[redacted]

12 October 2020

Dear sirs. Review of Judicial Reviews

I write as a retired commercial lawyer. Whilst I have no experience of Human Rights cases I have had in depth experience of cases involving Government Departments and Local Authorities.
Only last week Lord Neuberger Said once you deprive people the right to go to Court to challenge the Government you are in a dictatorship , you are in a tyranny.(see attached pages from The Guardian 7 October 2020)Attachment1.
In my case I was upset by Surrey County Council not once but twice and was left with no alternative but to resort to JR first in our individual names and second in the name of the Parish Council.
I attach a press release we made on the first Judgment (attachment 2)together with that Judgment (attachment 3)and a summary of the second Judgment (attachment 4)
The erring on each case by Surrey CC shows how important Access to the Court is by way of JR.

Yours sincerely

John K McCall

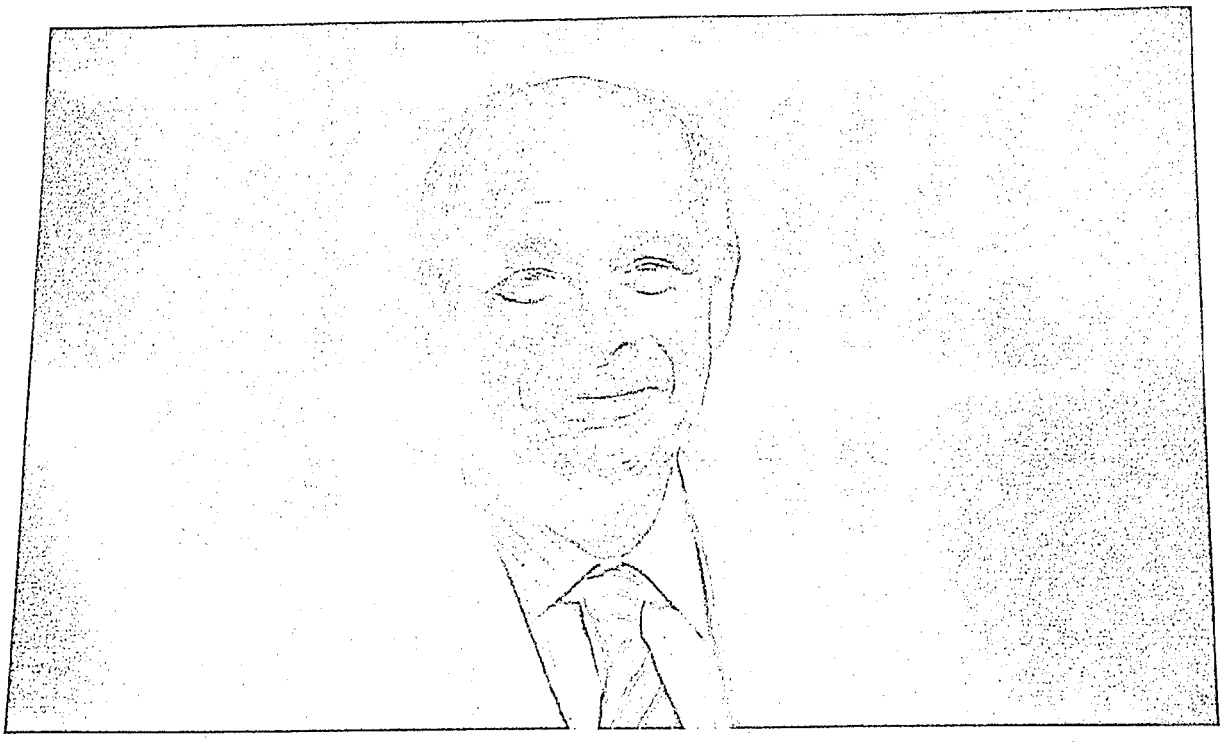
To Independent Review of Administrative Law
Protcourt 10.18
102 Petty France
London SW1 9AJ

Attachment 1

The Guardian

Brexit strategy risks UK 'dictatorship', says ex-president of supreme court

Lord Neuberger condemns internal market bill for exempting some of its powers from legal challenge



Lord Neuberger: 'Once you deprive people of the right to go to court to challenge the government, you are in a dictatorship, you are in a tyranny.' Photograph: Supreme Court/PA

Owen Bowcott *Legal affairs correspondent*

Wed 7 Oct 2020 22.49 BST

The government's Brexit strategy is in danger of driving the UK down a "very slippery slope" towards "dictatorship" or "tyranny", according to a former president of the supreme court.

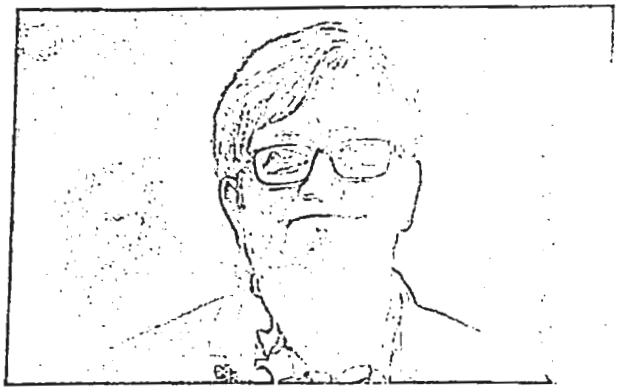
Addressing an online meeting of lawyers, Lord Neuberger on Wednesday evening condemned the internal market bill, which enables the government to breach international law and exempts some of its powers from legal challenge.

"Once you deprive people of the right to go to court to challenge the government, you are in a dictatorship, you are in a tyranny," Neuberger told the webinar. "The right of

litigants to go to court to protect their rights and ensure that the government complies with its legal obligation is fundamental to any system ... You could be going down a very slippery slope."

His comments came as the Scottish parliament at Holyrood voted by 90 votes to 28 against granting legislative consent to the Westminster bill. The Scottish National party, Labour, Green and Liberal Democrat MSPs united to oppose the legislation; only Conservative MSPs supported it.

The vote will not prevent Boris Johnson's government at Westminster from pushing through the internal market bill, but the Scottish constitution secretary, Mike Russell, said the Scottish parliament had "explicitly" and comprehensively rejected it.



Joanna Cherry said she feared the Scottish government might itself have to initiate legal proceedings against the Westminster government. Photograph: Jonathan Brady/PA

The hastily assembled online panel opposing the bill, organised by the International Bar Association, included Lord Neuberger, the former home secretary and Conservative party leader Michael Howard, the former attorney general Dominic Grieve QC, the SNP justice spokesperson Joanna Cherry QC, Helena Kennedy QC and Jessica Simor QC.

All hoped the internal market bill would be defeated in parliament - overturned and fatally delayed by the House of Lords - rather than being challenged in the courts.

Cherry said she feared it would end up in the courts and the Scottish government might itself have to initiate legal proceedings against the Westminster government.

Neuberger warned that any hearing would "put the judges in a position where they are on a collision course with the government or are seen to be craven ... [But] you have to sort out problems in court, if you don't you have a civil war."

Lord Howard told the online rally, which attracted more than a thousand participants, that he was "opposed to the clauses in the bill which breach international law".

"I'm opposed because I think governments ought to keep their word and uphold treaties," he said. "I hope this bill is defeated in parliament not in the courts."

Grieve said not only did the bill breach international law, it contained an "ouster

Attachment 2

PRESS RELEASE

JUDGMENT TRANSCRIPT ISSUED ON CAPEL ACTION GROUP'S SUCCESSFUL JUDICIAL REVIEW ACTION AGAINST SURREY COUNTY COUNCIL

"IT WAS WHOLLY UNREASONABLE OF THE COUNCIL OFFICERS NOT TO TAKE THE MATTER BACK TO COMMITTEE. THIS IS A HEARING THAT SIMPLY SHOULD NOT HAVE OCCURRED" - Mr Justice Sullivan

Para 89

The transcript of Mr Justice Sullivan's Judgment, delivered in the High Court on Friday 8 November 2002, has now been issued.

The Judge expressed concern over the manner in which County officers appeared to exclude County Councillor involvement in the Council's response to the Judicial Review - *"The lack of member involvement in the circumstances of this case does give rise to serious concern"*

The Judgment was issued on the three key issues of site definition, the proximity principle and need.

- The Judge ruled against the way in which the Local Waste Plan 1997 (the Plan) had been interpreted by the Officers of Surrey County Council (SCC), with regard to the definition of site locations. This was in complete contradiction to the reasons given by SCC when adopting modifications to the Plan. The Judge said *"I am in no doubt that it would be unreasonable, because it would be wholly unfair and inconsistent, for a Local Planning Authority to contend for an interpretation of a policy which it had expressly rejected in the modifications process".*

Para 28

Neutral Citation Number: [2002] EWHC 2471 Admin
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

CO/2216/2002

Royal Courts of Justice
Strand
London WC2

Friday, 8 November 2002

BEFORE:

MR JUSTICE SULLIVAN

- - - - - - -

THE QUEEN ON THE APPLICATION OF
DINO ADRIANO
PAUL GARBER
JOHN MCCALL

(CLAIMANTS)

-v-

SURREY COUNTY COUNCIL

(DEFENDANT)

Computer -Aided Transcript of the Stenograph Notes of
Smith Bernal Wordwave Limited
190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

MR P VILLAGE QC AND MR J STRACHAN (instructed by Pitmans, Reading) appeared on behalf of the CLAIMANTS
MR A KELLY QC AND MR D EDWARDS (instructed by Legal Services Division, Surrey County Council) appeared on behalf of the DEFENDANT

JUDGMENT
(As Approved by the Court)

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Friday 8 November 2002

1. MR JUSTICE SULLIVAN: On 6 December 2001 a special meeting of the Planning and Regulatory Committee of Surrey County Council resolved to grant conditional planning permission for an Energy from Waste (EfW) incinerator at the Clockhouse landfill site, Horsham Road, Capel.

