Neutral Citation Number: [2019] EWHC 2992 (Admin)

Case No: CO/209/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2019

Before :

Timothy Mould QC (sitting as a Deputy High Court Judge)

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Between:

THE QUEEN	**Claimant**
(on the application of)	
SAGAR VISHNUBHAI PATEL	
- and -	
DACORUM BOROUGH COUNCIL	**Defendant**
-and-	
HARKALM INVESTMENTS LIMITED	**Interested Party**

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Saira Kabir Sheikh QC and **Conor Fegan** (instructed by **Clyde and Co LLP**) for the **Claimant**
Giles Atkinson (instructed by **Legal Team Dacorum Borough Council**) for the **Defendant**
Richard Kimblin QC and **Christian Hawley** (instructed by **WGS Solicitors**) for the **Interested Party**

Hearing dates: 10-11 July 2019

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Approved Judgment

Timothy Mould QC:

1. This is an application for judicial review of the decision of the Defendant, Dacorum Borough Council, to grant planning permission ('the planning permission') subject to conditions for development comprising the change in the use of Unit 1 and Unit 2, Richmond Square, Hicks Road, Markyate, Hertfordshire AL3 8 FL ('the site'). The Defendant gave notice of the grant of the planning permission on 5 December 2018.

2. The Claimant is the joint owner and operator of the Nisa Local convenience store and Post Office at High Street, Markyate. In his claim form, the Claimant challenged the lawfulness of the Defendant's decision to grant the planning permission on no less than sixteen grounds.

3. On 27 February 2019 John Howell QC, sitting as a deputy high court judge, granted permission to apply on nine of those grounds and refused permission on the remaining seven grounds. On 3 April 2019 the Interested Party, as leasehold owner of the site, together with the freehold owner entered into a planning obligation, in the form of a unilateral undertaking, under section 106 of the Town and Country Planning Act 1990 ('the 1990 Act'). The effect of that planning obligation is to limit the net retail sales area of Unit 1 at the site to no more than 170 square metres. In the light of that planning obligation, Ms Saira Kabir Sheikh QC, who appeared on behalf of the Claimant, did not pursue grounds 5 and 6 of the claim. The claim before me accordingly proceeded on grounds 4, 10 to 13, 15 and 16 as stated in the claim form.

Background

4. On 4 July 2012, the Defendant granted planning permission ('the 2012 permission') for the comprehensive redevelopment of land at Hicks Road, Markyate to provide a range of 75 residential dwellings, new class B1, B2 and B8 accommodation, a new surgery/health centre, 3 commercial units for class A1/A2/A3/A4 and B1 use, creation of a public square, associated landscaping, formation of new access roads and provision of 197 car parking spaces. The 2012 permission was granted subject to 37 conditions. Condition 29 was in the following terms-

> *"Any shop unit falling within Use Class A1 shall not exceed 105 square metres as shown on the approved plans. This condition shall apply to the original construction and any future re-arrangement of the commercial floorspace within the development hereby permitted."*

5. The reason given for the imposition of condition 29 was-

> *"In order to maintain the viability of existing retail units within the village in accordance with Policy 43 of the [Dacorum Borough Local Plan]".*

6. That reasoning was explained further by the Defendant's planning officer in his report on the application for the 2012 permission -

> *"...this application is an opportunity to create a new commercial focus for Markyate that would encourage more residents to use the village for shopping and other services to the benefit of not only the application site, but also the wider High Street.*

> *However, it is also important to acknowledge the success that the independent operator of the local NISA shop...* [i.e. the Claimant] *...has had in tailoring his business to the needs of the local community and thus maintaining a thriving small business through the recent economic downturn. It is therefore necessary that the livelihood of this local shop is complemented by the proposed new retail units. This can be addressed by limiting the maximum size of retail outlet by way of condition, in accordance with the aims of Proposal SS2 which seeks small A1 to A4 units".*

7. The comprehensive redevelopment scheme authorised by the 2012 permission was carried out. There followed a period of marketing of both the doctor's surgery/health centre accommodation and a commercial unit within the scheme which did not result in the occupation of either of those premises. On 24 May 2018 the Interested Party submitted a planning application to the Defendant for the following description of development ('the proposed development') -

> *Units 1 and 2, Richmond Square, Hicks Road, Markyate, AL3 8FL – change of use of unit 1 (Class D1 surgery/health centre use) to Class A1 convenience foodstore, together with change of use of unit 2 (Class A1/A2/A3/A4 and B1) to three residential units (one 1-bed and two 2-bed flats), together with associated external alterations. Landscaping, amendment to Richmond Square and provision of parking.*

8. The planning statement submitted in support of the Interested Party's planning application indicated that the proposed change of use of the vacant surgery/health centre premises (Unit 1) would enable The Co-operative Food Group to take up occupation of those premises for a convenience store. The ground floor would provide the main sales area and dedicated refuse store, with additional back of house space located at first floor level. No car parking was proposed to serve the convenience store, on the basis that customers would be able to make use of the existing Hicks Road public car park.

9. The planning application was notified to neighbours and publicised for comment between 6 June 2018 and 19 July 2018. The Claimant objected to the proposed development. He instructed his agent, Mr Julian Sutton, Managing Director of JMS Planning and Development Limited, to write to the Defendant setting out the basis of his objections. In his letter to the Defendant's Planning Department dated 26 June 2018, Mr Sutton wrote that the Claimant raised three principal objections relating to retail issues, loss of the Post Office services and highway issues. Mr Sutton explained each of these three objections in some detail, before concluding –

> *"...it is considered that the above application should be refused as the current proposal does not accord with the previous permission on the site and it is considered that the retail unit is too large and will have an adverse impact on the character of Markyate and therefore is in contradiction with Policy CS16 and saved Policies 43 and 44 as it would have an adverse impact on the existing retail centre within Markyate and has failed to address the sequential approach to site selection. Furthermore, the proposal also raises significant highway safety issues and does not make appropriate provision for car parking. My client also raises concerns over the impact of the application proposal on Markyate Post Office*

and the failure to comply with saved Policy 45 of the Dacorum Borough Local Plan".

10. Mr Bhavesh Patel, the Claimant's uncle and joint owner of the Nisa Local store and Post Office, also wrote on 26 June 2018 raising objections to the proposed development. Mr Bhavesh Patel raised concerns that the proposed development would put both the continuing operation of the Post Office service at the Nisa store at serious risk and lead to a loss of existing jobs in the existing village centre. Mr Patel wrote further letters of objection raising, amongst other matters, concerns about the ability of the Hicks Road public car park to serve the proposed convenience store and the impact of the operation of the store on highway safety.

11. Markyate Parish Council lodged an objection to the proposed development. There were numerous persons who also raised objections and some expressions of support. A petition which attracted over 1,000 signatures was lodged objecting to the 2018 development on a number of grounds, including its impact on highway safety, the lack of car parking, the impact of the proposed convenience store on existing shops with Markyate village centre with a resulting loss of employment and the risk of closure of the Post Office.

12. In October 2018, the Interested Party submitted amendments to the car parking, servicing and delivery arrangements for the change of use of Unit 1 as a convenience store under the proposed development. Those amendments now proposed that 5 car parking spaces be provided on site to serve Unit 1 (4 customer spaces and 1 staff space). The amended plans also included an updated Delivery and Servicing Management Plan (October 2018).

13. Given the existence of a significant level of local interest in and concern about the proposed development, the Defendant decided to undertake a further round of publicity to enable both neighbours and the public to comment on the amended plans for car parking, servicing and delivery arrangements for the proposed convenience store in Unit 1. On 12 November 2018, the planning officer wrote to neighbours, offering a further opportunity to comment on the planning application. The planning officer wrote that any comments would need to be submitted by 3 December 2018 to be considered, and that –

"...your comments will be taken into account by Planning Officers in making a decision".

The planning officer also wrote that most applications are decided at officer level, however some applications are referred to the Defendant's Development Management Committee ('the Committee') for determination. He drew attention to the Defendant's website for an explanation of the process and how people were able to participate in it.

14. The Defendant also gave notice on its website of a further period of public consultation on the planning application. A screen shot of the relevant page dated 23 November 2018 shows that the planning application was "awaiting decision", with an "actual Committee date" of 29 November 2018, and a neighbour and standard consultation running from Monday 12 November 2018 and expiring on Friday 7

December 2018. The same information appears on a screenshot of the same page dated 1 December 2018.

