Neutral Citation Number: [2017] EWHC 970 (Admin)

Case No: CO/6389/2015 & CO/6624/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 May 2017

Before :

MRS JUSTICE LANG DBE

- -

Between :

CO/6389/2015:

THE QUEEN
on the application of

HEADCORN PARISH COUNCIL **Claimant**

- and -

SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL GOVERNMENT **Defendant**

(1) MAIDSTONE BOROUGH COUNCIL
(2) DHA PLANNING **Interested Parties**

CO/6624/2015:

THE QUEEN
on the application of

HEADCORN PARISH COUNCIL **Claimant**

- and -

MAIDSTONE BOROUGH COUNCIL **Defendant**

(1) RYCHARDE HAWKES
(2) LISA HAWKES
(3) CRABTREE AND CRABTREE (HEADCORN) LIMITED
(4) SHOREGROVE LIMITED **Interested Parties**

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- -

Richard Buxton (instructed by **Richard Buxton Environmental and Public Law**) for the **Claimants**
Robert Williams (instructed by the **Government Legal Department**) for the **Secretary of State for Communities and Local Government**
Stephen Whale (instructed by **Sharpe Pritchard LLP**) for **Maidstone Borough Council**
The **Second Interested Party** in CO/6389/2015 did not appear and was not represented
The **Interested Parties** in CO/6624/2015 did not appear and were not represented

Hearing date: 4 April 2017
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Approved Judgment

Mrs Justice Lang :

1. The Claimant seeks judicial review in respect of a proposed housing development of up to 220 houses on land immediately north of the village of Headcorn, Kent ("the Site"). The Claimant is the Parish Council for Headcorn and represents the interests of local residents who are concerned about the large scale and unsuitable location of this development.

2. In its first claim for judicial review (CO/6389/2015), the Claimant challenged the screening direction made by the Secretary of State for Communities and Local Government ("the Secretary of State"), on 2 November 2015, that the proposal was not likely to have significant effects on the environment and so was not EIA development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA Regulations 2011").

3. In its second claim for judicial review (CO/6624/2015), the Claimant challenged the grant of planning permission by Maidstone Borough Council on 13 November 2015.

4. Permission to apply for judicial review in the first claim was refused by Jay J. on the papers on 21 December 2015. On 27 January 2016, Holgate J. ordered that both claims should be consolidated and heard together. At an oral hearing, on 17 February 2016, Holgate J. refused permission to apply for judicial review in both claims. On appeal to the Court of Appeal, Jackson LJ granted permission to apply for judicial review in both claims, at an oral hearing on 15 December 2016.

5. By the date of the substantive hearing, both judicial review claims were based upon one ground only, namely, that the Secretary of State failed to take into account a material consideration, namely the concerns expressed by Mrs Cooper, Corporate Director – Growth, Environment and Transport at Kent County Council ("KCC"), in correspondence with Maidstone Borough Council ("MBC"), about the cumulative impact of traffic on the A229 and A274 south of Maidstone, generated by the proposed developments. The other grounds pleaded by the Claimant in its grounds were not pursued.

Facts

6. The Site is some 8.6 ha in size, and is immediately north of Headcorn village, between Ulcombe Road to the east and houses fronting the A274 to the west. The land is agricultural, and is located within the countryside in the Maidstone Local Plan 2000. Parts of the Site adjoin the settlement boundary of the village of Headcorn. Headcorn is 15 km south of Maidstone town centre, which is accessed via the A274.

7. The application for planning permission was submitted on 21 April 2015. It followed an earlier application made in 2014 which was not determined in time by MBC, and so was appealed on that basis. MBC indicated on 17 April 2015 that it would have granted planning permission, which prompted the second application.

8. The application was supported by a Transport Assessment by DHA Transport, which assessed the increased traffic which would be generated by the new homes on Site and the impact on local traffic. The assessment was predicated upon 270 homes but only 220 homes were included in the proposal. The scope of the assessment was agreed with KCC Highways, and it did not include the cumulative impact of congestion in the A274 corridor south of Maidstone.

