Your reference:

Our reference: BL03.EAS0316-0001.BL

Direct email: blee@hcrlaw.com

23 July 2025

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REAL ESTATE COMMERCIAL PROP

BY RECORDED DELVERY & EMAIL
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Dear Sirs,

PROPOSED STATUTORY REVIEW UNDER SECTION 288 TCPA IN RESPECT OF PINS APPEAL DECISION APP/F2605/W/24/3351737 (COUGHTREY INDUSTRIAL ESTATES (UNITS 1 - 17) CHURCH ROAD GRISTON, NORFOLK IP25 6QB)

1. We are instructed on behalf of Eastern Attachments Ltd in relation to the decision of Louise Nurser BA (Hons) MA Dip UP MRTPI ("**the Inspector**"), a planning inspector appointed by the Secretary of State, to grant planning permission, LPA ref: 3PL/2022/0368/F PINS ref: APP/F2605/W/24/3351737 ("**the Permission**"), for development described as ("**the Development**"):

   > "*demolition of Units 1-6 (whole block Western boundary) and Units 7-13 (part of North Block), extensions to units 14 and 15 (large extension to North block), extension to unit 16 (small extension to South Block), external fascia changes, refurbishment to Unit 17.*
   >
   > *Change of use of whole site to mixed B2 and Class E (offices). The reconfiguration of parking and creation of a new loading and unloading area*."

   at Coughtrey Industrial Estates (Units 1 - 17), Church Road, Griston, Norfolk, IP25 6QB ("**the Site**").

2. This letter is a formal letter before claim in accordance with the pre-action protocol for judicial review under the Civil Procedure Rules.

The Claimant

3. The Claimant is Eastern Attachments Ltd whose address for service is HCR Hewitsons, 50-60 Station Road, Cambridge, CB1 2JH. The solicitor with conduct of this matter is Brendon Lee (Partner) (BLee@hcrlaw.com). Reference: BL03.EAS0316-0001.

Defendant's reference details

4. PINS appeal decision reference APP/F2605/W/24/3351737 (Coughtrey Industrial Estates (Units 1 -17) Church Road Griston Norfolk IP25 6QB.

Details of the matter being challenged

5. The decision of the Inspector, dated 23 June 2025, to grant planning permission for the Development, described as:

> "*demolition of Units 1-6 (whole block Western boundary) and Units 7-13 (part of North Block), extensions to units 14 and 15 (large extension to North block), extension to unit 16 (small extension to South Block), external fascia changes, refurbishment to Unit 17.*
>
> *Change of use of whole site to mixed B2 and Class E (offices). The reconfiguration of parking and creation of a new loading and unloading area*."

at the Site.

Details of any interested parties

6. Breckland Council of Elizabeth House Walpole Loke Dereham Norfolk NR19 1EE (legal@Breckland.gov.uk / planning@breckland.gov.uk).

7. We confirm that all of the parties named in this paragraph have been sent a copy of this letter of claim.

The issue(s)

Summary of background relevant to proposed grounds

8. As recorded at paragraph 7 of the Inspector's decision letter dated 23 June 2025 ("**the DL**") Breckland Council refused the application on 12 March 2024 for three reasons, namely:

> "*1. Insufficient information has been provided in the form of an Environmental Impact Assessment. The Local Planning Authority therefore, cannot conclude that the proposals would not have significant Environmental Impact. The proposals are therefore considered contrary to The Town and Country Planning (Environmental Impact Assessment) Regulations 2017.*
>
> *2. The proposal, in principle, is not considered to accord with Policy EC04 of the Breckland Local Plan (2023) on the basis that this does not constitutes expansion of an existing business, the business is not reliant on agriculture, nor this location to operate and therefore is not considered acceptable in this location.*
>
> *3. Insufficient information has been provided to demonstrate that the proposals would not impact the amenity of neighbouring properties in terms of noise, air quality, and odour impacts. The proposals are therefore considered contrary to Policies COM02 and COM03 of the Breckland Local Plan (2023)*."

9. On 17 September 2024, the Secretary of State issued an updated Screening Direction concluding that an EIA was not required. As a result of that, reasons for refusal 1 and 3 were no longer considered to be relevant.

10. As to the second reason for refusal, the Council's position at appeal was that the Development conflicted with Policy EC04 of the Breckland Local Plan – a matter in dispute between the parties at the hearing.

11. For reference, Policy EC04 provides as follows:

> "***Policy EC 04 Employment Development Outside General Employment Areas***
>
> *Proposals for employment uses outside of the identified General Employment Areas and allocated sites will be permitted where:*
>
> *a. It is demonstrated that there are no other suitable sites available on identified or allocated employment sites; and/or*
>
> *b. There are particular reasons for the development not being located on an established or allocated employment site including:*
>
> *1. The expansion of an existing business;*
>
> *2. Businesses that are based on agriculture, forestry or other industry where there are sustainability advantages to being located in close proximity to the market they serve; or*
>
> *3. Industries and / or businesses which would be detrimental to local amenity if located in settlements, including general employment areas.*
>
> *c. The development of the site would not adversely affect the type and volume of traffic generated.*
>
> *<u>Replacement of Rural Buildings</u>*
>
> *The replacement of rural buildings for B Use Classes as defined in the Use Classes Order may be considered acceptable where the proposal:*
>
> *d. Involves the removal of a building that is substantially intact but is not a traditional building of clear architectural or historic interest;*
>
> *e. Represents a clear and substantial improvement in terms of size, scale, impact and design from the original; and*
>
> *f. The replacement buildings are well located to the existing buildings, unless it can be demonstrated that an alternative location would be visually less prominent.*
>
> *The Council will consider the need for appropriate measures in order to maintain the visual appearance and architectural character of buildings and prevent the proliferation of buildings in the countryside.*
>
> *Existing Employment (Outside General Employment Areas, employment allocations that have not been superseded and proposed employment allocations).*
>
> *Employment uses in locations outside of those outlined in Policy EC 03 are considered important to the economy, particularly those in rural areas. Proposals that will result in a permanent loss of employment uses with no alternative proposed will be considered on their own merits. The loss will be weighed in the planning balance, taking into account factors such as the long term sustainability*

