Neutral Citation Number [2014] EWCA Civ 1393

Case No: C1/2013/2479; C1/2013/2567

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
HHJ Richard Foster
[2013] EWHC 1877 (Admin); [2013] EWHC 2073 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday 28th October 2014

Before :
LORD JUSTICE MOORE-BICK
LORD JUSTICE BEATSON
and
LORD JUSTICE BRIGGS

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Between :

Chalfont St Peter Parish Council	**Appellant**
- and -	
Chiltern District Council	**Respondent**
- and -	
Holy Cross Sisters Trustees Inc	**Interested Party in C1/2013/2479**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Ian Dove QC (instructed by **Richard Buxton Environmental and Public Law**) for the **Appellant**
Morag Ellis QC (instructed by **Sharpe Pritchard**) for the **Respondent**
Mark Lowe QC and Asitha Ranatunga (instructed by **Pothecary Witham Weld**) for the **Interested Party**

Hearing dates: 7 and 8 July 2014

Judgment
As Approved by the Court

Lord Justice Beatson :

I. INTRODUCTION

1. The questions in these two appeals concern a site in Chalfont St Peter in Buckinghamshire owned by Holy Cross Sisters Trustees Incorporated ("the Trustees"), a charity. Between 1928 and 2006 the site was used as a convent and a convent school. On 31 July 2006 the convent school closed because the Trustees considered that it required an unsustainable level of financial support at the expense of the Holy Cross Sisters' other charitable activities. The convent itself continues in a new building on part of the site.

2. At issue is whether in future part of the convent school site[1] should be used for a school. The Chalfont St Peter Parish Council ("the Parish Council") want the Chalfont St Peter Church of England School ("the Church of England school") to be relocated to part of the site because the school is overcrowded and it considers that its facilities are inadequate. The Church of England school's existing site is surrounded by residential housing which leaves no room for expansion. The convent school site is much larger and could accommodate both the school and some residential housing.

3. The use of part of the convent school site for the Church of England school is precluded by the two decisions of the Chiltern District Council ("the District Council") which are challenged by the Parish Council in these proceedings. The first decision challenged is that on 21 December 2010 granting the Trustees planning permission for a mixed use development on the site, including 198 dwellings. That decision confirmed the District Council's decision on 5 August 2010 to grant planning permission subject to the completion of a section 106 agreement and the exercise by the Secretary of State of his power to "call in" the application.

4. The second decision challenged is the District Council's adoption on 15 November 2011, following an examination in public before an Inspector, of a Core Strategy containing Policy CS6. Policy CS6 identified the convent school site as one of three strategic housing sites. Mr Simon Emerson, the Inspector who examined the Core Strategy document submitted by the District Council, concluded that the document, including Policy CS6, provided an appropriate basis for the planning of the district, was supported by sufficient evidence, and had a reasonable chance of being delivered. The effect of the two decisions is that the site will primarily be used for residential development. Although, there would also be a care home and a sports pitch on it, and the convent's chapel would be retained, there would be no school.

5. The Parish Council has described the use of the convent school site as "the most significant planning issue facing [the] community for the foreseeable future". It considers that its wish to relocate the Church of England school is a realistic aspiration because that school's present site could be sold for residential development and the funds used for the new project, and because the Diocese of Oxford supports what became known as the "land swap" proposal and has agreed that funds from the sale of the school's existing site can be used. The relevant education authority is not

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[1] The site is referred to in the documents as "the Holy Cross site, "the Grange", and "the convent school site". I shall refer to it by the last of these names.

the Parish Council or the District Council but Buckinghamshire County Council ("the County Council"). The County Council has stated that in principle it supports the relocation of the Church of England school but that there is no statutory requirement for a move and it will not contribute to costs. The District Council's position is that, at the time of the relevant decisions, for reasons summarised later in this judgment,[2] the relocation plan was an impractical aspiration which it was not required to consider as a "reasonable alternative" in the preparation of its Core Strategy.

6. The Parish Council's challenge to Policy CS6 of the District Council's Core Strategy insofar as it relates to the strategic housing allocation on the convent school site is brought by a statutory application pursuant to section 113 of the Planning and Compulsory Purchase Act 2004 ("the Act") filed on 12 December 2011. This challenge was dismissed by His Honour Judge Richard Foster on 3 July 2013: see [2013] EWHC 1877 (Admin). The grant of planning permission for the mixed use development on the convent school site was challenged in judicial review proceedings filed on 18 November 2011. The Trustees are an interested party to those proceedings. This challenge was dismissed by the same judge on 17 July 2013: see [2013] EWHC 2073 (Admin). Both judgments are admirably concise. The Parish Council appeals against the orders of the judge with the permission of Sullivan LJ following an oral renewal hearing on 24 March 2014: [2014] EWCA Civ 346.

7. The questions for decision in the appeal against the dismissal of the section 113 challenge to policy CS6 of the Core Strategy are:

   (1) Did the judge err in law when determining that the District Council was not under an obligation to consider the "land swap" proposal as a reasonable alternative in the environmental report as required by Article 5(1) of Directive 2001/42/EC ("the 2001 Directive") and Regulation 12(2)(b) of the Environmental Assessment of Plans and Programmes Regulations 2004 SI No. 1633 of 2004 ("the SEA Regulations"); and
   (2) Did the judge err in law in determining that the decision of the Inspector who conducted the examination into the Core Strategy document between January and October 2011 contained adequate reasons?

8. The questions for decision in the judicial review appeal are:

   (1) Did the judge err in law by failing to conclude that the District Council's planning committee made its decision based on an error of fact as to the extent of the playing fields on the convent school site, and did that error lead it to conclude that the application complied with Policy R2 of the adopted District Local Plan;[3] and
   (2) Did the judge err in law when determining that the District Council's interpretation of Policy CSF2 of the adopted Chiltern District local plan[4] was correct in not requiring a like-for-like replacement of a community service or facility on the site (here the school use)?

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[2] Its position was based on the positions of the County Council and the Trustees, and the absence of a financial business plan: see below, [20], [25], [34] (setting out §6 of the Officer's Report to the Planning Committee) and [56] – [57].

[3] See Appendix, §11.

[4] See Appendix, §13.

9. The material legislation and the policies relevant to this appeal are set out or summarised in the Appendix to this judgment ("the Appendix"). Paragraph numbers in judgments are indicated by square brackets and those in other documents by "§". The judgment itself is divided into eight sections. Sections II – VI contain the factual background ([11] – [32], [36] – [37], [42] – [47] and [49] – [59] and [61]), the officer's report and decision of the District Council granting planning permission ([33] – [35], [40] and [48]), the decisions of the Inspector and District Council approving and adopting the Core Strategy ([60] and [61]), and the judge's reasoning ([63] – [68]). Section VII contains my analysis and the reasons for my conclusion that both appeals should be dismissed. I deal with the challenge to the Core Strategy at [69] – [94] and [125] and the judicial review at [95] – [121]. Section VIII ([126]) summarises my conclusions.

10. The written and oral submissions on behalf of the Parish Council, the District Council, and the Trustees of Mr Dove QC, Ms Ellis QC and Mr Lowe QC have been of considerable assistance in a case of some complexity. For the purposes of the appeal the parties commendably attempted to reduce the very large volume of material that had been before the judge. Unfortunately, the documents concerning the Core Strategy appeal were put before the court in a very unsatisfactory way. There were separate bundles for the appellant's documents and the respondent's documents. There was a significant amount of overlap between the two bundles, duplication of documents, even within the same bundle, and some parts of the same document were in one bundle while other parts were in another. As both bundles had attempted to keep the pagination used below, it should have been possible for the experienced planning solicitors and counsel to produce a single bundle. Additionally, the skeleton arguments were prepared before the pagination in the bundle was settled. These factors significantly impeded pre-hearing preparation by the court because of the difficulty in finding the material relied on by the parties, and in at least one respect (see [24], footnote [6] below), affected the way the material was presented at the hearing.

II. THE FACTUAL BACKGROUND TO THE DECISIONS

11. The significant overlap in the facts relevant to the two challenges led to them being heard together. It is therefore convenient to summarise the factual position relevant to both together and in a broadly chronological way. In view of the nature of the submissions and to provide the context for my conclusions, it is necessary to do so in some detail.

(i) The decision to close the convent school

12. The decision to close the convent school was first announced in January 2006, and finally confirmed in April, after a parents' group had sought alternative sources of support and put forward a proposal. The Trustees then had to consider the future use of the convent school site. It was not until February 2010 that they applied for planning permission.

13. By the time it was announced that the convent school was to be closed the District Council had commenced the development of its core planning strategy. The context of its strategic planning was a significant requirement for additional housing under the South East plan. In May 2006, the District Council published its "Core Strategy Preferred Options", a Sustainability Appraisal report, and a "Housing Potential Study 2005 – 2026". These identified "broad locations" for new housing but not particular preferred sites. Part of the convent school site was only identified for potential development in the long term, and then only for 69 dwellings.

14. At some stage in 2006, the headmaster of the Church of England school contacted the cabinet member for education at the County Council about the possibility of the school moving to the convent school site. The Parish Council and others in the local community were interested in a "land swap" with a mixed use of the convent school site involving the relocated Church of England school and housing. The site of the existing Church of England school would be sold for development which would meet some of the housing need, and the proceeds of sale would be available for relocating the school. The District Council and the Trustees considered this an impractical aspiration.

(ii) Development of the Core Strategy: August 2007 – February 2010

15. In August 2007 the District Council's officers decided to add the remainder of the convent school site to the site identified in the Core Strategy Preferred Options document. There were two developments in January 2008. The first was that the District Council's Strategic Housing Land Availability Appraisal ("SHLAA") was published. It included the convent school site as a "first priority site for consideration" with a net capacity of 379 dwellings but did not identify the Church of England School site as a potential development site. The second development was that the County Council, the education authority, published an infrastructure study which, despite acknowledged deficiencies in capacity in a number of schools, identified no requirement for additional schools in Chiltern District.

16. In June 2008, the District Council published its "Core Strategy: Strategic Options" document. This contained four scenarios for development within its area and a "sustainability appraisal" for each scenario. One of the scenarios, scenario 3, was "targeted expansion of Amersham, Chesham and Chalfont St Peter urban areas" with up to 600 new dwellings in Chalfont St Peter. About a month later, in a letter dated 23 July 2008 to the cabinet member for education at the County Council, the headmaster of the Church of England school again raised the possibility of his school moving to the convent school site.

17. The evidence of Anna Cronin, Interim Head of the Council's Planning Service between January 2011 and July 2012[5] was that the County Council's Children and Young People's Service responded to the District Council's Core Strategy Options paper in August 2008. The County Council's response was based on its January 2008 infrastructure study. It stated that "the scale of the [proposed] development is unlikely to generate substantial education infrastructure requirements" but "there are existing deficits in the provision of infrastructure which the County Council wanted to address

[5] Statement, §16. See also District Council's Skeleton Argument, page 12.

by agreeing a policy with all District Councils to ensure that developers make a contribution towards education facilities where there is insufficient capacity to support the development". The response also provided a table showing the planning areas projected to have a shortfall of school places and stated that "primary schools in… Chalfont and all secondary schools in the Chiltern District are projected to have insufficient capacity to accommodate additional demand from new development". The County Council also stated that, until there was an agreed policy on the contribution to educational facilities by developers to this effect it would not support the grant of planning permission for developments of over four dwellings. It is clear from other documents that the contributions the County Council had in mind were to be secured by agreements with developers pursuant to section 106 of the Town and Country Planning Act 1990.

18. At a Cabinet meeting on 30 September 2008, the District Council chose scenario 3, as the preferred strategic option for the Local Development Framework – Core Strategy. This scenario involved "targeted expansion: Amersham, Chesham and Chalfont St Peter".

19. The Church of England school's headteacher wrote a further and more detailed letter about the "land swap" proposal to the County Council on 31 March 2009: see [2013] EWHC 1877 (Admin) at [7]. The County Council's response dated 8 April 2009 stated *inter alia*:

> "Whilst I understand your keenness to pursue a move to the Holy Cross Convent site and acknowledge that there appears to be local support for this move to take place, the Local Authority is not currently in a position to give consent to this proposition or to instruct the County Valuer to commence a valuation of the two school sites".

It also referred to its review of schools in the county and stated that it was on an area and not a school by school basis. It stated that the consultation on the review would be in the autumn with final plans in the summer of 2010.

20. Jumping ahead in the chronology, in a letter dated 9 November 2009, Chris Munday, the County Council's Divisional Director, Commissioning and Business Improvement, wrote to the Church of England school's headmaster stating that the County Council was not able to bring forward the review of primary provision in Chiltern and South Buckinghamshire, and that at that time it envisaged that the review would commence in the spring of 2010. The letter made the following points:

    (1) The writer was aware that proposals were being put forward by the Trustees to develop the site to provide a number of new facilities including a convent, community centre, care home and housing.
    (2) The County Council's officers were in discussion with the District Council regarding the education requirements that would be generated by the proposed development.
    (3) The writer was sure that the Trustees would be seeking a residential sale price for the convent school site, which was likely to be prohibitive in the light of the amount of land required to house the school and its playing fields. The letter

stated that "even if it were possible for funding to be released from the sale of land, it is highly probable that this would be insufficient to meet the cost of the residential sale price at the convent school site even when combined with any section 106 developer contributions generated from the development".

(4) The County Council understood that the Church of England school's current site was not "ideal". However, an assessment would have to be made as to whether the existing school buildings on the convent school site were fit for purpose or suitable to accommodate the expansion of places in the area, or in need of refurbishment or rebuilding, which would require further additional investment.

(5) The District Council would need to find additional sites to enable them to meet housing needs if the Church of England school was successful in its move to the convent school site.

21. The next material development to the Core Strategy challenge was the publication by the District Council of its "Draft Core Strategy for Chiltern District: Document for Stakeholder Dialogue" and a preliminary Sustainability Appraisal in June 2009. The Draft Core Strategy identified the need for 720 new dwellings in Chalfont St Peter, and allocated the convent school site for 406 dwellings and retail development as part of that policy. The preliminary Sustainability Appraisal stated that a small part of the convent school site was designated as private open space in the local plan so a conflict of use might have to be addressed. This was because it fell within policy R11. It also stated that the site was in an area of high historic value and sensitivity.

