CO/2375/2016

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 9 December 2016

B e f o r e:

MR JUSTICE MITTING

Between:

THE QUEEN ON THE APPLICATION OF EAST BERGHOLT PARISH COUNCIL
Claimant

v

BABERGH DISTRICT COUNCIL
Defendant

PAUL BERNARD AGGETT (1)
SARAH JANE AGGETT (2)
Interested Parties

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(Official Shorthand Writers to the Court)

Miss Sasha Blackmore (instructed by Royds Withy King) appeared on behalf of the **Claimant**
Mr Reuben Taylor QC and Mr Mark Beard (instructed by Head of Legal, Babergh District Council) appeared on behalf of the **Defendant**
Miss V Hutton (instructed by Linda Russell Solicitors) appeared on behalf of the **Interested Parties**

J U D G M E N T
(Approved)

1. MR JUSTICE MITTING: On 9 March 2016, the Planning Committee of Babergh District Council resolved to grant planning permission for the erection of 10 single-storey dwellings for the over-55s and ancillary works on a 0.87-hectare site off Hadleigh Road, East Bergholt. Planning permission was granted on 29 March 2016. East Bergholt Parish Council challenges that decision and grant.

2. The site is the major part of a meadow between two listed buildings to the north and south, Gatton House and The Gables. It lies to the east of the modern built-up area of East Bergholt to the north of the old village. It is in an area designated as an Area of Outstanding Natural Beauty and abuts the conservation area which includes the old village but not the substantial modern additions to the north.

3. The principal grounds of challenge are four: (1) the Local Planning Authority did not follow its own policy set out in its Local Plan adopted in February 2014; (2) it did not properly apply paragraph 115 of the Planning Policy Framework or deal adequately with the heritage issues; (3) it failed to have proper regard to the emerging Neighbourhood Policy produced by East Bergholt Parish Council; (4) it did have regard to a financial benefit to Babergh District Council without disclosing that fact.

4. East Bergholt is a village of 2,700 inhabitants in rural Suffolk in Constable country to the south of Ipswich. It is designated in Babergh's Local Plan as a "Core Village". The significance of the designation is set out in policy CS (for Core Strategy) 2 in the Local Plan:

    i. "Core Villages will act as a focus for development within their functional cluster and, where appropriate, site allocations to meet housing and employment needs will be made in the Site Allocations document."

5. A "functional cluster" comprises a Core Village, a number of - not less than five - Hinterland Villages, of which there are 43; and the countryside and smaller settlements in between.

6. Paragraph 2.1.3.2 of the Local Plan explained that Core Villages were defined as such because of the role that they played in the provision of essential services and facilities to a catchment area of smaller villages and rural settlements. Policy CS2 contained two significant further statements. One:

    i. "In all cases the scale and location of development will depend upon the local housing need ... and the views of local communities as expressed in parish ... neighbourhood plans."

7. Two:

    i. "In the countryside, outside the towns/urban areas, Core and Hinterland Villages defined above, development will only be permitted in exceptional circumstances subject to a proven justifiable need."

8. "Countryside" was not defined in Policy CS2, but it was in paragraph 2.1.5.1 of the explanatory notes which preceded it:

    i. "Everywhere beyond the built up areas of the urban/regeneration areas and Core and Hinterland Villages, defined by settlement development boundaries, is treated as open countryside".

9. As noted, allocations to meet housing needs were to be made in a site allocations document. This has not yet been done.

10. Policy CS3 set out Babergh's strategy for growth and development. It included provision for 5,975 new dwellings between 2011 and 2031 in the district. Of these, 1,050 were to be provided in Core and Hinterland Villages. As Note 4 to the table of

dwellings to be built in identified locations stated, this figure was the allowance for rural growth.

11. Policy CS11 set out the strategy for development for Core and Hinterland Villages:

    i. "Proposals for development for Core Villages will be approved where proposals score positively when assessed against Policy CS15 and the following matters are addressed to the satisfaction of the local planning authority (or other decision-maker) where relevant and appropriate to the scale and location of the proposal:

ii) the landscape, environmental and heritage characteristics of the village;

iii) the locational context of the village and the proposed development (particularly the AONBs, Conservation Areas and heritage assets;

iv) site location and sequential approach to site selection;

v) locally identified need - housing and employment, and specific local needs such as affordable housing;

vi) locally identified community needs;

vii) cumulative impact of development in the area in respect of social, physical

and environmental impacts."

12. Policy CS15 sets out a long list of desirable characteristics in proposals for development which are not in issue in these proceedings and do not require to be set out.

13. Two paragraphs of the explanatory notes to Policy CS11 are relevant to its interpretation for present purposes:

    i. "2.8.5.4: It is clear that the Core Villages identified are very varied and their needs and factors which influence what is an 'appropriate level of development' will vary from village to village. This is especially the case where villages are situated within environmentally and visually sensitive landscapes, particularly the AONBs, and/or where they include conservation areas and heritage assets. These landscapes and heritage assets will be key considerations in the site allocation process, and when considering planning applications. Although a total number of 1,050 new dwellings is indicated in Policy CS3, this includes the ten Core Villages and all the Hinterland Villages. It is therefore important that this not viewed as a sum simply to be divided equally or randomly between the number of villages listed. The approach to the distribution of new dwellings within Policy CS3 is to be driven by the function of the villages, their role in the community, and the capacity for a particular level of growth which will be guided by many factors and which will result in a different level of development being identified as 'appropriate' in different settlements, even those within the same category."