15. In fact, because the planning application was "contrary to the views of Markyate Parish Council", it was reported by the planning officer to the Committee for determination at its meeting on 29 November 2018. The Committee received a full report ('the report') on the planning application from the planning officer.

16. The planning officer drew together his conclusions in section 10 of the report. He concluded that the proposed development would bring vacant units into productive use. The provision of 3 new flats would make a small but valuable contribution to the borough's housing stock. The proposed convenience store would offer a greater choice of food products for local residents. It would serve as a link to the High Street, where other goods and services are available. Considered in the context of the retail policies in the development plan, there were no sequentially preferable sites within the Markyate Local Centre. The size of retail floorspace proposed did not raise the need for a retail impact assessment on the Local Centre. The edge of centre location was considered to be appropriate. Parking and highway impacts had been addressed in a satisfactory way. He recommended the grant of planning permission, subject to conditions.

17. The planning officer appended to the report *verbatim* both the responses received from statutory consultees on the proposed development (appendix 1 to the report) and the responses received from neighbours and members of the public objecting to or supporting the proposed development (appendix 2 to the report).

18. On 28 November 2018, Mr Sutton wrote to the Chair of the Committee reiterating the Claimant's objections to the proposed development and also expressing concern that the planning application was being presented to Committee *"before the end of the current consultation period which does not expire until 3 December 2018"*. An addendum sheet submitted to the Committee for its meeting on 29 November 2018 included the following advice –

> *"Neighbour consultation letters sent on 12 November 2018 erroneously gave 21 days for comment instead of the standard 14. Consequently, it is recommended that the decision is changed from "Grant" to "Delegated with a view to approval" in order to allow time for the consultation period to run its course – i.e. up to 3 December 2018. It is recommended that the application is then determined in accordance with Members' resolution".*

19. The minutes of the Committee's meeting on 29 November 2018 record that the planning officer introduced the planning application to the Committee. The minutes record that, during the Committee's discussion, it was moved and agreed that the planning application should be granted in line with the planning officer's recommendation, with the addition of a condition restricting the length of vehicles delivering to the convenience store in Unit 1. On that basis, and by a majority of two to one, with four members abstaining, the Committee resolved that planning permission be granted, subject to conditions, for the proposed development.

20. The minutes of the Committee's subsequent meeting on 13 December 2018 record that the minutes of its meeting held on 29 November 2018 were confirmed by the Members present and were then signed by the Chair.

21. On 30 November 2018, the Claimant wrote a further letter of objection to the Defendant's planning officer. In that letter, the Claimant reiterated in some detail that his and his co-owners' concerns about the impacts of the proposed development on highway safety, car parking, the shops and businesses in the existing village centre and the risk of losing the Post Office service had not been properly considered and evaluated by the Committee at its meeting on the previous day.

22. On 5 December 2018, the Defendant issued the planning permission.

The report

23. In the report, the planning officer advised that there were four main issues to consider in relation to the planning application for the proposed development. These issues were planning policy and principle, parking and impact on highway safety, impact on appearance of building and street scene, and other material considerations. It is necessary to set out in a little more detail how the planning officer dealt with the issues both of planning policy and principle and of parking and highway safety, in relation to the proposed change of use of Unit 1 to use as a convenience store.

24. Under the heading of policy and principle, the planning officer set out his assessment of the proposed change of use of Unit 1 to retail use in paragraphs 9.2.2 to 9.2.24 of the report.

25. The planning officer said that the Dacorum Core Strategy 2013 ('the Core Strategy') promotes new retail development in central locations first in order to support the vitality and viability of centres. The Core Strategy requires a sequential approach to site selection for new retail development. Policy CS16 states that any new retail floor space will only be permitted outside of a defined centre if the proposal complies with the sequential approach and it is demonstrated that the proposal would not impact upon the vitality and viability of the centre.

26. The planning officer advised that, applying the definition given in the National Planning Policy Framework (2018) ('the NPPF'), the site comprises an 'edge of centre' location for new retail development. He considered that the selection of the site for retail use was in accordance with the sequential approach required by Core Strategy policy CS16, since there were no unoccupied shop units within the existing designated local centre at Markyate. He said that the site had formed part of Strategic Site 2 (SS2) in the Dacorum Borough Local Plan ('the DBLP'), under which *"Ground floor retail uses will be acceptable where they meet local need and complement the existing retail offer within the village centre. Such uses to create a link to/extension of High Street into Hicks Road"*. He also referred to the approved Hicks Road Masterplan which supported *"The provision of small-scale retail uses (Classes A1/A2/A3 and A4) to add life and vibrancy to the new public spaces and to complement the role and function of the existing High Street"*. He said that the 2012 permission had established the principle of retail floor space outside the village centre and of Richmond Square as forming a continuation of that centre.

27. In recognition of the Hicks Road Masterplan's support for "small-scale retail uses" and the fact that the proposed convenience store in Unit 1 would be larger than the retail unit approved under the 2012 permission, the planning officer gave further consideration to what "small-scale retail uses" actually meant in practical terms –

> *"9.2.19 Saved Policy 45 (Scattered Local Shops) of the [DBLP] states that "Small means up to 235 sq. m in area". It is important to note that the proposed net sales area equates to 170 square metres, with the remaining 177 square metres required for back-of-house facilities and plant equipment, which is split over two levels. As such, the whole of the unit (347sqm) is not proposed to be given over to the sale of goods. It is uncommon for convenience stores to operate over two levels; however, for the avoidance of doubt and to allay any potential concerns over the impact of the additional space at first floor level, it has been indicated that the applicant would be amenable to a planning condition limiting the sales area to 170 square metres. The proposal is therefore considered to be a small-scale retail use".*

28. The planning officer then turned to consider the impact of the proposed new convenience store on the existing Nisa Local store –

> *"9.2.21 The Hicks Road Masterplan refers to small-scale retail uses complementing the role and function of the existing High Street, but does not say that competition is inappropriate. Limiting competition is not the role of planning, as acknowledged by the previous case officer. The key issue is the impact on the Markyate local centre as a whole, not the NISA store in isolation. Competition between respective shops can benefit customers (by keeping prices competitive and offering a wider choice of goods), and is an integral part of a free market economy. Whether in a local centre or not, two businesses selling similar products will be in competition with each other."*

29. The planning officer said that, as the doctors' surgery no longer wished to occupy Unit 1, a productive new use now needed to be found for it. At paragraph 9.2.24 he set out the advantages of the proposed new use of Unit 1 as a convenience store –

> *"9.2.24 The combination of a Doctor's surgery and enhanced retail offerings at Richmond Square was intended to serve the growing needs of Markyate. In recent years there have been a number of new developments in and around the area, as well as increases in density through infilling. The provision of a new A1 shop would be commensurate with the growth in population and density within the local area. The site's proximity to the A5183 (formerly the A5) may also attract passing trade from residents of outlying areas – i.e. Flamstead, Pepperstock, Kensworth – on their way to and from work. It is considered that this could have positive spin-off benefits for the other shops and retail offerings within Markyate. The food store is considered to further the aims and objectives of Policy CS23 of the Dacorum Core Strategy, which states that "Social infrastructure providing services and facilities to the community will be encouraged."."*

30. The planning officer summarised his assessment as follows –

> "*The proposal would not conflict with the retail/shopping aims of Policy CS16.*

The principle of a retail unit outside of the Markyate Village Centre was established by [the 2012 planning permission].

Small-scale retail is encouraged in the Hicks Road Masterplan, noting previous approval of a Class A1 use (within Unit 2).

The designated local centre comprises a number of active retailers and there do not appear to be any vacant units.

The site is visually and physically connected to the centre – well connected, as required by paragraph 87 of the NPPF (2018).

The centre suffers from a lack of focus.

The application offers the opportunity to provide a convenience store which would be commensurate with the size of Markyate and take into account the recent growth in population."

31. In relation to car parking provision, the planning officer said that saved appendix 5 of the DBLP set a maximum parking standard of 12 spaces to serve the proposed convenience store in Unit 1. For the reasons given in paragraphs 9.3.11 to 9.3.16 of the report (to which I return later in this judgment), he concluded that the provision of 4 short stay spaces and 1 staff car parking space, as proposed under the amended plans, was acceptable. The planning officer also assessed the adequacy of the updated Delivery and Management Plan and the potential for delivery vehicles turning into Hicks Road from the High Street to disrupt the free flow of traffic and endanger pedestrians on the footway. At paragraph 9.2.23, he acknowledged that a lorry making the turn might encroach to some extent onto the footway connecting Hicks Road to the High Street and also into the oncoming lane. However, such a lorry would not be travelling at speed and could reasonably be expected to take careful note of any pedestrians using the footway at the time. There was unlikely to be any significant resulting disruption to the free flow of traffic. He noted that the highway authority had raised no objection to the proposed development.