22. In a letter dated 22 July 2009, the District Council provided further information to the Parish Council about the Draft Core Strategy and sought "to establish a dialogue on issues relevant to Chalfont St Peter". The Parish Council replied in a letter dated 10 August 2009 welcoming the opportunity to meet and asking a number of questions. These included questions about the evidence to support the need for the number of dwellings in Chalfont St Peter, the planning application for the convent school site, and what provision was made in the Draft Core Strategy to accommodate the increase in the number of children of school age bearing in mind the lack of capacity that existed at some schools in the village. The Parish Council also expressed its concerns about the adequacy of educational infrastructure in Chalfont St Peter in a letter dated October 2009.

23. The District Council responded to the Parish Council in a letter dated 9 December 2009. It stated that it was concerned to ensure that any housing development was accompanied by supporting infrastructure. It also stated that the County Council had acknowledged there were discrepancies in the models used to project the education needs, and that its most recent position was that there could be deficits in different parts of the district, including Chalfont St Peter. The letter stated that "at this stage the County Council has no precise proposals for expanding schools in Chiltern" and that the concern of the District Council was to ensure that developer contributions should achieve tangible results in the district and not end up in a pooled account. It also stated that concerns of the Head Teacher needed to be channelled through the education authority and that it would be continuing its dialogue with that authority.

24. The Parish Council's response to the Draft Core Strategy was given in a letter to the District Council dated 7 December 2009.[6] This letter contained a number of objections to the Core Strategy, including two about the convent school site. The first was an objection to the site being identified as a strategic housing site based on the fact that the former educational use of the site meant it was covered by Policy CSF2 which dealt with loss of community services and facilities. The second was that the Church of England school was "above full capacity". The response stated that the County Council had indicated that the Core Strategy developments would increase the number of children requiring education in the village, but the Draft Core Strategy methodology was based on numbers falling. It complained that the District Council had stated it would not pursue the possibility of a land swap with the convent school site, and that this was a responsibility of the County Council.

25. At about this time residents of Chalfont St Peter contacted Marion Clayton, the County Council "Cabinet Member Achievement, Learning and Skills", about the future of the convent school site. In an undated letter responding to those residents,[7] she stated that the County Council was reviewing the way schools were organised and that the need for additional school places would be addressed through plans on an area basis. The letter also stated that:

> "as part of this review, we will consider all available options regarding school place provision, which may include the option to relocate one or more schools to the Holy Cross site. For each option, we will need to consider the funding implications and viability as well as considering the views of key stakeholders.
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> ...
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> Currently … the only way the County Council could seek to use the site for educational purposes would be to purchase the land and put in its own planning application. It is certain that the Charity would seek a residential sale price for the land which is likely to be prohibitive in light of the amount of land that would be required to house the school and its playing fields. Even if the Local Authority were able to release funds from the sale of the existing school site, and combine this with the developer contributions secured in the area, it is possible that this could still be insufficient to meet the cost of the residential sale price at the Holy Cross site. Further, if the school were to move to the Holy Cross site, the District Council would need to find additional sites to enable them to meet their housing allocation within the South East plan."

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[6] This letter provides one illustration of the unsatisfactory nature of the way the documents were put before the court and the way that impeded the court's understanding of the factual background and the issues. Neither party referred to it. The document Mr Dove relied on for the Parish Council's response was an undated and unsigned document in the appellant's bundle. That document differs from the dated letter which was in the respondent's bundle and is probably a draft.

[7] The District Council received a copy of this letter in January 2010: skeleton argument, page 13.

26. What the County Council said to the District Council had a different emphasis. In an email dated 2 February 2010, Stephen Chainani, the County Council's School Place Planning Commissioning Partner, informed the District Council that its Core Strategy was acceptable to the County Council provided that the District Council supported the County Council's policy on education contributions from developers. The email also stated that the County Council would shortly be developing its plans for addressing the need for additional school places as a result of housing growth. A document dated March 2010 made the same points. The County Council's position was that the existing Church of England school, including the, albeit not ideal, offsite sports facilities, met statutory requirements and there was no requirement to provide an improved school.

(iii) The application to develop the convent school site

27. By November 2009, it was known that the Trustees were preparing an application to develop the convent school site. There had been correspondence between the Parish Council and a representative of the Trustees. The Trustees stated that they were following the provisions in the Charities Act 1993 to trustees of charities who are considering the disposal of surplus charitable assets. The first application on behalf of the Trustees to develop the convent school site to comprise residential development, a 74 bed residential care home, community facilities and open space was made on 21 February 2010. It did not propose to retain any of the existing playing field land because (i) there was no continuing community need for it, and (ii) the District Council's sport and recreation facilities needs assessment stated that Chalfont St Peter was already served by sports pitches. It stated that the care home was a community facility and the need for it was supported by the Primary Care Trust.

28. Sport England objected to the loss of the existing playing field land, on the basis of its own policies and policy PPG 17 of the Department for Communities and Local Government's policies. Policy PPG17[8] provided that planning permission for developments on playing fields should not be allowed unless the playing fields that would be lost would be replaced "by a playing field or fields of equivalent or better quantity and quality and in a suitable location". As a result of this, a revised application was made on 25 June 2010, in which it was proposed to provide a new public sports pitch on the site to replace the disused private pitch.

29. While these events were happening, on 12 March 2010 the "Draft Core Strategy for Chiltern District: Consultation Document" and an updated Preliminary Sustainability Appraisal were published. Policy CS15 stated that 600 new dwellings would be built in Chalfont St Peter, and that the convent school site was allocated for residential development, and was expected to accommodate 260 dwellings. There was no allocation for retail development on the site.

30. The Diocese of Oxford and the Parish Council objected to the Trustees' application. In an email to the District Council dated 1 April 2010, the Diocese referred to its longstanding wish to relocate the Church of England school. Because the convent school site was probably the only possibility for relocating the school in the village, it asked for the application not to be considered until a detailed appraisal, taking into

[8] See Appendix, §10.

account the wider perspective, and greater consultation had occurred. The Parish Council's planning advisers objected on its behalf to the application and to the Draft Core Strategy. A letter dated 22 April 2010 stated that the number of dwellings proposed for Chalfont St Peter needed to be reduced significantly. It also stated that the number in the draft depended on using the convent school site but that site was "of questionable delivery" because of significant constraints. The constraints identified included that the site included greenfield land, "amenity open space and playing pitches" and "community uses which should be protected for their own sake". The Parish Council's consultants' response also criticised the District Council's broad growth strategy. It did not, however, mention the relocation of the school or the idea of a "land swap".

31. Further objections by the Parish Council to the planning application were submitted in a document dated July 2010. The objections were based on the fact that the redevelopment of the entirety of the site would result in the loss of significant areas of open space and the playing pitches, and social and community facilities in terms of the school. After referring to policy R2, which deals with the loss of existing sports facilities, the objection stated (at §5.18) that the policy "applies to the entirety of the application site, since it includes land last used as school playing fields" and (at §5.20) "the applicants have not demonstrated that there is no continuing community need for the facility or that it is not possible to use the facilities for other sports" and refers to the fact that the alternative provision proposed was not "of an equivalent size, suitability and convenience". It stated (at §5.57) that all the playing fields that would be lost as a result of the development were not being replaced by the single playing field proposed, and it was questioned whether that was of equivalent or better quality or in a suitable location.

32. The Parish Council (at §5.22) stated that policy CSF2 was "a negatively-worded policy which does not allow any development which results in the loss of the community service or facility unless a replacement building and/or land is provided…or it can be demonstrated…that the facility is no longer required for its existing use or for any other community use". It stated (at §5.23) that the retention of the chapel did not offset the loss of the convent and the school. It did not, however, refer to the proposed care home in that section of its objections. It also stated (at §§5.72 and 5.74) that proposals retaining the chapel did not justify the loss of other community facilities and that, in the light of the "overwhelming support for the existing primary school to be relocated to the application site", alternative community facilities have not been "thoroughly examined". Accordingly, (see §5.77) in its view policy CSF2 made it "premature to consider a planning application which seeks to remove a school and develop land capable of being used for schools in advance of the County Council's review process".

(iv) The officer's report to the Planning Committee about the application

33. The officer's report for the committee meeting on 5 August 2010, which was to consider the application, went out as from the District Council's Head of Planning Services, at that time Carol Castle, but was in fact drafted by Richard Turnbull, its Development Control Manager. The report recorded the objections that had been made to the application and assessed them and the questions raised. It recommended the committee to be:

> "… [m]inded to grant conditional permission subject to the conditions set out below, with the decision deferred for referral of the application to the Secretary of State and for the prior completion of a section 106 Planning Obligation. Final decision delegated to Head of Planning Services."

34. The advice to committee members about community facilities was:

> "4. Policy CSF2 of the Adopted Local Plan deals with the loss of community facilities within the built up area, and this states that any development which results in the loss of the community service in question or facility on the site will not be allowed unless a replacement building and/or land can be provided in an equally convenient location that could comply with policy CF1, or it can be demonstrated to the satisfaction of the council that the facility is no longer required for its existing use or for any other community use in the built up area in which it is located.
>
> 5. The development includes the demolition of the convent and the school buildings, both of which are classed as community facilities within the scope of these policies. However, the proposal includes the retention of the existing chapel and the construction of a building for use as a Residential Care Home. Both these uses are also classed as community facilities within the scope of these policies and therefore the proposal does not result in the loss of a community facility. Concerns have been raised regarding the loss of the school building and also the loss of the site as a whole as a community facility. In fact there are no policies that presume against the specific loss of school premises and the council has no control over this issue. In respect of community facilities generally, the relevant local plan policy does not require an equivalent amount of floor space to be retained or replaced but only requires that some community facilities are retained or replaced in a convenient location. It is acknowledged that the floor space of the buildings and the amount of land associated with community facilities as part of a current proposal is reduced, butt he proposed development retains two elements that are classed as community uses, and the proposal is in accordance with policy CSF2.
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> 6. The Parish Council and other response also make reference to the need for a replacement school in Chalfont St Peter, and they consider that this site would provide the ideal solution for this. However, the existing site is privately owned and the private school that used to operate from the site has long since closed. The council is not in a position to require the land owner to use the site as a school and there are no planning policies that presume against the change of use of school premises. As noted, the proposed development does not include the retention of the school use and

the proposal is in accordance with policy CSF2. It should also be noted that Bucks County education authority does not raise any objections to this planning application subject to a section 106 agreement with the land owner to secure a financial contribution towards the additional education demand arising from this development. The applicants agreed to this. As such, whilst the points raised about a replacement school are noted, it is not possible to refuse this application on the grounds that either there is a loss of a school facility or that the development should include retention of the school facility."

35. As to playing fields, the advice to the committee was:

"10. Policy R2 concerns the loss of existing sports facilities within the district and states that development that results in the loss of such facilities will not be permitted, unless there is no continuing community need for the facility or alternative provision is made. The policy confirms that it also applies to land last used as playing fields. The applicant has confirmed that the site, when operated as a private school, contained a playing field and has submitted plans to show its extent and location towards the north west of the application site. The original scheme submitted under this planning application did not include the retention of the playing field. … Subsequently … the application has been amended and [a] revised scheme has been submitted which … retains the playing field. Whilst the layout remains only indicative at this stage, it does show the retained playing field, which is of the same size and shape as the existing playing field, to be relocated within the site. Notwithstanding this, Sport England is maintaining its objection the proposal. The reason for this appears to be that Sport England has assumed that the playing fields associated with the school incorporated all the open grassed land to the north and east of the school buildings, and if this were the case then approximately 1.2 hectares of playing field land would be lost. Sport England does not therefore consider the relocated and retained playing field meets criterion E4 of Sport England adopted Playing Field Policy, which refers to the minimum accepted requirement that 'proposed development would be replaced by a playing field or playing fields of an equivalent or better quality'. However, the applicant who has had extensive first hand knowledge of the site as they have owned it and operated the school from it for many years, has stated that the extent of the playing field was not as indicated by Sport England but was as shown on their submitted plans. The applicant states that the proposed playing field is the same size and shape as the existing playing field and that no loss of playing field will in fact occur as a result of the proposed scheme.

11. Bearing in mind the first hand nature of the land owner's extensive knowledge of this site spanning decades, the comments of

> Sport England are noted, but there is no evidence to indicate that the extent of the playing field went beyond that shown by the applicant on the submitted Location Plan."

36. Sport England maintained its objection to the Trustees' application in a letter dated 3 August 2010. This stated that "the case in favour of [the] application rests on the definition of 'playing field land' and the extent to which the proposals result in the loss of playing field". Sport England considered that the extent of playing field identified on the location plan submitted by the applicants was incorrect. It referred to Article 10(2) of the Town and Country Planning (General Development Procedure) Order 1995 ("the 1995 T&CP (GD) Order"), set out in section (ii) of the Appendix to this judgment and in particular the definition of the term "playing field" as the "whole of a site which encompasses at least one playing pitch".

37. Sport England's letter enclosed Google aerial images which were stated clearly to indicate the presence of pitches across the site, and not only in the area indicated by the applicant. The photographs enclosed did not show a date, but the date 5 March 2003 was on a version of them attached to an earlier (22 July 2010) email to the District Council by Sport England.[9] Sport England's 3 August 2010 letter stated that the athletics track, while not technically a pitch, was further evidence that the whole of the site "is physical and functional terms part of a single site (sic)". It also enclosed a legal opinion which it had obtained in 2002 containing advice about the circumstances in which Article 10 of the 1995 T&CP (GD) Order required that it be consulted. Sport England stated that the opinion reinforced its view that the entire grassed area on the site constituted playing field land.

(v) The meeting of the Planning Committee on 5 August 2010

38. At the meeting on 5 August, Mr Turnbull reported on developments since his report, including Sport England's letter and the response of the Trustees' agent. He showed the committee the photographs. As to the agent's response, this was that two of the sisters had informed the agent that they had lived and worked on the site for 35 years, during which time the land had only been used for informal recreational purposes and not as playing pitches, although once a year a track was laid out for the annual sports day events. This position had been confirmed by the caretaker. Mr Turnbull's notes of the meeting record the Parish Council stating that there were two playing fields and strongly objecting to the application, and to a district councillor, Miss Horsbrugh-Porter, stating that there were two pitches and a running track. Mr Turnbull's statement dated 18 April 2011 states that Carol Castle relayed the legal advice she had received on the 1995 T&CP (GD) Order, which was that Sport England's opinion was concerned only with consultation requirements. He stated that "there was a full discussion about the issue among members, with a local ward member…describing her recollections of there having been more than one pitch".