2. The Capel application was considered along with two other EfW incinerator proposals: at Copyhold Works, Redhill and at Slyfield Industrial Estate, Guildford. Officers provided members with a very considerable amount of information. Eleven core documents were prepared dealing with a range of topics common to all three applications. These topics included Development Plan Policies, The Best Practicable Environmental Option (BPEO), the Proximity Principle and Need. For each application there was a substantial report, in the case of the Clockhouse application this ran to 92 pages, and a summary report (the main report and summary report respectively). In addition, there was an "Overview and Summary of the Officer Reports and Recommendations (Revised)" (the Overview). The Officers recommended that the Capel application should be approved and the Redhill and Slyfield applications should be refused. Their recommendations were accepted by the committee.

3. The EfW incinerator involves the construction of a large plant with an ash recycling facility. The main plant building varies in height from 12 to 32 metres and there is a 70 metre high emission stack. The plant would process some 110,000 tonnes of municipal waste per annum, operating continuously for 24 hours every day of the year. It was intended that it should become operational in 2004 and have a design life of 25 years. The village of Capel is in a rural area in the southernmost part of the county. Clockhouse landfill site lies to the south of the village, close to the southern boundary of the county. To the north, outside urban areas, most of the county is in the green belt. Capel is in the "countryside beyond the green belt".

4. The claimants are residents in Capel and live some two kilometres to the north of the proposed plant. The third claimant participated as an objector in the procedures leading up to the adoption of the Surrey Waste Local Plan 1997 (the Local Plan). When the committee resolved to grant conditional planning permission for the Capel EfW, it did so subject to referral of the application to the Secretary of State as a departure from the Development Plan, and the completion of agreements under section 106 of the Town and Country Planning Act 1990 (the Act), dealing with such matters as HGV routing and a nature conservation and land management plan. By letter dated 10 April 2002 the Secretary of State informed the council that he was not calling in the application.

5. The claimants had waited to see whether the Secretary of State would call in the application before commencing proceedings for judicial review. Following the Secretary of State's letter dated 10 April, they applied for permission to apply for judicial review of the 6 December 2001 resolution on 8 May 2002. Although no planning permission had been granted (negotiations on the section 106 agreements are still continuing) this was a sensible precaution, since at that stage the House of Lords had not given its decision in R(Burkett) v Hammersmith and Fulham London Borough Council [2002] 1 WLR 1593.

6. Leave to apply for judicial review was granted on 5 July. The core document dealing with need, the main report and the Overview had all referred to two outstanding appeals in respect of landfill proposals at Coldharbour Lane and Patteson Court. An enquiry into the Coldharbour Lane proposal had concluded on 23 March 2001 and the Secretary of State's decision was awaited. In a decision letter dated 4 April 2002 the Secretary of State dismissed the Coldharbour Lane appeal. In June 2001 the Secretary of State had called in the Patteson court application for his own determination. As at December 2001 an enquiry was awaited.

The enquiry opened on 14 May 2002, and in a decision letter dated 17 September 2002, the Secretary of State granted planning permission. By letter dated 31 September the claimants' solicitors contended that this was a material change of circumstances after the committee's decision on 6 December 2001, and asked for confirmation that the committee would be asked by Officers to reconsider its decision. The defendant's Head of Legal Services replied on 16 October 2002 saying:

> "It is not proposed to review the resolution made during December 2001. There has not, as you suggest in your letter, been a fundamental change in circumstances since the committee made its decision."

7. The claimants applied for permission to amend their grounds of challenge to include a challenge to this decision not to refer the matter back to committee. The defendant did not oppose this amendment. Certain other proposed amendments were opposed. So the claimants now challenge both the December 2001 resolution and the October 2002 decision by Officers not to refer the matter back to committee in the light of the Patteson Court decision.

8. In his submissions on behalf of the claimants, Mr Village QC outlined their principal complaints (post 17 September 2002) as follows:

(1) the defendant erroneously treated the Clockhouse landfill site as "land with an existing waste use" within policies WLP 10 and WLP 18 in the Local Plan.

(2) The defendant misapplied the proximity principle.

(3) The defendant has failed to reassess the issue of need in the light of the Patteson Court decision.

9. There were other complaints, relating to the manner in which the defendant had considered the issue of prematurity, the manner in which need was addressed (pre 17 September) and the adequacy of the Environmental Impact Assessment in respect of the Great Crested Newt population on the site.

10. Having heard the submissions of Mr Village QC, and Mr Kelly QC on behalf of the defendant, in respect of grounds (1) to (3) above, I did not find it necessary to hear the claimants' submissions on their remaining complaints. Grounds (1) to (3) are concerned with matters which were of fundamental importance to the proper determination of the application for planning permission. Given the importance accorded to the Development Plan in the decision making process (see section 54A of the Act), it was essential that policies WLP 10 and WLP 18, which are concerned with the general approach to be adopted to the establishment of waste handling and treatment facilities and the site criteria for the establishment of EfW plants respectively, should be properly applied to the application.

11. The importance of the proximity principle was confirmed by the Court of Appeal in Thornby Farms Ltd v Daventry District Council, Murray v Derbyshire County Council [2002] JPL 937. The objective in the EU Waste Framework Directive is:

> "... something different from a material consideration ... A material consideration is a factor to be taken into account when making a decision and the objective to be attained will be such a consideration, but it is more than that. An objective which is obligatory must always be kept in mind when making a decision even while the decision maker has regard to other material considerations. Some decisions involve more progress towards achieving the objective than others."

see per Pill LJ at page 954. Thus it was essential that the defendant properly applied the proximity principle to the application.

12. The Overview explained that "Need is a major and common consideration in determining all the applications". The claimants contend that the Patteson Court decision is highly relevant to the question of need, so that the committee should be asked to reconsider its decision. The defendant submits that Patteson Court is not a material consideration and therefore there was no need to invite the committee to reconsider the matter on this basis. The importance of the committee (and not merely the defendant's Officers) having regard to all material considerations before any planning permission is granted pursuant to the resolution was underlined by the Court of Appeal's recent decision in R(Kides) v South Cambridgeshire District Council [2002] EWCA Civ. 1370, dated 9 October 2002. Jonathan Parker LJ said this in paragraphs 125 and 126:

> "On the other hand, where the delegated officer who is about to sign the decision notice becomes aware (or ought reasonably to have become aware) of a new material consideration, section 70(2) requires that the authority have regard to that consideration before finally determining the application. In such a situation, therefore, the authority of the delegated officer must be such as to require him to refer the matter back to committee for reconsideration in the light of the new consideration. If he fails to do so, the authority will be in breach of its statutory duty.
>
> "In practical terms, therefore, where since the passing of the resolution some new factor has arisen of which the delegated officer is aware, and which might rationally be regarded as a 'material consideration' for the purposes of section 70(2), it must be a counsel of prudence for the delegated officer to err on the side of caution and refer the application back to the authority for specific reconsideration in the light of that new factor. In such circumstances the delegated officer can only safely proceed to issue the decision notice if he is satisfied (a) that the authority is aware of the new factor, (b) that it has considered it with the application in mind, and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision."

13. I have emphasised the importance of these three issues, the Local Plan, the proximity principle and need, because I am anxious that it should not be thought that any error or omission in an Officer's report to a planning committee will afford a proper ground of challenge by way of judicial review. The error or omission may not be significant; the members may have been able to correct the error or make good the omission as a result of their local knowledge. They may not have followed the process of reasoning set out in the officer's report. In the present case, however, there has been no evidence from members of the committee, and there has been no suggestion on the part of the defendant that the members did not follow the approach advocated by the Officers.

14. I am also concerned that the necessary highly selective quotations in this judgment, from the Overview, the main and summary reports and the core documents before the committee, should not give the impression that it is appropriate to scrutinise such lengthy reports in a nitpicking or legalistic manner. The committee was provided with a mass of material. These three applications raised a wide range of issues, all of which were explored in considerable depth in the extensive documentation before the committee. If complaints are to be made about an Officer's report, they have to be focused upon errors of real significance. With these considerations in mind, I will examine the claimants' three principal complaints in turn.

Ground (1): The Local Plan

15. In their summary report Officers advised the committee:

> "The adopted criteria based SWLP [Surrey Waste Local Plan] provides for the development of EfW plant and in principle the proposal meets the requirements of SWLP Policy WLP 18, in that it is located on land with an existing waste use and the site is large enough to accommodate the facility, associated infrastructure and landscaping."

16. Paragraphs 182 and 183 of the main report were as follows:

> "Policy WLP 18 of the SWLP sets out the locational criteria by which EfW proposals should be judged. The supporting text advises that there should be no automatic assumption that these sites are appropriate as any proposals would also have to be judged on the basis of Policy WLP7 and other policies. The applicant considers that as an existing waste disposal site, Clockhouse Landfill is an appropriate location for an EfW plant (WLP Policy 18(b)). In addition, the applicant considers that, as the land has been subject to clay extraction, it 'is already despoiled' and therefore also meets criteria (d). Officers do not agree with the applicant's conclusion on criteria (d). Although the land is currently 'despoiled' following clay extraction, it is currently being restored to agricultural afteruse, under landfill planning permission MO98/1448.
>
> "Objections from consultees including Mole Valley District Council, Capel Parish Council and objectors, including Capel Action Group, refer to EfW plant as being inappropriate development in attractive countryside and remote rural areas. Amongst other matters they consider that the industrial nature of and scale of the development to be out of keeping with the surrounding land uses and character of the local area. As the application site is an existing waste use Officers consider that, in principle, it could be considered to be an acceptable location under SWLP Policy WLP 18. However, this also needs to be considered against the criteria in WLP7 and other policies, including the material planning considerations raised by consultees and in representations. These are considered in the following sections of the report."

