



Neutral Citation Number: [2017] EWHC 349 (Admin)

Case No: CO/2815/2016

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 02/03/2017

**Before :**

**MR JUSTICE KERR**

**Between :**

**THE QUEEN (ON THE APPLICATION OF  
KEITH LUCAS (ON BEHALF OF SAVE DIGGLE  
ACTION GROUP))**

**Claimant**

**- and -**

**OLDHAM METROPOLITAN BOROUGH  
COUNCIL**

**Defendant**

**- and -**

**SECRETARY OF STATE FOR EDUCATION**

**First Interested  
Party**

**- and -**

**WRT DEVELOPMENTS LIMITED**

**Second  
Interested  
Party**

**- and -**

**UNITY PARTNERSHIP**

**Third  
Interested  
Party**

-----  
-----  
**Mr Robert McCracken QC (instructed by Irwin Mitchell) for the Claimant**  
**Mr D E Manley QC (instructed by Oldham Council Legal Services) for the Defendant**

Hearing dates: 23 and 24 January 2017

-----  
**Approved Judgment**

## MR JUSTICE KERR :

### Introduction

1. This case is about a disagreement over where Saddleworth Secondary School (the school) should be located. The claimant is a retired television producer and editor, and a local resident of Diggle, Saddleworth, near the north western edge of the Peak District National Park. He brings the claim in his capacity as chairman of the Save Diggle Action Group (the Action Group). The defendant is the local planning authority. It has granted three applications for planning permission and one for listed building consent, enabling the school to move to a new site in Diggle, in a building to be newly constructed.
2. The defendant (the council) wishes to dispose of the existing site of the school at Uppermill, in the central settlement of Saddleworth. The Action Group wishes the school to remain at its present location and argues that it can be satisfactorily redeveloped without moving to another site. The first interested party is a provider of funds for the project. The second interested party is the freehold owner of most of the proposed new site, which the council has an option to exchange for the current school site in Uppermill. The third interested party was the applicant in one of the planning applications, as it carries out certain highway functions on behalf of the council.
3. The interested parties have not taken part in the proceedings, which came before me by permission of Lang J granted on 22 September 2016. The grounds for challenge are many and varied, including complaints about the adequacy of the consultation process. The core of the challenge to the decision itself is that it was wrong in law for the local planning authority to rule out, as an alternative to granting the applications, leaving the school on its existing site.
4. The council says that it had already lawfully ruled out that option on non-planning grounds, in its capacity as education authority for the area; and that it was lawful, when acting as local planning authority, to treat that prior non-planning decision as a *fait accompli*. The claimant, by contrast, argues that relocating the school to Diggle would cause substantial damage to heritage assets, as the council now acknowledges; that it had not acknowledged that when it made the decision, as education authority, to prefer the Diggle site to the existing site; and that redeveloping the school on its existing site is accepted as a viable and affordable, albeit more expensive, alternative.
5. The claimant complains that there was never any direct weighing exercise measuring the damage to heritage the proposals entail, against the benefits, from a planning perspective, of leaving the school where it is and redeveloping it on that site, thereby avoiding that harm to heritage. The council contends that such a weighing exercise was unnecessary; the alternative of redeveloping the school on its existing site was rightly treated as an immaterial consideration which cabinet members could disregard.

### An Outline of the Facts

6. In 2008, the former Building Schools for the Future programme (BSF) was still in existence. The council, as part of that programme, appraised certain options in 2008 and concluded that redeveloping the school on its existing site would be “expensive and disruptive”, as an officer later expressed it. No concrete proposal emerged at that

stage, and there was a change of government in 2010, leading to the BSF programme being discontinued.

7. Between 2008 and early 2013, the council was engaged in a marketing exercise for the sale of part of the now proposed new site for the school in Diggle. Sign boards were erected and advertisements placed in local newspapers. The site includes former manufacturing premises called the “pallet works”. The buildings comprising the old pallet works were unoccupied. They were marketed as a site for new buildings. The likely market was considered to be purchasers wanting “cheap industrial space” (to quote from an email at the time).
8. The council’s Mr Prestwich considered the rent per square foot “a little excessive”. He asked the estate agents instructed to improve the marketing materials. This request was made in an email dated 8 January 2013. There is no evidence that the improvements requested were ever made. The marketing exercise did not lead to a sale of the pallet works. The council concluded that the site was no longer suitable to be used for employment purposes.
9. By March 2013, central government funding for redeveloping schools was channelled through the Education Funding Agency (EFA), an executive agency of the Department for Education. EFA funding was available for redeveloping the school. The council and the EFA turned their attention to how best to achieve that. Starting in 2014, the EFA undertook a feasibility study looking at various options for redevelopment of the school.
10. Two meetings took place in July and November 2014, attended by elected members of the council and representatives of the EFA. The latter clarified that the decision where the school should be located rested with the council, not the EFA. According to an uncontradicted note of the meeting on 8 July 2014, the budget available for the school building would be “fixed irrespective of the design chosen”, but “[a]dditional funds will be provided by the EFA to cover abnormalities (e.g. ground preparation, levelling and demolition). These will vary depending on the site issues involved”. An uncontradicted media release following the meeting on 20 November 2014 emphasised the same point.
11. The results of the feasibility study were published in January 2015. At around the time the study was published, Diggle residents opposed to relocating the school to the site now proposed, met the EFA’s Head of Capital, Mr Mike Green, in Manchester on 16 January 2015. They were aware that the site now proposed was one of the four that had emerged as front runners in the EFA’s appraisal. And also among the four was the option of redeveloping the school on its current site.
12. The claimant’s witness, an objector and Diggle resident, Mrs Samantha Marshall, was present at the meeting. Her written evidence was not contradicted by the council, nor the Secretary of State, one of the interested parties. Mrs Marshall explained that at the meeting Mr Green confirmed that all four possible sites were viable alternatives. The new school could be located at any one of them; none were ruled out on grounds such as cost, disruption or safety.
13. Mr Green explained at the meeting that the site now proposed was the EFA’s preferred option, but if the council chose the school’s existing location, that would

also be funded by the EFA. Mrs Marshall accepts the council's assertion that the fixed amount allocated for building the new school by the EFA is £19,259,834, and that the cost of redeveloping the school on the existing site would be above that figure; but maintains that this does not mean the existing site is unaffordable, since "abnormal" costs would be available from the EFA over and above that budget allocation.

14. Mrs Marshall went to the trouble of emailing Mr Green on 21 January 2015 to "restate our understanding of your responses to the key points we discussed", since no formal minutes were taken. There is no evidence of any reply from the EFA. Her email attributes to Mr Green the statements that the recommended choice of the pallet works site in the feasibility study was due to it being the lowest cost option of the four sites examined; that the feasibility study had determined that all four options were feasible and none had been rejected on budgetary grounds; that the choice of site remained solely a decision for the council; and that if the pallet works site were chosen and planning permission subsequently refused, the focus would have to shift to a different site, which would include the existing one.
15. The EFA's feasibility study was published in the same month, January 2015. The authors of the study noted that the existing school buildings were in a poor state of repair. Of the four options considered, the pallet works site was identified as the preferred option. Searches and surveys had been undertaken to ensure that initial design proposals could be developed and that these would be deliverable, and accompanied by "robust costings". The recommendation of the pallet works site as the preferred option was "made on the option offering the best value for money to the public purse" (paragraph 3.1).
16. Eight criteria were used to evaluate the four options. They were: (i) estimated cost (ii) buildability/construction (iii) teaching/learning (iv) programme, (v) statutory issues (vi) ecology (vii) operational issues and (viii) public perception and opinion. Each of the four options was assessed against those criteria and the results tabulated (paragraph 4.1). The pallet works option obtained the best (lowest) score (17). The existing site option came in third (with a score of 21).
17. The "affordability" of each proposal was discussed in the body of the published feasibility study. The pallet works option would cost, it was estimated, £18,460,905 i.e. £798,929 less than the capped sum of £19,259,834. The cost plan included £468,700 of local authority funded costs. The cost plan included "additional abnormals". In the case of the existing Uppermill site, the estimated cost was £20,176,128 i.e. £916,294 more than the capped budget allocation of £19,259,834. The cost plan included £267,500 of local authority funded costs. Again, the plan was said to include "additional abnormals".
18. There is, therefore, no doubt that the redevelopment of the existing site would, it is estimated, be more expensive than relocation to the pallet works site. This is common ground. On the evidence before me, it is not certain that the additional cost would come entirely, or indeed at all, from the EFA, although some or all of it might do.
19. It is also common ground that the feasibility study exercise did not include consideration of the effects of the proposals on heritage assets and harm to them. The council's updated grounds of resistance included acceptance "that the EFA's selection

did not consider the impact on 'cultural heritage' in their selection process". Similarly, Mr Prestwich of the council, in written evidence, said that it was "accepted that heritage considerations were not included in the 8 criteria identified by the EFA".