of the location, individual site constraints and the existing and potential market demand for employment uses."

12. Due to an EIA not being required, the Council's position at the hearing, as set out in its Statement of Case, was that a planning balance should be undertaken. Carrying out this exercise, the Council concluded that permission ought to be granted as, in their view, the Development complied with the development plan taken as a whole. Moreover, the Council also identified strong planning considerations which further supported the grant of planning permission.

13. Paragraphs 2.3-2.6[1] of the Council's appeal statement provide as follows:

"*2.3 Having regard to Policy EC04 the Councils position is as set out above in the 17 January 2023 report. The Council position remains one of non-compliance with Policy EC04 (as set out in the above report). However, since an EIA is now not required following the September 24 Direction by the Secretary of State the Council is able to undertake a Planning Balance exercise, as set out above, and considers that when looking at the Development Plan as a whole, that whilst the proposal is not considered to accord with Policy EC04 of the Breckland Local Plan (adopted 2019) there is considered to be compliance with the Development Plan as a whole taking into account the support for employment, including in rural areas overall in the Development Plan (and set out in Policy GEN01 of the Breckland Local Plan), and other relevant policies that have been discussed throughout the Report below with regards to highways, layout and design, amenity, ecology, trees etc i.e. Policies GEN01, GEN02, GEN03, COM01, COM03, ENV06 and ENV02 of the Breckland Local Plan (adopted).*

2.5 There are also considered to be strong material planning considerations which further support the grant of permission, including in the now revised NPPF (December 2023), specifically Section 6 and paragraphs 85, 88 and 89 and Section 11. It is worth noting that the wording in the NPPF mirrors exactly that when the January 2023 application was considered (with regards to the relevant paragraphs quoted in the text above). The NPPF (December 2023) has been given significant weight as its supports business investment and expansion, supporting economic growth and investment and the sustainable growth and expansion of all types of business in rural areas, through conversion and new buildings. Also, it is recognised that sites to meet local business needs in rural areas may have to be found adjacent to or beyond existing settlements, and in locations that are not well served by public transport. Here regard has been had to the sensitivity of this site to its surroundings, noting that there are no statutory objections to the application on the grounds of highways, amenity or character, taking into consideration the fallback position as a material planning consideration in the planning balance. Finally, through the use of this previously developed site, which is an existing mixed use employment site. On the basis of these strong material planning considerations, which weigh in favour of the development, as set out in paragraphs 85, 88 and 89 of the NPPF (December 2023), the existing use of the land as a mixed employment site that could intensify and the support for employment overall in the Development Plan (as set out in Policy GEN01 of the Breckland Local Plan), these are considered to outweigh any conflict with any material planning considerations against the proposal and the conflict with Policy EC04 of the Breckland Local Plan (adopted 2019).

2.6 Having regard to Section 38(6) of the Planning and Compulsory Purchase Act 2004, Section 70(2) of the Town and Country Planning Act 1990 and Paragraph 2 of the NPPF, it is considered that the proposal accords with the development plan as a whole (despite being contrary to Policy EC04 of the Breckland Local Plan (adopted 2019)) and other material planning considerations weigh in favour of granting planning permission, in the form of Sections 6, 9, 11, 12 and 15 of the NPPF (December 2023) and the existence of a mixed use employment site. The proposals have been redesigned so that matters of highways, amenity, design and trees are all considered acceptable, subject to conditions.

[1] The Council's Appeal Statement makes no reference to para 2.4

On this basis, the proposals are considered acceptable and it remains the basis on which Members of the Planning Committee voted to approve the application in January 2023."

14. Accordingly, the only matter in dispute between the parties was whether the Development complied with EC04. In particular:

    a. The parties agreed that the Development complied with all other relevant policies in the Local Plan, in particular Policies GEN01, GEN02, GEN03, COM01, COM03, ENV06 and ENV02; and,

    b. Alongside the policy compliance identified above, there were also strong material planning considerations which further support the grant of permission.

15. The substantive hearing was held on 8-9 April 2025[2]. The only parties to the hearing were the Claimant and the Council. Whilst numerous local residents attended the hearing and took part in discussions at the Inspector's discretion, none were formally joined as parties to the appeal.

16. Following the closing of the hearing, on 22 May 2025 Simon Spanyol, a local resident who had taken part in the hearing, sent an email to PINS concerning power supply at Snetterton. This was not a matter raised in the hearing. This email stated as follows:

    "*Having attended the hearing for this appeal it was eventually ascertained that one of the principle reasons that Eastern Attachments went for the Griston site was the available power.*

    They stated that power was either unavailable or too expensive at their first site they applied for new build planning (Attleborough) and that the same was true for Snetterton. This view appears to have been supported by Breckland's planning officer Rebecca Collins.

