now contend, then it is remarkable that it was not raised by any of the objectors at the time.

(x) In circumstances where the Council adopted an unchallenged negative screening opinion and was under no duty to reconsider it, I do not think that it is open to the Claimants now to challenge the substance of the Council's view that the development was not an EIA development

43. In my judgment I should depart from the reasoning of Richards J only if I was convinced that he was wrong. Far from considering that his analysis is wrong I can think of no basis upon which I should disagree with his views. His understanding of the law has been extant, now, for some years and not challenged hitherto so far as I am aware.
44. In his Written Skeleton Mr Pike refers to the decision of Elias J in **R (Anderson) v York CC [2006] EnvLR 11**. In paragraph 29 of his judgment Elias J expresses the view that it is “*also established that a screening opinion is final*”. Mr Pike cites this passage not to rely upon it but, quite properly, to point to a further obstacle in his path.
45. In my judgment the expression to the effect that a screening opinion is final as used by Elias J is to be read in the context of the analysis undertaken by Richards J in **Fernback**. For my part I make it clear that I base my judgment on the analysis in **Fernback**.
46. Adopting the approach of Richards J in **Fernback** there can be no basis to conclude that the Defendant was under a duty to revisit the opinion. There is no suggestion that the Interested Party made any request of the Defendant to revisit its screening opinion in the light of the views of Natural England.
47. Mr Pike submits that the judgment of Richards J should be considered in the light of the decision of the House of Lords in **R v Bromley LBC ex parte Barker [2006] 3 WLR 1209**. This case focused upon the need for EIA at the reserved matters stage following the grant of outline planning permission. In my judgment, nothing contained within the speech of Lord Hope casts doubt upon the analysis of Richards J in **Fernback**. Indeed, Lord Hope makes no reference to that decision in his speech. I am equally of the view that nothing said in **R v South Cambridgeshire DC ex parte Kides** [2002] EWCA Civ 1370 impacts upon the judgment in **Fernback**.
48. I add for completeness that the opinion identified development as a golf course as being the second potential type of development within Schedule 2. Having identified the possibility, Mr. Simpson did not deal with it further in the opinion but it is not suggested that he fell into any legal error in that respect – no doubt for the good reason that a golf course already existed on the land which was the subject of the planning application.

Ground 2

49. The Defendant admits that:- (a) it did not consult Essex County Council before granting planning permission to the Interested Party; (b) it did not consider the policies relating to waste within the Statutory Development Plan (the SDP) prior to the grant of permission and, therefore (c) it did not consider whether the proposed development was a departure from the SDP in respect of waste policies.
50. The Claimants submits that those failures render the grant of planning permission

unlawful. Additionally, however, the Claimants submit that the Defendant did not “address its mind” to whether or not the planning permission sought by the Interested Party was one which should be determined by the county planning authority, Essex County Council, as opposed to itself. I begin this section of my judgment with a consideration of this latter point.

51. Town and Country Planning (Prescription of County Matters) (England) Regulations 2003 provide, so far as relevant, as follows:-

“1.....

2. The following classes of operations and uses of land are prescribed for the purposes of paragraph 1(1)(j) of Schedule 1 of the Town and Country Planning Act 1990:-

(a)(i) the use of land;

(ii) the carrying out of building, engineering or other operations; or

(iii) the erection of plant or machinery used or proposed to be used, wholly or mainly for the purposes of recovering, treating, storing, processing, sorting, transferring or depositing waste;

(b) the use of land or the carrying out of operations for any purposes ancillary to any use or operations specified in paragraph (a) above, including the formation, laying out, construction or alteration of the vehicular access to any public highway.”

The fact that the operations described in the Regulations are prescribed under paragraph 1(1) (j) of Schedule 1 to the 1990 Act means that the relevant planning authority for the purpose of determining a planning application is the county planning authority.

52. There is no contemporaneous document which shows whether or not the Defendant considered whether Essex County Council, as the County Planning Authority, was the appropriate planning authority in respect of the instant application. Nonetheless in his witness statements Mr Simpson has asserted consistently that he considered the matter, discussed it with other planning officers and reached a conclusion that the instant application was not a county matter.
53. Mr Simpson gave oral evidence about this issue. He maintained the position that he had considered whether the Interested Party’s planning application was a county matter and, after discussion with other planning officers, concluded that it was not.
54. In his written submissions of 14 November 2008 Mr Pike makes a number of detailed

criticisms about the quality of some of the details of Mr Simpson's evidence. He points, in particular, to the fact that the predicted importation of waste as described in the Screening Opinion was erroneous and yet Mr Simpson claimed in oral evidence that he was aware of the actual likely volume of importation at all material times. In this context Mr Pike also refers to a letter dated 2 May 2007 (two months after the date upon which the application for planning permission was made) in which the Defendant's case officer in respect of the application, Ms Van Houten, was asking the Interested Party for clarification about the scale of importation of waste material. Mr Pike submits that it is implausible to suggest that Mr Simpson knew the correct figures but that the case officer needed to ask the Interested Party for clarification of the true position. It is also submitted that that it is surprising that there is no shred of contemporaneous documentary evidence which demonstrates that proper consideration was given to whether or not the application should be dealt with by Essex County Council as opposed to the Defendant - a point which I accept without much difficulty.