The grounds of challenge

32. In her skeleton argument, Ms Sheikh summarised the grounds of challenge advanced by the Claimant as follows –

(1) **Ground 4**: The Defendant misinterpreted saved policy 45 of the DBLP by considering the net floor space and not the gross floor space when assessing whether the proposed development was a small-scale local shop.

(2) **Ground 10**: The Defendant failed to take into account that the proposed development would divert customers away from the High Street. This was a material consideration which the Defendant was required to take into account when assessing whether the proposed development complied with saved policy 44 of the DBLP and policy CS16 of the Core Strategy.

(3) **Ground 11**: The Defendant failed to take into account the impact which the proposed development could have on the continuing availability of the Post

Office. This was a material consideration which the Defendant was required to take into account both when assessing the impact of the proposed development on valued facilities under paragraph 92 of the NPPF and when assessing the impact of the proposed development on the vitality and viability of the Village Centre, under saved policy 44 and policy CS16.

(4) **Ground 12**: The Defendant failed to take into account the impact which the proposed development could have on employment levels in Markyate even though this was a key issue which was raised by numerous objectors.

(5) **Ground 13**: The Defendant misinterpreted the car parking standards contained in saved appendix 5 of the DBLP, by calculating the requirement for parking spaces with reference to the difference in floor space between the proposed retail unit and the existing, permitted retail unit. The correct approach was to consider the gross floor space of the proposed unit.

(6) **Ground 15**: The Defendant breached a procedural legitimate expectation by resolving to grant planning permission before the publicly advertised further period of consultation on the amended planning application had come to an end.

(7) **Ground 16**: The Defendant acted unfairly by consulting at a stage when it had already made up its mind to grant planning permission for the proposed development and was not willing conscientiously to consider consultation responses before it made a final decision.

Legal Principles

33. There is no dispute between the parties over the relevant legal principles against which the Claimant's grounds of challenge are to be considered.

34. In dealing with an application for planning permission, a local planning authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations: section 70(2) of the 1990 Act. The local planning authority must make its determination in accordance with the development plan, unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004 ('the 2004 Act').

35. A local planning authority's decision will be open to legal challenge if it fails to have regard to a relevant policy of the development plan or properly to interpret that policy: City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1459.

36. A planning policy is to be interpreted objectively in accordance with the language used, read in its proper context: Tesco Stores Ltd v Dundee City Council [2012] UKSC 13, [2012] PTSR 983 at [18].

37. Where a claimant seeks judicial review of a local planning authority's decision to grant planning permission on the basis of criticisms of the planning officer's report which informed that decision, the question for the court is whether, on a fair reading of the report as a whole, the planning officer has materially misled the members of the planning committee on a matter bearing on their decision to grant permission. It is

necessary to ask whether any such error went uncorrected before the decision was made. Minor or inconsequential errors may be excused. It is only if the advice in the officer's report is such as to misdirect the members in a material way – so that, but for the flawed advice it was given, the committee's decision would or might have been different – that the court will be able to conclude that the decision itself was rendered unlawful by that advice. See Mansell v Tonbridge and Malling Borough Council and others [2017] EWCA Civ 1314, [2018] JPL 176 at [42] per Lindblom LJ.

38. Having reviewed the relevant authorities in Mansell's case, Lindblom LJ said (at [42]) –

> *"Where the line is drawn between an officer's advice that is significantly or seriously misleading – misleading in a material way – and advice that is misleading but not significantly so will always depend on the context and circumstances in which the advice was given, and on the possible consequences of it".*

Lindblom LJ gave the following as examples of situations in which the court may conclude that the advice given was misleading in a material way: a case in which the planning officer has plainly misdirected the members as to the meaning of a relevant policy; or a case in which the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law.

39. If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed, it may be unfair for that authority to be permitted to follow a different course to the detriment of a person who entertained that expectation, particularly if that person acted in reliance on it. Where the conduct alleged against the public authority is in the form of a statement made by that authority, it is necessary for the statement relied upon to have been clear, unambiguous and devoid of any relevant qualification. See R v Inland Revenue Commissioners ex parte MFK Underwriting Agents Ltd [1990] 1 WLR 1545 at page 1569G-H (Bingham LJ).

40. Consultation must be undertaken in accordance with the principles of fairness, whether or not it is undertaken as a matter of obligation. One of the purposes of consultation is to enable consultees to draw the decision maker's attention to relevant considerations that may otherwise have been overlooked when making the decision. In order to be a "proper" consultation of interested parties or the public, a consultation must (amongst other things) be undertaken when proposals are still at a formative stage; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: see R (JL and AT Baird) v Environment Agency [2011] EWHC 939 (Admin) at [40]-[41] (Sullivan LJ).

Ground 4: Misinterpretation of saved policy 45 of the DBLP

The Claimant's submissions

41. Ms Sheikh submitted that, in paragraph 9.2.19 of the report, the planning officer misinterpreted saved policy 45 of the DBLP in that he assessed whether the proposed convenience store in Unit 1 was a small-scale retail use by reference to its net sales

area rather than (as paragraph 45.2 of the DBLP required) by reference to its gross floor space.

42. Saved policy 45 of the DBLP is principally concerned with protecting existing local shops from change to alternative uses –

> *"**45 Scattered Local Shops***
>
> *The loss of individual local shops outside town centres and local centres to alternative uses will not be permitted unless-*
>
> *a. There is another shop similar in use available for customers within convenient walking distance, or, in the absence of such an alternative, all reasonable attempts to sell or let the premises for shop purposes have failed; and*
>
> *b. The alternative use complements the function and character of the area.*
>
> *Additional small shops may be permitted in exceptional circumstances where there is a proven need".*

43. Ms Sheikh acknowledged that saved policy 45 is not directly relevant to the proposed development, which does not involve the loss of an existing individual shop. Nevertheless, she relied upon the following guidance given in paragraph 45.2 of the DBLP –

> *"45.2 Small means up to 235 sq. m in area. Local shops in this context will usually be newsagents, sub-post office and grocer but could include others in the list of local shops..."*

44. As Ms Sheikh correctly pointed out, the planning officer relied upon that guidance both to explain and to justify his conclusion that the proposed convenience store would be a small-scale retail use. In paragraph 9.2.19 of the report, she submitted, the planning officer applied a threshold of up to 235 sq. m in area to the net sales area alone in Unit 1, in order to determine whether the proposed convenience store was a small-scale retail use. His approach was founded upon a misinterpretation of the definition of a "small local shop" given in paragraph 45.2 of the DBLP. Interpreted objectively in accordance with the language used, and read in its proper context, the reference in that paragraph to "up to 235 sq. m in area" is properly to be understood as a reference to the gross floor space of the shop, and not merely to its net sales area.

Discussion

45. In my view, it is clear from its language, its context and its purpose that the guidance given in paragraph 45.2 of the DBLP requires the decision maker to focus on the overall size of the shop under consideration, rather than its sales area alone. In other words, I accept Ms Sheikh's submission that, if it is right to read that paragraph as stating a definition of a "small local shop", that definition is properly to be understood as being governed by the gross floor area of the unit in question and not merely by its net sales area. The real issue under this ground, however, is whether the planning officer followed a different approach in paragraph 9.2.19 of his report.

46. In my judgment, that is clearly not the case. On the contrary, as I read his reasoning in paragraph 9.2.19, the planning officer followed precisely the approach that Ms Sheikh says paragraph 45.2 of the DBLP demanded of him. The planning officer recognised that taken as a whole, the size of Unit 1 was considerably in excess of the threshold of 235 square metres gross floor area for a small local shop as stated in paragraph 45.2. As he said, the floor area of the proposed shop unit as whole, measured across its two floors, was 347 square metres.

47. He advised, however, that it was uncommon for a convenience store to operate its sales area over two floors. The proposal here was to confine the sale of goods to the ground floor only of Unit 1, a proposal which the applicant was willing to see formalised by the imposition of a planning condition, if that were thought to be necessary. Confined to the ground floor of Unit 1, the net sales area of the proposed convenience store would be 170 square metres, that is to say, no more than half of the size of Unit 1 taken as a whole. The planning officer plainly considered that a net sales area of 170 square metres was consistent with the threshold of 235 square metres gross floor space for small local shops stated in paragraph 45.2 of the DBLP. On that basis, he was able to conclude that the proposed change of use of Unit 1 was to a small-scale retail use.

