Neutral Citation Number: 2013 EWHC 2582 (Admin)

Case No: CO/13600/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22nd August 2013

Before:

MR JUSTICE HADDON-CAVE

- -

Between:

THE QUEEN on the application of CHERKLEY CAMPAIGN LIMITED	**Claimant**
- and -	
MOLE VALLEY DISTRICT COUNCIL	**Defendant**
- and -	
LONGSHOT CHERKLEY COURT LIMITED	**Interested Party**

- -
- -

Douglas Edwards QC and Sarah Sackman (instructed by **Richard Buxton Solicitors**) for the **Claimant**
James Findlay QC (instructed by Sharpe Pritchard) for the **Defendant**
Christopher Katkowski QC and Robert Walton (instructed by **Berwin Leighton Paisner LLP**) for the **Interested Party**

Hearing date: 6th, 7th & 10th June 2013

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APPROVED JUDGMENT

MR JUSTICE HADDON-CAVE:

> *"The planning system…is created as an instrument of government, as a means of restricting private land use rights in the interests of the community as a whole."* (Sir Malcolm Grant, *Urban Planning Law,* 1982 edition, p. 6).

INTRODUCTION

Preamble

1. This case engages the fundamentals of planning law. By its origins, philosophy and principles, planning law is concerned with the regulation of the private use of land in the interests of the community as a whole. As Sir Malcolm Grant said in his seminal book, *Urban Planning Law* (1982 edition at p. 6): *"The planning system… is created as an instrument of government, as a means of restricting private land use rights in the interests of the community as a whole."* Sir Malcolm Grant also observed that planning law prescribes the procedures - or sets the battle lines - for the resolution of conflict over land use *"between the interest of private property and the prevailing "public" or "community" interests"" (ibid,* p. 1). His words are as relevant today as they were 30 years ago.

2. This case concerns a conflict between private developers and public campaigners. The developers seek planning permission to develop exclusive private golf and hotel facilities in the scenic setting of the Surrey Hills. The campaigners wish to prevent such a development in protected landscape of national importance. Much of the legal argument revolved around whether a *"need"* for further golfing facilities could be demonstrated as required by the policy matrix. The developers argued that proof of private *"demand"* for exclusive golf facilities equated to *"need".* This proposition is fallacious. The golden thread of public interest is woven through the lexicon of planning law, including into the word *"need".* Pure private *"demand"* is antithetical to public *"need"*, particularly very exclusive private demand. Once this is understood, the case answers itself. The more exclusive the golf club, the less public need is demonstrated. It is a zero sum game.

3. Further, planning law decision-making is a process informed by policy; and the courts employ pragmatism and common sense when interpreting it (see Lindblom J in *Cala Homes (South) Limited v. Secretary of State for Communities & Local Government* [2011] EWHC 97 (Admin) at paragraph [138]).

Judicial review

4. By these judicial review proceedings, Cherkley Campaign Limited ("the Claimant") challenges a decision by Mole Valley District Council ("the Council") to grant planning permission to Longshot Cherkley Court Limited ("Longshot") on 21st September 2012 to develop Cherkley Court and Cherkley Estate, near Leatherhead in Surrey, into exclusive golf facilities together with a hotel, health club and spa. The Claimant contends that the Council's decision was legally flawed, contrary to planning policy, irrational and should be quashed.

THE FACTS

Cherkley Court and Estate

5. The Cherkley Estate is in the Surrey Hills. It totals approximately 375 acres, including 195 acres of farmland. It comprises a main house, Cherkley Court, and a secondary house, Garden House, together with substantial outbuildings and cottages, all set in parkland and woodland. The whole estate is within the Surrey Hills Area of Great Landscape Value and part is also within the Surrey Hills Area of Outstanding Natural Beauty. The Estate is adjacent to the Box Hill Estate, a National Trust property, and the Mole Gap to Reigate Escarpment, a Special Area of Conservation. The Estate includes a large field of uncultivated chalk grassland known as the '40-Acre Field', which is a UK Priority Biodiversity Action Plan Habitat and has the designation criteria of a Site of Nature Conservation Importance. 40-Acre Field (on which it is proposed to put 5 golf holes) abuts an adjacent EU classified Special Area of Conservation and Site of Special Scientific Interest. The whole Estate is within the Metropolitan Green Belt.

Cherkley Court and Lord Beaverbrook

6. Cherkley Court is a Grade II listed building and is located to the south-west boundary of the estate. It has an interesting and distinguished history. It was originally built in the late 1870s, but had to be re-rebuilt after being severely damaged by fire in 1893. In 1911 it was purchased by the Canadian businessman, Max Aiken (later Lord Beaverbrook). It became his family home until his death in 1964 and remained his widow's home until her death in 1994. Garden House became the home of Lord Beaverbrook's son, Sir Max Aiken, in the late 1950s.

7. In the 1960s, title in Cherkley Court passed to a charitable trust, the Beaverbrook Foundation. In 1984, the family sold off Garden House and the Estate to a Chinese businessman, but retained Cherkley Court itself. In 1998, the trust re-purchased Garden House and the Estate and re-united it with Cherkley Court again. The Beaverbrook Foundation then carried out extensive renovations to Cherkley Court and the Estate and opened its formal grounds to the public, pursuant to planning permission granted on 30th October 2003. On 7th June 2010 the Beaverbrook Foundation obtained planning permission for Cherkley Court to revert to a single family dwelling and put it up for sale for £20 million.

