

RE: IN THE MATTER OF AN APPLICATION FOR OUTLINE PLANNING PERMISSION  
LAND OFF DRAYCOTT ROAD, DRAYCOTT ROAD, BLOCKLEY, GLOUCESTERSHIRE

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OPINION

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Introduction

1. I am asked to advise the Blockley Environmental Action Group ("BEAG") extremely urgently as to the contents of the Case Officer's Report ("COR") on a residential development for up to 23 dwellings and associated works in Blockley, Gloucestershire. BEAG is a local group which was formed in April 2014 by more than 100 residents.
  
2. There have been a number of concerns raised in relation to this development. These are summarised as the "Main Issues" at the beginning of the COR. For reasons which will become clear, I do not agree that this list is accurate. Nevertheless, it is helpful to list them here. They are:
  - (a) Residential Development Outside Development Boundaries
  - (b) Sustainability Location
  - (c) Impact on Character and Appearance of Cotswold Area of Outstanding Natural Beauty and Setting of Blockley
  - (d) Impact on Heritage Assets
  - (e) Affordable Housing
  - (f) Highway Safety and Traffic Generation
  - (g) Loss of Agricultural Land
  - (h) Impact on Biodiversity
  - (i) Flooding and Drainage
  - (j) Archaeology
  
3. I understand this application has been referred to Committee by Officers *"in consultation with the Ward Member due to the size of the development, its location within the Cotswolds Area of Outstanding Natural Beauty and the level of local opposition to the application"* and is due to be considered at a Committee Meeting this week.

Significant concerns

4. I have a number of significant concerns about this COR. Many of them are encapsulated in the approach to NPPF Paragraph 16.

NPPF Paragraph 16

5. The applicability of NPPF Paragraph 116 is self-evidently of major importance to the proper and lawful determination of this scheme. If this application did fall within NPPF Paragraph 16, it has plainly not been properly assessed (and it would almost certainly fail those tests, given *inter alia* that the current need for this development given that the LPA can demonstrate a 7 – 9 year HLS and there is at best low demand for affordable housing in this locality itself, is weak).
  
6. However, this is not listed as a "Main Issue". It is first referred to as a material consideration at p.33 of the COR, where it is finally set out. It is helpful to set it out NPPF Paragraph 116 again (emphasis added):

Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of:

- The need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy
- The cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and
- Any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated

7. The COR is correct to set out that the phrase "*major development*" does not have a uniform meaning. It has to be determined in its local context.
8. However, some of the reasons and analysis given for concluding that this site does not fall within NPPF paragraph 116 are illogical, poorly reasoned, selective/partisan, and in some cases entirely irrelevant. This is deeply worrying.
9. Firstly, the starting point (but not, of course, the end point) for consideration of whether this application is a "major development" has to be that this application has been referred to the Committee precisely because of:
  - (i) The "*size of the development*"
  - (ii) its "*location*" within the "*Cotswolds Area of Outstanding Natural Beauty*"
  - (iii) the "*level of local opposition to the application*"
10. There is no analysis whatsoever as to the level of local opposition to the application, and whether this should have any relevance as to whether or not an application should be considered "*major*". Clearly, the level of local opposition is not of itself necessarily relevant to the planning merits of an application. However, where a clearly sizeable scheme, in an AONB, has aroused such substantial passion that a local action group has been formed against it by more than 100 members of the village, who have carefully argued a cogent case based on the planning merits of an application, that is a factor which one would expect to at least see assessed in determining whether or not a scheme is "major". That opposition is substantial – indeed it has led to my instruction.
11. Secondly, the concluding section on this issue begins that "*on balance, and having regard to issues such as location, scale, content, design and local distinctiveness, it is considered that the proposal will have a very localised impact on the AONB*". It goes on to explain that this is why the COR considers that it does not constitute major development in the context of the NPPF, and adds
 

**If Members were to consider that the proposal does constitute major development, then an approval would need to be justified in the context of the aforementioned Paragraph 116.**
12. In my view, whether or not this site is a "major application" is clearly one that must be reached "on balance". It is finely balanced. It is also undoubtedly a question for Members to determine in the exercise of their planning judgment. To that extent I agree with these concluding remarks.

13. However it must be reached lawfully.
14. Thirdly, I am concerned at the lawfulness of the rest of the analysis in this section for the following six major reasons:
- 1) I see no reason at why in an outline application whereby all matters are reserved other than access that "design and local distinctiveness" has any relevance as to whether or not this is a "major application". They are irrelevant considerations (in the usual way such expressions are understood) as to whether or not this application falls within NPPF Paragraph 16.
  - 2) A proposed increase of 3.1% is plainly in principle capable of being significant. A 3.1% in London's housing stock would be an enormous development. A 3.1% increase in a small rural community in a valley with poor roads and poor bus-links is also plainly capable of being significant.
  - 3) The size and scale of developments that took place in the early 1990s under a different planning framework is essentially irrelevant to whether or not NPPF paragraph 116 is engaged nearly twenty years later. From the analysis, in any event one of them was in the centre of the village, and they may or may not have been regarded as major at the time, but they give no indication at all as to how this settlement would today cope with the significant expansion that is proposed.
  - 4) Further, it is at best unclear and at worst irrational to conclude that "*the level of development now proposed is commensurate with the size of developments that have been accommodated in the past*" where one of the core issues is the capacity of Blockley to absorb such sizeable development, particularly in its highway network, and in the context of NPPF Paragraph 16, whether the development is better located elsewhere.
  - 5) The size and scale of developments in Welland and Ampleforth, in Worcestershire and Yorkshire respectively, is also essentially irrelevant as to whether in this particular case this scheme is or is not a major development in its local context. The only relevant conclusion that can be drawn from this evidence is that it is quite clear that as an Inspector had to determine this issue in two recent appeals, that it is clearly a very live issue in decisions of this type for this scale of development. This is not surprising – clearly sizeable developments will engage consideration of NPPF Paragraph 16 – and is precisely the conclusion that needs to be properly determined.
  - 6) See below.
15. Lastly (and sixth, continuing the list above), the analysis in this (and other) sections of the report is arguably inadequate and significantly misleading, such that it could be considered partisan and flawed in law. This is particularly acute in the context of determining whether Paragraph 116 of the NPPF is engaged (although also goes to the lawfulness of the remainder of the COR).

16. The proper approach was recently ably summarised by Dove J in *R (Sainsbury's Supermarkets Ltd v London Borough of Hillingdon v Albemarle Developments Ltd, Arla Foods UK Property Company Ltd* [2015] EWHC 2571 (Admin). Dove J was of course a highly experienced planning barrister now appointed to the High Court, and unsurprisingly for a challenge by Sainsburys the parties were all represented by leading planning QCs; Mr David Forsdick QC, Mr Craig Howell-Williams QC, and Mr Patrick Clarkson QC. Dove J held (emphasis added):

35 The examination of the making of these types of decision and in particular the assessment of the committee report, which will no doubt in every case underpin such a decision, needs to be undertaken in the context of the legal principles before approaching such a committee report which were aptly summarised by Mr Justice Hickinbottom in *R (On Application of Zurich Insurance Ltd T/a Threadneedle Property Investments) v North Lincolnshire Council* [2012] EWHC 3708 at paragraph 15 as follows:

- i. "15 Each local planning authority delegates its planning functions to a planning committee, which acts on the basis of information provided by case officers in the form of a report. Such a report usually also includes a recommendation as to how the application should be dealt with. With regard to such reports:
  - i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.
  - ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently: ii. [A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken.' ( *Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council* (18 April 1997) 1997 WL 1106106 , per Judge LJ as he then was).
  - iii) In construing reports, it has to be borne in mind that they are addressed to a 'knowledgeable readership', including council members 'who, by virtue of that membership, may be expected to have a substantial local and background knowledge' ( *R v Mendip District Council ex parte Fabre* (2000) 80 P & CR 500 , per Sullivan J as he then was). That background knowledge includes 'a working knowledge of the statutory test' for determination of a planning application ( *Oxton Farms* , per Pill LJ)."

17. In my view, there is a very real risk that this COR "*significantly misleads the committee about material matters*" for the following reasons:

- 1) It is of course correct that this site has been allocated in emerging Local Plan documents. However, nowhere in the COR does it properly set out the extent and depth of local opposition to that allocation or the detailed reasons why. That is highly relevant to sub-paragraph (ii) of NPPF Paragraph 16 "*...scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way....*"

It is also highly relevant that NPPF Paragraph 216 is engaged, but nowhere has this been properly addressed or considered. This indicates that whilst decision-takers may give "*weight*" to relevant emerging policies ("*unless material considerations indicate otherwise*") a key consideration in that weight is "*the extent to which there are unresolved objections to relevant policies*". There are plainly "*unresolved objections*" to these relevant draft emerging policies in this case.

Proper consideration of this application requires the decision-maker to properly engage with the first of the 12 "*core planning principles*" of the NPPF at NPPF Paragraph 17. This is that planning should "*be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area.*"

*Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues".* In this case, this requires the COR to properly engage with the Parish Council (and BEAG's) representations on this scheme including other sites and cumulative impacts.

There are also good prospects that it would be unlawful for a straightforward breach of a failure to have considered alternatives. Whether or not alternatives are a material consideration in any particular case "will depend upon the precise circumstance of the case, as assessed by the local planning authority", see *R (Langley Park School) v Bromley LBC* [2009] EWCA Civ 734. By analogy with Sullivan LJ analysis in *Langley Park School*, where there is harm caused by an application, where that harm may be reduced by a different siting, and where there are clear objections to a proposed development, alternatives are more relevant. Sullivan LJ indicated the following (non-exhaustive) factors were relevant. They are all in play in this case and the COR does not engage with them in any real sense:

"likely to have a bearing on the issue of whether alternative [schemes] are relevant in a given case:  
 i. the nature and degree of the harm arising from the proposal;  
 ii. the nature and urgency of the need;  
 iii. the scope for alternatives which could sensibly satisfy the need;  
 iv. the extent to which the feasibility of such alternatives has been demonstrated (ie the weight which can be attached to them)."

- 2) Nowhere (in this section of the COR, or at all) does it refer to the (Independent) RPS Group's review of the Blockley Conservation Area and its conclusions as to the expansion of that area and the inclusion of this area – plainly relevant when considering whether or not NPPF Paragraph 116 is engaged.

