



Neutral Citation Number: 2009 EWHC 1227 (Admin)

Case No: CO/2820/2008

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**ADMINISTRATIVE COURT SITTING AT MANCHESTER**

Before :

**HIS HONOUR JUDGE WAKSMAN QC**  
**(sitting as a Judge of the High Court)**

Between:

**THE QUEEN**  
**(on the application of SIMON WOOLLEY)**

**Claimant**

and

**CHESHIRE EAST BOROUGH COUNCIL**

**Defendant**

and

**MILLENNIUM ESTATES LIMITED**

**Interested Party**

Richard Harwood (instructed by DLA Piper, Solicitors) for the Claimant  
Martin Carter (instructed by Cobbetts LLP Solicitors) for the Defendant  
The Interested Party did not appear and was not represented

**Hearing dates: 21 and 22 May 2009**

## **Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Waksman QC :

## **INTRODUCTION**

1. This is the hearing of a substantive application for judicial review of the grant of planning permission by the Defendant, now known as Cheshire East Council (“the Council”) for the demolition of a property known as Bryancliffe in Wilmslow, Cheshire and its replacement by a larger property consisting of 3 apartments. The planning permission itself was granted on 15 February 2008. That followed a resolution of the Council’s Planning Sub-Committee to grant permission subject to conditions and the making of a s106 agreement, on 24 October 2007.

## **BACKGROUND**

2. The site in question abuts land running down to the River Bollin. See the plan at p261 of the Bundle and the photographs at pp148-153. The area surrounding the river is a designated Area of Special County Value (ASCV) although the site itself is not. The site was largely hidden from the river by a row of mature trees. The developer which bought the site in 2003 (“Millennium” the Interested Party in this case) cut down those trees shortly after acquisition. They were not protected and it was entitled to do so.
3. Millennium first applied for planning permission on 15 April 2005 but it was refused on 15 June. On 9 October 2006 a planning appeal against that refusal was dismissed by the Inspector. A second application was made on 22 December 2006 but later withdrawn after an adverse committee report. A third (and the ultimately successful) application was made on 16 August 2007. On 25 September, the Claimant in this case, the owner of an adjoining property called Bollinholme made representations through his solicitors. On around 14 October, the operative planning officer’s report was produced for consideration by the Planning Sub-Committee on 24 October.
4. After the Planning Sub-Committee promulgated its resolution of 24 October, Mr Woolley’s solicitors sent a pre-action protocol letter to the Council dated 7 November 2007, threatening judicial review unless its resolution was set aside and the matter returned to the Planning Sub-Committee. This was refused and the formal planning decision letter of 15 February 2008 later followed.
5. In very broad terms, the reason why the appeal failed in 2006 was because the Inspector found that the view of the proposed property from the river (unmasked by trees) was an unacceptable visual intrusion onto the ASCV. Millennium had proposed the planting of trees so as (once more) to mask the property but because of the then layout and location of the flats, the Inspector held that the owners were likely subsequently to obtain permission to remove them.
6. It was also the case before the Inspector that a small bat roost had been found at the existing property. A bat assessment (divider 13) dealt with the evidence

as to the existing roost and put forward proposals for adequate mitigation compensation and enhancement for the local bat population. The Inspector found that the proposal would not result in significant harm to biodiversity interests as set out in paragraph 1 of national policy statement PPS 9.