48. In my judgment, that was a conclusion that he was entitled properly to reach for the reasons that he gave in paragraph 9.2.19 of the report, based on his professional knowledge and experience. He did not misunderstand the guidance given in paragraph 45.2 of the DBLP. As I have explained, his conclusion that the proposal was for a small-scale retail use was founded on his recognition that, taken as a whole, the proposed convenience store was of a size that exceeded the threshold size for a small local shop as stated in that paragraph. For these reasons, Ground 4 fails.

Ground 10: Failure to consider diversion of trade

The Claimant's submissions

49. Ms Sheikh submitted that in his report, the planning officer failed to consider the possibility that the proposed convenience store would divert custom and trade away from Markyate High Street to the Richmond Public Square and result in significant harm to the vitality and viability of the existing Village Centre. This was a substantial point of concern to both the Claimant and many other local objectors, including shopkeepers and business owners, to the proposed development. Objectors feared that the proposed development would seriously damage the vibrancy of the High Street.

50. Ms Sheikh pointed to policy CS16 of the Core Strategy and saved policy 44 of the DBLP. Both policies required the Defendant to assess the likely impact of the proposed development on the vitality and viability of the High Street. The potential for the proposed convenience store to divert trade and custom away from the High Street was a necessary element of that assessment. Yet there was no explicit consideration of these potential impacts, and of local concerns about them, in the report. The planning officer did not address the specific issue of diversion of trade in the context of the vitality and viability assessment required under policy CS16 and saved policy 44. The proper inference to be drawn was either that the planning officer had failed to have regard to those relevant development plan policies or that he had failed to take account of the issue of trade diversion, which was a material

consideration in the determination of the planning application. On either basis, the Defendant had failed in its duties under sections 70 of the 1990 Act and section 38(6) of the 2004 Act.

Discussion

51. The planning officer undoubtedly drew the Committee's attention to policies CS16 and saved policy 44. In paragraph 9.2.2 of the report he said that under policy CS16, any new retail floorspace will only be permitted outside of defined centres if the proposal complies with the sequential approach and demonstrates that the proposal would not impact upon the vitality and viability of an existing centre. In paragraph 9.2.6 of the report, he said that saved policy 44 requires shopping proposals outside defined centres to demonstrate that a sequential approach to site selection has been followed. In summarising his assessment, the planning officer concluded that the proposed development would not conflict with the retail/shopping aims of policy CS16.

52. In paragraph 9.2.12, the planning officer advised that having regard to paragraph 89 of the NPPF, the proposed development was well below the threshold at which an impact assessment is required for the purposes of applying policy CS16. In other words, the nature and degree of any impact that the proposed development might be expected to have on the existing Village Centre was a matter for judgment on the basis of the material facts.

53. In my view, the planning officer's assessment of the likely impacts of the proposed convenience store on the vitality and viability of the existing Village Centre is to be found principally in paragraphs 9.2.21 and 9.2.24 of the report (which I have set out in paragraphs 28 and 29 above). That assessment was as follows -

    (1) There are currently no vacant units in the existing Village Centre.

    (2) As a small-scale retail use in Richmond Square, the proposed convenience store would complement the role and function of the existing Village Centre, which currently lacks retail focus.

    (3) The proposed convenience store was likely to compete with the existing Nisa Local store, but retail planning policy does not seek to limit competition between individual shops.

    (4) On the contrary, such competition can benefit shoppers by keeping prices down and broadening the range and choice of goods available to them.

    (5) The proposed convenience store would help to meet the needs of the growing population with the local area, and also to attract passing trade, in each case leading to "spin-off benefits" for other shops and retail activities within Markyate.

54. In short, the planning officer both acknowledged and drew attention to the potential for the proposed convenience store to divert trade way from the existing Nisa Local store, but advised that it was likely to lead to a number of positive impacts that would be to the overall benefit of the existing Village Centre. On this basis, he was able to

conclude and to advise the Committee that the proposed development would not conflict with the retail /shopping aims of policy CS16.

55. In the light of the above analysis of the planning officer's assessment of the retail impact of the proposed development, I am satisfied that he did consider the possibility that the proposed convenience store would divert trade away from the existing High Street to Richmond Square. He concluded that any such diversion of trade would be likely to be felt primarily by the existing Nisa Local store, but that the overall impact of the proposed convenience store on the vitality and viability of the existing Village Centre along the High Street was likely to be positive. That was a planning judgment that he was entitled properly to reach. He explained why he had done so. His explanation is in accordance with policy CS16 and saved policy 44, both of which contemplate that the impact of new retail development outside of defined centres may be either positive or negative, or involve both positive and negative elements.

56. For these reasons, I am unable to accept Ms Sheikh's submission that the Defendant failed to consider the question of trade diversion. Ground 10 must be rejected.

Ground 11: Failure to consider impact on the Post Office

The Claimant's submissions

57. Ms Sheikh submitted that the Defendant had failed to take into account the potential impact of the proposed development on the existing Post Office operation within the Nisa Local store. She drew my attention to Mr Sutton's letter to the Defendant's Planning Department dated 26 June 2018, in which he said that the existing Post Office counter operates "on the margins of viability". Mr Sutton wrote that –

> *"Any trade diversion from my client's store, which would result in the store's closure, would obviously result in the loss of the Post Office facility. Furthermore, any significant trade diversion from my client's store prejudices its ability to underpin the existing Post Office counter".*

58. Mr Sutton went on to refer to the policy of the NPPF that seeks to guard against the unnecessary loss of local community facilities such as Post Offices. He asserted that –

> *"As part of the officer's assessment of all relevant material considerations, a view of the likelihood of Markyate Post Office closing must be reached".*

59. Ms Sheikh submitted that, notwithstanding Mr Sutton's clear identification of the potential threat posed by the proposed development to the continuing availability of the Post Office counter to the local community and the importance placed on that consideration under national planning policy, the Defendant had failed to take account of that issue before deciding to grant the planning permission. The planning officer had neither acknowledged nor attempted to assess the risk of closure of the existing Post Office counter in the report. This was all the more striking, since the Claimant's concerns on this issue were echoed by those many members of the local community who had put their names to the petition. It was clear that the planning officer had lost sight of the issue, treating it as adding nothing to the assessment of the impact of the proposed development on the existing Village Centre. Whereas as a matter of national and development plan policy, the impact of the proposed development on the Post

Office as a local community facility (albeit one that operates within the existing Nisa Local store) was a distinct material consideration that, on the facts, demanded separate consideration and advice to the Committee in the report.

Submissions on behalf of the Defendant and the Interested Party

60. Both Mr Giles Atkinson for the Defendant and Mr Richard Kimblin QC for the Interested Party resisted these submissions. They accepted that the existing Post Office facility provided at the Nisa Local store was properly to be regarded as a community facility falling within the ambit of paragraph 92 of the NPPF and policy CS23 of the Core Strategy. They submitted that the Claimant had not justified (and could not justify) the Court drawing the inference that the Defendant had failed properly to take into account the potential impact of the proposed development on that community facility.

61. Essentially, both Mr Atkinson and Mr Kimblin presented the following submissions as to the approach that the Court should follow in considering this ground of challenge –

(1) When considering an allegation that a local planning authority has failed to take account of a material consideration, the Court should assess the totality of the information that was before the committee that resolved to grant planning permission.

(2) That information is by no means confined to the contents of the planning officer's report. It will (for example) extend to representations received from consultees, members of the public, and professional persons submitting comments on behalf of neighbours and other interested parties. It will also include the local knowledge and experience of the members of the committee, particularly in a case where the material consideration is the potential impact of the proposed development upon a local community facility.

(3) Members of a local planning authority are to be taken to be familiar with the policies both of that authority's development plan and to have a working knowledge of the NPPF. They are also to be taken to be reasonably familiar with the recent planning history of the site to which the planning application relates.

(4) The approach that the planning officer chooses to take to the presentation and analysis of the planning considerations that arise in any given case is a matter for the planning officer. The task of the Court is to read the report fairly and as a whole: see Mansell's case (paragraph 37 above).

62. Applying that approach, Counsel submitted as follows –

(1) There was no doubt but that Defendant was well aware of the concern raised both on behalf of the Claimant and by others, that the proposed development put at risk the continuing viability of the Post Office counter as part of the Nisa Local store. The planning officer had set out *verbatim* in appendix 2 to the report both the contents of Mr Sutton's letter of 26 June 2018 and other written representations received in relation to the proposed development.