It is also a very serious omission that this is not referred to at all in section (d) of the COR "*Impact on Heritage Assets*", where one would expect the evidence of a relevant independent consultant to at least have been set out.

- 3) Nowhere (in this section of the COR, or at all) does it set out in any detail or engage with the possibility of cumulative harm from this (and other) developments to the AONB, which is plainly an acutely relevant consideration when considering if paragraph 116 of the NPPF is engaged (as well as the other matters raised in 17(1)).
- 4) Nowhere in this section of the COR where it is most relevant does the Officer refer to the fact that applications for 76 and 90 houses in Chipping Campden were considered by this LPA to be major development, nor the representation by BEAG and others (set out at no. xxviii of the list of representations) that in the same context (given their respective population sizes, which is also not set out) 23 houses in Blockley in an AONB and outside a Development Boundary must also be considered major, especially as it comprises almost 50% of Blockley's remaining quota until 2032; nor does it refer again to the representation (at no. xxix) that the detailed, through village consultation that Blockley Parish Council carried out "*identified that small scale development of*

*up to 10 dwellings is acceptable but that estate development on the scale proposed is unacceptable"*

18. In the context of the last point in particular, I would emphasise that it is noteworthy that not only is Paragraph 116 of the NPPF essentially "buried" within this COR, but further although it sets out "*if Members were to consider that the proposal does constitute major development, then an approval would need to be justified in the context of the aforementioned Paragraph 116.*" It does not then address that question.
19. In my view, on the evidence before me in relation to this application, it would clearly fail those tests. Members should clearly be advised of that fact.
20. For all these reasons (and probably others which I have not been able to identify in the time available), I consider that the approach to Paragraph 116 of the NPPF is likely to be unlawful.

#### Other matters

21. Many of the points raised above self-evidently overlap with other issues. I am particularly concerned at the number of omissions in the report. It is, of course, the duty of an COR to set out the issues fairly so that Members can make an informed judgment for themselves.
22. In addition to those I have raised above, other examples of "*significant inadequacy*" which concern me include:

#### Sustainability Assessment

23. The "Sustainability assessment" section sets out the local bus services between Stratford-upon-Avon and Evesham (via Chipping Capden and Moreton-in Marsh), operating 5 times a day in one direction and 4 times in reverse, and that a mainline railway station operates at Morteon in Marsh. It fails to set out the representations of BEAG and others that the reality is that this service is plainly insufficiently frequent to be much use, that Moreton-in-Marsh is a major pinch-point, and their representations in relation to the fact that the network is such that cycling to Morteon in Marsh is unrealistic.
24. These are highly relevant to the overall sustainability assessment under the NPPF which is of course a key consideration in any development, but particularly one in an AONB.
25. The "sustainability assessment" section also sets out that the site is "approximately 850m" from the village's shop and primary school, and the guidance from the Guidance in Manual for Streets that "*walkable neighbours are typically characterised by having a range of facilities within 10 minutes (up to 800m) walking distance of residential areas which residents may access comfortably on foot*". It then sets out that they would have to progress up hill to reach the centre of the settlement and says "*However, they would also benefit from a downhill journey on their return. The gradient is considered*

*not to be unduly steep or of a level that would be unduly prohibitive to pedestrians and cyclists*". Whilst this example sets out the relevant facts, the analysis appears flawed and partisan. The reality is that (i) older people and (ii) families with young children – who are the two groups who indicated they were most interested in affordable housing – would not walk 850m uphill to the local shops. Thus this is likely to be beyond "within 10 minutes". There is no real engagement with the consequences of this point – clearly, they reduce the degree to which the development is sustainable, and substantially increase the likelihood that local facilities will be accessed by car.

26. Similarly with the assessment of the sustainability of the transportation links. There is a serious criticism levelled that 2001 census data is used which substantially underestimates the level of commuting out from the village, putting it below the relevant averages. All of the evidence I have seen in relation to the availability of bus services in Blockley and the lack of many employment options or other facilities suggest it is unlikely to be below average, and it is substantially more likely that, as BEAG suggest, it is significantly above it. BEAG further reference the draft Gloucestershire Local Transport Plan which apparently suggests that the figures would be 5% higher than the county average. The levels of estimated movements for 23 dwellings in Blockley seem to me to be unlikely to be accurate in these circumstances. I would also factor in the point raised immediately above as to the likelihood of people in fact walking 850 metres uphill.
27. Clearly, none of these factors are fatal to a conclusion in Members' planning judgment that overall a site is sustainable. BEAG also set out other relevant matters, in particular such as the lack of local employment. It has some relevance that the local shop is only supported by a National Lottery grant and its management committee run voluntarily and that other services are on a skeletal or part-time staff. The core point is that the degree to which this site is sustainable is significantly more finely balanced than the COR represents (if indeed it should be properly concluded that it is sustainable), and that has important repercussions for the overall balancing exercise (see below).

#### SHLAA Review and Affordable Housing

28. The explanation of where the evidence is on the SHLAA Review and the assessment of the Council's Forward Planning Section is at best inadequate and at worst is highly partisan. It is simply not sufficient to assess the complex stage that those Proposed Housing Allocation sites are at in the emerging Local Plan documentation as

"Forward Planning noted the comments of the Parish Council in respect of the whole site. However, the comments also had to be considered alongside national planning policy guidance and the substantial amount of other evidence collected about a number of SHLAA sites., On balance and having regard to all factors Forward Planning considered that the current application site was potentially suitable for residential development

29. I am also surprised that nowhere in the analysis in the COR is there any proper reference to, let alone analysis of:

- 1) The representations made by Brockley in relation to the proposed allocation (which is hotly contested); I have already noted the surprising omission of detailed consideration of this point, given that NPPF Paragraph 216 is plainly engaged and would substantially reduce the weight that

can be placed on these emerging policies as “*there are unresolved objections to relevant policies*”.

- 2) Blockley’s detailed community engagement consultation in December 2014. It is not even referred to in section (e) where “*affordable housing*” is analysed. Bizarrely it there states that “*a housing needs survey of the parish of Blockley was last conducted in 2010...*” but does not reference the most recent door-to-door survey conducted by the Parish Council, which is plainly a material consideration.

This December 2014 community engagement included a Housing Needs Survey delivered to every household in Blockley, with 149 surveys returned. Only 13% of the respondents (some 19 households) said they were in any type of housing need. Approximately even numbers said they wished to move to a smaller property (11 people). Only 4 wished to rent from a Housing Association. Only 6% said they a family member had left Blockley in the last 5 years because of affordability problems – 90% said that no family member had done so. From other analysis that Blockley did, it would appear that there are 23 empty properties in Blockley;

- 3) The other sites being put forward. Clearly, it is only in certain circumstances that considerations as to alternative sites are relevant, most commonly in the Greenbelt. However, this is development in an AONB, and where the allocation of this site in the emerging housing land supply reviews is highly controversial, and where there has been detailed analysis of the local need which raises substantial questions in relation to such development. It is plainly a case where these are material planning considerations as to the situation on this site. It is highly surprising that there is no analysis of this.

30. The COR does record that there is a 7- 9 year HLS.

31. In these circumstances where the COR has completely failed to set out or engage with the competing representations in relation to sites, or to set out the very real and hotly contested issues which are taking place as part of that process (and will be subject to detailed review), and yet seeks to put material weight on the need to continue to release sites, I am concerned that this conclusions is unlawful:

“...It is also evident that the continuing supply of housing land will only be achieved, prior to the adoption of the new Local Plan, through the planning application process. Allocated sites in the current Local Plan have essentially been exhausted. In order to meet its requirement to provide an ongoing supply of housing land there will remain a continuing need for the Council to release suitable sites outside Development Boundaries for residential development. It is considered that the need to release suitable sites for residential development represents a material consideration that must be taken into fully into account [sic] during the decision making process”.

32. Whilst it is not “wrong” either in law or in fact that this “need” is capable of being a material consideration (in principle many matters in planning are capable of being material considerations) the evidence set out and the analysis engaged with in the COR is simply not likely to properly sustain such a conclusion. The LPA has a 7- 9 year supply. Not only is there (or in any event,



should be) ongoing reviews of the HLS but it seems highly unlikely that there will not be a new Local Plan in place at some point within that period.

33. The weight being placed on this factor in these circumstances also verges on *Wednesbury* unreasonableness and there are good prospects it would be seen as irrational (see further paragraph 42-46 below).

Character and appearance of the AONB and setting of Blockley

34. I am concerned at the approach to the assessment of the character and appearance of the AONB and the setting of Blockley. These are, of course, quintessentially matters of planning judgment.

35. I have already noted the failure to have set out references to the RPS Group's analysis. Although I consider the COR does go into more detail in relation to its assessment of the Landscape and Visual Impact, in my view I have three major concerns with this section of the COR.

36. First, in addition the points already made above about the approach to the impact on the conservation area, in my view the Officer's Report falls into a clear error of law where it states:

On balance it is considered that short range views of the site reveal it to be seen in context with existing development. There is a degree of visual inter-connectivity between the site and the settlement with the result that the site does not appear as a distinctly separate parcel of land with no visual or landscape connection to the village. The applicant's Landscape and Visual Impact Assessment (LVIA) identifies that the proposal will have a medium magnitude of change and the significance of the visual effect will be moderate. Officers consider this to be a reasonable assessment

37. I contrast the final sentence with that of the analysis on HBY71 and HBY43, where the conclusion is "Officers concur that the proposed landscape and visual impact will not have an adverse impact on the character or appearance of the AONB from HBY71 and HBY43"

38. The question is not whether the Landscape and Visual Impact Assessment is "reasonable". It is not about whether the applicant's LVIA team reached a decision that was reasonably open to them to reach. The LPA must form its own view.

39. Paragraph 115 of the NPPF states that "great weight should be given to conserving landscape and scenic beauty in.... Areas of Outstanding Natural Beauty".

40. Second, in my view, the COR does not analyse in any real or proper detail the principal criticisms made by BEAG of the Appellant's Landscape and Visual Impact Assessment Study. For example, it does not engage with the individual photographs that BEAG puts forward nor the analysis of the different site views put forward. It also does not properly engage with the fact that whether this density can work on this site given the tension between (i) the need to provide the "area of open space at the front of the site" relied upon in relation to the AONB and (ii) with the other constraints that are also put forward (in particular that of the brook corridor that also needs to be included within the open space provision, and the uncertainty around the visibility splays

that I refer to below). Such a detailed analysis is required given Paragraph 115 of the NPPF (and the other policies set out in the COR).