### **THE PLANNING OFFICER'S REPORT**

7. The report referred to the land lying to the North of the site as within the Bollin Valley where special conservation policies applied and also within the Green Belt and an ASCV. The key issues concerned the impact on the visual amenity of the Bollin Valley, the impact on protected trees at the site and the impact on the neighbours' residential amenities. It noted that Millennium had now improved the siting, design and orientation of the new building and had also proposed a wider tree belt along the northern side of the site. It had also amended the bank profile to raise the height of the bank to form an even slope.
8. The existing villa was itself an intrusive urban feature visible from the Bollin River. The new building would be significantly larger than Bryancliffe in terms of footprint mass and scale and would be 1-2 metres higher although 4 metres further away from the valley bank than Bryancliffe. The new building would have a significant visual impact on the valley until the proposed tree belt matured sufficiently to screen and filter views.
9. At p6 the report stated that the most relevant structure and local planning policies included a list of various numbered policies. The Inspector's report on the appeal on the previous planning refusal was said to be a significant material consideration. At p7 the Inspector's concern at the visual intrusion of the proposed new apartments was set out in detail. He had concluded that due to its elevated position the development would be an unduly prominent urban intrusion and that its "unacceptably urbanising effect on the open rural character and visual amenities of the Bollin Valley" was in conflict with SP Policies R2, GEN 3 and NE 1 among others. As already noted he also found that the proposed tree planting plan before him would not provide a solution.
10. The report noted that the main improvement now was that the new building would be set further back from the valley allowing a belt of woodland to be planted and the regrading to the embankment would increase the height of the planting. The result of the resiting of the apartments meant that any new trees would not be under threat of removal by future residents.
11. Although the new building would be much more prominent than the existing one, it would become gradually screened over the 20 years it would take for the new trees to be fully established. At that point the resulting view from the Bollin Valley would be improved from the existing situation. Hence "the main issue for members to determine is whether the potential longer-term improvements outweigh the harm to the visual amenities of the Bollin Valley that would result in the earlier years following development."

12. The report concluded thus: “Taking into account all representations made, the proposed development is considered acceptable in terms of design the impact on the living conditions of the occupiers of adjoining property the impact on housing supply in the Borough, the interests of nature conservation the impact on protected trees and highway considerations. It is also considered though, that the proposed development will introduce an intrusive building into the landscape when viewed from the Bollin Valley which is characterised by its wooded sides and limited views of buildings. However, on balance, subject to the introduction of a comprehensive and long term landscaping plan, it is considered that the negative impacts of the development can be adequate mitigated and hence overcome the concerns with the previously dismissed appeal. The application is therefore recommended for approval.”
13. The report also said that a condition would have to be imposed to secure a method statement concerning the mitigation for the bats.
14. I will deal with other aspects of the report, in context, below.
15. The Council agreed with the recommendation in the report on 24 October, as noted above. It delegated the matter to the Corporate Manager Planning and Development for approval subject to the completion of a s106 agreement to include reference to the fact that any planting must take place prior to the commencement of building works and the conditions set out in the report.

#### **THE PRESENT POSITION**

16. It is common ground, for the reasons set out below, that where demolition was proposed in relation to a site containing a bat roost a licence from Natural England was required. Such a licence was acquired by Millennium on 16 July 2008. In August 2008, it demolished the old building. But in January 2009 it went into administration. So there is now, no longer, any intrusive urban view impacting upon the valley of the River Bollin. The site with the benefit (or otherwise) of the now-challenged planning permission is currently up for sale. The administrators took no part in this hearing.

#### **THE ISSUES GENERALLY**

17. The planning permission is challenged on a total of 7 grounds. I deal with each in the order taken by Counsel at the hearing. It is common ground that subject to the decision of the House of Lords in *Berkeley v SSE* [2001] 2 AC 603, dealing with obligations under EC law, if the permission is found by me to have been unlawful in any way, then it should be quashed provided that the outcome, if there had been no unlawfulness, may or might have been different. Mr Woolley does not have to show that it necessarily, or even probably, would have been. See *Simplex v SSE* (1989) 57 P & CR 306, 327. That deals with the hypothetical position at the time of the original permission. If there might have been a difference at that time, however, Mr Harwood for Mr Woolley accepted that he would also have to show that there might also be a difference if the Council were to make a fresh decision now. There was no issue about

that. Mr Carter for the Council conceded that it might well have done, which is hardly surprising given the change of circumstances referred to above.