8. Two private bidders wished to use Cherkley Court and Estate as a private residence but were outbid by Longshot who purchased the Cherkley Estate in April 2011. In July 2011, Longshot also purchased the adjoining Micklenam Downs Estate to the south comprising an additional 18.5 acres (also within the Surrey Area of Outstanding Natural Beauty). This acquisition brought the total planning application site up to approximately 394 acres.

Longshot's planning application

9. In October 2011, Longshot applied to Mole Valley District Council for planning permission to develop Cherkley Court and the Estate into a hotel and spa complex together with an 18-hole golf course. The application (MO/2011/1450) was lodged under cover of a letter dated 28th October 2011 from Longshot's planning

advisors, Planning Perspectives LLP. The application sought planning permission in the following terms:

> *"The use of Cherkley Court, and its existing associated buildings as a hotel comprising guest accommodation, health club, spa and cookery school. Provision of additional floorspace to accommodate further guest rooms, underground plant and leisure uses, including an outdoor pool. Provision of an 18 hole golf course, practice facilities, clubhouse and maintenance area (underground)…"*

10. Longshot also applied for listed building consent to make alterations to Cherkley Court, but this is not part of the present challenge. Longshot submitted detailed evidence with it main planning application, including reports from its golf club consultants, 360 Golf, and various environmental, water and other technical consultants. The cost of the scheme was said to be in the region of £45 to £50 million.

11. The proposal required a departure from the Mole Valley Local Plan and Core Strategy, and was advertised as such.

Objections

12. The application proved highly controversial. There were numerous objections to the proposal to turn the Cherkley Estate land on the Surrey Hills North Downs into a golf course and the proposal to turn Cherkley Court into a hotel and spa complex. Objectors included Campaign to Protect Rural England (Surrey Branch), Campaign to Protect Rural England (Mole Valley Branch), Friends of Box Hill, Leatherhead Residents Association, Micklenham Parish Council, National Trust (Polesden Lacey South East Office), Surrey Hills Board, Butterfly Conservation and Surrey Botanical Society.

Summary of designations affecting the application site

13. The planning and environmental designations and policies affecting the application site are legion. They can be conveniently listed in full and summarised as follows:

    (1) The whole application site lies within the Surrey Hills Area of Great Landscape Value ("AGLV"). This is a county-level designation which recognises its *"high quality landscape"* (Core Strategy, paragraph 6.4.5.).

    (2) Part of the site is within the Surrey Hills Area of Outstanding Natural Beauty ("AONB"). This is a national designation which confers the *"highest level of protection in relation to landscape and scenic beauty"* (National Planning Policy Framework ("NPPF"), paragraph 115).

    (3) The entire site is within the Metropolitan Green Belt.

    (4) The site is adjacent to the Box Hill National Trust Estate.

    (5) The site is adjacent to the Mole Gap to Reigate Escarpment Site of Special Scientific Interest ("SSSI"), a nationally important site. The SSSI is also a Special Area of Conservation ("SAC"), indicating European importance for

nature conservation. There is an 800 metre buffer zone associated with the SAC which covers much of the southern half of the site.

(6) The site includes Cherkley Wood, which is a Site of Nature Conservation Importance ("SNCI"). This is a local designation. 40-Acre Field comprises chalk grassland which is a habitat identified as Biodiversity Action Plan Priority Habitat and is considered to meet the requirements for a designation as an SNCI. The application site falls within a Biodiversity Opportunity Area ("BOA").

(7) A significant part of the parkland within the site comprises Areas of High Archaeological Importance and includes designated archaeological sites.

(8) The site includes Grade II listed buildings and several curtilage-listed buildings. Cherkley Court is described as *"a significant listed building within Mole Valley and forms an important part of the nation's cultural heritage"*.

(9) The site includes Scheduled Ancient Monuments.

Applicable policy

14. The primary policy relevant to this planning application was REC12 of the Mole Valley Local Plan (set out below). There were also other policies germane to development in an AONB and AGLV and the Green Belt which contained material considerations. These are dealt with in more detail later below.

Mole Valley Local Plan

15. The section of the Mole Valley Local Plan relating to golf courses is referred to as REC12 and comprises eleven paragraphs (numbered 12.70 to 12.81) and a box of text, set out as follows:

> ***"GOLF COURSES***
> *12.70 There are seven established golf courses in the District concentrated principally around Dorking and Leatherhead. In the Newdigate area a new course has been opened in recent years and another permitted. More generally this part of Surrey is very well served with golf courses. According to the recognised standards of provision there is no overriding need to accommodate further golf courses in the District.*
>
> *12.71 In considering proposals for new courses, the protection of the District's Green Belt and countryside will be of paramount importance. In this regard it will be important to ensure that a proposal is compatible with retaining and where possible enhancing the openness of the Great Belt and rural character of the countryside. Applicants proposing new courses will be required to demonstrate that there is a need for further facilities.*
>
> *12.72 New courses are likely to have an impact on the District's landscape because of their extensive size, formal appearance, considerable earth works and new buildings. The Council will seek to ensure that proposals for golf courses do not reduce the distinctiveness and diversity of the District's landscape. The Council is particularly concerned about the effect on the special landscape qualities of the Surrey Hills Area of Outstanding Natural*

Beauty and the Area of Great Landscape Value and future golf course proposals will be directed away from these areas of high landscape quality.