Members of the Committee had the petition drawn to their attention. Moreover, Mr Sutton had written directly to the Chair of the Committee on 28 November 2018 repeating the Claimant's concerns in relation to the Post Office.

(2) Policy CS23 of the Core Strategy is the development plan policy that gives effect locally to paragraph 92 of the NPPF. Policy CS23 states that existing social infrastructure providing services and facilities to the community will be protected. Members of the Committee will have been aware of that policy.

(3) Moreover the planning officer drew the Committee's attention to policy CS23 as a relevant policy and discussed the performance of the proposed development against that policy in paragraph 9.2.24 of the report. The planning officer's assessment in that paragraph was that the proposed development "could have positive spin-off benefits for the other shops and retail offerings within Markyate" and that the proposed convenience store "is considered to further the aims and objectives" of policy CS23. When that assessment is set in the context of his assessment in paragraph 9.2.21 of the potential impact of the proposed development on both the Nisa Local store in isolation and the existing Village Centre as a whole, it cannot justifiably be concluded that the Defendant failed to take into account the asserted impact on the Post Office facility.

(4) It is also the case that the Claimant's and others' asserted concerns about the potential risk to the Post Office facility were not quantified. It was said that the viability of the existing Post Office counter was marginal and that any significant trade diversion from the Nisa Local store would place the Post Office facility in jeopardy. However, the point was put no more scientifically than that. In response, in paragraph 9.2.21 of the report, the planning officer had acknowledged that the Nisa Local store was likely to face competition from the proposed convenience store, but that the latter would complement the existing Village Centre as a whole.

(5) In summary and for these reasons, there was no good reason to infer that the Committee had failed to consider the Claimant's and others' concerns about the potential impact of the proposed development on the Post Office facility. Insofar as those concerns added materially to the assessment of the impact of the proposed development on the existing Village Centre, the Committee had considered them in resolving as it did to grant the planning permission.

Discussion

63. I readily accept that the Court should follow the approach that I have set out in paragraph 61 above. It is beyond reasonable argument that both the planning officer and the Committee were aware of the Claimant's and others' concern that the proposed development would put at risk the continuing viability of the Post Office counter as part of the Nisa Local store. It is also fair to say that there was no evidence before the Committee upon which it was able to assess the scale or degree of that risk in any scientific way. What the Committee did know, however, was that the Claimant, speaking as the operator of the Nisa Local store judged the Post Office operation within it already to be marginal. The Committee also knew that the Claimant

considered that any significant diversion of trade from the Nisa Local store would prejudice the ability to maintain the Post Office counter as a viable part of the Claimant's business.

64. In paragraph 9.2.21 of the report, the planning officer acknowledged that the proposed convenience store would be in direct competition with the Nisa Local store. His answer to the concern that, as a result, the existing store risked loss of trade to the proposed convenience store was that it is not the role of planning control to limit competition between individual shops. From the perspective of retail planning policy, that answer is correct. As the planning officer said (and as is apparent from policy CS16), retail planning policy focuses upon the impact on the existing town or local centre as a whole.

65. However, as Ms Sheikh points out, the issue under this ground arises in the context of a distinct planning policy objective found in policy CS23 and paragraph 92 of the NPPF, that of seeking to protect existing community facilities. Of course it is true to say that the planning policy objective of safeguarding the vitality and viability of an existing town or local centre and the planning policy objective of protecting existing community facilities are to some degree interrelated. In many instances, it may well be that achieving the former objective will lead also to achieving the latter, since the health of the shopping centre and the community facilities within it are found to go hand in hand.

66. But it does not follow that is necessarily the case. It depends on the circumstances. The crux of Ms Sheikh's submission, as I understood her, was that in the circumstances placed before the planning officer and the Committee in the present case, protecting the existing Post Office counter depended not on the impact of the proposed convenience store on the Village Centre as a whole, but rather on the diversion of trade away from the Nisa Local store. In my judgment, that submission is well founded. It follows that, in advising as he did in paragraph 9.2.21 of the report that "The key issue is the impact on the Markyate local centre as a whole, not the NISA store in isolation", the planning officer begged the question as to the degree to which the proposed development was in accordance with national and development plan policy for the protection of community facilities such as (in this case) the Post Office.

67. Both Mr Atkinson and Mr Kimblin submit that the planning officer went on to address that question in paragraph 9.2.24 of the report by reference to policy CS23, with the result that (read fairly and as a whole), there is no foundation to the contention that the Committee was misled.

68. I have set out paragraph 9.2.24 of the report in paragraph 29 above. The focus of paragraph 9.2.24 is clearly upon the benefits to the community that would result from provision of a new foodstore as part of the proposed development. It was that provision that was said "to further the aims and objectives of Policy CS23". There is no mention in that paragraph of the Post Office counter in the Nisa Local store, or any further discussion of the concerns raised by the Claimant and others about the potential loss of that community facility, were the Nisa Local store to lose trade to the proposed convenience store.

69. It is necessary to have in mind that policy CS23 and paragraph 92 of the NPPF have two distinct and complementary objectives. The first objective is to encourage the provision of new social and community facilities, whether in their own right or as a component of new development. The second objective is the protection of existing social and community facilities. Thus, policy CS23 states –

> *"Social infrastructure providing services and facilities to the community will be encouraged.*
>
> *...*
>
> *Existing social infrastructure will be protected...*
>
> *...*
>
> *All new development will be expected to contribute towards the provision of social infrastructure...".*
>
> Paragraph 92 of the NPPF states –
>
> *"To provide the social, recreational and cultural facilities and services the community needs, planning policies and decisions should:*
>
> *a) plan positively for the provision and use of shared spaces, community facilities (such as local shops...) and other local services to enhance the sustainability of communities and residential environments;*
>
> *...*
>
> *b) guard against the unnecessary loss of valued facilities and services, particularly where this would reduce the community's ability to meet its day-to-day needs;*
>
> *..."*

70. In my view, in paragraph 9.2.24 of the report the planning officer was concerned with the first of those two policy objectives. As he put it, "The food store is considered to further the aims and objectives of Policy CS23 of the Dacorum Core Strategy, which states that social infrastructure providing services and facilities to the community will be encouraged". He did not mention or assess the Claimant's and others' concern that the proposed food store would run contrary to the second of the two policy objectives, that of seeking to protect the existing community facility comprising the Post Office counter in the Nisa Local store. Insofar as he did offer advice that bore upon that concern, it was his advice in paragraph 9.2.21 that the impact of the proposed convenience store on the Nisa Local store in isolation was not a significant material planning consideration.

71. Contrary to the submissions of Mr Atkinson and Mr Kimblin, it is clear to me that paragraph 9.2.24 of the report did not address the question as to whether the proposed development was in accordance with national and development plan policy for the protection of existing community facilities. Given the terms and objectives of both development plan policy (i.e. policy CS23) and paragraph 92 of the NPPF, and the

evidence before the Defendant, that was a material consideration. The report did not question that the Post Office counter at the Nisa Local store was a valued local community facility deserving of protection in accordance with policy CS23. The report advised that the proposed foodstore would further the aims and objectives of policy CS23. Yet the report, read as a whole, offered the Committee no explanation or advice as to the risk of closure of the Post Office counter resulting from loss of trade to the Nisa Local store. The report did not suggest that the Claimant's concerns about the loss of trade to the Nisa Local store were unfounded. On the contrary, the report acknowledged that there would be an impact on the Nisa Local store. The report advised, however, that the impact on the Nisa Local store was not a significant planning consideration.

72. For these reasons, in my judgment, Ms Sheikh is correct in her submission that, on a fair reading, the report did not address as a material consideration the risk posed by the proposed development to the Post Office counter within the Nisa Local store.

73. Nevertheless in order to succeed, Ms Sheikh must establish that the error in failing to address that consideration in the report resulted in the Committee being misdirected or misled in a material way: see paragraphs 37 and 38 above. There is force in the submissions of Mr Atkinson and Mr Kimblin that I have set out in paragraph 62 above. It is clear not only that the concerns raised by the Claimant and others were before the Committee but also that the report drew the Committee's attention to policy CS23. However, those submissions do not answer what is, in my view, the decisive point. The report needed to address the question whether the proposed development risked the loss of the existing Post Office counter at the Nisa Local store. That was a material consideration in its own right. The report did not address that consideration. Instead the report advised that the impact on the Nisa Local store in isolation was not a significant planning consideration and that the proposed foodstore fulfilled the aims and objectives of CS23. That was misleading, and materially so, in the sense stated by Lindblom LJ at [42] in Mansell v Tonbridge and Malling Borough Council and others [2017] EWCA Civ 1314, [2018] JPL 176, since it is right to conclude that had the question whether the proposed development risked the loss of the existing Post Office counter at the Nisa Local store been addressed, the Committee at least might have reached the overall conclusion that planning permission should be withheld.