    My enquiries have shown that Snetterton (one of Breckland Council's preferred industrial locations) has actually got several mW of power available with affordable connections.

    Even if a power connection is delayed it is possible to rent diesel generators of sufficient capacity to get a factory started and running. Indeed, in two new builds I was involved with portable generators were used to bridge the gap in supply.

    Given all of the benefits that an Industrial site has (versus the Griston Estate with its poor access and residential neighbours) for example freedom on hours of operation, noise, transport links, etc. I am keen that this information on power supply is incorporated into the decision process."

17. On 3 June 2025, the planning inspectorate emailed the Claimant and the Council forwarding the above email and stating that the Inspector intended to accept the above email. This email stated as follows:

    "*The following has been brought to the Inspector's attention. This detail was not raised at the hearing. Notwithstanding this, exceptionally, the Inspector intends to accept the email. However, in the interests of fairness she asks that both main parties provide a written response to the matters raised within fourteen days of the date of this email*"

18. As acknowledged in the above email, whilst there had been discussion concerning EC04 during the hearing, at no point was the question of power supply at Snetterton raised.

[2] The appeal was originally listed to be heard on 11 February 2025 however the hearing was adjourned shortly after the hearing was opened due to issues with the venue

19. Both parties replied on this point. Significantly, both parties explained that, contrary to Mr Spanyol's email, there was no available power capacity at Snetterton. The Council's email, dated 12 June 2025, provided as follows:

> "*1. At the time the planning application was made back in 2022, the lack of available electrical capacity at Snetterton was a significant constraint and almost certainly the cost of necessary network reinforcement to access sufficient capacity would likely have deemed the development of a single commercial premises financially unviable.*
>
> *2. To address the market failure identified above, the Council led construction of a new primary substation (PSS) which was completed in June 2023. The new PSS initially provides 6MVA output but is capable of delivering up to 36 MVA output, subject to upgrades.*
>
> *3. BDC reserved the initial 6 MVA capacity emanating from the new facility, but we can confirm that this 6 MVA has now been fully allocated.*
>
> *4. The network operator at Snetterton is UK Power Networks who will be able to answer any queries surrounding the availability of electrical capacity there*."

20. The Claimant's reply, also sent on 12 June 2025, provided as follows:

> "***Response to Resident Comments: Power Capacity and Site Selection Issues – Appeal at Griston, Norfolk***
>
> ***1. Introduction***
>
> *This statement is submitted on behalf of the Appellant to respond in detail to third-party representations made by Mr. Simon Spanyol concerning alleged alternative sites at Snetterton and Attleborough. It corrects inaccuracies regarding power availability, site selection, and commercial viability, and is supported by evidence from Breckland Council, utility network operators, and relevant planning case law. It also cross-references the* ***December 2024 revision of the National Planning Policy Framework (NPPF)*** *to confirm the proposal's alignment with national policy.*
>
> ***2. Summary of Third-Party Claims***
>
> *The representation argues:*
>
> - *That sufficient and affordable power is now available at Snetterton;*
> - *That temporary diesel generation could bridge any shortfall;*
> - *That Griston's planning context is less suitable than designated employment land;*
> - *That alternative sites should have been pursued more fully.*
>
> ***3. Factual Background to Site Selection and Power Constraints***
>
> *Prior to acquiring the Griston site in January 2021, the Appellant undertook extensive due diligence across multiple sites:*
>
> ***3.1 Attleborough (London Road)***
>
> - *Full planning permission was obtained following close cooperation with Breckland Council and Norfolk County Council.*
> - *However, the* ***land sale was ultimately refused by the County Council****, frustrating delivery.*
>
> ***3.2 Snetterton Business Park***
>
> - *Engaged with* ***Paul Downing, Director at Snetterton****, and site managers.*
> - *Offered just* ***330kVA (0.33 MVA)*** *— well below the required* ***1.5 MVA****.*
> - *Refused concentrated allocation of power to a small plot due to implications for estate-wide land sales.*

The Appellant's engagement continued through 2020–2023, including meetings at business forums. As of that time, ***Snetterton was unable and unwilling to allocate sufficient density of power*** *to meet Eastern Attachments' operational needs.*

4. Evidence from Breckland District Council on Snetterton's Capacity

Breckland District Council has provided direct and highly material input to this appeal, confirming:

"At the time the planning application was made back in 2022, the lack of available electrical capacity at Snetterton was a significant constraint... the cost of network reinforcement to access sufficient capacity would likely have rendered a single commercial premises financially unviable."

Further:

- *The* ***Snetterton Primary Substation (PSS)*** *completed in* ***June 2023*** *now delivers* ***6 MVA****, with long-term upgrade potential to 36 MVA.*
- *However,* ***the full 6 MVA initial capacity has already been allocated****.*
- ***No residual power is available to serve this development.***

Therefore, the third-party claim that "several megawatts are now available" is ***factually incorrect*** *and fails to reflect either the chronology or network operator constraints.*

5. NPPF 2024 Compliance: Economic Growth and Infrastructure

The ***NPPF (December 2024)*** *reinforces the themes that were present in the 2023 version, particularly around economic development and infrastructure.*

5.1 Sustainable Economic Growth

- ***Paragraph 86*** *of the NPPF 2024 states:*

  "Planning policies and decisions should help create the conditions in which businesses can invest, expand and adapt. Significant weight should be placed on the need to support economic growth and productivity."