41. Third, I am concerned about the rationality of the final conclusion. This reads:

Overall, it is considered that the proposal will help to address the Council's needs to provide a continued supply of housing land and will provide affordable housing to meet local needs. It is noted that the Council can currently demonstrate a robust 5 year supply of deliverable housing land. However, this requirement is a minimum not a maximum and as such the Council still needs to ensure that a supply of land is maintained in order to meet its ongoing requirements. Whilst the weight that can be given to the need to provide housing when the supply is in surplus is less than when the supply is in deficit the provision of housing still carries weight when considering this application, especially given the requirement of the NPPF to 'boost significantly the supply of housing' (para 49).

In addition to the above the site is also located in a sustainable location in terms of accessibility to services and facilities and has been identified in emerging Local Plan documents as a proposed housing allocation site. In addition, no objections have been received to the proposal from any statutory or technical consultees in respect of matters such as highway impact and safety, drainage and flooding, ecology, archaeology, heritage or infrastructure. These matters are considered to weigh in favour of the proposal.

It is noted that great weight should be given "to conserving landscape and scenic beauty" in AONBs. The impact of the proposal on the designated area has been given careful consideration. It is of note that the ability of the site to accommodate residential development has been assessed as part of the emerging Local Plan process. Independent landscape consultant's reports indicate that the site has a medium sensitivity and the emerging Local Plan identifies it as a potential housing site. The level of development now proposed for the site is low at approximately 10 dwellings per hectare and as such it could represent a transitional form of development rather than an abrupt urban edge to the settlement. Long range views of the site are limited and reveal the site to be seen in context with existing village development. With regard to short range view the site is bordered on two sides by residential development and has a degree of visual connection with the village rather than appearing as a disconnected and unrelated parcel of land. It is considered that the impact on the AONB is not such that it would outweigh the benefits arising from the proposal. It is considered that the proposal accords with the principles of sustainable development as set out in the NPPF... and is therefore recommended for approval.

42. This conclusion is predicated on the earlier conclusion in relation to (1) that having a housing land supply well beyond 5 years is nevertheless important and a material consideration and (2) the assertion that the site's location is "sustainable".

43. I am concerned at the rationality of this approach where Paragraph 115 of the NPPF is engaged. The starting point has to be that great weight is placed on the AONB.

44. Against that "great weight", there is the fact that yes, longer term housing land supplies are beneficial. Clearly they are. But this is a LPA that can demonstrate a 7 – 9 year housing land supply, and where the relevant local community is saying very clearly having conducted a household level survey that it does not need this development and where BEAG's analysis indicates a substantial number of developments in the pipeline in the relatively near vicinity (which of itself is not surprising if there is a 7-9 year housing land supply). Properly analysed, the sustainability of this site is far from clear, and it is misleading to assert in such clear and certain terms that there is a sustainable location in relation to "*accessibility to services and facilities*" and that it has been "*identified in emerging Local Plan documents as a proposed housing allocation*

site” without even setting out the very important caveats to those two conclusions (including other sites that the emerging Local Plan may prefer.

45. Put shortly, in my view, this conclusion (and the analysis more generally in the COR) does not display full, clear, adequate reasoning. For a decision to be lawful, it must grapple with the “*principle controversial issues*” and do so rationally and reasonably, indicating how and why those principle controversial issues were resolved. On one side of the scales there is a hefty consideration – either Para 116 of the NPPF (in which case the “exceptionality” tests have to be met, which it seems highly unlikely that they could be) or Para 115 of the NPPF and the AONB. On the other side of the scales, there are some far more light-weighted considerations that have not been full and adequately considered, for the reasons I have set out.

#### Other matters

46. I am not able to comment on the approach to the flood risk assessment, other than to note that the concerns in relation to surface water do not appear on the face of the COR to have been adequately addressed, including whether Gloucestershire County Council has been consulted. I am also uncertain whether the issues in relation to the relevant speeds on the roads adjacent and proximate to the development, the highway capacity within Brockley, and the adequacy of the visibility splays, has been properly resolved. It may be that these matters can be adequately dealt with by condition, given that this is an outline application, but this is not clear from the COR. Given the other inadequacies in the report, however, it seems to me there is a real risk that these considerations (or the evidence before the LPA on which to reach a conclusion) has been inadequate.

SASHA BLACKMORE  
LANDMARK CHAMBERS  
10 NOVEMBER 2015

## COTSWOLD DISTRICT COUNCIL

LAND OFF DRAYCOTT ROAD, DRAYCOTT ROAD, BLOCKLEY, GLOS.

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ADVICE

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1. I am asked to advise Cotswold District Council on their consideration of a planning application concerning proposed development of 23 dwellings and associated works on a site in Draycott Road, Blockley, Glos. in the light of a legal Opinion dated 10 November 2015 alleging a number of legal failings in the officer's report relating to the application.

Summary

2. For the reasons which follow, I do not regard any of the matters raised in the Opinion as giving rise to even arguable grounds for legal challenge. In many respects the points of criticism made amount to a disagreement on the planning merits and/or a difference of view as to how the decision on them should be approached. Subject to one point I mention in para. 31 and following below, I would not propose that any changes be made to the terms of the report beyond noting the Opinion of 10 November and the fact that advice has been taken on it. If any challenge is made it can be stoutly defended on the basis of the matters set out below.

Legal principles

3. I will set out at the beginning of my advice a number of statements in case law which are relevant to a consideration of whether a local planning authority have been properly advised by their officers according to what is set out in a report put before Council members. These go somewhat beyond the Sainsbury's case referred to in the Opinion of 10 November and are as well to bear in mind when considering whether the report is likely to contain any significant failing such as to lead to any planning permission granted in reliance on it being quashed.
4. In R v. Selby District Council ex parte Oxton Farms Ltd unreported, 18 April 1997, Pill LJ said this (emphasis supplied in this and subsequent quotations):

“...a planning officer reporting to and advising council members who are to make a relevant decision must keep the [contextually appropriate] test in mind in the information and advice he provides and in the manner in which he provides it.

Clear mindedness and clarity of expression are obviously important. However that is not to say that a report is to be construed as if it were a statute or that defects of presentation can often render a decision made following its submission to the council liable to be quashed. The overall fairness of the report, in the context of the statutory test, must be considered..."

5. Judge LJ agreed saying:

"The report by a planning officer to his committee is not and is not intended to provide a learned disquisition of relevant legal principles or to repeat each and every detail of the relevant facts to members of the committee who are responsible for the decision and who are entitled to use their local knowledge to reach it. The report is therefore not susceptible to textual analysis appropriate to the construction of a statute or the directions provided by a judge when summing a case up to the jury.

...In my judgment an application for judicial review based on criticisms on the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken.

As the analysis by Pill LJ demonstrates, the planning officer in this case took great care fairly to place the relevant legal and factual issues before the committee in a difficult planning application. In my judgment also the report is not susceptible to the criticisms directed at it".

6. See also R (British Telecommunications plc) v. Gloucester CC [2001] EWHC 1001 (Admin); [2002] JPL 993 in which Elias J, as he then was, said at [118]:

"The fact is that members can be intimidated and discouraged by too much detail just as they may be ill equipped if there is too little. It is important that the principal issues and the key information are put to them, but it is not necessary, or indeed desirable that the report should be exhaustive. Plainly there will always be room for dispute as to whether the report should in certain respects have been fuller, or whether certain guidance should have been expressly referred to, particularly in a development which is as large and significant as this one. But it is not for the court to second guess the officers".

7. Similarly, in R v Mendip District Council ex parte Fabre [2000] J.P.L. 810 Sullivan J, as he then was, said this at 821:

“Whilst planning officers’ reports should not be equated with inspectors’ decision letters, it is well established that, in construing the latter, it has to be remembered that they are addressed to the parties who will be well aware of the issues that have been raised in the appeal. They are thus addressed to a knowledgeable readership and the adequacy of their reasoning must be considered against that background. That approach applies with particular force to a planning officer’s report to a committee. Its purpose is not to decide the issue, but to inform the members of the relevant considerations relating to the application... Part of a planning officer’s expert function in reporting to committee must be to make an assessment of how much information needs to be included in his or her report in order to avoid burdening a busy committee with excessive and unnecessary detail”.

8. Again, and even though as acknowledged by Sullivan J in ex parte Fabre the context is slightly different, the High Court has long resisted challenges to inspectors’ decision letters which involve too close a textual analysis of their reasoning without looking at the broader picture, see eg West Midlands Cooperative Society Ltd v. Secretary of State [1988] JPL 121 at 122-123:

“...In relation to matters of weighing and matters of judgement, this court could not and should not attempt to concern itself. So far as the identification of the issues was concerned, the court would seldom interfere with either the Minister’s or an Inspector’s identification of the issues unless there was a manifest and substantial error of law because they were essentially matters for the Minister or the Inspector. The courts would certainly look at the conclusions in order to ask the question: Could they be reasonably readily understood? And the court might have to look at the material which lay, as it were, between the two terminal points if it was germane to a challenge of the conclusions and thus the decision itself.

... [But] it was wholly inappropriate to approach an Inspector’s decision letter with a toothcomb. Nor was it appropriate to scrutinise the document as if it were a statute or a contract or a formal document of some other kind. The correct approach was to read the decision letter as a whole and in so doing to have in mind the following questions: Look at the conclusions, identify them, and pose the question, were they reasonably intelligible by reference to the material and the issues to which they were directed? Then in relation to the intervening material it might be necessary to ask questions such as, did it contain matters that should not have been considered as a matter of law; did it fail to contain material that was plainly material as a matter of law? Then having had regard to those considerations, the question was asked, were the conclusions in relation to the identified material perverse in the sense that no Inspector acting reasonably and directing his mind to the material

considerations could plainly and inescapably not have come to those conclusions?

In this case, by virtue of the way the matter was cast, it had been necessary to consider in detail paragraphs in the decision letter, sentences in the decision letter and even words in the decision letter. It was a rare situation that would justify that kind of approach and this case was not such a rare situation. If one stood back and asked oneself what were the conclusions, they were readily identifiable...”