18. I deal with the EC law aspect of this in the context in which it arises, Ground 1, to which I now turn.

## **GROUND 1: FAILURES IN CONNECTION WITH THE EC HABITATS DIRECTIVE**

### **Legal Materials**

19. Art. 12 (1) of the EC Habitats Directive requires Member States to take requisite measures to establish a system of strict protection of certain animal species prohibiting the deterioration or destruction of breeding sites or resting places. It is common ground that the pipistrelle bats who had their roost at Bryancliffe are so protected. Art. 16 then provides that if there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species at a favourable conservation status in their natural range, then Member States may derogate “in the interests of public health and public safety or for other imperative reasons of overriding public interest, including those of a social and economic nature and beneficial consequences of primary importance for the environment” among other reasons.
20. All derogations have to be reported to the European Commission every two years and in *Commission v Finland* C-342/05 the ECJ held that Member States were to ensure that all action affecting the protected species was authorised only on the basis of decisions containing a clear and sufficient statement of reasons referring to the reasons conditions and requirements of Art. 16 (1).
21. This directive is then implemented by the Conservation (Natural Habitats etc) Regulations 1994 (“the Regulations”). The Regulations set up a licensing regime dealing with the requirements for derogation under Art. 16 and this function is now carried out by Natural England. However, Regulation 3(4) provides that local planning (among other) authorities must “have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.”
22. The critical issue which arises under this Ground is how a local authority such as the Council here should have regard to the Directive. The most pertinent and direct guidance is given by ODPM Circular 06/05 which accompanied and is complementary to PPS 9. Paragraph 98 thereof refers to protected species generally, stating that they are a material consideration for planning permission purposes and that local authorities should consult English Nature before granting planning permission. It then refers to the “further strict provisions” for those species governed by the Habitats Regulations.
23. Paragraph 103 then refers to the licensing regime pointing out that planning permission does not absolve the relevant party from obtaining a licence.

24. Paragraph 116 provides as follows:

“When dealing with cases where a European protected species may be affected, a planning authority ...has a statutory duty under regulation 3(4) to have regard to the requirements of the Habitats Directive in the exercise of its functions. So the Directive’s provisions are clearly relevant in reaching planning decisions, and these should be made in a manner which takes them fully into account. The Directive’s requirements include a strict system of protection for European protected species prohibiting deliberate killing catching or disturbing of species and damage to or destruction of their breeding sites or resting places. Derogations from this strict protection are only allowed in certain limited circumstances and subject to certain tests being met. Planning authorities should give due weight to the presence of a European protected species on a development site to reflect these requirements, in reaching planning decisions and this may potentially justify a refusal of planning permission.”

25. DEFRA Circular 2/2002 is also relevant. It deals with the duties of local planning authorities to provide information to the licensing authority then dealing with a licence application under the Regulations. This is not of direct relevance to the question of their duties when considering a planning application itself. However, it is worth noting that on p2 it is said that authorities will typically be asked to provide information as to whether the tests specified in Art. 16 (1) of the Directive and Regulation 44 of the Regulations have been met. This will include an assessment of the importance attached to the development against the background of national planning policy guidance and regional and local development plans including material considerations. This shows that local planning authorities are expected to have the knowledge to assist in the exercise of whether the Art. 16 (1) tests (see paragraph 20 above) are met.

### **The Relevant Duty at the planning stage**

26. Mr Carter submits that the only duty imposed by Regulation 3 (4) on an authority at the planning stage is to note the existence of the Directive and Regulations and to note the existence of the relevant bats. And beyond perhaps also stating that the applicant for permission needs a licence, the authority need not go.