POLICY REC 12 – DEVELOPMENT OF GOLF COURSES

[A] Proposals for new golf courses and extensions to existing courses will be considered against the following criteria:

1. *the impact of the course on the landscape, archaeological remains and historic gardens, sites which are important for nature conservation and identified in Policies ENV9, ENV10, ENV11, ENV12 and ENV13, and the extent to which the proposal makes a positive contribution to these interests;*
2. *the extent of any built development and facilities and their impact on the character and appearance of the countryside;*
3. *courses will not be permitted on Grade 1, Grade 2 or Grade 3a agricultural land;*
4. *the course should have safe and convenient vehicular access to an appropriate classified road. Proposals generating levels of traffic that would prejudice highway safety or cause significant harm to the environmental character of country roads will not be permitted;*
5. *the extent to which public rights of way are affected and whether any provision is proposed for new permissive rights of way;*
6. *the provision of adequate car parking which should be discreetly located or screened so as not to have an adverse impact on the character and appearance on the countryside.*

[B] In considering proposals for new golf courses, the Council will require evidence that the proposed development is a sustainable project without the need for significant additional development in the future, such as hotels or conference facilities.

[C] Proposals for new golf courses should be designed to respect the local landscape character. New golf courses in the Surrey Hills Area of Outstanding Natural Beauty and the Area of Great Landscape Value will only be permitted if they are consistent with the primary aim of conserving and enhancing the existing landscape.

12.73 In determining proposals for golf courses and ancillary development, the Council will have regard to the Surrey County Council's guidelines for the development of new golf facilities in Surrey. Account will also be taken of the existing and proposed provision of courses in the area.

12.74 etc..."

The planning decision-making process

Planning Officer's Reports (OR1 and OR2) recommending refusal

16. In advance of relevant planning meeting of the Council's Development Control Committee, the Council's planning officers, Case Officers Ms Sherelle Munnis, Ms Megan Rowe, Mr Rod Shaw and Mr Gary Rhoades-Brown, prepared a detailed, 110 page, original report (OR1) and an addendum report (OR2) analysing the application in light of the policy Framework (NPPF). Their report,

OR1, which makes impressive and lucid reading, recommended refusal of the application.

Executive Summary to OR1

17. The Executive Summary to OR1 described the application as follows:

> *"The proposal is a substantial and complex application in a very sensitive location within land designated as Green Belt, partly Areas of Outstanding Natural Beauty, a Site of Nature Conservation Interest, a Special Area of Conservation buffer zone and an area of high archaeological potential. The site also falls within the Area of Great Landscape Value and includes Scheduled Ancient Monuments. The proposals involve work to a Grade II Listed Building and curtilage listed buildings, change of use of these buildings, extensions to these buildings, new build in the green belt, and the provision of an 18 hole of golf course on the open parkland."*

18. The Executive Summary to OR1 listed the policy-compliant and non-compliant elements of the proposal. It stated in relation to the latter:

> *"In relation to the latter, the following elements are not considered to be policy compliant:*
> - *The new buildings proposed in the Green Belt*
> - *The impact of the proposal on the existing landscape character*
> - *The need for the proposed golf course*
>
> *It is considered that these 3 elements are serious breaches of adopted policies in the Core Strategy, the Local Plan, The Surrey Hills Management Plan, and, national guidance."*

19. The Executive Summary to OR1 continued in relation to the non-compliant elements of the proposal:

> *"With regard to the non compliant elements of the proposal, significant weight must be given to inappropriate development in the Green Belt as stated in PPG2 regarding the harm caused. In relation to landscape issues, objection and concern has been raised by numerous statutory and non statutory bodies including Natural England, the Surrey Hills AONB Adviser, the Surrey Hills Board, The National Trust, the Campaign to Protect Rural England (Mole Valley Group), and, The County Landscape Officer. Part of the site is designated by the Govt as having the highest status of protection in relation to landscape and scenic beauty. This must be given significant weight too. Natural England is considering this year whether to extend the AONB status to cover the entire application site and beyond. This must be given weight. Linked to this is the fact that the need for a golf course in the AONB/AGLV has not been proven by the applicant. ..."*

Planning officers' recommendation

20. The planning officers recommended refusal of Longshot's application for planning permission for three main reasons:

(1) First, the proposed golf course, including tees, greens, bunkers and fairways, in this highly exposed and sensitive landscape (i) would be *"seriously*

detrimental" to the visual amenities of the locality, (ii) would fail *"to respect or enhance"* the landscape character of the AGLV and AONB and (iii) was contrary to the aims of PPG2, PPS7, Core Strategy Policies CS1 and CS13, 'saved' Mole Valley Local Plan Policies ENV4 and REC12 and policies LU2 and LU3 of the Surrey Hills Management Plan.

(2) Second, the site was located in land designated as AONB and AGLV and *"no justification"* had been provided as to *"why the proposed golf course needs to be located in protected landscape"*. The proposal was therefore contrary to the aims of the NPPF, 'saved' policies REC11 and REC12 of the Local Plan and Core Strategy policy CS16.