9. It follows from the above that, when invited to consider the adequacy of an officer’s analysis of a planning proposal in a report to members, the court will look at the overall fairness of the report and whether it is in any respect “significantly misleading” in how it addresses the issues for decision by members and in the choice of relevant information put before them for that purpose. But the identification of those issues and the choice of material to inform a decision on them is very much a matter for the author of the report, subject only to Wednesbury criteria. The report will also not be subjected to hyper-critical textual analysis in seeking to determine whether it reveals any “significant” or substantial legal failing.
10. Finally, to the extent that it is alleged that any of the officer’s conclusions were Wednesbury unreasonable, it should be noted that it was held in R (Newsmith Stainless Ltd) v. Secretary of State [2001] EWHC Admin 74 that the threshold of Wednesbury unreasonableness is a “difficult obstacle for a challenger to surmount” and that “an applicant alleging that a decision maker has reached a Wednesbury unreasonable conclusion on a matter of planning judgement faces a particularly daunting task”, see the judgment of Sullivan J at paras. 7-8.

#### Discussion

11. The first tranche of criticisms set out in the Opinion of 10 November relates to the report’s treatment of NPPF para. 116 and the question whether proposal should have been regarded as “major development” within the AONB.
12. The first point raised, in para. 6 of the Opinion, is that the question should have been listed as a “Main issue” whereas it (merely) comes in as a sub-heading under the third main issue, “Impact on character and appearance of Cotswolds Area of Outstanding Natural Beauty and setting of Blockley”, expressed in terms as follows: “Major Development within the Cotswolds AONB”. Any suggestion that this might call into question the validity of the report in point of law is quite unarguable, given that the identification of relevant issues is a matter for the author of the report and, in any event, the issue is expressly addressed anyway.

13. The next criticism in the Opinion, in para. 8 and following, is to the effect that the proposal before the Council should properly have been regarded as a “major development” within the meaning of para. 116 of the NPPF.
14. The decision on this question is self-evidently a matter of planning judgement. Even though Tesco Stores v. Dundee City Council [2012] UK SC 13 is authority for the proposition that the interpretation of a planning policy is a matter of law for the court, Lord Reed also notes at [19] that the application of certain policies to a given set of facts requires the exercise of judgement which can only be challenged on Wednesbury grounds (and compare the reference to the Aston case [2013] EWHC 1936 (Admin) in the officer’s report).
15. The scope for taking a different view on such a matter of judgement, “on balance” or otherwise, is underlined by the fact that neither the Parish Council, the Cotswold Conservation Board or the CPRE actually assert that the development should be so-regarded. In any event, as acknowledged in para. 11 of the Opinion, the report leaves it open to members to take a different view if they were minded to do so.
16. As for some of the other points raised (for what they are worth), contrary to the apparent assertion in para. 10 of the Opinion, mere local opposition cannot convert what is not a major development into a major development. Complaint is made that there is “no analysis” of the local opposition but, in fact, the Parish Council’s, the Blockley Environmental Action Group’s and other representations objecting to the proposal before members were set out in full in an appendix to the report. It cannot therefore be contended that local opposition was in any way left out of account.
17. The reference to “design and local distinctiveness” which is criticised in para. 14 of the Opinion is part of a list beginning “issues such as location, scale, context, design and local distinctiveness” which is evidently not a closed list (and apparently echoes a reference in the former Gloucester Structure Plan), see top of page numbered 34 of the report. Whether or not a 3.1% increase in the village’s housing stock is significant is plainly within the range of reasonable responses to that question. This and the other matters mentioned in para. 14 amount to no more than criticisms of the approach to the issue for consideration on the planning merits and cannot vitiate the validity of the officer’s approach.
18. It is to be noted, similarly, that this section of the Opinion concludes, in para. 15, that the criticisms made are only “arguably” inadequate and significantly misleading which seems to be an acknowledgement that the requisite standard for intervention by the courts in Oxton Farms and subsequent cases is not met.
19. Paragraph 17 then includes various criticisms such as the “extent and depth of local opposition” to the draft Local Plan allocation and asserts that the issue of the “weight”



to be given to the draft allocation in that context should have been “properly addressed or considered”. But that matter (as appears from the Parish Council’s and BEAG’s representations which were before members as noted above) was not in doubt. The fact that the draft Local Plan is still subject to consideration is also well-known, as referred to for example in the representations of the Cotswold Conservation Board recorded at pages 22-23 and in the report itself in the second last full para. on page 26.

20. In any event, the report does not invite members to place any “weight” on the draft allocation but rather makes the point, again in the second last full para. on page 26, that “the continuing supply of housing land will only be achieved, prior to the adoption of the new Local Plan, through the planning application process”.
21. A further point is made in para. 17 of the Opinion that this is the sort of case where the Council should have resorted to a consideration of alternatives as in the Langley Park School case. But it is a matter for an authority – as acknowledged in the quotation from the judgment of Sullivan LJ in para. 17 – whether it should wish to consider alternatives and the (officer and the) Council were entitled to take the view that this was not the sort of case where eg the “nature and degree of harm” arising from the development was such that alternatives had to be considered. It is also not apparent to me that BEAG was contending that any particular alternative site would have been a better choice and so the criticism of a failure to consider alternatives would seem to be merely abstract and academic.
22. This section of the Opinion is followed by a number of other essentially hollow points. It is said that the RPS review of the conservation area is not referred to in this part of the officer’s report but it is clearly prayed in aid in the Parish Council’s representations which (again) were before members, see para. 49 of the appendix to the report.
23. It is said that cumulative harm was not taken into account but it is again not apparent that anyone said that this was an issue which needed to be addressed and, in any event, it was inevitable that the officer in addressing the impact of the proposed development would have regard to cumulative effects.
24. There is then further quarrelling with the purported failure properly to identify the proposal before the Council as a “major development” which I have addressed above.
25. The next section of the Opinion, paras. 23-27, queries the extent to which Blockley is to be regarded as a sustainable location. The criticisms are nevertheless significantly undercut by the acknowledgement in para. 27 that “none of these factors are fatal to a conclusion in members’ planning judgement that overall a site is sustainable” which appropriately reflects the truth of the position. But the criticisms advanced would in

any event fail to hit home, eg para. 23 again complains that BEAG's representations were not set out in the body of the report when they were clearly appended to it and the rest of the arguments resolve themselves into differences of opinion on issues of relative sustainability and cannot therefore involve an error of law.

26. The following section of the Opinion, paras. 28-33, criticises the use of the SHLAA Review and affordable housing and "surprise" is expressed that various matters are not referred to or analysed in the committee report. It is suggested for instance that the representations objecting to the draft Local Plan should have been referred to in the report and the same point is made about the Parish Council consultation in December 2014. But both of these points are referred to expressly on the first and second pages of the Parish Council's reputations which were before the committee. The same point as addressed above about alternative sites is repeated (despite the previous acknowledgement that such a consideration is a matter for the decision maker). It is said that the report has "completely failed to set out or engage with the competing representations in relation to sites" when this falls clearly into the category of information in respect of which the officer could exercise a judgement as to its inclusion or otherwise. The section concludes with a reference to need and the assertion that the officer's weighing of need "verges on Wednesbury unreasonableness" which itself concedes that the officer's conduct does not exceed that high hurdle.
27. The last main section of the Opinion, paras. 34-45, challenges the report's treatment of the "character and appearance of the AONB and the setting of Blockley", but prefaces the criticisms advanced with the acknowledgement that such issues are "quintessentially a matter of planning judgement", thereby effectively conceding that the conclusions expressed are unassailable. The Opinion again refers to the alleged failure to refer to the RPS review when that is referred to in the representations which were before the committee.
28. The Opinion purports to contrast certain statements referring to "medium magnitude" having "moderate" effects with another statement in a different context saying that "proposed landscape and visual impact will not have an adverse impact on the character or appearance on the AONB..." But these are evidently separate judgements on different points. It is next suggested that the officer should not express a view about the reasonableness of the applicant's landscape and visual impact assessment as if it was not open to members to disagree on this or any other matter of subjective judgement. Then it is said that the officer should have analysed BEAG's criticisms of the applicant's assessment when, again, there was clearly a difference of opinion between the officer and BEAG (as members would have seen when they read their representations) and not one which he was under any obligation to seek to resolve.

29. Finally, the opinion challenges the rationality of the report's final conclusion recommending that planning permission be granted. This is done by reference to BEAG's assertions as to the lack of sustainability of the proposals and the fact that "great weight" is to be placed on the conservation of the AONB (especially when dealing with what is contended to be a "major development") when, it is asserted, the availability of a 7-9 year housing supply and the fact of stout local opposition to the development should tip the "scales" against recommending approval. But, once again, the terms in which the criticisms are put themselves undermine the allegation that there has been any error of law. For if the judgement to be made depends on a balance of considerations then, self-evidently, the analysis which comes out "on balance" in favour of one view rather than another must have been based on an exercise of planning judgement which is only reviewable on Wednesbury grounds.

### Conclusion

30. It follows from the above that any challenge made to a grant of planning permission based on any of the above allegations should be regarded by the court as unarguable. The Council would be entitled to claim its costs of responding to any such challenge in reliance on the principle in Mount Cook Land v. Westminster CC [2003] EWCA Civ 1346.

31. The only other matter I would mention is the general duty in section 85 of the Countryside and Rights of Way Act 2000. Section 85 provides as follows:

“(1) In exercising or performing any functions in relation to, or so as to affect, land in an area of outstanding natural beauty, a relevant authority shall have regard to the purpose of conserving and enhancing the natural beauty of the area of outstanding natural beauty”.

32. It may be that the terms of the guidance in the NPPF (in particular para. 115 which requires authorities to give "great weight" should be given to "conserving landscape and scenic beauty" in AONBs) in practice assure its observance.

33. But para. 8-003 of the NPPG refers to it and so it would be a counsel of prudence expressly to take the duty into account when this matter goes back to committee so as to forestall yet further arguments from BEAG.

34. It is to be noted that the duty is not expressed in terms quite as strong as those requiring authorities to have "special regard" to the desirability of preserving a building or its setting or to pay "special attention" to the desirability of preserving or enhancing the character or appearance of a conservation area, duties to be found respectively in sections 66(1) and 72(1) of the Listed Buildings Act 1990. The authority concerned is required merely to "have regard" to the "purpose of conserving

and enhancing the natural beauty” of the AONB. I take the view that the officer’s analysis in the report is sufficient to discharge that duty but the opportunity can now be taken to put that beyond doubt.

35. I hope that the above is reasonably clear and answers all of the questions on which I have been asked to advise. Instructing Solicitor should nevertheless not hesitate to be in contact if there is any aspect of the case on which my further views may be of assistance.

