Our Reference: CLA.D6.ISH6-7.S
Your Reference: EN010110

Medworth Energy from Waste Combined Heat and Power Facility – Written Summaries of Oral Representations Made by CCC and FDC at Issue Specific Hearing 6 and Issue Specific Hearing 7

This document summarises the oral representations made by Cambridgeshire County Council (**CCC**) and Fenland District Council (**FDC**) (together, **the Councils**) at the Issue Specific Hearing 6 (ISH6) on Monday 26 June 2023 and Issue Specific Hearing 7 (ISH7) on Tuesday 27 June 2023 in relation to the application for development consent for Medworth Energy from Waste Combined Heat and Power Facility (the Scheme) by Medworth CHP Limited (the Applicant).

This document does not purport to summarise the oral submissions of parties other than CCC and FDC, and summaries of submissions made by other parties are only included where necessary in order to give context to CCC and FDC's submissions in response, or where CCC and FDC agreed with the submissions of another party and so made no further submissions themselves.

The document contains two separate tables – Table 1.1. for Written Summaries of Oral Representations Made at ISH6 and Table 1.2. for Written Summaries of Oral Representations Made at ISH7. Each table is structured according to the order of items in the agenda for the Hearings published by the Examining Authority (ExA) on Tuesday 20 June 2023.

Cambridgeshire County Council
Fenland District Council

Table 1.1 – Written Summaries of Oral Representations Made at ISH6 on Monday 26 June 2023

Agenda Item	The Councils' Submission
3. Landscape and Visual	Mr Andrew Fraser-Urquhart KC introduced Mr Mark Flatman, Director at Liz Lake Associates Chartered Landscape Architect. The Councils made the following points: Nature of mitigations provided in this scheme The site is constrained in terms of the ability to mitigate, as the building is of such size and scale that it fills much of the Proposed Development areas. There will be a net loss of vegetation and tree cover on the site, with a notably smaller line of trees proposed to be planted. The plant's size will make it extremely difficult to mitigate. It is evident from the LVIA that these effects cannot be mitigated. The Year 1 and Year 15 outcomes demonstrate the ineffectiveness of the mitigation measures, as the effects are the same for both years. With regards to the Applicant's comments in Table 3.1 of [REP3-039] and ZTVs: Overall Impact The ZTVs show that virtually the whole study area will be affected to some degree by the Proposed Scheme. This makes it even more important to remember that an LVIA and a selection of viewpoints only represent a snapshot. In reality, no matter where you move throughout the landscape and local area, you will experience this facility to one degree or another, whether it is to a significant degree or not. This will have both a landscape and visual impact. As suggested by the ZTVs, you will see and feel this development from many locations. Following the Applicant's response to the Councils points, Mr Flatman acknowledged that professionals have different judgements on matters such as these. There are clear significant effects that have been established, as to areas of disagreement, these are a difference in professional judgement and opinion. Mr Flatman noted he is fully aware of what ZTVs are and how they work, they can give an indication of impact, but being on site provides a different experience. The Councils do not dispute that the viewpoints were agreed. Mr Flatman emphasised again that there are clearly different judgements held on the magnitude of change from some of the receptors locally. The ExA asked the Councils to clarify if we were content with the viewpoints as agreed with the Applicant. Mr Fraser-Urquhart KC noted that the Councils were content with the

	locations, but would stress that these represent only a snapshot of the local visual and landscape effects. Individual Viewpoints The conclusion (LVIA ES Chapter 9, para 9.12.3 [APP-036]) correctly confirms significant effects arise for Recreational Users of Nene Way, as does Table 9.172 Effects on recreational visual receptors (page 9-142); however, Table 9.14 Summary of Viewpoint Analysis (9-75-9-98) incorrectly states Not Significant for Viewpoint 13 on the same receptor. Mr Flatman set out that there are a huge number of visual effects of varying Magnitudes of Change (MoC) and therefore Significance, both Significant and Non-Significant Effects. Whilst the Council considers that the assessment largely demonstrates clear Significant Adverse Effects, it notes the following: • Community of Wisbech St Mary The Council considers that the community of Wisbech St Mary will be affected by the development. Although the assessment for Viewpoint 15 (in page 9-33) states "representative of views available to residents", the viewpoint photography (Figure 9.31a and b) is taken behind the tallest row of trees. It is considered that there will be locations where the views are clearer in between tree cover and thus parts of the community will have Significant Effects (Table 9.14 currently shows non-significant, where a Moderate MoC results in Moderate (and Significant) Effects on the community. The Councils maintain this view and believe there is a variation of professional judgement as to these impacts. • Bevis Lane In addition, the receptor covering Bevis Lane (Lords Lane/Bevis Lane (page 9-164) exaggerates the level of tree cover, which is not continuous or tall in all locations (as noted above for Wisbech St Mary). There are sections of road from where there will be more open views of the Proposed Development. This will result in a Medium MoC and Moderate (and Significant Effects). The Council notes and agrees that, amongst others, Significant Effects have been identified for High Sensitivity receptors along the Nene Way, rights of way at Crooked Bank/ Narrow Drove/ Broad Drove (West of Begdale), as well as Sustrans NCR63, noting these are all located broadly south-west of the Proposed Development, within 5km of the Site. However,

	the Council is concerned that the likely effects in a similar radius to the south and south east has been under assessed or omitted from the assessment. These include: South east of the Site within 5km, users of Needham Bank, Bar Drove, Kirkham Lane, Gosmoor Lane are not included, suggesting no effects identified. The Council considers these will result in a range of Medium to Low MoC and Moderate (Significant) to Minor Significance Friday Bridge Whilst it is acknowledged that for many receptors there may be no view, those residents living on the west side of the village (west edge of B1101, Fridaybridge Rd), the Council disagrees with the assessment of "Very Low" and considers that part of the community (western edge) will experience at least a Low MoC, resulting in Moderate (and Significant Effects at both construction and Operation (Yr 1 and 15). Whilst it is acknowledged that for many receptors there may be no view, those residents living on the west side of the village (west edge of B1101, Fridaybridge Rd), the Council disagrees with the assessment of "Very Low" and considers that part of the community (western edge) will experience at least a Low MoC, resulting in Moderate (and Significant Effects at both construction and Operation (Yr 1 and 15). South of Friday Bridge The assessment (para 9.5.48, page 9-49) acknowledges as a location where settlement pattern is "particularly dispersed or almost absent". Accordingly, with an absence of tree cover, the landscape is relatively open in places, such that there are clear views across the landscape towards Wisbech and the Site. In this area there are roads (for example Laddus Drove) and footpaths along Laddus Bank (FP 72/14, 72/15 running between Longbeach Farm and Maltmas Farm with particularly open views towards the development that have not been assessed. The Council considers these receptors will experience at least a Low MoC with Moderate (and Significant) Effects for the PRoW and Minor (non-Significant) Effects for the roads. These are important receptors in understanding that effects including Significant effects remain south of Begdale and Elm in the range of approximately 5km from the Site. In addition, the Council considers that the change on viewpoint 7 (Table 9.14 Summary of Viewpoint Analysis and recorded in wireframe photography, Figures 9.23 a and b) should be assessed as a Moderate MoC (not Low), resulting in Major (and Significant) Effects during operation (Y 1 and 15).

