VEOLIA ES (UK) LTD

Claimants

-and-

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendant

and

HERTFORDSHIRE COUNTY COUNCIL

and

WELWYN HATFIELD BOROUGH COUNCIL

and

NEW BARNFIELD ACTION FUND

and

GASCOYNE CECIL ESTATES

Interested Parties

GROUNDS OF CLAIM

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1. INTRODUCTION

1. This is a claim pursuant to section 288 of the Town and Country Planning Act 1990 (TCPA 1990) that seeks an order quashing the decision of the Defendant given by letter dated 7 July 2014 ("DL") to refuse an application for planning permission by

the Claimant for the construction and operation of a waste recycling and energy recovery facility ("RERF") on land at New Barnfield, Hatfield, Hertfordshire.

2. The application for planning permission was made on 16 November 2011 and on the 28th January 2013 the Secretary of State (the Defendant) directed in pursuance of section 77 of the TCPA 1990 that the application be referred to him instead of being dealt with by the waste planning authority, Hertfordshire County Council.

3. A public inquiry was held by an Inspector appointed by the Defendant on dates between 10 September and 25 October 2013.

4. The waste planning authority supported the proposals at the inquiry, having resolved to grant planning permission subject to a referral to the Defendant. Welwyn Hatfield Borough Council, the New Barnfield Action Fund and the Gascoyne Cecil Estates appeared as parties in opposition to the proposals at the Inquiry. English Heritage appeared in opposition on heritage matters.

5. The Inspector recommended in his report to the Defendant ("IR") that planning permission should be refused. The Defendant accepted that recommendation for the reasons set out in the DL.

6. The Claimant acknowledges that a claim under section 288 is limited to points of law and is not a re-run of the planning merits. Although matters of planning judgment are for the Defendant and his Inspector, the striking of the balance of competing factors in making the overall judgment on the acceptability of a proposed development must be on a lawful basis. This Claim is based upon the errors that the Defendant has made in respect of both relevant national and local policy and other material considerations.

This has resulted in that overall judgment being unlawful as application of the correct policy approach could have led to a different overall conclusion by the Defendant.

7. The Secretary of State and the Inspector weighed on one side of the planning balance the harm they identified that would be caused by the proposed facility to the openness and other purposes of the Green Belt, by its landscape visual and visual effects, by its effects on heritage assets, by the perceived effects on Southfield School and the effects on its setting and context as against on the other side of the balance the need for the development, the absence of any alternative sites, its carbon balance and climate change benefits and the potential for combined heat and power. The Defendant found that the balance came down against the proposal and so very special circumstances were not shown clearly to outweigh the harm to the Green Belt and the other harm identified.

8. The need in Hertfordshire to divert very large quantities of waste from landfill in accordance with European and national obligations and policy was accepted and it was accepted that that need would not be able to be met in the absence of the proposals for at least some 7 to 10 years. It was accepted that over half of Hertfordshire is Green Belt and that the population and waste arisings are centred on the south of the county and within the Green Belt. It was accepted that significant quantities of waste are exported from Hertfordshire and that this is not in accordance with the proximity principle. It was accepted that the proposals were sustainable and that a thorough and reliable exercise had been carried out to see if there was an alternative site and it was accepted that there was none. It was accepted that there are no proposals to deal with the waste in smaller facilities of the nature proposed and that such facilities would not be proportionately smaller or less visually intrusive than the New Barnfield proposal. It was accepted that the harm to heritage assets was less

than substantial. It was accepted that there would be no harm in terms of noise, highways and traffic, air quality, health and issues of equality or ecology.

9. So the need is urgent, there is no other place or way to meet it which would not be in the Green Belt or would not be significantly less harmful but planning permission was refused. The Defendant does not suggest a solution other than to observe that it is "reasonable to expect that HCC and Veolia have considered what options would be available to them in the event of planning permission being refused."[1] All potential alternatives were debated at the inquiry at length and there was no evidence of any such alternative other than the continuation of landfill in breach of European and national obligations and policy if landfill capacity could be found.