20. On 30 March 2015, the council's cabinet met to consider an officer's report recommending that the EFA's preferred option be adopted and the pallet works site for the school selected, in accordance with section 14 of the Education Act 1996. The report acknowledged the strength of public opposition to relocating the school to the pallet works site, but emphasised its perceived advantages over the existing site, at some length.
21. An appendix setting out "Frequently Asked Questions" and answers to them, conceded that "the replacement school could be rebuilt on the existing site" but stressed the perceived disadvantages of this: disruption, additional expense, and less space for educational use, among other things. The report recognised that choosing the pallet works site would mean more bus transport for children, and consequently the additional costs of such transport.
22. The council's cabinet resolved to agree the pallet works site as the location for the replacement school, in accordance with the report. The additional transport cost was estimated at "in the region of £200k per annum, but this is not a confirmed figure" (paragraph 5.13). Increased bus services to Diggle would be needed and these would be "both school and local bus services". In the same paragraph, it was suggested that the cost would fall on Transport for Greater Manchester. The report did not make clear what part of the cost of increased bus services, if any, would fall on the council.
23. Nothing was said in the report to cabinet of 30 March 2015 about the question of planning permission or listed building consent. After the council's decision to choose the pallet works site, the focus of Diggle residents opposed to that decision shifted to the planning process that inevitably had to follow.
24. The pallet works site, bounded by a road, a public footpath, the Huddersfield Narrow Canal and a railway line, and grazing land to the south, comprises former manufacturing premises which has been used for various purposes. The site is partly on Green Belt land and partly a brownfield site. There is a grade 2 listed office building, which does not form part of the site, but access to it is by a link bridge which is also considered to be grade 2 listed.
25. Four separate applications would need to be granted to enable the project to proceed. Applications were accordingly made for (a) demolition of the existing industrial buildings (that had been the subject of the marketing exercise); (b) demolition of the link bridge between the grade 2 listed office building and those industrial buildings (this was a listed building consent application); (c) construction of the school and associated facilities; and (d) provision of a parental drop off facility, with residential car parking.
26. In July 2015, objectors sent letters to the council, objecting to the application for permission to demolish the industrial buildings, on the ground that English and European case law prohibited such a "piecemeal" approach and submitting that there should be an environmental impact assessment in respect of the proposed

development as a whole. Various other objections were made. Solicitors acting for the action group joined the correspondence from 23 July 2015.

27. In October 2015, one of the objectors, Ms Kerry Skelhorn, raised a complaint about lack of access to comments from statutory consultees on the council's website. Another objector, Mr Mark Brooks, encountered a limit of 100 characters (not 100 words) on 23 November 2015, when attempting to submit an online comment on the council's website.
28. In his witness statement, Mr Brooks complained that documents on the council's website were missing or illegible; that his address had been falsely attributed to a fictitious person (called Aneurin Goodwin); that his son, a pupil at the school, had been improperly pressurised into submitting online comments favourable to the pallet works site; and that the 21 day consultation period had taken place over the Christmas period, starting on 23 December 2015.
29. The consultation period did indeed start then, though it was subsequently extended to 31 March 2016. The consultation followed publication of the council's revised Environment Statement (ES). It was a lengthy document. Chapter 9 dealt with hydrology and flood risk. It did not include reference to ground engineering works and assessed the risk of flooding of the site as low.
30. Ms Skelhorn, one of the objectors, was concerned that the flood risk assessment in the ES made no reference to the effect of the planned ground engineering works and new embankments (not mentioned in the ES) on run-off and flooding downstream from the site, and had been applied as if there were to be no development of the southern part of the site comprising an area of Green Belt grazing land earmarked for sports pitches. (The site had, indeed, flooded on 26 December 2015 when the Diggle Brook had burst its banks, as shown in a photograph produced by Ms Skelhorn.)
31. During the consultation period as extended, Mr Brooks complained to the council about the limit of 100 characters for comments entered directly on the website. Mr Irvine, of the council, responded in an email on 21 January 2016 that there were many other ways of commenting in writing, and asserted that the 100 character limit had started from 1 January 2016 as a result of a software change. (This appears to be a mistake; Mr Brooks had encountered the limit of 100 characters earlier, in November 2015.) Mr Irvine's evidence is that the limit was increased to 2,000 characters by about 27 January 2016.
32. On 12 February 2016, the council's conservation officer, Ms Karen Heverin, wrote an internal memorandum opposing the proposals, and saying among other things that in her view the harm to the setting of the grade 2 listed building was unacceptable, and that the new school would not make a positive contribution to local character and distinctiveness.
33. The three planning applications and one application for listed building consent were considered at the planning committee's meeting held on 25 February 2016. A detailed report was before the committee. It advocated granting the applications. An executive summary at the start was followed by detailed consideration of planning conditions, in section 10 of the report.

34. To quote from the executive summary, officers considered that demolition of the factory buildings would cause “less than substantial harm” to the listed office building as the latter would not be touched by the application except indirectly, through demolition of the link bridge, which would sever the link between the listed building and the (unlisted) factory buildings.
35. As for demolition of the link bridge, it provided the “historical context” for construction of the listed building, but the bridge, while of some historic value, was of “low” aesthetic, communal and evidential value. Demolition of the link bridge would therefore cause “less than substantial harm” to the significance of the designated heritage asset, i.e. the listed building.
36. It followed, the officer stated in the report, that the “less than substantial harm to the significance of a designated heritage asset has to be weighed against the public benefits of the proposal, including securing its optimum viable use”. The conclusion was that the benefits of the proposal to remove the link bridge are “significant enough to outweigh the ‘less than substantial harm’ to the significance of the listed building”.
37. The loss of employment land that would result from building the new school, was acceptable, the report’s author argued: “the individual and cumulative harm to the designated and non-designated heritage assets is outweighed by the strong and clear public benefits of providing the proposed school development, together with the associated demolition and highways works”.
38. Those views were developed in more detail in the body of the report, within section 10 (paragraphs 10.41-10.68), and reiterated in the “overall conclusion” (paragraph 10.105-10.108).
39. A letter from the Action Group’s solicitors sent just before the committee was due to meet, supported by a brief written opinion of leading counsel (Mr McCracken QC). The solicitors asked the committee to adjourn its meeting or defer consideration of the applications, or face a judicial review application.
40. The Action Group’s contention was that the committee would be applying the wrong test if it accepted that the harm was “less than substantial”, since the officer’s report overlooked paragraph 132 of the National Planning Policy Framework (NPPF), which included the consideration that harm to a heritage asset could occur by “development within its setting”. The argument was that the stricter test in paragraph 132 should be applied: “[s]ubstantial harm to .... a grade II listed building ... should be exceptional”.
41. The letter failed to persuade the committee to stay its hand and adjourn the meeting or defer consideration of the applications. They were granted, subject to conditions. However, on 9 March 2016, the council having considered the Action Group’s contentions in more detail, wrote to the Action Group’s solicitors, saying it had decided that the applications should be reconsidered by the planning committee, and confirmed that no decision notices would be issued until this had been done.
42. An extraordinary meeting of the planning committee was fixed for 13 April 2016. In advance of the meeting, a long and detailed report (the main report) running to 410 pages was produced by the council’s planning department and published on 6 April

2016. It started with an executive summary and proceeded to analyse and comment on the proposals, planning policies and considerations, the consultation process and the numerous objections to the proposals.