	Overall, it should be remembered that many roads, lanes and droves are not only vehicular routes, but they are also used by cyclists, runners and walkers too, and are fundamental to enable the public in accessing and connecting the rights of way and countryside access for health and wellbeing. Landscape Mr Flatman then moved on to explain landscape and townscape receptors. Wisbech Settled Fen (Ref 9-99) Significant localised effects are acknowledged within the detailed rationale text; however, the table summary (Table 9.15 Summary of Significance of Adverse Effects: Landscape and Townscape Receptors) refers to 'Not Significant' on the basis it considers the whole LCA. This should be amended to confirm Moderate and Significant at both Construction and Operation (Yr1 and 15) to fully and correctly acknowledge the Significant effects of the proposed scheme on part of the local character, but the rationale should then acknowledge the wider effects on character are more limited. The Fens LCA (Ref 9-100): The Council considers that a Medium Magnitude of Change (not Low) will occur locally on the landscape, as suggested in the Applicant's rationale this does not extend far enough. The Council suggest that the Medium MoC will change the character of the local landscape, given the extensive number and nature of views and experience of the proposed scheme that is imposed on the local area. TCA8: Wisbech Retail Development (Ref 9-114): As set out in the Councils' LIR [REP1-074] (at para 5.2.3, 5.3.8 and 5.3.9, 5.3.10), the Council disagrees with the assessment of Low Magnitude of Change and Negligible (Not Significant). The introduction of a highly prominent new building would be at a far greater scale/volume than almost every building in the local townscape (and surrounding landscape). The Council considers the MoC to be Medium, and of Minor Significance. Although the Applicant in their rationale (page 9-114) suggests the contrast would be "partly reduced by the detailed design including its cladding", the Council consider this is very difficult to achieve, as set out in 5.4.24 of the LIR report. Mr Flatman summarised that, considering the extent and nature of effects evident across the landscape (including views), the Council is of the opinion that the landscape effects of Moderate Significance (considered to be Significant Effects) extend in an arc in the open

	landscape from the edge of Wisbech St Mary extending round to the A1101 at approximately 5km radius. Mr Fraser-Urquhart KC then asked Mr Flatman if he agreed with the Applicant's conclusion in Section 3.4 (page 19) of the Applicant's Comments on Written Reps [REP3-039] there would be some significant visual effects, but that these would be limited. Mr Flatman noted that there are certainly significant effects from properties and highways and parts of recreational routes. The Councils are of the view that there are more significant effects, and additionally the Councils acknowledge that, as the ZTVs show, there are many viewpoints from which there will be significant and non-significant effects. Existing Infrastructure Mr Fraser-Urquhart KC referred to Section 3.7, page 22 of [REP3-039], where there is a discussion regarding the edge of settlement nature of the Proposed Development and the relationship with existing developments, in particular the cold store. The Councils have suggested there is no nearby infrastructure which approaches the Proposed Development in size or scale. Mr Fraser-Urquhart KC asked Mr Flatman whether he thought there was an existing infrastructure, particularly the cold store, that was equivalent to or capable of masking this development. Mr Flatman noted that the cold store was currently the largest building in that vicinity, but that the Proposed Development far exceeds that, particularly once the stack height and plume are taken into consideration. The visibility and potential for effects is much greater. The cold store is softened by vegetation at a number of locations, and other smaller scale structures in the vicinity are lost in from view by vegetation, so the full scale of this development, which cannot be hidden from view by vegetation, will be felt even further and be more noticeable. A47 Mr Fraser-Urquhart KC asked Mr Flatman for a view on how the Applicant has used the A47 as a boundary marker for landscape and visual effects. Mr Flatman responded that the Councils feel the A47 has been used as a boundary to denote that anything south of the A47 is not as important. The Councils are of the view that there are evidently significant effects to the south beyond the A47 and that these effects and impacts extend beyond this road to wider areas, within the 5km radius. Planning balance As to the issue raised by the ExA as to whether the benefits of the scheme outweighed the landscape and visual harm, Mr Fraser-Urquhart KC noted that this was a planning balance

	issue, and that the extent to which benefits might or might not outweigh the harm caused should be considered. Mr Fraser-Urquhart KC drew the ExA's attention to two points of national policy in EN-1. 5.9.15 of EN-1 has a section dealing with landscape and visual impacts in other areas outside nationally designated areas, indicating that there will often be visibility within many miles of proposed Infrastructure. The ExA should judge whether adverse impacts on the landscape would be so damaging that it is not offset by any benefits including need of the facility. The policy clearly contemplates that there are circumstances in which the L&V impacts would be so damaging that they are not outweighed by the benefits This is clearly one of those schemes given the nature of the topography and visibility of the scheme. The second point of national policy to which Mr Fraser-Urquhart KC drew the ExA's attention was 5.9.19 of EN-1, which suggests the Applicant should draw attention to examples of existing permitted infrastructure with similar magnitudes of impact on sensitive receptors to help the ExA in their assessments. The Councils would suggest there are no examples of existing permitted infrastructure that have similar magnitude of impacts. The Applicant has mentioned wind farms and pylons, whilst the Councils have mentioned the cold store. The Councils do not believe these have a similar magnitude of impact. The Councils believe the piece of infrastructure will have a particular and unique impact on this visual environment and landscape. Pursuant to this piece of guidance, the ExA can place greater weight on these impacts as they are different from anything else that surrounds the Proposed Development. 10 New Bridge Lane Regarding 10 New Bridge Lane, the Applicant asserts that the rear patio would not have a view of the Proposed Development, and that the front of the dwelling is not used and therefore is not impacted in terms of visual amenity at this time. Mr Fraser-Urquhart KC noted that the Applicant has referred to the pattern of use at this property by the existing occupants. Whilst this is relevant, it should not be determinative. The property may not remain in its use, and different occupants may use it in a different way. Following the Council's presentation of evidence on RVAA, Mr Flatman noted that the Council disagreed with the Applicant's conclusions and felt that 10 New Bridge Lane was indeed beyond the threshold, resulting in an overwhelming/overbearing effect as a result of the Proposed Development, in particular. Mr Flatman noted that the section line drawn by the Applicant only showed the upper part of the chimney and building; whereas Mr Flatman drew the ExA attention to the whole length of building and stack that would be visible in views. If the section line was drawn to follow the top of the acoustic fence, the arc would suggest that the extent of the scheme

	that would be visible would be nearer 70m, which would include the majority of the building and some of the stack. If you were to lower the sightline, the extent of view would be higher. This would be greater than the relationship between Potty Plants and the Lineage cold store building, but Mr Flatman noted he does not think the Councils should be comparing the two as they are so different. Mr Flatman noted he appreciates that the Proposed Development is further away, but also noted that the tree loss on the road frontage would mean much of the area is going to open up to a clear view through, with any remaining or replanted trees providing little to no effect in relation to screening. Any replacement landscape planting proposed by the Applicant along New Bridge Lane would take over a decade to become effective, according to the Applicant – the Councils disagree, and do not believe this planting would be effective in this way. Mr Flatman noted that traffic movements outside 10 New Bridge Lane would be seen above the proposed acoustic fencing, as would their lighting and lighting for the Proposed Development. These effects would be ever-present during operational hours. The residents may not wish to close their fate all the time. If the gate was open, they would have a clear view of the proposed development. Mr Flatman concluded that this scheme would breach the residential visual amenity threshold for this property, taking it beyond something which would be acceptable. The effects cannot be mitigated. Public Rights of Way Mrs Camilla Rhodes, Highway Records & Definitive Map Team Manager, made the following points: The Proposed Development, if granted planning permission, will result in a large industrial plant dominating the flat fenland landscape where once there was only a cold store. The Proposed Development would be double the size of MVV's facility at Plymouth in terms of output. According to the Environmental Justice Index for Cambridgeshire & Peterborough, completed by consultants Natural Capital Solutions in 2022, Wisbech is the worst area for environmental justice in the county, and is one of the most deprived areas in the county in terms of both health and nature. This work supports and develops existing national local policies, including NPPF paragraph 100 the CCC ROWIP (SOA2: A safer and health-

	enhancing activity: Countryside access provision should be safe for users and encourage healthy activities; SOA3: new development should not damage countryside provision. Where appropriate, development should contribute to the provision of new links and/or improvement of the existing PROW network), and the CCC and Peterborough Joint Health & Wellbeing Integrated Care Strategy, Priority 2 (Create an environment to give people the opportunity to be as healthy as they can be) and policies within the current and emerging Fenland Local Plans that require development to both protect and enhance public access opportunities and the local communities they serve. How people perceive their sense of place and what happens to it directly affects their sense of identity, how they view and use that changed landscape, and consequently affects their physical and mental well-being. Dealing with the point Mr Furber was making about Goss Drove, Mrs Rhodes' 20 years of experience suggested that one has to be careful about making assumptions about how and why people use their PROW network and the local road that connect them. Similarly, how people perceive impacts on their landscape is often not how technical assessments judge them, so one has to be careful in making assumptions about this. Impact is perceived more negatively than is often considered by technical assessments, and it is helpful to acknowledge this in understanding impact on mental and physical well-being. The Councils' approach is therefore that, where adverse impact on public access and local communities within a landscape cannot be adequately mitigated, then it is appropriate to seek mitigation to offset that adverse impact in compensation. Mitigation Package It is the Councils' view that the Proposed Development cannot mitigate its adverse impact on NMUs and local communities with the arc of the open landscape from the edge of Wisbech St Mary extending round to the A1101 at approximately 5km radius, as detailed by Mr. Flatman. The Councils have therefore sought a Local Community and public access Mitigation Package to offset this impact on these communities The Councils are pleased to say that a constructive meeting with the Applicant was held on the 7th June and again on 22nd June. In the Councils view, which it has developed in conjunction with Norfolk County Council, there are 4 elements to the Local Community and public access Mitigation Package:

