IN THE HIGH COURT OF JUSTICE CLAIM NO. 5CF20088
ADMINISTRATIVE COURT
CARDIFF DISTRICT REGISTRY

BETWEEN

DR. MAX KLIM WALLIS

CLAIMANT

AND

VALE OF GLAMORGAN COUNCIL

DEFENDANT

JUDGMENT

1 On the 27th May 2005 the Claimant issued a Claim Form in which he sought an order to quash, in whole or in part, the Unitary Development Plan (hereinafter referred to as "the UDP") which had been adopted by the Defendant on the 18th April 2005. In his Particulars of Claim the Claimant sought a quashing order on a substantial number of grounds and in relation to many parts of the UDP. By the time of the hearing before me the Claimant sought to quash five discrete parts of the UDP (identified below) and during the course of the hearing, at my request, a document was produced which identified with precision the relief which was sought. Before addressing each of the five discrete parts of the UDP which are the subject of the Claimant's complaints, it is necessary that I set out in some detail the chronology relating to the process of evolution between the commencement of work upon the UDP and its ultimate adoption.

2 It is also necessary that I record at the outset that the Defendant accepts that the Claimant has standing to bring this challenge. That being so, I say no more about that subject in this judgment.

The Chronology

3 Much of this section is taken from the first witness statement of Mr. David Thomas who holds the post of Head of Planning and Transportation with the Defendant.

4 On the 2nd May 1996, the former Economic Development, Planning, Transportation and Highways Committee of the Defendant resolved to start work on the UDP. Between 2nd April and 13th May 1998 a draft of the UDP was placed on deposit. During this period 1300 representations were made about various aspects of it. On the 2nd December 1998, officers of the

Defendant reported to the same Committee; they detailed the representations which had been made and they suggested changes to the draft UDP.

5 During January and February 1999 the changes proposed to the draft were placed on deposit. 175 representations were received. Officers proposed yet further changes in the light of these representations. However, no further period of public consultation occurred. That was because a public local inquiry had been scheduled for June 1999 to consider the contentious aspects of the draft UDP. The Inquiry took place between June 1999 and January 2000.

6 The Defendant received the Report of the Inspector who had conducted the Inquiry in November 2000. It was presented to the Planning Committee of the Defendant in January 2001.

7 On the 7th February 2003 the Defendant approved Proposed Modifications to the draft UDP. Thereafter, a Statement of Decisions and Proposed Modifications to the draft UDP was placed on deposit from the 17th February to the 1st April 2003. A number of representations were received.

8 In September 2004, relevant committees of the Defendant considered a detailed report on those representations. Further Modifications were promulgated and these were placed on deposit between 18th October and 1st November 2004. Further representations were received and considered. In February 2005 the Defendant resolved to adopt the UDP in its then existing form. Notice of an intention to adopt was duly published in early March.

9 In the light of that notice of intention to adopt various individuals and bodies made representations to the Welsh Assembly Government (hereinafter referred to as WAG). On the 23rd March 2005 WAG issued a holding direction to the Defendant not to adopt the UDP. On the 6th April 2005 WAG authorised the Defendant to proceed to adoption. Notice of adoption was published in the London Gazette on 20th April 2005 and in the Western Mail on the 27th April 2005.

10 The period of the UDP as adopted is 1996 to 2011.

11 In the early years of its gestation it was anticipated that a review of the UDP would take place in 2005. Such a review has not been undertaken and will not be undertaken in the light of the statutory provisions to which I refer below.[1]

12 During the whole of the period between the commencement of the work on the UDP and its adoption the governing statute was the Town and Country Planning Act 1990 (as amended from time to time between 1990 and 2004). In 2004 the Planning and Compulsory Purchase Act 2004 was published. Its coming into force and the significance of that are dealt with below.[2]

[1] Paragraph 99

[2] Paragraph 99

The First Ground of Challenge

13 The Claimant seeks an order that part of Paragraph 3.4.10 of the UDP should be quashed by its removal from the plan. Paragraph 3.4.10 was formulated in its final form following the Defendant's consideration of the Inspector's report into the objections to the then draft UDP. The full text of the paragraph is to be found at Trial Bundle Volume 2 page 347. If I accede to the Claimant's challenge the paragraph would read as follows:

"Whilst the Plan presently seeks to protect vulnerable land by implementing a policy of designating areas of green wedges this does not preclude the designation of a green Belt within the Vale of Glamorgan during the Plan period. Important factors of a Green Belt are its strategic control of development and its permanence."

14 The Part of paragraph 3.4.10 which the Claimants seeks to quash makes it clear that no Green Belt designation in the Vale of Glamorgan will take place prior to a sub-regional study in which other local authorities in South Wales participate. The Claimant argues that if the quashing order is made there will be no requirement that such a study pre-dates the designation of a Green Belt.

15 Paragraph 3.4.10 is one of the explanatory paragraphs which follows Policy ENV 3-GREEN WEDGES. That policy specifies that Green Wedges have been identified at a number of locations within the Plan area and that they have been so identified "in order to prevent urban coalescence between and within settlements." Within Green Wedges, "development which prejudices the open nature of the land will not be permitted."[3]

16 The original form of Policy ENV 3 and paragraph 3.4.10 as placed on deposit is to be found at Trial Bundle 2 pages 336 and 337. The Policy and explanatory material provoked a number of objections.[4] Accordingly the policy and explanatory material was the subject of debate at the Inquiry into objections conducted by the Inspector. It is clear from the preamble to that section of the Inspector's report with which I am here concerned that a number of objectors thought that the UDP should designate areas of Green Belt. Friends of the Earth (Penarth Area) was one such group of objectors.[5]

17 It is to be noted that paragraph 3.4.10 as it was written in its draft form prior to the Inquiry made it clear that a Green Belt designation should await the completion of a sub-regional study by a number of local authorities.

18 In his report the Inspector took a different view. He recommended that the UDP should include a Green Belt designation and consequential policies. As was to be expected, the Inspector provided a reasoned justification for his recommendation. Further he specifically addressed the question of whether it was appropriate for the designation to take place in the UDP or at the stage of

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[3] Trial Bundle 2 page 346
[4] Trial Bundle 2 page 338
[5] Trial Bundle 2 page 338

a review of the plan.[6] He did that since the text of paragraph 3.4.10 before him suggested that the possibility of a Green Belt designation at some later stage within the Plan period was not precluded.

19 As was their legal obligation, the Defendant considered the Inspector's report. As I have set out above it prepared and published a Statement of Decisions upon the Inspector's report and it also published proposed modifications to the UDP.

20 The Defendant rejected the Inspector's recommendation that it should include a Green Belt designation in the UDP. It did, however, modify the wording of Policy ENV3 and it expanded paragraph 3.4.10. The expansion of paragraph 3.4.10 had the effect of making it clear that it was not anticipated that a Green Belt designation would take place within the UDP.

21 It is common ground between Claimant and Defendant that the Defendant was not bound to accept the recommendation of the Inspector. It was its duty, however, to provide reasons for the decision which it proposed to take.[7]

22 The Defendant did provide reasons. They are to be found in its Statement of Decisions.[8] According to the Claimant, however, the reasons given for rejecting the Inspector's recommendation are wholly inadequate. On that basis he claims that the Defendant has acted unlawfully.