27. I disagree. That approach disregards the very clear guidance set out in paragraph 116 of ODPM Circular 06/05 which (a) refers to the giving of weight “to reflect these requirements” and (b) contemplates that as a result of taking account of the Directive the authority might refuse permission altogether. Indeed, Mr Carter conceded, as he was bound to do in order to give any meaning to the last part of paragraph 116, that in a serious enough case, like an application to build a supermarket on a brownfield site which would involve considerable disruption to a local bat population, the authority might refuse permission where there was adequate space somewhere else on the brownfield site. But if that is right, it recognises that the local authority should engage with the provisions of the Directive. In my view that engagement involves a consideration by the authority of those provisions and considering whether the derogation requirements might be met. This exercise is in no way a substitute for the licence application which will follow if permission is

given. But it means that if it is clear or perhaps very likely that the requirements of the Directive cannot be met because there is a satisfactory alternative or because there are no conceivable “other imperative reasons of overriding public interest” then the authority should act upon that, and refuse permission. On the other hand if it seems that the requirements are likely to be met, then the authority will have discharged its duty to have regard to the requirements and there would be no impediment to planning permission on that ground. If it is unclear to the authority whether the requirements will be met it will just have to take a view whether in all the circumstances it should affect the grant or not. But the point is that it is only by engaging in this kind of way that the authority can be said to have any meaningful regard for the Directive. The very attenuated duty suggested by Mr Carter for the Council is in truth, no duty at all.

28. I have considered whether the Council could discharge its duty simply by making the obtaining of a licence a condition of the grant of permission. But that is not sufficient. After all, if no licence is obtained it is a criminal offence so there is a clear incentive to obtain one anyway. And the making of a condition is not in truth engaging with the Directive.

**Was the Council in breach of Regulation 3(4) here?**

29. In my view it clearly was. Indeed it is not suggested that the Council embarked upon the kind of exercise referred to above. The Planning Officer’s report made no mention of the Directive or the Regulations. It referred to the need to have a condition for the mitigation of disturbance to the bats but that in effect assumes that the A16 (1) requirements could otherwise be met. It is true that the bat assessment on Bryancliffe which was referred to in the Planning Officer’s report itself makes reference to the Regulations and the need for a licence together with a limited reference to OPDM Circular 06/05. But that does not amount to consideration by the Council.
30. Mr Woolley’s solicitors’ pre-action protocol letter dated 7 November 2007 expressly referred the Council to the relevant provisions of the Regulation and ODPM Circular 06/05, including paragraph 116. Following this letter the Council had sought to consult with Natural England. And Natural England’s response was in effect that it did not have sufficient resources to provide a detailed commentary on the proposed development. But the points made in the letter about the Council’s duty under paragraph 116 were not taken up or dealt with in Cobbett’s response to that letter. That duty can be fulfilled without input from Natural England.
31. The Planning Permission itself stated in reason 6 that the proposal had an acceptable impact on European protected species. But that is not the question posed by the Directive and Regulation 3 (4) which concerns the requirements to be met before any derogation can take place at all. Equally a reference at the end of the Permission to the existence of the regulations and the need for a licence cannot discharge the Council’s duty. The Planning Officer should have specifically raised this rather specialised duty upon the Council in his report so

that the Planning Sub-Committee could then seek to discharge it. As there was no reference to any of the relevant materials it is hardly surprising that the Council gave them no consideration.

32. Accordingly, it is clear that the Council was in breach of Regulation 3 (4).

### **Consequences**

33. Mr Carter accepted that if I reached this conclusion as to the nature of the Council's duty and its consequent breach, the unlawfulness on its part had to be seen as a substantive breach of European Law. On that basis, since it is not suggested that the breach was *de minimis*, the principles enunciated by Lord Bingham and Lord Hoffmann in *Berkeley* (supra at pages 608, 613 and 615) come into play. In such a case the unlawful decision should be quashed without more. The Court does not even inquire as to whether it could be said that the impugned decision would have been the same in any event.
34. In any event, given the strict requirements for any derogation I would be very reluctant to hold that the outcome would have been the same in any event. And the fact that a licence was ultimately obtained (and based upon what appear to be some questionable assertions about the existing property and its ability to be used in the future) does not alter that conclusion. Indeed at the Inquiry Millennium's planning witness agreed that imperative reasons of overriding public importance did not arise and that there was a suitable alternative to demolition which was to retain Bryancliffe.
35. The planning permission must therefore be quashed on this ground alone. Strictly, it is not necessary for me to deal with the other grounds in the light of this conclusion. But in deference to the arguments made, I will deal with them briefly below.