74. For these reasons, I conclude that ground 11 has been made out.

Ground 12: Failure to consider impact on employment levels

The Claimant's submissions

75. Ms Sheikh submitted that the Defendant had failed to take into account the impact that the proposed development was likely to have on employment levels within Markyate. Loss of employment was a key issue raised by objectors to the proposed development in their representations. It was a specific point of concern raised by those who had signed the petition. There was a particular concern that the proposed convenience store would put at risk jobs in the High Street. One of the Claimant's points in relation to the risk to the Post Office had been the impact that was likely to have on levels of employment in the High Street.

76. Despite loss of employment being a key issue raised by objectors, the planning officer had not addressed that issue in the report. It was not enough merely to have included the representations themselves in the appendix to the report. Whilst it was correct to say that the planning officer was not under a legal duty to mention every point raised in relation to the proposed development, the issue of loss of employment was a material consideration of sufficient importance that it needed to be drawn expressly to the Committee's attention. On a fair reading of the report, this key issue had not been taken into account. In the result, the planning officer's assessment of the proposed development as materially misleading. The outcome might have been different if this error had not been made.

Discussion

77. I accept Mr Atkinson's submissions in response to this ground of challenge.

78. The planning officer is not under a legal duty to rehearse every point raised by objectors in his report to the Committee. The claimant's and other objectors' concerns about the potential impact of the proposed development, particularly the proposed convenience store, on levels of employment in Markyate were before the Committee. They were included in the appendix to the report. Likewise, the issues raised in the petition. Loss of employment was not, in itself, one of the key issues raised by Mr Sutton on behalf of the Claimant (see paragraph 9 above).

79. In contrast to her case under ground 11, Ms Sheikh did not draw attention to any distinct development plan or national planning policy objective which supported her argument. Whereas, for the reasons that I have given, the risk of loss of the Post Office as a local community facility was a key policy consideration in its own right, I am unable to reach the same conclusion in relation to objectors' concerns over employment.

80. The focus of objectors' concerns was upon the risk of job losses in the High Street resulting from the coming into operation of the proposed convenience store. As I have concluded in relation to ground 10, in the report the planning officer carried out a proper assessment of the impact of the proposed foodstore on the existing Village Centre in accordance with the relevant policies of the Core Strategy and the DBLP. The planning officer concluded that the proposed development would complement the existing Village Centre and bring a number of benefits overall for shops and retail businesses within Markyate. Conversely, the planning officer advised that the proposed foodstore was likely to compete with the existing Nisa Local store.

81. In my judgment, it is unrealistic for the Claimant to suggest that, in reaching these conclusions, the planning officer failed to take account of the implications for job gains and losses in the High Street and in Markyate as a whole. On the contrary, it is plainly to be inferred that the planning officer considered that the proposed development was likely to result in an increase overall in economic activity within both the High Street and Markyate as a whole, including opportunities for employment. As he noted, Unit 1 at the Richmond Centre had never been occupied. There were no vacant units in the High Street. The proposed foodstore would help to meet the needs of a growing local population. I can find nothing misleading in the planning officer's assessment insofar as concerns the likely effects of the proposed development on levels of employment. Ground 12 accordingly fails.

Ground 13: Misrepresentation of car parking standards

The Claimant's submissions

82. Ms Sheikh drew my attention to the car parking standards set out in saved appendix 5 of the DBLP. She pointed out that the relevant standard for small food shops up to 500 square metres in area was set by reference to the gross floor area of the unit under consideration. The maximum requirement was for one parking space per 30 square metres gross floor area.

83. Ms Sheikh submitted that the planning officer's approach in paragraphs 9.3.13 of the report was founded upon a misinterpretation of the car parking standard in the DBLP. Paragraph 9.3.13 stated –

> *"It must however be acknowledged that a retail permission exists at Richmond Square for 191m2, of which 105m2 could be used for retail sales. A Convenience Store retailer could therefore occupy one of the existing units and trade with no alterations to parking or improvements to the benefit of the area. This application seeks to provide a number of parking spaces commensurate with the uplift in gross floor area; namely 191m2 to 347m2. A difference of 156m2 would give rise to a parking requirement of between 3.9 (75%) and 5.2 spaces (100%)".*

84. Ms Sheikh submitted that the planning officer had followed an approach that was not open to him under appendix 5 of the DBLP. Instead of basing his assessment on the overall gross floor area of the proposed convenience store, he had focused only on the uplift in gross floor area that represented the difference between the size of the retail store authorised by the 2012 permission and the proposed convenience store. The risk with that illegitimate approach was that it ignored existing shortfalls in car parking and so risked making inadequate parking provision for the proposed development, even allowing for the fact that the parking standards are stated to be maxima. In any event, there was a clear misinterpretation of the relevant car parking standard in the DBLP and the Committee had been materially misled.

Discussion

85. The planning officer assessed the car parking requirements for the proposed development in paragraphs 9.3.11 to 9.3.16 of the report. His starting point was as follows -

> *"9.3.11 Saved Appendix 5 of the [DBLP] requires 1 off-road parking space per 30m2 of gross floor area for A1 shops. Consequently, the proposed shop would give rise to a maximum parking standard of 11.56 spaces – essentially 12 spaces as it is not feasible, nor desirable, to provide 0.56 of a parking space".*

86. It is clear from that reasoning that the planning officer's approach to the application of the car parking standard for small food shops at least started from the right place. He applied the relevant standard to the overall gross floor area of the proposed convenience store. In paragraphs 9.3.12 to 9.3.14, the planning officer went on to consider whether there was any basis for reducing the required provision of parking spaces on-site from 12 to a lesser number. Again, that approach was undoubtedly in accordance with appendix 5 of the DBLP, which speaks of the maximum demand-

based car parking standards as "the starting point for progressive reductions in on-site provision".

87. Understood in that context it is clear, in my judgment, that the planning officer's approach in paragraph 9.3.13 of the report is not founded upon a misinterpretation of appendix 5 of the DBLP. As Mr Atkinson submitted in his skeleton argument, the planning officer was doing no more than seeking to identify those factors in this particular case that supported a reduction in on-site provision to serve the proposed development. One such factor was the existence of the 2012 planning permission, which allowed retail operations at Richmond Square without the need to make any on-site car parking provision. There were other factors too, including the likelihood that many of the customers using the proposed convenience store would be from the local area and walk to the store.

88. Nevertheless, I am unable to accept Ms Sheikh's submission that, in taking account of the 2012 permission as he did in paragraph 9.3.13, the planning officer failed properly to interpret or to apply the parking standards in appendix 5 of the DBLP. On the contrary, I am satisfied that the planning officer's approach in paragraph 9.3.13 of the report was a proper exercise in seeking to identify for the Committee those opportunities for progressive reductions in on-site provision that were to be taken into account in relation to the proposed development. Ground 13 accordingly also fails.

Ground 15: Breach of procedural legitimate expectation

The Claimant's submissions

89. Ms Sheikh submitted that the Defendant had made clear to the Claimant and other objectors to the proposed development that the Defendant would not determine the planning application before the expiry of the further period of public consultation on the amended car parking, servicing and delivery arrangements for the proposed convenience store. Given the terms in which the planning officer had written to neighbours on 12 November 2018, the recipients of that letter reasonably expected that the Defendant would not reach its decision on the planning application for the proposed development until after 3 December 2018. Moreover, the Defendant's website gave rise to a reasonable expectation that the planning application would not be determined until after 7 December 2018.

90. In fact, the approved minutes of the Committee recorded that the Defendant had determined to grant planning permission for the proposed development at the meeting of the Committee held on 29 November 2018. There was no contemporary evidence to indicate that the planning officer had reviewed that decision in the light of the further written representations made by the Claimant on 30 November 2018. Nor was there any contemporary record of the Defendant having reviewed the Committee's decision to grant planning permission in the light of further written representations made by other objectors immediately after the Committee on 29 November 2018 and by Ms Eccleston on 2 December 2018. In any event, notice of the grant of planning permission was issued on 5 December 2018. It followed that the Defendant had failed to honour the reasonable expectations of objectors that the period for responding to the further round of public consultation would remain open until 7 December 2018.