23 Legal challenges to decisions of local authorities on the basis of the inadequacy of reasons given for a particular planning decision are not uncommon. In Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1W.L.R. 153 Lord Bridge (with whom the other law lords agreed) laid down the principles which are to be applied in deciding whether such challenges are well founded. That part of his speech in which the principles are to be found begins at page 166 letter H and ends at page 168 letter E. It is, of course, necessary to have regard to the whole of that section of his speech but in the context of the present case the following points are particularly important. Firstly, the reasons given must be proper, intelligible and adequate. If the reasons are improper they will reveal some flaw in the decision – making process which will be open to challenge on some ground other than the failure to give reasons. If the reasons are unintelligible that will be equivalent to giving no reasons at all. Reasons will be inadequate if they do not deal with the substantial points which have been raised against the decision although the degree of particularity required will depend entirely on the nature of the issues falling for decision. Secondly, the alleged deficiency of reasons will only afford a ground for quashing the decision if the court is satisfied that the interests of the applicant have been substantially prejudiced by it. However, the court must not ask itself whether the reasons are proper, intelligible or adequate and whether the alleged deficiency of reasons has caused substantial prejudice as separate questions. The court must ask itself the single question whether the interests of the applicant have been substantially prejudiced by the

[6] Trial Bundle 2 page 343 paragraph 3.5.19
[7] Regulation 16 (1)(b) of the Town and Country Planning (Development Plan) Regulations 1991
[8] Trial Bundle 2 page 352

deficiency of the reasons given. Thirdly, where the complaint is of a failure to give adequate reasons the applicant must prove that the shortcomings of the stated reasons are such so as to raise a substantial doubt whether the decision was taken within the powers of the Act. In concluding his discussion of the relevant principles Lord Bridge said this:

> "If it was necessary to the decision to resolve an issue of law and the reasons do not disclose how the issue was resolved, that will suffice [to show substantial prejudice]. If the decision depended on a disputed question of fact and the reasons do not show how that issue was decided, that may suffice. But in the absence of any such defined issue of law or fact left unresolved and when the decision was essentially an exercise of discretion, I think it is for the applicant to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision – making process which would afford a ground for quashing the decision."

24 In Welsh Development Agency v Carmarthenshire County Council 80 P&C.R. 192 the Court of Appeal applied the principles laid down by Lord Bridge. The local planning authority had designated a site as being one of great landscape value in a draft deposit local plan. The owner objected to the designation at the local inquiry conducted by an Inspector; at the Inquiry the planning authority put forward the view that the development of the land would represent an unacceptable intrusion into the countryside to the detriment of the general amenity of the area. The Inspector recommended that the site should be allocated for residential development but the local planning authority resolved to reject his recommendation to that effect. The site owner sought to challenge part of the local plan on the grounds of a failure to give adequate reasons for refusing to follow the Inspector's recommendation.

25 Schiemann LJ, giving the main judgment, categorised the decision faced by the local planning as to whether it should accept or reject the recommendation of the Inspector as being a pure value judgment. It was manifestly a subjective judgment as to whether or not residential development upon the site was or was not appropriate and in the context of the case such an issue was not capable of much complication or elaboration.

26 In my judgment the essence of the reasoning of Schiemann LJ is encapsulated in the head note to the case. That reads as follows:

> "Where the issue is one of pure value judgment a local planning authority can repeat its earlier reasons for a decision notwithstanding that the Local Plan Inspector has disagreed with them. Planning decisions sometimes involve making pure value judgments, whether on their own or coupled with fact – finding and/or prognostications about what will happen in the future. While the appellate process can test whether something has gone wrong in a fact – finding or a prognostication exercise it is not suited to testing whether something has gone wrong in a pure value judgment. In such cases all the legal process can usefully test is whether all the legally relevant material has been taken into account by the decision – maker."

27 In the context of a challenge on the grounds of a failure to give adequate reasons I remind myself that the weight to be attached to material considerations and, therefore, matters of planning judgment are exclusively matters for the local planning authority.[9]

28 It has not been suggested that the reasons given by the Defendant for the rejection of the Inspector's recommendation were either improper or unintelligible. It is said, however, that they were inadequate because they failed to address major parts of the reasoning process which led the Inspector to his recommendation.

29 In my judgment the thrust of the Inspector's reasoning was as follows. The designation of areas of Green Belt was justified on planning grounds as at the time of the Inquiry. The justification was that such designation was necessary to prevent the coalescence of Cardiff, Penarth, Dinas Powys and Barry and to protect the openness of the countryside to the west of Cardiff. Further, in general terms he felt that the environmental policies contained within the UDP did not sufficiently protect the areas he would designate as Green Belt from development pressure. He took the view that designation should be made in the UDP (as opposed to some later time e.g. when the UDP was reviewed) because such designation would not compromise any regional study that was undertaken.

30 I stress that the preceding paragraph is my summary of the main points of the Inspector's reasoning. My judgment, of course, takes account of the whole of the relevant section of his report.

31 On any view, in reaching his conclusion that there should be a Green Belt designation, the Inspector was engaged in making a planning judgment.

32 In rejecting his recommendation the Defendant was exercising its own planning judgment. The reasons demonstrate that quite clearly. The reasons are encapsulated by its assertion that there needed to be an assessment of the longer term needs for development land in the area before a designation of a Green Belt. In the view of the Defendant the Inspector "did not give sufficient consideration to the potential impact of the designation on the growth dynamics f the region."

33 The Defendant also made it clear that a reason for rejecting the Inspector's recommendation was the guidance to be found in Planning Policy Wales 2002. Obviously that national policy guidance was not in existence at the time of the Inquiry or when the Inspector reported.

34 In my judgment the reason given by the Defendant adequately explain why the Defendant did not accept his recommendation. The Defendant was not required to "demolish" the reasoning process of the Inspector. Such was and is not possible given that the Inspector was engaged in exercising a planning

[9] Tesco Stores v Secretary of State [1995] 1WLR 759

judgment. All that the Defendant was required to do to discharge its legal duty was to explain the basis of its own decision in the light of the Inspector's recommendation and reasons for it. As is pointed out by Schiemann LJ sometimes the Planning Authority need do no more (and can do no more) than re-state what it has said in support of the relevant section of the plan.[10] In the instant case the Defendant did significantly more than that. It expressed its view that the Inspector had failed to give sufficient weight to an important planning consideration. It set out the National Guidance and draft policy which, it claimed, supported its planning judgment.

35 I am required to consider whether the interests of the Claimant have been substantially prejudiced by the alleged deficiencies of the reasons. In the context of the present case the Claimant will be prejudiced only if he can establish that the "lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision-making process which would afford a ground for quashing the decision.[11] As I have indicated I do not think that there were deficiencies in the reasons. Even if I am wrong about that, however, I can find no basis for saying that there arises a substantial doubt as to whether the decision to reject the Inspector's recommendation was based upon relevant grounds. I can detect no legal flaw in the Defendant's approach to its decision.

36 In the evidence filed by the Claimant he suggested that the Defendant's reliance upon Planning Policy Wales 2002 was misplaced. He contended that properly read that document supported the recommendation of the Inspector. He quoted various extracts from the Policy Document to support his thesis. In response, the evidence on behalf of the Defendant highlights those parts of the Policy Document which, it says, supports its thesis.