(3) Third, the proposal involved new buildings in the Green Belt, including a partly underground indoor swimming pool, an underground spa and a partly underground maintenance facility. These buildings, together with the activity generated by the proposed uses, would represent *"inappropriate development in the Green Belt, in conflict with the aims of PPG2"*. There were no *"very special circumstances"* advanced which clearly outweighed the harm caused by reason of inappropriateness and the level of activity generated. The partly-underground indoor swimming pool and underground spa were not considered acceptable extensions to the proposed hotel since 'saved' policy REC22 of the Mole Valley Plan only made allowance for extensions to existing hotels which would not prejudice the openness of the Green Belt or rural character of the countryside. These elements are also contrary to 'saved' Policy REC11 which prevents recreational development that is not incidental to outdoor recreation.

21. The planning officers reports' OR1 and OR2 and recommendations were submitted to the Council's Development Control Committee. This case involves the relatively unusual situation of disagreement by the planning decision-makers with the clear recommendations of their planning officers.

Committee meeting 4th April 2012 - rejected recommendation (9 votes to 8)

22. On 4th April 2012, Longshot's application came before the Council's Development Control Committee for consideration. The Committee members were briefed by planning officers as to the contents of reports OR1and OR2, and the reasons for their recommendation against granting planning permission. At the meeting, a motion was proposed by Councillor Dickson that the Committee reject the planning officers' recommendation in OR1 that the application be refused. There was a lengthy debate, with councillors speaking for and against the motion. Councillor Dickson's motion was eventually passed by a slim majority of 9 votes to 8. The Council was not in a position formally to grant planning permission because conditions had to be attached to any grant, and the terms of a section 106 agreement still had to be worked out. It was, accordingly, agreed the application needed to come back before the Committee.

Committee meeting on 2nd May 2012 – fresh motion defeated (10 votes to 9)

23. On 2nd May 2012, the Council's Development Control Committee met again to consider the matter. At that meeting, the Committee were presented by the planning officers with two further reports: a third planning officer's report (OR3)

which set out a list of recommended planning conditions and heads of terms for a legal agreement with the applicants in the event that the Committee resolved to grant permission; and a further fourth addendum report (OR4), which dealt mainly with the case raised by certain objectors that further ecological surveys were required before a decision could be lawfully reached on whether to grant consent for the scheme.

24. At this meeting, a fresh motion was proposed which sought to overturn Councillor Dickson's previous motion which had been passed on 4th April 2012. Council members objecting to the scheme proposed a motion that the planning officers' original recommendation of refusal in Report OR1 should be supported and the application for planning permission be rejected. This led to a further lengthy and impassioned debate, with councillors again speaking for and against the motion. This fresh motion was, however, eventually defeated by another slim majority of 10 votes to 9. The Committee then resolved to grant planning permission, subject to certain conditions and the entering into of a section 106 agreement.

Referral to the Secretary of State

25. Since Longshot's proposal involved a departure from the Local Plan, which formed part of the Development Plan, before the Council could formally grant permission, the matter had to be referred to the Secretary of State, *via* the National Planning Casework Unit, for a decision as to whether the application should be 'called in', *i.e.* for an inspector to hold an inquiry. On 18th July 2012, the Council was informed that the Secretary of State had decided that the application should not be called in, and, accordingly, the decision as to whether planning permission should be granted remained with Mole Valley Council.

Decision and Reasons – 21st September 2012

26. The Council formally granted planning permission to Longshot to develop Cherkley Court on 21st September 2012. Reasons for the Council's Decision drafted by the Council's officers were published together with that grant of permission on the same day. These Reasons were drafted by the planning officers who had previously recommended that planning permission be refused. This was clearly a not-altogether easy drafting exercise for them since it ran counter to their own recommendations and views.

27. It is necessary to set out the published Reasons in full:

"[REASONS FOR GRANT OF PLANNING PERMISSION]:

[1] The development hereby granted consent has been assessed against Mole Valley Core Strategy policies CS12 and CS 13; Mole Valley Local Plan policies ENV22, ENV31, MOV2 and REC12, Surrey Hills Management Plan policies LU1, LU3 and RT 1 and the National Planning Policy framework (NPPF). In addition, certain aspects of the development were subject to an Environmental Statement. The applicants commenced a public participation programme in October 2010 which ran until October 2011 – the various stages of which are set out on p. 13 of the officer report to the 4th April 2012 Development Control Committee. Representations received from the public were summarised on pp. 38 to 49 of the report to the 4th April Committee; p. 1

of the Addendum to that Committee and pp. 1-4 of the Addendum to the 2nd May Development Control Committee.