9. The Claimant objected to the application, relying *inter alia*, upon the recommendation on 28 January 2015 by MBC's Planning, Transport and Development Overview & Scrutiny Committee that this Site ought not to be allocated in the Local Plan for a range of reasons, including highway congestion.

10. On 29 May 2015, KCC submitted its comments on the application, as the highways authority. It expressed concerns about local traffic problems near the access to the site, but it made no reference to the cumulative impact of traffic on the A274 south of Maidstone. Subject to the specific issues raised, it did not object to the proposal. Overall, it considered that the Site was in a reasonably sustainable location, close to village facilities and transport links.

11. On 29 May 2015, the Claimant requested a screening direction from the Secretary of State. It raised a number of environmental issues, including local traffic problems, but it did not refer to the cumulative impact of congestion in the A274 corridor south of Maidstone.

12. In about June 2015, Dr James Ker (a resident of Headcorn) sent a request to the Secretary of State to call in the application for his own determination.

13. On 30 June 2015, MBC adopted a screening opinion which determined that no Environmental Impact Assessment was required. The opinion found that the proposal was an urban development project within paragraph 10(b) of Schedule 2 to the EIA Regulations 2011, and exceeded the Schedule 2 threshold for consideration as it exceeded 150 dwellings and 5 hectares. In considering whether significant effects on the environment were likely, the opinion took into account the guidance in the indicative screening thresholds, noting that although the Site exceeded 5 ha (it was 8.6 ha), it was for only 220 houses, significantly below the threshold of 1,000 houses. Taking into account other proposed developments in the Headcorn area, the number rose to 455 houses.

14. In assessing the proposal against the criteria in Schedule 3 to the EIA Regulations 2011, the material finding in the screening opinion on road use was:

> "(e) pollution and nuisances
>
> The main implication for pollution and nuisances would be through an increase in traffic (air quality and noise) during construction and once occupied. However, I do not consider this scale of development would result in significant levels of pollution or noise from its use to warrant an ES …."

There was no consideration of the cumulative impact of congestion in the A274 corridor south of Maidstone.

15. On 9 July 2015, MBC resolved to grant planning permission. The planning officer's report analysed the material which had been received in respect of highways issues at paragraphs 7.20 to 7.27, including the assessment of additional traffic generated by the development, objections from the Claimant and local residents, and the comments by KCC, consulted in its capacity as the highways authority. None of the material referred to the cumulative impact of congestion in the A274 corridor south of Maidstone. The report concluded:

> "Overall, it is considered the accesses would be safe and that the impact of additional traffic on local roads and junctions would, or could be made acceptable through improvement, with no objections raised by the Highways Authority. It is noted that the NPPF at paragraph 32 advises that development should only be refused on transport grounds where residual cumulative impacts of development are severe, which is not the case here, subject to mitigation. As such, any highways impacts are not considered grounds for refusal."

16. On 15 July 2015, the Secretary of State directed MBC not to grant permission without specific authorisation, to enable him to consider whether he should direct that the application be referred to him for determination.

17. On 23 July 2015, MBC's Strategic Planning, Sustainability and Transportation Committee recommended that the Site be reinstated as part of the allocation in the Local Plan.

18. In an email dated 13 August 2015, Dr Ker wrote to the Secretary of State, pursuant to his request for the application to be called in. He provided a detailed critique of the Transport Assessment, on the basis *inter alia* that it was at odds with the concerns of KCC as expressed by Mrs Cooper in correspondence with MBC about the cumulative impact of traffic on the A229 and A274 south of Maidstone, generated by proposed developments. He annexed Mrs Cooper's letters dated 20 January 2015 and 23 July 2015.

19. On 19 August 2015, Dr Ker sent a further email to the Secretary of State asking him to take into account further letters from Mrs Cooper to MBC dated 13 and 17 August 2015, a reply from MBC dated 17 August 2015, and a KCC briefing note.