MEYRIC LEWIS

Francis Taylor Building  
Temple, London EC4

24 November 2015

**IN THE MATTER OF**

**THE APPLICATION OF CALA HOMES FOR OUTLINE PLANNING PERMISSION  
RELATING TO LITTLE SHOE BROAD, OFF DRAYCOTT ROAD, BLOCKLEY,  
GLOUCESTERSHIRE**

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**OPINION**

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**1. INTRODUCTION**

1.1 I am asked to advise CALA Homes ("CALA") regarding an application for outline planning permission made to Cotswold District Council ("CDC") for the erection of 23 dwellings at Little Shoe Broad, Off Draycott Road, Blockley, Gloucestershire ("the site"). CDC has received written representations of objection in respect of the application from *inter alia* Blockley Parish Council and a local campaign group, Blockley Environmental Action Group ("BEAG").

1.2 Prior to the application being considered by CDC's Planning Committee in early November 2015, BEAG submitted a legal opinion drafted by Sasha Blackmore, which strongly criticised the Officer's Report. The Planning Committee has deferred consideration of the application in order that Ms. Blackmore's opinion can be considered and assessed.

1.3 I am asked to review the BEAG opinion and provide advice as to the legal position with regards to the issues raised. I understand that CDC has also

instructed Counsel, namely Mr. Meyric Lewis, to conduct a separate review of the BEAG opinion.

## 2. BACKGROUND

### The Site

- 2.1 The site, which is 2.3ha in size, consists of two fields, the western and northern boundaries of which adjoin the eastern edge of the village of Blockley. The site is not located within the development boundary of the village.
- 2.2 The site, and indeed the whole village, is located within the Cotswolds Area of Outstanding Natural Beauty ("AONB").
- 2.3 The site does not lie within the Blockley Conservation Area, the westernmost part of the site being located approximately 65m from the easternmost part of the conservation area.
- 2.4 The majority of the site is within Flood Zone 1. A small section of the northern part of the site is located within Flood Zones 2 and 3.

### The Application

- 2.5 In March 2015, CALA made an outline planning application for the erection of 33 dwellings on the site, with all matters reserved except for access. Following meetings with the planning officer and a review of comments made during the consultation process, CALA amended the application to reduce the number of dwellings to 23, 11 of which are to be affordable units.
- 2.6 CDC issued a screening opinion indicating that the development was not EIA development. There is no neighbourhood plan for Blockley nor, to my knowledge, is there one in the process of preparation.

2.7 Aside from the representations made by BEAG and the Parish Council, the application has attracted a number of independent objections from the local community and CPRE.

2.8 I understand that there are presently no other live planning applications for residential development in Blockley.

#### The Local Plan

2.9 The adopted local plan is the Cotswold District Local Plan 2001-2011. It includes 'Policy 19: Development Outside Development Boundaries'. Part (a) of Policy 19 includes a general presumption against the erection of new build open market housing (other than that which would help to meet the social and economic needs of those living in rural areas) in locations outside designated development boundaries.

2.10 At a recent public inquiry in relation to a s.78 appeal regarding a proposal to erect up to 90 dwellings on land located in the nearby Mickleton (APP/F1610/A/14/2228762), the Inspector indicated that CDC has a demonstrable 5-year supply of deliverable housing land and judged it to be in the range of 7-9 years.

2.11 With regard to Policy 19, nevertheless, the Inspector considered that it was *"time-expired, conforms to a superseded strategy, fails to reflect the advice in the Framework (NPPF) in severely restricting rather than significantly boosting the supply of housing and conflicts with the emerging strategy"*. The Inspector considered that Policy 19 could only be regarded as out-of-date.

2.12 The Preferred Development Strategy for the emerging local plan, published in May 2013, identified Blockley as one of 17 sustainable settlements suitable for accommodating housing development.

2.13 Strategic Policy 5 ("SP5") of the Local Plan: Regulation 18 Consultation: Development Strategy and Site Allocations, published in January 2015,

allocates 59 dwellings to Blockley, of which 8 have been built or are subject to extant planning permissions. CDC considered potential housing sites in Blockley in its Strategic Housing Land Availability Assessment ("SHLAA"), which was published in 2014. Through the SHLAA process, three sites, namely BK5, BK8, and BK14A, were identified as suitable for housing development in the plan period. The application site is proposed to be allocated for approximately 22 dwellings under policy BK5.

- 2.14 There are a number of objections to both draft policies BK5 and SP5. I am instructed that there are some 400 objections to policy SP5, with the majority based on supporting a proposal for a 2000 dwelling scheme on an airfield in preference to greenfield sites. Blockley Parish Council has not objected to Policy SP5.

The Officer's Report

- 2.15 The officer's report ("the Report"), drafted in advance of the committee meeting that was due to be held on 11 November 2015, sets out the reasons for the application being referred to committee as being "*the size of the development, its location within the Cotswolds Area of Outstanding Natural Beauty and the level of local opposition to the application*".<sup>1</sup>

- 2.16 The main issues are identified in the Report as follows:

- (a) Residential Development Outside Development Boundaries
- (b) Sustainability of Location
- (c) Impact on Character and Appearance of Cotswolds Area of Outstanding Natural Beauty and Setting of Blockley
- (d) Impact on Heritage Assets
- (e) Affordable Housing
- (f) Highway Safety and Traffic Generation
- (g) Loss of Agricultural Land
- (h) Impact on Biodiversity
- (i) Flooding and Drainage

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<sup>1</sup> See p. 16 of the Report.



(j) Archaeology.<sup>2</sup>

- 2.17 The Report recommends approval of the application "*subject to s. 106 agreement covering provision of affordable housing and education contribution*".
- 2.18 The Officer sets out in the body of the Report the fact that the Parish Council has objected to the application. The Officer also sets out that 106 letters of objection and 1 letter of support were received to the original proposal, and 59 objections and 1 comment received to the amended proposal. The main grounds of objection to both the 33 dwelling and 23 dwelling proposals are then set out in detail (pp. 18-22). Objections from the Cotswolds Conservation Board and CPRE (the latter only to the 33 dwelling scheme) are also summarised.
- 2.19 The Report contains a number of appendices including the representation from the Parish Council in relation to the original 33 dwelling proposal (pp. 47-59), the representation from the Parish Council in relation to the 23 dwelling proposal (pp. 60-62), and a representation from BEAG objecting to CALA's application dated 27 October 2015.
- 2.20 The Officer's Assessment is set out at Part 8 of the Report (pp. 24-39).
- 2.21 With regard to (a) 'Residential Development Outside a Development Boundary' (see pp. 24-26), the Officer sets out that the site is located outside a development boundary as designated in the 2001-2011 Local Plan and is therefore subject to Policy 19. The Officer also notes that the NPPF is a material consideration and sets out *inter alia* the text of paragraph 14 NPPF, which states that where the relevant policies in a development plan are out of date, the Council should grant planning permission unless any adverse impacts of doing so would "*significantly and demonstrably outweigh the benefits when assessed against the*

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See p. 16 of the Report.

*policies in this Framework taken as a whole* or *"specific policies in the Framework indicate development should be restricted"*. He notes that the second of these caveats applies by virtue of the site's location in the AONB which engages footnote 9 of the Framework.

2.22 The Officer points to the recent s.78 appeal decision in relation to Mickleton to justify the conclusion that Policy 19 is out of date and that the application should therefore be considered in accordance with paragraph 14 NPPF.

2.23 The Officer also notes CDC's position with regard to land supply and repeats the position set out by the Inspector in the aforementioned appeal i.e. the fact that CDC does presently have a 5 year supply, and that the present position is in the region of a 7-9 year supply. The Officer notes that notwithstanding the land supply position, the NPPF seeks to boost significantly the supply of housing land supply and that the ability to demonstrate a 5 year supply should not be seen as a maximum supply. He indicates that there is a continuing need to release suitable sites for residential development in CDC as allocated sites in the current local plan have, essentially, been exhausted.

2.24 Section (c) 'Impact on Character and Appearance of Cotswolds AONB and Setting of Blockley' (see pp. 29-34) sets out paragraph 115 of the NPPF as being relevant to the determination of the application because it states that *"great weight should be given to conserving landscape and scenic beauty in...AONBs"*. The Officer considers the impact of the application on the AONB, taking into account *inter alia* the Landscape and Visual Impact Assessment that accompanied the application. He concludes that the proposal would have *"moderate effect on landscape character and a moderate/minor visual effect"*.<sup>3</sup>

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See pg. 32 of the Report.

- 2.25 Section (c) sets out the Officer's position with regard to paragraph 116 of the NPPF (see pp. 33-34), which provides that planning permission for *"major developments"* should be refused in AONBs *"except in exceptional circumstances and where it can be demonstrated they are in the public interest"*. The Report refers to the fact that *"major development"* does not have a fixed meaning and that it is a matter for the decision-maker, taking into account the proposal in question and the local context, to determine whether or not the development is *"major"* for the purposes of paragraph 116.
- 2.26 The Officer then considers a number of factors concerning the nature of the proposal and its local context, and concludes that *"on balance, and having regard to issues such as location, scale, context, design and local distinctiveness it is considered that the proposal will have a very localised impact on the AONB"*. He concludes that he does not consider the proposal to constitute *"major development"* but notes: *"if Members were to consider that the proposal does constitute major development then an approval would need to be justified in the context of the aforementioned Paragraph 116."*
- 2.27 Section (b) Sustainability of Location (pp. 26-29) observes that the emerging local plan has identified Blockley as one of 17 settlements that has sufficient services and facilities to accommodate new residential development and that the January 2015 Regulation 18 Consultation paper allocates a total of 59 dwellings to Blockley. The Officer indicates that *"it must be noted that the 59 dwelling figure is not fixed in stone and may be subject to change as the new Local Plan progresses"* and that *"limited weight can therefore be attached to the figure at the current time"*.
- 2.28 The Officer also records that the site was considered as part of CDC's SHLAA, which stated that it was *"available, suitable, achievable"* and *"deliverable within a 6-10 year time period"* and had a capacity of approximately 22 dwellings, albeit that it should be noted that Forward Planning officers have since advised that the figure should be 24. The

Report notes and considers the representations that made by Blockley Parish Council to the Forward Planning Officers prior to the allocation of the site in the latest consultation paper. On the topic of sustainability, the Report refers to the accessibility of the site both in terms of pedestrian movements and local bus services.