37 In my judgment, it is for the Defendant, not me, to interpret and apply the Policy Document. Unless I was to take the view that the interpretation or application of the Document was perverse, irrational or unreasonable (in the Wednesbury sense) it is not for me to interfere. There is no basis for such a conclusion in the instant case.

38 Accordingly, the Claimant has failed to establish that the Defendant acted unlawfully.

<u>Ground Two</u>

39 Policy Tran 1 reads:

"Land will be protected and provision made for the development of the strategic highway network including:

(i) The airport access road; and

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[10] See paragraph 25 above
[11] See paragraph 22 above

(ii) The Barry Waterfront to Cardiff link."

The Proposals Map within the UDP shows protected lines for both roads.

40 The Claimant seeks an order that the Policy should be quashed by the deletion of the words from "including" to the end of the policy. He also seeks an order quashing part of the Proposals Map by deleting the protected lines of the roads.

41 Policy Tran 1 as set out above was in that form, substantially, when it was part of the UDP placed on deposit. There were objections to the Policy. Friends of the Earth (Penarth Area) objected to the inclusion of both roads within the Policy. The Inspector recommended minor modifications to parts of the Policy. The Defendant accepted the Inspector's recommendations and said so in its Statement of Decisions. It published minor modifications to the Policy. (They were not changes of substance.) No one objected to the proposed Modifications. The Policy was not considered again prior to adoption.[12] It should be recalled that the proposed Modifications were published in February 2003.

42 The Claimant's challenge to this part of the UDP is based upon the assertion that the Defendant failed to take into account material circumstances which prevailed at the time when it resolved to adopt the UDP. In effect, the Claimant alleges that the Defendant was under a duty to keep its UDP under review until adoption and take the relevant steps to change it if circumstances came into being which dictated that course.

43 In his evidence the Claimant asserts that airport access road was officially abandoned in August 2003 or shortly thereafter.[13] In the same witness statement he appears to suggest that the Barry Waterfront to Cardiff link has also been abandoned and had been so abandoned long before the Defendant published its Modifications to the UDP in February 2003. On that basis, says the Claimant, both roads should have been excluded from the UDP at the stage of Modifications, or at the latest, at the stage of Further Modifications. Mr. Upton, Counsel for the Claimant, did not suggest in terms that the evidence as a whole demonstrated that the roads had been "officially abandoned." His argument was that over time between 2000 and the time of adoption of the UDP it became increasingly unlikely that either of the road proposals identified in Tran 1 would be implemented within the plan period and that by the date of the publication of Further Modifications and certainly adoption the likelihood was remote. He submitted that the effect of Policy Tran1was to cause blight to the land reserved for the road schemes and that since the schemes were very unlikely to be implemented within the plan period the blight effect should be removed by the removal of the schemes from the UDP. In making that submission he relied heavily upon paragraphs 1.23 and 1.24 of Planning Guidance (Wales) Unitary Development Plans (2001).

[12] Trial Bundle2 page 222 paragraph 40
[13] Trial Bundle 1 page 17 paragraph 28

44 Ms. Ellis, Counsel for the Defendant, did not accept that there was a duty upon the Defendant to keep its UDP under review following the publication of the proposed modifications and the absence of any objections to the same. If that was wrong her submission was that as a matter of fact the Defendant was obviously well aware of all the matters relevant to the implementation of these road proposals and that nothing in substance changed between the date of the publication of the proposed Modifications and the adoption of the UDP.

45 At all material times the governing statutory provision was section 15 of the Town and Country Planning Act 1990. The section empowered the Defendant to adopt the UDP either as originally prepared or as modified so as to take account of any objection to the plan or any other considerations which appeared to the Defendant to be material. Mr. Upton founds his submission that the Defendant was under a duty to keep its UDP under review and modify it in the light of changed circumstances upon that part of section 15 which empowers the Defendant to modify the UDP in the light of any considerations which appear to the Defendant to be material.

46 The language of section 15 is permissive. It does not oblige the local planning authority to modify its plan in the light of changed circumstances. The local planning authority determines what considerations are material. Further I have considerable sympathy with the proposition that a local planning authority cannot be expected to keep an emerging plan constantly under review so as to ensure that it is always in tune with circumstances as they change.

47 It also seems to me, however, that this case has to be considered in the light of its own very particular history. The Defendant received the Inspector's report in November 2000. It published Modifications consequent upon that report in February 2003. It received objections to the Modifications within the period during which the Modifications were on deposit. It published its decisions in relation to those objections and yet further Modifications in October 2004. The resolution to adopt was in February 2005. As is obvious, therefore, long periods elapsed between the various statutory steps.

48 It does not seem to me to be correct to say that the Defendant was entitled to ignore any change in circumstance which may have occurred in these periods between the statutory steps. Even if section 15 of the 1990 Act did not oblige the Defendant to have regard to changes in circumstances, in my view, general and well accepted principles of administrative law did. Any decision-making body in the context of planning law should have regard to all material considerations before making a decision.

49 That does not mean, of course, that a change of circumstance would necessarily oblige the Defendant to modify its plan. It would be for the Defendant to consider the change and the weight to be given to it and then reach a conclusion about what, if anything should be done. Any decision to leave a plan unchanged, having considered the change in circumstances, could be impugned, in my judgment, only if it was shown that the decision was irrational, perverse, or unreasonable.

50 Accordingly, I reject the notion that as a matter of law the Defendant was entitled to cease to consider the content of Policy Tran1 once it had published its Modifications and there had been no objection.

51 I turn to consider whether there was any material change in circumstances which the Defendant failed to take into account. I do so against the background that throughout the period between 2000 and the adoption of the UDP both road schemes remained in the Defendant's Local Transport Plan.

52 As early in time as the Inquiry into the objections to the UDP objectors raised doubts about whether the road schemes would be implemented during the plan period. Equally clearly, the Defendant expressed confidence that implementation would occur within that period.[14] The Inspector noted that the Welsh Office (which was an objector to Policy Tran 1 although not the specific schemes) was the body responsible for funding the schemes and that it had not suggested that they could not be funded in the plan period.

53 Following the Inspector's report and before the Modifications were published two policy documents were published which contained relevant and complimentary material. The first was Planning Guidance Wales (Unitary Development Plans) 2001. The second was Planning Policy Wales 2002.[15] It is inconceivable that the Defendant did not have these documents in mind as they considered the UDP and in particular at the time they published first the Modifications and secondly the Further Modifications. No other national policy document was published before the adoption of the plan which was of relevance to the road schemes.

54 In August 2003 a study was published which had been commissioned by the Welsh Assembly Government. It was entitled "The A48/4232 Culverhouse Cross and Airport Access Study, The Way Forward." The evidence before me on behalf of the Defendant accepts that the Study identified short, medium and long term options for alleviating traffic congestion at Culverhouse Cross and improving access to the airport and that those options were different from the road lines protected in the then emerging UDP.

55 In the aftermath of the publication of the Study, the Defendant was not inactive. It is extremely difficult for me to describe exactly what occurred because the evidence before me is necessarily selective. However, the Study appears to have been discussed by the Defendant's Cabinet. A report was prepared upon it, presumably by the Defendant's officers. Following the discussion in Cabinet a letter was sent to the Transport Directorate of the Welsh Assembly Government and a reply was received.[16]

56 As is obvious therefore, the Defendant did give consideration to the Study. It was for the Defendant to consider whether the contents of the Study were such

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[14] Trial Bundle 2 page 427

[15] The relevant passages from each document so far as they relate to the road schemes are quoted in the evidence of the Claimant and Defendant.