Thus Officers were saying to the members that this operational landfill, which was being restored to agricultural use, was "an existing waste use" for the purposes of policy WLP 18. It is common ground that the claimants' reference to an EfW plant being inappropriate development in the countryside was a reference to paragraph 4.27 of the Local Plan:

> "Whilst the deposit of waste in the former mineral workings to secure restoration will generally be appropriate, other forms of waste related development will be considered in the light of the need to protect the countryside from inappropriate and intrusive development. The key issues are likely to be the visual impact of the development, traffic generation and the suitability of the highway network to accommodate it, the impact on the natural environment and the amenities of residents. Development of an industrial or commercial nature should not normally be accommodated in the countryside."

17. Policy WLP 10 is contained within paragraph 5.12 of the Local Plan and is concerned with the general approach to the provision of sites. It reads as follows:

"5.12 It is likely that a number of additional sites or facilities will be needed during the life of the Plan if the shift in emphasis away from landfill and in favour of recycling and treatment of waste is to be achieved.

"POLICY WLP 10

"The establishment of facilities for the handling and treatment of waste should be:

"(a) on land that is, or has been used, or is allocated in a Local Plan or has planning permission for industrial or storage purposes; or

"(b) on land with an existing waste use; or

"(c) on land not in beneficial use but which has previously been used for a waste use. Restored former landfill sites are not included in this category where they are capable of beneficial use.

"In all cases the site should be large enough to accommodate the proposed facility and any associated infrastructure, groundworks, servicing and landscaping appropriate to the life span and location of the proposed facility.

"Such facilities may also be acceptable on operational landfill sites. Proposals for facilities at these locations would be determined in accordance with the proximity principle and other relevant policies in this plan.

"5.13 A list of sites with a waste disposal use is given in Appendix 4. There should be no automatic assumption that these sites are appropriate for limited scale development; proposals on any of these sites would be considered on the basis of Policy WLP7 and other policies of this Plan."

The Clockhouse site is included as site D11, a landfill site, in appendix 4.

18. Policy WLP 18, which is concerned with site criteria, is as follows:

"The establishment of energy from waste incineration plants should be:

"(a) within an industrial area or on land allocated for industrial use; or

"(b) on land with an existing waste use; or

"(c) on land not in beneficial use but which has previously been used for a waste use. Restored former landfill sites are not included in this category; or

"(d) on extensive areas of despoiled, contaminated or previously developed derelict land.

"In all cases the site should be large enough to accommodate the proposed facility and any associated infrastructure, groundworks, servicing and landscaping.

"5.66 A list of sites with a waste disposal use is given in Appendix 4. There should be no automatic assumption that these sites are appropriate for an energy from waste plant; proposals on any of these sites will also be judged on the basis

of Policy WLP7 and the other policies of this Plan."

19. The similarity between paragraphs (a) to (c) in policies WLP 10 and WLP 18 will be immediately apparent. Mr Kelly QC accepted, on behalf of the council, that whatever may be meant by "land with an existing waste use" in paragraph (b), it must mean the same thing in both policy WLP 10 and WLP 18. If these words are considered in isolation, entirely out of context, it might well be thought that an operational landfill site was indeed land with an existing waste use, notwithstanding the fact that the object of the landfill was restoration, not waste disposal. But it would not be right to consider the words in isolation and out of context. Having said that the establishment of facilities for the handling and treatment of waste should be on land with an existing waste use, paragraph 5.12, within which policy WLP 10 is contained, continues:

> "such facilities may also be acceptable on operational landfill sites ..."

The distinction between a locational preference in policy terms and a possible exception in policy terms is plain.

20. The reason for the distinction between operational landfill sites and land with an existing waste use becomes clear as soon as one considers the evolution of the policy through the Local Plan process. Policy WLP 7 in the draft Local Plan (now policy WLP 10) had expressly excluded landfill sites. The Local Plan Inspector considered that this exclusion was not justified and recommended the following policy:

> "The establishment of [limited scale] facilities for the handling and treatment of waste should be:
>
> "(a) on land which is, or has been used, or is allocated in a Local Plan or has planning permission for industrial or storage purposes, or
>
> "(b) on land with an existing waste use; or
>
> "(c) on land not in beneficial use but which has previously been used for a waste use. Restored former landfill sites are not included in this category where they are capable of beneficial use.
>
> "(d) at operational landfill sites."

The Inspector recommended that the distinction in the draft plan between limited and large-scale facilities should be deleted and the council agreed with this recommendation. However, in its response to the Inspector's report, the council expressly rejected the Inspector's recommendation in respect of operational landfill sites. It accepted her proposed modified policy except for the Inspector's criterion (d). Paragraph 25 of the council's reasons for not accepting the Inspector's recommendation and proposing its own modification was as follows:

> "The Inspector supports the development of waste related facilities at landfill sites ... This consideration gives rise to serious reservations. The inclusion of landfill sites in policy as a preferred location for waste related development is not acceptable for a number of reasons. Landfill sites in many cases lie remote from populated areas and provision of facilities such as civic amenity sites and transfer stations would be contrary to the proximity principle. In addition, the majority of landfill sites in Surrey lie within the Green Belt. The Inspector's approach can be accommodated by indicating not in policies but in the text of the Plan that such facilities may also be acceptable on landfill sites and this is

recommended."

Thus in the reasons given for the council's decision in the schedule of modifications and responses to the Inspector, we find:

> "The locational preferences for waste related activities is [sic] now clearly indicated. The inclusion of operational landfill sites is not appropriate. The County Council view landfilling at a mineral site as the means by which a site can be restored not as the use of land for a waste disposal operation as of right. Landfill sites are not viewed as a preferred location for this type of activity particularly as they are likely to be remote from waste arisings and intensification in activities at a landfill site may lead to unacceptable impacts on the local area. Proposals for facilities at landfill sites will be viewed by the Authority as exceptions to this policy."

So the council modified policy WLP17 (now policy WLP 10) as set out above, excluding any reference to operational landfill sites in the policy itself, but including reference to them in the text in paragraph 5.12.

21. It is important to bear in mind that the council's response to the Waste Local Plan Inspector's report, its reasons for not accepting her recommendations, and its proposed modifications to the policies in the Draft Waste Local Plan are not merely public documents. They were produced as part of the formal statutory process leading up to the adoption of the statutory development plan. This process ensures that the public are involved in the evolution of local plan policies.

22. I confess that I was, therefore, more than a little surprised to hear Mr Kelly QC submit, upon instruction from the council's Head of Legal Services, that it was "plain, on the express wording of policies WLP 10 and WLP 18 and the explanatory text to those policies, that landfill sites, including Capel, are intended to be regarded as 'land with an existing waste use'". He further submitted that it was "not appropriate to seek to construe, let alone contradict, the clear and express words of an adopted Local Plan by reference to ... the Local Planning Authority's pre -adoption decision making process". For this latter proposition, he relied upon the decision of MacPherson J in Jeantwill v Secretary of State for the Environment [1993] JPL 445. In that case an appellant had sought to rely upon a Local Plan Inspector's recommended modification to a Local Plan, which had been rejected by the Local Planning Authority. Understandably, in those circumstances, MacPherson J said:

> " ... that it would be confusing to require the Secretary of State to consider the recommendations which had in fact been rejected. Were it otherwise decisions on policy would never be settled but could be re -opened, thereby destroying the value of such policies in providing a framework for planning control."

23. By contrast, in the present case, Council Officers defending this challenge rely on an approach to WLP 10 and WLP 18 (to include operational landfill sites in the types of land where there is a locational preference for the establishment of waste handling facilities, including EfW plants) which was expressly rejected by the Local Planning Authority itself during the modifications process. Whatever the position may be if the Local Planning Authority has, through inadvertence, adopted a Local Plan policy the text of which does not properly reflect its intentions, that is not the case here. There would be no reason to include in the text of paragraph 5.12 "such facilities may also be acceptable on operational landfill sites" if such sites were to be regarded as land with an existing waste use within WLP 10(b). The approach in the text of paragraph 5.12 is entirely consistent with that in paragraph 4.27:

landfill for restoration purposes is distinguished from other forms of waste related development.

24. Mr Kelly QC made various submissions in relation to the references to "restored former landfill sites" in paragraph (c) of policies WLP 10 and WLP 18. They do not, however, advance the defendant's case. The Clockhouse site is an operational landfill in the process of being restored. If it is restored to agricultural use, it will be excluded from paragraph (c). The defendant's approach to the interpretation of WLP 10 and WLP 18 flies in the face of the council's own expressed intentions when adopting those policies. It also conflicts with the proper approach to the interpretation of planning policies generally. Particular words in individual policies should not be taken out of context and construed in the abstract. The Plan has to be construed as an whole. Thus it is necessary to read policy WLP 18 together with policy WLP 10 and the explanatory text, which includes paragraphs 4.27 and 5.12.

25. If there is room for doubt about the meaning of a particular policy, it should not be construed in a vacuum, but in the surrounding planning context. An important part of this context may be the reasons given by the Local Planning Authority for proposing a particular modified version of a policy in response to recommendations made by a Local Plan Inspector. The reasons given for modifying the policy cannot override its express terms, but they may be of considerable assistance in resolving any ambiguity or uncertainty.