- 2.29 The Officer concludes this section of the Report by stating: *"Blockley has therefore been recognised as a potentially sustainable location for new residential development in terms of accessibility to services, facilities and amenities"*.
- 2.30 The Report does not undertake any consideration of alternative sites for residential development.
- 2.31 The Report's Conclusion is set out at Part 9 (pp. 39-40) and reads as follows:

*"Overall, it is considered that the proposal will help to address the Council's needs to provide a continued supply of housing land and will provide affordable housing to meet local needs. It is noted that the Council can currently demonstrate a robust 5-year supply of deliverable housing land. However, this requirement is a minimum not a maximum and as such the Council still needs to ensure that a supply of land is maintained in order to meet its ongoing requirements. Whilst the weight that can be given to the need to provide housing when the supply is in surplus is less than when the supply is in deficit the provision of housing still carries weight when considering this application, especially given the requirement of the NPPF to 'boost significantly the supply of housing' (para 49). (sic)*

*In addition to the above the site is also located in a sustainable location in terms of accessibility to services and facilities and has been identified in emerging Local Plan documents as a proposed housing allocation site. In addition, no objections have been received to the proposal from any statutory or technical consultees in respect of matters such as highway impact and safety, drainage and flooding,*

*ecology, archaeology, heritage or infrastructure. These matters are considered to weigh in favour of the proposal.*

*It is noted that great weight should be given "to conserving landscape and scenic beauty" in AONBs. The impact of the proposal on the designated area has been given careful consideration. It is of note that the ability of the site to accommodate residential development has been assessed as part of the emerging Local Plan process. Independent landscape consultant's reports indicate that the site has a medium sensitivity and the emerging Local Plan identifies it is a potential housing site. The level of development now proposed for the site is low at approximately 10 dwellings per hectare and as such it could represent a transitional form of development rather than an abrupt urban edge to the settlement. Long range views of the site are limited and reveal the site to be seen in context with existing village development. With regard to short range view the site is bordered on two sides by residential development and has a degree of visual connection with the village rather than appearing as a disconnected and unrelated parcel of land. It is considered that the impact on the AONB is not such that it would outweigh the benefits arising from the proposal. It is considered that the proposal accords with the principles of sustainable development as set out in the NPPF and is therefore recommended for approval."*

- 2.32 The conclusion states that great weight should be given to conserving the landscape and scenic beauty of the AONB in accordance with paragraph 115 NPPF but that the impact on the AONB would not be such as to outweigh the benefits arising from the proposal, which includes the fact that the development would help to address the Council's needs to provide a continued supply of housing land and provide affordable housing to meet local needs.

Legal Opinion on behalf of BEAG

- 2.33 Sasha Blackmore's opinion is dated 10 November 2015. Ms Blackmore indicates at the outset that her advice was requested "*extremely urgently*". The opinion, possibly as a result of the urgent basis upon which it was

drafted, is somewhat confusing in relation to both its structure and the nature of the points that it raises. I have set out to summarise the points raised by Ms Blackmore as I understand them as follows.

*Paragraph 116 NPPF*

- 2.34 The main criticism of the Report in the BEAG Opinion is cited as the treatment by the Officer of paragraph 116 NPPF.
- 2.35 Ms. Blackmore appears to disagree with the Officer's exercise of planning judgment with regard to determining that the application is not "*major development*"; whilst accepting at the same time that such a term does not have a uniform meaning and that the matter is undoubtedly a question for members to determine in the exercise of their judgment.
- 2.36 With regard to a potential challenge based on the Report itself, Ms Blackmore indicates that, for a series of reasons, there is a "*real risk*" that the Report "*significantly misleads the committee about material matters*" such as to make it unlawful in accordance with the decision in Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council 1997 WL 1106106. She lists those reasons as follows:
- a. the lack of reference in the Report to local opposition to the allocation of the site in the emerging plan;
  - b. the failure to address paragraph 216 NPPF, which states that the weight to be accorded to emerging policies depends on the extent to which there are unresolved objections to them;
  - c. the failure to engage with the statement at paragraph 17 NPPF to the effect that planning should empower local people to shape their surroundings and be based on joint working and co-operation;
  - d. the failure to consider alternatives;
  - e. the failure to refer to a review of the Blockley Conservation Area that recommended including the site within the conservation area;
  - f. the failure to refer to the possibility of cumulative harm to the AONB from this development and others; and

- g. the failure to refer to applications in nearby Chipping Camden for 76 and 90 houses being considered as major development and BEAG's representations on the relevance of this.

2.37 In addition, Ms Blackmore makes a number of comments with regard to the Officer's conclusion that the application is not a "*major development*". Whilst she does not suggest that the Report itself could be challenged for being misleading on the basis of these matters, she nevertheless considers that a decision by members taken on the basis of the Officer's analysis of paragraph 116 NPPF would be potentially unlawful for the following reasons:

- i. the local objections to the proposal are not considered when determining whether the application is major development;
- ii. reference by the Officer to "design and local distinctiveness" in coming to a conclusion that the application is not major development is an irrelevant consideration;
- iii. a 3.1% increase in the housing stock of Blockley is capable of being significant;
- iv. the reference to the size and scale of developments that took place in the 1990s is an irrelevant consideration in determining whether or not the application is major development and it is unclear or irrational to conclude that the proposed level of development is commensurate with that which occurred in the past;
- v. the size and scale of developments in other parts of the UK and their treatment or otherwise as major development is an irrelevant consideration.

2.38 Ms. Blackmore also raises a concern that, while the Report indicates that an approval would need to be justified under paragraph 116 if the Members were to consider that it did amount to major development, the Report does not then go on to address whether or not the proposal would comply with paragraph 116.

*Additional Concerns*

- 2.39 Ms. Blackmore raises additional concerns under the following headings: Sustainability Assessment, SHLAA Review and Affordable Housing, Character and Appearance of the AONB and the Setting of Blockley, and Other Matters. In respect of such matters, there does not appear to be any assertion made to the effect that the treatment of such matters in the Report means that the *“overall effect of the report significantly misleads the committee about material matters”* in accordance with the Oxton Farms decision. It would appear therefore that Ms Blackmore accepts that the Report itself could not be challenged regarding its treatment of these matters.
- 2.40 Instead, Ms Blackmore appears either to be expressing disagreement with the planning judgment of the Officer on certain matters, or alleging that the Report could be improved by including references to additional material, or instead alleging that a decision by Members based on the reasoning of the Report could be subject to a Wednesbury rationality challenge.
- 2.41 In the Sustainability Section at paragraphs 23-27 of the BEAG opinion, Ms. Blackmore criticises the comments made in the Report regarding, for example, transport links and distance of the site to local facilities. Her point is simply that, in BEAG’s view, the site is not as sustainable as the Report suggests. She accepts that none of her comments would be fatal to a conclusion by members of the committee that the site was sustainable.
- 2.42 With regard to the section on SHLAA Review and Affordable Housing at paragraphs 28-33 of the BEAG opinion, Ms. Blackmore’s main criticism concerns the weight placed on the continuing need for the Council to release suitable sites outside development boundaries for residential development. She indicates that this verges on Wednesbury unreasonableness.
- 2.43 Criticism is made of the lack of reference in the Report to the objections lodged by the local community in respect of the allocation of the site in the



emerging plan, the lack of reference to a housing needs survey conducted by the local community, and the lack of reference to alternative sites being put forward.

- 2.44 With regard to the Character and Appearance of the AONB and setting of Blockley, Ms. Blackmore criticises the Officer's treatment of the Landscape and Visual Impact Assessment, implying firstly that he does not appear to have formed his own view on the assessment, and secondly that he has not engaged with the criticisms made by BEAG of the assessment.
- 2.45 As an overarching point, Ms. Blackmore considers that the conclusion of the Report is irrational. She does not agree with the Officer's conclusion that the impact on the AONB is not such that it would outweigh the benefits arising from the proposal. Her position is that the harm to the AONB would not be outweighed by competing considerations due to the fact that CDC has a 7-9 year housing land supply, the local community do not consider that the project is needed, there are other nearby developments in the pipeline, and the sustainability of the site is unclear.
- 2.46 In the Other Matters section, Ms. Blackmore raises concerns about surface water and a number of highway matters including the adequacy of visibility splays, albeit she accepts that these may be adequately dealt with by condition.

### **3. THE LAW AND POLICY**

#### Determination of Applications

- 3.1 When dealing with applications for planning permission, the decision-maker is under an obligation, set out in s. 70(2) Town and Country Planning Act 1990 to "*have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations*".

- 3.2 Section 70(2) must be read together with s. 38(6) Planning and Compulsory Purchase Act 2004. This provides that *“if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the provisions of the development plan unless material considerations indicate otherwise”*.

The Proper Approach to Materiality of National and Local Planning Policy

- 3.3 The principles relevant to the materiality of national and local planning policy are as follows.

- 3.4 The statutory development plan is the starting point in the determination of planning applications. It is the whole plan which is relevant for these purposes: see R (Cummins) v. London Borough of Camden [2001] EWHC 1116 (Admin) at paras. 160- 164. National planning policy and any relevant local plan are material considerations. However, local authorities need not follow such guidance or plan if other material considerations outweigh them.

- 3.5 Whether or not a particular consideration is material is a matter for the court: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 W.L.R. 759 per Lord Keith at p.764. Subject to Wednesbury unreasonableness, however, it is a matter for the decision-maker to decide what weight should be accorded to a material consideration :Tesco Stores. Moreover, the courts adopt a restrained and cautious approach to allegations of Wednesbury unreasonableness which are, in truth, merely complaints about planning judgment: see Newsmith Stainless Ltd v. SoSE [2001] EWHC 74 (Admin.).

The Officer’s Report

- 3.6 Planning committees exercise the planning functions delegated to them by local planning authorities on the basis of information provided by case officers in the form of an officer’s report. Such reports ordinarily include a

recommendation as to how the application should be determined. The role of the officers in drafting reports is to ensure that all considerations material to the decision are brought to the attention of the committee.