43. I will return to some aspects of the main report when considering the grounds of challenge. For present purposes, I confine my account to two salient features. First, it was now accepted, possibly in deference to Mr McCracken's opinion on the point, that the harm to the setting of the heritage asset (the grade 2 listed building, the link bridge to which was to be demolished) was "substantial" and not "less than substantial". Thus, in the executive summary, it was stated that officers "consider that the demolition of the link bridge results in substantial harm to the setting and therefore the significance of the Grade II listed building" (paragraph 1.8).
44. However, officers also considered that the "strong presumption" against substantial harm to heritage assets was outweighed by the public benefits flowing from the proposals, and that accordingly approval of them would be in accordance with paragraph 133 of the NPPF (paragraphs 1.10 and 1.22).
45. The second feature is the consideration of alternative sites. The main report contained a section (section 4) discussing this topic. A list of them was included in that section, to explain why they were non-runners, for differing reasons including that they were unavailable, because they were privately owned by parties unwilling to sell, or unsuitable, because they were in the Green Belt, and so forth.
46. The four sites considered in the EFA's feasibility study of December 2015 were then mentioned, and the criteria used in that study, its history and its outcome were then explained. Figures were provided in a footnote (footnote 1 to paragraph 4.9) as mentioned above, to support the point that rebuilding the school on its existing site would be "above the available budget of the EFA (by £916,294) and over £1,715,223 more than developing a school at the ... Pallet Works".
47. It was conceded (at paragraph 4.10) that "[t]he replacement school could be rebuilt on the existing site", but the disadvantages of that course were then mentioned: they meant that "the construction period would be prolonged and problematic". The authors explained in the previous paragraph that the decision had been taken "not to develop the school on the existing site (when compared to the ... Pallet Works site)".
48. The non-planning reasons for that decision were then summarised in bullet points: disruption to education, higher build cost exceeding the fixed EFA budget, a new building that would be "compromised in its design" and "[i]ssues regarding build complexity and programming". These drawbacks were developed in more detail in paragraphs 4.11-4.18 within the executive summary.
49. At paragraph 4.19, the authors acknowledge that many objectors favoured keeping the school on its present site, but went on to state that "the Local Planning Authority is tasked with assessing the acceptability of the current planning applications on their own merit, having regard to the relevant national and local planning policy framework and any other material planning considerations".
50. This point was repeated later in the body of the main report, at paragraph 12.75, forming part of section 12, entitled "Planning Considerations – Application C" i.e. the



- application for permission to construct the new school at the pallet works site. At paragraph 12.75(d), the authors stated that “[m]embers are obliged to make decision [sic] on the acceptability of the application proposals as submitted, not to consider there are any other alternative options”.
51. On Friday 8 April, the revised ES of December 2015 was revisited by its authors and received in further revised form that day. Officers were able to consider it on Monday 11 April, and started to summarise it that day. On Tuesday 12 April, the day before the meeting, they circulated a “late list report” to members which included the gist of the new addendum to the ES. The late list report included a “Flood Risk Update”, which acknowledged the error to which Ms Skelhorn has drawn attention: the original flood risk assessment had been “based on a previous site layout”.
  52. The result was a proposed change to the project specification: the applicants would “provide flood compensatory measures within the site”. A “flood compensatory area” would be provided by “locally lowering the area within the shot putt area [part of the proposed outdoor sports facilities] by approximately 100mm (which is all located outside the flood plain)”.
  53. This would provide 50 cubic metres of “flood compensatory storage”, i.e. a lowered space into which (by dint of gravity) any excess water would flow. Officers considered this “acceptable since it will provide an element of betterment to existing flooding issues which occur during more extreme flood points”. There is a dispute, to which I will return, about whether the plan representing these proposed changes was materially misleading or not. The late list report became available to members and to objectors, but only shortly before the meeting.
  54. The Action Group’s solicitors again wrote to the council on the day of the meeting, 13 April 2016. The letter did not mention the late list report and may therefore have been written without sight of it. The solicitors noted that officers now accepted that demolition of the link bridge would cause substantial harm to the setting of the grade 2 listed office building. They continued to maintain that it would be unlawful to grant the applications, for reasons that in part tread the ground covered at the hearing before me.
  55. At the meeting, Mr Brooks (who has two sons at the school) spoke in opposition to the proposals, from a note which is before the court. He said, among other things, that the council must refuse to allow the development to proceed because there was an alternative site available in Uppermill, at which the public benefits of the proposals could be achieved but avoiding altogether the harm that would be caused if the school were located at the pallet works site. He also referred to the EFA’s position on funding and submitted that proposal to redevelop the school on its existing site was affordable. The committee decided, however, to grant the applications.

### The Issues, Reasoning and Conclusions

56. Those, then, are the facts. There are nine grounds of challenge. Mr McCracken QC, for the claimant, prefaced his nine grounds with general criticisms of the main report and the ES, which (as I understood his skeleton argument) he sought to liken to a “paper chase” of the type identified by Lord Hoffmann in *Berkeley v. Secretary of State for the Environment* [2001] 2 AC 603, at 617B-F.

57. He lamented that the lengthy main report was, as he contended, “in important places unclear, inconsistent and contained some fundamental defects of approach”, and that the challenged decisions “cannot stand consistently with the application of the well known principles set out in” various well known authorities, which I need not cite here, confirming that officers’ reports must not seriously mislead and must not transgress classic public law principles.
58. Those general criticisms were not relied on as a ground of challenge in their own right, however. They were there to introduce Mr McCracken’s nine specific grounds of challenge, and to counter any suggestion from the council that I should withhold relief in the exercise of discretion, even if of the view that the decisions challenged were legally flawed.
59. In my view it is not correct to characterise the main report (or the ES) as defective in the general senses asserted by the claimant. The report is lengthy but it is not unclear, nor factually misleading.
60. As for the ES, the “paper chase” in *Berkeley* was completely different: to find what was said to be the compliant environmental statement, you had to look at two statements of case prepared for the planning inquiry, read with an officer’s report, read with background papers and proofs of evidence to which the public had access. There was no separate and discrete environmental statement as such.
61. In the present case, the objectors had access to the ES and the main report (and its February 2016 predecessor) and were able to address those documents. The ES was a separate document. Mr McCracken accepted that objectors also had access to the late list report, albeit (as its name suggests) only late in the process, like the elected members of the committee.
62. In my judgment, the claimant’s case must stand or fall depending on whether any of the nine specific grounds of challenge have merit. I turn to consider them. I start by taking the first two grounds together. I do not regard the second ground as separate from the first.

*Grounds 1 and 2: failing to have regard to the alternative site at Uppermill*

63. The first ground is that the council was obliged under section 70(2)(c) of the Town and Country Planning Act 1990 (the 1990 Act) to have regard to, as a material consideration, the availability of the alternative existing Uppermill site. The second ground is that the council’s earlier consideration of alternative sites in March 2015 was undertaken at a time when it was under the misapprehension that the harm to the heritage asset if the pallets site were chosen, would be “less than substantial” rather than, as was later conceded, “substantial”.
64. Since it is common ground that officers indicated to members in the main report (a) that the Uppermill site as an alternative should not be considered, and (b) that planning considerations, including harm to the heritage asset, or its setting, were not weighed in the scales in the 2015 site selection exercise, it seems to me that the issue is whether the availability of the alternative Uppermill site was a “material consideration” under section 70(2)(c) of the 1990 Act or not.