	1. A Biodiversity Net Gain (BNG) site as close as possible to the site of the Proposed Development with permanent public access as part of the BNG strategy, helping to relieve recreational pressure on sensitive ecological sites and providing a valuable facility for local communities, supporting positive public health outcomes 2. Monies for enhancements to PROW network/local road connectivity within the area of landscape adversely affected by the Proposed Development: 4 parishes of Wisbech CP, Wisbech St Mary, Elm (Cambs) and Emneth (Nfk) 3. A community fund for heritage, public health and other local community initiatives 4. The formalisation of permissive access rights for NMUs over the former level-crossing on New Bridge Lane The Applicant is supportive of providing a S106 public access and community impact mitigation package in principle. Draft HoT have been issued for the S106 Agreement. The Councils provided comments back on the HoT on 23 June following the meeting with the Applicant on 22 June. With regard to the first element, the Councils have requested a clause within the S106 Agreement committing the Applicant to using best endeavours to secure public access within BNG land to be established pursuant to Requirement 6 of the DCO, recognising that such access should not be to the detriment of the biodiversity gain sought. The Applicant has verbally agreed to a commitment along these lines and the Councils are hopeful that this can be agreed. The reason for adding this into the S106 Agreement is that public access is not something that is a requirement within the BNG guidance, but Cambridgeshire County Council's experience is that increasing public access opportunities relieves pressure on existing sensitive biodiverse sites, particularly in the Fenland area which is poor in the amount of both biodiverse sites and of public access opportunities. Therefore, the only way to make the link as a commitment is through the S106 Agreement. The Councils are pleased that the Applicant has agreed in principle the second element of the package, that is, to providing £400k monies for enhancements to PROW network/local road connectivity upon commencement of the development, if development consent is granted. It should be noted that the map of indicative sites supplied with the Councils' response to SPC2.3 of the ExWQ2, [REP5-045] at Deadline 5 will be amended for the purposes of the S106 Agreement to cover the four parish areas but not otherwise to be specific as to what will be delivered. This is because no negotiations have yet taken place with any third parties and no consultation has taken place with statutory parties, except Fenl;and District Council and Norfolk County Council, and so it would be unreasonable to make specific suggestions now. The purpose of the initial plan was to provide an initial evidence base for the calculation of appropriate s106 monies.

	On the third element, it has been agreed with the Applicant that the mitigation package will include a Community Trust Fund to help offset the adverse impact of the proposed development on the local community, details of which are under negotiation, but it is anticipated that terms will be agreed before the close of the Examination. With regard to the fourth element, permissive access for NMUs over New Bridge Lane former level crossing, some progress has recently been made following a meeting with Network Rail, MVV and CCC on 22 June. Network Rail have, without prejudice, said they are willing to enter into a permissive agreement provided that their reasonable terms can be agreed. NR have advised that unfortunately the existing signage cannot be changed as it is standard wording agreed with DfT and the ORR, but additional advisory signs could be added to provide clarity on the ground. The Councils are therefore hopeful that this matter can be resolved, although they are unsure as to the timescale in which this will be achieved. In summary, the Councils are confident that elements 1, 2, and 3 of the public access and local community mitigation package can be agreed by the close of the Examination. The Councils are hopeful that the fourth element, permissive access over the former level-crossing on New Bridge Lane will also be achievable, though it is not yet clear if that will be within the timeframe of the Examination. The Councils consider that the Package does not mitigate the scheme but starts to offset the adverse impact of it and provides reasonable measures in compensation for NMUs and the local community. Biodiversity Mrs Deborah Ahmad, Ecology Officer, then made some comments regarding biodiversity following from Mrs Rhodes points: From a biodiversity perspective, the scheme will result in a net loss of habitat. The Applicant has committed to a biodiversity net gain of 10%, and proposed to deal with this through requirement 6 of the DCO. The Applicant has attempted to seek offsite BNG solutions, but they have not secured anything to date. The Councils remain unsure as to how the Applicant will actually deliver the 10% BNG. The Outline BNG Strategy has been submitted as part of [REP5-015], and contains a priority for offsite net gain to be undertaken locally. But there is no clear understanding yet of where that could be.

	Mr Fraser-Urquhart KC noted that it is the Applicant's responsibility to bring forward appropriate proposals to ensure this is deliverable. The ExA will need to give appropriate weight to the uncertainty as to the Applicant's ability to deliver 10% BNG.
4. Biodiversity (if required)	No further comments were made by the Councils beyond those raised under Item 3.
5. Traffic and Transport	Mr Fraser-Urquhart KC acknowledged that the Change Application has been made in response to the Council's comments about safety. The Councils maintain that safety is of paramount importance and it would be unacceptable for the Applicant to proceed with an unsafe design. The Councils have undertaken an investigation regarding the land ownership for the additional plot of land required on New Bridge Lane for the junction. Some of the land the Councils believed to be highway land is owned by Tesco, and is subject to a Section 106 agreement. Mr Fraser-Urquhart KC confirmed that the Council is not in a position to give an interim certification of this land. There are three options as to how to proceed: 1) The Council could find a way to give a partial interim certification of that land which solely links to this application, but there is not a mechanism in the existing Section 106 agreement to permit this. . In any event, issues still remain with the works which have been constructed by Tesco which would prevent certification. 2) The Applicant seek to enter a private contractual agreement with Tesco and potentially the Council to enable that land to be transferred to highway or to the Applicant. The Applicant stated that they are making strides to achieve this. The Council's engagements with Tesco on this matter so far have been less encouraging in terms of moving this option forward. 3) The Applicant amend their DCO application to include powers to compulsorily acquire that land that they need for these highways improvements. Mr Fraser-Urquhart KC noted that two additional areas the Councils wished to comment on included the position regarding modelling of the effectiveness of the proposed signalised Cromwell Road/New Bridge Lane junction, and any other technical issues regarding this junction, and whether the intended change takes enough land to make this junction practicably functionable. Mr Jez Tuttle, Transport Assessment and Smart Journeys Manager, explained where matters stand with respect to the modelling of whether this proposed junction design would function. The Councils have reviewed the revised designs, and whilst the Councils are broadly happy with the flows the Applicant has used, albeit they have used some

	assumptions, they are concerned with some of the signal phasing, as it appears to allow right turn traffic from the South onto New Bridge Lane without stopping the southbound traffic from the north. This would allow the southbound traffic to cut across the northbound traffic's right turn. The Councils feel the southbound traffic would need to be stopped in all settings to allow the northbound traffic to turn right onto New Bridge Lane. The phasing diagrams submitted by the Applicant show the southbound traffic is not stopped in all settings currently. The staging needs to be completely separate so that the southbound from Wisbech traffic is stopped to allow the vehicles turning right into New Bridge Lane to do so safely. Mr Fraser-Urquhart KC asked Mr Tuttle to confirm whether there was any technical or practical reason why this could not be done. Mr Richard Ling Traffic Signals and Systems Manager confirmed that there is no reason why the staging cannot be changed and remodelled to show the manoeuvre safely. Mr Daniel Ashman, Asset Information Searches Manager, then explained that the Councils question whether the plans include sufficient land for the required improvements to the New Bridge Lane/Cromwell Road junction. Firstly, the additional land required by the Applicant on the carriageways of both New Bridge Lane and Cromwell Road does not achieve a sufficient distance back from the proposed stop lines that would be installed at the revised junction. A minimum distance of 50m is required, to ensure appropriate road surfaces and sensors can be installed, at the correct locations of the junction. This should be included within the expanded DCO boundary. Second, on the western side of the crossroads, on the land that borders the Murkett's car garage, the DCO boundary has been expanded slightly but there appears to be limited space in one area. The Council questions why temporary powers of acquisition are not deployed for the two parcels of land on either side of parcel 12/1d at Salter's Way/New Bridge Lane. The Council acknowledges that the Council have advised the Applicant these areas are part of the highway, but even though highway rights exist over the surface, the subsoil is in private ownership. In common with the rest of the DCO application, the Council would anticipate some sort of power of acquisition being deployed over these areas. This principle may also be applicable if any additional land is required at the New Bridge Lane/Cromwell Road junction.