39. In a passage much relied on by Mr Dove, Mr Turnbull's statement continued: "I see from the notes of the meeting taken by the [Parish Council's] agent…and the

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[9] This document and the email chain was adduced by the Parish Council about a month before the hearing of the appeal. It was not before the judge. In response to it a further witness statement dated 26 June 2014 by Mr Turnbull was adduced. In the event none of this evidence has affected my conclusions.

defendant's officer…that members proceeded on that basis". Mr Dove submitted that this showed that the members proceeded on the basis that there was more than one pitch. It was submitted on behalf of the District Council and the Trustees that this was not so. Miss Ellis QC maintained that this sentence must be seen in context. Mr Turnbull was responding to §29 of the grounds, which stated that the conclusion at §11 of the officer's report "fail[ed] to grapple at all with Sport England's undeniable photographic evidence", and that the decision proceeded on the basis of a material error of fact. She submitted that Mr Turnbull was seeking to show that the discussion did grapple with Sport England's position and evidence. The Trustees' position was similar: skeleton argument, §15.

40. At its meeting on 5 August, the committee resolved to grant the Trustees' application. Its decision to grant planning permission was subject to a reference to the Secretary of State to consider whether to "call in" the application, and the provision by the developers of a section 106 obligation.

41. In a letter dated 12 August 2010 to the Government Office for the South-East, Sport England stated that §10 of Mr Turnbull's report, which cast doubt over the validity of Sport England's case about the extent of the playing field, disregarded the formal definition of "playing field" in the 1995 T&CP (GD) Order, and dismissed the photographic evidence. It also criticised §11 of his report, which stated that there was "no evidence" to indicate that the extent of the playing field went beyond that shown by the applicant. Sport England stated that this was simply untrue given the nature of the email exchange between it and the District Council on 22 July 2010. This letter was not copied to the District Council.

42. The District Council's reference to the Secretary of State is contained in a letter dated 19 August from Mr Turnbull to the Government Office for the South-East. The District Council's position on Sport England's objection is in an appendix to the letter. This reiterated the statement that "no evidence was provided by Sport England that the larger area of land it claimed was a playing field was used" as a playing field, and that the aerial photographs available to the District Council did not show the land in question so marked or used when the school closed or in the five year period prior to the planning application. This is understandable since Sport England's letter dated 12 August was not copied to it and the email dated 22 July with the attached photographs had not been scanned into the electronic or paper record.[10] The appendix also stated that the photographs submitted by Sport England after the officer's report were undated, with one showing faint markings of what looked like an athletics track marked out on the land and the other showing very faint markings of a sports pitch and goalposts, and that no indication was given by Sport England of when they might date from. After summarising the response of the Trustees' agent, the appendix concluded that "no convincing evidence existed to refute the claim of the applicant" that the replacement playing field proposed is the same size as the existing one, "and therefore it is not considered that the revised development results in the loss of an existing playing field".

43. Notwithstanding further representations by the Parish Council's agents on the playing fields issue and support by the Oxford Diocese for the "land swap" proposal, the

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[10] Mr Turnbull's second witness statement, dated 26 June 2014, §4.

Secretary of State declined to call in the application. A letter dated 15 September 2010 from the Government Office for the South-East stated that he was of the view that calling it in would not be justified as it did not sufficiently conflict with national policies, and because he was satisfied that the questions raised did not relate to matters of "more than local importance."

(vi) Development of the Core Strategy: August – October 2010

44. In August 2010 the County Council updated its response to the District Council's consultation on the Core Strategy in the light of increases in the pre-school age population and ONS forecasts. It now stated that primary schools in Chalfont St Peter "are at capacity" and that it would need to consult further with schools *inter alia* in Chalfont St Peter to explore options for existing provision. But its position remained that "the scale of development [proposed] is unlikely to generate substantial education infrastructure requirements".

45. After considering the responses to the consultation, in October 2010 the District Council published its Core Strategy and a "Final Sustainability Appraisal Report". It invited comments on those which would be passed to the Secretary of State. The strategic housing allocations in policy CS6 of the Core Strategy included the convent school site. That site was (see §9.1) one of three sites assessed in the January 2008 SHLAA which were suitable, deliverable, and of sufficient importance to be allocated in the Core Strategy. The document stated (see §7.10) that the District Council did not have power to require landowners to undertake land swaps and it was for the owners or developers of such sites to reach agreement in principle before the District Council would consider their proposals. It would be necessary for any such proposal to ensure that development on one site could not proceed without the appropriate development occurring on the other site.

46. The Core Strategy stated (at §2.16) that the potential strategic sites were tested against sustainability restraints that were grouped around the sustainability objectives, and section 5 set out the sustainability testing that had been done. Section 6 stated that the 32 policies in the Core Strategy were appraised against the sustainability objectives and described the way the policy appraisal was carried out and its results. §6.15 stated that additional testing of the Strategic Housing Sites revealed that two of them, including the convent school site "could potentially result in adverse effects". §6.16 stated that the convent school site:

> "… generally performs well assessed against the sustainability criteria, as it is considered to score favourably against with (sic) 20 of the 26 criteria. A small part of the site is however currently undeveloped (privately accessible area of open space) and this area could potentially be reduced if development were to take place on the site. …"

After referring to the site's location adjacent to an area of high historic value and to contamination and surface water drainage, this paragraph concluded:

> "These issues need to be considered when any proposals for the site are developed."

47. The frustration of the Parish Council with the County Council is seen in a letter dated 26 October 2010 to Cllr Adams, the Cabinet Member for Education. This stated that there was an "abject neglect of responsibility" by the County Council in assessing the needs of education facilities in the Chiltern area at a time when it was projected that there would be 600 new dwellings in Chalfont St Peter and its existing schools were already oversubscribed. The County Council was criticised for missing the point that, if development on the convent school site went ahead, "existing educational land, buildings and playing fields will be built upon", and that those facilities could have been used to provide the spaces created by the development on the site and around the village. In an exchange of emails with the Diocese in December 2010, the County Council confirmed that its position was support "in principle for a move but [that it] will not contribute to costs". It also indicated that if it needed to provide additional places in the area it might consider investment to increase the capacity of the school for such places.

III. THE DECISION TO GRANT PLANNING PERMISSION

48. On 21 December 2010, after concluding a section 106 agreement with the Trustees, the District Council granted planning permission. The reasons given for the approval refer to the earlier process, the additional information received about the playing fields from third parties and Sport England, and the reasons given by the Secretary of State for not "calling in" the application. They state that the full content of the letter from the Government Office for the South East was taken into account. It was considered that there were no material planning considerations of such weight to lead to an alternative conclusion, and stated that further details of the District Council's reasons for allowing the development were to be found in the application file and the officer's report to the committee, the material sections of which I have set out at [33] – [35] above. It is clear from the reasons for the decision that it was not solely based on the officer's report, but also on the information given at the committee meeting and the Secretary of State's letter dated 15 September 2010.

IV. THE CORE STRATEGY: EXAMINATION AND INSPECTOR'S REPORT

49. In November 2010 the Parish Council submitted its objections to the Core Strategy. These broadly reiterated the points made by its planning advisers in the letter dated 22 April 2010, to which I have referred at [30] above. The Parish Council also sent the District Council a further report by consultants and asked that it and the Parish Plan Survey and Village Design Statement be submitted to the Inspector. The comments of officers of the County Council to the Core Strategy at this time (see an email dated 26 November 2010) maintained the position that primary schools in Chalfont St Peter were at capacity and that "it is essential that the approach by planning authorities to secure funding from developers for additional places is in line with the County Council's". The comments did not state that the County Council was seeking a new school. The "Core Strategy for Chiltern District Submission Document" was submitted to the Secretary of State by the District Council on 13 January 2011. The text of the document was unchanged from that published by the District Council in October 2010.

50. The Inspector's examination of the Core Strategy took place between January and October 2011. The "main matters and questions" identified by the Inspector noted that planning permission had recently been granted for residential development on the convent school site. The Inspector stated that "the principle of such development on that site has thus been established" and that he did not intend to consider further the principle of redeveloping the site "as the allocation reflects current circumstances". He sought clarification from the District Council about whether the selection of the strategic housing allocation for the convent school site should include the land shown as a relocated playing field. The District Council's response, dated 18 March 2011, (unsurprisingly) stated that the principle of development on the convent school site was established by the recent planning permission and that it was not necessary to amend the boundary of the strategic housing site because the condition in the planning permission provided some flexibility in the location of the playing field.

51. After a hearing on Policy CS6 on 13 April 2011, the Inspector gave the Parish Council time to make further representations about the soundness of the submitted Core Strategy. The Parish Council's submission (dated 28 April 2011) referred (§1.10) to the limited range of school provision in the village, and in particular to the Church of England school,[11] which was designed for 90 pupils but was stated to have over 300 pupils, and no dining facilities, changing facilities or playing fields.

52. The Parish Council also maintained that the proposed housing allocation was unsound in planning terms because reasonable alternatives had not been considered and that national barriers to delivery of residential dwellings affected the entirety of the site. The national barriers included the policies in §11 of PPG17 that open space and sports and recreation facilities should be protected. The Parish Council proposed that the site be allocated for housing development, provision of a new school, and retention of existing playing fields. It also proposed that the site of the Church of England school be allocated for housing development in accordance with Policy CS6 of the Core Strategy and that school be relocated to the convent school site. It acknowledged that "a phasing requirement would need to be included in the Core Strategy to ensure that the housing development at [the Church of England] school site did not take place until after the…school had relocated" to the convent school site.

53. In a letter dated 20 April 2011 to the Parish Council, the Church of England school's head-teacher, and the Oxford Diocesan Board of Education supported the Parish Council's position. The Diocesan Deputy Director of Education stated that the Diocese would "ensure" that the proceeds of the sale of the existing site "are fully utilised to construct the new school". The letter stated that "the intention would be to provide a 14 class school at a cost of £3.6 million which would be constructed within 56 weeks", that the Diocese had "considerable certainty on the cost" but that there were a number of processes to go through, and that it regarded the scheme "as an extremely viable option".

54. In the light of the Parish Council's submissions, in a "post-hearing note (1)" dated 4 May 2011, the Inspector raised three specific queries with the District Council and one with the Parish Council. Those raised with the District Council concerned whether it had considered (i) the future land use needs of the Church of England

[11] The submission described it as "Chalfont St Peter Middle School".

school, (ii) whether the allocation of the site solely for housing was justified when compared with alternatives such as the relocation of the Church of England school, and (iii) why the planning permission given to the Trustees required the retention of a playing field. The query raised with the Parish Council concerned the soundness in planning terms of its proposal for a land swap. The Inspector asked whether the estimated cost of building a new school included the purchase price of the land on the convent school site, if so, at what value, and if not, why the Trustees would be willing to release part of a site for which permission for residential development had been given.

55. The District Council's response to the Inspector, dated 17 May 2011, stated that the Parish Council's submission did not introduce any new issues and did not justify any alteration to the Core Strategy. It stated that it was on the basis of information provided by the County Council in 2010 that the Core Strategy stated that there was no requirement for the provision of new primary schools. It appended an email dated 16 May from the County to its response in which the County Council re-stated its position on education provision on the convent school site.

56. The County Council stated that its position had "always been that it would support the relocation of the [Church of England] school provided that it was at no cost to the Authority". While relocation was not "a necessary requirement", it, like the Diocese, could see the benefits of doing so, and listed those benefits. The email, however, also stated that it had had discussions with the agents wishing to sell the land about possible land swaps and, following those, that it "did not express interest in the land". It was advised that the Charities Act 1993 would not allow the land to be sold in parts or as part of a land swap. It referred to the duty of the Trustees to obtain market value for the land and stated that "these options were unlikely to give best return and would add uncertainty and risk to the process". It also stated that "the County Council does not have the required level of resource to enable this to happen". It believed that there were other, more cost-effective, expansion schemes on other school sites to meet the cumulative impact of all development proposed in the area which, "although perhaps not as ideal as" the convent school site, would allow the County Council to meet its duty to provide sufficient school places. Referring to the additional school places projected to result from the development in Chalfont St Peter, the email stated "[w]e have secured the appropriate level of developer contributions from this development and in accordance with our s 106 policy would seek appropriate contributions for all future developments in the area".

57. The District Council's response to "post-hearing note (1)" also stated that the oversubscription of the Church of England school and its desire to move to larger premises did not, in itself, mean there was a "need" for a new school which made the Core Strategy "unsound". The District Council did not consider that the Core Strategy was "unsound" because it did not specifically address the future aspirations of the Church of England school. As to the playing field, the retention of the playing field offered by the Trustees was secured by a condition in the planning permission. The District Council did not consider that the provision of a sports pitch on the convent school site was essential to meet a local need because its 2005 sports audit and needs assessment did not identify a need for additional sports facilities in Chalfont St Peter. It was for that reason that this was not mentioned in the Core Strategy.

58. The Parish Council's planning advisers' (23 May 2011) response to the Inspector's question whether the estimates included the purchase price of the land was in very general terms. §1.3 stated that the assessment of the viability of the "land swap" was undertaken on the basis of a residential use value, since "considerations of viability have been undertaken in the context of the consented application albeit that the application is the subject of a High Court challenge". §1.4 stated that "the ability to deliver a school on the [convent school] site is dependent on securing residential development on the existing [Church of England] school site and disposing of this at residential values". It also stated that there were no policy constraints to housing on the existing site because the educational facility would be relocated and the site had no playing pitches.

59. After the deadline imposed by the Inspector for further submissions, on 8 September 2011 the Parish Council put forward a proposal for the development of the convent school site by Arrowcroft Holdings Ltd. The proposal was for a mixed use for the site involving approximately 100 houses, a school, a supermarket and open space. In a letter dated 15 September, the Trustees' agents stated that their clients were committed to a disposal of the site to another party after the judicial review proceedings.