91. Ms Sheikh submitted that a legitimate expectation had arisen that the Defendant would not reach its decision on the planning application for the proposed development until it had first considered the responses that it received to the further round of public consultation. In breach of that legitimate expectation, the Defendant had reached its decision to grant the planning permission on 29 November 2018, well before the close of the further period of public consultation, which (for those being guided by the Defendant's website) would not expire until 7 December 2019, by which date the planning permission had actually been issued.

The Defendant's evidence

92. In response to both this ground of challenge and to ground 16 below (which is at least to some degree interrelated), Mr Atkinson sought to rely on two witness statements. Ms Sheikh submitted that those witness statements were inadmissible. It is, therefore, necessary to determine that issue before I proceed to consider grounds 15 and 16 on their substantive merits.

93. It is convenient first to consider the witness statement of Colette Wyatt-Lowe, dated 2 April 2019. Ms Wyatt-Lowe is an elected councillor of the Defendant. She is the vice-chair of the Committee and was present in that capacity at the Committee's meetings held on both 29 November 2018 and 13 December 2018. Ms Wyatt-Lowe's principal purpose in making her witness statement appears to have been to correct what she considered to be the inaccuracy of the Defendant's minutes of the Committee's meeting on 29 November 2018. In paragraph 9 of her witness statement, she says –

> *"9. I have seen the minutes from the meeting of 29 November 2018 and have noticed that they incorrectly state that permission was granted by the committee. This was not the case. The minutes are wrong in that regard".*

94. Ms Sheikh submits that it is not open to the Defendant to adduce evidence which directly contradicts or questions the accuracy of the minutes of the Committee's meeting of 29 November 2018. She referred me to R (Lanner Parish Council) v The Cornwall Council and another [2013] EWCA Civ 1290 at [64] –

> *"64. Save in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached. In the present case the officer's report, the minutes of the Planning Committee meeting and the stated reasons for the grant of planning permission all indicate a misunderstanding of policy H20. These are official documents upon which members of the public are entitled to rely. Mr Findlay's submission that this is not a "reasons" case like Ermakov misses the point. The Council should not have been permitted to rely upon evidence which contradicted those official documents. Alternatively, the judge should not have accepted such evidence in preference to the Council's own official records".*

95. Ms Sheikh submitted that the minutes of the Committee's meeting on 29 November 2018 record the Committee's resolution that planning permission be granted for the proposed development subject to conditions. At its meeting held on 13 December 2018, the Committee had confirmed the minutes of its meeting on 29 November 2018. The confirmed minutes had then been signed by the Chairman. It would plainly be

contrary to the law as stated by the Court of Appeal in Lanner Parish Council's case for me to admit Ms Wyatt-Lowe's evidence, since the clear purpose of that evidence was to contradict the Defendant's own official record and, on that false basis, to outline how the Defendant would have dealt with any further representations received after 29 November 2018 in response to the further public consultation, in accordance with its scheme of delegation.

96. I accept Ms Sheikh's submissions on this issue. It is clear that Ms Wyatt-Lowe's evidence in her witness statement is primarily concerned to correct what she asserts to have been an inaccuracy in the minutes of the Committee's meeting on 29 November 2018. Her account of what would have happened after that date is essentially predicated on the Court accepting her account of what was decided on 29 November 2018 in relation to the proposed development in preference to the confirmed minutes of the Committee meeting held on that date. For the reasons given by the Court of Appeal in Lanner Parish Council's case, it is not open to the Court to proceed in that way. I decline to admit Ms Wyatt-Lowe's witness statement.

97. I turn to the witness statement of James Gardner dated 8 February 2019. Mr Gardner is the Defendant's planning officer who was responsible for the handling of the planning application and who prepared the report to Committee on 29 November 2018. Ms Sheikh objected to the admissibility of Mr Gardner's evidence essentially for the same reasons as she opposed Ms Wyatt-Lowe's witness statement. Ms Sheikh argued that Mr Gardner's evidence was an attempt to remedy, after the event, the Defendant's procedural failings that were evident both from the Committee minutes and from the contemporary record of the course of events from 29 November 2018 until the planning permission was issued on 5 December 2018. That contemporary record showed that both the Claimant and others had made further representations on the proposed development following the Committee meeting on 29 November 2018, but there was nothing to indicate that those representations had been considered by the Defendant prior to the issue of the planning permission on 5 December 2018. It would be contrary to the approach stated by the Court of Appeal in Lanner Parish Council's case for the Court to admit the evidence of Mr Gardner in order to enable the Defendant now to assert the contrary, i.e. that those further representations had indeed been considered.

98. Insofar as Mr Gardner seeks in his witness statement to refine or to supplement the resolution of the Committee as recorded in the confirmed minutes of its meeting of 29 November 2018, his evidence is not to be admitted for the same reasons as I have given in relation to Ms Wyatt-Lowe's witness statement. However, Mr Gardner goes on in his witness statement to give his account of what happened in relation to the further written representations received by the Defendant in response to the further public consultation after 29 November 2018. In paragraph 25, he says –

> *"25. As no new material planning considerations were raised following the committee meeting, in line with the resolution of the committee, the application was subsequently granted on 5 December 2018".*

99. In my view, Mr Gardner's evidence in that paragraph is in no sense seeking to contradict the minutes of the Committee's meeting of 29 November 2018. The grant of planning permission was plainly *"in line with"* the resolution of the Committee as recorded in the confirmed minutes. Mr Gardner's statement that *"no new material*

planning considerations were raised following the committee meeting" of 29 November 2018 does not contradict any official document of the Defendant in evidence before the Court. To the contrary, it is Ms Sheikh's submission that there is no such document which records the Defendant's consideration (or lack of consideration) of the further representations received in the period between 29 November 2018 and 5 December 2018.

100. In my judgment, Mr Gardner's evidence is admissible at least insofar as it provides his account, speaking as the responsible planning officer, of the further written representations received by the Defendant during the period between 29 November 2018 and 5 December 2018 and of the consideration (if any) given to those further representations. To admit his evidence for that purpose does not offend the principle stated by the Court of Appeal in Lanner Parish Council's case. On the contrary, it enables the Court to understand the relevant facts upon which the Claimant's complaints under grounds 15 and 16 are founded. Paragraphs 16 to 25 of Mr Gardner's witness statement address events following the meeting of the Committee on 29 November 2018. Although expressed throughout in the passive voice, which is not entirely satisfactory for the purpose of providing the Court with a clear and precise factual account of what Mr Gardner, as the responsible planning officer, received and considered before he issued the planning permission on 5 December 2018, I am satisfied that those paragraphs of his witness statement provide an accurate account as case officer of his handling of the further written representations received, in response to his letter of 12 November 2018 and the publicity given on the Defendant's website.

Ground 15 - discussion

101. In his skeleton argument, Mr Atkinson referred to the planning officer's letter of 12 November 2018 and to the Defendant's website pages notifying the public of the further period of consultation on the planning application. Mr Atkinson accepted that the contents of those documents gave rise to a legitimate expectation that the period of further consultation would remain open until 3 December 2018. He did not, however, accept that there arose such an expectation that the period of further consultation would remain open until 7 December 2018.

102. I am prepared to proceed on the basis that, insofar as the planning officer's letter and the entry on the Defendant's website may properly be said to have given rise to such a legitimate expectation, the expectation was that the consultation period would remain open until 7 December 2018. I am willing to do so because the planning officer's letter of 12 November 2018 directs those reading it to the Defendant's website for further information about the decision making process, particularly in a case where (as here) the planning application had been referred to the Committee for determination. Had the reader followed that direction, he or she would no doubt have found their way to the website which, at that time, identified the date of expiry of the consultation period as Friday 7 December 2018.

103. The letter of 12 November 2018 informed readers that their comments would be taken into account by planning officers in making a decision on the planning application. The website as it stood at both 23 November 2018 and 1 December 2018 notified readers that the planning application was awaiting decision and that the actual committee date was 29 November 2018.

104. The question arises as to precisely what (if any) legitimate expectation arose in the light of these various statements by the planning officer and the Defendant. In my view, the most that can fairly be said is that the readers of one or other (or both) of these documents were able reasonably to expect that, if they submitted further representations to the Defendant in relation to the planning application by 7 December 2018, the Defendant as local planning authority would take those representations into account in deciding whether to grant planning permission. However, neither of those documents raised the reasonable expectation that the Defendant would postpone the Committee's consideration of the planning application until after the close of the further consultation period. To the contrary, the website was consistent both before and after 29 November 2018 in stating that the actual Committee date fell on that date.