3.7 A summary of the legal position with regards to officer's reports was set out by Mr Justice Hickinbottom in R (Zurich Assurance Ltd) v North Lincolnshire Council [2012] EWHC 3708 (Admin). He said at [15]:

- "i) In the absence of contrary evidence, it is a reasonable inference that members of the planning committee follow the reasoning of the report, particularly where a recommendation is adopted.*
  
- ii) When challenged, such reports are not to be subjected to the same exegesis that might be appropriate for the interpretation of a statute: what is required is a fair reading of the report as a whole. Consequently: "[A]n application for judicial review based on criticisms of the planning officer's report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters which thereafter are left uncorrected at the meeting of the planning committee before the relevant decision is taken" (Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council (18 April 1997) 1997 WL 1106106, per Judge LJ as he then was).*
  
- iii) In construing reports, it has to be borne in mind that they are addressed to a "knowledgeable readership", including council members "who, by virtue of that membership, may be expected to have a substantial local and background knowledge" (R v Mendip District Council ex parte Fabre (2000) 80 P & CR 500, per Sullivan J as he then was). That background knowledge includes "a working knowledge of the statutory test" for determination of a planning application (Oxton Farms, per Pill LJ)."*

Areas of Outstanding Natural Beauty

- 3.8 Paragraphs 115–116 of the NPPF refer to areas of outstanding natural beauty. Paragraph 115 provides:

*"Great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads, and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty. The conservation of wildlife and cultural heritage are important considerations in all these areas, and should be given great weight in National Parks and the Broads."*

- 3.9 Paragraph 116 then continues:

*"Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated that they are in the public interest. Consideration of such applications should include an assessment of:*

*the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;*

*the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and*

*any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."*

- 3.10 The meaning of "major development" is not fixed. In Aston v Secretary of State for Communities and Local Government [2013] EWHC 1936 (Admin) at paragraphs 90–94) Wyn Williams J rejected an argument to the effect that that phrase should be given the same meaning wherever it appeared in regulations or planning policy documents, and, specifically, that it should be interpreted in accordance with the definition of "major development" set

out in article 2 of the Town and Country Planning (Development Management Procedure) Order 2010. Rather, he held that the phrase should be construed in the context of the document in which it appeared. The context of paragraphs 115 and 116 of the NPPF militated against the precise definition of "major development" contained in the 2010 Order. On the definition of major development, he said:

*"The word "major" has a natural meaning in the English language, albeit not one that is precise."*

3.11 The position must therefore be that a proposed development that is 'major' in one area or under one set of circumstances may well, perfectly lawfully, not be characterised as 'major' when transplanted to a different area under a different set of circumstances.

3.12 This position is supported by the Planning Practice Guidance, which states:

*"Whether a proposed development in these designated areas should be treated as a major development, to which the policy in paragraph 116 of the Framework applies, will be a matter for the relevant decision taker, taking into account the proposal in question and the local context."* (Ref: 8-005-20140306)

#### Consideration of Alternatives

3.13 The existence of alternative sites is capable of being a material consideration relating to the use and development of land; the extent to which it will be relevant in any case will depend on all the circumstances, particularly on the degree to which a proposal causes harm or conflicts with policy. In R. (on the application of Derbyshire Dales DC) v Secretary of State for Communities and Local Government and Carsington Wind Energy Ltd [2009] EWHC 1729 (Admin), Carnwath LJ, (as he then was) said at [15]:

*“Common sense suggests that alternatives may or may not be relevant depending on the nature and circumstances of the project, including its public importance and the degree of the planning objections to any proposed site. The evaluation of such factors will normally be a matter of planning judgment for the decision-maker, involving no issue of law.”*

In R. (Langley Park School for Girls Governing Body) v Bromley London Borough Council [2010] 1 P. & C. R. 10, the Court of Appeal indicated at [45] that *“where there are clear planning objections to a proposed development...the more likely it is that it will be relevant, and may in some cases be necessary, to consider whether that objection could be overcome by an alternative proposal.”* The position is therefore that the mere fact that there have been objections to a proposal does not mean that it will be relevant to consider alternative proposals. To be relevant in this connection, objections must be planning objections. The existence of such objections, however, might make it more likely that alternatives would be relevant.

3.14 In R. (Mount Cook Land Ltd) v Westminster City Council [2004] 2 P. & C. R. 405, Auld LJ (with whom Clarke and Jonathan Parker LJJ agreed), accepted the following propositions advanced by counsel for the local authority as correct statements of the law in relation to the consideration of alternative sites at [30]:

- “(a) In the context of planning control, a person may do what he wants with his land, provided his use of it is acceptable in planning terms.*
- (b) There may be a number of alternative uses from which he could choose, each of which would be acceptable in planning terms.*
- (c) Whether any proposed use is acceptable in planning terms depends on whether it would cause planning harm judged according to relevant planning policies where there are any.*
- (d) In the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the*

*application site or of the same use on alternative sites are normally irrelevant in planning terms.*

- (e) *Where an application proposal does not conflict with policy, otherwise involves no planning harm, and, as it happens, includes some enhancement, any alternative proposals would normally be irrelevant.*
- (f) *Even in exceptional circumstances where alternative proposals might be relevant, inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight."*

3.15 It was recognised in Mount Cook that vague or inchoate schemes and/or those that are unlikely to or have no real possibility of being realised would not be a relevant consideration in determining an application.

#### 4. **ADVICE**

##### Adequacy of the Officer's Report

4.1 The BEAG opinion indicates that there is a "very real risk" that the Report would "significantly mislead the committee about material matters" such as to make it unlawful in accordance with the judgment in Oxton Farms, which, along with the principles from other relevant case law on the content of an officer's report, is summarised in the recent judgment of Dove J in R (Sainsbury's Supermarkets) v LB Hillingdon [2015] EWHC 2571 at [35].

4.2 The BEAG opinion lists some seven points in support of the proposition that the Report itself is unlawful (set out at paragraph 2.36 above) (as opposed to the position that elements of reasoning in the Report, if accepted by the members, would result in an irrational decision).

- 4.3 I do not consider that the points raised, taken individually or cumulatively, would lead to a conclusion that the *“the overall effect of the Report”* would be *“significantly to mislead”* a planning committee about *“material matters”*. The specific wording of the Oxton Farms decision on this point should be noted. Judge LJ said that *“an application for judicial review based on criticisms of the officer’s report will not normally begin to merit consideration unless the overall effect of the report significantly misleads the committee about material matters...”* (emphasis added).
- 4.4 The threshold for such challenges is therefore high. Even if the overall effect of a report did significantly mislead a committee as to material matters, only then would such a challenge *begin* to merit consideration. In other words, it is only in rare circumstances that such a challenge would be likely to succeed. An examination of recent caselaw in which reports have been considered bears out that the principle is one to which the Courts fully subscribe.
- 4.5 In Oxton Farms, Judge LJ emphasised that it is not one or two minor matters in a report that must be significantly misleading but rather the *“overall effect”* of the report. This reinforces the point outlined in Zurich Assurance to the effect that such reports are not to be read as though they are statutes. There is no requirement that each and every sentence in a report be wholly accurate and/or relevant. What is required is a fair reading of the Report as a whole.
- 4.6 Further, the decision in Mendip DC indicates that reports are addressed to a *“knowledgeable readership”*, including council members *“who, by virtue of that membership, may be expected to have a substantial local and background knowledge”*. Thus, it is not the case that each and every nuance or factor must be pointed out in terms in a report given that a committee is made up of individuals who can be expected to know both the local area and the local policy context.



- 4.7 With the above analysis of the law in mind, I do not consider that the Report is likely to be held to have fallen below the required standard or to be materially misleading. Without prejudice to this conclusion, I set out below some simple ways in which I think that the Report could be improved. Whether or not the Report could be improved is not the legal test for a successful judicial review challenge, nevertheless, that is not to say that it would not be prudent, given the controversy, to address some matters and I do this below. As it stands, however, the Report, taken as a whole, clearly identifies the material matters in the determination of this application. Relevant policies in the current and emerging development plan are set out and considered, as are the key relevant policies in the NPPF such as paragraphs 14 and 115 NPPF, as well as other material considerations. The question as to whether the application should be treated as "*major development*" for the purposes of paragraph 116 NPPF is considered in detail and a rational view for concluding that it is not is reached. The Report identifies that great weight must be attached to preserving the AONB in accordance with paragraph 115 NPPF and then weighs up the benefits of the development against the harm caused to the AONB, concluding that the harm is outweighed by the benefits.
- 4.8 The points raised by the BEAG opinion are either matters that the committee members, with their local knowledge, would be expected to know, or matters that are not sufficiently relevant to make a difference to the "*overall effect*" of the Report on the committee. The failure to refer to policies, documents submitted by BEAG, or other matters that BEAG considers to be material, should not lead to a conclusion that the Report is unlawful. It is neither realistic nor a requirement of law that each and every document submitted to the local planning authority must be specifically adverted to in the officer's report.
- 4.9 I shall, nevertheless, respond to a number of the specific points raised by the BEAG opinion on this issue. First, the local opposition to the site allocation in the emerging plan is a matter of which one could expect the committee members, with their local knowledge, to be aware. Further,

committee members will understand the status of an emerging plan and know that the weight to be attached to such a document depends on the stage of the plan process and the nature and number of objections to relevant policies. Indeed, the Report itself indicates that the 59 dwelling figure *"is not fixed in stone and may be subject to change as the new Local Plan progresses"* and that *"limited weight can therefore be attached to the figure at the current time"* (see paragraph 2.28 above). There is therefore an explicit reference in the Report regarding the weight to be attached to emerging plans.

4.10 In addition, a failure to consider alternatives would not amount to significantly misleading members as to material matters. Given his lawful findings on the currency of Policy 19 (based on the recent finding of a planning inspector) and the professional advice, which he accepted, as to landscape and visual impacts (which are consistent with the emerging allocation of the site in the draft development plan) it is unlikely to be the case that the Officer was in any way required to consider alternatives in this instance. While it is correct to state that the fact that objections are made to a proposal increases the likelihood that alternative sites should be considered (see Langley Park above), the decision in Mount Cook is clear that *"inchoate or vague schemes and/or those that are unlikely or have no real possibility of coming about would not be relevant or, if they were, should be given little or no weight"*. Moreover, such objections must be planning objections, rather than mere opposition. Here again, the officer's thorough assessment of impacts is highly relevant.