60. The Inspector's Report was published on 6 October 2011. It stated (at §108) that "sustainability appraisal has been carried out and is adequate", and that changes proposed by the District Council were also subjected to sustainability appraisal. The material part of the report is that concerned with issue 4 "Are the strategic housing allocations and Major Development Sites (MDS) allocated for residential development justified and deliverable?" The paragraphs dealing with the convent school site state:

> "50. The third allocation made in policy CS6 is land at the former Holy Cross Convent school in Chalfont St Peter. It is currently designated in the local plan as an "Other Amenity Open Space" protected by R10. This designation would be removed upon adoption of the Core Strategy as shown in the submission Proposals Map (CDN094). Planning permission was granted by the Council at the end of 2010 for a redevelopment of the site to include 198 dwellings and a care home. The site is included in the Housing Trajectory (CDN113) as delivering 198 dwellings over 4 years from 2013/14. Given that planning permission has been granted it would not normally be necessary to consider further the justification for the allocation in the Core Strategy. However, both the allocation and the grant of planning permission have caused much local controversy. The Parish Council is pursuing a judicial review of the grant of planning permission.
>
> 51. The site is within the settlement of Chalfont St Peter, one of the 4 main settlements identified in the overall strategy. It adjoins the centre of the village and is thus well located for access to local shops and other facilities. The location scored the maximum of 5 in the Accessibility Study (B10 Accessibility Plan in CDN09). Housing is an appropriate use of the land. The overall need to secure housing justifies the loss of undeveloped land within the centre of the settlement and the limited historic interest of the site. …

52. The former use of the site included playing fields. Although these were private facilities their loss has been a great concern to many residents. The Council's open space audit and needs assessment (June 2005, CDN010) did not identify the need for additional sports facilities in Chalfont St Peter. Accordingly, it is not necessary for soundness for policy CS6 to require the retention of playing fields. The permitted scheme includes a playing pitch, but that appears to be part of that specific proposal rather than arising from any wider requirement.

53. The Parish Council and others consider that the site should be allocated for a mixed use scheme including a relocated middle school and associated playing fields and are working on alternative detailed proposals. On the basis of information provided by the education authority in 2010 the Core Strategy indicated that there was no requirement for a new school in this settlement (taking into account housing growth). This remains the advice of the education authority to the Council (CDC20). In the absence of evidence of need from the education authority it was reasonable for the Council not to have considered a new middle school as a potential alternative use for the Holy Cross site in the evolution of the Core Strategy. Compared with the need for housing, there is not the overriding need or justification to set aside part of the Holy Cross site for a new school.

54. The planning permission on the Holy Cross site was obtained by the longstanding owner (a charity) rather than by a housing developer. Given that the use as a school ceased some years ago, there is no reason to doubt the owner's stated intention to sell to a developer or that there is developer interest in this substantial site in an attractive location. The legal challenge to the planning permission is likely to delay any sale, but there remains a reasonably prospect of securing delivery as envisaged. The allocation is justified with reasonable prospects of delivery."

V. THE ADOPTION OF THE CORE STRATEGY

61. The District Council adopted and published the "Core Strategy for Chiltern District" in November 2011. Policy CS6 contained a strategic housing allocation for the land at the convent school site and stated that outline planning permission had been granted for 198 dwellings on 21 December 2010. Appendix 7 contains the infrastructure delivery schedule. This states *inter alia* that additional primary school places are required in Chalfont St Peter and Chalfont St Giles, but there is no requirement for new primary schools in any of the settlement areas, and that the County Council anticipates that "all school place requirements will be secured by developer contribution through s 106 Agreement".

62. After the District Council's adoption of the Core Strategy, there were further exchanges between it and Arrowcroft. In a letter dated 12 February 2012 about the development for which it was proposing to apply for permission, Arrowcroft stated that it had "completed a preliminary assessment of the housing density that may be appropriate" for the Church of England School site.

VI. THE JUDGMENTS BELOW

(i) The challenge to the Core Strategy

63. The judge concluded ([2013] EWHC 1877 (Admin) at [33] – [34]) that the District Council was not under an obligation, pursuant to Article 5 of Directive 2001/42/EC and Regulation 5(2)(b) of the SEA Regulations, to subject the Parish Council's "land swap" proposal to a sustainability appraisal. He stated (see [35]) that the District Council "was entitled to rely upon the submissions received from [the County Council] at all times, and was certainly under no duty to go behind what [the County Council] was saying and take its own view on the available material". He recognised that there was some conflicting material about the statistical projections, but the County Council's consistent view "throughout the process was that there was no policy or plan which would make the land swap proposal a realistic possibility", and it was the County Council "alone" which could make the "land swap" proposal deliverable. He also held (at [37]) that the District Council was entitled to consider this "alongside the planning permission which had been granted, the consequent effect upon the market value of the site, and the expressed desire of the owner of the site to sell it for housing development". It was "reasonable for the [District Council] to decide not to treat the land swap proposal as a 'reasonable alternative'" because "a key element of core strategy proposals is that they must be 'deliverable'" and "there was ample evidence upon which the [District Council] could form the view that the [Parish Council's] land swap proposal was not deliverable".

64. As to the Inspector's reasons, the judge stated (at [45]) that "it was a pity that the Inspector did not spell out more clearly in his report the fundamental flaw" in the Parish Council's proposals for a "land swap" and its "unsoundness" in planning terms as an alternative. But, relying on *South Lakeland DC v Secretary of State for the Environment* [1992] 2 AC 141, he stated (at [46]) that the report should be read as a whole without excessive legalism on the basis that the reader understands the principal controversial issues. He rejected (at [41]) the submission that the reasons were defective in not addressing the *gravamen* of the Parish Council's objections, namely that the "land swap" proposal addressed "qualitative deficiencies", because the Inspector, like the District Council, was entitled to rely upon the stated policy position of the County Council, "that there were no plans for a new school, and so accordingly there was no plan either to sell the existing [Church of England] school site or to acquire the [convent school] site". The Inspector was, he considered, not required to go behind the policy of the County Council or to appraise the material upon which the County Council based its decisions of policy, which policy rendered the Parish Council's "land swap" proposal undeliverable.

(ii) The judicial review of the grant of planning permission

65. In his judgment rejecting the challenge to the grant of planning permission ([2013] EWHC 2073 (Admin)), the judge stated (at [19]) that the committee "had full knowledge of all the competing views and arguments…[and the] members were also fully acquainted with all the relevant policy issues, including those of Sport England, of PPG 17 and its own Policy R2". He considered (at [18]) that reliance on the definition of playing fields in the 1995 Order was unhelpful, because the definition was "for consultation purposes, which necessarily one might expect to be a wide interpretation". He stated that what area amounted to playing fields on the site "should

not be interpreted in a legalistic way" and "must be fact-specific in the circumstances of each planning application".

66. As to the contention that the planning decision was based upon an error of fact as regards the extent of the playing fields on the site, the evidence before the judge that had not been before the planning committee when it made its decision included the statements made between May 2011 and April 2013 of the former headmistress and three teachers, including the head of P.E., and a parent about the extent of the site that was laid out and used for sporting activities and the nature of those activities. In relation to the evidence that was before the committee, the judge stated (at [21]) that "there was clearly conflicting evidence as regards the extent of the playing field on the site", that this "was all fairly placed before the committee" and that "[n]othing in the correspondence following the meeting changed that position so as to render any fact uncontentious". Mr Turnbull, the officer advising the committee, set out why he believed the application complied with policy, including R2, and put before the committee the competing arguments. The judge stated that "the committee was not misled as regards the availability of evidence" and that its "decision and the basis upon which it was made cannot in law be criticised".

67. As to the second ground of challenge, whether Policy CSF2 required a like-for-like replacement of the school use, the judge stated (at [27]) that the District Council "was entitled to interpret Policy CSF2 in a broad way". After referring to Lord Reed's judgment in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 reported at [2012] PTSR 983 at [18], he stated that:

> "the broad wording of the policy…did not require like-for-like replication. The [District Council] was entitled to consider the then current use of the site – or rather lack of use – as redundant private school buildings and compare this with what would be the outcome of the proposed development."

68. The judge (at [28]) considered that the District Council was entitled to take a view about the likelihood of the possible use of the convent school site for a school in the light of the information available to it. He stated that it was well aware of the history of the closure of the school and that the County Council as local education authority had no plans to acquire the site "notwithstanding the aspirations expressed" by the Parish Council and others to relocate the Church of England school to the site. He referred to his conclusion in the Core Strategy challenge as to why the "land swap" proposal was not a "reasonable alternative" within the meaning of the SEA Regulations and the Directive, and to the statement by Lord Bridge in his speech in *Westminster City Council v British Waterways Board* [1985] AC 676 that "in a contest between the planning merits of two competing uses, to justify refusal of permission for use (b) on the sole ground that use (a) ought to be preserved it must, in my view, be necessary at least to show a balance of probability that, if permission is refused for use (b), the land in dispute will be effectively put to use (a)". He considered that the officer's report dealt fairly and lawfully with the issue of the retention of the current permitted use of the site.

VII DISCUSSION

(i) The challenge to the Core Strategy

69. I deal first with the appeal against the judge's rejection of the challenge pursuant to section 113 of the strategic housing allocation of the convent school site in Policy CS6.

70. It is to be recalled that, because of the requirement for additional housing in the South East plan, the District Council needed to identify an adequate supply of housing land including land which was judged to be reasonably deliverable. This was likely to be difficult because all the countryside in its area was in the Metropolitan Green Belt and over 70% was an Area of Outstanding Natural Beauty. The District Council conducted a sustainability appraisal of the convent school site. This (see [46] above) assessed the site positively in 20 of the 26 key sustainability criteria that were tested. The potential for land swaps and what would be required before the District Council would consider proposals for swaps was referred to in §7.10 of the Core Strategy (see [45] above).

71. *(a) Was the land swap proposal a "reasonable alternative"?* The first ground of the "core strategy" appeal concerns only one aspect of the District Council's sustainability appraisal of the site. Mr Dove submitted that the judge erred in determining that the District Council was entitled to consider that the educational use of the site contemplated by the "land swap" proposal was not a reasonable alternative and thus that it was not obliged pursuant to Article 5 of the Directive and Regulation 12(2)(b) of the SEA Regulations to subject the proposal itself to sustainability appraisal. At the core of his submissions was the argument that the District Council, the Inspector and the judge erred in law in concluding that the District Council was entitled to regard the County Council's stance as meaning the land swap proposal was not viable, and therefore not deliverable and not a reasonable alternative.

72. Another limb of this ground was Mr Dove's submission that the judge was wrong not to find that the District Council had erred in failing to state in the Core Strategy why the Parish Council's mixed use option which retained an educational use on the convent school site had been rejected. Mr Dove relied on the decisions of the Administrative Court in *District Council of St Albans and Hertfordshire County Council v Secretary of State for Communities and Local Government* [2009] EWHC 1280 (Admin) reported at [2009] JPL 70 (Mitting J), *Save Historic Newmarket v Forest Heath DC* [2011] EWHC (Admin) at [17] (Collins J) and *Heard v Broadland DC* [2012] EWHC 344 (Admin) reported at [2012] Env. LR 23 at [57] – [58], [66] and 69] – [71] (Ouseley J).

73. On the main argument, whether the "land swap" proposal was a reasonable alternative, Mr Dove maintained that it was wrong to answer this negatively simply because the County Council considered that the additional dwellings from housing development did not mean there was a need for a new school in the area (a quantitative need), and was not prepared to put funds into the land swap proposal. There were, he submitted, two important factors pointing the other way. First, the County Council recognised that the "land swap" proposal had qualitative advantages because there would be better learning and recreational facilities if the Church of England school was relocated, and supported it in principle. Secondly, the Diocese stated (see [53] above) that it would ensure that the proceeds of the sale of the existing

Church of England school "would be fully utilised to construct the new school". Mr Dove submitted that these factors meant that the "land swap" was not a hopeless non-starter but a reasonable alternative which should have been contemplated and appraised as part of the environmental report.

74. Mr Dove argued that the only objection raised to deliverability of the "land swap" was derived from the high value of the convent school site as one for residential development. For two reasons, it was wrong to consider deliverability purely in terms of the land value aspirations of the owner of the land. The first is that one of the purposes of the planning process is to apply policies which control land use values to enable beneficial sustainable development to occur. The second is that the approach of the District Council and the Inspector ignored the protection given to the existing community use of sites in Policy CSF2 of the Local Plan. Mr Dove argued that this policy protected the community use, i.e. an educational use, and not any community use, i.e. a use which serves a need other than the need which can be served by the retention of the existing use. The exception in sub-paragraphs (ii) of Policy CSF2[12] where the site is no longer required for its existing use, i.e. that there was no longer a need for an educational use, did not apply because the qualitative improvement which would be achieved for the Church of England school by the "land swap" was an obvious form of need. This reason is closely interlinked with the second ground of appeal against the judge's dismissal of the judicial review of the decision to grant planning permission which I consider at [112] – [121] below. I deal with this aspect of the challenge to the core strategy at [125] below.

75. It is clear from the Directive and the Regulations that a sustainability appraisal must be carried out at each stage of the development of the Core Strategy and (see the *District Council of St Albans and Hertfordshire County Council* case at [21]) that "reasonable alternatives to the challenged policies be identified, described and evaluated before the choice [is] made". Departmental Policy PPS12, which was in force at the time of the decisions, states of the requirement to evaluate reasonable alternatives, that "there is no point in inventing an alternative if it is not realistic". That and the phrase "obvious non-starters" used by Ouseley J in *Heard's* case (at [66]) for proposals which do not warrant even an outline reason for being disregarded shows that the threshold is low.

76. Notwithstanding the low threshold, and leaving aside at present the argument based on what is said to be ignoring the protection given to the existing community use of sites in Policy CSF2, I have concluded that, in the circumstances of this case, the District Council was not under an obligation to consider the land swap proposal as a reasonable alternative. It was thus not under an obligation to subject it to a sustainability appraisal in its environmental report.

77. First, the position of the County Council, the relevant education authority, was that, although the land swap proposal would lead to improved facilities, the provision in the existing Church of England School met statutory requirements, and there was no requirement for a new school. The County Council was not willing to provide funding to facilitate the land swap proposal and stated (see [56] above) that it did not have the resources to do so and that there were other more cost effective expansion options on

[12] See paragraph 13 of the Appendix.

other school sites. It was not even willing (see [19] above) to instruct the county valuer to value the two sites. The need for all the finance to enable a land swap and the relocation of the Church of England school to come from other sources is clearly highly significant in assessing whether the land swap proposal was a "reasonable alternative". It is also linked to my second and third reasons for concluding that it was not.

78. Secondly, the position of the County Council meant that any swap would have to be a private arrangement with the owners of the convent school site. There was, however, no indication that the owners, the Trustees, would agree to a swap or a sale which would enable a swap, and such evidence as there was suggested they were not interested.