The Law:

10. ***The statutory framework for the determination of the application*** is as follows.

    Section 70(2) of the TCPA provides that in dealing with a planning application:

    "The authority shall have regard to–

    a) The provisions of the development plan, so far as material to the application…

    b) any local finance considerations, so far as material to the application…

    c) any other material considerations."

11. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides that where regard must be had to the development plan, a determination must be made in

[1] IR980 and DL39

accordance with the development plan unless material considerations indicate otherwise.

12. ***The scope of an application under section 288 TCPA 1990***

> Section 288 of the 1990 Act provides, so far as is material, that: *"(1) If any person—*
>
> *...*
> *(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds–*
> *(i) that the action is not within the powers of the Act, or*
> *(ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section. ...*
> *(5) On any application under this section the High Court—*
> *...*
> *(b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."*

13. Section 288(1)(b)(ii) relates to procedural requirements, and is qualified by the requirement that the claimant should show that he has been substantially prejudiced by the failure to comply with the provisions (subs.(5)(b)). There is some degree of overlap between the limbs of the statutory formula.

14. The general principles of judicial review are applicable. As Forbes J. said in *Seddon Properties v Secretary of State for the Environment (1981) 42 P&CR 26* :

> *"(1) The Secretary of State must not act perversely. That is, if the court considers that no reasonable person in the position of the Secretary of State, properly directing himself on the relevant material, could have reached the conclusion which he did reach, the decision may be overturned. See, e.g. Ashbridge Investments Ltd v. Minister of Housing and Local Government [1965] 1 W.L.R. 1320 , per Lord Denning M.R. at 1326F and Harman L.J. at 1328H. This is really no more than another example of the principle enshrined in a sentence from the judgment of Lord Greene M.R. in Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1 K.B. 223 at 230:"*

> *"It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere."*
> *(2) In reaching his conclusion the Secretary of State must not take into account irrelevant material or fail to take into account that which is relevant: see, e.g. again the* ***Ashbridge*** *Investments case, per Lord Denning M.R. loc. cit.*
> *(3) The Secretary of State must abide by the statutory procedures, in particular by the Town and Country Planning (Inquiries Procedure) Rules 1974 (*as they then were*). These Rules require him to give reasons for his decision after a planning inquiry r.18 and those reasons must be proper and adequate reasons which are clear and intelligible, and deal with the substantial points which have been raised: Re Poyser and Mills Arbitration [1964] 2 Q.B. 467 ."*

15. In accordance with the requirements of public law, the Secretary of State must ask himself the right question and take reasonable steps to acquaint himself with the relevant information to answer it correctly: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014* , per Lord Diplock at 1065B. He ought to take into account a matter which might cause him to reach a different conclusion – the use of the word "might" means that there must be a real possibility that he would reach a different conclusion if he did take that consideration into account: *Bolton MBC v Secretary of State for the Environment (1990) 61 P & CR 343* , per Glidewell LJ at 352–252.
16. The exercise of planning judgment and the weighing of the various issues are entirely matters for that decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment (1981) 42 P & CR 26* , at 28 and *Tesco v Secretary of State for the Environment* [1995] 1 WLR 759 , at 780. In the latter case Lord Hoffmann said: "If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State".

17. In *Newsmith v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 74* (a case concerning a challenge to a planning inspector's decision) Sullivan J., as he then was, said at [6] – [8]:

> *"An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is Wednesbury perverse is, in principle, within the scope of a challenge under section 288 , but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.*
>
> *In any case, where an expert tribunal is the fact finding body the threshold of Wednesbury unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.*
>
> *Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site*

inspection. Against this background an applicant alleging an Inspector has reached a Wednesbury unreasonable conclusion on matters of planning judgment, faces a particularly daunting task ... "

18. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment [1992] 2 AC 141* , at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment (1993) 66 P & CR 263* , at 271; *Seddon Properties v Secretary of State for the Environment (1981) 42 P & CR 26* , at 28; and *South Somerset District Council v Secretary of State for the Environment (1993) 66 P & CR 83* .