20. On 2 November 2015, the Secretary of State refused the request to call-in the application.

21. On 2 November 2015, the Secretary of State made a screening direction finding that, although the proposal was a Schedule 2 development under paragraph 10(b), the proposal was not likely to have significant effects on the environment and so was not EIA development. The statement of reasons said:

> "In assessing the proposal the Secretary of State considers that transport and related impacts (i.e. pollution) together with flood related, landscape and ecology impacts arising from additional

> residential development in Headcorn are the main issues to be addressed.
>
> Firstly, turning to the transport impacts of the proposal, the Secretary of State notes that a transport assessment has been produced (Oct 2014) and that the Highway Authority are broadly content although the findings are contested. Nonetheless, the information is sufficient to indicate that the effects of the additional residential development will be local in effect and will not have a wider significance both in terms of access onto the Ulcombe Road and more widely in and around Headcorn. Furthermore, the information indicates that there would be only limited impact on Headcorn in terms of any additional congestion and any associated indirect impacts (e.g. pollution) that may result. For these reasons, the Secretary of State's view is that there is not a likelihood of significant environmental effects in terms of transport impacts.
>
> …
>
> As set out above, there are a series of recent residential permissions and further proposals at this settlement. The view of the local planning authority, that all the additional potential residential development, individually and cumulatively, would not give rise to a likelihood of significant environmental effects, is noted. In this context, the Secretary of State's view is that the combined impacts of this proposal alongside particularly but not exclusively application 1. (14/505162/ FULL) above and other recent residential development and permission would not be likely to have a significant environmental effect with regard to either of the main issues identified above or in relation to any other matters raised. Overall, there is no evidence of any factors that either in isolation, or in combination would necessitate EIA for this proposal, including on grounds of cumulative impact."

22. On 13 November 2015, MBC issued a planning decision notice, granting outline planning permission for up to 220 houses, together with areas of open space, a nature conservation area, landscaping, new access on to Ulcombe Road, improved access to Kings Road, and change of use of land to school playing field, subject to conditions.

Legal framework

23. Art. 2(1) of the EIA Directive 85/337/EEC (as amended) requires Member States to adopt all measures necessary to ensure that, before consent is given, projects likely to have a significant effect on the environment are made subject to an assessment of their effects. The Directive has been implemented into UK domestic law by the EIA Regulations 2011.

24. Under reg. 3(4) of the EIA Regulations 2011, a local planning authority and the Secretary of State are prohibited from granting planning permission for 'EIA development', as defined, unless before doing so they have "*taken the environmental information into account and have stated that they have done so*."

25. 'EIA development' is defined in reg. 2(1) as Schedule 1 development or "*Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location*."

26. It is common ground that the proposed development in this case was Schedule 2 development, namely, an "*urban development project*", within the scope of paragraph 10(b) of Schedule 2, which exceeded the statutory threshold of more than 150 dwellings and 5 ha. The issue was whether it was "*likely to have significant effects on the environment by virtue of factors such as its nature, size or location*".

27. Reg. 4 provides that a screening opinion adopted by the local planning authority or a screening direction by the Secretary of State will determine whether or not proposed development is EIA development. The terms "*screening opinion*" and "*screening direction*" are defined in reg. 2(1):

> "'Screening opinion' means a written statement of the opinion of the relevant planning authority as to whether development is EIA development."
>
> "'Screening direction' means a direction made by the Secretary of State as to whether development is EIA development."

28. Under reg. 5, a request may be made to a local planning authority to adopt a screening opinion. By reg. 4(8), the Secretary of State may make a screening direction of his own volition or upon request.

29. Reg. 4(6) provides that where a local planning authority or the Secretary of State has to decide whether Schedule 2 development is EIA development, each "*shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development*".

30. Schedule 3 provides:

> "**Selection criteria for screening Schedule 2 development**
>
> **1. Characteristics of development**
>
> The characteristics of development must be considered having regard, in particular, to –
>
> (a) the size of the development;
> (b) the cumulation with other development;
> (c) the use of natural resources;
> (d) the production of waste;
> (e) pollution and nuisances;

(f) the risk of accidents, having regard in particular to substances or technologies used.