[2] The Development Control Committee considered that the development did conform to the policies above and granted permission for the following reasons:

[3] The development was considered to accord with the principles of sustainable development as set out in the NPPF and the Council's Core Strategy 2009 and Mole Valley Local Plan 2000. Particular emphasis was placed on the degree to which the proposals supported the local economy, providing jobs for local people and accommodation and facilities for visitors to the District. The Committee considered these benefits were enhanced further by measures to convert the listed building of Cherkley Court sensitively, finding a long term viable use that would ensure the on-going maintenance of the house, the estate buildings, the formal gardens and the wider estate. The case for approving the development was furthered by design and management proposals that would allow the ecology of the estate to be managed and, in places, enhanced alongside the formal playing areas of the golf course, whilst respecting the landscape characteristics on the estate and the wider landscape. The development was considered overall to balance the needs of the economy with those of nature and landscape conservation, as required by Mole Valley Core Strategy policies CS12 and CS13, and the conservation of the historic environment.

[4] The Committee also considered that the development supported measures in Mole Valley Core Strategy CS12 and Surrey Hills Management Plan policy RT1 to support the provision of accommodation for visitors to the District. Included in this is the provision of opportunities for the public to continue to visit the house and gardens, including the creation of a new statutory Right of Way.

[5] The development was considered not to compromise significantly the Green Belt policies contained in the NPPF and the Council's Core Strategy by: re-using existing buildings, utilising floorspace granted under previous, extant permissions and locating additional floorspace underground. The design of the development in terms of siting, scale and detailing was considered to retain substantially the openness of the site sufficiently to overcome concerns set out in the officers' report, having regard to the other benefits that would be achieved.

[6] In coming to its decision and in judging the impact on the Area of Great Landscape Value and Area of Outstanding Natural Beauty, the Development Control Committee were mindful of the Environmental Statement undertaken by the applicant under the EIA Regulations, the Council's assessment of the EA, the details contained in the application, the concerns of officers set out in their report and the requirement under a legal agreement to undertake a Landscape and Ecology Management Plan for the Cherkley Estate. It was judged that the landscaping and mitigation measures contained in the application were sufficient to ensure that the overall landscape character

would not be compromised, that protected species would be safeguarded and that the ecology of the estate could be enhanced through control mechanisms in the legal agreement; planning conditions and the Landscape and Ecology Management Plan, despite the presence of the golf course. It was considered that the design of the proposals met the terms of planning policies designed to protect the biodiversity of the estate and the character of the countryside, namely Core Strategy policy CS13, Local Plan policy ENV22 and REC12, as well as Surrey Hills Management Plan policies LU2 and LU3. It was noted that the development included suitable measures to protect and enhance the majority of open countryside of the estate alongside formal playing spaces, whilst introducing management of neglected woodland, retaining hedgerows, managing trees and including new planting that is appropriate to a chalk grassland location. There would also be suitable protection afforded during construction phase.

[7] The Committee was mindful that a management plan will be prepared to integrate all the management provisions, from construction through to the maturity of the golf course. Therefore, the development could meet commitments to safeguard and enhance the natural environment within the NPPF, Core Strategy policy CS13, Local Plan policy ENV22 and REC 12 and Surrey Hills Management Plan policies LU2 and LU3. The development was considered to provide an opportunity for stable long term management of the estate and investment to safeguard its ecology and landscape.

[8] The development was considered to provide opportunities to meet a need for recreation facilities in the countryside and the applicant had been able to demonstrate in the supporting documents, such as the 'Report on Viability of Golf at Cherkley' and the 'Hotel Viability Study', that they would be able to secure enough interest in the facilities to make it viable in the short and long term. Therefore, the terms of Mole Valley Local Plan policy REC12 and its supporting text were considered to have been met in that a need for the facilities had been demonstrated and the character of the countryside could be safeguarded even within and adjacent to the Area of Outstanding Natural Beauty. The Committee did, nevertheless, as a condition of its approval, require the provision of a bond to be provided to the Local Planning Authority and held for a period of 5 years, to be used to reinstate the land in the event that the golf course venture should fail.

[9] The Committee was satisfied that the arrangements for car parking and access to and from the site were adequate and that the surrounding roads network could cope with the traffic generated by the development, as required by Mole Valley Local Plan policy MOV2.

[10] The proposals also provided opportunities to encourage the provision of new works of art and craft, as set out in Local Plan policy ENV31.

[11] Having considered all of the material considerations and objection to the development and the officers' concerns as expressed in their reports, the Committee concluded that, when balancing all of the issues, the development would achieve sufficient economic benefits and contained adequate

environmental safeguards, having regard also to the conditions set out in the decision notice and to the Section 106 Agreement, to outweigh any concerns."

THE CHALLENGE

28. The Claimant's lodged their challenge by way of judicial review on 17th December 2012. The challenge was originally brought on seven grounds (to which an eighth ground was subsequently added):

    (1) **Ground 1**: breach of Green Belt policy requirements;

    (2) **Ground 2**: failure to demonstrate *"need"* for further golf facilities in breach of Policy REC 12;

    (3) **Ground 3**: breach of policies on protected landscape;

    (4) **Ground 4**: failure to give adequate reasons

    (5) **Ground 5**: failure to have regard to the adequacy of water resources in breach of Policy ENV68;

    (6) **Ground 6**: failure to have regard to impact on European Protected Species

    (7) **Ground 7**: failure to consider the optimum viable use of Cherkley Court as a residential dwelling; and

    (8) **Ground 8**: failure to take into account a 2010 Agreement regarding the 'Glass House Cottages'.