26. Mr Kelly QC relied upon R v Derbyshire County Council ex parte Woods [1998] 6 Env LR 277 for the proposition that, even if an alternative construction of policy WLP 18 was possible, the council's decision should be quashed only if its construction could be said to be unreasonable: see per Brook LJ at page 291 applying the dicta of Auld J (as he then was) in North Avon District Council v Secretary of State for the Environment [1993] JPL 761.

27. That general principle is not in doubt, but it has to be applied to the particular facts of this case where the Local Planning Authority itself, in the statutory modifications process, contended for a particular interpretation of the relevant policy. Brook LJ recognised, at page 290:

> "If there is room for dispute about the breath of the meaning the words may properly bear, then there may in particular cases be material considerations of law which will deprive a word of one of its possible shades of meaning in that case as a matter of law."

He mentioned on page 291, by way of example:

> "... the need for consistency in the construction of policies as between two policy sources might be a relevant consideration when determining the meaning which the words in a policy document were capable of bearing."

28. It may well be possible to envisage other circumstances where it would be unreasonable and/or inconsistent for a Local Planning Authority to contend for a particular interpretation of a policy. But I am in no doubt that it would be unreasonable, because it would be wholly unfair and inconsistent, for a Local Planning Authority to contend for an interpretation of a policy which it had expressly rejected in the modifications process. This is not simply a question of there being a need for consistency in the planning process, there is a need for integrity in the Local Plan process. I accept that a Local Planning Authority may wish, for perfectly proper reasons, to alter its interpretation of a policy, for example, in response to decisions by Inspectors or the Secretary of State. If it makes it clear that this is what it proposes to do and fairly considers the implications of making such a change, then its revised

interpretation may not be unreasonable, unfair or inconsistent, but that is not what happened here.

29. Mr Kelly QC submitted, as a fallback position, that even if the report had been in error in treating the Clockhouse operational landfill site as "an existing waste use", that error was of no consequence because, in the light of the many factors considered in the documents before the committee, it was considered to be a suitable site for a proposed EfW plant.

30. I do not accept that submission. There is no evidence to suggest that the councillors wished to change the council's policy approach to the use of operational landfill sites, as set out in paragraphs 4.27 and 5.12 of the Plan and as explained in the modifications document. There is a clear distinction, in Local Plan policy terms, between a locational preference for sites in existing waste use (I understand that the Slyfield site was such a site) and the recognition in paragraph 5.12 that operational landfill sites 'may also' be acceptable.

Ground 2: The Proximity Principle

31. The principle is discussed in detail in the Thornby Farms case (see above). It derives from the EU Waste Framework Directive, and is given effect within Surrey by policy WLP 2, which is contained within paragraph 4.1 as follows:

> "The movement of waste is one of the most significant impacts of waste -related activity. The aim must therefore be to reduce movements of waste generally. This accords with the proximity principle, that is, waste should be disposed of close to where it arises.
>
> "POLICY WLP 2
>
> "In considering proposals the County Council will have regard to the extent to which the location of the development minimises the need for lengthy haulage of waste, waste products and residues. The County Council in dealing with proposals will give preference to the location of waste related facilities as close as practicable to the origin of waste."

That reflects what is said in paragraph 3.27 of the Plan, which is concerned with the principles of the waste strategy:

> "Where practicable waste should be handled, treated and disposed of as close as possible to the place where it is produced thereby reducing the environmental impact and financial costs of transporting waste. This accords with the Government's proximity principle and the aim of achieving as far as possible, self-sufficiency in the provision of waste facilities."

32. Understandably, the proper application of the proximity principle within the county was of concern to the claimants, since the Clockhouse site is at the southern, rural edge of the county. The main report explained in paragraph 351, under the heading "Proximity Principle":

> "351 Objectors consider that given the location of application site, close to the County boundary and distant from the origin of waste within Surrey that proposal is contrary to the proximity principle, and would be likely to attract and process waste from outside Surrey."

The Officers' response was contained in paragraph 352, which, having referred to policy advice in RPG9, continued:

"The applicant does not intend to process waste other than that arising within Surrey in the proposed EfW plant and has indicated willingness to accept a planning condition restricting the source of waste in the event that planning permission is granted. Regional waste policy is that authorities should seek to make adequate provision For an amount equivalent of its waste arisings. There is no national or regional guidance which seeks to apply the proximity principle below the level of county, and Officers do not consider that the current application, even though the plant would be situated close to the County boundary, and is considered by some to be remote from the origin of the waste it would process, to be contrary to the proximity principle."

33. The report then referred to detailed mileage assessments which had been undertaken by the Highway Authority. Compared with a 'do nothing' scenario, the Highway Authority concluded:

> " ... that the proposed 110.000 tonnes per annum capacity EfW plant would assist in reducing the overall mileage associated with transporting Surrey's waste by some 270,000 miles per year. This would equate to a 77% reduction on the distances associated with the current transfer for disposal of waste arisings from Guildford, Woking and Waverley District."

The Highway Authority then carried out a second comparative assessment which compared the relative merits of each of the three applications and concluded, in paragraphs 364 and 365:

> "Compared to the proposals for EfW plant at Copyhold Works and Slyfield, Guildford, the travel efficiency of the Clockhouse Landfill EfW proposal to process 110,000 tonnes per annum measured in terms of miles/tonne would be equivalent to 3.6 miles/tonne compared with 2.61 miles per tonne at Slyfield and 3.34 miles per tonne at Copyhold. If the difference between the miles/tonne figures is looked at in terms of the annual mileage travelled the difference between the Clockhouse EfW proposal and the Slyfield EfW proposal would be some 109,000 additional road haulage miles per year.
>
> "This the Highway Authority consider is a reflection of the location of the respective proposals in relation to the source of waste and illustrates the relative remoteness of the Clockhouse Landfill site compared to the two other proposals."

34. Against this background, the Overview said this, under the heading "Proximity Principle":

> "45 There is clear guidance that the proximity principle should be applied at a regional level such that adequate provision should be made for the management of a region's waste within its boundaries. Below the county level there is no formal framework for applying the proximity principle. Local transport considerations are an important means of assessment in terms of the Development Plan. While the need to limit the distance over which waste is transported is a consideration in the determination of all the applications, it is not a principal test and needs to be set against other locational and waste policy requirements.
>
> "46 All the proposals are deemed to satisfy the regional test of proximity principle. None of the proposals can be refused planning permission on the grounds of lack of proximity to waste arisings given other locational and waste

policy considerations."

35. The Overview paper summarised eight key points. The eighth key point was as follows:

> "All the proposals are in accordance with the proximity principle described at regional level. There is no requirement to consider the proximity principle below County level. None of the proposals can be refused planning permission on proximity principle grounds given other locational and waste policy considerations."

On behalf of the claimants, Mr Village submits that this advice improperly diminished the importance of the proximity principle, effectively sidelining it. The approach is erroneous because it looks at the principle at regional level (at which level all three proposals were compliant), but says in terms that:

> "There is no requirement to consider the proximity principle below County level".

It was common ground that "below County level" means within the county's boundaries. There is such a requirement, it is submitted on behalf of the claimants, given that the proximity principle is carried forward at county level by policy WLP 2. Applying policy WLP 2 on the Highway Authority's calculations, the Clockhouse site is the least compliant with the objective. Moreover, there is no recognition in the Overview of the fact that the proximity principle is not to be treated merely as a material consideration among many others. It is in a different and more important category, as explained by the Court of Appeal in the Thornby Farms decision above. In these circumstances, it was seriously misleading to advise members that the proximity principle was "not a principal test". It is perfectly true that the objective has "to be set against other locational and waste policy requirements", but it must "always be kept in mind".

36. Notwithstanding Mr Kelly's valiant efforts to defend the Officers' advice to members in relation to the proximity principle, I accept Mr Village's submissions. Mr Kelly laid particular stress on the fact that, although policy WLP 2 was not mentioned in the Overview, the exercise contemplated by the policy, the detailed mileage assessments, had been carried out, and, compared with the 'do nothing' situation, there would be a substantial reduction in mileage as a result of granting planning permission for the Clockhouse site. That is to ignore the County Council's second assessment, which showed that the difference between the Slyfield EfW proposal and that at Clockhouse would be 109,000 additional road haulage miles per annum. It is true that the Overview said:

> "Local transport considerations are an important means of assessment in terms of the Development Plan."

But that factor would have been regarded by members as being of little consequence if there really was no requirement to consider the proximity principle below county level and/or if it was not to be regarded as a principal test.

37. While the Court of Appeal does not describe the objective in those terms, it is plain that it should not be relegated, as the report sought to do, to the status of "AN Other" material consideration. Moreover, to concentrate upon compliance with the proximity principle at regional level, and then to claim that there was no requirement to consider the principle below county level (within the county boundaries) was to effectively discount policy WLP 2, which does give effect to the proximity principle within the county, below regional level.

Mr Kelly emphasised the words "no formal framework" and said that there was no such framework below regional level, but paragraphs 45, 46 and key point 8 have to be read as a whole and in a commonsense way, as they would have been by members. If one does that, one can see that members were being advised, in effect: do not trouble yourselves about the proximity principle below county level; the principle is, in any event, only one of a number of material considerations. This explains why the relative advantage of the other sites, by comparison with the Clockhouse site, in terms of WLP 2, was not drawn to the members' attention in the Overview. The figures, in terms of the mileage that would be saved, were there in the report, but they were not related to the extent to which each of the three sites complied with WLP 2 and hence with the proximity principle below regional level. Overall, the advice to members in relation to the proximity principle was, albeit unintentionally, seriously misleading.