2. Location of development

The environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard, in particular to –

(a) the existing land use;
(b) the relative abundance quality and regenerative capacity of natural resources in the area;
(c) the absorption capacity of the natural environment … [listing specific types of environments]

3. Characteristics of the potential impact

The potential significant effects of development must be considered in relation to criteria set out under paragraphs 1 and 2 above, and having regard in particular to -

(a) the extent of the impact (geographical area and size of the affected population);
(b) the transfrontier nature of the impact;
(c) the magnitude and complexity of the impact;
(d) the probability of the impact;
(e) the duration, frequency and reversibility of the impact."

31. The case law provides guidance on the approach which the court should take in judging the lawfulness of a screening direction.

32. In *R (Loader) v Secretary of State for Communities and Local Government & Ors* [2012] EWCA Civ 869, Pill LJ, giving the judgment of the court, held:

> "43. What emerges is that the test to be applied is: "Is this project likely to have significant effects on the environment?" That is clear from European and national authority, including the Commission Guidance at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (Commission v UK).
>
> The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be

> able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken….
>
> 44. The criteria in the annexes to the Regulations justify the approach to the question proposed in Circular 02/99, paragraphs 33, 34 and annex A. It is stated, at paragraph 34, that the number of cases of schedule 2 development which are EIA developments will be "a very small proportion of the total number of schedule 2 developments"."

33. Although Circular 02/99 has since been cancelled, similar guidance is now found in the Planning Practice Guidance which provides:

> "What is the procedure for deciding whether a Schedule 2 project is likely to have significant effects?
>
> When screening Schedule 2 projects, the local planning authority must take account of the selection criteria in Schedule 3 of the Regulations. Not all of the criteria will be relevant in every case. Each case should be considered on its own merits in a balanced way and authorities should retain the evidence to justify their decision.
>
> Only a very small proportion of Schedule 2 development will require an assessment. While it is not possible to formulate criteria or thresholds which will provide a universal test of whether or not an assessment is required, it is possible to offer a broad indication of the type or scale of development which is likely to require an assessment. It is also possible to provide an indication of the sort of development for which an assessment is unlikely to be necessary. To aid local planning authorities to determine whether a project is likely to have significant environmental effects, a set of indicative thresholds and criteria have been produced. See the indicative thresholds and criteria. The table also gives an indication of the types of impact that are most likely to be significant for particular types of development.
>
> However, it should not be presumed that developments above the indicative thresholds should always be subject to assessment, or those falling below these thresholds could never give rise to significant effects, especially where the development is in an environmentally sensitive location. Each development will need to be considered on its merits.
>
> Paragraph: 018 Reference ID: 4-018-20140306
>
> Revision date: 06 03 2014"

34. In *R (Evans) v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114, Beatson LJ gave helpful guidance on the approach required of the Secretary of State:

> "21. The authorities considered by this court in Loader's case show that an approach which considers whether there is a real risk as opposed to a probability of an impact embodies a precautionary approach. They are set out by Pill LJ, who gave the only substantive judgment: see [2012] EWCA Civ 869 at [26] – [30]. Toulson and Sullivan LJJ agreed with Pill LJ. For the reasons in the following paragraphs of this judgment, I have concluded that it is unarguable that the Secretary of State's approach in this case failed to embody a precautionary approach.
>
> 22. The assessment of the significance of an impact or impacts on the environment has been described as essentially a fact-finding exercise which requires the exercise of judgment on the issues of "likelihood" and "significance": see *Bowen-West v Secretary of State [2012] EWCA Civ 321* at [40] *per* Laws LJ, and *Jones v Mansfield [2003] EWCA Civ 1408* at [17] and [61] *per* Dyson and Carnwath LJJ. Carnwath LJ stated that, because the word "significant" does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped. See also the well-known statement of Lord Hoffmann in *Tesco Stores v Secretary of State [1995] 1 WLR 759* at [57] that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State. This is particularly so where the issue is the visual impact of a development on a site, and the relevant officer, unlike the court, has visited the site and used his expertise in assessing it.
>
> 23. I reject Mr Wolfe's submission that the statement in the supplementary note that English Heritage's advice was that the impact on the landscape and building "would" not be of such significance to justify EIA constituted a reviewable error. English Heritage certainly did not maintain that the impact on the historic landscape justified EIA. Both European and national jurisprudence show that the "likely to have significant effects on the environment" test probably requires "something more than a bare possibility … though any serious possibility would suffice": see *R (Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157* at [17] and the opinion of the Advocate-General in *Case C-75/08 R (Mellor) v Secretary for Communities and Local Government [2010] Env. LR 18* at [51]. The last paragraph of the supplementary note replicates the statutory test and the Secretary of State's conclusion was unequivocal and stronger. It stated that the development "would