105. The actual course of events was that the Committee did actually meet on 29 November 2018 and resolve that planning permission should be granted subject to conditions. In passing that resolution, in my view, the Committee was not acting in "breach" of any expectation created by the planning officer's letter of 12 November 2018 or the Defendant's website. On the contrary, both the letter and, in particular, the website anticipated that the Committee might meet and consider the planning application on 29 November 2018. Moreover, the Claimant and his professional representative were both well aware of that fact and understood that to be what the Defendant intended. With that in mind, Mr Sutton wrote to the Chair of the Committee on 28 November 2018. Notwithstanding the resolution of the Committee to grant planning permission, on 30 November 2018 the Claimant submitted a further detailed written representation to the planning officer arguing that the planning application required further consideration by the Committee.

106. There is no good reason to infer that others saw things differently. Indeed, the fact that other persons made further written representations to the Defendant objecting to the proposed development strongly indicates that there was a general understanding amongst objectors that the Committee's resolution on 29 November 2018 to grant planning permission was not its final decision on the planning application. In other words, both the Claimant and other objectors well understood that the opportunity to make further representations had not been closed off by the Committee's resolution of 29 November 2018.

107. It follows, in my judgment, that Ms Sheikh's primary argument under this ground is without merit. Far from being in breach of the asserted legitimate expectation that representations made during the further round of public consultation would be conscientiously taken into account prior to the decision to grant planning permission, the Committee's resolution of 29 November 2018 is consistent with that expectation.

108. Ms Sheikh's further argument is that there was a breach of legitimate expectation by reason of the fact that planning permission was issued on 5 December 2018, two days in advance of the close of the consultation period stated on the Defendant's website. Had there been evidence that any further representations were received by the Defendant during that two day period, and that those representations raised relevant matters that had hitherto not been raised and considered in respect of the proposed development, there might have been some force in Ms Sheikh's further argument. But there is no such evidence. Both the contemporary documentary record and the relevant paragraphs of Mr Gardner's witness statement attest to the absence of any

such further representations being made during the period between 5 December 2018 and 7 December 2018. Nor is there any evidence to suggest that any person who might have been minded to make such a representation was discouraged from so doing by the grant of planning permission on 5 December 2018.

109. For these reasons, I am not satisfied that ground 15 has been made out.

Ground 16: Unfair consultation

The Claimant's submissions

110. Ms Sheikh submitted that the further public consultation on amendments to the car parking, servicing and delivery arrangements for the proposed development was unfair, because it was not undertaken at a formative stage and the responses to that further consultation were not conscientiously taken into account before the Defendant decided to grant the planning permission.

111. Ms Sheikh reminded me of the sequence of events during late November and early December 2018. The Defendant opened the further round of public consultation on 12 November 2018. The public was informed that the consultation would continue until at least 3 December 2018; on Ms Sheikh's argument, until 7 December 2018. Yet during that period, the planning officer prepared the report recommending that planning permission should be granted for the proposed development and, on 29 November 2018, the Committee resolved to grant planning permission. Representations received by the Defendant after that resolution to grant planning permission were not fairly and conscientiously considered by the Defendant. Indeed, such representations were not fairly considered after the planning officer had written the report. They could not be fairly taken into account, because both the planning officer and the Defendant had reached a well formed and settled conclusion that planning permission should be granted. The subject matter of the further public consultation, that is to say, the Defendant's consideration of the planning application for the proposed development, was no longer at a formative stage. Certainly, that was the position following the Committee's resolution to grant on 29 November 2018.

Discussion

112. The circumstances of this case are certainly unusual, in that the planning application was reported to the Committee with a recommendation that planning permission should be granted whilst the public was still being consulted on certain aspects of the proposed development. It is entirely unsurprising that, in these circumstances and in the absence of any contemporary document recording the planning officer's further assessment of the written representations received after the Committee met on 29 November 2019, permission was granted on this ground.

113. Nevertheless, I have had the advantage both of hearing argument from Counsel on the substance of the representations received by the Defendant after 29 November 2018 and of considering paragraphs 16 to 25 of the witness statement of the planning officer, Mr Gardner.

114. By far the most extensive of the further written representations received by the Defendant after 29 November 2018 was that submitted by the Claimant on 30

November 2018, which was supplemented by his letter of 3 December 2018. Ms Sheikh emphasised that the focus of those further representations was upon an aspect of the proposed development that was particularly controversial within the local community, that is to say the impact of the operation of the proposed convenience store on highway safety and the free flow of vehicles in and around Markyate Village Centre. The Claimant had made a series of further, detailed points about those issues which added substantially to the position as reported to the Committee in paragraphs 9.3.8 to 9.3.25 of the report. Moreover, she argued, the Committee had themselves been divided and the minutes recorded that members of the Committee had particular concerns about the ability of the local road network to accommodate service and delivery vehicles associated with the proposed convenience store.

115. I see the force of these submissions. Nevertheless, having considered and compared carefully both the matters reported by the planning officer to the Committee in paragraphs 9.3.8 to 9.3.25 of the report, the issues raised by objectors in representations that were set out in detail in the appendix to the report, and the reported lack of objection of the local highway authority following the amendments made to the proposed car parking, servicing and delivery arrangements, I am not persuaded that the Claimant's written representations of 30 November 2018 and 3 December 2018 added anything of substance to the information and arguments already before the Committee on 29 November 2018. Indeed, it is a theme running through the Claimant's letter of 30 November 2018 to draw the Defendant's attention to the fact that he had already raised the point at issue in previous representations, albeit without success. Fair consultation demands that the consultee's representations must be conscientiously considered by the decision maker; it does not demand that those representations must prevail.

116. Mr Atkinson submitted that ultimately it was enough that the planning officer had read and considered the further representations submitted by objectors during the period after 29 November 2018. If, having done so, the planning officer concluded that those further representations did not raise any new matter of relevance and substance to the planning application, or anything that called into question the accuracy or fair balance of the report, then the planning officer was able fairly and reasonably to conclude that there was no reason to refer the matter back to the Committee: the planning permission could properly be issued. Mr Atkinson submitted that the evidence supported the conclusion that this was indeed what had happened. In his witness statement, the planning officer had stated that objectors had not raised any new material planning considerations in their further representations following the Committee meeting on 29 November 2018. Those matters that the Claimant and others, including Ms Eccleston, had raised had either been addressed in the report or during the course of the Committee meeting.

117. I accept Mr Atkinson's submissions. The focus of the Claimant's further written representations was upon the inadequacy of the highway to accommodate the servicing and delivery arrangements for the proposed convenience store without serious disruption to traffic and danger to pedestrians. The report dealt clearly with those issues. Paragraphs 9.3.21 and 9.3.22 addressed the first of them. Paragraphs 9.3.23 to 9.3.24 addressed the safety issue concerning the need for delivery vehicles to mount the kerb. I have no doubt that the Claimant and other objectors are not persuaded by the planning officer's reported response to their concerns and surprised

at the lack of objection from the local highway authority. But that is a different thing altogether. For my part, I am not satisfied that the Defendant, through its planning officer, failed conscientiously to consider the further representations made by the Claimant and other objectors during the period following the Committee's resolution to grant planning permission at its meeting on 29 November 2018. I am satisfied that, albeit that the Committee was plainly minded that planning permission should be granted, nevertheless the Defendant remained at a formative stage in decision making, pending the planning officer's receipt and consideration of the further representations received from objectors, a process that was properly completed prior to the issue of the planning permission on 5 December 2018.

Conclusion

118. I conclude that ground 11 of the claim has been made out. Although in their skeleton arguments Counsel for the Defendant and the Interested Party invited the Court to withhold relief in the exercise of its discretion, they did not press that argument in oral submissions. In any event, I am in no doubt that it would not be appropriate for me to take that course. Modest in scale the proposed development may be, but the Claimant raised before the Defendant a material consideration of substance as regards the protection of a local community facility, that was firmly founded upon the policy of both the development plan and the NPPF. The Claimant did so, speaking as the co-owner and operator of the Nisa Local store and the Post Office within it, and his concerns were founded upon his own assessment of the risk posed to that community facility by any significant loss of trade from his store to the proposed new convenience store. The report needed to consider that issue. It did not do so. It is at least a realistic possibility that the Committee will take a different view of the proposed development, when it does reflect upon the risk that it presents to the continued operation of the Post Office counter within the Nisa Local store at Markyate.

119. The claim succeeds on ground 11. All the remaining grounds of challenge fail.