Ground (3): Patteson Court

38. CD4 (Revised) dealing with the issue of need is a substantial document which was revised and updated for the committee. Inevitably, there are uncertainties in forecasting. Officers will be looking at a moving target: as the capacity of some sites becomes exhausted, other sites must be included in the pipeline for obtaining planning permission. The Overview explained that it dealt:

> "... primarily with the salient issue of need for additional waste handling capacity in Surrey as a whole ... "

39. Having established the total need for waste handling capacity in the county up to 2020, and having noted the "significant uncertainties in forecasting", the Overview continued in paragraphs 14 to 17 as follows:

> "14 A particular uncertainty relates to the outcome of decisions for Coldharbour Lane and Patteson Court referred to in Core Document 4 ... Shortfalls in permitted landfill capacity in the short term and total non -inert waste handling capacity could be accommodated if planning permission is granted for Coldharbour Lane. Even if the Coldharbour Lane appeal is dismissed, then the grant of a planning permission for Patteson Court - a position, which the Authority currently supports - would deal with the predicted deficit.
>
> "15 Thus, there are possible alternatives involving landfill, which mitigate [militate] against the grant of planning permission for EfW in Surrey in the short term. However, the reliance on landfill related schemes is contrary to the intention of the waste hierarchy and in potential conflict with the Landfill Directive. In order to maintain flexibility in terms of the provision of waste handling capacity over the short to medium term and to avoid a landfill led approach to the supply handling capacity, it is considered appropriate to discount the Coldharbour and Patteson Court schemes from the need assessment. In any case, these two landfills, if permitted, are more likely to cater largely for commercial and industrial waste."
>
> "16 A decision in the case of each application will require the Committee to take a position on uncertainty. The position described above is considered to represent a cautious and prudent approach to the assessment of need involving reasonable assumptions balanced with the policy requirement to move away from landfill.

"17 Ultimately, the prime consideration probably comes down to a matter of timing. There is a need to move away from landfill, but the question is how fast and when that process should begin. A single plant represents a significant commitment in terms of capacity given the twenty -five year life of such a facility. However, given the results of the forecasting work, it is considered that the development of a single plant now would start the process of moving up the waste hierarchy in a balanced manner without the risk of over -providing biodegradable waste handling capacity ... The needs assessment indicates that a second facility might be required by 2005, however, given the uncertainty of the forecasts, it is suggested that a cautious approach should be taken."

40. In CD 4 members had been advised under the heading "Future Possible Capacity" that Patteson Court had a capacity of up to 3 million cubic metres to 2014; that Coldharbour lane had a capacity of 1.8 million cubic metres and a site at Princess Royal 0.3 million cubic metres. Graphs showed the differing extents of unmet need, depending upon whether or not any or all of these sites were granted planning permission.

41. It is common ground that the 3 million cubic metre capacity estimate for Patteson Court was erroneous. The defendant says that the true additional figure (since there was already planning permission for some landfill) is 5.1 million cubic metres. The claimant disputes that, but it is unnecessary to resolve that issue for the purpose of determining this application.

42. It is important to see the basis on which the Inspector recommended, and the Secretary of State accepted, that planning permission should be granted for Patteson Court. The Inspector concluded, in paragraph 7.15:

> " ... I have also found above that operating a containment landfill for non -inert waste as proposed is probably the best means of achieving restoration to the highest quality in the shortest time. This is relevant when it comes to determining the BPEO for disposing of waste arising in the area. Even though landfill is at the bottom of the waste hierarchy, it is still capable of being the BPEO for a given set of circumstances and the achieving of restoration is surely one such circumstance."

43. The Inspector then considered the information put before him by the County Council relating to the question of need. He was provided with a graph similar in form to the graphs that had been provided for the assistance of members in CD 4. The graph included the 110,000 tonnes per annum capacity of the Clockhouse site. He said this in paragraph 7.20:

> "The graph also shows, in heavy shading, the effect of granting permission for the present proposals. Without this, it is assumed that Patteson Court would effectively have to close as a non -inert site in 2005 ... It appears from this that the site, if filled at the planned rate, would largely make up the expected deficit in capacity up to 2014, but it would not create any surplus except in 2005 -6. During those years there would be an apparent slight surplus, but not if it is assumed that Surrey should play some part in meeting London's waste disposal needs in the short term."

Paragraph 7.26:

> "I have already identified that the site would meet a need for disposing of waste arising in Surrey. In fact it is currently more local than that, taking municipal waste from Tandridge and Reigate & Banstead Districts. Some comes from

south London but such localised cross -boundary flow is not necessarily in conflict with the proximity principle. The site also accepts industrial and commercial waste, in respect of which the recycling targets are regarded as less rigorous, and where there is more uncertainty about arisings."

In paragraph 7.29 the Inspector said that he was:

> " ... in no doubt that a continuation of non -inert landfill at Patteson Court is the best practicable environmental option for the management of wastes arising in the area."

The Secretary of State agreed with these conclusions saying, inter alia:

> "He agrees that, in the circumstances, the proposals are consistent with the waste hierarchy."

44. The claimants say that this decision is a new material consideration, to which council members must have regard before planning permission can lawfully be granted. In summary, Mr Village submits that the Overview acknowledged that Patteson Court was one of two possible alternatives involving landfill, which would militate against the grant of planning permission for an EfW in the short term. The short term is important because the Overview said that the prime consideration came down to timing:

> "There is a need to move away from landfill, but the question is how fast and when that process should begin."

But, he submits, the committee was invited to discount both Coldharbour and Patteson Court from the needs assessment. It followed that the committee was seeking to meet a very considerable shortfall in capacity, as shown in the graphs in CD 4. Members did not know that Patteson Court could make an even greater contribution to the shortfall (5.1 million cubic metres rather than 3 million cubic metres). They were told inaccurately that it was "more likely to cater largely for commercial and industrial waste" (compare paragraph 7.26 of the Inspector's report above) and they were told that reliance on landfill related schemes would be "contrary to the intention of the waste hierarchy". But, in granting planning permission for Patteson Court, the Inspector and the Secretary of State had concluded that the proposal was, in all the circumstances, BPEO and consistent with the waste hierarchy. Thus some, at least, of the reasons given for discounting Patteson Court were falsified by the decision letter; and, in any event, since planning permission has now been granted for a substantial additional capacity, it could not simply be discounted in the assessment of need.

45. These points, among others, had been made in the letter from the claimants' solicitors dated 30 September 2002. The council's reply dated 16 October explained why the claimants' request that the matter should be referred back to the committee was not being accepted by the Officers. As the first paragraph of the letter makes clear, it was a considered response on behalf of the Head of Legal Services. So far as material, the letter said this:

> "The Planning and Regulatory Committee, in the reports presented to the meeting held on 6 and 8 December 2001, were made fully aware that applications were before the then Secretary of State the effect of which were that, if granted, a significant volume of landfill void space would be made available to receive non -inert waste. This matter was fully addressed in the Overview report paragraphs 8 to 17 and in Core Document 4 ... However the Committee was also made aware that (a) there was a significant shortfall in

available landfill capacity within Surrey such that the available void was not even sufficient to permit the County to dispose of the volume of non -inert waste to landfill up to the allowance provided for in the National Waste Strategy Target, (b) even were the applications in respect of Patteson Court, Coldharbour Lane and Area C at the Princess Royal Sandpit to be allowed there would still remain a future shortfall in capacity to handle the projected waste arisings, and (c) that reliance upon landfill as a means of disposal is contrary to the intention of the waste hierarchy. In the event, the appeal in respect of Coldharbour Lane was dismissed and no appeal was lodged against the Council's refusal of planning permission at Princess Royal Sandpit.

"When the Planning and Regulatory Committee of the Council resolved to grant planning permission for the development of an EfW plant at Capel, it was assumed that the volume of additional void capacity at Patteson Court, were the extant applications to be allowed, was approximately 3 million cubic metres to 2014 (rounded down from 3.3 million cubic meters) ... However, in preparation for the Patteson Court public enquiry it was discovered that due to an error in the applications this was an underestimate and the true additional void capacity which would be released was approximately 5 million cubic metres over 12 years to 2014. However, this extra approximately 1.8 million cubic metres equates to the void capacity of the dismissed Coldharbour Lane proposal.

"Thus, even having regard to the additional capacity at Patteson Court over and above the 3.3 million cubic metres formerly assumed, the need for an EfW plant as set out in the reports to the Planning and Regulatory Committee remains unchanged. In these circumstances, it is not proposed to review the resolution made during December 2001. There has not, as you suggest in your letter, been a fundamental change in circumstances since the Committee made its decision."

46. Pausing there, this response, with due respect to the Head of Legal Services simply does not make sense. It may well be the case that the revised figure of capacity for Patteson Court at 5.1 million cubic metres is substantially the same as the estimated capacity of the three potential sites that had been identified in CD 4, the other two of which did not obtain planning permission. But the claimants' complaint is that the committee were told to discount that potential 5.1 million cubic metres capacity. Now that planning permission has been granted for 5.1 million cubic metres, it is no longer a potential capacity which the council can choose to discount, it has to be taken into account, more particularly, since two of the reasons given for discounting it have been falsified. Whilst reliance on landfill related schemes generally would indeed be contrary to the intention of the waste hierarchy, the Secretary of State has concluded that reliance on Patteson Court (for the purposes of ensuring the most rapid restoration to its previous condition) is consistent with the waste hierarchy. Secondly, it is not disputed by the defendant that Patteson Court will cater largely for municipal, not commercial and industrial waste.