55. All that said I am not prepared to make a finding that Mr Simpson deliberately sought to mislead me. That would be a very harsh judgment upon a senior public official and, in my judgment, is not justified by reference to the forensic points which I have set out above and the further forensic points which are contained within paragraphs 2 and paragraphs 8 to 17 of Mr Pike's written submissions.
56. Ultimately it has become necessary for me to make a judgment about the credibility of Mr Simpson. I have compared the consistency of his oral evidence with that of his written evidence; I have taken due account of Mr Pike's cogent and detailed submissions about the state of the evidence and, inevitably, I have formed an impression on Mr Simpson having seen him subject to detailed cross-examination over some time. To repeat I am not prepared to conclude that his oral evidence before me was a deliberate attempt to mislead me about whether or not due consideration was given to whether the planning application should be dealt with by the county planning authority or by the Defendant.
57. Accordingly, I find as a fact that the Defendant did "address its mind" to whether or not the planning application should be considered by the Defendant or Essex County Council.
58. In reaching this conclusion I have also had regard of the likely probabilities in this case. As Mr Pike himself submits in his Skeleton Argument of 23 October 2008 the question of whether the development was a waste development was a "principal important controversial issue". The phrase "principal important controversial issue" is taken from the speech of Lord Brown in **South Buckinghamshire District Council v Porter [No.2]** [2004] 1 WLR 1953. That being so it seems to me to be highly improbable that a very experienced planning officer would have failed to consider whether or not the application was one to be dealt with by the county planning authority as opposed to the Defendant.
59. In his written submissions of 14 November 2008 Mr Pike invites me to conclude that if the Defendant did form a concluded view about whether or not the planning application was to be dealt with by Essex County Council it was doing so (through Mr Simpson) on the basis of a manifestly erroneous factual matrix. Mr Pike submits that the Defendant:-

“..... could not have rationally formed the conclusion on the basis of its understanding, or lack of understanding, of events. Any such decision was in the circumstances perverse or irrational.”

60. In support of this submission Mr Pike relies upon the difference between the importation figure contained within the Screening Opinion and the actual rate of importation predicted; he relies upon Mr Simpson’s understanding (or lack of it) of two plans C1 and C2 which were in his possession at the material time and relies, further, upon a factual issue about whether or not the Interested Party would be likely to install a crusher on site – in this context pointing to apparent conflicts in the evidence.
61. Ms Ward submits that there is a simple and definitive answer to the challenge based on rationality. The test which Mr Simpson had to consider was whether the application was “wholly or mainly for the purposes of recovering, treating, storing, procession, sorting, transferring or depositing of waste” or was ancillary to such use. Mr Simpson took the view that the main purpose of the application was the improvement of a golf course. She submits that there can be no challenge to the rationality of that appraisal on the facts of this case.
62. I agree with the submission of Ms Ward. It seems to me that I must ask the question whether or not the whole of the information available to Mr Simpson could reasonably and rationally lead him to the view that this was an application for the improvement of a golf course as opposed to an application within the 2003 Regulations. While I accept that errors relating to the important features of an application may lead to an irrational or unreasonable appraisal of an application I do not think this is such a case. It does not seem to me that if due allowance is made for the increased importation of waste over that which is specified in the Screening Opinion, if due allowance is made for the fact that the earth mounds to be created might be higher than demonstrated in one of plans considered by Mr Simpson and even if one takes into account the possibility of a crusher being positioned on site Mr Simpson’s opinion as to the true nature of this planning application cannot be categorised as irrational or unreasonable.
63. I turn to the other threads of this ground of challenge. As I have said it is common ground that the Defendant did not consult Essex County Council before planning permission was granted. Was that failure to consult unlawful?
64. There is no suggestion that there is any statutory duty placed upon the Defendant to consult a county planning authority in a case of this sort particularly, as here, when the planning authority assuming jurisdiction over the application has made a decision that it is the local planning authority as opposed to the county council. Mr Pike submits that the county planning authority had an expectation that it would be consulted. No doubt the county council did expect to be consulted upon this application and, further, it may very well be that applications of this type are often if not invariably referred to the county planning authority for an expression of view about (a) whether the county should determine the application and (b) the merits of the application.
65. The fact that the county planning authority expected to be consulted does not mean that a

failure to consult the authority is a ground for saying that the planning permission granted without such consultation was unlawful. To repeat, no statutory duty exists upon the Defendant to consult the County Council. Mr Pike has referred me to no authority for the proposition that a failure to consult in circumstances such as these renders a planning permission granted unlawful. He does not go so far as to submit that the county council had a “legitimate expectation” that it would be consulted in the sense that phrase is used in public law. If, as I have found, the Defendant was entitled to conclude that it was the relevant local planning authority it was entitled to exercise its own planning judgment about whom it should consult – absent any legal provision which mandated a consultation with any particular party.

66. I agree with Ms Ward that the Defendant’s acknowledged failures to consider the waste policies in the SDP and/or whether the application constituted a departure from those policies cannot be a successful ground of challenge given the conclusions which I have reached hitherto in this section of my judgment. Having concluded, reasonably and rationally, that the application before it was for the improvement of a golf course, the Defendant was also entitled to conclude, as a matter of planning judgment and reasonably and rationally that policies within the SDP as they related to waste operations were not relevant. That being so I refrain from considering whether Mr Simpson’s subsequent assessment that the planning application did not conflict with the material aspects of the policies on waste in the SDP was one which was reasonably open to him.

Conclusion

67. For the reasons expressed above this challenge fails. However I would like to record the fact that I have scrutinised the points made by the Claimants anxiously not least because the Defendant had a commercial interest – albeit a legitimate one – in the outcome of the planning application. In those circumstances, obviously, a Court is anxious to ensure that a planning authority has not abused its position. In this case I can well understand why the Claimants were anxious about the decision to grant planning permission – an anxiety which would not have been assuaged by the lack of documentation to demonstrate that the Defendant had given proper consideration to whether or not it was the appropriate planning authority. However having considered the grounds of challenge with care I do not consider that the Defendant engaged in any conduct which was unlawful.