	Mr Fraser-Urquhart KC noted that the technical aspects set out by officers seem capable of resolution in due course, but the issue of how the land is acquired still remains a fundamental issue which may not be resolved by the change application in its current form. Mr Tuttle confirmed that there may be some sensitivity testing required in the modelling of the junction, but that the Council are happy to proceed with the Applicant to resolve the technical junction design issues. Regarding private rights of access, Mr Ashman explained that as the County Council, it is CCC's responsibility to assert and protect the rights of the public who use its highways, and one of the issues that is coming into play at Newbridge Lane is the issue of the level crossing over which the Council know highway rights and are no longer recorded. Public right of access over the level crossing was extinguished in 1981 by virtue of the British Railways Act. If the development is permitted and goes ahead as designed, the level crossing will become the only route providing access to properties on the eastern side of the former railway; these premises are currently accessed via New Drove further to the east, a route which will be closed by virtue of the installation of a bollard to prevent through-traffic. The Council understands that the Applicant is in negotiations with Network Rail about providing a right of access for affected landowners across the level crossing. However, it has not seen any detail about those agreements. In order for the Council to be satisfied that this change to access arrangements does not disadvantage any party, as part of its duty to assert and protect the right of the public, it needs to be content that access agreements with those parties have been reached prior to the closure of the examination. Mrs Camilla Rhodes summarised the Councils position regarding non-motorised users and New Bridge Lane. Notwithstanding the creation of a pavement along New Bridge Lane, the Councils remain concerned that there is a degradation in the overall experience for NMUs along New Bridge Lane arising from the Proposed Development which cannot be adequately mitigated, which is why the Councils seek the public access and local community mitigation package discussed earlier in the hearing. Secondly, the Councils have previously made representation advising that the Liaison Group needs to include both statutory and local user groups, such as the Ramblers, BHS, cycling and local walking and health groups. The Applicant should proactively add those groups to the Liaison Group. On the matter of damage caused to the highway by extraordinary levels of traffic Mr Ashman made the following points:

	In response to ExQ2 TT.2.11 [REP5-032], the Applicant has broken down its assessment of the likely increase in traffic flows on some of the key 'highway links'. The Council is of the opinion that the figures for the increases in HGV traffic on New Bridge Lane and Cromwell Road during construction and operation are significant enough to have the potential to cause additional damage and wear to the highway. These increases are demonstrated in the Applicant's response to the ExQ2. In its response to the ExQ2, the Applicant has referred to the SoCG where it is noted that the Transport Assessment Team at CCC "would have no concerns over the impact of the Applicant's development subject to the enhancements to New Bridge Lane". However, this conclusion is based on an assessment of section 6.9 of Ch6 of the Env Statement [APP-033] which details the impact of the development on traffic movements in Wisbech. Section 6.9 does not make any mention of the impact of the development on the highway condition, so the Council's agreement to the points made in that section cannot be related to the additional wear that the development may have on the condition of the constructed highway; it can only be related to the traffic movements explored in that document. The Applicant has also made the point that New Bridge Lane will be reconstructed as part of the works. The inference taken from this is that the Applicant believes the reconstruction to offset any damage that might occur on the carriageway as a result of the HGV traffic that will be using it. However, the point should be made that there is a section of New Bridge Lane, to the east of the former level crossing and leading up to the entrance to the incinerator site that is intended under this application to be almost exclusively for the use of the HGVs accessing the development. This is part of a public highway where, after redevelopment, through traffic will not be permitted. Other access will be limited to authorised users only, or passing NMU traffic. It follows that the only vehicles likely to cause damage to the carriageway are those accessing the MVV site. On a public highway where use by the public is proposed to be restricted and tailored to suit the development, and where the highway authority currently has minimal maintenance liability owing to the extremely low usage, it would be reasonable for the Applicant to commit to providing compensation for excess damage that its development may cause.

Table 1.2 – Written Summaries of Oral Representations Made at ISH7 on Tuesday 27 June 2023

Agenda Item	The Councils' Submission
3. Waste Issues	Mr Matthew Breeze, Principal Planning Officer at Cambridgeshire County Council, made the following points , which have been the Councils' consistent case throughout the Examination.: In relation to waste need, and the proposed size of the facility, the Council has three main areas of concern: Ensuring waste is managed as high up the waste hierarchy as possible. Ensuring the proximity principle is observed. Ensuring the ExA has a clear understanding of the implications of permitting a facility that provides 625ktpa of capacity, particularly on the distance that waste will need to travel for as long as the facility exists, and the likelihood that it will prevent smaller more localised facilities being brought forward in both this and adjoining waste plan areas in the future, thereby undermining the local planning process. Each of these relate to the content of the WFAA. Taking each in turn: **Waste Hierarchy** On the topic of the waste hierarchy the Council made representations starting in the Council's Relevant Representation requesting additional criteria to Schedule 2 - Requirement 14 - Waste Hierarchy Scheme. It is the Councils' view that it is important that the future operator not only be seeking to prevent waste that could be treated further up the waste hierarchy from being accepted at this facility, but also being seen to do this too. In relation to this topic, CCC can confirm that they have reached agreement with the Applicant on wording for additional criteria as set out in the Applicant's recently submitted Draft Development Consent Order text. CCC strongly support the inclusion of these additional criteria in the DCO text. **2. Proximity Principle**

	On the topic the proximity principle, the Council and the Applicant have reached an agreement on the text of an additional requirement (29) as set out in the Draft Development Consent Order text. This is designed to prevent the worst potential excesses or waste traveling extreme distances. It is the view of the Council that this requirement is essential to provide a backstop to ensure that the proximity principle is observed, even if it is minimally. The Council strongly supports the inclusion of this requirement in the DCO text. The Council notes that the Applicant has shared a draft of the waste area 2 plan, but this does not appear to have been submitted, and the Council would like to ask if the Applicant would be willing to confirm when they will be submitting waste area 2 plan to the ExA. (Applicant confirmed that it would be submitted at D6). The ExA then asked about the origin of the 17.5% related to waste area one (75km radius from facility), identified in the proposed catchment requirement (29).] Mr Breeze explained that the Council originally proposed figures of 20% and 90% in relation to subsection (1) and subsection (2) of the draft catchment requirement (29). The figure of 20% was estimated to be a realistic minimum amount of waste within 75km of the facility that the proposed facility could achieve. This considers the spatial distribution of the waste, (which was illustrated used page 94 of the Local Impact Report [**REP1-074**], describing the urban areas within and outside the 75km distance), and the fact that this is a commercial facility and would need to secure waste through commercial contracts, which it may not always be successful in winning. The Applicant's counterproposal was for 17.5% and 80%, which for the 17.5% would mean a change from 125ktpa to 109.375ktpa. In the spirit of compromise the Council agreed to the Applicant's counterproposal. Mr Andrew Fraser-Urquhart KC emphasised that whilst the Councils have agreed a proposed requirement to deal with the proximity principle, this is a longstop against the worst possible outcome, and that all of the Councils submissions about the difficulties in adhering to the proximity principle remain. The councils maintain that the violation of the proximity principle is a significant potential disbenefit to which the ExA should have due regard. **3. Spatial Distribution of Waste and Local Impact**