### **GROUND 5: FAILURE TO TAKE ACCOUNT OF CERTAIN APPLICABLE POLICIES**

#### **The Law**

36. Section 70 (2) of the Town and Country Planning Act 1990 requires the planning authority to have regard to the development plan so far as is material to the application and to any other material consideration. Section 38 (6) of the Planning and Compulsory Purchase Act 1994 states that if regard is to be had to the development plan, the determination must be made in accordance with the plan unless material considerations indicate otherwise.
37. It is accepted by Mr Harwood that if in substance the planning authority has considered the application, taking into account the provisions of a particular policy the fact that no specific mention is made of it does not render the decision unlawful. One example of that would be where several policies in effect say the same thing but only one is mentioned.



38. A planning officer also has a duty to provide sufficient information and guidance to the planning sub-committee to enable it to reach a decision applying the relevant statutory criteria. See *Lowther v Durham County Council* [2001] 3 PLR 83 at p105.

### **The Relevant Policies**

39. Mr Woolley contends that the Council failed to have regard to a number of policies. They are referred to in paragraph 98 of Mr Harwood's Skeleton Argument. It seemed to me that the only two policies which (a) have real relevance and (b) whose provisions might have altered the approach taken by the Council are Structure Plan R1 and GEN 3. Both of them were stated in the Planning Permission to be relevant. R1 did not feature at all in the Planning Officer's Report. GEN 3 did, not as one of the listed relevant policies but as one which the Inspector had relied upon in the appeal when he upheld the refusal.

#### R1

40. At one stage it was contended that this policy was not actually relevant at all. That was a somewhat surprising submission in the light of the fact that the Planning Permission (issued after Mr Woolley's Pre-action protocol letter) said that it was. In any event I find that it was. It refers to loss or damage to particular sites including ASCV's. This includes, in my judgment, interference with its setting. That in turn can include the view to be had from the site which forms part of its overall value.

41. In the highlighted section of the first part of R1 it is stated that:

“Where, exceptionally, because of other overriding considerations, unavoidable loss or damage to a site or feature or its setting is likely as a result of a proposed development measures of mitigation..will be required.”

42. And paragraph 5.24 says that R1 acknowledges that

“a development which would damage a heritage site or feature may exceptionally be allowed because of other overriding considerations. These considerations relate to the need for the development and whether there are alternatives to the proposal. Alternatives include a reduction in scale or redesign of the development and whether it can be accommodated on a suitable site elsewhere.”

#### GEN 3

43. This states that all developments will be required to minimise adverse impacts on the beauty, heritage value and amenity of its site and surroundings. Also a development which has a major adverse impact on adjacent areas particularly ASCV's, should not be allowed.

## **Was the Council in breach?**

### R1

44. There can be no question but that the Council must have regarded its task on this application as essentially balancing two conflicting considerations – the adverse visual impact from the point of view of the river valley, caused by the erection of a new much larger building on the one hand, and the ultimate benefit of the screen provided by the new trees on the other. But R1 suggests that damage to the setting should only be permitted exceptionally. In a case where on any view the competing considerations were finely balanced and against a background of two prior failed applications at the same site, an appreciation of the need to show an exceptional case was of significance as were the other points made in paragraph 5.24.. In my judgment, the Council should have been alerted by the Planning Officer specifically to R1 for that reason. They were not and did not have it in mind.

### GEN 3

45. This was of course mentioned in the report as being a policy relied upon by the Inspector. But what does not clearly emerge from that is the stipulation that if the development causes a major adverse impact on an adjacent ASCV it should not be allowed. Of course that it not an absolute but it is a strong indicator. That feature of GEN 3 was not set out in terms and in my judgment it should have been.

### Timing of the impact

46. Mr Carter contends that there is a real question about the extent at least of the application of R1 and GEN3 since any interference would be for the limited period of 20 years at most and decreasing before then. I take that point and obviously the Council had the 20 year period in mind. But that does not alter the fact that they should have considered these policies head-on as it were and then within that they could consider the ameliorating tendencies of the fact that the impact was not to last for a lifetime.