4.11 Thus, it is not in every case that alternative sites must be considered and, even if there are objections to a proposal, there is no requirement to consider alternative sites in circumstances in which there are no other realistic schemes under consideration. There are no other planning applications for residential development in Blockley at present and no real prospect of an alternative site in the vicinity that could accommodate a similar development save for the other allocations in the draft Plan, which are also urban extension sites on the edge of the settlement. Objections

suggest that housing needs can, are being or should be met elsewhere, at larger settlements and/or refer to sites favoured in the village's community engagement process, presumably as part of the consultations for the emerging Plan. Affordable need arising in the village, which is noted at p.35 – 6 of the Report could not, by definition, be met by local housing in other locations, nor could the strategy for sustaining Key Settlements, which is being pursued by the emerging Plan, be served by locating development in different strategic locations. These considerations are present in the Report but, in fairness, not woven together in the context of the 'alternative sites' objection now, apparently, being raised by BEAG through their Counsel. It would be prudent, in my opinion, for this matter to be specifically addressed in a supplementary report.

Other Concerns raised by the BEAG Opinion

- 4.12 Aside from the points raised in relation to a potential challenge to the Report, the BEAG Opinion also questions the Officer's reasoning on a number of points and raises issues regarding a potential rationality challenge to any subsequent decision based on the Report and/or a challenge based on relevant/irrelevant considerations.

*Para. 116 NPPF<sup>4</sup>*

- 4.13 The BEAG opinion accepts that the determination as to whether or not an application is for "major development" is one within the planning judgment of the decision-maker. The implication of this is that a challenge to such judgment will only lie in relation to an error of law (including taking into account irrelevant considerations/failing to take into account relevant considerations) or Wednesbury irrationality. The opinion does not appear to allege Wednesbury irrationality in relation to the treatment of paragraph 116 NPPF but rather implies that there is a relevant/irrelevant considerations point to be raised. The separate suggestion at the beginning of the Opinion that the Report is defective in not listing paragraph 116 as a "Main Issue" is baseless. Main Issue (c), *"Impact on*

<sup>4</sup>

There are repeated references in Ms Blackmore's Opinion to paragraph 16 of the NPPF. I assume that it is intended to refer to paragraph 116

*Character and Appearance of Cotswold AONB and Setting of Blockley* includes this point, which is addressed in terms at pp.33-34.

4.14 With regard to the legal definition of "*major development*", the judgment in Aston, along with the NPPG, makes it clear that the term has no fixed definition and that it will depend upon the proposal itself and the local context. This therefore leaves a broad discretion to the decision-maker to come to a judgment on this matter. There is no guidance in law or policy as to the considerations that ought, or ought not, to be taken into account when considering the local context. The points raised by the opinion in relation to the reasoning process by the Officer (see paragraph 2.37 above) are unfounded. There is no reason in law why the Officer would not be permitted to take into account e.g. previous developments in the local area, the intended design and local distinctiveness of the application (even though it is only an outline application), or any other sensible landuse matter of relevance to the local context. There is, furthermore, no reason why an officer must, as a matter of law, take into account local objections when considering whether or not a proposal is a "*major development*". The fact that the local community has objected to the proposal is a factor that resulted in the application going to committee. That an application is referred due, in part, to the fact that there have been significant objections to it does not mean that objections are necessarily relevant to the question of whether the development is "*major*". Determination by the Committee in this instance is a matter of process rather than one of planning significance. It does not trigger the application of paragraph 116.

4.15 There is also nothing in the point raised regarding the fact that the Report does not address compliance or otherwise of the proposal with paragraph 116 NPPF. The Officer, in the exercise of his planning judgment, considers that paragraph 116 is not material for the purposes of this application by virtue of the fact that he does not regard the development as "*major*". Having reached this judgment, it is not then incumbent upon him to assess the "*what if*" position. It is unrealistic to expect an officer's report to

consider the effect of a policy that he does not consider to be relevant to the decision.

*Sustainability Assessment*

- 4.16 The points raised by Ms. Blackmore in relation to the sustainability assessment appear to be nothing more than a disagreement with the judgment by the Officer regarding the degree to which the site is sustainable. There is no indication that Ms. Blackmore considers the Officer's reasoning to be legally defective on this matter; she concedes as much at paragraph 27 of her Opinion.

*Character and Appearance of the AONB and setting of Blockley*

- 4.17 With regard to the character and appearance of the AONB and setting of Blockley, Ms. Blackmore indicates that the Officer does not appear to have formed his own view on the Landscape and Visual Impacts Assessment but rather "*concur*s" with the position taken in the assessment. The fact that the Officer has indicated that he agrees with the landscape architect's expert assessment and that he considers its conclusions to be "*reasonable*" does not mean that he has not formed his own view on this matter. The Officer has evidently taken into account the content and conclusions of the assessment, as set out in his Report, and then formed his own view on the matter, which happens to be one that agrees with the assessment. There is no legal point raised by this criticism.
- 4.18 There is also a criticism that the views of BEAG have not been taken into account in relation to landscape and visual impacts. As set out above, it cannot be expected that an officer's report will list and explicitly consider in the assessment section of the report every single submission made in relation to the application. The Officer considered in detail the impact of the proposal on the character and appearance of the AONB and the setting of Blockley and it can be no criticism of him that he did not make explicit reference to a document submitted by BEAG. The document is appended to the Report as well as being summarised appropriately.

*SHLAA Assessment, Affordable Housing and General Conclusion*

- 4.19 The BEAG opinion sets out concerns regarding the weight that the Officer places on the continuing need for CDC to release suitable sites outside development boundaries for residential development, and the overall conclusion that such a benefit would outweigh the harm caused by the development to the AONB. The point made is that, in BEAG's view, the harm to the AONB would not be outweighed by competing considerations due to the fact that CDC has a 7-9 year housing land supply, the local community do not consider that the project is needed, there are other nearby developments in the pipeline, and the sustainability of the site is unclear. Ms. Blackmore raises the possibility of a rationality challenge if a decision were to be made based on the conclusions reached in the Report.
- 4.20 The Officer has exercised his planning judgment in coming to the conclusion that the benefits of the scheme outweigh the harm that the scheme would cause to the AONB. He makes explicit reference to the fact that paragraph 115 NPPF requires that great weight should be given to conserving landscape and scenic beauty in AONBs and sets out the detailed consideration that has been made of the impact of the proposal on the AONB. He indicates that the site has been identified as having a "medium sensitivity". He also considers the fact that CDC have a robust 5-year supply of deliverable housing land and states that the need to provide housing when the supply is in surplus is less than when the supply is in deficit, but that the provision of housing would still carry weight when determining the application. His conclusion refers to the fact that the site is allocated in an emerging local plan, having been considered to be a sustainable site.
- 4.21 I do not consider that the Officer's conclusions, if accepted by the members, would be susceptible to a challenge based on Wednesbury unreasonableness. I would recommend, however, that explicit reference be made to the statutory duty under s.85 Countryside and Rights of Way

Act 2000 to have regard to the purpose of conserving and enhancing the natural beauty of the AONB. Whilst the Officer has clearly had regard to such matters as general policy considerations, it would, in my view, be preferable for him to make specific reference to the statutory position and expressly address it. The Officer has taken into account the fact that CDC has a greater than 5-year supply of deliverable housing land and attributed less weight to the need to provide housing as a consequence. In his judgment, the benefits of the scheme in providing housing, albeit that those benefits weigh less in the balance than would be the case if there were no 5-year supply, are not outweighed by the limited harm identified by the proposal to the AONB. That is a judgment which the Officer is entitled to make and there is no reason why such a position should be considered *Wednesbury* unreasonable. I have drawn attention to the s.85 point, however, which, in my view it would be safer to address expressly, although this is not a matter raised by Ms Blackmore.

#### Improvements to the Report

- 4.22 In spite of my view that (a) the Report, viewed as a whole, would be likely not to be held to have fallen below the required legal test and (b) a legal challenge to any decision taken in reliance on the Report on the basis of irrationality or error of law would not succeed, I do consider that the Report could be improved, in terms of clarity, by a number of additions or amendments. I have already alluded to some of these matters and now address other points. It is obviously desirable for the Officer, in a supplementary report, to acknowledge and deal with Ms Blackmore's criticisms, albeit that many of them, in my view, are not properly matters of law. The deferral of the committee meeting results in an opportunity for the Officer to ensure that the content of the Report is as clear as possible.

#### *The Emerging Plan*

- 4.23 The Report refers in detail to specific policies and allocations in the emerging local plan and also to the 2014 SHLAA. It would be useful, in the light of paragraph 116 NPPF, if it also explained in detail the particular stage that the emerging plan has reached, timescales in relation to

examination of the plan, and provided information as to the nature, number and relevance of objections received in relation to the particular policies in relation to the application site.

- 4.24 The Report could also usefully refer more explicitly to the weight that the Officer considers should be attached to the emerging plan in relation to the application. The Officer has made clear that only limited weight can be attached to the 59 dwelling figure for Blockley but does not make any further comments as to the weight to be attached to the emerging plan in the context of the application.

*Major Development*

- 4.25 The Officer has indicated that he has had regard to “*issues such as location, scale, context, design and local distinctiveness*” in coming to a conclusion that the application is not major development. The Report would benefit from a more detailed analysis of the particular points that the Officer has considered in relation to those five matters when determining that the development does not fall under the category of “major”.

*Local Objections*

- 4.26 The Report sets out in detail the content of representations made by the local community objecting to the application. However, in the assessment section of the Report, there is little reference to the impact or relevance of those objections on the consideration of the site. It would be useful, where relevant, for the Officer to respond to particular concerns raised by, for example BEAG, in relation to the assessment of the impact of the development on the AONB so that it is made clear the reason why BEAG’s position has not been preferred.

*Alternative Sites, Applications and Proposals*

- 4.27 It would be advantageous for the Report to set out the position with regard to other current applications for permission in the local area (if any) and the potential (if any) for residential development to come forward in similar sites in the vicinity, together with a brief explanation as to why it is



important, in his view and that of the Authority generally, to locate some housing development at Blockley.

## 5. CONCLUSION

5.1 It is my view that a challenge on the basis that the Report would significantly mislead members as to material matters would fail. In addition, I do consider that the criticisms levelled at the conclusions reached by the Officer are, in truth, merely disagreements with his planning judgment. As such, a challenge to a committee decision taken in reliance on the Report on the basis that there was an error of law or irrationality in the decision should similarly be unsuccessful.

5.2 Notwithstanding the above, I do consider that the Report would benefit from some clarification and additional information, and CDC is encouraged to consider redrafting the Report to take into account the comments made at paragraphs 4.22 to 4.27 above.

**MORAG ELLIS QC**  
23rd November 2015

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