14. There is then a reference to the Site Allocations document, which is the same document as that referred to in Policy CS2.

15. Paragraph 2.8.5.7 provides:

> i. "The BUABs [Built-Up Area Boundaries] defined in the 2006 Local Plan Saved Policies and later in a future DPD [Development Planning Document] for Site Allocations, provide a useful starting point when considering the relationship of proposed development in relation to the existing pattern of development for that settlement and for defining the extent of its developed area and a distinction between the built up area and the countryside. Policy CS11 intentionally provides greater flexibility for appropriate development beyond these, for identified Core and Hinterland Villages subject to specified criteria."

16. It is common ground that the interpretation of these policies is a matter of law, see Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 at paragraph 17, but that they are not to be read like a statute or contract (SSCLG v Hopkins Homes Ltd [2016] EWCA (Civ) 168 at paragraph 24). That is fortunate, because the policies are far from clear.

17. The first question in issue is whether or not Policy CS11 is an exception to or supplants Policy CS2. Mr Taylor QC and Mr Harwood QC for the Local Planning Authority and the applicant for planning permission and interested party respectively submit that it is and does. Miss Blackmore for East Bergholt Parish Council submits that it does not.

18. Mr Taylor and Mr Harwood submit that the purpose of Policy CS11 is, as explained in paragraph 2.8.5.7 in the explanatory notes, to afford the Local Planning Authority greater flexibility for appropriate development outside the built-up area boundaries as defined in the 2006 plan or in the as yet undrafted Site Allocations document. Consequently it must prevail over the qualified prohibition on development in the countryside set out in Policy CS2. I do not agree. If interpreted thus, it produces a flat contradiction between two policies. It is common ground that the Local Plan must, if possible, be construed as a whole. A construction of Policies CS2 and 11 which combines both is possible. Development can take place outside the built-up area boundaries in the 2006 Local Plan

or those to be shown in the Site Allocations document, if they fulfil the requirements of CS11 and if the Local Planning Authority are satisfied that the circumstances are exceptional and are subject to a proven justifiable need. Fulfilment of the requirements of Policy CS11 may more readily permit the Local Planning Authority to be satisfied about both of the requirements for development in the countryside, as defined in paragraph 2.1.5.1, hence the greater flexibility, but they do not remove the need to address both. Only if satisfied that both requirements are met should planning permission be granted for a development outside the built-up area boundary of a Core Village.

19. The second issue is what is meant by "locally identified need" for housing in Policy CS11(iv)? Mr Taylor and Mr Harwood submit that it refers to the housing needs of the whole of the rural area of Babergh's district. They accept it cannot apply to the housing needs of Ipswich or other urban areas within the district. Their submission is based on the Strategy for Growth and Development set out in Policy CS3 and in particular the identification in the table to that policy of the target of 1,050 dwellings in Core and Hinterland Villages to allow for rural growth(see Note 4 already cited), and on the reference to that part of Policy CS3 in paragraph 2.8.5.4 of the explanatory notes to Policy CS11, already cited. They submit that a distinction is deliberately drawn between "locally identified need" and "specific local needs" in subparagraph (iv).

20. Miss Blackmore submits that the meaning is to be derived from the words in paragraph 2.8.5.4 which follow the reference to Policy CS3 which, she says, are consistent with the guidance given in paragraph 14 of the Supplementary Planning Document adopted on 8 August 2014 to provide guidance on Policy CS11. It states:

    i. "A key part of CS11 is that proposals should meet locally identified need. The policy refers to housing, employment and specific local needs such as affordable housing and locally identified community needs. Policy CS18 of the Core Strategy also states that the mix, type and size of housing development will be expected to reflect established needs in the Babergh District.

> Objective 1 of the Core Strategy refers to the delivery of a mix of housing types which matches the identified need being a critical success factor. Developers should therefore set out how the proposal meets these locally identified needs. This should include an analysis of the number and types of dwelling in the village, an assessment [of] the need for housing in the village and the identification of any gaps in provision. Proposals should provide affordable housing in accordance with Policy CS19. Proposals should therefore be accompanied by a statement that analyses the local housing, employment and community needs of the village and how they have been taken into account in the proposal. It is anticipated that such statements should be prepared in consultation with the Council using evidence from a number of sources."

21. I do not accept the submissions of Mr Taylor and Mr Harwood. Paragraph 2.8.5.4, read as a whole, is clearly directed to factors relevant to individual Core Villages and their clusters, hence the need for policy to be driven (my emphasis) by the function of the villages, their role in the community and their capacity for a particular level of growth. Paragraph 14 of the Supplementary Planning Document only makes sense if similarly understood.