This mirrors and strengthens the earlier ***para. 81 (2023)*** *and confirms that* ***significant weight must be given to enabling employment growth****, especially where infrastructure is available and development can proceed rapidly.*

5.2 Infrastructure Delivery as a Material Consideration

- ***Paragraph 92*** *of the NPPF 2024 echoes earlier versions:*

  "Planning policies and decisions should... support the delivery of local infrastructure to meet future development needs."

Where infrastructure such as electrical capacity ***cannot be delivered at alternative sites****, the existence of* ***available and deliverable infrastructure at Griston*** *is a significant material consideration and justifies the chosen location.*

5.3 Decision-Making Principles

- ***Paragraph 14 of the 2024 NPPF*** *reaffirms that planning decisions should be made in a timely, positive and pragmatic way, especially in the context of supporting sustainable development and ensuring timely delivery of employment land.*

6. Case Law and Precedent

6.1 Tesco v Secretary of State [1995] 1 WLR 759

The judgment held that while all relevant considerations must be considered, the ***weight to be given to each is for the decision-maker****.*

*In this case, the availability of power at Griston, and the lack of it elsewhere, is a **substantial material consideration**, carrying more weight than theoretical advantages of other locations.*

6.2 Leith Hall v Aberdeen City Council [2011] CSIH 67

*This case established that **viability and infrastructure constraints** are material to site assessments — a site cannot be a reasonable alternative if **infrastructure barriers render it undeliverable**.*

7. Diesel Generators – Not a Realistic Alternative

The suggestion that temporary generators could suffice is flawed:

- ***Environmental Harm**: Large-scale diesel generation is polluting and inconsistent with **NPPF 2024 paras. 162–170**, which require low-carbon, resilient infrastructure.*
- ***Noise & Amenity**: Would likely breach statutory nuisance thresholds and be refused planning permission near any sensitive receptor.*
- ***Unsuitable for Precision Manufacturing**: The Appellant's operations involve high-end steel cutting, robotic welding, and testing — all highly sensitive to electrical quality and stability.*
- ***Short-termism and Business Risk**: Any delay or compromise risks **losing key clients like JCB**, potentially irreversibly damaging the business.*

8. Freedom of Hours and Industrial Site Comparisons

*Contrary to assumptions, the Appellant has **never required or operated beyond the stated hours**. Unlike large logistics uses at Snetterton, the business model is **daytime production-based**. The application reflects these parameters, and the **Noise Impact Assessment** confirms no adverse impact to neighbouring residents.*

9. Availability of Existing Premises

*Extensive market analysis shows **no existing buildings in Norfolk** capable of accommodating:*

- *The **required floor area**;*
- ***Minimum 1.5 MVA** electrical capacity;*
- *B2 industrial use without major change of use or planning delay.*

*As per NPPF 2024 **para. 87(c)**, development proposals must be assessed based on the **availability and suitability of sites**, not theoretical alternatives that are unavailable or unviable.*

10. Conclusion: Planning Balance and Deliverability

This appeal must be assessed in the context of:

- ***Confirmed infrastructure availability** at Griston;*
- ***No suitable or deliverable alternatives**, either at Snetterton or Attleborough;*
- *Urgent operational need to expand or face commercial risk;*
- *Compliance with **economic, environmental, and infrastructure policies** under the **NPPF 2024**.*

*We respectfully submit that the third-party representation is both **factually flawed and immaterial** in light of clear evidence from both the Appellant and Breckland Council. The Appellant's case remains robust, policy-compliant, and well-evidenced.*"

21. Accordingly, in response to the evidence submitted after the close of the inquiry, both the Council and the Claimant made clear that:

    a. All existing capacity at Snetterton had been allocated;

    b. There was no residual power at Snetterton to serve the Development;

c. The Claimant had engaged with Snetterton and been told that "**Snetterton was unable and unwilling to allocate sufficient density of power** to meet Eastern Attachments' operational needs"; and,

d. There was nothing before the Inspector to state that any upgrades would be carried out at Snetterton to provide further capacity, let alone to indicate that Snetterton was planning on carrying out those upgrades in a given time-frame.

22. Despite this, the Inspector rejected the appeal on the basis that Snetterton was an available site such that the Claimant had not demonstrated that there were no other suitable alternative sites on identified or allocated employment sites, such that the Development conflicted with EC04. Paragraph 23 of the DL provides as follows:

> *"According to the Council (ID:8), there is capacity to deliver up to 36 MVA on the site, subject to further upgrades to the PSS at Snetterton. This has not been contradicted by the appellant, At the time of writing my decision no evidence has been provided to me setting out the length of time any upgrade to the PSS would take. Consequently, in the absence of compelling evidence to suggest that any delay would be such as to result in the site not being available and infrastructure barriers rendering it undeliverable, it has not been demonstrated that there are no other suitable sites identified or allocated for employment uses which can provide for a steady supply of high voltage power. As such, the appeal is contrary to Policy EC04 of the LP and the wider employment strategy of the LP which remains consistent with the overarching economic objectives, and Chapters 6 and 11 of the Framework in relation to both making effective use of land and building a strong competitive economy*."