47. Mr Kelly sought to remedy the obvious deficiencies in the reasoning contained in the letter of 16 October by submitting that the reason why members had been advised to discount the potential capacity of Coldharbour Lane and Patteson Court was because the issue of need had been considered in qualitative as well as quantitative terms. In qualitative terms, there was a need to maintain flexibility in terms of waste handling capacity, and to avoid a landfill -led approach to supply handling capacity. Such a qualitative approach was in accordance with national policies for waste management; see, for example, the targets for reducing the amount of waste that is disposed of by way of landfill. Notwithstanding the fact that this "qualitative" approach to the assessment of need was not clearly articulated as the reason for the Officers'

decision that Patteson Court was not a material consideration and so did not have to be referred back to the committee until Mr Kelly made his oral submissions. I accept that both qualitative and quantitative considerations were considered to be relevant in deciding whether there was a sufficient need, bearing in mind the inevitable impact of the EfW plant on the countryside beyond the green belt. That there was a need was never in dispute, but the question before the committee was the extent of that need and when it should be met: the question of timing. Assuming that qualitative considerations were important, there is no doubt whatsoever that quantitative issues were also of considerable importance. They are extensively discussed in CD 4, and a proper appreciation of quantitative need is an essential foundation for any qualitative judgement. It is impossible to see how a planning permission for 5.1 million cubic metres of landfill space which was previously discounted could not be a material factor in the overall consideration of need.

48. While there was a desire to maintain flexibility and to avoid a landfill -led approach, the proposition that reliance, not on landfill generally, but on Patteson Court, would be contrary to the intention of the waste hierarchy is, at least arguably, undermined by the Secretary of State's conclusion.

49. The additional reason given for discounting Patteson Court, that it would cater largely for commercial and industrial waste, is also arguably falsified by the Inspector's findings. Mr Kelly submitted that this latter error was of no consequence. I do not accept that submission. The comment was not included in the report as an inconsequential aside. The EfW plant was intended to deal with municipal waste. A site that would be catering largely for commercial and industrial waste would be of less significance in assessing the need for capacity to deal with the municipal waste stream.

50. For these reasons it is plain, leaving entirely to one side any "counsel of prudence", that the Patteson Court planning permission is a material consideration which must be referred to the committee so that it can take it into consideration before any decision notice is issued.

51. In conclusion, I feel bound to express my considerable disquiet about the defendant's stance in response to this challenge. It is councillors, not Officers, who adopt local plan policies. It is councillors, not Officers, who decide major planning applications such as the Capel EfW proposal. There does not appear to have been any member involvement in the preparation of the defendant's response to this judicial review. I do not suggest that councillors should always, or even often, be involved in responding to judicial review challenges, that would be unduly burdensome for individuals whose council duties already impose considerable demands upon their spare time. But the lack of member involvement in the circumstances of this case does give rise to serious concern. In adopting the Waste Local Plan in 1999, councillors had made it perfectly clear that, in policy terms, they did not wish operational landfill sites to be treated as land where there was a locational preference for waste related activities. Yet leading counsel was instructed by Officers to submit that the Waste Local Plan should be construed to precisely the opposite effect, and that the Court should not consider the Council's views as expressed in the modifications to the Local Plan. Faced with that difficult task, Mr Kelly QC made the very best of an inherently unattractive argument. The question is whether Officers should have taken it upon themselves to urge such an interpretation of the council's Local Plan.

52. I am baffled by the refusal, in a considered response to the letter of 30 September, to take the matter back to members in the light of the Patteson Court decision. I certainly do not suggest that it was necessary to immediately invite the committee to review its decision. An assurance that the matter would be put back to the committee in due course with a report outlining any material changes in circumstances, including the Patteson Court decision, before

any decision notice was issued would have sufficed. The claimants' eminently sensible suggestion was however met with a blank refusal. It may well be that on reconsideration members will decide to adhere to their earlier decision, but the decision whether to do so should be left to them, with the advantage of knowing the most up -to -date information in relation to need, and should not be pre -empted by the defendant's Officers. For these reasons this application is allowed.

53. MR VILLAGE: My Lord, I therefore seek an order quashing the resolution of the council dated 6 December 2001 to conditionally approve planning application 10/00/0913 and I also seek an order quashing the decision of the council of 16 October 2002 not to re -determine the application for the Capel Energy from Waste incineration application.

54. MR JUSTICE SULLIVAN: It is the decision of the Head of Legal Services in fact.

55. MR VILLAGE: Thank you, my Lord.

56. MR JUSTICE SULLIVAN: Yes.

57. MR VILAGE: My Lord, I also seek an order that the defendant pays the claimants' costs in these proceedings, including the costs of the hearing before Davis J, in respect of which costs were reserved, and I also seek an order that the costs be paid on an indemnity basis.

58. As to the latter point, I have provided my learned friend with an authority, which I am now handing to my Lord, which is a Court of Appeal recent authority on the principles to be applied in making an order under Part 44 of the Civil Procedure Rules Reid Minty v Taylor [2002] 2 All ER at page 150. The facts are not important. Halfway down the headnote:

> "The judge held that the application fell within CPR Pt 44, that the court could only make an order for indemnity costs under that Part if a party had been guilty of a moral lack of probity or conduct deserving of moral condemnation and that there be no such conduct on the claimant's part. Accordingly, the judge dismissed the application."

It was held that:

> "A party could be made subject to an order for indemnity costs under CPR 44.3 even though there had been no moral lack of probity or conduct deserving of moral condemnation on its part. The discretion under r 44.3 was to be exercised judicially, in all the circumstances, having regard to the matters referred to in that provision. It included a discretion to decide whether some or all of the costs awarded should be on a standard or indemnity basis. If costs were awarded on an indemnity basis, in many cases there would be some explicit expression of disapproval of the way in which the litigation had been conducted, but that would not necessarily be so in every case. Litigation could be conducted in a way in a way that was unreasonable and which justified an award of costs on an indemnity basis, but which could not properly be regarded as lacking moral probity or deserving moral condemnation."

If we turn to the judgment at page 156, May LJ, at paragraph 28g said:

> "As the very word 'standard' implies, this will be the normal basis of assessment where the circumstances do not justify an award on an indemnity basis. If costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted.

> But I do not think that this will necessarily be so in every case. What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation."

My Lord, whilst I certainly would happily submit that the council's behaviour has, in fact, come within the description "[being] guilty of a moral lack of probity or conduct deserving of moral condemnation", I need not go that far. It has certainly been unreasonable for the reasons given by my Lord, in relation to the policy: contending a meaning from a policy which was precisely the opposite of what it contended in the Local Plan process, striking at the integrity of the Local Plan process; and, secondly, in relation to ground 7, the response of 16 October, which simply was a nonsense, where it should have been perfectly obvious that there was a real need to refer the matter back to members for their reconsideration.

59. For those reasons I, therefore, ask that the costs be paid on an indemnity basis, because, just standing back from it all, why are we here, effectively, in circumstances where, simply on ground 1, we have, not just knocked the bails off, to use a cricketing analogy, we have taken the three stumps out? The fact of the matter is that, if there had been a submission to judgment in relation to ground 1, it would have been wholly unnecessary to proceed with the rest of these proceedings.

60. MR JUSTICE SULLIVAN: Thank you. Right, Mr Kelly, what do you want to say, firstly about the principle and then about the method of assessment - - standard or indemnity?

61. MR KELLY: In terms of the principle, my Lord, clearly I resist the application that any costs should be paid on an indemnity basis. I understand the application is made expressly in relation to the litigation in respect of grounds one and seven.

62. MR VILLAGE: No, I wish to make it clear that it is all the proceedings.

63. MR KELLY: The submissions that you had just now in relation were restricted to grounds one and seven.

64. MR JUSTICE SULLIVAN: Mr Kelly, to save time, it seems to me there is a distinction between pre - and post - the letter of the 30 September. I have made my views about the council's approach to policy pretty clear, but I would not say that their conduct in relation to how you interpret the policy actually overstepped the line for indemnity costs. On the other hand, I do want you to explain to me why you should not have to bear indemnity costs after 30 September, because I simply cannot understand why this matter was not taken back.

65. MR KELLY: My Lord, may I refer you to the way in which the matter is put in Reid Minty v Taylor?

66. MR JUSTICE SULLIVAN: Yes.

67. MR KELLY: In particular, the paragraph which has been relied upon, 28. It is in the second sentence:

> "It costs are awarded on an indemnity basis, in many cases there will be some implicit expression of disapproval of the way in which the litigation has been conducted. But I do not think that this will be necessary in every case. What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs

on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation."

My Lord, clearly, one accepts that your Lordship has found to the contrary in relation to the arguments which I advanced to my Lord yesterday: in relation to why there was, as alleged in the letter of 30 September, you will recollect, a fundamental change of circumstances. In my submission, my Lord, the fact that your Lordship has rejected the view taken by the defendants does not mean that the defendants, in standing by their view, on the basis that I made my submissions to your Lordship yesterday, as to why Patteson Court, in the way in which they looked at the need issue, did not arise to a fundamental change of circumstances, does not mean that it was unreasonable for the defendants to maintain their line, subject, of course, to hearing your Lordship and deciding one way or another. The fact that your Lordship has found firmly in favour of the claimants in relation to that matter does not mean that the defendants were unreasonable in adhering to their view, for the reasons which were clearly set out in the letter of 16 October and which were subsequently made plain in the skeleton argument: that the defendants simply took a contrary view as to the significance of the Patteson Court decision.

68. So, my Lord, although your Lordship has expressed his bafflement in relation to that decision by Officers, in my submission, on a rational interpretation and reading of the Overview report, which I took your Lordship through with some particular care yesterday afternoon, that was a reasonable position on the part of the Officers; and the degree of your Lordship's bafflement, in my submission, should not interfere with the judgment as to whether or not the right of the defendant to proceed to trial and have that matter determined should be dealt with.