65. If it was, the council did not have regard to it. If it was not, that does not matter. The fact that, after the 2015 site selection exercise, the council concluded that the harm to the heritage asset at the pallet works site would be less than substantial, and that it was subsequently persuaded by the Action Group to change that view, is part of the factual history which may or may not help to persuade the court that the alternative site at Uppermill was a material consideration. I do not see how that point can be a separate ground of challenge in its own right.
66. Taking the first two grounds together, therefore, the claimant's submissions were to the following effect.
- (1) This was a case in which the duty to consider the Uppermill site as a viable alternative arose, applying the established principles from the case law. The alternative site was viable, albeit more expensive. The evaluation and assessments of the two alternative sites had been undertaken in an exercise which heritage considerations had been excluded from consideration.
  - (2) The need for the site selection exercise to be revisited with heritage considerations included, was the more pressing since the council had, at the time the of the March 2015 selection exercise, been under the misapprehension that the harm to the heritage asset at the pallets work site would be less than substantial; it was only later conceded (under pressure from the Action Group) that this view was wrong.
  - (3) There was clear evidence that the EFA funding earmarked for the pallet works site development could be redirected to a rebuild of the school on the Uppermill site, which the council already owned. The objection that such a rebuild would be beyond the budget allocated by the EFA was specious, since the budget had flexibility built into it and officers conceded in the main report that the school could be rebuilt at the Uppermill site.
  - (4) Mr McCracken produced an addendum to his skeleton argument in which he drew attention to the difference discussed in the cases between the materiality of a consideration, which is a question of law; and the weight to be given to that consideration, which is a matter for the judgment of the decision maker, within the bounds of the *Wednesbury* principles.
  - (5) He noted that the Court of Appeal had made several decisions (to which I shall come shortly) identifying a further distinction between mandatory material considerations, which the decision maker must take into account, and permissible material considerations, which could be treated as relevant but without any duty to do so. This is, of course, well known in the context of administrative law more broadly, outside as well as within the sphere of planning law.
  - (6) On any view, Mr McCracken submitted, it had been wrong for officers in the main report to instruct the planning committee members in imperative language that they must disregard the alternative Uppermill site as a basis for refusing the applications, and must consider those applications "on its own merit" (main report paragraph 4.19) and were "obliged ... not to consider whether there any alternative options" (paragraph 12.75).

- (7) Mr Brooks, for the Action Group, had advocated that alternative at the meeting, and members had wrongly been told that his argument for Uppermill should be excluded from consideration. The elected members should have considered the availability of the alternative Uppermill site as a potential factor to weigh in the scales in favour of Mr Brooks' argument at the meeting that the harm to the heritage asset outweighed the public benefits of the proposed development.
67. The council countered those points with the following main arguments.
- (1) In the absence of any mandatory direction contained in legislation or guidance, the cases established that a local planning authority need only have regard to alternative sites where it would be irrational not to do so. The present case, Mr Manley QC submitted, was far from being one in which that high test was met.
  - (2) The site selection exercise following the EFA's feasibility study was not challenged at the time and was a rational choice of site based on educational, financial and construction grounds. That was sufficient to absolve the council from reopening the issue of site selection in the context of planning considerations, including that of harm to the setting of the grade 2 listed office building.
  - (3) It was, therefore, not wrong in law for the authors of the main report to direct members not to have regard to the availability of a potential alternative site for the school. The claimant's submissions wrongly sought to invent a non-existent novel principle of law: that whenever substantial harm arises to a heritage asset by development, the decision maker must consider alternative sites. That is not the law, and there was no legal duty to do so in this case.
  - (4) Mr Manley submitted orally that the officers who wrote the main report were entitled to exercise their planning judgment to "advise" (as he put it) members not to have regard to the possibility of reopening the site selection issue and consider the alternative of redeveloping Uppermill, the existing school site. Members, he said, were free to disregard that advice if they chose, but it was not wrong for the officer to advise them to disregard the available alternative site, in the absence of a legal duty on members to take it into account as a material consideration.
68. Both counsel referred me to relevant authorities on this issue. Each argued that the authorities pointed to the result he advocated. I come next to my reasoning and conclusion on the first two grounds of challenge, taken together.
69. In *Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 759, the House of Lords held that a planning obligation under section 106 of the 1990 Act was a material consideration within section 70(2) of that Act if it was relevant to the development. If "the decision maker wrongly takes the view that some consideration is not relevant, and therefore has no regard to it, his decision cannot stand .... But it is entirely for the decision maker to attribute to the relevant consideration such weight as he thinks fit ..." (per Lord Keith at 864G-H).
70. Lord Hoffmann, with the rest of their Lordships, agreed with Lord Keith, though Lord Hoffmann in a concurring speech added the observation at 780F-G that the law distinguishes between "the question of whether something is a material consideration

- and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority"; see also the citation from Lord Hoffmann's speech by Lord Clyde in *City of Edinburgh Council v. Secretary of State for Scotland* [1997] 1 WLR 1447, at 1459C-D.
71. In *Bolton MBC v. Secretary of State for the Environment* (1991) 61 P&CR 343, CA, a proposed change in the law which removed the basis for a local authority's withdrawal of its objection to a compulsory purchase order was held, at first instance and on appeal, to be a material consideration which the Secretary of State was obliged to take into account before confirming the order. It was for the court, not the decision maker, to decide whether the matter was one to which the decision maker must have regard.
  72. Glidewell LJ, giving the leading judgment, referred to the distinction articulated in cases such as *CREEDNZ Inc v. Governor-General of New Zealand* [1981] NZLR 172 (approved by the House of Lords in *Re Findlay* [1985] 1 AC 318, per Lord Scarman at 333G-334C), between obligatory and permissible considerations. He rejected (at 351) the submission of the Secretary of State that, for a consideration to be relevant, it had to be such that no reasonable Secretary of State could have failed to take it into account.
  73. Rather, Glidewell LJ reasoned in the course of setting out seven numbered propositions, the true position was (in the second proposition, at 352), that the decision maker "ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account". The verb "might" meant there had to be "a real possibility that he would reach a different conclusion if he did take that consideration into account".
  74. If the obligation to take account of a material consideration arises not from statute but by implication from "the nature of the decision and ... of the matter in question", then "it is for the judge to decide whether it was a matter which the decision maker should have taken into account" (*ibid.*, the fourth and fifth propositions). If the matter is "fundamental to the decision", or it is clear there is a real possibility that consideration of the matter would have made a difference, the judge "is enabled to hold that the decision was not validly made" (*ibid.*, the sixth proposition).
  75. In the *Tesco* and *Edinburgh* cases, their Lordships did not discuss the *CREEDNZ* and *Re Findlay* line of cases distinguishing between compulsory material considerations (which must be taken into account) and permissible material considerations (which may, not must, be taken into account). They did not need to address that distinction, because the considerations at issue, if material, were by statute obligatory; see the wording of section 70(2)(c) of the 1990 Act ("... shall have regard to ... any other material considerations"); and its (since repealed) similarly Scottish counterpart, section 26(1) of the Town and Country Planning (Scotland) Act 1972.
  76. Lord Hoffmann in *Tesco*, therefore, was talking about considerations which, if material within section 70, were mandatory in the sense that they must be taken into account. It was for the court to decide, as a matter of law, whether the consideration was material and therefore mandatory. If it was, section 70 required it to be taken into account, though the weight to be given to it was a matter of planning judgment for the

decision maker. The *Bolton* case was one of compulsory purchase, where the issue did not arise in the context of section 70 of the 1990 Act.