[16] Trial Bundle 2 pages 598 to 600

so as to cause it to assess its impact upon its emerging UDP. The whole tenor of the evidence filed on behalf of the Defendant is to the effect that it considered that they were not.

57 The Claimant has not identified any policy document published between August 1993 and the adoption of the UDP which had any impact on Policy Tran1. He does refer to a statement of the Minister of the Welsh Assembly Government of December 2004.[17] In my judgment, however, there was nothing in this ministerial announcement which impacted upon whether the Defendant's UDP should be adopted.

58 When the Defendant gave notice of its intention to adopt the UDP objectors wrote to WAG asking it to intervene. The Government was asked to call-in the UDP or parts of it or re-open the Public Inquiry. One of the grounds upon which it was asked to intervene was the inclusion of policy Tran1 within the UDP. WAG refused to intervene. While that does not and cannot in law demonstrate conclusively that the Defendant acted lawfully it does have some significance. It is common ground that the Government would provide funds for any new road scheme such as that contemplated by Tran1. It would also be fully conversant with its own planning guidance which seeks to avoid land being blighted. In my judgment, it is legitimate to conclude that WAG did not regard the inclusion of Tran 1 within the UDP as being a breach of its own planning guidance.

59 In my judgment, the Claimant has failed to establish that the Defendant failed to have regard to any material considerations when it adopted its UDP with Tran 1 included as a policy.

60 The Claimant also sought an order to quash that part of the UDP which allocated housing at a site in Rhoose known as "Land to north of Railway, Rhoose (hereinafter referred to as the "Rhoose Allocation)." However, he did so on the basis that the allocation could not be justified if Tran 1 was quashed by the removal therefrom of the Barry Waterfront to Cardiff link road. I did not understand Mr. Upton to contend that the Rhoose Allocation should be quashed if the Claimant's challenge to Tran 1 failed. However, if this understanding is wrong, and the Claimant is maintaining that the allocation should be quashed regardless of whether the challenge to Tran 1 succeeds I simply do not see what legal basis exists for such a course. The draft UDP placed on deposit prior to the Public Inquiry did not allocate the land for housing. Objections were received to that omission and the Inspector recommended that land should be allocated for housing. He did so for a variety of reasons.[18] The Defendant accepted his recommendations and when it published the Modifications to the UDP the Rhoose Allocation appeared as a Modification. Further the reasons for this decision appeared in the Statement of Decisions published at the same time as the proposed Modifications. I understand that objections were received to the proposed Modification but the Defendant did not accept those objections. I have been given no basis,

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[17] Trial Bundle 1pages 169 and 170
[18] Trial Bundle 2 pages 465 and 466

however, for the suggestion that the Defendant acted unlawfully in rejecting those objections and proceeding to adoption (other than the suggested link to the alleged unlawful inclusion of the link road within the UDP).

Ground 3

61 Policy Min 2 is headed "Release of Limestone Reserves." It reads as follows:

"The following land is allocated for the winning and working of limestone:

(i) Land to the South of Pantyffynnon Quarry;

(ii) Land to the North West of Lithalun Quarry;

(iii) Land to the South of Cwm Slade and Wenvoe Quarry;

As identified on the proposals map, in order to provide for a total of twenty years reserves at each site."

62 In the draft UDP which was placed on deposit, the land to the South of Cwm Slade and Wenvoe Quarry was not allocated within the policy. Rather, this area of land appeared within Policy Min 3 which protected certain areas of land from permanent building development so as to ensure its availability for mineral working if the need arose. In advance of the public Inquiry it was proposed by the Defendant that the allocation should be included within Min 2 and deleted from Min 3. Friends of the Earth Cymru objected to Policies Min 2 and 3 as a whole. Friends of the Earth (Penarth Area) objected to Policy Min 3 so far as it related to Wenvoe Quarry.

63 The Inspector supported the allocation of the land to the South of Cwm Slade and Wenvoe Quarry within Policy Min 2. He roundly rejected the objection raised by Friends of the Earth.[19] As I understand it when the Defendant published its Proposed Modifications in February 2003 it included the land in Policy Min 2.

64 I should record at this stage that the Inspector considered that the mineral policies contained within the draft UDP were broadly in line with advice contained within a draft Policy Document relating to mineral working in Wales. He commented, however, that it would be appropriate to review the policies when the definitive version of the Policy Document was published. Minerals Technical Advice Note (Wales) (MTAN 1) was published in its definitive form in March 2004.

65 In October 2004 the Defendant published its Further Modifications to the UDP. As I understand it Policy Min 2 remained the same but there may have been some change to the explanatory commentary. In any event the Claimant objected to Policy Min 2 on behalf of himself and Barry and the Vale Friends

[19] Trial Bundle 2 pages 478 to 480

of the Earth. Essentially, he required the deletion of the land to the South of Cwm Slade and Wenvoe from the Policy and additional written commentary

66 The Defendant rejected the Claimant's objection.

67 The Claimant now seeks to quash that part of Min 2 which includes the land to the south of Cwm Slade and Wenvoe Quarry. As I understand it, he also seeks to quash Min 3; substituting for the Policy as now written the Policy which appeared in the draft UDP before the Inspector. Further, he seeks an order to quash what he says is an inaccurate statement contained within paragraph 9.4.8 of the UDP which suggests that at current rates of extraction the permitted reserves at Pantyffynon and Wenvoe will be exhausted within 6 years.

68 As is clear from its wording, the rationale of Policy Min 2 is the preservation of reserves for the period of 20 years at each area of land allocated within the policy. In my judgment, that is an important factor to be borne in mind when considering the grounds upon which the Claimant seeks to quash the allocation at Cwm Slade and Wenvoe.

69 The first ground of complaint advanced by the Claimant, chronologically, relates to information provided to the Inspector at the Public Inquiry. He says that the Inspector was told that the reserves at the then existing Wenvoe Quarry were 9 million tonnes. As I understand it this figure originated from the Quarry operator albeit it was accepted as accurate by the Defendant. From that base the Inspector reached the conclusion that the Quarry had an expected lifespan of 9 years.

70 It is at least open to argument that if the reserves were 9 million tonnes the life span of the Quarry was nearly 11 years as opposed to the 9 years postulated by the Inspector. The reasons for this are canvassed at length in the evidence. In my judgment, however, the debate is a sterile one and it matters not whether the true life span was 9 years or 11 years. I say that since the Inspector clearly accepted that there should be reserves at the allocated sites of 20 years and it is inconceivable that he would have support the allocation of the land to the south of Cwm Slade and Wenvoe on the basis of a 9 year reserve at the existing Quarry but not on the basis of 11 years.

71 In any event, unless it is to be argued (which it was not) that the Defendant was in some way acting in bad faith I do not see how it acted unlawfully in accepting a recommendation by the Inspector about a policy even if one of the factual conclusions upon which the Inspector based his recommendation was erroneous.

72 In August 1999 the operator of Wenvoe Quarry submitted a planning application to the Defendant. This application was determined by the Defendant in April 2000 and the consequence was that a further 4 million tonnes became available for extraction at the existing Quarry.