> not cause a significant environment impact". That is a more precautionary approach than is required by the 1999 EIA Regulations.
>
> …
>
> 25. Mr Wolfe's argument that the Secretary of State fell into error depends on his submission based on the decision of the Grand Chamber in Case C/127/02 *Waddenzee* (2004) ECR 1–7405 that a key element of a precautionary approach and the approach which should have been undertaken by the Secretary of State is that further assessment is required, and thus a positive screening decision was required, unless it can properly be said that there is no reasonable doubt about the potential for significant environmental impact.
>
> 26. Mr Wolfe submitted that in the light of the views of English Heritage, the Suffolk Preservation Society, and the Council this could not be the case. That, however, comes very close to suggesting that once there are differing views on a question, there must be a full EIA. It is also very similar to the submission made unsuccessfully in Loader's case that a full EIA process is required in all cases where the effect would influence the development consent decision. As Pill LJ stated (at [46]), accepting that submission would devalue the entire EIA concept, which involves a formal and substantial procedure often involving considerable time and resources. It is also clear from both the national and the EU indicative guidance that the full EIA process will only be required in a very small proportion of the total number of Schedule 2 developments.
>
> 27. To require the EIA process where there are differing views would also largely make the Secretary of State's role redundant. As to the Waddenzee case, that was concerned with the Habitats Directive. The reference to a reasonable doubt is to a reasonable doubt in the mind of the primary decision-maker. There is no support in that case for the view that, where somebody else has taken a different view to the primary decision-maker, it is not possible to demonstrate that there is no reasonable doubt. It is not suggested in this case that the Secretary of State or his officer had any such doubt."

35. In *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 Moore-Bick LJ considered the nature and purpose of a screening opinion. He said at [20]:

> "It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission. That comes later and will ordinarily include an assessment of environmental

> factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, of whether an EIA needs to be undertaken at all. I think it important therefore that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term 'screening opinion'."

36. In *Hockley v Essex County Council* [2014] Env. LR 24, Lindblom J. said:

> "102. There has to be a sensible limit to what a screening decision-maker is expected to do. This view is supported in the cases to which I have referred, notably, for example, in Bateman (see paragraph 24 above)**.** Conjecture about future development on other sites that might or might not act with the development in question to produce indirect, secondary or cumulative effects is not in the screening decision-maker's remit. I do not think the precautionary approach extends to that. And when it is suggested in a claim for judicial review that a screening decision was deficient because some potential cumulative effect was left out, it is not enough for a claimant simply to point to other developments in the locality that have been or might be approved, and to leave it to the court to work out whether any aggregate effects were unlikely to be significant. Unless it is obvious that relevant and potentially significant effects on the environment have been overlooked, the court will need some objective evidence to show this was so. It will need to be satisfied that the authority responsible for the screening decision was aware, or ought to have been, of the potential cumulative effects; that the screening opinion could not reasonably have been negative if those potential effects had been considered; and that this was, or should have been, apparent to the authority at the time.
>
> 103. Above all, the court must be able to conclude in those circumstances that the authority's screening judgment was rendered unlawful by the omission. The court's role is not to second-guess the screening judgment of the authority to which Parliament has entrusted the task, but only to review that judgment on *Wednesbury* grounds. The thrust of what Sullivan L.J. said in paragraph 37 of his judgment in Boggis must surely apply to the screening process for EIA (see paragraph 28 above). If the court is to strike down an otherwise lawful planning permission because potentially significant effects on the environment have been ignored in a screening opinion it must have some solid basis for that conclusion. In this case I find it impossible to conclude, on the submissions and evidence

> before me, that the County Council's screening opinion was flawed in that way."