79. Thirdly, in order for the land swap proposal to get off the ground and to be more than an aspiration, there had to be an alternative source or sources of finance. Although the Diocese supported the proposal, at the time the District Council undertook its sustainability appraisal the Diocese had not formulated a business plan containing proposals for a new school on the site to put before the Trustees and the District Council. The Core Strategy and the sustainability assessment were published in October 2010. The Diocese only stated that it would provide finance in its letter dated 20 April 2011. That was written after the commencement of the Inspector's examination. Even then, the Diocese stated only (see [53] above) that it would ensure that the proceeds of the sale of the existing school site would be utilised to "construct" a new school.

80. The Diocese's letter did not address, and by implication did not include, the cost of acquiring the convent school site either at a "residential development" price or at a lower price. Its response to the question put to it by the Inspector in his "post-hearing note (1)" (see [54] and [58] above) was in very general terms and did not, for instance, state that its claim that the swap was viable was supported by independent consultants. Bearing in mind that the proposal was to relocate the Church of England school to a larger site, the residential use value of which would be greater than that of the site of the existing school, in assessing whether the proposal was realistic and so qualified as a reasonable alternative, this was an important point. While Mr Dove may be correct in stating that it was unsurprising that any detailed valuation work was not placed in the public domain given the negotiations that would need to take place, it is significant that the Diocese, the Parish Council and its consultants did not, for example, state that this work had been done or was in progress, but was confidential.

81. Fourthly, there had at that time been no assessment of the housing capacity of the Church of England school site or of the impact of the land swap proposal on the number of new dwellings on the convent school site. There had thus been no assessment of the total number of new dwellings that would be built on the two sites if the swap proposal went ahead, and thus of the value of the site if used for residential housing. It appears (see [61] above) that it was only in February 2012, three months after the adoption of the Core Strategy and four months after the Inspector's report, that a preliminary assessment of the number of houses that would be appropriate on the Church of England school site was made by Arrowcroft.

82. In considering whether the land swap proposal was a "reasonable alternative", I make three further observations. First, the Parish Council had not formally objected to the allocation of the convent school site for mixed development. Its 22 April 2010 "reasonable alternatives" submission was (see [30] above) concerned with the District Council's overall growth strategy and the deliverability of the convent school site. Secondly, there were no indications, let alone proposals by the Diocese about the phasing of any transfer of the Church of England school to the convent school site, and in particular how it contemplated funding construction of the new school before the completion of the sale of the site of the existing school. Thirdly, even in September 2011, when Arrowcroft's proposal was made (see [59] above), Arrowcroft's contact with the Trustees' agent seems to have been confined to informing them of the plans they were preparing. The Trustees' agent's response (which Arrowcroft passed to the District Council) was that the Trustees were committed to selling to a third party. It appears that as at February 2012 there had been no further contact.

83. *(b) Were the reasons given by the Inspector adequate?* Mr Dove relied on the important summary of the principles by Lord Brown of Eaton under Heywood in *South Bucks District Council v Porter (No 2)* [2004] UKHL 33, reported at [2004] 1 WLR 1953 at [36] and the recent decision of the Administrative Court in *University of Bristol v North Somerset Council* [2013] EWHC 231 (Admin) at [96] and [105] – [106]. He submitted that, although the Inspector's report referred to the land swap, it did not give reasons for rejecting the Parish Council's case for it that was based on the qualitative deficiencies of the Church of England school and the benefits of providing a higher quality education environment by relocating it to the convent school site.

84. Mr Dove's submissions were based on criticisms of §§53 and 54 of the Inspector's report which are set out at [60] above. §53 only dealt with the quantitative case for the swap; that is whether there was a need for a new school in Chalfont St Peter, and not with the quality of the provision at the existing school or the extent to which there would be housing on the existing school's site if it was relocated. Mr Dove maintained that §54 is "obscure and incoherent". Moreover, he argued that it was not open to the Inspector to proceed on the basis that (i) the challenge to the grant of planning permission would fail and (ii) there was no reason to doubt the Trustees' intention to sell to a developer. Mr Dove argued that the judge's statement (judgment, [45]) that "it was a pity that the Inspector did not spell out more clearly in his report the fundamental flaw in the [Parish Council's] proposals …" was "too generous" a reading of the Inspector's reasons and a "grotesque understatement". This was because there were no reasons about the qualitative case and the Parish Council did not know how the Inspector had dealt with it.

85. As to the law, the *South Bucks* case concerned an Inspector's decision granting an application for planning permission rather than a report following an examination into a planning authority's core strategy, but it was common ground that what was said about the duty of planning inspectors to give reasons applies to such a report. Accordingly, my starting points are the purpose of the development of a core strategy and Lord Brown's now classical "broad summary" of the case law on the duty to give reasons and his reformulation of what is required. Section 39 of the 2004 Act (set out in the Appendix, §1) makes it clear that the person or body exercising the function of

developing and formulating a core strategy must do so with the objective of contributing to the achievement of sustainable development. Lord Brown stated:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. **The reasons need refer only to the main issues in the dispute, not to every material consideration**. …" (at [36], emphasis added)

86. Lord Brown continued by stating that "decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced". This reflects the statements of Lord Bridge of Harwich in *South Lakeland DC v Secretary of State for the Environment* [1992] 2 AC 141 at 148, Hoffmann LJ (as he then was) in *South Somerset DC v Secretary of State for the Environment* [1993] 1 PLR 80, and Sir Thomas Bingham MR (as he then was) in *Clark Homes Ltd v Secretary of State for the Environment and East Staffordshire DC* (1993) 66 P & CR 263. Lord Bridge (with whom the other members of the Appellate Committee agreed) stated that "excessively legalistic textual criticism of planning decision letters is something the courts should strongly discourage". Hoffmann LJ stated (at 83) that "… because the letter is addressed to the parties who are aware of all the issues involved and the arguments deployed at the inquiry it is not necessary to rehearse every argument …". Sir Thomas Bingham MR stated (at 271 – 272) that the central issue "is whether the decision … leaves room for genuine as opposed to forensic doubt as to what … [has been] … decided and why".

87. In the *South Bucks* case, Lord Brown concluded by stating that "a reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision". That case and the decisions applying it show a clear acceptance of an approach emphasising substance, the nature of the issue, and prejudice. *Tegni Cymru v The Welsh Ministers* [2010] EWCA Civ 1635 and *Welsh Ministers v. RWE NPower* [2012] EWCA Civ 311, two decisions of this court involving decisions by Inspectors dismissing appeals against refusals by planning authorities to grant applications to erect wind farms, are helpful illustrations of that approach.

88. The *Tegni Cymru* case concerned the noise likely to be produced by a proposal to erect wind turbines near an existing wind farm. The developer challenged the Inspector's dismissal of its appeal *inter alia* on the ground that his reasons did not explain why the evidence of residents about the noise of the turbines in the existing wind farm outweighed the fact that it operated within the noise requirements, and that

the proposed additional turbines complied with the relevant noise standards. This court held (see especially Pitchford LJ at [27]) that "read as a whole the relevant paragraphs reveal an acceptable line of reasoning towards the Inspector's conclusion" and that "none of the parties could really be in any doubt what was the basis for the Inspector's planning judgment", which concerned the increase in the duration of the time during which the noise would be heard, rather than the level of noise at any particular time. In reaching his conclusion, Pitchford LJ (at [25]) took into account the steps implicit in the Inspector's reasoning.

89. The *RWE NPower* case concerned whether the proposed wind farm would have a significant effect on a deep peat bog habitat. The Inspector decided that it would and that the deep peat should be avoided. This Court rejected RWE NPower's contention that the Inspector's conclusion was insufficiently reasoned because he did not explain the basis of his rejection of the evidence of RWE NPower's ecology and hydrology experts that there would be no or minimal adverse effects. It stated (see [16], [24] and [50]) that it was clear that the Inspector thought that there would be a significant impact or at least a risk of a significant impact because several turbines and the access track were sited where the peat was deepest. In both cases the Inspector had dealt with the principal controversial issue, but not with a particular aspect of that issue. Nevertheless, because this Court considered that the parties could not really be in any doubt as to the basis for the Inspectors' decisions, the reasons challenges failed.

90. I have not found this question easy. Mr Dove's submissions have considerable force because the Inspector did not explicitly address the Parish Council's qualitative case in the body of his report. My views fluctuated during the course of the hearing and the preparation of this judgment. It is important not to lose sight of the fact that the question is whether, in Sir Thomas Bingham MR's words in the *Clark Homes* case, the Parish Council was left with genuine as opposed to forensic doubt as to what was decided and why. This case, like the *Tegni Cymru* and *RWE NPower* cases, involves a main or overarching issue and the reasons for the decision about it, and the Inspector's position on an aspect of it, in a sense a sub-issue. There is no doubt as to the Inspector's decision on the main issue, which in this case was whether the "land swap" proposal was viable, that is whether it was sound in planning terms. The Inspector dealt with that. It is clear from his report that he did not consider the proposal was sound because of the County Council's position.

91. What of the case for relocation based on the qualitative benefits? The question the Inspector put to the Parish Council in post-inquiry note (1) showed that, given the County Council's position, he doubted whether the proposal to relocate the Church of England school was realistic, and therefore whether it was viable in planning terms. The response submitted on behalf of the Parish Council (summarised at [58] above) was in general terms, and was (see [81] above) particularly vague about how it was proposed to finance the cost of acquiring the larger area needed on the convent school site by the sale of the Church of England's school's site. The Inspector's report referred (see §53 set out at [60] above) to "CDC 20". That was the County Council's 16 May 2011 email reiterating its position in the light of post-inquiry note (1). That email (summarised at [56] above) referred to the County Council's support for the proposal if it was at no cost to it, and contained a list of the qualitative benefits amounting to about a quarter of the email. The fundamental question, however, was

whether the proposal could be financed because, absent such finance, the County Council's position meant the scheme was a non-starter.

92. The Inspector's report referred to the County Council's decision that there was no requirement for a new school. He did not, however, expressly address the Parish Council's qualitative case, and it was very unfortunate that he did not do so. But, in the light of the matters to which I have referred in the last paragraph and at [77] to [82] above, I do not consider that his failure to do so affected the cogency or the lawfulness of his substantive decision. Although that is not generally the primary issue in a reasons challenge, it is important to recall Lord Brown's statement in the *South Bucks* case (at [36]) that "a reasons challenge will only succeed if the party aggrieved can satisfy the court that he has been substantially prejudiced by the failure to provide an adequately reasoned decision".

93. In the circumstances which I have described, and, in the light of the matters to which I refer in the next three paragraphs, notwithstanding the unfortunate omission by the Inspector, and despite the undoubted force of Mr Dove's submissions, I have reached the conclusion that the Inspector did just enough to explain his reasons adequately, and that, if he did not, the Parish Council was not substantially prejudiced by the failure. I have concluded that he did just enough because the Parish Council and the Diocese were well aware of the issues involved, the arguments advanced, and the concerns expressed by the Inspector during the process, particularly in post-hearing note (1): see the authorities cited at [86] above about the need to recognise that decision letters are addressed to parties well aware of the issues and the arguments advanced. Apart from what the Inspector stated in the report about the position of the County Council and the likely position of the Trustees, adopting the phrase used by Pitchford LJ in the *Tegni Cymru* case, it is clear (particularly in the light of the reference in his report to "CDC20") that the steps implicit in his reasoning were the following:- (1) the clear position of the County Council that its support for relocating the Church of England school was premised on this being at no cost to it, so that its support for the qualitative case was only support in principle rather than of a practical kind; (2) the absence of any concrete proposal for alternative finance for relocating the school and in particular purchasing the land needed on the convent school site by the Diocese or anyone else, let alone a developed proposal; and (3) the fact that in the absence of any such proposal, whatever the strength of the qualitative case for the "land swap" proposal, it was not sound in planning terms because it was not viable.

94. The reason that I do not consider that any inadequacy in the reasons substantially prejudiced the Parish Council is that the question put to it in post-hearing note (1) showed precisely what, in the light of the County Council's position, his concern was.

(ii) The challenge to the grant of planning permission

95. There are two grounds of appeal. The first is that the judge erred in not finding that the planning committee made a reviewable error of fact because of its mistake as to the extent of the playing fields on the convent school site, and that mistake led it to conclude that the Trustees' application complied with policy R2 of the District Plan. The second is that he erred in determining that the District Council's interpretation of

Policy CSF2 of the adopted Chiltern District local plan[13] was correct in not requiring a like-for-like replacement of the existing community service or facility on the convent school site, that is a school and playing fields.

96. *(a) Error of fact:* Leaving aside questions of jurisdictional fact (as to which see *R (A) v Croydon LBC* [2009] UKSC 8, reported at [2009] 1 WLR 2557), the circumstances in which a mistake of fact will give rise to a ground of challenge in public law are stated in the judgment of this court, delivered by Carnwath LJ, in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, reported at [2004] QB 1044 and are comprehensively discussed in chapter 17 of Professor Craig's *Administrative Law* (7th ed., 2012). This court relied in particular on *R v Criminal Injuries Compensation Board, ex p. A* [1999] 2 AC 330, in which a police doctor's statement in a contemporary medical report that her findings were consistent with the claimant's allegation had not been included in the evidence before the CICB when it rejected her claim for compensation. The decision was quashed. However, this was not because mistake of fact was a separate ground of review analogous to those based on no evidence or acting under a mistake of law. It was because what happened was held to be a breach of the rules of natural justice and constituted unfairness.[14]

97. *E*'s case concerned "subsequent objective evidence" in the form of reports by Human Rights Watch, the World Organisation Against Torture, and a Country Guidance report which became available after the tribunal hearings but before the promulgation of the decisions. The reports were described (at [95]) as "credible" and "obviously credible", and as throwing considerable doubt on the Tribunals' understanding of the matters before them. After reviewing the *CICB* case, other cases, and the discussion in textbooks and articles, the court (at [61]) stated that it doubted whether the taking into account of a mistaken fact could be absorbed into the traditional "relevant" and "irrelevant" considerations and "no evidential basis" grounds of judicial review. It stated (at [63] and [66]) that the *CICB* case pointed the way to a separate ground of review on a point of law which was based on and a species of the principle of fairness. The court stated (at [66]) that there were four ordinary requirements to establish this ground of review:

> "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 have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the tribunal's reasoning."