### Conclusion

47. Accordingly I find that there was unlawfulness here as well. And given the fine balancing exercise in any event performed here, it is impossible to say that the result would have been the same if the Council had considered these two policies directly.

## **GROUND 4: FAILURE OF THE REPORT TO SAY WHETHER THERE WAS COMPLIANCE WITH THE POLICIES IN THE DEVELOPMENT PLAN OR NOT**

48. The Planning Permission states that the proposal did not comply with all relevant policies in the Development Plan, but it was considered acceptable because of the long term landscape mitigation. While the report clearly addressed the competing considerations for the Planning Sub-Committee it did not address directly the question of compliance or otherwise with the

Development Plan. Although often policies within a Development Plan as it affects a proposal might pull in different directions (eg housing or employment need as against conservation of the landscape) it is not clear that there were conflicting policies as such here. The proposal manifestly had nothing to do with employment and the Council had a moratorium on more housing at the time so that policy pulled in the same direction as conservation.

49. Given the debate before me as to whether, for example, policies R1 or GEN 3 were truly engaged at all, I take the view that the report should have expressed a view about non-compliance or otherwise with the relevant policies (or the Development Plan as a whole) so that the Council had a clear view of the legal framework within which they were to operate given the terms of s38 (6). This was all the more important where the matter was a finely balanced one. The fact that the Planning Permission expressly stated that there was non-compliance but this was outweighed here itself shows the relevance of the question of compliance or otherwise.
50. Mr Carter submits that it might not be possible for the Planning Officer to come to a clear view on compliance because here it could be said that the temporary nature of the intrusion meant there was compliance or alternatively there was not but there were other material considerations. But that possible ambiguity does not prevent the Planning Officer from taking a view and setting these matters out. And in any event an officer at some stage prior to the Planning Permission (but not the Planning Committee it would seem) took the view that there was non-compliance hence the statement in the Permission itself.
51. As with Ground 5, to which this ground is in truth closely allied, it is not at all clear that the Council would inevitably have come to the same view had the question of compliance been brought to the Committees' attention and addressed head-on. So this is another ground for quashing the Permission.

## **GROUND 2: FAILURE TO CONSIDER ALTERNATIVES**

52. As ultimately refined the allegation here was that before the Council agreed that the benefit of a new row of trees screening the proposed building outweighed the visual intrusion for the first 20 years, it should have considered what might have happened if no permission was granted. The existing owner might have decided to plant trees in front of the river valley anyway so that the desired screen would emerge in any event. Then the supposed virtue of this development would in truth have been no virtue because the development was not needed in order to provide the screen.
53. In my judgment there was nothing in this point. The Council was not required to indulge in speculation about what this or some future owner of the site might do in terms of trees, or at all events it was well entitled to decide not to. Millennium might be thought to be unlikely to plant outside of a permission since it had cut the original trees down in the first place. And the position of any purchaser from it was simply unknown. An owner may have preferred an

uninterrupted view of the river. And even if an owner at some point in the future were to plant trees, that process would be starting later than any planting to be undertaken first off as a condition of this Planning Permission.

54. This ground of challenge therefore fails.

**GROUND 3: THE PROPOSED SWAP OF UNITS BETWEEN BRYANCLIFFE AND MACCLESFIELD ROAD/DAVEYLANDS SITES WAS IRRELEVANT AND CONTRARY TO CIRCULAR 05/05**