73 The Claimant asserts that that the Defendant should have informed the Inspector of the planning application.

74 The Public Inquiry did not close until early 2000. Clearly, therefore, there was an opportunity to inform the Inspector of the application. That opportunity was available to the Defendant but also to any other interested person with knowledge of the application.

75 Be that as it may I do not consider that the Defendant acted unlawfully by not informing the Inspector of the application. The application, of itself, was not germane to the Inspector's consideration since, of course, the application may have been rejected.

76 The decision to grant planning permission was made after the close of the Inquiry. I do no think the Defendant was under an obligation to report the fact of the permission to the Inspector. In my judgment the obligation of the Defendant was to take the fact of the permission into account when determining how to proceed following the receipt of the Inspector's report. I can find no evidence in the witness statements or exhibits which suggests that the Defendant ignored the fact of the grant of permission when it decided to accept the Inspector's recommendation in relation to Min 2.

77 As I recorded above, when the Defendant published its Further Modifications in late 2004 the Claimant objected. In these proceedings he complains that the objection was misreported. However, the evidence of the Defendant shows that the representation of the Claimant was faithfully recorded in the report which the officers prepared for the Defendant.[20] The representation made by the Claimant was reproduced, word for word, in the report made by the officers.

78 The substance of the objection made by the Claimant to the Further Modifications was that the Defendant had failed to review land banks for limestone and the need for new allocations as required by MPPG and Mineral Technical Advice Note 1(MTAN1). The Claimant also asserted that the UDP and supporting documents did not provide a verified assessment of reserves and current rate use at Wenvoe, nor any reason why this use should continue.

79 The report prepared by the officers dealt with that objection. It argued, firstly, that a thorough review had taken place before and leading to the Public Inquiry. Secondly, the report stated:

"In addition, the Local Planning Authority undertakes an annual monitoring programme on all mineral and related activity in the Vale of Glamorgan. This is presented to the Council's Planning Committee in the form of detailed report on an annual basis and includes information on specific sites as well as trends in supply and demand and the use of secondary and recycled material. Such an appraisal allows for an annual review of mineral activity in the local context. The Local Planning Authority has therefore fulfilled the requirements

[20] Trial Bundle 2 pages 489 to 491

of MTAN 1 in that the Unitary Development Plan does contain an assessment of the land bank requirements of the Vale of Glamorgan. In addition annual reports ensure that the local context is regularly monitored and reviewed."

80 Paragraph 45 of MTAN1 provides that development plans should include an assessment of the current land bank and state how many years of mineral extraction the land bank will provide based on the latest 3 years production figures. Such plans should also include an assessment of the future land bank. Paragraph 49 provides that where land banks already provide for more than 20 years of aggregate extractions new allocations in development plans will not be necessary.

81 It is argued on behalf of the Claimant that the Defendant has not complied with these paragraphs of MTAN1 and that its failure to do so is unlawful.

82 In my judgment, the UDP does not contain the sort of assessment contemplated by paragraph 45. A far as I know it contains no assessment of how many years extraction the land bank will provide based upon the latest three years of production as at the date of its adoption. Miss Ellis argues, however, that the failure to include such an assessment within the UDP itself does not mean that the Defendant has acted unlawfully. MTAN1 is not a statute or statutory instrument. The obligation upon the local authority is to have regard to national policy and give it appropriate weight. She submits that the yearly assessment carried out by the Defendant complied with the spirit of the Advice Note in the sense that the Defendant did the necessary assessment to satisfy itself of the current land bank in each year and, therefore, make an assessment of the need for future allocations.

83 As a matter of principle, in my judgment, Miss Ellis is correct. I do not consider that the Defendant acted unlawfully simply because its assessments were not included within the UDP. In my judgment the real issue is whether the Defendant carried out the sort of assessments which MTAN 1 contemplates that it should.

84 There is no evidence before me to suggest that the Defendant did not have regard to the need to make assessments which conformed with MTAN1. Its officers obviously thought that the yearly assessments read in conjunction with the UDP were sufficient since they said as much in the report to Committee on the objections to Further Modifications. In his evidence, Mr. Thomas expresses the same view. During argument, Mr. Upton advanced no specific point based upon the evidence before me to suggest that the yearly assessments did not conform to the spirit of MTAN1.

85 The Claimant was also disposed to argue with vigour that by the time the UDP became ripe for adoption the land bank exceeded 20 years supply. Accordingly, he argued, the Defendant failed to heed the advice given in MTAN1 to the effect that if the supply exceeded 20 years there should be no new allocations. The basis for this argument was the Annual Report of the South Wales Regional Aggregates Working Party for the year 2003. The

report suggests that as of that year the land bank for crushed rock for the Vale of Glamorgan was 32 years.

86 I readily accept the argument of Mr. Upton to the effect that a published document of this type should be given due weight by any local planning authority engaged in the task of assessing reserves. I do not accept, however, that the authority is bound to accept the conclusion of the document even though it believes it to be erroneous.

87 In this case the Defendant does believe that the document was erroneous. Mr. Thomas has gone to some lengths in his witness statement to demonstrate that the land bank has always been much less than that suggested in the Report. In a letter to the Claimant dated 7th March 2005 Mr. Thomas asserted to the Claimant that as from the 1st January 2004 the land bank was 15.09 years.[21]

88 In his evidence, the Claimant disputes the Defendant's calculation of the land bank. He continues to argue that it exceeds 20 years.

89 I am in no position to adjudicate upon the rival contentions of the parties. I suspect that a fraction, only, of the material necessary to undertake a true analysis is before me and, in any event, that is not my function. My function is to scrutinise the evidence put before me in order to decide whether the Defendant has made an error of law. Nothing in the evidence of Mr. Thomas suggests that he or his team made any error such that I could safely conclude that their assessment of the reserves was wrong.

90 Since the Defendant's assessment is that the land bank is less than 20 years nothing in MTAN1 precludes it from allocating new sites.

91 I have reached the clear conclusion that no grounds exist upon which it would be proper to quash that part of Min 2 which the Claimant suggests should be quashed.

92 I turn shortly to the claim that the UDP contains a misleading sentence which should be quashed, namely the sentence to the effect that the reserves at Pantyffynon and Wenvoe will be exhausted within 6 years at current rates of extraction. The Defendant does not dispute that this statement was inaccurate at the time the UDP was adopted. Indeed, it may never have been accurate.

93 The inclusion of a statement of fact which is wrong within a UDP may amount to an error of law. It may reveal, for example, a flaw of reasoning or reliance upon an irrelevant consideration. In this case, however, the inaccuracy does no such thing. The point of the sentence was to demonstrate the need for the inclusion of new sites for extraction within the UDP. The view of the Defendant was that such a need was established and that view would have remained the same had the reserves at Patyffynon and Wenvoe been expressed to last for longer. I say that since the Defendant was satisfied that the reserves would not last for 20years.

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[21] Trial Bundle 2 page 492

94 Accordingly I do not propose to quash the sentence in question.

Ground 4

95 The primary relief sought is the quashing of the whole of the Waste Chapter of the UDP. In order to understand the basis of the Claimant's case it is necessary to set out the relevant statutory provisions and principles derived from case law.