19. A decision letter ought to be construed in a reasonably flexible manner: *Seddon Properties v SSE [1981] 42 P&CR 26* (at 28). Because the decision letter "is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph."

20. *Tesco Stores v Dundee City Council [2012] P.T.S.R. 983* dealt with the approach to planning policy as follows:

"18. ... policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.

19 That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose

to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759 , 780, per Lord Hoffmann. Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

21. The proper application of policy may be a valid ground of challenge if the decision-maker has misunderstood the policy: *Gransden (E.C.) Ltd v SSE* [1986] JPL 519 and [1987] JPL 365 and *R (oao Hunston Properties Limited) v SSCLG* [2013] EWCA Civ 1610.

22. The relevant principles on the adequacy of reasons were summarised by Lord Brown in *South Bucks District Council and another v Porter (No 2) [2004] 1 W.L.R. 1953* :

"36. 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. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. 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. 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."

THE GROUNDS

(i) Failure to take into account as part of very special circumstances that the WSALDD Inspector endorsed allocation of New Barnfield and considered

that should carry weight in the determination of very special circumstances.

23. The Waste Site Allocations Local Development Document inspector carried out the examination into the document submitted to the Defendant by the waste planning authority which seeks to identify and allocate sites needed for waste management in the whole county. After carrying out that examination he reported[2]:

> *"Over half of the county is designated as Green Belt. The Areas of Search for organic waste recovery facilities and local authority collected waste treatment and transfer facilities fall predominantly within the Green Belt. It is not possible to meet the anticipated needs of the county without developing waste management facilities on Green Belt land.*
>
> *There are exceptional circumstances for the allocation, for waste management purposes, of five Green Belt sites. These sites are Waterdale; Travellers Lane New Barnfield Centre; Roehyde; Westmill; and Birchall Lane. They are sites which contain or have been used for waste management provision in the past or are previously developed sites in whole or in part.*
>
> *Having demonstrated exceptional circumstances to justify the allocation of these Green Belt sites, it is envisaged that they would be omitted from the Green Belt. Related alterations to defined Green Belt boundaries would be effected by the relevant district / borough councils within the county at the time of adoption of their local plans. Until that time, there would have to be a demonstration of very special circumstances in respect of any inappropriate development. Such very special circumstances would include the fact that allocation of the site*

[2] Inspector's Report at MM9 page 15

for waste management purposes was deemed acceptable under the terms of this Waste Site Allocations Plan". (Emphasis added)

24. The Defendant had this report before him when he made his decision and refers to it at DL18 but nowhere does he acknowledge that the fact of allocation or recommended allocation of the application site at New Barnfield should be included amongst the very special circumstances. In his consideration of the "planning balance and overall conclusion" at DL 50 to 55 he does not mention that the WSALDD Inspector recommended that the fact that the allocation of New Barnfield was considered acceptable under the terms of the Waste Site Allocations Plan should itself be part of the very special circumstances justifying permission and nowhere does the Secretary of State put that in the balance on the side of granting permission.

25. That is a failure to take into account a material consideration (*Seddon Properties* above) and is a public law error which justifies quashing the decision so as to allow the balance to be reconsidered with that factor in the scale on the side of granting permission.

(ii) Adopting an incorrect approach to the consideration of harm in assessing whether very special circumstances existed to justify planning permission.

26. The approach to the consideration of 'very special circumstances' in national policy is set out in paragraphs 87 and 88 of the National Planning Policy Framework. Those paragraphs read:

"87. As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.