77. How does that body of law apply in the present context, where the consideration that is said to be material is an alternative site to that proposed by the developer? The issue was looked at by Carnwath LJ (as he then was) sitting at first instance in *Derbyshire Dales DC v. Secretary of State for Communities and Local Government* [2010] JPL 341. The decision on the facts was straightforward, because in the case before Carnwath LJ, “no alternatives have been identified, and it is simply the possibility of such sites which is said to be material” (paragraph 22). It was therefore a case where, even if the consideration was material, failure to take it into account would have made no difference.
78. Carnwath LJ examined a number of cases about alternative sites including, among those also cited to me, *GLC v. Secretary of State for the Environment* (1986) 52 P&CR 158, [1986] JPL 193, in which Oliver LJ said at 196 that there were cases in which a comparable site “had to be a material consideration”, and that without seeking to lay down a test for every case, that would be likely where there was:
- “[f]irst of all ... a clear public convenience, or advantage, in the proposal under consideration; secondly, the existence of inevitable adverse effects or disadvantages to the public or to some section of the public in the proposal; thirdly, the existence of an alternative site for the same project which would not have those effects, or would not have them to the same extent; and fourthly, a situation in which there could only be one permission granted for one such development, or at least only a very limited number of permissions”.
79. Those words of Oliver LJ formed part of Simon Brown J’s exposition of the principles in *Trust House Forte Ltd v. Secretary of State* (1986) 53 P&CR 293, cited in turn by Carnwath LJ in *Derbyshire Dales* (at paragraph 16). Simon Brown J’s formulation of the principles was subsequently applied by Sullivan LJ in *R (Langley Park School) v. Bromley LBC* [2010] 1 P&CR 10, at paragraph 45, where he quoted Simon Brown J’s words:
- “[w]here ... there are clear planning objections to development upon a particular site then it may well be relevant and indeed necessary to consider whether there is a more appropriate alternative site elsewhere”.
80. The *Langley Park* case itself, Sullivan LJ added, was not, unlike the *Trust House Forte* case, an “alternative sites” case; “the principle must apply with equal, if not greater, force if the suggested means of overcoming the clear planning objection is not that the development should take place on a different site altogether, but that it should be sited differently within the application site itself” (paragraph 46). The appeal was allowed and the permission quashed.
81. *Secretary of State v. Edwards* (1995) 69 P&CR 607, CA, was another case in which a permission had been granted without considering alternative sites for a motorway service station. The facts were unusual because the owner of the alternative sites had made a competing application for planning permission and had asked for his sites to be considered at the same time as the sites (owned by “RDL”) for which permission

was granted, and the Secretary of State had refused to consider all the applications together.

82. There was therefore a whiff of procedural unfairness (or, as Carnwath LJ thought in *Derbyshire Dales* at paragraph 22, irrationality) in the case. Roch LJ, giving the leading judgment, cited the judgment of Simon Brown J in *Trust House Forte* and of Glidewell LJ in the *Bolton MBC* case. Applying the latter's tests, he concluded that Mr Edwards' alternative sites were material planning considerations, "account of which would have created a real possibility that the Inspector's decisions in the RDL appeal would have been different" (616).
83. In *Derbyshire Dales*, Carnwath LJ expressed a marked lack of enthusiasm for Glidewell LJ's formulation in the *Bolton* case, saying it suggests "a relatively low threshold" that was "not supported by the textbooks, nor ... by other authorities" (paragraph 24). After considering the impact of *CREEDNZ*, accepted as correct in *Re Findlay*, he concluded at paragraph 28 that it was:

"not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter is one which the statute expressly or impliedly (because 'obviously material') requires to be taken into account 'as a matter of legal obligation'".
84. Finally, I need to mention the Court of Appeal's recent endorsement of Carnwath LJ's analysis, in *R (Luton BC) v. Central Bedfordshire BC* [2015] EWCA Civ 537. Luton challenged Central Bedfordshire's grant of permission for a major development in the Green Belt. Luton was concerned that not enough of the housing on the development would be "affordable". Its challenge rested on various grounds including failure to take account of alternative sites, a contention that failed on the facts because those alternative sites that had been identified had been considered and found not to be viable on planning grounds.
85. Sales LJ's leading judgment recorded, at paragraph 71, acceptance by both sides that the legal principles were those set out by Carnwath LJ in *Derbyshire Dales*, as accurately summarised by Holgate J at first instance, including the proposition derived from Carnwath LJ's paragraph 36 that "planning legislation does not expressly require alternative sites to be taken into account"; and that if no requirement of local or national policy contained such a requirement, "the matter is one for the planning judgment of the decision-maker".
86. Mr McCracken reserved the right to argue in a higher court that the approach of the Court of Appeal in cases decided after *Tesco* and *Edinburgh* in the House of Lords, were decided according to reasoning inconsistent with the reasoning in those House of Lords cases. As I understood his argument, he reserved the right to complain that the later cases had moved away from the proposition that materiality is a question of law for the court (while weight is a matter of planning judgment) and embraced the heretical proposition that materiality is now a matter of planning judgment, and not law.
87. Whatever the merits of that argument may be for another day, Mr McCracken accepted that I was bound to follow the subsequent Court of Appeal decisions. I must

reconcile them as best I can with the proposition that materiality is a question of law. I also bear in mind that the wording of section 70 of the 1990 Act makes obligatory any consideration that is material, a point not expressly touched upon in the authorities cited to me.

88. I conclude that on the present state of the authorities, there are, even in the context of section 70 of the 1990 Act, and despite its wording, three categories of considerations:
- (1) those that must be taken into account, either because statute (not including section 70), or national or local policy, so requires, or because they are so obviously relevant on the facts it would be irrational not to do so;
  - (2) those that may be taken into account, so that the authority will not err by doing so; they are not intrinsically irrelevant but do not fall within (1) above; the weight they should bear is a matter of planning judgment, and may properly be nil; and
  - (3) considerations that are legally irrelevant, which may, in the normal way, taint a decision with illegality if taken into account; for example, a desire to benefit or punish a developer, or to benefit or punish objectors, or to favour one developer over another.
89. And on the present state of the authorities, where the consideration that is said to be material, and indeed obligatory, is the existence of an alternative site that will better serve the public benefit than the development, the position is no different: the alternative site issue may fall into either the first or second category above, depending on the facts (but would be unlikely to fall into the third category).
90. In the present case, my difficulty with the council's decision under challenge is that the availability of the Uppermill site as an alternative to the pallet works site that would avoid the harm that would result from approving development at the latter site, was treated in the main report as an irrelevant consideration falling into the third category; whereas it was at the very least a consideration falling within the second category. Indeed, applying the tests derived from the *GLC* and *Langley Park School* cases to the facts here, I would go further and place it in the first category. The alternative site was obviously relevant for a number of reasons.
91. First, the EFA's feasibility study had been based on non-planning considerations and the obtaining of "value for money". Despite that, the study had not ruled out Uppermill on financial grounds. The EFA would be willing to contribute over £19 million, if not the total cost, of redeveloping the school at Uppermill if the council should select it. The main report conceded as much, and did not advise members that the school could not be rebuilt at Uppermill.
92. Second, the feasibility study had not included any consideration of harm to a heritage asset. The only mention of the issue was at paragraph 4.1 of the study, which stated in the EFA's words that included among the advantages of the pallet works site was the following point: "[w]hile not included within the proposal the option supports the redevelopment and setting of the Grade II Listed Building". That is not consistent with the council's subsequent acceptance that substantial harm would be caused to the listed building.