22. There is a further point. Policy CS11(iii) requires that "site location and sequential approach to site selection" are addressed to the satisfaction of the Local Planning Authority. It is common ground that the sequential approach requires sites for housing development in villages to be considered in the following descending order: those within the built-up area of a village; those which adjoin a built-up area; and those which do not, possibly with brownfield sites as the first category. If the sequential approach to site selection applies to sites to meet local housing need in the whole of the rural area of Babergh District, it would logically have to be applied to all villages within that area, yet that is not how the guidance in the Supplementary Planning Document deals with the question in paragraph 11:

i. "Sequential Approach:

ii. 11. In considering the suitability of sites for development under CS11 the Council will have regard to the sequential approach, plus any other relevant material considerations. In the context of CS11 this means:

- In the first instance considering whether there are other available, suitable and deliverable sites within the built-up area of the village

- If no suitable sites are available within the built-up area then the next preferred location is sites which adjoin the built-up area of the village

- Sites that do not adjoin the existing built-up area of the village will only be considered if there is special justification e.g. it is meeting a local need which cannot be met elsewhere or is easily accessible from the parent village

- Preference will also be given to brownfield sites where these are well located and meet sustainability criteria"

23. This only makes sense if the local housing need is that of the village and its cluster, otherwise an unsuitable site in the village selected to provide part of the housing needs of the rural area of the Babergh district would have to be preferred to a more suitable site in another village. I am satisfied that for the reasons explained, local housing need in Policy CS11 means housing need in the village and its cluster, and perhaps in areas immediately adjoining it.

24. The third issue is, what is required by the sequential approach? This means that sites in descending order of categories of suitability must be considered in sequence, as Mr Taylor and Mr Harwood submitted. If Miss Blackmore was submitting that it required sites within the same category of suitability to be considered sequentially, I disagree. I did not in the end understand her to make that submission.

25. For the sake of completeness I have read Policies CS18, 19 and 20 on the mix and type of dwellings, affordable housing and rural exception sites. I do not consider that they are of assistance in construing Policies CS2 and 11.

26. The Local Planning Authority's officers prepared and submitted a lengthy report to the Planning Committee. It is common ground that it should be read as a whole and benignly construed, and that unless modified by statements made at the meeting of the Committee or dissented from by the majority of its members, it should be taken that the Committee have accepted and acted on its conclusions. If the report contains significant legal errors, therefore, it may call the decision of the Committee into question.

27. The officers conducted an extensive and careful assessment of the planning issues. In paragraph 185 they correctly advised the Committee that pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004 the determination must be made in accordance with the Local Plan unless material considerations indicated otherwise. In paragraph 188 they concluded that there were no such material considerations, and so considered that the proposals were acceptable in planning terms. They recommended that planning permission be granted subject to conditions.

28. In the body of the report the officers addressed the following issues as well others which

are not in issue: (1) development outside the built-up area boundary of East Bergholt in paragraphs 54 to 58; (2) site location and sequential assessment in paragraphs 59 to 68; (3) local needs in paragraphs 77 to 81; (4) East Bergholt's Emerging Neighbourhood Policy in paragraphs 84 to 113; (5) the impact on heritage sites in paragraphs 114 to 139; and (6) the impact on the Area of Outstanding Natural Beauty in paragraphs 148 to 159.

29. Their approach to issue (1) was that Policy CS11 provided a complete code to determine compliance of the proposal with the Local Plan:

    i. "There is not therefore an in-principle objection to development outside the built-up area boundary of the village."

30. For the reasons already explained, this was a significant error. In consequence they did not expressly address the two requirements of Policy CS2 for development in the countryside.

31. (2) They dealt briefly but accurately and sufficiently with sequential assessment, on the correct assumption that what was required to be assessed were sites within East Bergholt. There were none within the built-up area of the village, the only relevant category of suitability which was required to be considered before a site adjoining the built-up area (see paragraph 61).

32. (3) Their approach to local housing need was set out in paragraphs 77, 78 and 79:

    i. "Local needs:

    ii. 77. The core strategy identifies that 1,050 homes will need to be built in the Core and Hinterland Villages, and currently Babergh

District Council does not have a Site Allocation document. Policy CS2 identifies East Bergholt as a Core Village and states that Core Villages will act as a focus for development within their functional cluster. Paragraph 2.8.5 of the Core Strategy provides further clarification and advises that Policy CS11 will lead to greater flexibility in the provision of affordable housing related to need, which has to be considered more widely than just within the context of individual settlements, but also the other villages within that cluster and in some cases adjoining clusters. The core strategy's definition of local need is encompassed within Policy CS18, which states: 'Residential development that provides for the needs of the District's population ... will be supported where such local needs exist, and at a scale appropriate to the size of the development.

iii. The mix, type and size of the housing development will be expected to reflect established needs in the Babergh district.'

iv. 78. ... This is further supported by paragraph [3.5.4.3 of the Core Strategy] which confirms that 'by identifying Core Villages and their clusters it widens the opportunity for local needs to be met in more sustainable locations within the cluster.'

v. 79. Therefore it is considered that Policy CS18 and paragraphs 2.8.5 and 3.5.4.3 enable officers to conclude that 'local need' relates to the needs of the district population consistent with the approach in the NPPF and the PPG, and that local need has to be considered more widely than just within the context of

individual settlements, but also within that cluster and in some cases adjoining clusters."