55. The Council's then policy was against any net increase to the housing supply in the area which of course this development was. Millennium however had planning permission for the building or conversion of up to 15 apartments at another site. It agreed to enter into a s106 obligation whereby that permission would not be put into effect if it built according to a permission for the apartments at Bryancliffe. The Council agreed to this "swap" so that the net housing supply was not increased as a result of the development at Bryancliffe.
56. Circular 05/05 emphasises that planning obligations should be linked to the proposed development with a functional or geographical link between the development and the item being provided by the obligation. In *Tesco v SSE* [1995] 1 WLR 759 Lord Keith stated that an offered planning application that had nothing to do with the development apart from the fact that it was offered by the developer will plainly not be a material consideration and could be regarded as an attempt to buy planning permission. If it had some connection with the proposed development which was not *de minimis*, then regard should be had to it.
57. Here it is said that there was no connection between an offer not to implement a planning permission at some other site in order to obtain permission on this site. And in any event the Council failed to consider whether that other permission might have expired before being implemented anyway.
58. I do not accept this. First, it seems to me that there is a proper functional linkage between what was offered and this development. Specific objection was taken on the basis that without more, housing supply would increase in contravention of Council policy for the area. That consideration by definition deals with a general matter (housing in the area) rather than something specific to the site itself. If the developer is in a position to avoid any net increase to housing supply in the area by giving up another permission, there is a direct connection with one of the policy considerations affecting the planning permission sought. It is not the same as "buying" the instant permission.
59. Moreover, it was not for the Council to speculate as to whether the other permission would in fact be implemented. That would have been an impossible task and it was entitled to assume that as it had been sought, the likelihood was that it would be implemented.

60. In paragraph 34 of his Decision, the Inspector reached the same view and he was right to do so.
61. Accordingly this ground of challenge fails.

**GROUND 6: NO AUTHORITY TO ISSUE THE PLANNING PERMISSION AS THE DECISION NOTICE DID NOT INCLUDE A CONDITION REQUIRING A METHOD STATEMENT FOR PLANTING ON THE SLOPE OR LANDSCAPE AND IMPLEMENTATION CONDITIONS**

62. The report recommended approval subject to a list of conditions which included the submission of details and approval of all landscaping (A01LS) and implementation of landscaping (A04LS). There should also be a method statement for planting on the slope. See Conditions 6, 7 and 24. However such conditions were not included within the Planning Permission. It is said that they were omitted without authority from the Council and accordingly the Planning Permission as a whole was unauthorised and should be quashed for that reason. The original Ground 6 referred only to the omission in the Planning Permission of a condition in relation to the Method Statement.
63. The minutes of the Planning Sub-Committee state that this application was to be delegated to the Corporate manager for Planning for “approval subject to the completion of a Section 106 Agreement to include reference to the fact that any planting must take place prior to the commencement of building works and that any damaged verges must be reinstated, the conditions set out in the report and additional conditions relating to the provision of a wheelwash and the gate post being protected and reinstated.” On the face of it, therefore, the Council appeared to want all the conditions recommended by the Planning Officer as well as the s106 Agreement to include planting to take place before commencement of the building works.
64. However, paragraph 3 of the letter from Cobbetts dated 13 March 2008 states that the Council members considered that the grading works should be undertaken before the building works commenced and this was included in the s106 agreement. Accordingly there was no further requirement for the condition and it was omitted from the decision notice. This explanation was no doubt given on the instructions of the Council and it suggests that whatever the minutes might say the intention was that the Condition dealing with a method statement was no longer needed. Certainly, if it was intended to deal with some aspect of the grading works in the s106 agreement it would seem very odd if other aspects still fell to be dealt with by conditions. So although the minutes referred to the conditions generally, there was no intention in fact to retain a condition for the Method Statement.
65. Paragraph 1.5 of Schedule 1 to the s106 agreement provides that a “Detailed Planting Plan and Method Statement will be submitted to the Council for approval prior to the Commencement of the Bryancliffe Permission such consent not to be unreasonably withheld or delayed.”