96 The Waste Framework Directive 75/442/EEC sets out various objectives in relation to waste. Article 7 of the Directive requires planning authorities to draw up waste management plans which shall relate in particular to "the type, quantity, and origin of waste to be recovered or disposed of, general technical requirements, any special arrangements for particular wastes and suitable disposal site or installations." The Directive was implemented in England and Wales by the Waste Management Licensing Regulations 1994. By virtue of Regulations 1 and 2 the Defendant was under an obligation when discharging its functions in relation to the preparation and adoption of the UDP (so far as the plan related to the recovery or disposal of waste) to do so "with the relevant objectives." Regulation 4 specifies the "relevant objectives." It reads as follows:

> (1) For the purposes of this Schedule, the following objectives are relevant objectives in relation to the disposal or recovery of waste-
>
> (a) ensuring that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment……
> (b) implementing, so far as material, any plan made under the plan-making provisions.
>
> (2) The following additional objectives are relevant objectives in relation to the disposal of waste-
>
> (a) establishing an integrated and adequate network of waste disposal installations, taking account of the best available technology not involving excessive costs; and
> (b) ensuring the network referred to at paragraph (a) above enables-
> (i)…..
> (ii) waste to be disposed of in one of the nearest appropriate installations, by means of the most appropriate methods and technologies in order to ensure a high level of protection for the environment and public health.
>
> (3) The following further objectives are relevant objectives in relation to functions under the plan-making provisions-

(a) encouraging the prevention or reduction of waste production and its harmfulness…….

(b) encouraging-

   (i) the recovery of waste by recycling, reuse, or reclamation or any other process with a view to extracting secondary raw materials; and

   (ii) the use of waste as a source of energy.

97 Regulation 7 of the 1994 Regulations has the effect of requiring a UDP to include policies in respect of suitable waste disposal sites or installations. It does so by providing that section 12(3)(A) of the Town and Country Planning Act 1990 shall have effect as if the policies listed therein also included policies in relation to suitable waste disposal sites or installations. Section 12(3) of the Act makes it obligatory for a UDP to include policies in relation to those matters specified in section 12(3)(A).

98 The European Court has given guidance upon the proper approach to Article 7 in its decision in Commune de Brain-le-Chateau and Michel Tilleut and others v Region Wallonee (Joined cases C-53/02 and C217/02). The relevant extracts from that decision were quoted by Auld LJ at paragraph 23 of his judgment in Derbyshire Waste Ltd and another v The Secretary of State for the Environment, Food and Rural Affairs [2004] EWCA Civ. 1508. They are encapsulated in paragraph 85 of the judgment in the following passage.

"In my view, the starting point is that, subject to the provisions of Article 7 and 3, 4and 5 of the Waste Framework Directive and the guidance now given in Braine-le-Chateau as to the provisions of Article 7 waste management plans for location of waste disposal sites, member states are left with a margin of discretion at various levels. This margin of discretion may extend, not only to the detail of provision, but also to how prescriptive it is. Plans will vary, both according to their national, regional or local scale and, in the latter two cases particularly, differing constraints relating to the area, existing provision, needs and competing demands for other use of land."

The Lord Justice went on to repeat the following passage from Braine-le-Chateau

"…management plans cannot in all cases be the only factor which determines the exact location of waste disposal sites…."

99 It was common ground before me that following the adoption of the UDP and by virtue of various provisions of statutory instruments which I need not detail, the Act of 1990 ceased to have effect in relation to the Defendant on the 15th October 2005. Rather, the provisions of the Planning and Compensation Act 2004 came into force upon that date and became the statute governing the exercise of planning functions by the Defendant. The practical effect of that change was agreed. As from the 15th October 2005 the effect of this court quashing either the whole or part of the UDP was that no further work could be done upon it by the Defendant. There would be no possibility of policies

being formulated to replace any policies excised from the UDP by virtue of a quashing order.

100The Claimant also invokes Regulation 9(3)(b) of the T&CP (Development Plan) Regulations 1991. That regulation provides that the reasoned justification of the general policies in a UDP shall contain a statement of the regard which the authority has had in formulating their waste policies to any waste disposal plan for their area or to the national waste strategy and the reason for any inconsistency between their waste policies and the waste disposal plan or waste strategy.

101 One final statutory provision is relevant to the Claimant's case. Regulation 5 of The Environmental Assessment of Plans and Programmes (Wales) Regulations 2004 provides that where the first formal preparatory act of a plan which is prepared for waste management, town and country planning or land use occurs after 21st July 2004 the planning authority must carry out or cause to be carried out an environmental assessment during the preparation of the plan and before its adoption.

102 I deal firstly and shortly with the point raised by the Claimant in relation to the regulations referred to in the preceding paragraph. The Proposed Further Modifications as they related to the Waste Chapter were published after the 1st July 2004. Mr. Upton argues that the "first formal preparatory act" in relation to those modifications occurred after 1st July 2004 and that as a result the Defendant should have carried out or caused to be carried out an environmental assessment. It is common ground that no such assessment was carried out, and, in consequence, says Mr. Upton, the Defendant is in breach of its duty.

103 By virtue of Regulation 2 of the 2004 Regulations the word "plan" in the Regulations is to be interpreted as including any modification to the plan.

104 The Regulations give no clue as to the meaning to be given to the phrase "first formal preparatory act." In my judgment, the phrase "first formal preparatory act" contemplates a time prior to the time when the modification in question is published and placed on deposit. I say that since if it was intended to mean the time when the plan/modification was first published and placed on deposit the regulation could easily have said so. I find it difficult to understand what the word "formal" is intended to convey but in the context of a plan making process it probably connotes an act which has been authorised by the authority responsible for preparing the plan.

105 In my judgment, the evidence clearly establishes that the Defendant's officers had embarked upon the work necessary to produce the proposed Further Modifications prior to 1st July 2004. The most obvious piece of evidence which supports that conclusion is the letter dated 28th April 2004 from the Defendant to the Welsh Assembly Government which actually attached a draft of the suggested modifications.[22] It is inconceivable, in my judgment, that the

[22] Trial Bundle 2 pages 547 to 552

officers were not authorised to engage in the work of producing modifications by the date of that letter. Accordingly, in my judgment, the Defendant had taken the "first formal preparatory act" in relation to the proposed Further Modifications before the 1st July 2004.

106 It seems to me that the Claimant's remaining grounds of challenge to the Waste Chapter are threefold. First, he complains that the Chapter does not comply with the statutory regime (including the European Directive) set out above. Secondly, he complains that the Defendant has ignored national policy guidance in its formulation of the Waste Chapter. Thirdly he complains that the Defendant has failed to give adequate reasons for rejecting objections during the decision-making process. I will deal with each in turn although first it is necessary to describe how the Waste Chapter in the adopted UDP evolved.

107 The Waste Chapter of the draft UDP placed on deposit in 1998 was the subject of a number of objections which were maintained through to the Public Inquiry. Following the Inquiry the Inspector made recommendations which, if accepted, necessitated modifications to the Waste Chapter but, in the main, he rejected the main thrust of the objections made by Friends of the Earth. The Inspector considered the issue of whether the Chapter provided an integrated strategy for waste management and it does not appear from the Inspector's Report that he concluded that it did not. However, the Inspector expressed the opinion that the Chapter should be reviewed when the regional Strategic Waste Management Assessment was published. To recap, the Inspector's report was received by the Defendant in late 2000 and presented to the Planning Committee of the Defendant in January 2001.