37. The obligation imposed by regulation 4(7)(a) of the EIA Regulations 2011 to provide, with the Screening Direction, a "*written statement giving clearly and precisely the full reasons for that conclusion*" is not to be equated with the obligations placed on an Inspector writing a decision letter on appeal: *Mackman v Secretary of State for Communities and Local Government* [2015] EWCA Civ 716, per Sullivan LJ at [16]. The test was whether the reasons were adequate for the particular application: per Sullivan LJ at [20].

Summary of submissions by the parties

38. The Claimant submitted that Dr Ker's representations, attaching Mrs Cooper's correspondence with MBC, plainly raised environmental concerns about the cumulative adverse impact of housing development upon the highway network, local residents, and the local economy. On a correct reading of the correspondence, KCC's concerns extended to developments beyond the Maidstone urban area, along the A274 highway corridor to Headcorn, as these generated traffic up towards Maidstone. This was confirmed in Mrs Cooper's witness statement made in these proceedings on 6 March 2017, and KCC's comments on another proposed development in Headcorn, dated 22 February 2017.

39. The Claimant submitted that the Secretary of State erred in not taking these concerns into account when deciding whether the proposal was likely to have significant effects on the environment. It was apparent that he did not take them into account because he made no reference to them in the screening direction. At the very least, he should have investigated these issues further with KCC.

40. Since the screening direction was flawed, it followed that the grant of planning permission by MBC was unlawful because it was granted on the basis that the development was not EIA: see *R (Berky) v Newport CC* [2012] 2 P & CR 12, per Carnwath LJ at [22]; *R (Gilbert) v Secretary of State for Communities and Local Government* [2014] EWHC 1952 (Admin) per Supperstone J. at [3].

41. On behalf of the Secretary of State, Mr Williams informed the court, on instructions, that Mr M. Hale, Senior Planning Casework Officer in the National Planning Casework Unit of the Department of Communities and Local Government, had responsibility for both the call-in application and the screening direction for this proposal and so he had Dr Ker's representations, together with Mrs Cooper's correspondence, available to him when he considered the screening direction, on behalf of the Secretary of State. Mr Hale did not make any enquiries of KCC. This information accorded with an email from the Government Legal Department's solicitor in response to a query from the Claimant. Mr Buxton, on behalf of the Claimant, did not challenge this, and indeed relied upon Mr Hale's knowledge of the material in support of his case.

42. The Secretary of State submitted that the EIA legislation neither expressly nor impliedly required him to take into account the issues raised in the representations made by Dr Ker and the correspondence from Mrs Cooper, as relied upon by the

Claimant. In Mrs Cooper's correspondence she was expressing concern about the A274 corridor to the south of Maidstone, not 15 km away in Headcorn. KCC's comments on the proposal made no mention of these issues. KCC agreed the scope of the developer's Transport Assessment and was content with the methodology and findings of the Transport Assessment, which identified local traffic issues only.

43. MBC relied upon the detailed witness statements of Mr Richard Timms, Principal Planning Officer at MBC, explaining the history of the issues raised by KCC, which concerned Local Plan housing allocations within the Maidstone Urban Area, not housing allocations in Headcorn, and were not raised in respect of this particular Site. Mr Whale accepted that if the Secretary of State's screening direction was quashed, MBC's grant of planning permission would have to be quashed also.

Conclusions

44. There was some debate before me as to the correct legal tests to apply in determining whether a public body has acted unlawfully by failing to take into account a relevant consideration, and so it is necessary to go back to first principles.

45. A public body must take into account all relevant considerations when taking a decision. Relevant considerations are those to which the legislation either expressly or impliedly requires the decision-maker to have regard. As Lord Greene MR said in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, at 228:

> "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters."

46. Express considerations may readily be identified in the empowering legislation. It is a more difficult task to identify implied considerations. In *Re Findlay* [1985] 1 AC 318, Lord Scarman adopted (at 333G – 334D) the analysis of Cooke J. in the New Zealand case of *CREEDNZ Inc. v Governor General* [1981] 1 N.Z.L.R. 172 where he said (at 183), that considerations may be impliedly identified by the statute and in certain circumstances, notwithstanding the silence of the statute, "*there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers… would not be in accordance with the intention of the Act*". The other members of the House of Lords agreed with Lord Scarman's speech.