	The third topic is that of the spatial distribution of waste and the implications of locating a facility such as this in this location. This has been set out in CCC's submissions from the relevant representations onwards. The Council are not aware of any possible mitigation for this issue. In brief, the development is presented a regional facility, which with a capacity of 625ktpa will need to source waste on a regional basis. This is a large facility and is disproportionally large for the local need and the community that is being asked to host it. The development of this facility in this location will result in waste traveling further distances, than if it was to be located closer to the main concentrations of waste. More localised energy recovery facilities as envisioned in the relevant waste local plans in the region would not have the same scale of negative effects as this facility. The pattern of waste that the Council see now, will be affected by future recovery capacity provision and government and market interventions in waste production, all of which have a level of uncertainty attached. In the future, should residual waste reduce, or other plants be permitted more locally to existing waste sources, the negative effects associated with the facility will be amplified as it must look further and further for fuel. Whilst this proposal provides a significant benefit in recovery capacity, it also comes with all the disbenefits that you have heard that come from concentrating this capacity one location. On this topic, the Council asks the ExA to give very careful consideration to the disbenefits that come from centralising capacity in what is a largely rural and spread-out region and attribute the appropriate weight in their determination of this application. **Sufficiency of fuel** The ExA asked about the response to ExA Q2 PP.2.1. In the Council's response to the Examining Authorities Second Questions, there was a question relating to whether or not there was sufficient fuel. The Council's position is that there is adequate fuel at this time, but forecasting future waste arisings is difficult to do as it will depend on many different factors. From the available data it is possible to argue that both scenarios, that is, there is sufficient fuel, or that there will be insufficient fuel, could arise in the long term. It is in that context the Council raises the question of what would happen if there was insufficient waste to fuel the entire facility? If the fuel falls below 525ktpa will the whole plant cease to operate or can part of the plant continue to operate? This was raised earlier in ISH7 and the Applicant set out that the facility could be run at reduced hours.

	Memorandum of Understanding The ExA asked about response to ExA Q2 PND.2.1. The ExA in their question asked who the signatories to the East of England Waste Technical Advice Body Memorandum of Understanding were; at the time, the Council listed the parties involved and listed the ones that CCC had on file as having signed the MOU. The Council have since received confirmation from the Secretary of the EoEWTAB that all the authorities listed did sign the MoU. The ExA asked about net self-sufficiency, and the implications of the proposed development on net self-sufficiency. Net self-sufficiency was briefly explained to mean that it is where a waste planning authority provides a total waste management capacity equivalent to that which is required for their area. The capacity provided for does not necessarily need to be of the same type that is required. A more complete explanation is included in the Council's response to ExA Q2. The effect of a proposal such as this will be to make a significant overprovision of capacity in one area, which will undermine the ability of other nearby local plans to deliver their planned capacity, and in the future have difficulty meeting net self-sufficiency and proving the deliverability of their plan, as this capacity will exist, but they will have no certainty as to if it is available to them. The ExA explores the effect of the proposal on local waste management capacity, and relevant local policy / plans. The Applicant explained that in their view that local should be considered to be at a regional scale, proportionate to the facility. The Council disagrees with the Applicant's position, and suggests that 'local' in the first instance means waste planning authority level or potentially lower at waste collection authority level depending on the context. The ExA's attention is drawn to the spatial distribution of waste on page 94 of the LIR [**REP1-074].**
4. Cumulative Effects	Mr Andrew Fraser-Urquhart KC drew the ExA's attention to the basis upon which the ExA might consider the issue of cumulative effects, noting it is a difficult area to define exactly how to assess cumulative impacts. Mr Fraser-Urquhart KC referred to a particular case: *R(Leicestershire County Council) -v- Secretary of State for Communities and Local Governmen*t [2007] EWHC 1472 (Admin). A copy of this case can be found in Appendix A of the Councils' Deadline 6 Submissions [**CLA.D6.ISH6-7.AA**]. This case raised the issues of how cumulative impacts were to be assessed, and at paragraph 41 of the judgement, Mr Justice Barton suggested examples:

	(1) *even though each individual area of potential impact was not objectionable yet each such feature was so close to objectionability that, although none could be said to be individually objectionable, yet because each was nearly objectionable, the totality was cumulatively objectionable; or* *(2), one, two, three or four of the particular features were close to being objectionable and that would be an important matter to take into account when looking at the totality; or* *(3) one particular combination of two or three otherwise unobjectionable features could cause objectionability in their totality; or* *(4) … there could be some unusual feature or some unusual combination of features such as to render that combination objectionable when the individual feature was not.* The Councils commend that authority to the ExA and suggest it forms a useful yardstick against which to judge cumulative impacts and the Applicant's assessment of them.

CO/5542/2006

Neutral Citation Number: [2007] EWHC 1427 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Date: Monday, 11 June 2007

B E F O R E:

MR JUSTICE BURTON

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THE QUEEN ON THE APPLICATION OF LEICESTERSHIRE COUNTY COUNCIL

(CLAIMANT)

-v-

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

(DEFENDANT)

UK COAL MINING LIMITED

(INTERESTED PARTY)

- - - - - - -

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Mr Jeremy Cahill QC and Miss Jenny Wigley (instructed by Leicestershire County Council) appeared on behalf of the Claimant
Mr John Litton (instructed by Treasury Solicitor) appeared on behalf of the Defendant
Mr Timothy Corner QC and Mr Andrew Fraser-Urquhart (instructed by Nabarro Nathanson) appeared on behalf of the interested party

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J U D G M E N T

1. MR JUSTICE BURTON: This has been the hearing of an application by the Claimant, Leicestershire County Council, for whom Mr Jeremy Cahill QC and Miss Jenny Wigley have appeared, under section 288 of the Town and Country Planning Act 1990. It arises in respect of a planning application by UK Coal Mining Limited, for whom Mr Timothy Corner QC has appeared with Mr Andrew Fraser-Urquhart (the Interested Party), made to the Claimant, the Leicestershire County Council, as Mineral Planning Authority ("MPA") for planning permission in respect of opencast coal mining in a green field site between the villages of Ravenstone, Heather and Normanton le Heath in Leicestershire called Long Moor.

2. The application by the Interested Party to the MPA was refused on 30 July 2004. The Interested Party appealed, and an Inspector was appointed by the Secretary of State for Communities and Local Government, now the Defendant to this application, for whom Mr John Litton has appeared, and that inquiry was held between 13 September and 11 October 2005. It resulted in the Inspector recommending the grant of conditional planning permission. On 25 May 2006 the Defendant Secretary of State agreed with the Inspector's recommendation and granted conditional planning permission.

3. The Claimant's challenge is by reference to two policy documents issued by the Defendant and with which he must comply. The first is the Mineral Planning Guidance Note 3 (MPG3), issued in March 1999. There are two material paragraphs in MPG3. Paragraph 7 sets the scene for paragraph 8, which is the paragraph upon which the claimant relies. Paragraph 7 reads as follows:

> "Opencast coal working differs from many other types of mineral working due to the amount of overburden that has to be removed, and stored, to access the coal; the use of large engineering plant and machinery; and the need, often, to transport the coal won over significant distances. On the other hand, the large amounts of material that have to be removed means that, through careful restoration, original landforms can be recreated, or more attractive ones produced over time. In some cases, opencasting can clear derelict and despoiled land, or remove land instability from old mineral workings, and thereby restore the land ultimately to a better condition than it was before. However, the Government takes the view that, although some sites are capable of being well restored, opencast mining can be extremely damaging to the environment and amenity of a locality whilst it is taking place, and the restored landscape can take many years to mature. The proposals for restoration, and the extent to which the proposal provides local or community benefits must be weighed against the severity of the harm likely to be caused during the duration of the development and the time it would take for the landscape to regenerate following restoration."

4. Paragraph 8 then follows:

> "8. In applying the principles of sustainable development to coal extraction, whether opencast or deep-mine, and to colliery spoil disposal, the Government believes there should normally be a presumption against

development unless the proposal would meet the following tests:

(i). is the proposal environmentally acceptable, or can it be made so by planning conditions or obligations?

(ii). if not, does it provide local or community benefits which clearly outweigh the likely impacts to justify the grant of planning permission?"

5. There is thus a presumption against development; for the purpose of considering whether that presumption is rebutted, the two limbs of the test have loosely been referred to as costs or detriments on the one hand and benefits on the other.