93. Third, the alternative site was not far-fetched or vague; it was a concrete and costed proposal, albeit one with perceived financial disadvantages and one that would cause disruption to education, and inconvenience, during the construction phase. The council already owned the Uppermill site. Although the costings produced a more expensive build figure, the excess over the EFA's indicative figures was not very large and there would be savings to be made in relation to bus transport to the pallet works site, which would not need to be provided if the school were to remain at Uppermill.
94. In the main report, there was a long section about alternative sites. They were not, in the main report, initially dismissed as irrelevant. The history of the feasibility study and its preference for the pallet works site were deployed in the main report. For the objectors, the availability of the alternative Uppermill site was the mainstay of their objection, in practical terms. The passages in the main report explaining why it had been rejected on non-planning grounds, no doubt acted as a counterweight to the advocacy of Mr Brooks at the meeting. Those passages were not included in the main report to enable members to consider those alternatives, but, it appears, to explain to them why they should not do so.
95. In my judgment, it was obviously rational and sensible for the members of the planning committee to weigh the educational, financial and construction advantages of the pallet works site against the harm done to the heritage asset if that site were adopted. That was done. But it was equally rational and sensible, and indeed necessary as a matter of rationality, for the members of the committee to weigh the educational, financial and construction disadvantages of the Uppermill site against the benefit of avoiding substantial harm to the heritage asset at the pallet works site. That was not done.
96. Mr Manley, rightly, did not submit that the members of the committee would have been acting wrongly if they had chosen to consider the alternative Uppermill site as a material factor in its decision. That concession, correctly made, establishes that the availability of the alternative site was, at least, a consideration falling into the second category above, and not the third.
97. Mr Manley's further submission was that members were free to reject the "advice" of officers in the main report that they should not consider the alternative Uppermill site, and that while the members would not be acting wrongly if they chose to reject that advice, neither was the advice that members should ignore the alternative site wrongly given; it was a legitimate exercise of officers' planning judgment.
98. I reject that submission. The language of the main report was, as Mr McCracken submitted, imperative and not merely advisory. Members were positively instructed to put the Uppermill site out of their minds. Contrary to Mr Manley's submission, the language in the main report does amount to a direction to members that they *would* be acting wrongly if they were to take account of the alternative site. The case is to some extent analogous to the *Langley Park School* case; although the alternative site was not, as in that case, on the application site itself, it was as much a viable alternative as in that case.
99. I do not accept any suggestion that the committee's conclusion would plainly have been no different if the members had been told that they could consider the Uppermill

alternative if they wished to, or if the members had been told that they *should* consider the Uppermill alternative. The case for Uppermill to be preferred on heritage grounds has not yet been considered. It cannot be devoid of all force given the availability of EFA funding for nearly all the cost, the council's ownership of the site and the substantial harm to the setting of a heritage asset that would be avoided if Uppermill were preferred.

100. The council argued that if heritage concerns had been considered during the feasibility study, the pallet works site would still have outstripped Uppermill as the preferred site. Mr Manley relied on the numerical scoring exercise undertaken by the EFA and argued that, if heritage considerations had been scored on the same scale of one to four, Uppermill would still have lost the contest because its overall score would still have exceeded that of the pallet works site even if it had achieved the best (lowest) score for heritage and the pallet works site had achieved the worst (highest) score for heritage.
101. This is to reduce the concept of substantial harm to a heritage asset to a mere unweighted number in a scoring exercise which assumes, without warrant, that heritage concerns should command the same weight in the scoring exercise as other concerns that were scored in the feasibility study. Furthermore, if heritage concerns had been scored in the exercise, they might well have been downplayed just as they later were in the February 2016 report which characterised the damage as less than substantial (the point made in ground 2).
102. I conclude that the plainly relevant question that was never addressed by members was whether it was worth incurring the additional financial, educational and construction burdens of keeping the Uppermill site, to avoid the substantial harm to the setting of the heritage asset. They were wrongly told (see in particular paragraphs 4.19 and 12.75(d)) to ignore Mr Brooks' argument and not ask themselves that question. I therefore uphold the claim on the first ground, to which the second ground does not add anything.
103. I will deal with the other grounds of challenge more briefly, since none of them would have persuaded me to grant any relief. They are grounds 3 to 9 inclusive, except ground 4, which is not pursued.

### Ground 3: the marketing exercise

104. The claimant's argument is that the council failed to take into account manifest defects in the marketing exercise undertaken from 2008 to 2013. The submission is that the industrial buildings at the pallet works site were marketed at too high a price; that Mr Prestwich pointed this out in an email to the marketing agent (of which objectors were unaware at the time); that the site was marketed only as a vacant site, on the basis that the existing buildings would be demolished, and not as buildings suitable for employment use; that it was therefore misleading for members to be told in the main report that the marketing exercise had demonstrated that the industrial buildings at the site were unsuitable for renewed employment use; and that members should have been told about the admitted defects in the marketing exercise.
105. I do not think there is any merit in this argument. As Mr Manley pointed out, a narrative dealing with the marketing exercise was included in the main report (see

paragraphs 10.132-138). It included a fair summary of the objectors' case: that the marketing exercise had been inadequate; that the buildings had been allowed to fall into disrepair; and that efforts to find a purchaser were insufficient.

106. The passages that followed took issue with some of that criticism, saying that sign boards had been erected and that three advertisements had been placed in local newspapers. At paragraphs 10.186 to 10.188 it was pointed out that the relevant policy (Policy 14 of the Joint DPD [Joint Core Strategy and Development Management Policies]) did not require a marketing exercise at all; it was sufficient that officers had formed the view through a "viability exercise" that continued use or development of the site for employment purposes was not viable; or the view that development of the site for alternative uses would benefit a regeneration area identified as in need of investment or would benefit the community of an area.
107. I do not agree with the claimant's argument that members were misled about the adequacy of the marketing exercise by not being told about Mr Prestwich's criticisms of it as set out in his email to the marketing agent, sent on 8 January 2013. The paragraphs in the main report relied on by Mr Manley show that the council had properly considered whether use of the industrial buildings for employment purposes was viable and had properly recorded the objectors' case that the marketing exercise was inadequate. It cannot be said that the issue was not properly placed before the committee members.

Ground 5: failure to include "non-Green Belt harm" in the weighing exercise

108. This ground was advanced in the claimant's skeleton argument in different ways. In part, it was developed by reference to arguments about the availability of the alternative Uppermill site. I do not find it necessary to revisit this part of the claimant's argument, as it has been considered already within ground 1, where it properly belongs.
109. The starting point for the argument in ground 5 is paragraphs 87 and 88 of the NPPF:
87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.
110. It is common ground that "any other harm" in paragraph 88 includes harm other than harm to the Green Belt (*Redhill Aerodrome Ltd v. Secretary of State for Communities and Local Government* [2015] PTSR 274, [2015] EWCA Civ 1386, per Sullivan LJ at paragraph 20). Such "non-Green Belt harm" can include (to take as an example the facts of the *Redhill Aerodrome* case) harm to landscape character, adverse visual impact, noise disturbance and adverse traffic impact. It could also include, returning to the facts of this case, harm to the setting of a cultural heritage asset.