23. Paragraphs 34-38 of the DL set out the Inspector's approach to the planning balance. Notably:

a. Limited weight is given to the fallback position (i.e. the Claimant using the site under the existing permissions). The reasoning for this is set out in para 30 of the DL, in which the Inspector concludes that:

> "*As such, I conclude that the fallback position set out by the appellant would not readily provide for the efficiency and operational advantages delivered by the proposed reconfiguration and expansion of the site to meet the appellant's requirements. Nor would the fallback position provide for the quantum of proposed general industrial and office uses for which the appellant has applied. Therefore, I give limited weight to this*."

b. The Inspector repeats her conclusion that the Development is contrary to EC04. From that, by reference to no other policies in the local plan (the DL is silent on this), she concludes that the appeal should be refused. Paragraph 38 of the DL provides as follows:

> "*Given the statutory requirement to determine the appeal in accordance with the development plan as a whole I consider that the benefits of the scheme do not outweigh the harm in allowing this development which would be contrary to the requirement of the Framework to deliver land of the right type and in the right place and at the right time to support growth, innovation and improved productivity and by identifying and coordinating the provision of infrastructure. Therefore, for the reasons set out above, I conclude on balance, that the appeal should not succeed*"

Proposed grounds of challenge

24. The Claimant reserves the right to amend the proposed grounds in the event it is necessary to issue a claim.

Proposed ground 1 – in concluding that "there are no other suitable sites identified or allocated for employment uses which can provide for a steady supply of high voltage power", the Inspector (i) misinterpreted Policy EC04 of the Breckland Local Plan; (ii) made an error of fact; and (iii) was irrational

Legal principles

25. It is trite law that the correct interpretation of planning policy is a matter of law (*see Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13).

26. For a mistake of fact to give rise to unfairness, four elements must be shown. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning. (E v Home Secretary [2004] EWCA Civ 49; [2004] 2 WLR 1351 at [66]).

Submissions

27. It is plain that the Inspector misinterpreted EC04. EC04(a) requires it to be demonstrated that there "are no other suitable sites available on identified or allocated employment sites."

28. The evidence was clear that Snetterton was not available. As explained by both the Claimant and the Council, there was no capacity currently available at Snetterton. On any reading, therefore, Snetterton was not available for the Development. At the highest, the evidence before the Inspector concerning Snetterton was that at some point in the future it *might* be available if upgrades were carried out. Plainly, this is the opposite of a conclusion that Snetterton was available at the time of the Decision. Nor is there any requirement for an applicant under EC04(a) to show when a site *might* become available – all that has to be done is to show that no other alternative sites exist. That no evidence was put forward as to when upgrades might, or might not, take place is irrelevant to determining whether the site is in fact available.

29. The Inspector has clearly misinterpreted ECO4(a) as not requiring sites to be currently available but instead theoretically available – that is plainly wrong, unworkable and not what EC04(a) means.

30. Further or alternatively, the Inspector made a mistake of fact in concluding that Snetterton was available. The established position between the parties as of 12 June 2025 was that Snetterton was not

available. In concluding that 'Snetterton was an alternative available site despite the agreed position to the contrary, the Inspector has erred in fact.

31. Finally, the Inspector's conclusion that Snetterton was available was irrational given the above.

Proposed ground 2 – in dismissing the appeal, the Inspector (i) failed to have regard to the requirement to determine whether the Development accorded with the development plan as a whole; (ii) failed to have regard to the suite of policies identified by the parties as material which the Development complied with together with the identified planning benefits; and / or (iii) failed to give adequate reasons for concluding that the appeal should be refused ; and (iv) was irrational

Legal principles

32. Under s. 38(6) of the Planning and Compulsory Purchase Act 2004, planning decisions must be made in accordance with the provisions of a development plan unless material considerations indicate otherwise.

33. The purpose of s. 38(6) is to "enhance the status" of the development plan in the exercise of the planning authority's judgment (*Edinburgh City Council v Secretary of State for Scotland* [1997] 1 WLR 1447, 1449H). That is not to say that a decision must be taken in accordance with the development plan, rather the decision maker "will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given it" (*Edinburgh* 1459F). It must be emphasized that this presumption does not require greater weight to be given to the development plan over other considerations (*Secretary of State for Communities and Local Government v West Berkshire District Council* [2016] 1 WLR 3923 [20]).

34. Whilst s. 38(6) does not require that greater weight be given to the development plan, it is incumbent upon a decision maker to determine whether a proposal accords with the development plan as a whole. See, for example, the judgment of Richards LJ in *R (Hampton Bishop Parish Council) v Herefordshire Council* [2015] 1 WLR 2367 in which he stated at paragraph 28 that:

> "*It is up to the decision-maker how precisely to go about the task, but if he is to act within his powers and in particular to comply with the statutory duty to make the determination in accordance with the development plan unless material considerations indicate otherwise, he must as a general rule decide at some stage in the exercise whether the proposed development does or does not accord with the development plan. I say "as a general rule" because there may be exceptional cases where it is possible to comply with the section without a decision on that point: I have in mind in particular that if the decision-maker concludes that the development plan should carry no weight at all because the policies in it have been overtaken by more recent policy statements, it may be possible to give effect to the section without reaching a specific decision on whether the development is or is not in accordance with the development plan. But the possibility of exceptional cases should not be allowed to detract from the force of the general rule*."

35. A finding of compliance or conflict with the development plan is "an essential part of the decision-making process" (*Tiviot Way Investments Ltd v Secretary of State* [2016] JPL 171 [27], see also *BDW*

Trading Ltd (t/a David Wilson Homes (Central, Mercia and West Midlands)) v Secretary of State [2017] PTSR 1337 [21]).