66. Paragraph 1.6 requires Millennium to “implement the On-Site Landscaping Scheme prior to the Commencement of the Bryancliffe Permission..”
67. The Detailed Planting Plan refers to a plan giving details of what was to be planted and where. The Method Statement was defined to mean a method statement for the construction and detail of the retaining walls on the Site, the formation of any banks, the planting of any trees and details of any irrigation scheme.
68. The On-Site Landscaping Scheme meant the Method Statement, Detailed Planting Plan and Drawing No. M1445.01G as annexed to the agreement.
69. In my judgment the effect of all of that was that Millennium had to submit its proposed Method Statement and Planting Plans to the Council for approval prior to commencing the development and that approval had to be given before such work commenced. That is my interpretation of paragraph 1.5. Then, under paragraph 1.6 all of the landscaping work (as approved under paragraph 1.5) had to be completed prior to the commencement of the development. I do not read “implement” as meaning “start”. I take Mr Harwood’s point that my interpretation might mean that some (but by no means all) of the soft landscaping could not easily be done before the building works started or might be at risk of disruption once they were. Some relaxation of this obligation might be needed in practice. But this potential problem does not to my mind impel a reading of the word “implement” which is contrary to its normal sense. Moreover, to read it as meaning “start” deprives the obligation of much of its effect and would run counter to the Council’s clear intention expressed at the meeting.
70. Accordingly, as far as the Method Statement for the grading works is concerned, I do not consider that there was in truth any departure from what the Council authorised in the meeting of the Planning sub-committee.
71. As for soft landscaping other than that involved in the regrading works, I accept that there is a technical difference between placing an obligation within a condition and simply making it part of the s106 agreement. Breach of condition can lead to the issue of an enforcement notice claiming that the development is unlawful, with the possibility of a criminal sanction if not rectified. And while an injunction can be sought on the grounds of a breach of a s106 notice, the Council has the power to seek an injunction in relation to the non-fulfilment of a condition.
72. But given that the Council clearly wanted a very important aspect of landscaping (to do with regrading) covered in the s106 Agreement it is far from obvious to me that in truth it was still insisting on other aspects of soft landscaping remaining as conditions as opposed to being put into the agreement as well. As interpreted by me paragraphs 1.5 and 1.6 well cover all the soft landscaping points. The amendment to Ground 6 to include complaints about the lack of conditions dealing with soft landscaping came very late in

the day. And although Mr Carter was sensibly prepared to deal with them, there was not the same opportunity for the Council to deal with them as it had had when the Method Statement point was raised in DLA Piper's letter of 29 February 2008. Given that the Council might well in fact have been intending that all landscaping should now be in the s106 agreement, which provides for it comprehensively, I am not prepared to find on the materials before me that the officer drawing up the Planning Permission had no authority to deal with that question in the way that he did.

73. Accordingly, Ground 6 fails.

#### **GROUND 7: FAILURE ADEQUATELY TO SUMMARISE THE RELEVANT POLICIES**

74. Art. 22 (1) (b) of the Town and Country Planning (General Development Procedure) Order 1995 requires decision notices to include a summary of the relevant policies.

75. As noted above the Planning Permission makes reference to a number of policies. It does so by citing their number and then in brackets, what they are about. See p382 of the Bundle. It is said that a fuller description should have been given so as to refer to the particular parts of them that had a bearing on the decision. Reference was made to the decision of Collins J in *Tratt v Horsham District Council* [2007] EWHC 1485 (Admin) in which he stated that it would be insufficient to identify a policy without indicating what it concerns (as occurred in that case). A summary of the relevant policies was required. It need be no more than a few words identifying the relevant aspect of the policy. In *Mid-Counties Co-operative v Forest of Dean District Council* [2007] EWHC 1714 (Admin) Collins J said that all that was needed was an indication of what the policy deals with insofar as it is material to the permission in question.

76. In my judgment, the summaries given in the Planning Permission here were sufficient especially bearing in mind the relatively narrow compass of the issues arising.

77. Accordingly, this final ground of challenge fails also.

#### **CONCLUSION**

78. However because of my determination of Grounds 1, 4 and 5 in favour of Mr Woolley, this application for judicial review succeeds and the decision which granted planning permission dated 15 February 2008 must be quashed.

79. I am indebted to both Counsel for their excellent and helpful oral and written submissions. I will hear from them hereafter, if necessary, on any consequential matters which cannot be agreed.