47. The question whether a particular factor is a relevant consideration is a question of law for the court, whereas the weight to be given to that factor is a matter for the decision-maker.

48. When the Secretary of State made the screening direction in this case, he was expressly required under the terms of the EIA Directive and the EIA Regulations 2011 to have regard to the following relevant considerations:

i) whether the development was likely to have significant effects on the environment by virtue of factors such as its nature, size or location (reg. 2(1) and reg. 4(3)); and

ii) the selection criteria in schedule 3 in so far as they were relevant to the development (reg. 4(6)).

49. In my judgment, the environmental impact of increased traffic generated by a large scale housing development at this Site, assessed cumulatively with other housing development, would potentially come within the scope of reg. 2(1) and within the scope of the following criteria in Schedule 3(1): (a) the size of the development; (b) cumulation with other development; and (e) pollution and nuisances.

50. Therefore, if the issue relied upon by the Claimant had been raised, the Secretary of State would have been required to take it into account as a relevant consideration. However, on the evidence, the environmental impact of increased traffic generated by this proposal, either singly or cumulatively with other development, was only raised in the context of local traffic around Headcorn, including by KCC. See:

i) the Transport Assessment, the scope of which was approved in advance by KCC Highways;

ii) KCC Highways' consultation comments on the planning application, which also accepted the methodology and material findings of the Transport Assessment;

iii) the objections by the Claimant and others to the planning application;

iv) MBC's screening opinion;

v) the planning officer's report to MBC's Planning Committee; and

vi) the Claimant's representations to the Secretary of State in support of the application for a screening direction.

51. I do not accept the Claimant's submission that Mrs Cooper's correspondence, annexed to Dr Ker's representations, could or should have been read by the Secretary of State to refer to concerns about the cumulative environmental impact of increased traffic on the A274 generated by this development in Headcorn.

52. The context of that correspondence was the emerging Local Plan. As Mr Timms described in his first witness statement (which I accept), there were differences of view between KCC and MBC. Policy SP3 of the submitted Local Plan proposed a Strategic Development Location comprising six housing sites in the Maidstone Urban Area: South East, on either side of the A274, which were opposed by KCC. These were some 8 km from Headcorn. KCC's concern about the increasing volume of traffic was informed by its transport modelling results which were based upon the proposed allocation of sites on the A229 and A274 road corridors in south and south-east Maidstone. This had nothing to do with MBC's proposed allocation of housing sites in Headcorn. I accept Mr Timms' evidence that KCC did not oppose the Headcorn housing allocation (including this Site) on the ground that traffic generated

by the development would add to the unacceptable increase in traffic in the vicinity of Maidstone.

53. In the correspondence, KCC's concerns were expressed twice as relating specifically to "*further major development allocations (or speculative planning applications) on the southern approaches to Maidstone Town Centre (eg A229/A274)*" (Letter 13.08.2015; KCC Summary Technical Note 11.08.15).

54. MBC understood KCC's concerns to relate to the further development allocations on the "*southern highway approaches to Maidstone Town Centre*" and that KCC objected to "*any further development allocations on these approaches to the Town Centre*" (Letter 17.08.2015).

55. Consistent with the above, KCC had previously expressed its "*strong objections to the major development proposed at the urban periphery of Maidstone*" on the basis that it was not a "*sustainable location for future growth*". In contrast, its observations in relation to the 'additional allocations' within Rural Service Centres (of which Headcorn was one) had nothing to do with transport impacts, but were simply a concern that the community should be involved in the identification of these sites (Letter 20.01.2015).