108 In November 2001 Technical Advice Note (Wales) 21 was published. It is a detailed policy document covering a range of issues. In the context of the present case it is important to note that the Advice Note contained important guidance on the content of Regional Waste Plans and Unitary Development Plans. The section dealing with the content of Unitary Development Plans is section 5 and the whole of that section should be read as if it is quoted within this judgment.[23]

109 In February 2003 the Defendant published its proposed Modifications to the UDP. The Modifications published took account of the Inspector's recommendations (all were accepted so far as the Waste Chapter is concerned). Objections were received to the proposed Modifications insofar as the Waste Chapter was concerned. Those objections included objections from Friends of the Earth and WAG. The representations of WAG are within the Bundle.[24] In part at least they relate to the failure of the Defendant to take account of up to date policy, although Advice Note 21 was not mentioned specifically.

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[23] Trial Bundle 2 pages 596

[24] Trial Bundle 2 pages 517 to 520.

110 Between April 2003 and the publication of proposed Further Modifications in October 2004 a dialogue ensued between the Defendant and WAG. In advance of the publication of the proposed Further Modifications to the public at large, the Assembly Government had been sent them and it indicated that it was largely satisfied with the content.[25] The proposed Further Modifications as published constituted a very substantial revision to the Waste Chapter[26] I should record that in the period April 2003 and October 2004 there were the following developments as well as the dialogue between the Defendant and WAG. In March 2004 the South Wales Regional Waste Plan was published. In May 2004 the WAG issued a Policy Clarification Note which suggested that a Policy relating to waste in a specific form should be included in Unitary Development Plans.[27]

111 According to the evidence of Mr. Thomas, Friends of the Earth (Barry) made a limited objection to the Waste Chapter as written in the Further Modifications.[28] Otherwise there was no objection made by an organisation to which the Claimant is related.

112 WAG, of course, had advance notice of the proposed Further Modifications. Its one concern as set out in a letter of 12th August 2004 related to arrangements for landfill. Following the publication of the Further Modifications that point was again taken up. On the 23rd November 2004 Mr. Thomas wrote to WAG to explain the Defendant's strategy in relation to landfill facilities. Following the receipt of that letter it was discussed by officers of the Assembly Government and it was the subject of an internal email which made it clear that the officers were still concerned about the strategy for landfill but equally conscious that an objection to the Further Modifications would delay the adoption of the UDP.[29] On the 26th November 2004 Mr. Thomas wrote again to WAG to confirm that "the Council has in place appropriate waste management measures and plans that fully accord with the Council's responsibilities for all waste arisings in accordance with Planning Policy Wales (2002), Technical Advice Note 21: Waste (2001)."[30] This letter, in turn, became the subject of an internal email at the Assembly Government.[31] Its terms indicated that no objection would be made to the Further Modifications by WAG in view of the assurance contained with the letter of 26th November. However, the email described the circumstances prevailing as exceptional. In a letter sent to the Defendant the same day on behalf of the Assembly Government, the Defendant was informed that no objection would be made to the proposed Further Modifications. The letter contained this sentence:

"Development plans should generally provide clarification of landfill proposals, and you will appreciate that the Assembly Government's

[25] Trial Bundle 2 pages 561 and 562
[26] Trial Bundle 2 pages 572 to 578
[27] Trial Bundle 2 pages 569 to 571
[28] Trial Bundle 2 pages 324 (paragraph 36) and 650
[29] Trial Bundle 1 page 241
[30] Trial Bundle 2 page 566
[31] Trial Bundle 1 page 241

acceptance of this assurance is based upon this being a unique and exceptional situation."

113 The UDP was adopted in the form of the Further Modifications so far as the Waste Chapter was concerned.

114 Against that background, I turn to the grounds of challenge. In my judgment, there are no grounds to conclude that the UDP does not conform to the Waste Directive, the Regulations bringing the Directive into force or case law in Europe and England and Wales. In my judgment the Waste Chapter properly proceeds on the basis of the objectives set out in the 1994 Regulations. By the end of the submissions, I did not really understand Mr. Upton to say that it did not. Rather the focus of his submissions was that the Chapter did not accord with the guidance contained within Policy Documents and, in particular with the requirements of Advice Note 21.

115 There can be no doubt that the UDP does not accord with some of the advice contained within Advice Note 21 as to the information it should contain. In this respect the UDP does not conform with paragraph 5.5 of the Advice Note in particular. Further, there is little doubt but that the WAG thought the treatment of the issue of landfill within the UDP to be deficient.

116 Miss Ellis' riposte is twofold. She submits that as a matter of fact much, at least, of the information that ought to have been included is contained within the Regional Waste Plan. She points to the extract from that Plan put in evidence.[32] Since the UDP clearly refers to the Strategic Plan, submits Miss Ellis, it is permissible to read the two plans together and, in that way the necessary information is provided. Her second line of argument is that the Defendant's failure to comply with the requirements of the Advice Note does not necessarily mean that it has acted unlawfully. The Defendant's obligation is to have regard to national policy. By reading the UDP in conjunction with the Regional Plan, submits Miss Ellis, it becomes clear that it did so. That is even clearer, says Ms Ellis if one also reads the Municipal Waste Management Strategy prepared and published by the Defendant.

117 Upon this aspect of the case I am hampered by the fact that I do not have the whole of the Regional Plan nor the Municipal Waste Management Strategy before me. However, the line taken by Miss Ellis was foreshadowed in the evidence of Mr. Thomas and the evidence adduced in the Claimant's third statement does not really rebut it.

118 I am also conscious of the fact that between March 2003 and November 2004 WAG was closely involved with the evolution of the Waste Chapter of the UDP. From the documents which unfolded it is obvious that both the Assembly Government and the Defendant had well in mind the relevant policy advice and save in the one respect identified by WAG it expressed itself satisfied with the form and content of the UDP.

[32] Trial Bundle 2 page 652

119 I do not consider that the Claimant has established that the Defendant did not have regard to national policy in formulating its UDP. Further, notwithstanding that the UDP did not accord with advice as to its content it was not unlawful for the Defendant to proceed to adoption. It seems to me that any person interested in the Waste Management policies of and relevant to the Defendant and its area could obtain the information from public documents, namely the UDP, the Regional Plan and the Municipal Waste Management Strategy.

120 I also reject the Claimant's challenge based upon the inadequacy of reasons. As I understand it the challenge is based upon the assertion that the Chapter does not conform with Regulation 9(3) (b) of the 1991 Regulations. Having read the Waste Chapter with care I simply do not see how the Chapter does nor conform with the Regulation. In his skeleton argument, Mr. Upton seems to elide this point with an assertion that in formulating its Further Modifications the Defendant failed to have regard to the objections and/or it failed to have regard to objections to when deciding to reject them and adopt the plan as modified further.