111. The claimant's argument is that in the main report, officers failed to include "non-Green Belt harm", namely harm to cultural heritage, in the weighing exercise, when considering whether the "very special circumstances" threshold was reached. Mr McCracken referred me to passages in the main report (e.g. paragraphs 12.42-43 and 12.245) in which the "very special circumstances" test was referred to and reference made to the benefits of the scheme overwhelmingly outweighing harm to the Green Belt; without mentioning harm to cultural heritage.
112. Mr Manley, for the council, countered that there was overwhelming evidence that members were made aware of, and were alive to, the need to weigh cultural heritage in the balance when considering whether to approve the applications. He pointed, in particular, to passages in the main report (notably, paragraph 12.204ff) drawing members' attention to the issue of cultural heritage, and submitted that it did not matter that those passages did not appear in the section of the main report dealing specifically with harm to the Green Belt and the "very special circumstances" test.
113. Mr Manley submitted that the claimant's argument owed too much to an unduly forensic approach to the language of the main report, and overlooked the inference that relevant policies mentioned in the report had been complied with and properly taken into account (*Palmer v. Hertfordshire Council* [2016] EWCA Civ 1061, per Lewison LJ at paragraphs 7 and 8). He submitted that on a fair reading of the main report at a whole, it could not be said that members were invited to exclude cultural heritage from the weighing exercise when considering harm to the Green Belt.
114. Mr McCracken had another string to his bow which, he submitted, further undermined the council's position. He said that it was wrong that there was no acknowledgment in the main report that the playing fields were, in and of themselves, "inappropriate development" of the Green Belt. If I have understood his argument correctly, it is as follows.
115. The proposed school playing fields included associated buildings, not just marked out pitches. Therefore, they would not fall within the list of exceptions to inappropriate development in paragraph 89 of the NPPF. Playing fields are provision of "facilities for outdoor sport" and "outdoor recreation" and therefore not inappropriate in the Green Belt but provided the provision "preserves the openness of the Green Belt and does not conflict with the purposes of including land within it".
116. That proviso cannot apply in this case, says Mr McCracken, because the playing fields are to be accompanied by associated buildings. In the main report, however, officers treated the playing fields as appropriate development, but the addition of "man-made features" surrounding them as inappropriate: see paragraph 12.31. The playing fields themselves were not condemned as "inappropriate" development in the Green Belt.
117. Since, on the preponderance of authority (see *R (Timmins) v. Gedling BC* [2015] PTSR 837, [2015 EWCA Civ 10, per Richards LJ at paragraph 31), the list of exceptions to types of development that are inappropriate in the Green Belt contained in paragraph 90 of the NPPF is a closed list, i.e. is exhaustive, there was no scope for advising members that the playing fields themselves were appropriate development in the Green Belt.

118. Mr Manley pointed out that the terms of NPPF paragraph 89 had been expressly and correctly set out in the main report (paragraph 12.29) and submitted that the claimant's criticism was of no substance, since there was ample material in the report to alert members to the impact on the Green Belt of the proposed playing fields and surrounding associated buildings.
119. I agree with Mr Manley's submissions. There was a detailed section in the report bearing the sub-heading "Heritage / Demolition impact", comprising paragraphs 12.204 to 12.237, which was one of the sub-headings under the heading "Design". The "Design" section formed part of section 12 of the main report, dealing with the planning considerations applicable to consideration of "Application C", the application for a new school, sports pitches, playing fields and areas for play and parking.
120. Within section 12 of the main report, detailed consideration was given to the relevant policies contained in the NPPF, including in particular paragraphs 87-90 dealing with development in the Green Belt. I do not think there is any substance in the point I regard as arid and technical, that the playing fields ought to have been considered inappropriate per se; nor in the broader argument that the council failed to weigh cultural heritage in the scales when considering whether the "very special circumstances" test was met.
121. It is true that in the context of the Green Belt weighing exercise, cultural heritage was not specifically mentioned as a counterweight to the benefits of the proposals to build the new school and playing fields. But it was dealt with in the context of the proposals generally. I do not think it was material here that cultural heritage considerations were considered outside the specific "Green Belt" part of the overall weighing exercise.
122. Thus, paragraphs 12.20 to 12.50 dealt adequately with the Green Belt issues generally. Paragraphs 12.204 to 12.237 dealt in detail with the heritage concerns that would arise if the applications were approved. I do not think it matters that, as technically should have happened, the latter were specifically weighed in the "Green Belt" part of the exercise, rather than more widely, in the context of the proposals generally. I would therefore reject the claimant's case under ground 5.

Ground 6: irrationality in relation to industrial use of buildings

123. The claimant contends that the council adopted an irrational approach to the impact on local amenity of the school. The criticism is that in the main report, officers excluded any such impact, reasoning that the new school would preclude industrial use of the site buildings; while at the same time saying, inconsistently, that industrial use of those buildings was not viable.
124. This ground of challenge is founded, in particular, on what is said to be a contradiction within the executive summary at the start of the main report, between paragraph 1.13 ("*loss of employment land is acceptable as the applicant has shown the site is no longer viable as an employment use...*") and paragraph 1.25 ("*[i]t is not considered that the school will create any amenity issues that will affect residents to such an extent that it would sustain a reason for refusal, particularly in view of the fact that the proposal could potentially replace an unrestricted industrial use*").

125. The council submits that the point is a minor one and that the contradiction is more apparent than real: industrial use in the future is described as “unlikely” rather than impossible (paragraph 1.2); while paragraph 1.25 (quoted above) included the qualification “potentially”. Those features of the narrative are repeated in the body of the report.
126. I agree with the claimant that it is in principle irrational to report to committee members that buildings will not be used for industrial purposes, and then to report that the new school will prevent use for industrial purposes which would otherwise occur. But I agree with the council that the tensions within what are said to be those inconsistent statements are not as stark as the claimant says.
127. In my judgment, read in the context of the exercise as a whole, the element of irrationality relied on is, even taken at its highest in the claimant’s favour, nowhere near significant enough in itself to induce the court to quash the permissions. I therefore reject ground 6.

Ground 7: failure to take into account increased transport costs

128. The claimant asserts that officers failed to draw any attention in the main report to a saving if the school remained on the Uppermill site, estimated in March 2015 at a sum in the region of £200,000 per annum, in the cost of providing additional bus transport that would have to be met if the school were to relocate to the pallet works site.
129. The council submits that there was no requirement to reiterate this point in the main report. It was already known to the council as a result of the EFA’s feasibility study a year earlier; it was not an obligatory material consideration by virtue of any provision in legislation or in any policy document; and it was lawful for the council to treat it as a factor to which no weight need be attached; and that if the point had been expressly drawn to members’ attention, their decision would surely have been the same.
130. Again, I prefer the submissions of the council on this issue. The question of cost was considered in the main report, but in the context of a comparison between the construction (and associated) costs of, respectively, relating the school to the pallet works site, and redeveloping it on the existing Uppermill site (see, in particular, paragraph 4.9 of the main report, and footnote 1).
131. I accept that the estimated annual saving in transport costs was not included in that account of the comparative costs of the two competing sites. But I do not accept that it needed to be included. It would not clearly be a saving to the council; there was a suggestion that the additional transport costs, or some of them (presumably, in so far as provision was of community bus transport rather than school transport) would fall on Transport for Greater Manchester rather than on the council.
132. It was open to the objectors to draw attention to the omission from the calculations of the transport element, if they wished to. They did not do so or, if they did, the issue was there for the members to consider. I do not think there is any merit in this ground of challenge.