36. Whilst a finding of compliance or conflict can be implied from a fair reading of a decision letter as a whole, a challenge will succeed where there remains considerable doubt as to whether a decision-maker considered that the development was in accordance with the development plan taken as a whole (*R (Butler) v East Dorset District Council* [2016] EWHC 1527 (Admin) [32]).

37. For a consideration to be material it must be one that relates to the character and use of the land and which fairly relates to the development (*R (Wight) v Resilient Energy Sevendale Ltd* [2019] UKSC 53).

38. In *R (Client Earth) v Secretary of State for Business, Energy & Industrial Strategy* [2020] EWHC 1303 (Admin) Holgate J stated at paragraph 99 that:

> "*In R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] PTSR 221 the Supreme Court endorsed the legal tests in Derbyshire Dales District Council [2010] 1 P & CR 19 and CREEDNZ Inc v Governor General [1981] 1 NZLR 172 , 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is not irrelevant or immaterial, and therefore something which the decision-maker is empowered or entitled to take into account. But a decision-maker does not fail to take a relevant consideration into account unless he was under an obligation to do so. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so "obviously material", that it was irrational not to have taken it into account*."

Submissions

39. The sole difference between the Council and the Claimant at the time of the hearing was whether the Development complied with EC04. Both parties agreed that permission ought to be granted and both parties agreed that the Development complied with all other relevant policies.

40. The Council concluded that, notwithstanding their view that the Development conflicted with EC04, the Development complied with the development plan as a whole given the Development complied with Policies GEN01, GEN02, GEN03, COM01, COM03, ENV06 and ENV02.

41. The Inspector failed to carry out this task. Whilst the Inspector does refer to the requirement to "determine the appeal in accordance with the development plan as a whole", the Inspector makes no reference to any policy beyond EC04 and concludes that, by reference to the harm outweighing the benefits, the appeal should be dismissed. Accordingly, the Inspector failed to actually determine whether the Development complied with the development plan as a whole. Instead, the Inspector carried out a separate weighting exercise which failed to have regard to the overall compliance with the development plan and afford the appropriate weight to that overall compliance.

42. Moreover, in failing to determine whether the Development complied with the development plan as a whole, the Inspector failed to have regard to material considerations that were plainly material to the Decision – namely Policies GEN01, GEN02, GEN03, COM01, COM03, ENV06 and ENV02 and the strong material planning considerations identified by the Council which further supported the grant of permission. That failure is highly significant given not only the requirement to have regard to these factors, but also the fact that these factors were of direct relevance to the balancing exercise which the Inspector purported to carry out.

43. Alternatively, the Inspector failed to give reasons for her decision. The DL is silent as to Policies GEN01, GEN02, GEN03, COM01, COM03, ENV06 and ENV02 and the development plan as a whole. It cannot be known what the Inspector concluded on these matters and why.

44. Furthermore, it is particularly notable that the Inspector failed to identify any harm beyond the alleged conflict with EC04, whilst accepting that there were benefits to the Development, there was a fallback position and that the Site currently benefits from extant permissions for light and general industrial. There simply does not appear to have been any planning balance undertaken, let alone a rational one.

45. Finally, for these reasons it is plain that the Inspector's decision was irrational.

Proposed ground 3 – the Inspector erred in failing to apply the correct legal test to the Claimant's fallback position (i.e. that the site would be used in accordance with the extant permissions if the appeal was dismissed)

Legal principles

46. For a fallback to be material, there must be a "real prospect" of the fallback being carried out (*Mansell v Tonbridge And Malling Borough Council* [2017] EWCA Civ 1314).

47. For a fallback to be weighed in the planning balance all that must be asked are the following three questions (*R v Secretary of State for the Environment ex parte PF Ahern (London) Ltd* [1998] Env. L.R. 189):

> (i) is there a legal fall-back use, i.e. can the applicant lawfully undertake the use without any new planning permission;
>
> (ii) is there a real prospect of the use occurring; and
>
> (iii) if the answer to (ii) is "yes", compare the proposed development to the fall-back use.

48. Per *Ahern*, the fundamental question is whether:

> "*the proposed development in its implications for impact on the environment, or other relevant planning factors, likely to have implications worse than, or broadly similar to, any use to which the site would or might be put if the proposed development were refused*"

Submissions

49. The fallback relied upon by the Claimant was that, if the appeal was refused, the Claimant would continue to use the site under the extant permissions. This was less desirable than allowing the appeal for not only the Claimant but also local residents, due to amenity and highways impacts that could happen under the extant permissions that would not result from the appeal scheme.

50. Plainly there was a "real prospect" of this fallback position taking place given it was already being implemented by the Claimant. The only further work that had to be done was to ensure the use of the site was fully in compliance with the extant permission which may result in the intensification referred to by the Inspector.

51. However, the Inspector instead gave limited weight to the fallback position due to the fact that it would not "readily provide for the efficiency and operational advantages delivered by the proposed reconfiguration and expansion of the site to meet the appellant's requirements. Nor would the fallback position provide for the quantum of proposed general industrial and office uses for which the appellant has applied" (para 30 of the DL).

52. That approach is wrong in law. The Inspector has wrongly compared the desirability of the Development for the Claimant with the fallback. Clearly the Claimant preferred the scheme being applied for – indeed, it would be surprising if any fallback position relied upon by an applicant was seen as preferable to the fallback position being relied upon. However, that is not the comparison that must be undertaken when considering a fallback. The question is not to what extent an applicant would benefit more from a proposed scheme. Instead, the question is in terms of planning impact how does the fallback position compared to the proposed development.