6. The other policy document is Mineral Planning Statement 2 (MPS2), issued in March 2005. This post-dated the refusal of permission by the MPA, but antedated the inquiry. Central to our consideration has been paragraph 12 of MPS2:

> "With respect to an individual site, the effect of all relevant impacts (ie of noise, dust, traffic, on landscape etc.) should be considered objectively. Impacts that are acceptable individually should not be regarded as unacceptable in combination without a proper assessment."

7. The conclusion by the MPA in refusing planning permission was recorded by the Inspector at paragraph 7.2 of her report as follows:

> "7.2 The reason for refusal is concise. It refers to an unacceptable cumulative environmental impact adversely affecting those who live, work and pursue leisure activities in the area, 'as a result of the combination of the impacts of noise, dust, vehicle movements, landscape loss and visual amenity, and also because of the effect of previous open cast coal activity in the area'. This cumulative environmental impact would not be outweighed by the proposal's benefits nor overridden by the need for the development."

8. Both the MPA and the Interested Party called expert witnesses at the inquiry. The MPA called an independent expert, Mr Hunt, who was not involved in the original decision.

9. Each alleged or possible feature in respect of which there could be actual or potential individual impact on the environment was considered and addressed by both the MPA and the Interested Party, and considered and concluded upon individually by the Inspector in her report. There were nine of them as set out in paragraph 14.22, namely landscape and visual impact, ecology, soil and agricultural land quality, noise, dust, archaeology, hydrology and hydrogeology, rights of way, and traffic. In respect of each of them, for the reasons given by the Inspector, which sets out the rival contentions before her, she concluded that they did not stand in the way of the grant of permission. In respect of one of them, the MPA had before the Inspector contended that it did of itself amount to an objection to grant of planning permission. That was noise, and the Inspector set out her conclusion in paragraph 14.48 and following:

> "14.48. The site is in a quiet rural area and those living there are particularly concerned at the likelihood of disturbing and unacceptable noise from the opencast site and lorries on the haul road, especially those who remember previous workings. The adverse environmental impact of noise is considered by the MPA to be so unacceptable in itself as to justify refusal of permission, although that is not stated in its reason for refusal."

10. The conclusion by the Inspector in that regard commences at paragraph 14.75, and ends at 14.78:

> "I am satisfied that the noise conditions drafted and included in Annex A would meet the advice in MPS2 that planning conditions must be precise, capable of being monitored ..., defined succinctly ..., relevant to planning and to the development, and reasonable. I conclude on noise that whilst there would be an adverse environmental impact it would be controlled to an acceptable level and thus would comply with ... [and then she sets out the various policies]."

11. No challenge is made by the Claimant before me to the Inspector's conclusion, and indeed the Defendant's acceptance of that conclusion, in respect of noise, on this application, or indeed at all. In those circumstances, the Inspector set out what she calls her overall conclusion on individual environmental impacts as follows:

> "14.119 The proposal would give rise to a number of adverse environmental impacts, some of which, like landscape and visual impact and dust, would be significant. National and local policy requires consideration to be given to whether these impacts can be kept to an acceptable level. I have considered each individually and determined that they could be made so by the use of conditions and the undertakings contained in the S106 to ensure adequate control and mitigation. I find none on their own sufficiently objectionable and unacceptable as to warrant refusal of permission and dismissal of the appeal on that ground alone.
>
> 14.120 The MPA in its reason for refusal did not find any individual environmental impact to be unacceptable on its own. Whilst it later argued at the inquiry that noise impact would be significant and sufficiently unacceptable as to justify refusal, I have not been persuaded by that argument."

12. The battlefield on this application before me has been, and been alone, the question of cumulative impact. At 14.121 the Inspector said:

> "That however [consideration of the individual impacts] is only the first part of the consideration of the development. It is also necessary to look at the cumulative impact of the development and MPS2 at [paragraph] 12 refers to the extent of impacts that a particular site, locality, community,

> environment or wider area of mineral working can reasonably be expected to tolerate over a particular or proposed period."

13. I have read the MPA's reason for refusal, to which I refer. In support of its case it made submissions, and of course referred to Mr Hunt's evidence, to which I will return, and at paragraph 7.109 the concise submissions of the MPA, as they remained before the Inspector just as they had been in their original conclusion, are set out as follows:

> "7.109 In this case, there has been an objective analysis of each of the likely impacts ... All the likely impacts have been properly and objectively assessed individually and in combination and it has been concluded that the combined effect is unacceptable."

14. Mr Hunt's evidence, which underlay that submission, together of course with the MPA's original conclusion to which I have referred, is before me. It too can be described as concise, in the sense that there was a lengthy planning proof of evidence, extending over 50 pages, but in this regard only a few paragraphs. Under the heading: "Cumulative impacts" at paragraph 10.2.7 Mr Hunt said this:

> "The judgment as to whether or not cumulative impacts are acceptable or not is perhaps even more complex [this is after a lengthy dealing with the individual impacts]. I have taken into account the advice in MPS2 that 'impacts that are acceptable individually should not be regarded as unacceptable in combination without a proper assessment'."

15. In dealing with the individual impacts, he had asserted his opinion that a number of them "would contribute to the cumulative impact of the development".

16. At paragraph 10.2.8 he said this:

> "The preceding consideration of adverse environmental effects has identified negative noise, dust, ecological, landscape and visual impacts resulting from the proposed development including vehicle movements along the haul road. In turn, there would be a reduction in the amenity of local residents and an adverse effect on the character of this area of countryside for those using rights of way in the area ... Together, and in some cases individually, these impacts would appear to make the development contrary to policies of the development plan ..."

17. At 10.2.9 he said:

> "In my view, the cumulative effect of these adverse impacts taken together is at the very least significant enough to demand that planning permission is not granted without first applying the second test in LRRSP Resource Management Policy 11."

That is a reference to the ‘benefits’ test.

18. He then addresses whether the adverse impacts of the appeal proposals would be unacceptable because of the cumulative impacts which might occur because of other developments taking place, and he ruled that out, and he referred to the earlier history. Then he concluded at 10.2.12:

> "Taking all of this into account, I consider that the cumulative impacts of the proposals are unacceptable under the first test of LLRSP Resource Management Policy 11 [which is the 'costs/detriment' test]."

19. Those paragraphs of the proof, no doubt supplemented in cross-examination, were addressed in submissions to the inquiry by the Interested Party, as summarised by the Inspector in the following paragraphs of her report:

> *"Combined effects of the appeal scheme*
>
> 8.143 The starting point for consideration of this category of cumulative impact must be the recognition that all surface mineral workings have effects which occur together. However no one is suggesting that there is any policy embargo on surface mineral working in general or surface mineral working of coal in particular. Therefore the mere fact that effects of a proposal for such working will be experienced in combination cannot be sufficient to justify refusal and there would have to be something more. There must, in short, be something out of the ordinary that elevates impacts that are acceptable on an individual basis into an unacceptable cumulative impact when experienced together.
>
> 8.144 This is made explicit by the very recent guidance of MPS2 at [paragraph] 12 [which she then sets out].
>
> 8.145 The guidance offers no indication as to how the *proper assessment* [which is plainly a reference to those words as used in paragraph 12 of MPS2, and in this judgment I shall put them in italics wherever they appear] should be carried out. It must, however, be the case that the paragraph envisages a two-stage process. The individual effects must be objectively assessed. That is obviously necessary in order to assess any effect. There must then be a further *proper assessment* of any alleged cumulative impact. The guidance explicitly states that they cannot simply be regarded as unacceptable without such an assessment. It was notable that no suggestion was made to Mr Heaton [the expert for the Interested Party] in cross-examination that a further *proper assessment* had been made. It appeared to be suggested that a *proper assessment* had been made because each individual effect had been subject to objective assessment. That shows a failure to appreciate what is being said in the guidance. There must be a further *proper assessment* if combined effects are to justify refusal.
>
> 8.146 Nowhere has the MPA provided any such further *proper assessment*. There was no such assessment in the report to committee.