> *88. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness , and any other harm, is clearly outweighed by other considerations."*

27. These paragraphs were considered in **Redhill Aerodrome Limited v SSCLG** [2014] EWHC 2476 (Admin) in which judgment was given on the 18th July 2014. The case concerned a proposal to construct a new hard runway to replace the existing grass runways and for associated works at Redhill Aerodrome in the Metropolitan Green Belt. The appeal against the refusal of planning permission was dismissed. The Inspector found that the proposed development was inappropriate and that the Green Belt would also be harmed by loss of openness and by encroachment into the countryside. She also evaluated harm other than to the Green belt by reason of harm to landscape character and visual amenity, by noise and disturbance and in highway matters. She concluded that the factors that weighed in favour of the proposal did not clearly outweigh the potential harm to the Green Belt and the other identified harm so very special circumstances to justify the development did not exist.

28. The claimants in that case challenged the decision under section 288. They argued:

> *"34. 'Any other harm' in the immediate context can only mean harm to the Green Belt. The correct approach is, therefore, to go through the harm which is caused when a development is inappropriate in the Green Belt ('definitional harm') and add to that actual harm to the Green Belt. That combination amounts to substantial weight against a development proposal. Against that have to be placed the positive factors in favour of the development before reaching a conclusion as to*

whether very special circumstances have been demonstrated to clearly outweigh the harm to the Green Belt."

29. Their approach was accepted Mrs Justice Patterson. She held:

"54. ...All of planning policy is contained within the NPPF which is to be read and interpreted as a whole. That includes when, for individual considerations in a planning application, it is appropriate to refuse planning permission. For each of the individual considerations a threshold is set which, when it is reached or exceeded, warrants refusal. It is for the decision maker to determine whether the individual impact attains the threshold that warrants refusal as set out in the NPPF. That is a matter of planning judgement and will clearly vary on a case by case basis.

55. Here, the individual non Green Belt harms did not reach the individual threshold for refusal as defined by the NPPF. Was it right then to take them into account either individually or as part of the cumulative Green Belt harm assessments?

56. On an individual basis given the clear guidance given in the NPPF I have no difficulty in concluding that, in this case, it was not right to take the identified non Green Belt harms into account. The revised policy framework is considerably more directive to decision makers than the previous advice in the PPGs and PPSs. There has, in that regard, been a considerable policy shift. Where an individual material consideration is harmful but the degree of harm has not reached the level prescribed in the NPPF as to warrant refusal, in my judgment, it would be wrong to include that consideration as "any other harm".

57. That leaves the question of whether individual considerations can be considered together as part of a cumulative consideration of harm

> *even though individually the evaluation of harm is set at a lower level than prescribed for refusal in the NPPF. In my judgment it would not be right to do so."*
>
> ...
>
> *59. It is submitted ... by the defendants that such an approach would render the words "any other harm" otiose. I do not accept that submission. Once a development has been found to be inappropriate in the Green Belt it is by definition harmful. To that harm has to be added additional harm to the Green Belt. In the context of the NPPF that is what "any other harm" means."*

30. So the Judge held that in determining whether 'very special circumstances' exist only harm to the Green Belt – that is 'definitional harm' by reason of inappropriateness together with any other harm to the Green Belt such as harm to its openness or to its purposes such as prevention of by encroachment into the countryside - is to be weighed against the 'other considerations' which weigh in favour of the proposal.

31. Furthermore, the Claimants argued that the NPPF sets specific tests or thresholds for when non-Green Belt harm is being considered. For example, for heritage considerations they submitted that *"the threshold for refusal is whether the development would lead to substantial harm (paragraph 133)"* [3](of the NPPF). The judge does not seem to have disagreed with that view. So if a non-Green Belt "harm" is below the NPPF threshold for refusal it cannot be put in the balance against the other considerations.

[3] See paragraph 23(iii) of the judgment. That should in fact be a reference to paragraph 134 of the NPPF.

32. The Judge held that the Inspector had not approached the balance in this way and so quashed her decision.

33. Neither the Inspector nor the Secretary of State in the New Barnfield case approached their decision in this way. The Inspector put all the harm to the Green Belt and the other non-Green Belt harm he identified into the balance on one side and the benefits into the balance on the other side "to determine whether VSCs exist."[4] The Secretary of State followed suit.[5]

34. The **Redhill Aerodrome** case establishes that they have followed the wrong approach and they have misunderstood and misapplied national policy in the NPPF (see *Gransden* above).