121 So far as objections made in advance of the formulation of the Further Modifications are concerned, they can only be such objections as were made to the Proposed Modifications in February 2003. Neither party has adduced evidence of the objections, if any made, by Friends of the Earth at that stage. So far as the WAG is concerned, of course, their objections were the subject of extensive correspondence and thought between 2003 and November 2004. When the Defendant published its Further Modifications the one objection made by Friends of the Earth was the one from its Barry Branch and that was dealt with appropriately and adequate reasons given for its rejection.[33]

122 As an alternative to an order quashing the whole Waste Chapter, the Claimant sought an order to quash the section of the Chapter relating to new policy WASRXXX. The reason why, I believe, this less extensive order was sought will be considered below. Mr. Upton's skeleton in support of this submission was simply that the policy did no more than repeat national policy and the criteria set out in the policy should not be given development plan status without proper justification.

123 This Policy was formulated as a consequence of the clarification issued by the WAG in May 2004. I do not see how it is correct to describe the Policy as contained within the UDP as either lacking in reasoned justification or simply a repeat of national policy. I certainly do not see how its inclusion within the UDP is unlawful.

124 In my judgment the attempt to identify a section of the Waste Chapter which could be quashed was an attempt to avoid the legal consequence of quashing the whole Chapter. What is the legal consequence of quashing the whole Chapter? According to Ms. Ellis it was that the UDP as a whole would cease to be a lawful UDP. She says that by virtue of the provisions of section 12(3)

[33] Trial Bundle 2 page 650

(A) of the 190 Act.[34] In short it is a mandatory requirement of primary legislation that a UDP contains policies about suitable waste disposal sites and installations. If the whole Chapter is quashed the UDP would contain no such policies and would therefore be unlawful. In the exercise of my discretion, she submits I could not possibly contemplate the quashing of a part of a plan if the effect of it was to leave the Defendant's administrative area with no lawful plan at all. Strictly, this point does not call for a decision from me. However, I should record that Mr. Upton struggled to counter it, founding his opposition to the point by reference to the recent decision of Sullivan J Ensign Group Limited v The First Secretary of State [2006] EWHC 255 (Admin). In my judgment that decision is wholly distinguishable. In Ensign Sullivan J had to grapple with whether as a matter of discretion he should quash a part of development plan under the 2004 Act. Counsel for the Secretary of State submitted that the discretion should be exercised against making a quashing order since the effect of quashing part of the development plan would be leave a policy vacuum. His decision to quash part of the plan turned upon the facts as they were found to be in that case (which are completely unrelated to the facts in this case) and upon provisions within the 2004 Act which are not found within the 1990 Act but which give to the Planning Authority greater flexibility of approach in the event that a part of a development plan is quashed. Sullivan J did not have to consider a situation where the quashing of one part of a plan led inexorably to there being no lawful plan in existence.

125 In my judgment, Ms Ellis is correct when she says that the effect of quashing the Waste Chapter would be to render the whole plan unlawful. In those circumstances I would be very reluctant to quash the Chapter even if I had acceded to one or more of the grounds upon which it was alleged to be unlawful. Such reluctance would be compounded in this case since, as I have said, it is common ground that the 1990 Act ceased to apply to the UDP upon its adoption. It appears to me that there would be a complete local policy vacuum within the Defendant's area for a very significant period of time. (Essentially until there were draft policies for the Local Development Plan under the 2004 Act.) In my judgment, that would not be in the pubic interest and the prejudice thereby caused to the system of planning control within the Defendant's area would far outweigh any harm to the public interest caused by the continued existence of a UDP parts of which were unlawful because, for example, they had failed to have regard to national policy in their formulation.

126 To repeat, however, my primary conclusion is that the Waste Chapter within the UDP is not unlawful.

Discretion

127 I have touched upon the exercise of discretion in the immediately preceding paragraphs insofar as it related to the Waste Chapter. It seems to me that the problem posed by a quashing of the whole Chapter was unique or at the very least very unusual.

[34] see paragraph 96 above

128 During the course of the hearing Ms Ellis advanced reasons why I should not quash any of the parts of the UDP which the Claimant challenged, even if I concluded those parts were unlawful. In view of my conclusions on the substance of the challenges I propose to deal with this issue very shortly. The principles to be applied are those set out in First Corporate Shipping Limited v North Somerset Council [2001] EWCA Civ 693 as applied by Richards J (as he then was) in Bersted Parish Council v Arun DC [2004] 2 P&C.R. 12.

129 In relation to the first ground of challenge there is a requirement that the Claimant show that he has been substantially prejudiced since his complaint is of the inadequacy of the reasons given for rejecting the Inspector's recommendations. That could be satisfied in the context of this case only if the test set out in paragraph 34 above was satisfied. If I had concluded that such a test was satisfied I would have proceeded on the basis I should be slow to withhold relief. My concern in this case, however, would be that the relief granted would no in no sense address the real mischief about which the Claimant complains. His complaint, in reality does not focus upon the sentence which he requires to be excised from the Plan. His complaint is of about the failure of the Defendant to incorporate a Green Belt. Nonetheless, on balance, if the stringent test of prejudice had been satisfied I would not have refused to grant relief.

130 Grounds 2 and 3 were based upon the premise that the Defendant had acted outside the powers conferred by the Act. If such a challenge is made good there is no requirement that the Claimant shows prejudice, although prejudice to the Claimant, if established, will be a strong factor supporting the grant of relief. In relation to Tran 1, no possible prejudice to the Claimant would be occasioned if the relevant part is not quashed. Further, no work would be possible upon the Plan to remedy the policy deficiency if the policy is quashed. Those factors militate against the grant of relief. On the other hand Ms Ellis was unable to identify any specific prejudice to the Defendant or the inhabitants of its administrative area if the policy was quashed in the manner suggested by the Claimant. On balance, if it had come to the exercise of discretion on this ground I would have granted the relief sought.

131 Similar considerations would apply in relation to the Rhoose Allocation and I would have probably reached the same conclusion.

132 The challenge to Min 2 also raises similar considerations. There is one factor, however, which differentiates it. The Claimant seeks an order that I quash Min 3 so as to restore Min 3 to its wording prior to Modification. In my judgment I have no power to achieve that. If I quashed Min 3 I have no power to order that a previous wording of the policy be adopted. Further, of course, the Defendant has no power to formulate a new policy since it is precluded from further work upon the UDP. The consequence of quashing Min 2, therefore, is to allow a situation whereby valuable reserves are neither allocated nor protected. On balance, this additional factor which militates against quashing would have persuaded me that as a matter of discretion I ought not to quash the challenged part of Min 2. I would quash the one sentence in the

explanatory material if persuaded that its inclusion within the UDP was unlawful.

Conclusion

133 For the reasons given above I consider that this claim should be dismissed. I am conscious that even this lengthy judgment may not have done justice to each and every point advanced by Mr. Upton and countered by Ms. Ellis. I do register a mild protest that the Claimant's grounds of claim seemed to me to have enlarged and contracted at various points during the life of these proceedings not least during the course of argument itself. I believe, however, that I have considered the main points upon which each party relied.

134 I should also record that much of the Claimant's evidence was in reality an attempt to debate the planning merits of the points in issue. I simply record that I consider it essential that I resist the temptation to be drawn into such a debate.

135 I propose to hand down this judgment over the telephone at 9.30am on Friday 31st March 2006. I would be grateful if the parties would submit to me typographical corrections so that a corrected version of this judgment can be sent out after handing down. If the parties can agree the order to be made consequent upon my judgment they are free to submit the order for approval and there need be no appearance even by telephone. If, of course, there are contested issues or if the Claimant wishes to seek permission to appeal there will have to be a short hearing over the telephone.