33. This approach was significantly in error for the reasons already explained. It started with the premise that there was a need for 1,050 houses to be built in Core and Hinterland Villages. It continued with an irrelevant reference to Policy CS18, which deals with the mix and type of dwellings required to meet the needs of the population of the district, not the number, and to a paragraph (believed to be 3.5.4.3) which likewise was irrelevant because it dealt with affordable housing. The houses to be built on this site did not fall into that category.

34. The key part is paragraph 79, in which both definitions of local need are set out. Mr Taylor and Mr Harwood submit that they were right to do so, because of their construction of the difference between the reference to "locally identified need" and "specific local needs" in subparagraph (iv) of Policy CS11. For the reasons which I have already explained, there is no such difference. The officers' conclusion that "local need" refers to the needs of the district's population as a whole is wrong.

35. (4) The officers conducted an extensive analysis of the emerging East Bergholt Neighbourhood Plan and concluded that limited weight could be given to it, principally because of cogent objections which had been lodged to it by them. They repeated their conclusion orally to the Committee. They were entitled to do both, and the Committee was entitled to act on their view.

36. (5) and (6) I will deal with these together. The officers acknowledged the existence of harm to the setting of two listed buildings and to the Area of Outstanding Natural Beauty, but concluded that it posed "less than substantial harm", as a statutory consultee (Historic England) had asserted, to heritage interests and no significant adverse impact on the Area of Outstanding Natural Beauty. They considered that on balance, the harm was outweighed by three benefits taken together: the delivery of ten dwellings, the removal of inappropriate non-native trees - an overgrown Leylandii hedge abutting the road - and the

provision of a commuting sum of about £150,000 towards the delivery of affordable housing elsewhere.

37. Miss Blackmore submits that this reasoning is flimsy and that the benefits, especially the last two, did not rationally offset the long-term harm to both interests which would be caused by the development. As a free-standing ground of challenge this cannot succeed. It was a matter of planning judgment, and though said to be finely balanced it cannot be upset on review by this court.

38. Two further points made by Mr Taylor and Mr Harwood need to be addressed. First, if there was a need to find exceptional circumstances, the officers addressed the need in the paragraphs dealing with the impact of the scheme on the Area of Outstanding Natural Beauty. They concluded that the development was not a major development as contemplated by paragraph 116 of the Planning Policy Framework, which must be refused except in exceptional circumstances and where it can be demonstrated to be in the public interest. There is rightly no challenge to that conclusion. They went on to consider what the outcome might be if it was a major development and concluded that because there was no significant adverse impact in landscape and visual terms, and because of the three identified benefits already referred to, the development would have been in accordance with paragraph 116.

39. This contention is only a partial answer. It deals only with the impact of the proposal on one - albeit important - interest, intrusion into the Area of Outstanding Natural Beauty, and only does so conditionally, in other words if the first correct conclusion was not accepted. It does not establish that the Committee did address exceptional circumstances, still less that it addressed such circumstances beyond the impact on the Area of Outstanding Natural Beauty.

40. Their second point is that it was not disputed by East Bergholt Parish Council that there was a need within East Bergholt and its cluster for at least ten dwellings for the over-55s, therefore the second part of the sentence addressing local need in paragraph 79 of the officers' report was all that was required to address the issue. It is correct that the written submissions of East Bergholt Parish Council were confined to the impact on the Area of

Outstanding Natural Beauty and the green space which the Emerging Neighbourhood Policy sought to protect, and that the Emerging Neighbourhood Policy did identify a medium-term need within East Bergholt for smaller houses for the young and the elderly. It is also right that Councillor Miller, an East Bergholt parish councillor, did not in the three minutes allotted to her address this issue specifically, but others did and the issue needed to be addressed on a correct basis by the officers and the Committee. For the reasons explained, it was not. It is not suggested that East Bergholt Parish Council are not entitled to raise the issue now, and I am satisfied that they are. The answer to both submissions is that the local planning authority was required to determine that there were exceptional circumstances subject to a proven justifiable need. Because of the meaning of "need" in this context - local housing need within East Bergholt and its cluster and perhaps parts of adjoining clusters - that was the justifiable need of which the Local Planning Authority had to be satisfied. The evidence on its existence is sketchy and contentious, and the outcome, if the issue had been or will in future be addressed, is not obvious. Establishing such a need could properly lead to the conclusion that there were exceptional circumstances, but both issues needed to be addressed by the Local Planning Authority on a legally correct basis. This has not been done. The decision must therefore be quashed and remitted to the Local Planning Authority to be retaken.

41. It is not suggested that relief must be refused under section 31(2A) of the Senior Courts Act 1981 on the basis that it is highly likely that the outcome for East Bergholt Parish Council would not have been substantially different if the errors of approach had not been made.

42. I would have reached the same conclusion even if I had accepted the submissions of Mr Taylor and Mr Harwood that Policy CS11 constituted an exception to Policy CS2 because of the error by the officers, and so the Committee, about the definition of locally identified need in paragraph (iv) of Policy CS11.