98. Because the Tribunals under consideration in *E's* case had wrongly failed to consider the new objective evidence, the court stated that it was unnecessary for it to decide whether, if admitted, the evidence did demonstrate an error of law which met the four "ordinary" requirements it identified. Whether or not the principle identified in *E's* case and its requirements are technically *obiter dicta*, they have been applied in other contexts (see *R (Assura Pharmacy Ltd v NHS Litigation Authority* [2008] EWHC 289

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[13] See paragraph 13 of the Appendix.

[14] See Lord Slynn at 345, and Lord Nolan and Lord Hobhouse at 348.

(Admin)), including planning: see *R (Connolly) v Havering LBC* [2009] EWCA Civ 1059, reported at [2010] 2 P & CR 1 and *McArthur v Secretary of State for Communities and Local Government* [2013] EWHC 3 (Admin).

99. In *Connolly*'s case, this court (at [37] – [40]) quashed a planning Inspector's decision where the Inspector had not been informed of the planning authority's negative view about a materially identical application. The fact was "established" in an uncontentious and objectively verifiable form because it was documented in the planning authority's decision on the other application and it was accepted by the parties that it was materially identical. In *McArthur*'s case, the submission that there had been a material mistake of fact because the Inspector had relied on an expert witness's written assessment which had been revised during oral evidence was rejected. Although Lang J accepted (at [50]) that a decision-maker's failure to correctly record or understand the evidence before it can amount to a material mistake of fact, she was (see [37]) unable to conclude that the witness had in fact revised his opinion. She stated (at [49]) that "establishing the existence of a mistake of fact on the evidence is a fundamental requirement which a claimant must meet in order to succeed", but the claimant in that case had failed to establish that there was a mistake of fact which was uncontentious and objectively verifiable.

100. It is important to note that in *E's* case the court did not describe the new ground as based on a breach of natural justice and procedural irregularity. It emphasised that it is a distinct and separate head of challenge and conceptualised it as an error of law. As Professor Craig has stated (*op. cit.* at p.521), unfairness plays only a limited role in relation to it, and is not a matter to be proved independently, but is the consequence of finding that the requirements are met. The four "ordinary" requirements also mean that the scope of review under the general principle of public law identified in *E's* case is significantly more limited than in situations where it is held that the fact in question is one which, on the construction of the particular legislation is "jurisdictional",[15] that is one which it is for the court to determine, if necessary hearing oral evidence.

101. The Parish Council's case was that the requirements in *E's* case are satisfied in this case and that the judge erred in law in concluding (i) that the committee had full knowledge of the competing views and arguments and the relevant policy issues, including the requirements of policy R2, and (ii) stating that nothing in the correspondence following the meeting of the planning committee changed that position. As to (i), I have referred (at [39] above) to Mr Dove's reliance on Mr Turnbull's note of the meeting recording that a District Councillor stated there were two pitches and a running track, and the passage in his witness statement referring to the note that "…members proceeded on that basis". As to (ii), he submitted that the judge was clearly wrong because, in Mr Turnbull's letter dated 19 August 2010 to the Secretary of State (see [42] above), he retracted his opinion that the proposed development complied with policy R2.

102. Focusing on the first and second requirements in *E's* case, Mr Dove maintained that there was a clear and established error of fact. It arose because the District Council did not approach the question of loss of playing fields by examining the

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[15] See eg *R (A) v Croydon LBC* [2009] UKSC 8, reported at [2009] 1 WLR 2557.

whole of the site and including all the open ground land to the north and east of the school buildings as playing fields, but included only the area so identified by the Trustees in their amended application. It was, he submitted, necessary for the planning committee to understand the nature and extent of the playing fields on the site because policy R2 protected outdoor sports facilities such as school playing fields, and to satisfy that policy it was necessary for the District Council to decide that a replacement playing field of "equivalent size, suitability and convenience" was provided. The definition in the 1995 T&CP (GD) Order should not have been discounted. Mr Dove submitted the definition is helpful and indeed definitive because its purpose is "precisely" the same as policy R2, to preserve open space so as to the meet the community's sports and recreation needs.

103. Mr Dove submitted that there was confusion as to the District Council's position because there was no clear decision as to the extent of the playing fields. In the light of Mr Turnbull's evidence, the District Council's position was incoherent. Secondly, he submitted that, on a correct approach to policy R2, it was clear that the application did not comply with the requirement of a replacement of "equivalent size" because it did not provide a playing field of 1.2 hectares. Thirdly, to the extent that the issue concerned the number of pitches on the site, he maintained there was a clear error of fact because of the evidence. As well as what was attributed to Miss Horsbrugh-Porter in Mr Turnbull's notes, this was seen from the evidence of the former headmistress and staff which, although not before the planning committee and only adduced for the purposes of these proceedings, it was legitimate to rely on to show that there was a clear error of fact.

104. The starting point in considering these submissions is the extent to which the question as to the extent of the playing field on the convent school site was one of fact for the committee, or one for the court. That question is undoubtedly as to the meaning of policy R2 which, as a planning policy, is (see *Tesco Stores Ltd v Dundee City Council* at [18] and [19], *per* Lord Reed) to be "interpreted objectively in accordance with the language used, read as always in its proper context". Accordingly, as a matter of principle the meaning of planning policy is a matter of law. But Lord Reed also observed that "many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment" and that "[s]uch matters fall within the jurisdiction of planning authorities, whose exercise of judgment can only be challenged on the ground that it is irrational or perverse".

105. I consider that the determination of whether a particular open space is a "playing field" within policy R2 is a matter requiring the exercise of judgment by the relevant planning authority. That is implicitly recognised in the advice given to Sport England by counsel as to the meaning of the 1995 T&CP(GD) Order because it stated that what constituted a "playing field" is fact-dependent. In some cases, for example, where the entirety of an open space is laid out for one or more sporting activities, determining the extent of the playing field or fields is likely to be a question of simple observation. But in cases where the area so laid out is be part of a wider area including, for example, parkland, car-parking space, informal garden, or groups of trees, an evaluative exercise is needed. That was the position in this case.

106. The mere fact that the factual question under consideration is one requiring evaluation will not be fatal to establishing a mistake of fact which satisfies the requirements in *E's* case. That case itself involved evidence about such a question from respected independent organisations. So did the *CICB* case in which the report considered gave the doctor's contemporary evaluation of the victim's injuries. But in the planning context, Lord Hoffmann's oft-cited statement in *Tesco Stores plc v Secretary of State for the Environment* [1995] 1 WLR 759 at 780 that "matters of planning judgment are within the exclusive province of the local planning authority of the Secretary of State" shows that caution is needed. It is significant that the *CICB* case and *Connolly*'s case involved uncontentious and unquestioned evidence. The CICB did not have the contemporaneous medical report. The Inspector in *Connolly*'s case did not have the other planning decision about the site he was considering. The evaluative evidence in *E's* case was "objective" evidence about risks in particular countries which the tribunals refused to consider. There was no suggestion in any of these cases that the evaluation relied on was controversial. In *MT (Algeria) and others v Secretary of State for the Home Department* [2007] EWCA Civ 808 at [69][16] this court cautioned against the use of the principle in *E*'s case "to turn what is a simple error of fact into an error of law by asserting some new fact which is itself contentious". Accordingly, whatever the position as to the other requirements, it is in my view unarguable that the second of the "ordinary requirements" of this head of review is satisfied.

107. The judge was entitled to say that there was clearly conflicting evidence as to the extent of the playing field on the convent school site. The complaint made on behalf of the Parish Council is that the District Council relied only on the Trustees' evidence and that the judge accepted what are described as the District Council's "assertions". But the submission that the evidence "unequivocally" and "quite clearly" showed the District Council misunderstood the facts also only relies on the evidence in support of one position, the Parish Council's position, and discounts the views of those who lived on the convent school site. I also accept the submission on behalf of the District Council and the Trustees (see [39] above) that Mr Turnbull did not resile from the position he had taken in his report in his witness statement.

108. My conclusion on the second requirement is fatal to this ground of appeal. Had it been necessary to decide the point I would, however, also have held that the first of the ordinary requirements in *E*'s case – that there <u>was</u> a mistake of fact – is not fulfilled in this case. The question was as to the extent of the playing field. Policy R2 protects sports facilities, and (see (iii))[17] includes existing school playing fields and land last used as school playing fields. The question is whether the provision in the 1995 T&CP (GD) Order that, for the purpose of that Order, "'playing field' means the whole of the site which encompasses at least one playing pitch" applies, and, if so, to what extent.

109. Three factors have led me to reject Mr Dove's submission that the approach in the 1995 T&CP (GD) Order is "definitive" as to the meaning of "playing field" in policy R2. First, this would, in a sense, treat the term "playing field" in a policy document as one to be construed as if it was a statutory or contractual provision, in the way Lord

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[16] Affirmed by the House of Lords ([2009] UKHL 10, reported at [2010] 2 AC 110) on other grounds without reference to *E*'s case.

[17] Appendix, §12.

Reed stated such statements should not be construed. Secondly, the context and purpose of policy R2 are important. I agree with the judge that reliance on the definition in the 1995 T&CP (GD) Order is unhelpful because that definition is in a document providing a regime for consultation. Thirdly, Mr Dove's submission takes insufficient account of the relationship of policy R2 with other policies concerning open space in the development plan, in particular policy R10 which deals with the loss of other amenity open space not open to the general public. Part of the convent school site was (see [21] above) designated as open space within policy R10. In the light of the other policies designed to protect open spaces and parkland, to regard the whole of every site, or the whole of every open or grassed site, which encompasses at least one playing pitch as a playing field and thus protected by a policy concerned with "sports facilities" would have an extraordinary and undesirable effect when considering the position of, for instance, a school, hotel or facility such as a care home which is set in extensive open space or parkland in a rural setting.

110. The committee's decision was based not only on the officer's report, but (see [48] above) all the information given at the meeting. That included the differing views as to the extent of the playing fields and the submission of Sport England and others that the area in the photographs which they said was laid out as an athletics track showed that the whole of the grassed area was in "physical and functional terms part of a single site". It was for the committee to determine the extent of the "playing fields", and to decide whether the occasional (possibly only once a year) use of land for sporting activities meant that it was part of the "playing fields". While there can be legitimate differences about how these matters are to be decided, they are classically matters for the determination of the primary decision maker. There was no suggestion that the "fact" involved was a jurisdictional fact which it is for the court to determine. Notwithstanding this, because the issue was presented as a "mistake of fact" qualifying under *E's* case, the Court was invited to consider the aerial photographs which were said to show an athletics track and two playing fields and the post meeting evidence said to show clearly that use of a larger area as a playing field was more frequent than that claimed by the evidence relied on by the Trustees.

111. Neither the material before the committee nor the post-meeting evidence showed the matter fell within the requirements laid down in *E's* case. The post-meeting evidence simply asserted additional matters which were contentious in the way deprecated in *MT (Algeria)'s* case: see [106] above. The evaluation of these matters was for the planning committee. Absent irrationality or perversity (which is not alleged in this case), it was for the committee to decide the extent of the playing fields on the convent school site. Its decision in this case, taken with the material to which I have referred was, in my judgment clearly open to it. Accordingly, I have concluded that the judge did not err in rejecting the submission that the planning committee's decision was affected by a mistake of fact which fell within the ground identified in *E*'s case.

112 *(b) Policy CSF2:* This ground concerns sub-paragraphs (i) and (ii) of policy CSF2.[18] There are three main limbs to Mr Dove's submission that the judge was wrong in accepting the District Council's position that the policy should be given a broad interpretation and did not require "like for like" replacement of the particular

[18] Set out in Appendix, §13.

community use (here a school and playing fields) that would be lost by developing the convent school site in the way planning permission granted.

113 The first limb is based on the phrase "the community service or facility" in the opening paragraph of the policy. Mr Dove submitted that the use of the definite article meant the wording could not be more explicit. Secondly, he submitted that an approach requiring "like for like" reflects the purpose of policy CFS2 to retain low-value but essential community uses such as schools and sporting facilities unless they are demonstrated no longer to be required. The justification for the policy and the language of sub-paragraph (ii) require the planning authority to have regard to whether the facility is still "required for its existing use, or for any other community use in the … area …." It would, he submitted be absurd to argue that the community need for land for education facilities was met by the provision of a chapel and a residential care home. At the renewal hearing before Sullivan LJ he put it more vividly (see [2014] EWCA Civ 346 at [14]) by submitting that "it is not sensible to interpret a policy which seeks to preserve community [uses] in a manner which would enable the replacement, say of a hospital with a sewerage farm on the basis that both are community uses". Thirdly, Mr Dove submitted that sub-paragraph (ii) of the policy was not satisfied because there was "a clear need for the use of this land as a school" in view of the evidence regarding the qualitative need for it to meet the deficiencies of the school on its present site. He argued that the judge was also wrong to refer (at [28], summarised at [68] above) to the "fall-back" position, that is what the use of the convent school site would likely be.

114 Mr Dove put the Parish Council's case on this point in an attractive way. I can see the force of the argument that replacing a community use which is still needed with another community use which may also be needed but is more urgently needed or is more attractive to a developer because developing it for that use would mean the land had a higher value may dilute the policy. But the only indication of a hierarchy within the extensive list in the Local Plan of uses of land which qualify as community uses is the reference in the explanatory text (see [121] below) to the need to respond positively to changing needs. Moreover, notwithstanding the need to interpret planning policies objectively in the light of the language used, the construction which Mr Dove advances does not in my judgment accord sufficient recognition to the context of Policy CSF2 and the fact that its language means that a planning authority has to exercise judgment when considering its application to particular circumstances or reflect the approach of the court in such cases. I referred to what Lord Reed stated about the approach in *Tesco Stores Ltd v Dundee City Council* when discussing Policy R2 at [104] above.

115 Some of the submissions of each of the parties involved a linguistic dissection of the text of the policy itself. That may be sufficient when determining the meaning of a legislative provision, but (see *Tesco Stores Ltd v Dundee City Council*) it is not in the context of a planning policy. In any event, I did not find that the dissection deployed by either side provided strong support for the case they were seeking to advance. I reject the submission on behalf of the District Council and the Trustees that the last paragraph of Policy CSF2, which states that community services and facilities "include" the very wide list of land uses listed in §§12.2 and 12.7 of the explanatory text to the Local Plan, shows or is a strong indication that CSF2 is concerned with the overall category of community uses rather than the particular one

that will be lost. All that those words do is to identify which uses qualify and to point to the width of the overall category.