56. As part of this litigation, the Claimant approached Mrs Cooper, asking for her comments on her earlier correspondence, and she made a witness statement on 6 March 2017 in which she stated:

> "6. …although the highway objections that have been raised by the Council to date have been limited to major development that are within the Maidstone urban area, the Council's concerns relate to the potential traffic impacts of developments along the A229 and A274 corridors and are not limited to the effects of development only within the Maidstone urban area, and in particular within south and south-east Maidstone.
>
> 7. I indeed noted in my letter of 20 January 2017, exhibited by Mr Timm's second witness statement, that "constraints are most pronounced within the south eastern sector of the Maidstone area". However the point is that the traffic levels on these corridors are not dictated solely by development within Maidstone itself, but are influenced by housing supply along the length of the relevant corridors. The letter further notes that it is uncertain whether strategic improvement can be achieved that will mitigate the impact of development along these corridors."

57. Mrs Cooper rightly conceded that the highway objections raised in the 2015 correspondence which was before the Secretary of State were limited to major development within the Maidstone urban area. I agree with Mr Timms (Third witness statement, para 9) that the suggestion that KCC's concern on this particular issue extended beyond the Maidstone urban area as far as Headcorn was "*entirely novel*". It was unsupported by any reports or committee resolutions from KCC.

58. Even as recently as 20 January 2017, the focus of KCC's letter to the examining Inspector was in respect of the South East Maidstone urban area, not settlements further south along the A274. She said:

> "The evidence made available through the jointly commissioned VISUM traffic modelling has demonstrated how such constraints are most pronounced within the south eastern sector of the Maidstone urban area, due to extensive traffic congestion on the A229 and A274 corridors." (emphasis added)

I note that in her witness statement (quoted above), Mrs Cooper inaccurately omitted the highly significant word "urban" from the quotation from her own letter. Mrs Cooper went on to say:

> "In view of the known physical constraints at key junctions in the south eastern sector of Maidstone, such as the Wheatsheaf and Loose Road/Armstrong Rd/Park Way junctions, it is uncertain whether strategic improvement can be achieved that will mitigate the impact of development. This uncertainty is relevant to the planned developments on both the A229 and A274 corridors…."

I accept Mr Timms' evidence that, in both these paragraphs, she was referring to the A274 corridor in the south eastern sector of Maidstone, not the entirety of the A274.

59. It was open to KCC at any stage during the planning application process in this case to notify MBC or the Secretary of State that its consultation comments no longer adequately reflected its position, and to raise its concerns about the cumulative environmental impact of this proposal. It has never done so. I was shown KCC's recent consultation comments on another development in Headcorn, dated 22 February 2017, which included reference to congestion on the A274 corridor to Maidstone. No such information was provided in respect of earlier developments in Headcorn, including this Site.

60. Applying the legal principles in *Loader*, *Bateman, Evans* and *Hockley* which I have set out above, I consider that the Secretary of State was entitled to base his screening assessment upon the material before him which did relate to the Site, and to disregard as irrelevant the issues raised in the correspondence from Mrs Cooper which did not relate to the Site. Since KCC had submitted detailed comments on this particular application, the Secretary of State was entitled to assume that these comments represented KCC's views. He was not under any legal obligation to launch a speculative investigation into whether KCC might also be concerned that development in Headcorn could have a cumulative environmental impact on the A274 corridor in the south eastern sector of Maidstone, when there was no objective evidence to support this suggestion.

61. In carrying out the screening exercise, the Secretary of State treated transport, and its environmental impacts, as a main issue. He assessed the evidence in the transport assessment, and noted KCC's comments, as well as Dr Ker's criticisms. He set out the other developments in Headcorn to which he had regard, in order to assess cumulative

impact, and no complaint was made by the Claimant in this respect. His view that the transport effects would only be local in effect was one which he was entitled to reach on the basis of the evidence before him. He concluded that there would be some environmental impact, falling short of significant. His overall conclusion was that:

> "neither the urbanising effect of this level of residential development, nor the cumulative impact in relation to the main relevant issues (particularly transport and associated impacts, but also flood risk, landscape, heritage and ecology) indicate that, cumulatively, significant effect is likely. There is at worst minor adverse impact for most issues, although this is greater in relation to traffic and transport impacts. However, the information for that topic in particular does not indicate this to be so severe as to be significant."

In my judgment, this was a legitimate exercise of his planning judgment which cannot be successfully impugned.

62. For the reasons set out above, the claims for judicial review are dismissed.