> Instead there was simply [an] assertion that there would be an unacceptable environmental assessment. The MPA's witness at the inquiry does no better. Mr Hunt's proof simply states: 'It is significant that there would be a number of different impacts; that these would all occur during the working life of the mine; and the some would continue for some time afterwards. Taken together ... these impacts would appear to make the development contrary to the policies of the development plan'. This is nothing more than an assertion that the effects are experienced together. The fact that effects are experienced together does not mark this application out from any other for surface mineral working."

20. In paragraph 8.147 are recorded the Interested Party's submissions regarding what they call "the only factor on which the MPA relies as establishing something unusual or particular to this case" - which apparently arose in Mr Hunt's answers in re-examination - and their case that there was nothing out of the ordinary.

21. Finally, at 8.148 the Interested Party's submissions are drawn together:

> "If the effects are examined together, they do not justify a refusal on the grounds of cumulative impact by the combined effects of the proposal. There is nothing unusual about the combination of minor impacts which would be created by this scheme. If the list of impacts arising from this scheme is compared with the list in Annex C of MPG3, it is apparent that there is nothing unusual about this site.

22. The Inspector's conclusions are set out under the heading: "The combined effects of multiple environmental impacts" at paragraph 14.130:

> "The effects of all the relevant impacts have to be considered objectively. UK Coal accepted that the MPA had done that and I take a similar view, even though on certain impacts I have come to a different view as to the extent and acceptability of the impact. However more needs to be done and a further step taken if an unacceptable cumulative impact is to be demonstrated. MPS2 [paragraph] 12 refers to 'impacts that are acceptable individually should not be regarded as unacceptable in combination without a proper assessment'. There is no other guidance on what this proper assessment might be nor was anything that looked like an assessment put forward in the report to committee on the appeal proposal."

23. At 14.132 she refers to her conclusions on the individual environmental impacts set out above, and refers to the fact that all of those impacts could be kept to an acceptable level through the use of conditions and obligations to secure control and mitigation.

24. At 14.133 she says:

> "However, would these impacts, acceptable individually, when taken

> together with the other minor impacts be environmentally unacceptable and tip the balance back firmly against the proposal? There is nothing about the combination of impacts that is unusual [she thus accepts the submission made to her by the Interested Party]. In the absence of any evidence to indicate that a proper assessment has been carried out or how it might be done, it is my judgment that the combined effect of the multiple environmental impacts is not such as to tip the balance back against the proposal."

25. Consequently her conclusion in 14.134 is that:

> "... subject to the imposition of appropriate conditions and the provisions of the S106, the proposal meets the requirements of [the relevant policy] in that its adverse environmental impact, including the potential for cumulative impact, can be kept to an acceptable level."

26. The submissions of Mr Cahill in his skeleton argument are summarised conveniently in paragraph 36 of his skeleton, where he says this:

> "It is submitted that pursuant to her own guidance in MPG 3 paras 7 and 8 the correct approach should have been
>
> (1) to acknowledge that although the appeal constituted a re-hearing pursuant to section 79 of TCPA 1990 (or a "fresh look") [the reference to which I will come back to], the fact that the MPA had refused the application having concluded that it had unacceptable environmental effects was an important material consideration in the re-hearing (the reference in section 79(1) that the Secretary of State '... may deal with the application as if it had been made to him in the first place' is permissory ... and does not create a statutory obligation to ignore the MPA's conclusion on acceptability of environmental impacts which the Secretary of State's policy in MPG 3 now requires);
>
> (ii) to acknowledge that this important material consideration constituted a rebuttable presumption that the MPA's assessment of the environmental acceptability was correct;
>
> and
>
> (iii) if she believed the presumption had been rebutted she should give clear and adequate reasons as to why it had been rebutted and why the MPA's assessment should not prevail."

27. Those submissions were not really in issue between the parties. As to "fresh look", the Inspector did say at paragraph 14.14 of her report the following:

> "Submissions were made as to the interpretation to be placed on the last part of MPG3 [paragraph] 8 and that the MPA's assessment of environmental acceptability should normally prevail. That is however

> qualified by being 'subject always ... to normal rights of appeal' which provide for a fresh look to be taken at a proposal if permission is refused."

28. However, it is quite plain that the Inspector did not simply give a 'fresh look' ignoring the conclusions of the MPA, because they were put before her as submissions based not only upon the evidence of Mr Hunt, but upon the case which the MPA, through Mr Cahill, sought to uphold as the appropriate way of looking at the planning permission application, and it is totally apparent that the Inspector paid full regard to those submissions, as I shall describe.

29. It is also apparent that the Inspector recognised that there was a presumption against the mining development. She said as much in paragraph 14.171, when she concluded:

> "I find that the presumption against open cast working in MPG3 ... is outweighed."

That was repeated and recognised by the Defendant in paragraph 46 of the decision letter.

30. It is also accepted and common ground that reasons are required in planning decisions, not only as in other administrative decisions, but perhaps even more so for the reasons clearly, fully and bindingly set out in South Buckinghamshire County Council v Porter (No 2) [2004] 1 WLR 1953, particularly per Lord Brown at paragraph 36, and in Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153, particularly per Lord Bridge. That is not only for ordinary purposes whereby a person in the position of an application for planning permission can know why such an application has been refused, but also so that in the circumstance of an appeal being allowed against an original decision of a planning authority the planning authority should know in the future the reason why its decision has been overturned, so as to be able to take into account the appropriate approach in its decision on future applications.

31. I drew to the attention of the parties a particular example in the planning area of the need for and importance of the giving of reasons by an Inspector in Dunster Properties Limited v First Secretary of State [2007] EWCA Civ 236; [2007] PLSCS 40. That was a case where a second planning Inspector differed in view from a first planning Inspector, but did not give adequate reasons as to why he did so, and the Court of Appeal concluded that it was necessary to show why there was a difference from the first decision and on what basis. It appeared to me that it was a similar situation here, where there is the paramount decision of the MPA which is being differed from by an Inspector, namely that it is necessary for the Inspector to give good reasons why such decision was being differed from, particularly where it involves the rebutting of a presumption against such development.

32. Once again the parties did not differ in their approach to the applicability of Dunster. Indeed, it is apparent that, insofar as the MPA had a view about noise, from which the Inspector differed, giving full reasons, Mr Cahill did not object, indeed he concluded that the Inspector had approached the position in the correct way, and no challenge, as I have earlier indicated, was sought to be made in respect of it. It is to that position,

namely that the Inspector is entitled to differ from the view of the MPA, but if he or she does so, particularly if it involves rebutting the presumption against development, then adequate reasons must be given for doing so, and adequate reasons for overriding that rebuttable presumption, if that is what occurred, is that in the end the issue reverted by reference to the question of cumulative impact.

33. The MPA in this case had given its decision, as I have said earlier, before MPS2 was in place. Nevertheless, it is common ground that it was appropriate and necessary to consider and take account of cumulative impact. It was also common ground that it was appropriate and necessary for the Inspector to apply MPS2; and the very application of MPS2 might amount to a reason for the difference in the decisions if that were the case.

34. It is important, and I record, that Mr Cahill wished to submit that, if it were the case that there were going to be any criticism of the MPA for not giving a "*proper assessment*", the very fact that MPS2 was not in place at the time of the MPA's decision should be taken into account in accordance with MPS2, given that MPS2 was not available to give it guidance. I am entirely clear however that there is no question in any event of such criticism. MPS2 is simply a very helpful way of approaching the issue. The absence of what she concluded to be *proper assessment* was what enabled, or entitled, the Inspector to differ from the MPA's decision.

35. The warning that is given by MPS2 was also of course not before the MPA, who cannot accordingly be in any way blamed for not having that in red lights before it -- the warning, namely that it cannot and should not be an automatic conclusion that there is a cumulative effect simply because features arise in relation to more than one different potential environmental impact.

36. Mr Cahill submitted, first, that the impact of MPS2 simply underlined the fact that there was an obligation and entitlement on an MPA to address cumulative impact; secondly, that in this case the MPA did address cumulative impact; thirdly, that this MPA, like all MPAs in the light of MPG3, was in a special position; fourthly, that there was no need for any *proper assessment* of the cumulative impact to be in a separate document or to be the subject matter of a separate report. It was sufficient if it was addressed, as he submits it was here.