43. I deal finally with the last issue raised by Miss Blackmore. East Bergholt Parish Council contends that the Committee took into account the financial benefit to the District Council which would accrue if the development went ahead, namely a bonus paid by

central government estimated to be worth between £60,000 and £180,000, depending on the council tax band allocated to the houses, for new houses built. This would have been a material consideration if taken into account (see section 70(2)(b) of the Town and Country Planning Act 1990), but it was not mentioned in the officers' report or in the Committee's debate. The Local Planning Authority's case is that it was not treated as material. There is nothing to gainsay that case beyond, conceivably, the fact that its medium-term financial projections suggest a need for external finance to fill anticipated deficits. That is not sufficient to call into question the Local Planning Authority's good faith in denying that it treated finance as a material consideration. This ground of challenge therefore fails.

44. For the reasons which I have given, the claim succeeds on the basis explained in the judgment but not otherwise. Are there any consequential applications?

45. MISS BLACKMORE: My Lord, I seek the council's costs. I do not know whether the costs schedule has made its way to you. There is an Aarhus costs claim in this case which limits our ability --

46. MR JUSTICE MITTING: I have not seen the schedule that exists. I take it it has been served on the --

47. MISS BLACKMORE: It has, my Lord.

48. MR JUSTICE MITTING: You accept, I think, that you are limited to £35,000?

49. MISS BLACKMORE: Yes, the order of Mrs Justice Lang limited it according to the Aarhus principles.

50. MR JUSTICE MITTING: I had better find out from your opponents whether in the light of that limit there is any purpose in arguing about your schedule.

51. MISS BLACKMORE: Indeed, my Lord.

52. MR BEARD: My Lord, I am grateful. It is right to say that we accept that the principle of costs applies. This is an Aarhus claim and we would in theory, subject to the

submissions I am going to make, be liable to pay the claimant's costs for a total capped at £35,000.

53. My Lord, there are a number of detailed matters that my clients certainly wish the court to take into account either today or on the detailed assessment, if we had to go that far. My Lord, you will have seen that the total that is claimed is exactly £66,894.50, which is on its face excessive for a claim such as this, we say.

54. MR JUSTICE MITTING: Yes.

55. MR BEARD: My Lord, this is also a case where the claimant has abandoned a very substantial number of its grounds which were, in our respectful submission, without merit and it has not been explained, as I have said, why those were abandoned. On any view those substantial grounds have taken, or would have influenced, the level of costs that were incurred. Certainly from the defendant's point of view, we spent a considerable amount of time dealing with not only the grounds in the straightforward litigation sense, but also dealing with a number of requests for disclosure and the like. My Lord, on that basis the £66,000-odd pounds certainly does not reflect the amount of costs that the claimant would ever be entitled to. No attempt is made in this costs schedule to apportion the amount of time or the otherwise costs incurred for those grounds that were abandoned.

56. Likely there are a number of detailed points that we would wish to make in terms of the excessive amounts of time billed. My Lord, I will make those points if your Lordship wants me to, but I suspect that it will be fairly difficult for your Lordship in the absence of there being any correspondence on costs between the parties, to explain -- for the claimant to explain, the proportion that was incurred.

57. MR JUSTICE MITTING: As I understand it, you submit that there should be, at worst from your point of view, a proportionate order for costs?

58. MR BEARD: My Lord, yes.

59. MR JUSTICE MITTING: Both because of grounds that have been abandoned, and

because of those grounds upon which I have found that the claim cannot succeed?

60. MR BEARD: Exactly, my Lord.

61. MR JUSTICE MITTING: However, it rather depends whether one takes the percentage after the £35,000 cap has been applied or before?

62. MR BEARD: My Lord, that is absolutely right. I would have thought, my Lord, that as a matter of fairness certainly and to ensure that claims for costs are not being made for work that was done on matters that did not even come to the court, if I can put it that way, those should be deducted before the costs cap is considered. Then we are dealing with the total sum that then would be apportioned having regard to the outcome of the case. It is, in my respectful submission, going to be quite difficult for this court today to ascertain whether or not, having regard to that approach, we get below the £35,000.

63. MR JUSTICE MITTING: I am slightly surprised at that submission. I would have thought given that the purpose of the Aarhus cap is to limit recoverable costs for claims that succeed, that one does not -- I would have thought, therefore, one applied the discount in respect of claims that have not succeeded after the cap is taken into account, so that, let us suppose there is a 50 per cent order, the amount of costs ordered should not be greater than £17,500, rather than reduce the bill from £66,000 then apply the percentage discount to whatever the outcome is, suppose it is £50,000, £25,000. If you were advocating that approach it would be a surprise to me, and I must have misunderstood what you said.

64. MR BEARD: My Lord, I was not -- I absolutely agree with your Lordship, but there is, I think, a threshold issue to consider which is, this is a claim for the totality of the costs, of the claim as originally brought. Now, when we started two days ago, this claim, that was certainly a large part of the claim. It has not been explained why it has been abandoned. So in my respectful submission, the proportion should be within --

65. MR JUSTICE MITTING: If it is right that one starts with £35,000, tell me what proportionate costs order you say is appropriate.

66. MR BEARD: Having regard to the outcome of the --

67. MR JUSTICE MITTING: Having regard to those claims that have been abandoned and the outcome as I have decided it.

68. MR BEARD: My Lord, as originally claimed, there were -- I do not have it to hand, but certainly the claimant has succeeded on one of their grounds of challenge, as I understand your Lordship's judgment.