Permission for judicial review and interim injunction

29. On 24th April 2013, Collins J granted the Claimant permission to apply for judicial review on three grounds; **Ground 2** ('demonstration of *"need"*'), **Ground 3** ('landscape') and **Ground 5** ('adequacy of water resources'). He refused permission was refused on **Ground 1** ('Green Belt'), **Ground 4** ('failure to give adequate reasons'), **Ground 6** ('inadequacy of ecological information'), **Ground 7** ('heritage considerations') and **Ground 8** ('failure to take into account a 2010 agreement regarding the Glass House Cottages'). He directed that the Claimant was entitled to apply to renew any of these latter grounds before the trial judge on notice. The Claimant applied before me to renew its challenge on **Ground 1** and **Ground 8**, both of which were put in terms of the Council's alleged unlawful approach to Green Belt policy. **Ground 6** and **Ground 7** were no longer pursued. **Ground 4** was no longer pursued as a separate ground of challenge, but inadequacy of Reasons formed part of Claimant's challenges generally. I heard **Ground 1** and **Ground 8** on a 'rolled-up' basis.

30. On 26th April 2013 Collins J granted an interim injunction restraining Longshot from carrying out construction works at the site save for certain prescribed permitted works. This followed an earlier injunction granted by Simon J on 26th March 2013 and subsequently varied by Holman J on 16th April 2013..

31. I consider each of the Grounds in detail below. I turn first, however, to deal with a challenge by Longshot to the Claimant's standing (*locus standi*).

STANDING

32. A claimant in an application by way of judicial review must have *"sufficient interest in the matter to which the application relates"* (section 31(3) of the Senior Courts Act 1981). The phrase *"sufficient interest"* has traditionally been given a wide meaning.

33. Mr Katkowski QC, Counsel for Longshot, submitted that the Claimant, a limited company, had no *locus standi* because it had only been formed *after* the grant of permission and had never made any representations regarding the application during the planning process itself. He further submitted that it would not be unjust to refuse the claim since, by forming a limited company, the objectors to the proposal were seeking to gain unfair costs protection.

34. In my view, Longshot's objection to the Claimant's standing is artificial and unreal. Proof of active participation in the process of objection is not a *sine qua non* to standing, but merely strong evidence that such persons will ordinarily regarded as aggrieved (see Lord Reed in *Walton v. The Scottish Ministers* [2012]] UKSC 44 at paragraphs [83] to [84]). As explained by Ms Kristina Kenworthy, a director of the Claimant, numerous of the directors of and individual subscribers to Cherkley Campaign Limited not only live in the Mole Valley area (and can be said thereby to be 'aggrieved'), but were also involved in the process of objecting to the proposal through bodies such as the Surrey Branch of the Campaign for the Protection for Rural England (which sent the original letter before action). There is nothing unfair or improper about a group of aggrieved individuals forming a limited company to bring a claim. The CPR provides for relevant costs remedies as necessary.

35. The present case has echoes of the landmark case of *Turner v. Secretary of State of the Environment* (1973) 28 P. & C.R. 123, where Ackner J upheld the standing of the chairman of a local preservation society who had appeared at a public local inquiry by permission of the inspector. (See also generally: *R(Greenpeace Ltd) v. Her Majesty's Inspectorate of Pollution* [1994] 4 All ER 329; *R(Residents Against Waste Site Ltd) v. Lancashire County Council* [2007] EWHC 2558 (Admin); and *R (Blackfordby and Boothorpe Action Group Ltd) v. Leicestershire County Council.*)

36. In my judgment, there is no doubt that Cherkley Campaign Limited has *"sufficient interest"* in law to bring a claim by way of judicial review in this case.

37. I turn next to set out the law.

THE LAW

General principles and legislative scheme

38. There was elaborate debate between counsel regarding the general principles to be applied in the planning decision-making context. I have since had the benefit of reading Lindblom J's comprehensive judgment in *Cala Homes (South) Limited v. Secretary of State for Communities & Local Government* [2011] EWHC 97

(Admin) paragraphs [24] to [32] and gratefully adopt the following nine statements of general principle and law which I have gleaned from his magisterial analysis:

The legislative scheme for the planning decision-making

(1) When determining an application for planning permission, a local planning authority is required to have regard to two kinds of consideration, namely the development plan so far as is relevant, and other considerations that are *"material"* (section 70(2) of the Town and Country Planning Act 1990).

(2) Section 38(3) of the Planning and Compulsory Purchase Act 2004, as amended by the Local Democracy, Economic Development and Construction Act 2009, provides that for the purposes of any area other than Greater London the development plan is *"the regional strategy for the region in which the area is situated"* and *"the development plan documents (taken as a whole) which have been adopted or approved in relation to that area"*.

(3) Part 5 of the 2009 Act contains provisions relating to the adoption of Regional Strategies. The statutory scheme for the adoption of *"development plan documents"* is provided in Part 2 of the 2004 Act. In some areas, by virtue of transitional provisions in the 2004 Act, old-style plans adopted under the now repealed provisions of Part II of the 1990 Act survive as part of the development plan (see further below). (Note now the effect of Chapter 6 of the Localism Act 2011).