Ground 8: inadequacy of the consultation process

133. Mr McCracken, for the claimant, submits that the public was unlawfully deprived of its right to participate in the decision making process on a properly informed basis. He contends that participation in the consultation exercise (which, as extended, ran from 23 December 2015 to 31 March 2016) was made excessively difficult; and that there were breaches of obligations to provide information, creating directly effective rights, arising under the EU directive 2011/92/EU on assessment of the effects of certain projects on the environment (the EIA directive), and under the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the 2011 Regulations), which implemented predecessor directives.
134. Mr McCracken relied upon the following matters in particular. He said that the “100 character limit” encountered by Mr Brooks made participation in the consultation exercise excessively difficult. He complained that Mr Brooks’ young son, a pupil at the school, had been improperly cajoled into supporting the relocation of the school; that documents were missing from the council’s website portal, which constituted its statutory planning register (there being no paper register); and that responses on the portal were presented in misleading form, for example attributing Mr Brooks’ home address to someone else (who could, Mr McCracken accepted, have been an imposter).
135. Separately, Mr McCracken relied upon Ms Skelhorn’s evidence asserting that the ES had included materially inaccurate information about flood risk assessment, and that the late list report, which included a summary of an addendum to the ES seeking to remedy the defect, was itself defective because it misrepresented the extent of required changes to the project and the extent of the flood plain as shown in the council’s own Strategic Flood Risk Assessment and the corresponding assessment of the Environment Agency.
136. Furthermore, Mr McCracken submitted that the plans and drawings produced as part of the late list report exercise, were never placed on the council’s planning portal as they should have been; that Ms Skelhorn and others were materially impaired by these defects from contributing as they should have been able to do; and that the defects emerged so late that statutory consultees, such as Natural England and the Environment Agency, were unable to comment on them.
137. Mr McCracken submitted that these were egregious breaches of the notification and advertising requirements found in regulation 22 of the 2011 Regulations in cases, including this one, where an environmental statement clearly required to be supplemented by additional information. The requirements of regulation 22 were advertising in a local newspaper that further information is available, and suspension of consideration of the planning application until 21 days after publication (see regulation 22(1), (2), (3)(e)-(h) and (7)).
138. Separately, the claimant complains that the responses of statutory consultees, which were not placed on the council’s electronic-only planning register, were “main reports and advice issued to the competent authority”, i.e. the council, which “in accordance with national legislation” (i.e. the 2011 Regulations) ought “within reasonable time-frames” to have been “made available to the public concerned”: see the directly effective article 6(3)(d) of the EIA directive.

139. Once again keeping his powder dry, Mr McCracken accepted for present purposes that I am bound by the reasoning of the Supreme Court in *R (Champion) v. North Norfolk DC* [2015] UKSC 52, [2015] 1 WLR 3710. He reserved for another occasion the contention that the Supreme Court's approach in *Champion* was too restrictive of the rights conferred on individuals by the EIA directive and, therefore, under the 2011 Regulations.
140. In the *Champion* case, by which I am plainly bound, Lord Carnwath JSC (as he had by then become) said at paragraphs 54-58, leading to the conclusion at paragraph 58 (citing from paragraph 53 of the judgment of the Court of Justice in *Gemeinde Altrip v Land Rheinland-Pfalz* (Case C-72/12) [2014] PTSR 311) that it is:

“open to the court to take the view, by relying ‘on the evidence provided by the developer or the competent authorities and, more generally, on the case file documents submitted to that court’ that the contested decision ‘would not have been different without the procedural defect invoked by that applicant’. In making that assessment it should take account of ‘the seriousness of the defect invoked’ and the extent to which it has deprived the public concerned of the guarantees designed to allow access to information and participation in decision-making in accordance with the objectives of the EIA Directive.”
141. Mr Manley's riposte to these submissions was to the effect that the complaints were minor and, in so far as made out, not such as to impair the substance of the right of objectors to participate in the process, which they had exercised to the fullest extent and over a long period without difficulty.
142. He did not accept that the consultee responses were documents falling within the scope of article 6(3)(d) of the EIA directive. He accepted that they were not placed on the statutory portal; but pointed out that Ms Skelhorn had access to them in late October 2015, and they were made available as part of the ES, which became publicly available in December 2015.
143. He pointed out that the limit of 100 characters which for a time inhibited the length of comments placed directly onto the planning portal, in no way prevented the sending of lengthy and detailed letters to the council by email or post, which had been done many times in 2015 and 2016. He also asked me to note that the late list report was not said to have misrepresented the late addendum to the ES; it was the latter that was criticised, and the objectors were or should have been able to deal with it.
144. For those reasons, said Mr Manley, this was very much a case for the application of Lord Carnwath's reasoning in paragraph 58 of his judgment in the *Champion* case, and one where relief should be refused on the ground that any defects in the process were minor and not material.
145. I agree with Mr Manley's submissions. I do not accept that the responses of statutory consultees were “main reports and advice issued to the competent authority” within article 6(3)(d) of the EIA directive. Nor is this a case in which I find on the evidence that there was a substantial denial of rights of access to documents or other impediments to intelligent participation in the decision making process. The Action Group was astute to assert its members' right to participate. Although the objectors



complained that they were being hampered for procedural reasons from putting forward their best case, I do not find that they were prevented from putting it forward.

146. This was a consultation exercise which evoked a response from the objectors which was comprehensive, articulate and intelligent. Every point they could have wished to take was taken. The only possible exception was that Ms Skelhorn's complaints about the late revisions to the project and the inaccuracy of the plans purporting to represent them, were not available to her for deployment in support of objections as early as they should have been, due to the lateness of the addendum to the ES and the summary thereof in the late list report.
147. That deficiency in the consultation exercise was slightly more substantial than the other criticisms, but did not come close to persuading me that the case is a proper one for the court to grant relief rather than to withhold it in the exercise of its discretion, in line with Lord Carnwath's reasoning in *Champion*. I therefore reject the claimant's challenge under ground 8.

Ground 9: inadequacy of reasons

148. Finally, the claimant advances as an alternative (presumably, an alternative to the other grounds), the argument that the council "failed to set out clearly its approach" to "the above matters (in particular the materiality of alternative sites)", and to the inconsistency between acceptance of "substantial harm" to the setting of the heritage asset, and use of the phrase "limited harm" in paragraph 1.10 of the executive summary.
149. Reference is made in Mr McCracken's skeleton argument to *South Buckinghamshire DC v. Porter (No. 2)* [2004] UKHL 33, which includes Lord Brown's seminal paragraph 36, setting the standard for reasons challenges of this kind. Mr McCracken relied in oral argument in addition on regulation 24(1)(c)(ii) of the 2011 Regulations, requiring the planning authority to set out the "main reasons and considerations on which the decision is based including, if relevant, information about the participation of the public".
150. I am satisfied that there is nothing in this argument. The main report was unusually full in its treatment of all the issues. It is idle to pluck one phrase from the mass of detail and attempt to topple the entire edifice of reasoning by reference to it. The reasons are not only adequate to inform the reader why the applications were granted; they are open to criticism, if at all, more for being too detailed than too brief.

Section 31 of the Senior Courts Act 1981 (the 1981 Act)

151. In conclusion, I have found that ground 1 of the claim is well-founded for the reasons given above, but none of the other grounds have any merit. The council in its written grounds invited the court to treat this as a case falling within section 31(2A) of the 1981 Act, if of the view that the decision challenged was flawed. That provision requires me to refuse relief, notwithstanding any legal flaw, if it appears to me "highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred." By section 31(8), the "conduct complained of" means "the conduct (or alleged conduct) of the defendant that the applicant claims justifies the High Court in granting relief."

152. The conduct complained of in this case must be, I think, the direction to members given in the main report that they were required to disregard the alternative option of redeveloping the school at its existing site at Uppermill. If that conduct had not occurred, the committee members would, it appears to me, have considered whether the council should prefer the Uppermill site as an alternative to the pallet works site, notwithstanding that the latter had been preferred in the EFA feasibility study, as a means of avoiding the substantial harm that would, if the applications were granted, be done to the setting of the grade 2 listed office building by demolishing the link bridge leading to it.
153. For reasons I have already explained earlier in this judgment, I do not accept that the committee's conclusion would necessarily have been the same or substantially the same if they had, as they would have done but for the conduct complained of, embarked upon that consideration. It does not appear to me "highly likely" that the outcome would have been the same or substantially the same.
154. I bear in mind that the objectors' arguments in favour of Uppermill were not obviously trivial and without merit, and that the Secretary of State, though served as an interested party, has not sought to contradict Ms Marshall's account of her contacts with the EFA and the indication that it would be willing to fund redevelopment of the school on the existing site should the council choose that option.
155. For those reasons, the claim succeeds. I will quash the resolution to grant permission for the construction of the school and the three other issued permissions, and I will hear counsel on consequential matters.