69. Your Lordship will recollect that there was no objection by the defendants to the introduction of Patteson Court as an additional ground. You did not seek to resist that and you clearly accepted that that was a matter which was properly dealt with in the conduct of this hearing, even though, by reason of force of circumstances, it arose at a late date in relation to the timetabling for this hearing.

70. Your Lordship will also know that, in relation to the other suggested amended grounds, my clients were put in particular difficulty, in relation to being in a position to decide whether or not they would have to produce additional evidence, if those additional amended grounds were to be introduced.

71. My Lord, I do not ask you, when you are considering the issue of indemnity costs, in relation to the conduct of litigation leading up to this hearing, to bear in mind - - your Lordship says that each side has egged the other and your Lordship has clearly followed the correspondence in this regard, but my Lord, in my submission, it cannot be suggested that the claimants' conduct of the litigation has been faultless in terms of the timing of the raising of amended grounds, those which were within their control; the production of a skeleton argument, which ought to have been served 21 days in advance of the hearing and was served, I think, some ten working days in advance; and the difficulties that that necessarily put my clients in; and also, my Lord, the failure of these claimants - - and you will have taken on board from Davis J's uncorrected note of his judgment at the application hearing, his remarks in relation to the lack of the claimants' willingness, the moment they proposed to rely on additional evidence, to make an application to the court for that evidence to be admitted but when they were forced to make such an application, through the actions of the defendant, they proposed that the application be heard at this hearing. One of the directions sought was that the defendants ought to have previously submitted their defence in relation to the amendment application points. So, my Lord, in terms of the way litigation has been conducted in advance of this hearing, I would ask you not to make a distinction in the conduct of that litigation, in terms of

standard or indemnity costs, between the position of the claimants and the position of the defendants. My Lord, that is what I say as to the principle of indemnity costs.

72. MR JUSTICE SULLIVAN: Thank you.

73. MR KELLY: My Lord, may I then come to the detail of the costs, in that I resist the application of my learned friend that the claimants should have, in the light of your Lordship's judgment, all costs in any event. My Lord, there were four issues upon which your Lordship heard argument. They were: in relation to ground one, policy; in relation to grounds two and three, proximity principle; in relation to ground five, as pleaded, need -- the percentage point; and, in relation to ground seven, Patteson Court. My Lord, I note that in relation to ground five and the percentage point your Lordship has not found one way or the other, in relation to that position. But your Lordship will recollect, in terms of your Lordship's own observations during the course of that argument, of what I submitted to you was essentially a bad point in relation to that matter, it is not plainly an issue in respect of which you have found in favour of the claimants's claim. So, of the four issues canvassed before your Lordship, which your Lordship felt the need to hear argument upon, three have been found in favour of the claimant.

74. My Lord, two issues originally pleaded, in relation to prematurity and the Environmental Impact Assessment concerning the newt population, have not been heard by your Lordship, because you did not think that was necessary for the purpose of making a determination of the application, but, in being unheard, you have not had the opportunity of hearing the defendant's arguments as to why those were not proper grounds for the claimants to have advanced. In my respectful submission, the defendant should not have costs awarded against them when your Lordship has not heard argument in relation to those points.

75. My Lord, there are then, in a third category, the additional grounds, 5.2 to 6. My Lord, the application in relation to the admission of those grounds remains undetermined, because your Lordship felt it unnecessary to have to deal with that, in the light of your Lordship's approach to the four issues that I have previously indicated; and so, again, on those matters, not only have they not been formally admitted, the defendants have not had the opportunity to argue before your Lordship, and, again, the defendants should not have cost awarded against them in respect of those matters.

76. My Lord, to award costs against the defendant in relation to the second and third categories that I have mentioned would be equivalent to finding in favour of the claimants on those grounds, when the defendants have had no opportunity to be heard upon those grounds, and that cannot, in my submission, be either fair or proportionate: to award costs to the claimants in respect of them.

77. So, my Lord, as far as your Lordship has found in favour of the claimant, so far as I have indicated -- clearly, in relation to those matters, the claimants are entitled to their costs. In relation to the undetermined issues, whether they be judicial grounds, whether they be the grounds which your Lordship did not need to here arguments about, the claimants, in my submission, should bear their own costs because it would be unfair to order that the defendants pay those costs.

78. My Lord, may I just set out briefly, in my submission, the elements of the order for costs, which, in my submission, would be fair; and, my Lord, I had the opportunity, because I was telephoned by my learned friend during the course of today, to indicate to him that this is the way in which, as I have already begun and will continue, I intended to put the matter of costs before your Lordship. He is fully apprised. My Lord, I would firstly submit that each side

should bear its own costs on the undetermined grounds or issues for the reasons that I have given: either unheard and/or not admitted into evidence. Secondly, my Lord, the claimants to have the costs of the hearing itself proportionate to the issues in relation to which they have been successful: in other words, three out of the four issues which have been raised. Thirdly, my Lord, the claimants to have the costs up to the hearing on the grounds on which they were successful as a proportion of the issues originally raised in the claim. So, my Lord, there were originally six grounds of claim; they have been successful in respect of -- there were two grounds dealing which proximity which fall into one issue, but they were successful on those which I have already indicated. Fourthly, my Lord, the claimants to bear their own costs in respect of the undetermined additional grounds. Finally, each side bears its own costs of the application hearing before Davis J.

79. I would refer you to the transcript, which your Lordship has, wherein it is plain that the learned judge was clearly not impressed by the claimants' conduct in failing to apply for permission when they sought to introduce the additional evidence by Mr Cowley -- his original witness statement 1 -- and he indicated that the matter was to be left to the trial hearing, but it is, in my submission, quite plain, from the views which he expressed, my Lord, in his findings on the application, that, had it been left to the hearing date itself, he would not have been proposing to admit those additional grounds because of the difficulties in which the defendants would have been put, because they would not have had the opportunity to produce the evidence to address them. That was because of the retrospective point in the nature of the order.

80. Bearing those points in mind, in my submission, that would be a fair and proportionate to approach cost; and I remind your Lordship, if your Lordship needs reminding, in terms of the court's discretion under the Civil Procedure Rules, they are set out at --

81. MR JUSTICE SULLIVAN: I do not need reminding. Thank you. Mr Village, apart from the proposition that each side should bear its own costs in front of Davis J, I am bound to say, it seems to me, that that application on both sides was frankly pretty much of a nonsense. I do not need to trouble you about anything else, but do you want to make a point about that?

82. MR VILLAGE: I would because, in fairness to Mr Strachan -- Mr Strachan, I do not think, would forgive me if I did not.

83. MR JUSTICE SULLIVAN: I am not suggesting that anything he said was a nonsense; I am just saying that it was a nonsense -- the whole thing, really.

84. MR VILLAGE: If I may just say something about the hearing before Davis J. It was an application which was simply bound to go off half-cocked. It was given a one hour estimate. We were given virtually no notice of the hearing at all. Mr Strachan phoned Mr Kelly and told him that it was hopeless and that one hour was not sufficient. As soon as they walked into court, that is exactly what the judge said.

85. Mr Kelly was, effectively, complaining that we were raising issues by way of amendment and that he needed time to call evidence to deal with them. I make the following points. First, in terms of amendments to claims, it is quite clear under the rules, paragraph 11.1 of the Practice Direction, that one must give notice to the other side seven clear days before the hearing. In this case they have had almost four weeks' notice now. We gave notice on 14 October. The rules do not provide that we have to get permission and, therefore, the defendant's point was completely misconceived to that extent. But, in any event, as the last paragraph of Mr Phillips' statement makes clear, they were always going to be protected, in terms of prejudice, if they had presented the evidence -- no -one was saying "you have got to produce this

evidence", but they could always have produced the evidence and been protected in costs, if they were ultimately successful. This point about prejudice was absolute rubbish from beginning to end. They should have brought the evidence to the court and, in those circumstances, they would have been entirely entitled to their costs, if they had been successful in due course.

86. Our approach was the correct approach: make the application before the trial judge; he would be apprised of all the facts. Mr Kelly's approach was to rush off to the court, ask the administrative court to deal with an application which was bound to take more than an hour - on any basis, it was going to take about a day for a judge to read into it. If that is the correct approach the administrative court would be awash with such applications for adjournments. The correct approach -- it is a matter of important principle in the administrative court, I submit, my Lord -- is that one should make that application to the trial judge -- obviously give notice under the practice direction -- who is obviously apprised of the facts; he will be able to deal with it. We told the other side that their application before Davis J was misconceived. An hour was hopeless. What happened? It all went off half-cocked. I have to say, I have not seen the transcript of what Davis J said, but I do not accept that what my learned friend told you is a completely accurate version of events; certainly, Mr Vaughan's recollection is different, but I am not sure that matters. All I would say is it is a matter of principle. It was an application which was bound to, and plainly did, go off half-cocked.

87. MR JUSTICE SULLIVAN: Thank you very much. The order of the court is that the resolution in December 2001 is quashed. The decision of the Head of Legal Services, contained in the letter of 16 October 2002, not to take the matter back to committee is quashed.

88. As far as costs are concerned, having read the judgment of Davis J in draft, I am satisfied that, so far as that particular hearing is concerned, each side should bear its own costs. As far as the remainder of proceedings are concerned, I do not accept Mr Kelly QC's submission that there should be some sort of apportionment as between the various issues. It is perfectly true that the claimants have not been invited to advance arguments in respect of a number of their complaints, but that is for the simple reason that, in my judgment, it what so plain that the three principal points were going to succeed, in any event, that it was simply unnecessary to hear them. I do not see why they should be penalised by reason of the strength of their three principal points. Moreover, I bear in mind the fact that the fact that they did not have to argue the subsidiary points means that we probably saved at least a day of submissions in court. I consider that the proper order is that, subject to the exception for the hearing before Davis J, the defendant should pay the whole of the claimants' costs.