Section 38(6) of the Planning and Compulsory Purchase Act

(4) In England (as elsewhere in the United Kingdom) the planning system is still *"plan-led"*. In statutory as opposed to policy terms, the priority to be given to the development plan in development control decision-making is encapsulated in section 38(6) of the 2004 Act, which provides:

> *"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."*

(5) Section 38(6) must be read together with section 70(2) of the 1990 Act. The effect of those two provisions is that the determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise.

(6) Although section 38(6) requires a local planning authority to recognise the priority to be given to the development plan, it leaves the assessment of the facts and the weighing of all material considerations with the decision-maker. It is for the decision-maker to assess the relative weight to be given to all material considerations, including the policies of the development plan (see *City of Edinburgh Council v. The Secretary of State for Scotland* [1997] 1 W.L.R. 1447 (concerning an equivalent Scottish provision), especially Lord Hope at pp. 1449H-1450G and Lord Clyde at pp.1457H-1459G).

The distinction between materiality and weight

(7) The law has always distinguished between materiality and weight. The distinction is clear and essential. Materiality is a question of law for the court; weight is for the decision-maker in the exercise of its planning judgment. This was spelled out in the well-known passages of Lord Hoffmann in *Tesco Stores Limited v. Secretary of State for the Environment* [1995] 1 W.L.R 754 (at p. 780):

> *"The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into* Wednesbury *irrationality) to give them whatever weight the planning authority thinks fit or no weight at all.*
>
> *This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."*

(8) So long as it does not lapse into perversity, a local planning authority is entitled to give a material consideration whatever weight it considers to be appropriate. Under the heading "*Little weight or no weight?*" in *Tesco Stores* Lord Hoffmann observed (at p.784):

> *" If the planning authority ignores a material consideration because it has forgotten about it, or because it wrongly thinks that the law or departmental policy (as in* Safeway Properties Ltd v. Secretary of State for the Environment *[1991] JPL 966) precludes it from taking it into account, then it has failed to have regard to a material consideration. But if the decision to give that consideration no weight is based on rational planning grounds, then the planning authority is entitled to ignore it."*

39. Thus, in appropriate circumstances, a local planning authority in the reasonable exercise of its discretion may give no significant weight or even no weight at all to a consideration material to its decision, provided that it has had regard to it.

40. The concept of materiality for the purposes of planning decisions is wide. In principle, it encompasses any consideration bearing on the use or development of land. Whether a particular consideration is material in a particular case will depend on the circumstances (see the judgment of Cooke J in *Stringer v. Minister of Housing and Local Government* [1970] 1 W.L.R.1280 (at p.1294G)).

41. I turn to consider the principles applicable to Rationality and Reasons.

Rationality – principles

42. The threshold of irrationality for purposes of judicial review is a high one. This was emphasised by Lord Bingham in *R v. Secretary of State for the Home Department ex parte Hindley* [1998] QB 751 at p. 777A:

> *"The threshold of irrationality for purposes of judicial review is a high one. This is because responsibility for making the relevant decision rests with another party and not with the court. It is not enough that [the court] might, if the responsibility for making the relevant decision rested with [it], make a decision different from the appointed decision-maker. To justify intervention by the court, the decision under challenge must fall outside the bounds of any decision open to a reasonable decision-maker."*

43. Reasoning may be irrational in the sense that it *"fails to add up"* and has given rise to a decision *"in which, in other words, there is an error of reasoning which robs the decision of logic"* (*per* Sedley J in *R v. Parliamentary Commission for Administration ex p. Balchin* [1998] 1 P.L.R. 1, 13E-F).

44. However, where fact finding and planning judgments are involved, *Wednesbury* unreasonableness is a *"difficult obstacle"*; and the courts should be astute to ensure that perversity challenges are not be used *"as a cloak for what is, in truth, a rerun of arguments on the planning merits"* (*per* Sullivan J in *Ex parte Newsmith Stainless Ltd* [2011] EWHC Admin 74 at paragraphs [6]-[8]).

45. Mr Edwards QC, Counsel for the Claimant, advanced a proposition that where members reject planning officers' advice 'there must be a rational and discernable basis for doing so' and referred in support to *R v. Newbury District Council (ex parte Blackwell)* [1998] JPL 680. The point is obviously correct, but I do not see it as a stand-alone principle but merely part of the general principle of rationality.

Reasons – principles

46. The following three well-known statements of principles relevant to the issue of reasons are helpfully cited by Lindblom J in *Threadneedle Property Investments Ltd. v. Southwark LBC* [2012] EWHC 855 at para.125:

(1) A local planning authority's obligation to give summary reasons when granting permission is not to be equated with the Secretary of State's obligation to give reasons in a decision letter when allowing or dismissing a planning appeal. By their very nature, a local planning authority's summary reasons for granting permission do not present a full account of the local planning authority's decision-making process (*per* Sullivan LJ *R (Siraj) v. Kirklees Metropolitan Council* [2010] EWCA Civ 1286 at paragraph [14]).

(2) A fuller summary of the reasons for granting planning permission may well be necessary *"where members have granted planning permission contrary to a planning officer's recommendation in order to allow members of the public to ascertain the lawfulness of the decision*" (*per* Sullivan LJ *R (Siraj) v. Kirklees Metropolitan Council* (*supra*) paragraph [16]).