(iii) ***Prematurity:***

35. The Defendant agreed with the Inspector that "planning permission would be highly likely to prejudice the outcome of the WSALDD process"[6] – that is, the process leading to the adoption of the site allocations development plan document. And yet the Inspector who conducted the examination into the New Barnfield draft allocation recommended that the site be allocated for waste management including for thermal treatment as was proposed in the application. The basis for the prematurity argument is said to be that New Barnfield "would absorb all the residual local authority collected waste stream and considerable quantities of residual commercial and

[4] That is: 'very special circumstances': see IR 726 and see IR 1058 -1076 especially IR1060, 1072 and 1076
[5] DL 54 and especially DL55
[6] DL47 and see IR 1051-1057

industrial waste, which may adversely affect the investment prospects for other developments.[7]" There is however an accepted pressing need to manage this waste. There are no alternatives to New Barnfield available in the foreseeable future. A one-site solution is not excluded by the Waste Core Strategy or by the Site Allocations document. There is no planning reason therefore to exclude New Barnfield on this ground. The Inspector and the Defendant have misunderstood and misinterpreted adopted policy in the Waste Core Strategy and emerging policy in the Wastes Sites Allocations document (see *Gransden* above).

(iv) Misinterpretation and misapplication of Policy RA6 of the Welwyn Hatfield District Plan:

36. This is a policy which identifies what development on a major developed site in the Green Belt would not be inappropriate and therefore would not have to show very special circumstances to justify the grant of planning permission. The Claimants always acknowledged that the proposed facility would not satisfy the criteria of this policy to qualify as appropriate development in the Green Belt because of its size and scale[8] and always accepted that very special circumstances would have to be shown to justify planning permission.

37. The Inspector has nevertheless gone on to test the proposal against the criteria in RA6[9] and afforded "substantial weight to non-compliance with the policy."[10] But it is because the proposal does not comply with these criteria that very special circumstances have to be shown in the first place so there is double-counting against

[7] IR1057
[8] See IR 116
[9] See IR731
[10] IR1049

the proposal to give the non-compliance with the criteria for appropriate development substantial weight and also use it in the balance on very special circumstances. The Secretary of State adopted the same approach: DL20. They have misinterpreted and misapplied this policy: see *Gransden* above.

(iv) Failure to deal with the absence of a solution:

38. The Defendant did not address the consequences of a refusal of planning permission other than simply by saying that HCC and Veolia must have thought of something[11] when there is no evidence of what that something can be and when the Defendant does not identify it.

39. The Defendant therefore took into account a matter for which there was no evidence and failed to take into account the material consideration that that there was no alternative solution to the accepted pressing need to divert waste from landfill in the county: see *Seddon Properties* above.

(vi) Inconsistency in decision-making:

40. The Secretary of State by a decision letter dated the 14th July 2014 gave planning permission in the Green Belt in the neighbouring St Albans district of Hertfordshire for a strategic rail freight interchange whilst recognising that it would have a substantial impact on the openness of the Green belt, that it would result in a significant encroachment into the countryside, would contribute to urban sprawl and

[11] DL39 and IR 980

cause harm to the setting of the historic city of St Albans.[12] He went on to find that there was a need for such a facility and no alternative sites.

41. Consistency in planning is to be sought[13] but the Defendant has adopted entirely different and inconsistent approaches to these proposed developments and has given no explanation of or reasons for why he has reached completely different conclusions: see *South Bucks District Council* above.

RHODRI PRICE LEWIS QC

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[12] Appeal Decision: Helioslough Ltd - Strategic Rail Freight Interchange, Upper Colne Valley, Hertfordshire. Ref: APP/B1930/A/09/2109433 at DL24

[13] *North Wiltshire v SSE* [1992] 65 P&CR 34 and *Fox Strategic v SSCLG* [2013] 1 P&CR 6