53. Had the Inspector carried out the correct assessment, namely comparing the planning merits of the fallback vs the proposed development, she was bound to conclude that the Development was preferable given the issues caused by the fallback (para 31 of the DL).

Proposed ground 4 – the Decision is vitiated by the Inspector's apparent bias in favour of the local residents and against the Claimant

Legal principles

54. In accordance with the well-known judgment of Lord Bingham in *Porter v Magill* [2002] AC 357, 494H [103], in considering whether a decision can be challenged for apparent bias:

> "*The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*."

55. The test for apparent bias involves a two-stage process: (i) the court must first ascertain all the circumstances which have a bearing on the suggestion of bias and (ii) it must then be asked whether

those circumstances would lead the fair-minded and informed observer to conclude that there was a real possibility that the decision-maker was biased (*Bubbles and Wine Ltd v Lushka* [2018] EWCA Civ 468 at [17]).

56. The facts and context are critical in determining whether a decision gives rise to apparent bias. Each case will turn on "an intense focus of the essential facts of the case" (*Bubbles and Wine* [18], applying *Helow v SSHD* [2008] UKHL 62; [2008] 1 WLR 2416 [2]). It is against the context of the decision that the fair-minded observer will be informed about the decision and against which they will neither be complacent nor unduly sensitive or suspicious (*Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48 [53]).

57. In *Lawal v Northern Spirit Limited* [2003] UKHL 35 it was stated that "public perception of the possibility of unconscious bias is the key" (the opinion of the Committee (comprised of Lord Bingham of Cornhill (Chairman), Lord Nicholls of Birkenhead, Lord Steyn, Lord Millett and Lord Rodger of Earlsferry).

58. Decision-makers cannot refute an allegation of bias simply by asserting that they had an open mind and were not prejudiced (*R (Good Law Project) v Minister for the Cabinet Office* [2022] EWCA Civ 21 [82]). Where reasons are not provided at the time of the decision, the fair minded and informed observer will ask for an explanation before concluding as to whether the decision is tainted by apparent bias. This question must be answered by reference to all of the facts available (*Good Law Project* [82], *Helow* [2]).

Submissions

59. The Inspector's course of conduct towards the Claimant gives rise to apparent bias that infects the Decision. In particular, the following points are noted.

60. First, at the beginning of the hearing on 11 February 2025, the Inspector announced to the hearing that the advocate instructed on behalf of the Claimant was "only human" and that those attending "need not be afraid of him." Throughout the Hearing, the Inspector often did not want to hear from the Claimant's barrister and was dismissive of his input. That directly contrasts with the Inspector's approach to locals, where at all times she ensured they had the opportunity to speak and take part despite not being parties to the appeal.

61. Second, the Inspector elected to adjourn the hearing on 11 February 2025 because, in her view, the room was too small to comfortably accommodate those attending. The issue, however, was not insufficient seats but rather that those local residents attending were making so much noise that the hearing could not progress. Rather than choosing to continue the hearing and asking residents to remain quiet, as requested by the Claimant, the Inspector instead chose to put the parties to

significant expense to find a later date and larger room which would allow locals to attend and make as much noise as they wished.

62. Third, despite no local residents applying to formally take part in proceedings, as noted above the Hearing was effectively run by and for the locals. The hearing ran for two days, largely, if not entirely, due to local residents taking part in every discussion – including on expert evidence they had not read and conditions.

63. Fourth, and most egregiously, the Inspector allowed the submission of late evidence by a local resident which was entirely new information. Moreover, despite the parties to the appeal making clear why that new evidence was wrong, the Inspector based her decision entirely on that information. Indeed, the Inspector went so far as to critique the Claimant for not providing evidence as to when the upgrades might be done despite the fact that the Claimant and the Council both agreed that the relevant, current, position was that no power was available at Snetterton. The Inspector gave every impression of a decision-maker looking to refuse an appeal rather than fairly considering the appeal as a whole.

64. Taken in the round, the fair-minded and reasonable observer is bound to conclude that the Inspector appeared to be biased against the Claimant in favour of local residents. From the beginning of the hearing to after closing, the Inspector actively sought to promote the interests of local residents and in so doing significantly prejudiced the Claimant.

Proposed ground 5 – the Inspector's decision to allow evidence submitted after the close of the hearing was procedurally unfair

Legal principles

65. The features required to provide procedural fairness to participants in an administrative or quasi-judicial process are necessarily fact and context specific (*Vicente v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1555; [2015] JPL 562 [19]).

66. Whilst the procedure at a planning hearing lacks much of the formality of a planning inquiry (*Vicente* [20]), the strength of a case can be determined only upon an understanding of that case and by testing it with reference to propositions in the opposing case. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector in order to ensure there is a "full and fair" hearing.