69. MR JUSTICE MITTING: Well, it depends on whether you call it one or two, but it has succeeded on what was always going to be, leaving bias aside, the substantial debate.

70. MR BEARD: My Lord, certainly the matters that came to court, to they effect they were argued, I fully accept that. But my submission is that in fact those issues, or the issues that were argued at court, were subordinate to the issues as in the manner they were pleaded. Not all parties plead their best point first.

71. MR JUSTICE MITTING: I do not want a detailed exposition of the rights and wrongs of the pleadings, merely a statement of what, on your view, what would be an appropriate proportionate order.

72. MR BEARD: I think I ought to take some specific instructions on that.

73. MR JUSTICE MITTING: Certainly.

74. MR BEARD: Certainly the matters that were argued in court, I fully accept upon instructions that the point that has prevailed certainly took up a maximum of 50 per cent of the time taken both in preparation for the hearing and also the court's time, so on the basis of the analysis, your Lordship, the maximum that would be accepted would be half, we say, and even if I am wrong about the proportion of the time that your Lordship spent in court and the parties prepared for this hearing, there is that other matter of the abandoned points which would certainly tilt the balance in the defendant's way, not the claimant's. So in other words the maximum should be something of the order of £17,500 by that account.

75. MR JUSTICE MITTING: So you would advocate a 50 per cent recovery?

76. MR BEARD: Yes.

77. MR JUSTICE MITTING: The issue does not concern you, Ms Hutton, does it?

78. MISS HUTTON: As I understand it, my Lord.

79. MR JUSTICE MITTING: No.

80. Miss Blackmore?

81. MISS BLACKMORE: My Lord, I entirely reinforce the whole purpose of the Aarhus costs cap is to set out what those maximum limits of recoverability are, and it is not to send off to detailed assessment a claim in the region of what this one is. The purpose is to give parties certainty about what their costs are and the framework to be applied.

82. MR JUSTICE MITTING: It does not give free rein to running up arguments that are no good.

83. MISS BLACKMORE: No, my Lord, it does not, but the party who pays -- you will have seen on our costs bill the total of £66,000. The party that pays that is, of course, my clients once it goes over the cap. So there is an actual control in the system.

84. My Lord, the point my learned friend was making was in relation to the amount of time being taken up. My Lord, certainly what has taken me the most amount of time in this case is working on a local plan with which I had no familiarity, a neighbourhood plan in its different emerging stages as one went through this process and also, my Lord, the burden is on the claimant in the case to produce all the relevant information. The neighbourhood plan has gone through numerous iterations, and much of that evidence has not been placed before this court, including voluminous appendices and supporting evidence, and so there was a real burden on my clients.

85. MR JUSTICE MITTING: Well, you did not succeed on that issue.

86. MISS BLACKMORE: No, my Lord, it was not simply the -- you have local plans being

put in plus the supplementary planning documents that sit alongside it, and so what one has is the burden that was on my client and the sum that was sought, and my learned friend says that half would be reasonable, and of course half of £66,894 is basically £35,000 in any event. The point that is made is in relation to grounds that were abandoned. My Lord, those were abandoned in a reply some time ago. It was made very clear that they were abandoned because of the defendant's evidence, and obviously when permission is granted in any case, and indeed in this case, parties are reminded on the grant by Mrs Justice Lang, standard terms, that they need to review their case following service of the detailed evidence. That is precisely what my clients did, and a pre-action protocol letter had been sent, and at that stage there had never been any reply at all to the complaint made by Councillor Williams as to the possibility of bias, which had then been outstanding for some six months, and in relation to ground 4, which my Lord has probably never really engaged with because it was no longer live at the time, that was simply essentially a request for information as to what had happened, and it took up hardly any time from my side. It was a case of simply saying, this happened, what has happened? The parish was fully entitled to ask for that explanation. The evidence was requested in the PAC letter. It was requested again when it was sought by way of disclosure, and it would have been open to the defendants to give that evidence at a much earlier stage. So I say there is no basis in challenging costs on those matters.

87. MR JUSTICE MITTING: Well, I think what you need to address is the question of principle. Do you make what is an appropriate deduction on the by now conventional issues basis --

88. MISS BLACKMORE: No, my Lord.

89. MR JUSTICE MITTING: Hold on, I have not finished -- before or after you apply the Aarhus cap?

90. MISS BLACKMORE: Oh, sorry, my Lord, I was too quick to go. The Aarhus cap we should clearly apply afterwards, if one was to be doing some apportionment, because the £35,000 is the total cap that my clients are entitled to recover under the separate costs order of the court. My Lord, I was answering the point before that, which is that the

normal rule is that a successful party is entitled to its costs, and one needs a very good basis to be departing from that. The costs in this case are not easily separated into separate issues, they are interlinked, and my Lord will have seen from the oral hearing that my clients' principal concerns go to CS2 and CS11, and on that issue which impacts the 144, the 70, impacts other cases that are coming before the court, on that core issue we should have well over half the time. My clients have been entirely successful.