116 I also reject Mr Dove's submission that the use of the definite article in the opening paragraph means that the policy "could not be more explicit". I do, however, accept that there are two pointers in the language of the policy towards the construction for which Mr Dove contends. The first is the contrast between the words "loss of a community service or facility" on the site in the opening paragraph of Policy CSF2 and the use of the words "a replacement building and/or land" in sub-paragraph (a). The replacement building and/or land is to be a replacement for "the community service or facility" on the site which is to be lost.

117 The second is the reference in sub-paragraph (ii) of the policy to the existing community use and to any other community use in the built-up area. This is, as Moore-Bick LJ states, part of the context in which sub-paragraph (i) is to be read, and it provides an indication that alternative community uses are to be considered under that sub-paragraph. It therefore can be seen as a further pointer to the language in sub-paragraph (i) meaning that the replacement facility must be capable of being put to the same, or broadly the same, use as the community service or facility which would be lost.

118 I do not, however, consider that, in the context of the policy as a whole, these pointers are conclusive as to the meaning of sub-paragraph (i). This is because: (a) looking at Policies CSF1 and 2 together, and taking account of the explanatory text, there is no indication of a hierarchy of community uses; (b) the explanatory text emphasises retaining buildings in a community use rather than the existing use; and (c) the explanatory text also states that sites for community uses are difficult to find and that planning authorities need to respond to changing needs. I referred to the hierarchy point at [114] above, and discuss this and the other factors at [120] and [121] below. They, and in particular (c), suggest that planning authorities are to be given flexibility as to how to meet changing community needs and how to choose between competing needs.

119 I also reject the submission that the cross-reference in sub-paragraph (ii) to policy CSF1 supports a "like for like" requirement. The language of Policy CSF2 is to be contrasted with other parts of the Local Plan, including Policy R2 on the loss of sports facilities, which do contain prescriptive words. In the case of Policy R2, what is stated to be required is "an alternative provision of at least an equivalent size, suitability, and convenience". Had the District Council wished to adopt a policy requiring "like for like" replacement, it would have been easy to state this in sub-paragraph (i).

120 I have found the guidance in the explanatory text to the policy of considerable assistance in understanding its underlying purpose, and thus the meaning required to give effect to that purpose. §12.19 states that sites for further community facilities are difficult to find and "therefore the Council is concerned that the use of existing community buildings is maximised and that existing buildings are retained in a community use" (emphasis added). The contrast being made is between community uses and "other forms of development" with which developers may seek to replace existing community facilities, and is a clear indication that the policy is not

concerned to achieve "like for like". §12.20 addresses the position where it can be proved that the existing community use is no longer required. It states that if no alternative community purposes can be found "the Council may accept the loss of a site from community use", but also that it has produced a contact list for existing community facilities in the area to help find alternative community uses for a facility no longer required by the present user. Although less clear than §12.19, this is also in my judgment an indication that the policy is not concerned to achieve "like for like", but is concerned with maximisation of community use and retention in a community use.

121 To interpret the policy as requiring "like for like" replacements could also lead to undesirable rigidity and difficulty in meeting community uses which are considered to be particularly pressing. This is because of the difficulty (referred to in §12.19) in finding sites for further community uses and because the community uses needed change over time and (see §12.4) councils need to respond positively to such changing needs. One of the examples of such change is (see §12.14) the need for more residential care homes and supporting facilities produced by the trend to the care of the elderly and disabled in the community rather than large institutions. In the light of these considerations, it is in my judgment consistent with the policy of maximising community use and retention in a community use to treat the broad question of whether a community use that will be provided by a development is a replacement to the community use that will be lost as one to be left to the planning judgment of the planning authority. That authority is best placed to judge the weight to be given to competing community needs. In this case, it cannot be said that the District Council's decision that a care home so required was perverse or irrational. Such use is one of the examples of an emerging need, and it was supported by both the local Primary Health Trust and the County Council.

122 For these reasons, I have concluded that the District Council did not err in deciding that Policy CSF2 of the adopted Chiltern District local plan does not require a like-for-like replacement of a community service or facility on the site where a particular community use will be lost. Left to myself, I would therefore have rejected this part of the challenge to the grant of planning permission. Moore-Bick and Briggs LJJ disagree. They have concluded that the Planning Committee proceeded on the basis of an erroneous interpretation of the policy. Notwithstanding that error, they would dismiss this part of the challenge to the grant of planning permission on the ground that, for the reasons given by Moore-Bick LJ in [137] – [138] below, no different outcome could have ensued had the Committee proceeded on a correct interpretation of the policy. This is because the convent and school buildings as they stood at the date of the decision were not required for their existing use or for any other community use, and the requirements of sub-paragraph (ii) of Policy CSF2 were therefore satisfied.

123 The discretion to deny a remedy on the ground that remitting a matter would not lead to a different outcome is one to be exercised sparingly. But, where it can be, it is attractive because it reflects considerations of substance and because speed in public law decision-making is important, and is particularly important in planning. In this case, there has been considerable delay as a result of the litigation about the convent school site. I have considered whether, if contrary to my conclusion, the policy does require a "like for like" replacement, I agree with my Lords' conclusion that no

different outcome could have ensued if the Committee had proceeded on the correct interpretation of the policy because the requirements of sub-paragraph (ii) of the policy are satisfied. I consider that in the light of all the material before this court, that is the most likely position, but I would have found it difficult to say that there is no doubt. The officer's report, which refers to the buildings on the site and their value, in particular their architectural merit and historical value to the community, did not suggest any other community use. But that was not surprising in the light of his view that there was no "like for like" requirement and because, in any event, two other community uses (the care home and retention of the chapel for community use) were included in the application. Secondly, the policy requires that it "can be demonstrated to the satisfaction of the Council" that the facility is no longer required for its existing use or for any other community use. The requirement that "it can be demonstrated" suggests that silence in the officer's report does not suffice and that it is necessary for the planning committee *proactively* to consider this question. There is no indication that the committee did or that the district was so well provided with community facilities that the answer was clear.

124 Finally, on this ground, I do not consider that the judge fell into error in the way he referred (at [27] and [28]) to what he described as the "aspirations" expressed by the Parish Council and others in the community to relocate the Church of England school to the convent school site. I would therefore also reject this ground of appeal against the dismissal of the challenge by judicial review to the grant of planning permission.

125 This last point takes me back to the limb of the first ground of appeal against the dismissal of the statutory challenge to the core strategy that contended that the Inspector ignored the protection given to the existing community use by Policy CSF2. My conclusion on the other limb of that ground (see [76] – [82] above), was that the Inspector was entitled to conclude in the light of the evidence before him that there was no "quantitative" need for a new school in Chalfont St Peter, and that in the light of the position of the County Council and the Trustees, what had been done and remained to be done by the those promoting the "land swap" relocation option, in particular by the Diocese in relation to financing, that it was not a reasonable alternative or viable. In these circumstances, I have concluded that the fact that the Inspector did not expressly address CSF2 did not vitiate his or the District Council's decision, or render the challenged part of Policy CS6 of the adopted core strategy unsound.

VIII SUMMARY OF CONCLUSIONS

126 My conclusions can be summarised as follows:-

i. *Core strategy, ground 1:* The judge did not err in determining that the District Council was not under an obligation pursuant to Article 5(1) of the 2001 Directive and Regulation 12 of the SEA Regulations to subject the "land swap" proposal to sustainability appraisal when developing its core strategy because the position of the County Council and the incompletely formulated proposals of those advocating it and the absence of a business plan meant it was not a "reasonable alternative": see [76] – [82] and [125].

ii. *Core strategy, ground 2:* The reasons of the Inspector for his decision as to the soundness of the District Council's proposed core strategy were adequate for the reasons I give at [91] – [94] above.

iii. *Planning permission, ground 1:* The grant of planning permission by the District Council was not vitiated by a reviewable error of fact because the requirements for that ground of review laid down in *E's* case were not satisfied because (see [104] – [107]) the mistake of fact as to the size of the playing fields that the planning committee was said to have been under was not "uncontentious and objectively verifiable". I also consider (see [108] – [111]) that it was not established that there was a mistake of fact.

iv. *Planning permission, ground 2:* Left to myself, I would have concluded that the District Council's decision that Policy CSF2 of the adopted Chiltern District local plan does not require a like-for-like replacement of a community service or facility on the site where a particular community use will be lost was (see [112] – [121]) correct. I would therefore have rejected this part of the challenge to the grant of planning permission for this reason. Moore-Bick and Briggs LJJ have concluded that the Planning Committee proceeded on the basis of an erroneous interpretation of the policy but that, for the reasons given by Moore-Bick LJ in [137] – [138] below, no different outcome would have ensued if the Committee had proceeded on a correct interpretation of the policy.

The result will be that both appeals will be dismissed.

Lord Justice Briggs:

127 I agree that both appeals should be dismissed. Like my Lord I have found both limbs of this appeal difficult, and my views about several of the issues have changed over time. My greatest difficulty has been with point (4) in my Lord's summary. Having read in draft the judgment of Lord Justice Moore-Bick on this point, I find myself in substantial agreement with his analysis.

128 Policy CSF2 is by no means a model of clarity, but I think that, standing back and looking at it in context, it expresses the following priorities. First, regard must be had to the existing community facility or service which would be lost under the proposed development. The Council must ask itself whether there is a continuing need for that facility (or service). If there is, then it cannot be lost because of the proposed development, unless a "like for like" replacement is provided. Next, if there is no continuing need for the existing facility or service, but there is a need for the same building or land to be used for some other community use, then the existing facility cannot be lost unless, again, a suitable replacement is provided. This will have to be suitable for the alternative community use, but need not be "like for like" since that would needlessly build in suitability for the original redundant use. Finally, if the facility is not needed either for its existing community use, or for any other community use, then it may be lost as a result of the proposed development,

without any need for replacement, either “like for like” or by a facility for alternative community use.

129 Plainly this is not the interpretation of Policy CFS2 which the planning committee were advised to adopt. But for the reasons given by Lord Justice Moore-Bick, no different outcome could have ensued if the planning committee had proceeded on a correct interpretation. The short point is that the convent school was redundant as a school, there was no realistic prospect that the Church of England school could be relocated within it (due to the negative attitude of the County Council), and no alternative community use for the redundant school buildings was then, or has since, been suggested.

Lord Justice Moore-Bick

130 I agree that the appeal should be dismissed, substantially for the reasons given by Beatson LJ, although on one aspect of the matter my reasons differ from his. Two issues arise in relation to the challenge to the Core Strategy: whether the proposed land swap was sufficiently feasible to require consideration; and whether the reasons given by the Inspector for rejecting the Parish Council’s objection were adequate. As to the former, I think it is clear that, whatever aspirations the Parish Council may have had for the school and despite the support available from the diocese, sufficient funds were unlikely to be made available for it to move to the convent school site. The County Council was unwilling to provide funds for the project and the diocese was not offering to make good any shortfall between the sale price of the school’s existing site and the purchase price of the more extensive site required for the project. The Trustees could not be forced to sell part of the convent school site at a price below its development value and it was therefore likely that the purchase of the larger site would give rise to a shortfall of significant proportions. There was no proposal for bridging that gap; the scheme was therefore not viable and did not need to be considered because it could not come to fruition.

131 I am concerned, however, that the Inspector failed to deal in terms with the Parish Council’s case that a “land swap” would provide clear benefits in terms of the quality of the educational experience which the school would be able to offer in more spacious premises on a larger site and I do not myself consider that his reasons were adequate in that respect. However, the failure to give adequate reasons did not prejudice the Parish Council, since it is clear that he considered that the finance was not available to implement them, as indeed was the case. I agree, therefore, that the challenge to the Core Strategy should be dismissed.

132 The challenge to the grant of planning permission also raised two principal issues: whether the planning committee made a mistake of fact of a kind which vitiated its decision; and whether, on the development of a site which contained a community facility, policy CSF2 required the replacement of that facility with another of the same kind, a so-called “like for like” replacement.

133 As to the first, I agree with Beatson LJ that the expression “playing field” in policy R2 is one which calls for the exercise of judgment, at any rate in a case such as this where only part of an open space is laid out for sporting activities. It would make no sense, for example, to construe the policy as meaning that the whole of a

public park, part of which was an open area used for playing cricket or football, was a "playing field" for these purposes. I also agree that it is possible for an evaluative decision of that kind to be undermined by an error of fact of the kind considered in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49, [2004] Q.B. 1044, but that is not this case. The record of the meeting of the planning committee shows that there was a lively dispute about the number of pitches marked out on the convent school site and about the extent to which the site as a whole was used as a playing field. Although some of the aerial photographs tend to support the conclusion that there had been two pitches, there was evidence from some of those who claimed to have personal knowledge of the area that there had been only one. This is not one of those cases, therefore, in which it can be said that at the time of the decision the true position was capable of being objectively and incontrovertibly established but was somehow overlooked. I agree with Beatson L.J. for the reasons he gives that it is not appropriate to import wholesale into policy R2 the definition of "playing field" in the 1995 T&CP (GD) Order.

134 The second ground of objection concerns the application of policy CFS2. The convent school was a private girls' school. Although it was in one sense available to the community as a whole, it might be open to question whether it was a community facility in the ordinary sense of that expression or whether it fell within the scope of paragraph 12.2 of the Local Plan, which gives some guidance on the meaning of the term. However, in his report to the planning committee the planning officer advised the members that the convent and school buildings were classed as community facilities within the scope of the policy. As the judge noted, he appears to have thought that the retention of the chapel and the replacement of the other buildings by a care home satisfied the provisions of paragraph (i) of CSF2 because they constituted replacement of the original community facilities.

135 The judge considered that the Council was entitled to interpret policy CSF2 in a broad way and as allowing the replacement of a community service or facility of one kind with a community service or facility of another kind. However, a planning authority does not have a free hand in deciding what policy documents of this kind mean. The proper approach to interpretation was described by Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, to which Beatson LJ has referred. Such documents must be interpreted objectively in accordance with the language used, read in its proper context. It is also necessary to have regard to the purpose of the policy, which in this case is to ensure as far as possible that a community facility for which there is still a use of some kind is not lost as a result of development.