89. That leaves the question as to whether they should be paid upon a standard or indemnity basis. I have just given a lengthy judgment and, in view of the lateness of the hour, I do not intend to repeat the observations which were contained in that judgment. It will be evident to those who have listened to the judgment that I am, indeed, concerned about the manner in which the defendant has defended this case. That concern does not lead me to conclude that anything other than a standard basis for assessing costs would be appropriate up to the claimants' solicitor's letter of 30 September. However, I am quite satisfied that thereafter it was wholly unreasonable of the Council Officers not to take the matter back to committee. This is a hearing that simply should not have occurred. I quite understand and appreciate Mr Kelly QC's point that the mere fact that someone takes a contrary view from that expressed by the claimants does not mean, necessarily, that they are conducting litigation in an unreasonable way. However, I am satisfied that the response in that letter was indeed unreasonable and, therefore, it would be wrong to deprive the claimants of their costs on an indemnity basis after they had made the perfectly sensible suggestion that the matter should be taken back to

committee in the light of the Patteson Court decision. So, after 30 September, the defendant is to pay the costs on an indemnity basis.

90. Is there anything else?

91. MR VILLAGE: My Lord, may I suggest that junior counsel draw up the order to assist the associate.

92. MR JUSTICE SULLIVAN: That would be very helpful, I am sure.

93. MR KELLY: My Lord, I have one other matter. My Lord I request permission to appeal under rules 52(4), page 1087. That deals with the appellant's notice and, in the first instance, I apply to your Lordship for permission to appeal. The reason I am referring particularly to the appellant's notice is that your Lordship has referred to a lengthy judgment, which you have delivered this afternoon and, in my submission, to assist the Court of Appeal in the event of the appeal, it would be helpful, for the framing of the grounds of appeal before the Court of Appeal, to have sight of the transcript of your Lordship's judgment before lodging the appellant's notice. The appellant's notice must be filed at such period as may be directed by the lower court or, where the court makes no direction, 14 days after the date of the decision of the lower court that the appellant wishes to appeal. What I would seek is 14 days after receipt of the transcript - -

94. MR JUSTICE SULLIVAN: The approved judgment.

95. MR KELLY: - - in order to give a reason time for that to be taken on board and form the basis of the appeal. My Lord, if that is likely to lead to resistance or your Lordship needs further persuasion, I would address you further upon that.

96. MR JUSTICE SULLIVAN: I do not need further persuasion. So far as Mr Village QC is concerned, he can be told that resistance is useless. Well, I can see he is not resisting.

97. MR KELLY: My Lord, what I ask is that your Lordship directs that the period within which the notice of appeal should be made - -

98. THE JUDGE: I am perfectly happy to do that if I do give permission to appeal, but I think you will have to persuade me that it is right for me to give you permission to appeal. On the other hand, I am perfectly happy, as a procedural matter, if I refuse you permission to appeal, to extend the time within which you can ask the Court of Appeal to 14 days after receipt of the final version of the transcript.

99. MR KELLY: We need the additional 14 days to ask their permission to appeal, if your Lordship were to refuse me permission to appeal.

100. THE JUDGE: Yes. That would seem to be the sensible way to do it. Otherwise, if I refuse you, you would have rush off to the Court of Appeal without a proper transcript and without being able to formulate grounds and so on. By all means now try to persuade me to give you permission to appeal.

101. MR KELLY: My Lord, it is for this reason: it is because of the importance of your Lordship's decision, in respect of the administration of waste planning in the county and particularly in respect of the application of policies in the adopted Waste Local Plan; the application of the proximity principle to applications made which affect the Waste Local Plan; and, in respect of the appropriate assessment of need for Energy from Waste, relative to the provision of landfill, which are all matters affected by your Lordship's decision, particularly, my Lord,

because the effect of the orders which your Lordship has made in quashing the resolution and, if not in actually requiring the committee forthwith to reconsider its position in relation to the application, at least, before any permission is issued, having to give consideration to that matter - - that it does so on a proper basis. My Lord that is the reason why I ask for permission to appeal.

102. MR JUSTICE SULLIVAN: Thank you very much. Mr Village, I do not need to trouble you on that. I am satisfied that it would not be right to grant permission to appeal, whatever view may be taken on the first two grounds, it seems to me that this application is bound to go back to the committee, in any event, under the third ground on the particular facts of this case. It very much turns on its particular facts under ground three.

103. However, what I am perfectly happy to do, if I am able to do so, is to extend the period within which Mr Kelly QC may make an application for permission to appeal to the Court of Appeal to one of 14 days after receipt of the approved transcript of this judgment, which, I think, is perfectly sensible because it will enable proper consideration to be given to the matter.

104. MR KELLY: I am very much obliged to your Lordship.

105. MR JUSTICE SULLIVAN: Thank you all very much.

Attachment 4

Capel victory could help us all

Shlomo March 6, 2009 Campaign Updates

Campaigners celebrate a comprehensive victory for Capel and the Capel Action Group

At the High Court on Thursday 5 March 2009 Mr Justice Collins formally allowed Capel Parish Council's claims and ordered that:

- *All three planning permissions be quashed.*
- *The relevant references to the Clockhouse Brickworks site be deleted from the adopted Waste Plan – the other sites are retained.*
- *Permission to appeal to the Court of Appeal be refused. Surrey County Council has 14 days within which to renew its application for permission to appeal to the Court of Appeal.*
- *Surrey County Council make an interim payment of £100,000 within 14 days in respect of Capel Parish Council's legal fees.*

This is a comprehensive victory. It removes the Clockhouse Brickworks site from both policy WD5 (thermal treatment facilities) and policy WD2 (other waste management facilities) in the adopted Waste Plan. This means that there is no policy support, within the Waste Plan, for waste management facilities on the Clockhouse Brickworks site.

The full decision is available to download as a .pdf file

Key points from the judgement, handed down on 5 March 2009 include:

- *The inspectors, appointed to examine the Waste Plan, committed an error of law in assuming the Waste Plan to be sound which tainted their whole approach to the Clockhouse*

Brickworks site.

- *The inspectors' approach to the "proximity principle" was flawed.*
- *Concerns about the health risks from aircraft vortices should have been properly considered by the inspectors.*
- *Concerns about potential traffic problems and potential solutions around access to the site should have been independently tested and adjudicated upon by the inspectors.*
- *The correct status of Clockhouse Brickworks as a greenfield site should have been taken into account by the inspectors.*
- *No assessment of nature conservation had been carried out.*

The Capel Action Group's press release declares:

> *This represents both a comprehensive and just outcome for the people of Capel. The village has been blighted with the prospect of a mass-burn incinerator for 10 years and residents have worked tirelessly over that time to defeat Surrey County Council's ill-conceived intentions. The County Council has now been defeated twice in the High Court and its approach to planning once again has been found to be terminally flawed. The County Council will have wasted hundreds of thousands of pounds of public funds in defending Capel Parish Council's claims and should squander no more. Given the strength of the Judgement a second attempt to seek leave to appeal will lead to a further substantial waste of public funds. County Councillors should not allow this to happen.*

This decision gives hope to those campaigning against incineration and for better, more sustainable methods of waste management around the country.

Neil Pitcairn, UKWIN Treasurer and campaign activist explains:

> *From what I've read so far of the judgement there are*

fundamental weaknesses in the Inspectors' evaluation of the Surrey Waste Plan (SWP). The presumption of soundness throughout, and the failure to question whether incineration is a viable option in Surrey at all. This means that any approval of Trumps Farm without a re-examination of the SWP would be pretty shaky.

The following excerpts from the decision may be of interest to many campaigners:

> *It is recognised that there is a hierarchy, as it were, of methods of dealing with waste. These, in order of desirability, are re-use of material, recycling and composting, generation of energy and disposal.* ***It is perhaps obvious that incineration will merely be a form of disposal unless its main purpose is the production of energy.*** *Thus in order to place it above disposal in the hierarchy, there must be an ability to generate energy from whatever development may be permitted.*
>
> *There is a [planning] condition that the land must be returned to its state prior to any development.* ***That condition means that it is to be treated as a Greenfield site*** *and it is upon that part of the site that it is proposed that an incinerator be built.*
>
> *...in the context of this case where it was accepted that Clockhouse Brickworks was by no means ideal – quite the contrary* ***since an incinerator on a Greenfield site in the countryside was obviously likely to be regarded as an undesirable development*** *– the inspectors' consideration should have required a rigorous examination of any suggested alternative sites and of whether in reality an incinerator alternative to landfill was achievable.*
>
> *[Surrey County Council's solicitor] Mr Drabble submitted that the evidence before the inspectors from the SCC showed that there*

had been a substantial exercise carried out to make an informed assessment of suitable sites and to reject those which were unsuitable. That may be so, but **the inspectors were not entitled to assume that that had been done correctly, particularly where the evidence given on behalf of the claimant questioned on plausible grounds whether the exercises had indeed been satisfactory.**

Incineration is capable of amounting to recovery but only if the generation of energy is the primary purpose of the incineration.

And finally:

The inclusion of Clockhouse Brickworks in WD2 and WD5 must be quashed. I am aware that this may affect the overall validity of the SWP particularly as the inspectors' view was that the sites proposed were only just sufficient to meet the waste management needs, especially as most were in the Green belt and so subject to the usual planning constraints applicable to any development in the Green Belt. However, subject to any arguments counsel may wish to raise, I think that the consequential effect of quashing is a matter for SCC to deal with as it thinks appropriate.

Previous Anger over Newcastle Council consultant's pro-incineration bias