91. MR JUSTICE MITTING: Yes. Undoubtedly you have succeeded in your claim, and you have succeeded in what, in the cases presented to me, was the principal issue. I accept all of that. Where I am considering only the issues on which you have succeeded in the argument before me, you have had a pretty overwhelming victory and the deduction would not be large. I think there would have to be some, but not an enormous sum. But the abandonment of issues, proper abandonment of issues, to be encouraged, nevertheless has to be taken into account, and will inevitably increase the percentage.

92. MISS BLACKMORE: It may help then, my Lord, in relation to that separate issue, to look briefly at the pleadings, and my Lord will be able then to see the issue in relation to ground 4. So, my Lord, if one turns to the statement of facts and grounds, ground 4, paragraph 88, you can see from the first line there that it is pleaded on the basis that we are reserving the right to amend it or withdraw it when we are giving disclosure as to what had actually happened in another case. What had happened in that other case is, a pop-up message appeared as a result of which the defendant in due course withdrew a decision that had been made by the committee, and no proper explanation had ever been given to the councillors at that meeting as to why that withdrawal had happened, and in this case, there had similarly been a private message, the contents of which had not been disclosed. If you turn to the defendant's response at paragraph 8, which is at CB46, they say that the claimants' contention is tentative. My Lord, we sought that disclosure in the PAC correspondence, it was not provided at that stage when it should have been provided. When it was provided, it -- the costs associated with this point are small, and if any party is at fault for not responding to it it is the defendants for not responding at an appropriate stage. My Lord, we obtained permission on this ground, because at this point we did not have the evidence.

93. Similarly, my Lord, in relation to the bias grounds, at the point at which this case was pleaded, there had been two -- this case had its consent and the 144 had its resolution to grant, but did not have its consent. There is an issue between the councillors, between a councillor -- an indirect issue between one of the councillors and the developers then of the 144 site, which had been put in pre-action correspondence. The monitoring officer of the council had never investigated a properly made complaint to her by Councillor Williams as to the interests of these particular councillors, and we obtained permission on this ground. The only point at which the monitoring officer responded was months after the original complaint, after permission had been granted. Once that response of the monitoring officer was received it was reviewed and a decision was made that it should no longer be continued, which was set out promptly in a reply to the parties.

94. There are two points relating to this: the first goes to the principle, which is that the defendant could have provided relevant evidence and produced it at the pre-action stage. Secondly, the costs actually incurred were relatively low because the details of the issue came up at a very late stage, just before the issue date, and so the claim was pleaded in the way that it was pleaded. My Lord, there was some time taken up on the new homes bonus grounds, but it was not in any proportion to the length of time on CS2 and and CS11 points.

95. Turning then, my Lord, to the actual costs schedule my learned friend has not in fact made any criticism on any of the points actually in the costs schedule.

96. MR BEARD: My Lord, that is because I reserve my submissions on that.

97. MR JUSTICE MITTING: Precisely. I do not intend to make a summary assessment of costs on a line-by-line basis.

98. MISS BLACKMORE: Indeed.

99. MR JUSTICE MITTING: There are two questions of principle which I have to determine. One is, should there be a proportionate order for costs, and if so, what? Two, should the proportion be applied before or after the cap?

100. MISS BLACKMORE: My Lord, on those two points, on the first I would say that the claimant has been successful on the principal major issue, and this is not a case where it is suitable to divide up costs, and if my Lord was to feel differently the division would be very small. On the second, I say that clearly the cap should be applied at the second stage because that is the limit of my client's recoverable costs at £35,000.

101. MR JUSTICE MITTING: Okay. Anything in reply?

102. MR BEARD: My Lord, my learned friend raises a number of matters there, matters of detail, and made some factual assertions, and I am afraid I certainly do not have instructions, certainly about matters relating to --

103. MR JUSTICE MITTING: I am going to have to do a broad brush exercise.

104. MR BEARD: Yes, my Lord, that is exactly what I was about to say. But my Lord, in my respectful submission those issues, without being able to reply and reply in detail on the factual matters, I would invite the court not to accept them as being influential on your Lordship's approach to costs.

105. Just by way of clarification, my Lord, the reply that my learned friend refers to came at the beginning of October, and of course there was an earlier reply in June, but certainly since, until very recently, until October, we were facing a hearing for a case that involved the full gambit of the grounds, and in particular those bias grounds that as you know, your Lordship, the defendant put in a witness statement dealing with those matters, allegations of bias by individual members. That caused a great deal of time to be spent that, and when your Lordship comes to think about what is fair in all the circumstances, any of the totality of the costs that are claimed by the claimant should be offset by the costs that we have had to incur dealing with those matters, which were not insubstantial. That is what I say in respect of that.

106. MISS BLACKMORE: My Lord, can I just make one point, which is that we did not receive the detailed grounds and the evidence from the defendants until August, and we then asked for a short extension to be consented in order that (Inaudible), and that is what led to the timetable. The second thing is that the Bildeston case was actually

originally listed for October, and obviously the CS2 and CS11 issues were live in that case, and that case has then been adjourned off, because the Local Planning Authority made a further decision on a applicant called a section 73(a) application. But that was with them going in first, so my learned friend's responses around the October point do not really relate to the timescale, which is clearly that this has become the first case on CS2 and CS11, but it was not originally intended to be.