37. He then submitted in paragraph 57 of his skeleton as follows:

> "In these circumstances ... the absence of any reasons to explain why the assessment was not proper leaves the MPA ignorant as to:
>
> (a) what the Secretary of State's policy does require by way of assessment;
>
> (b) in what way the assessment provided in this case failed to meet that requirement;
>
> (c) what assessment would be 'proper' in order properly to assess cumulative impact in future opencast applications."

38. Effectively, Mr Cahill set this within the kind of criticisms such as were enunciated by Lord Bridge in Save Britain's Heritage, namely that they (the MPA) were left not knowing what they had done wrong or not knowing what they should do for the future.

39. It is obviously a concern to the court if it is said by a Council that, if an appeal is upheld by an Inspector, it is left not knowing what it did wrong. If indeed this were a case in which some criticism was being made of the Council on the basis of an allegation that the assessment was not *proper* in any sense -- that either it was improper or negligent or did not take sufficient care -- then I could entirely understand and sympathise with that approach. But it is quite plain to me what was meant by the Inspector in her conclusion, as she accepted was being submitted to her by the Interested Party, namely that all that the MPA's assessment was was the subject matter of an assertion: see paragraph 14.130 onwards in which the Inspector accepts the submissions to that effect made to her by the Interested Party.

1. It was indeed a value judgment, as Mr Cahill himself rightly submitted, and a value judgment made by a party which was recognised to be the most experienced in this regard. The Inspector herself recognised that in paragraph 14.127 of her report; namely "that the local community has had first-hand experience of the effects of opencast working adds legitimacy to its views. MPG3 at [paragraph 8] refers to the costs and benefit of an opencast proposal being best assessed by the communities and local authorities who are directly affected".

40. But I would seek to take this opportunity to spell out what seems to me to be obvious, namely that although the MPA's conclusion on cumulative impact – in concise form, as the Inspector said - was indeed an *assessment*, and no doubt from one point of view a *proper assessment* of the view of the MPA, it did not give any reasons; and although that may well not be a criticism because it is not here being suggested that there should have been, for example, or could have been, judicial review of that decision - there was an appeal to the Inspector, which is a better remedy - the fact is that that decision was without reasons. The less 'concise' the *assessment*, the more difficult it would be for an Inspector to differ from it, given the paramountcy of the views of the MPA, and if therefore the MPA is in this case looking to the future, not by way in any way criticising what they have done in the past but so as to make it more likely that their views in future will be upheld by an Inspector, the best advice would be: give your reasons for your value judgment – your *assessment* – because, if given, then they would likely be, if not unassailable, pretty difficult to assail.

41. Speaking as a layman in this area, I can only give what appear to me to be examples of such reasoning as to cumulative impact, which I put in the course of argument to Mr Cahill. But it may well be that there could be reasons that could be given along the following lines: (1) even though each individual area of potential impact was not objectionable yet each such feature was so close to objectionability that, although none could be said to be individually objectionable, yet because each was nearly objectionable, the totality was cumulatively objectionable; or (2), one, two, three or four of the particular features were close to being objectionable and that would be an important matter to take into account when looking at the totality; or (3) one particular combination of two or three otherwise unobjectionable features could cause

objectionability in their totality; or (4) as was specifically addressed by the Interested Party and by the Inspector here, and found not to be the case, there could be some unusual feature or some unusual combination of features such as to render that combination objectionable when the individual feature was not. This is not to say that there was a requirement to say that. But it is, in my judgment, a requirement to say that, if it is then to be asserted that there is no basis upon which an Inspector can differ from that view. The more reasoned the assessment by the Inspector would have to be in order to differ from it, and indeed the more unlikely it would be that he would wish to differ from it.

42. In those circumstances, what the Inspector here said, after being satisfied to that effect by considering not only the individual impacts themselves but his conclusion as to the totality or cumulative nature of those impacts, was that all there had been was the *ipse dixit* of the MPA, the assertion of the MPA, and that, given that there were no reasons - no separate, no *proper assessment*, no adequate assessment -- none of those words necessarily the correct ones -- but at any rate no reasons, she, the Inspector, because she saw the case in the way that she did after full consideration, was then entitled to differ from what would otherwise, or could otherwise, have been the decisive value judgment of the MPA.

43. In those circumstances, I am satisfied that there is no basis of challenge to the Inspector's conclusion, and consequently the Defendant's acceptance of that recommendation. The cumulative impact was considered by the Inspector and by the Defendant, and after addressing the conclusions to the contrary by the MPA and its conciseness or lack of reasoning, and the firm reasons given the other way which the Inspector accepted, what she did when she said that there was no *proper assessment* by the MPA was to articulate that there was nothing in the short concise assessment that had been put forward by the MPA which caused her any reason to conclude that she could not and should not differ from it, even though it meant rebutting the presumption against development.

44. In those circumstances I am satisfied that there is no basis for this challenge.

45. MR LITTON: Thank you, my Lord. On the question of costs I do not anticipate that there is any resistance to the principle that the claimant should pay the Secretary of State's costs. There has not been any schedule of costs prepared because it was anticipated it might take a little bit longer, my Lord. But I have had an opportunity to speak to my learned friend and I think he agrees that it should be taxed if not agreed.

46. MR CORNER: My Lord, I make no application.

47. MR JUSTICE BURTON: Well, that makes your life easier.

48. MR CAHILL: It does. Small mercies are always welcome, my Lord, and I cannot object to my learned friend's application in relation to his costs. I am also content that that should be taxed if not agreed.

49. MR JUSTICE BURTON: Thank you very much.

50. MR CAHILL: My Lord, I make an application which your Lordship may or may not be surprised to hear. My Lord, it is a novel point. It is of interest. My Lord, insofar as it is reasons, clearly reasons arguments are common place in the Administrative Court, but this is an unusual aspect of reasons because it is reasons set against a very clear presumption, and it is an unusual presumption. I think, as you have seen from the papers, it is not a presumption which exists elsewhere, certainly in terms of mineral planning is concerned. Therefore, my Lord, I ask for leave not on the basis --

51. MR JUSTICE BURTON: Well, you have seen, I think, from my judgment, indeed from what occurred in the course of submissions -- our discussions -- that I do not see that there is a point of principle here in the sense that it was hardly in issue between the parties that there was a presumption and that reasons needed to be given for shifting that presumption. So it is almost limited to its precise facts in that the Inspector said there was no proper assessment, when if she had said: "Although there was an assessment, I am satisfied that, because there were no reasons, I am entitled to differ from it and rebut the presumption", it would not have been challengeable. So I do not see there being a point of law in this case.

52. MR CAHILL: I must, as your Lordship knows, make my application to you. Your Lordship has made it clear that that is not going to be successful. My Lord, I know not how long it would be before the approved transcript will be available. My Lord, I wonder whether you might be kind enough to give me 14 days from receipt of the approved transcript if my clients wish to put in an application.

53. MR JUSTICE BURTON: What is the timescale here? You probably want to get cracking.

54. MR CAHILL: From the point of view of my clients we, as you put it, want to get cracking. My Lord, I would regard with some alarm 14 days from the delivery of a transcript --

55. MR JUSTICE BURTON: It depends when that is likely to be. Let me make enquiries as to what the state of play is likely to be. (pause)

56. I think it may not be necessary in the sense that the extremely diligent shorthand writer is, as ever, willing to help and you should have on that basis, all things being equal, the transcript in your hands probably by Tuesday of next week, which is a week. I cannot remember whether it is 21 days anyway, is it?

57. MR CAHILL: Whether it is 21 or not, my Lord, I am sympathetic to my learned friend's point. We need to make our mind up and act within 14 days, and that is the limit that I would ask for.

58. MR JUSTICE BURTON: I think you have 21 days actually so --

59. MR CAHILL: The norm is 21 days.

60. MR JUSTICE BURTON: But it is 21 days from today and not from the date when you get your transcript. So in effect you will have 13 days or so. At any rate, no special order in those circumstances.

61. MR CAHILL: That was my request, and clearly by virtue of the efficient working of the stenographer, I am going to get what I ask for, so I am grateful.

62. MR JUSTICE BURTON: Thank you very much.