136 In my view the judge was wrong to hold that the Council was entitled to give policy CSF2 a broad interpretation. It was bound to interpret it in accordance with the principle set out in *Tesco v Dundee*, informed by its context and its purpose. Whether, having regard to those matters the policy ought to be interpreted in the way that the Council's Planning Officer appears to have thought is another matter. Beatson LJ has set out the arguments in favour of the view taken by the planning officer and the judge, but I find myself unable to agree with them. Sub-paragraph (ii) of the policy provides part of the context in which sub-paragraph (i) is to be read. It deals with the situation in which the facility "is no longer required for its existing use, or for any other community use." This indicates that in the application of the

policy the council must consider the existing facility and the various community uses to which it might be put before deciding whether a replacement can be provided in an equally convenient location; and that in turn indicates that the replacement facility must be capable of being put to the same, or broadly the same, use as that of the facility which would be lost. To replace a meeting hall, for which there is still a community use with a hospital or a sewage treatment plant, desirable though either of the latter may be, does not in my view meet that objective or reflect the aim of the policy.

137 The convent and school buildings on the Holy Cross site were no longer required for their former use and there is nothing to suggest that apart from the chapel (which was to be retained) any of them could be put to any other community use. Even if the school project had been undertaken, they would have been demolished. Nor has it been suggested that the playing fields were required for community use as such, although in any event they are not considered to be community facilities for this purpose: see paragraph 12.2 of the Local Plan. Redevelopment of one kind or another was the only realistic option and I do not think that redevelopment can be regarded as a community use of the *existing* facility, since the opening section and sub-paragraph (i) of CSF2 contemplate that the existing facility is or may be capable of being put to some community use in substantially its current form. To my mind that is reinforced by paragraph 12.19 of the Local Plan, which explains that the Council is concerned to maximise the use of existing community buildings and to retain existing buildings in community use. There was no community use, however, to which the existing facility could be put. That is clear from the Planning Officer's report to the committee and the minutes of the meeting at which the grant of planning permission was approved. The report included an exhaustive consideration of the nature of the various buildings on the site, their value to the community and the uses to which they might be put. If any of them could have been put to community use that would surely have been drawn to the committee's attention, but nothing of that kind was suggested. Similarly, although different views were expressed in debate, some members supporting the proposal and others opposing it, no one suggested that the buildings (as opposed to the land on which they stood) were required for their existing use or could be put to any other community use. It is difficult to believe that if there had been some community use for them someone would not have raised it.

138 The planning officer advised the committee that the proposed development satisfied policy CSF2 because it required only that community facilities of some kind were retained or that the existing facilities were replaced by some form of community facilities in a convenient location. I think that he was right to advise the committee that the development satisfied policy CSF2, but not for the reason he gave. The convent and school buildings as they stood at the date of the planning committee's decision were not required for their existing use or for any other community use and the requirements of sub-paragraph (ii) of CSF2 were therefore satisfied. If there were any doubt about whether the existing facility could have been put to community use it would be necessary to send the matter back to the planning committee to enable them to consider the question, but for the reasons I have given I do not think there is. On this narrow point there is only one possible outcome. I would therefore reject this challenge to the grant of planning permission also.

APPENDIX
THE LEGISLATIVE AND POLICY FRAMEWORK

(i) Planning and Compulsory Purchase Act 2004

1. The material parts of this Act provide:

> "**19. Preparation of local development documents**
>
> (1) Local development documents must be prepared in accordance with the local development scheme.
>
> (2) In preparing a local development document the local planning authority must have regard to—
>
> (a) national policies and advice contained in guidance issued by the Secretary of State;
>
> …
>
> (i) the resources likely to be available for implementing the proposals in the document;
>
> (j) such other matters as the Secretary of State prescribes.
>
> …
>
> **20. Independent examination**
>
> …
>
> (5) The purpose of an independent examination is to determine in respect of the development plan document—

(a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;

(b) whether it is sound.

…

(7) The person appointed to carry out the examination must—

(a) make recommendations;

(b) give reasons for the recommendations.

…

39. Sustainable development

(1) This section applies to any person who or body which exercises any function—

(a) under Part 1 in relation to a regional spatial strategy;

(b) under Part 2 in relation to local development documents;

(c) under Part 6 in relation to the Wales Spatial Plan or a local development plan.

(2) The person or body must exercise the function with the objective of contributing to the achievement of sustainable development.

113. Validity of strategies, plans and documents

(1) This section applies to—

(a) a revision of the regional spatial strategy;

(b) the Wales Spatial Plan;

(c) a development plan document;

(d) a local development plan;

(e) a revision of a document mentioned in paragraph (b), (c) or (d);

(f) the Mayor of London's spatial development strategy;

(g) an alteration or replacement of the spatial development strategy,

and anything falling within paragraphs (a) to (g) is referred to in this section as a relevant document.

(2) A relevant document must not be questioned in any legal proceedings except in so far as is provided by the following provisions of this section.

(3) A person aggrieved by a relevant document may make an application to the High Court on the ground that—

(a) the document is not within the appropriate power;

(b) a procedural requirement has not been complied with.

(4) But the application must be made not later than the end of the period of six weeks starting with the relevant date.

(5) The High Court may make an interim order suspending the operation of the relevant document—

(a) wholly or in part;

(b) generally or as it affects the property of the applicant.

(6) Subsection (7) applies if the High Court is satisfied—

(a) that a relevant document is to any extent outside the appropriate power;

(b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.

(7) The High Court may quash the relevant document—

(a) wholly or in part;

(b) generally or as it affects the property of the applicant.

(8) An interim order has effect until the proceedings are finally determined.

(9) The appropriate power is—

(a) Part 1 of this Act in the case of a revision of the regional spatial strategy;

(b) section 60 above in the case of the Wales Spatial Plan or any revision of it;

(c) Part 2 of this Act in the case of a development plan document or any revision of it;

(d) sections 62 to 78 above in the case of a local development plan or any revision of it;

(e) sections 334 to 343 of the Greater London Authority Act 1999 (c. 29) in the case of the spatial development strategy or any alteration or replacement of it.

(10) A procedural requirement is a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document.

(11) References to the relevant date must be construed as follows—

(a) for the purposes of a revision of the regional spatial strategy, the date when the Secretary of State publishes the revised strategy under section 9(6) above;

(b) for the purposes of the Wales Spatial Plan (or a revision of it), the date when it is approved by the National Assembly for Wales;

(c) for the purposes of a development plan document (or a revision of it), the date when it is adopted by the local planning authority or approved by the Secretary of State (as the case may be);

(d) for the purposes of a local development plan (or a revision of it), the date when it is adopted by a local planning authority in Wales or approved by the National Assembly for Wales (as the case may be);

(e) for the purposes of the spatial development strategy (or an alteration or replacement of it), the date when the Mayor of London publishes it."

(ii) The Town and Country Planning (General Development Procedure) Order 1995 SI No. 419 of 1995[19]

2. Article 10 of this Order provides:

"**Consultations before the grant of permission**

10. (1) Before granting planning permission for development which, in their opinion, falls within a category set out in the table below, a local planning authority shall consult the authority or person mentioned in relation to that category, except where—

(i) the local planning authority are the authority so mentioned;

[19] This has now been replaced by SI No 2184 of 2010, which is for all material purposes identical to the 1995 Order.

(ii) the local planning authority are required to consult the authority so mentioned under articles 11 or 12; or

(iii) the authority or person so mentioned has advised the local planning authority that they do not wish to be consulted.

(1A) The exception in article 10(1)(iii) shall not apply where, in the opinion of the local planning authority, development falls within paragraph (zb) of the table below."

3. The category in the table that is material for this appeal is (z). This concerns:

"Development which:

(i) is likely to prejudice the use, or lead to the loss of use, of land being used as a playing field; or

(ii) is on land which has been:

(aa) used as a playing field at any time in the 5 years before the making of the relevant application and which remains undeveloped; or

(bb) allocated for use as a playing field in a development plan or in proposals for such a plan or its alteration or replacement; …

…"

4. By Article 10(2)(l), in paragraph (z):

"(i) 'playing field' means the whole of a site which encompasses at least one playing pitch;

(ii) 'playing pitch' means a delineated area which, together with any run-off area, is of 0.4 hectares or more and which is used for association football, American football, rugby, cricket, hockey, lacrosse, rounders, baseball, softball, Australian football, Gaelic football, shinty, hurling, polo or cycle polo; …"

5. The designated consultee in England is the body now called Sport England, and at the time the Order was enacted was the Sports Council for England.

(iii) Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment SI No.

6. The material recitals to this Directive provide:

"(9) This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, Member States should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes.

…

(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme; Member States should communicate to the Commission any measures they take concerning the quality of environmental reports.

(15) In order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion.

…"

7. The material provisions of the Directive provide:

Article 4

General obligations

1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.

…

Article 5

Environmental report

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and

evaluated. The information to be given for this purpose is referred to in Annex I."

8. Annex 1(h) provides that the information to be provided under Article 5(1) includes "an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information".

(iv) The Environmental Assessment of Plans and Programmes Regulations 2004 SI No. 1633 of 2004

9. The material parts of these Regulations provide:

"**Preparation of environmental report**

12. (1) Where an environmental assessment is required by any provision of Part 2 of these Regulations, the responsible authority shall prepare, or secure the preparation of, an environmental report in accordance with paragraphs (2) and (3) of this regulation.

(2) The report shall identify, describe and evaluate the likely significant effects on the environment of—

(a) implementing the plan or programme; and

(b) reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme.

(3) The report shall include such of the information referred to in Schedule 2 to these Regulations as may reasonably be required, taking account of—

(a) current knowledge and methods of assessment;

(b) the contents and level of detail in the plan or programme;

(c) the stage of the plan or programme in the decision-making process; and

(d) the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

(4) Information referred to in Schedule 2 may be provided by reference to relevant information obtained at other levels of decision-making or through other Community legislation.

…

SCHEDULE 2

INFORMATION FOR ENVIRONMENTAL REPORTS

…

8. An outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information."

(v) Department for Communities and Local Government Planning Policy Statement 12: creating strong safe and prosperous communities through Local Spatial Planning ("PPS 12")

10. The material parts of this document provide:

"**Alternatives**

4.38 The ability to demonstrate that the plan is the most appropriate when considered against reasonable alternatives delivers confidence in the strategy. It requires the local planning authority to seek out and evaluate *reasonable* alternatives promoted by themselves and others to ensure that they bring forward those alternatives which they consider the LPA should evaluate as part of the plan-making process. There is no point in inventing alternatives if they are not realistic. …

Sustainability Appraisal

4.39 The 'sustainability appraisal' required by s.19(5) of the Planning and Compulsory Purchase Act 2004 should be an appraisal of the economic, social and environmental sustainability of the plan.

4.40 Sustainability appraisal fully incorporates the requirements of the European Directive on Strategic Environmental Assessment. ….

4.41 Where authorities are required by law or encouraged by government policy to undertake assessments of their plans, such assessments should feed into and be summarised in the sustainability appraisal.

4.42 Sustainability appraisal must be proportionate to the plan in question. It should not repeat the appraisal of higher level policy.

4.43 The Sustainability Appraisal should perform a key role in providing a sound evidence base for the plan and form an integrated part of the plan preparation process. Sustainability Assessment should inform the evaluation of alternatives. Sustainability Assessment should provide a powerful means of proving to decision makers, and the public, that the plan is the most appropriate given reasonable alternatives."

(vi) Department for Communities and Local Government Planning Policy Guidance 17: Planning for Open Space Sport and Recreation ("PPG 17")[20]

11. Paragraph 15 of this document deals with playing fields. It provides:

> "15. In advance of an assessment of need, local authorities should give very careful consideration to any planning applications involving development on playing fields (see endnote 3). Where a robust assessment of need in accordance with this guideline has not been undertaken, planning permission for such developments should not be allowed unless:
>
> i. the proposed development is ancillary to the use of the site as a playing field (eg new changing rooms) and does not adversely affect the quantity or quality of pitches and their use;
>
> ii. the proposed development only affects land which incapable of forming a playing pitch (or part of one);
>
> iii. the playing fields that would be lost as a result of the proposed development would be replaced by a playing field or fields of equivalent or better quantity and quality and in a suitable location – see paragraph 13 above; or
>
> iv. the proposed development is for an outdoor or indoor sports facility of sufficient benefit to the development of sport to outweigh the loss of the playing field."

(vii) Adopted Chiltern District Local Plan 1997 including Adopted Alterations 2001

12. Policy R2 of this document provides:

> "**Loss of existing sports facilities throughout the district**
>
> Development which would result in the loss of any existing sports facility to a non-sports use will be refused, unless either of the circumstances set out below applies.
>
> An exception to this policy may be permitted in the following circumstances:
>
> (i) the Applicant demonstrates to the satisfaction of the Council that there is no continuing community need for the facility and it is not possible to use the facility for other sport, …
>
> …AND
>
> (iii) other policies in this Local Plan are complied with. For the purposes of this policy outdoor sports facilities include existing school

[20] PPG 17 was replaced in March 2012 by the National Planning Policy Framework.

playing fields, land last used as school playing fields and equipped childrens' playgrounds."

13. Policy CSF1 of this document provides:

"Within the built up areas excluded from the Green Belt including the District and Local Shopping Centres as Defined on the Proposals Map, development for community services and facilities will be acceptable provided that:

(i) the proposal would not involve the loss of residential land or an existing dwelling, unless:

(a) it can be shown that the loss cannot be avoided because there is no other suitable land or buildings available in the area; and

(b) it can be demonstrated to the satisfaction of the Council that the service or facility to be provided is either not currently available in the area, or demand is in excess of the existing level of supply. Or

(c) the application site is located as described in clause (b) of Policy H9.

(ii) the proposal would not be detrimental to the character and amenities of the area in which it would be located by reason of its appearance, layout, noise, traffic generation, vehicle parking, loss of landscaping or general disturbance.

and

*(iii)*other policies in this Local Plan would be complied with.

Community services and facilities include the land uses listed in paragraphs 12.2 and 12.7."

14. Policy CSF2 of this document provides:

"Within the built-up areas excluded from the Green Belt, the Council will not allow any development which results in the loss of the community service or facility on the site in question unless:

(i) a replacement building and/or land can be provided in an equally convenient location that would comply with Policy CSF1,

or

(ii) it can be demonstrated to the satisfaction of the Council that the facility is no longer required for its existing use, or for any other

community use in the built-up area in which it is located, or in the District, as appropriate to the type of use under consideration,

and

(iii) other Policies in this Local Plan would be complied with.

Community services and facilities include the land uses listed in paragraphs 12.2 and 12.7.”