107. MR JUSTICE MITTING: It is right in principle that the defendant should pay the claimant's costs of the litigation. However, that is subject to two further considerations. First, this is an Aarhus case so there is in any event, and it is accepted by Miss Blackmore, a cap of £35,000 on the costs which may be paid. The costs claimed by the claimants exceed £66,000.

108. Secondly, the claimants have not succeeded on all of the issues upon which they have brought this claim. They abandoned one significant issue alleging impropriety or bias on the part of the Committee before the case proceeded to trial, and they have not succeeded in full on their argued case at trial.

109. I turn to the first issue, whether the Aarhus cap should be applied before or after any proportionate order is made. There is no authority on this question. The purpose of the Aarhus Convention is to make it clear to both sides that recoverable costs will be confined to the now familiar capped sums. However, if one party is permitted to argue in its pleadings or for that matter at a hearing issues which are ultimately unsuccessful, then the purpose of imposing the cap is likely to be in part frustrated. It would give one party free rein to pursue unsuccessful or in some instances unmeritorious claims without any risk as to costs. That is not a procedure which I would wish to encourage, and it is not a procedure which I understand the purpose of the Convention has in mind.

110. I therefore conclude that in principle the cap should be applied before any question of apportionment is applied, so that if a successful party receives only a proportionate order for costs then it should be a proportion of the capped sum and not of the sum before the cap is applied.

111. On the facts of this case, I am satisfied that the claimant should recover 75 per cent of their capped costs. I reduce the 100 per cent claim for both of the two reasons that have been advanced, first, that they have abandoned a claim well before trial when it became apparent on the basis of evidence produced by the defendant that it was no longer sustainable and was then therefore properly abandoned, and secondly because not all of the arguments advanced by Miss Blackmore at the trial have succeeded. It seems to me, doing the best I can on a broad brush basis, that a 75 per cent order would be a fair reflection of the claimant's lack of success on those issues. If my arithmetic is correct I therefore order the defendants to pay to the claimants £26,250 on account of their costs.

112. Are there any other applications?

113. MR BEARD: My Lord, there is, very briefly, if I may. My Lord, it is an application for permission to appeal to the Court of Appeal, my Lord, and it is put on this basis. Clearly there are two grounds, whether there is any prospect of appeal grounds succeeding and other compelling reasons. Your Lordship indicated throughout the hearing that your Lordship did not find the proper interpretation of these policies to be at all easy.

114. MR JUSTICE MITTING: Correct.

115. MR BEARD: My Lord, may I say with respect that we all agree with my Lord. There is a real prospect of success. We say that as a matter of law the Court of Appeal might disagree with your Lordship's proper interpretation, not least because your Lordship has entertained the possibility that compliance with CS11 on the issues of need, for example, might well satisfy the requirements of CS2. My Lord, on that basis we say there is a good prospect of a ground of appeal succeeding in that respect.

116. My Lord, I also apply upon the other basis which is, is there is a compelling reason to grant permission, and we say given the importance of these policies to the work of the Local Planning Authority, both in terms of those cases that have been decided that involve development outside or in the countryside outside the built-up area boundaries of

Core Villages, but also those in the system, is an important consideration, and a compelling reason why permission should be granted. My Lord, I have to accept of course as was addressed in submissions, that as your Lordship observed wisely we are taking a prudential approach to decision-making, but my Lord, that does not take away the fact that there is one other case already before this court, and there are others, including the Morse Lake decision.

117. MISS HUTTON: My Lord, may I --

118. MR JUSTICE MITTING: Of course. I do apologise, you are absolutely entitled to make a submission.

119. MISS HUTTON: It is merely to echo what has been said. Had the application not been made by my learned friend it would have been made by myself.

120. MR JUSTICE MITTING: I refuse permission to appeal for these reasons: first, although I acknowledge that there is considerable difficulty in interpreting this Local Plan, in particular the relationship of Policy CS2 to Policy CS11, and I accept that a different view might be taken from that which I have reached about it, nevertheless I do not believe that the outcome of the case can be disturbed, because of my conclusion in the alternative on the definition of local need in relation to housing, upon which I do not believe that the outcome will be disturbed. I put it in the language appropriate to permission to appeal; I do not believe that there is a realistic prospect of success on that issue.

121. As to the alternative ground that there are other compelling reasons for permitting an appeal, all that I have done, applying familiar planning law, is to have attempted to construe a difficult local plan. I do not believe that the issue that I have decided has any importance beyond the local plan for this district. Furthermore, for the reasons that I explained in the judgment, I do not believe that it would create any future insurmountable difficulty in determining planning applications of this kind. It may have an impact upon one or perhaps even more than one outstanding case, but that is not by itself a reason for granting permission to appeal.

122. MR BEARD: My Lord, one last thing. May we have 21 days to file a notice from the date the transcript becomes available?

123. MR JUSTICE MITTING: Yes. You will have to apply for and pay for the transcript, of course. I will extend the time for applying to the Court of Appeal for permission to appeal to 21 days after the provision of an approved transcript to you.

124. MR BEARD: I am very grateful.

125. MR JUSTICE MITTING: Anything else? No? Thank you.