67. Pill LJ stated in *Dyason v Secretary of State for the Environment* (1998) 75 P & CR 506 at 512 that:

> "*Whatever procedure is followed, the strength of a case can be determined only upon an understanding of that case and by testing it with reference to propositions in the opposing case. At a public local inquiry the Inspector, in performing that task, usually has the benefit of cross-examination on behalf of the other party. If cross-examination disappears, the need to examine propositions in that way does not disappear with it. Further, the statutory right to be heard is nullified unless, in some way, the strength of what one party says is not only listened to by the tribunal but is assessed for its own worth and in relation to opposing contentions.*

There is a danger, upon the procedure now followed by the Secretary of State of observing the right to be heard by holding a "hearing", that the need for such consideration is forgotten. The danger is that the "more relaxed" atmosphere could lead not to a "full and fair" hearing but to a less than thorough examination of the issues. A relaxed hearing is not necessarily a fair hearing. The hearing must not become so relaxed that the rigorous examination essential to the determination of difficult questions may be diluted. The absence of an accusatorial procedure places an inquisitorial burden upon an Inspector."

68. Accordingly, as a result of the relative informality of a hearing compared to an inquiry an inspector at a planning hearing has to play an enhanced role in resolving conflicts of evidence. This enhanced role requires points being put to parties before making an adverse finding against them.

69. In *London Borough of Croydon v Secretary of State for the Environment* [2000] P.L.C.R. 171 Keene J stated at pg. 184:

"*What the Dyason case establishes is that, when there is an informal hearing which, as a matter of procedure, normally excludes cross-examination, the Inspector has to play an enhanced role in order to resolve conflicts of evidence. In addition, such an Inspector must not arrive at a finding adverse to a party without having put the point to the party in question or his witness, and that is what happened in the Dyason case*."

70. The requirements of procedural fairness extend to the conduct of site visits, including the provision of information on site visits. In *LDRA Limited v SSCLG* [2016] EWHC 950 (Admin) Lang J held that it was a breach of natural justice for the inspector to not take into account information given on the site visit. Lang J held at paragraphs 52 - 53 that:

"*52. In my view, the Inspector's witness statements demonstrated that he was confused about the area which Dr Hennell was referring to, and he did not understand the location of the potential alternative site. Rather than dismiss it out of hand, he ought to have asked for further assistance by way of maps or photographs or conducted a site visit on land, so that he could give it due consideration.*

53. If due consideration had been given to this alternative site, the outcome might have been different, and in my view the Claimants have been substantially prejudiced. If the alternative site had been found to be suitable and did not have the adverse impacts of the appeal Site, planning permission might not have been given."

<u>Submissions</u>

71. It was plainly unfair for the Inspector to allow new evidence to be submitted after the close of the hearing which was allegedly central to the matter in dispute between the parties without evidence having been heard on that point during the hearing.

72. In those circumstances, fairness required either (i) the Inspector to refuse to accept the evidence, as would ordinarily be done; or (ii) reopen the hearing to allow further evidence and discussion of the power supply at Snetterton.

73. Neither were done. Instead, the Inspector allowed the new evidence and then failed to consider the responses of the Council and Claimant, both of which made clear that the new evidence was wrong and was not relevant to the Decision. That is plainly contrary to the heightened duty of fairness imposed upon an inspector at an appeal hearing.

74. Furthermore, having allowed the submission of evidence post-hearing (which made clear that no power was available at Snetterton), the Inspector based her conclusion on the fact that "no evidence has been provided to me setting out the length of time any upgrade to the PSS would take". To be clear, the length of time of any upgrade wasn't a matter raised by any party – Mr Spanyol wrongly stated there was power available currently, whilst the Council and the Claimant explained in response that there was no power available at Snetterton. Given the post-hearing nature of this issue, taken together with the weight the Inspector applied to this finding, fairness required her to ask the parties a further question about upgrade timelines. Instead, the Inspector failed to afford the parties an opportunity to make representations on the key issue upon which her decision turned.

Action(s) that the Defendant is expected to take

75. The Defendant is asked to agree to a consent order quashing the decision notice dated 23 June 2025 granting the Permission.

ADR proposals

76. The Claimant has no ADR proposals as it is not considered that this dispute can be resolved by narrowing the issues.

Details of any information sought

77. As a public authority, the Defendant is under a duty of candour and must make full and frank disclosure of any and all documents relevant to the grounds set out above (*see R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 per Sir John Donaldson at 945G). That duty applies at the pre-action stage.

78. The duty to which the Defendant is subject is a high duty placed on public authorities to assist the court by providing full and accurate explanations of the relevant facts and, so far as they are not apparent from contemporaneous documents which have been disclosed, the reasoning behind the decision. The explanation provided under the duty of candour must not be selective. A public authority is under a duty to identify and draw to the court's attention "the good, the bad and the ugly". It must not mislead the court by omission or non-disclosure (*R (Hoareau) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWCA Civ 1812 at paras. 17- 23).

79. The Defendant is reminded of these duties and asked to comply with them.

Costs

80. This is a claim to which the Aarhus costs protection regime applies on the basis that the claim is an environmental matter (*Venn v Secretary of State for Housing, Communities and Local Government* [2015] 1 WLR 2328). If you disagree this is an Aarhus matter or with the making of an Aarhus costs order please give your reasons.

The address for reply and service of court documents

The address for reply and service of court documents is set out at paragraph 3 of this letter.

Proposed reply date

Due to the need for proceedings to be issued by Monday 4 August 2025, the Defendant is requested to reply by 4pm Wednesday 30 July 2025. Whilst this represents a shorter reply date than the 14 days in the pre-action protocol, given the brevity of this letter together with the obvious errors in the Decision it is considered that this represents a reasonable time in which to reply.

We look forward to your response.

Yours faithfully

Brendon Lee
Partner
For and on behalf of
HCR HEWITSONS