(3) The fundamental test is *"whether an interested person could see why planning permission is granted and what conclusion was reached on the principle issues" (per* Ouseley J in *R (Midcounties Co-operative Ltd) v. Wyre Forest District Council* [2009] EWHC 964 (Admin) at paragraph [190]).

Tesco Stores Ltd v. Dundee City Council [2012]

47. The following further pertinent statements are to be derived from the Supreme Court's recent judgment in *Tesco Stores Ltd v. Dundee City Council* [2012] SC 13:

(1) A planning authority must proceed on a proper understanding of the development plan. It cannot have proper regard to the provisions of the development plan if it fails to understand them (*per* Lord Reed at paragraph [17]).

(2) The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. In this area of public administration as in others policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context (*per* Lord Reed at paragraph [18]).

(3) Provisions of development plans which are framed in language whose application to a given set of facts requires the exercise of judgment fall within the jurisdiction of the planning authorities and can only be challenged on the grounds of irrationality. Nevertheless, planning authorities do not live in the world of 'Humpty Dumpty': they cannot make the development plan mean whatever they like it to mean (*per* Lord Reed at paragraph [19]).

(4) A local planning authority was required to proceed on the basis of a proper interpretation of the relevant provisions of the development plan which was a matter of textural interpretation not of planning judgment (*per* Lord Reed at paragraph [21]).

48. Lord Reed also referred in paragraph [20] to the following oft-cited passage of Brooke LJ in *R v. Derbyshire County Council, Ex p Woods* [1997] JPL 958 at p. 967, which he said, properly understood, was not inconsistent with the approach which he described:

> *"If there is a dispute about the meaning of the words included in a policy document which a planning authority is bound to take into account, it is of course for the court to determine as a matter of law what the words are capable of meaning. If the decision maker attaches a meaning to the words they are not properly capable of bearing, then it will have made an error of law, and it will have failed properly to understand the policy…."*

49. There was a somewhat sterile debate between counsel as to whether, and the extent to which, the proper 'application' of policies was a matter for the courts to police. However, since the key question as to the meaning of *"need"* in paragraph 12.71 of the supporting text to Policy REC12 was clearly a matter of construction

not of planning judgment (as *per* Lord Reed, *ibid,* at paragraph [21]), in my view, the debate was not particularly helpful or germane (see further below).

ANALYSIS OF GROUNDS OF CHALLENGE

50. It is convenient to deal with each of the Grounds in the order in which they were addressed by all Counsel, namely: **Ground 2** ('demonstration of *"need"*), **Ground 3** ('landscape') and **Ground 5** ('adequacy of water resources'); and the renewal of **Ground 1** ('Green Belt') and **Ground 8** ('Glass House Cottages').

GROUND 2: 'NEED'

Claimant's submissions

51. The Claimant´s submissions in relation to Ground 2 can be summarised as follows: (i) The majority of Council members failed properly to apply saved policy REC12 of the Local Plan in that they failed to apply correctly the requirement for *"need"* to be demonstrated under paragraph 12.71 of the Local Plan; and failed to consider whether the golf course could be *"directed away"* from the Surrey Hills AONB and AGLV as required by para.12.72 of the Local Plan. Alternatively, (ii) the decision was irrational because the evidence pointed in the opposite direction: there was no *"need"* for another golf course and the proposed development should be *"directed away"* from the Surrey Hills. Further, (iii) there was a lack of lawful reasons given for these decisions, as required by article 31(1)(a) of the TCP (Development Management Procedure) Order 2010.

Council's and Longshot's submissions

52. The Council and Longshot submitted four main points in response. First, there was no test or hurdle of *"need"* applicable to this case because the requirement to demonstrate *"need"* in paragraph 12.71 of REC12 was not part of the 'saved' policy. Second, *"need"* equated to *"demand"* in law and there was ample evidence from which the Council majority could infer a *"need"* for this sort of 'high end' 5-star golf course facility and hotel complex. Third, the court should not interfere with what was essentially a matter of overall planning judgment within the purview of Council members alone. Fourth, adequate reasons were given in the circumstances, which reasons the planning officers themselves understood.

NEW ISSUES

53. It was, initially, accepted by all parties at the permission hearing and on the first day of the substantive hearing before me, that Longshot had to demonstrate a *"need"* for further golf facilities in the particular location pursuant to policy REC12 of the Mole Valley Local Plan. The issue was simply whether the Council majority has properly interpreted the requirement of *"need"* in this context, and whether such a *"need"* for further golf facilities in the Surrey Hills had reasonably been identified.

54. However, Mr Katkowski QC, Counsel for Longshot, pulled a couple of surprise clubs out of his bag on the second day of the hearing and sought to argue:

(1) First, the requirement to demonstrate *"need"* in the paragraph 12.71 of the Local Plan amounted to *"policy"* and not *"reasoned justification"* for policy and, accordingly, fell foul of paragraph 24 of Annex A of PPG12 and was, therefore, unlawful and of no effect;

(2) Second, in any event, the Secretary of State only had power under paragraph 1(3) of Schedule 8 the 2004 Act to direct that *"policies"* be saved, and since Paragraph 12.71 of the Local Plan was not in fact or in law *"policy"*, it had not been, and was not capable of being, *"saved"* and it no longer existed in law.

55. Mr Findlay QC adopted both Mr Katkowski QC's new submissions.

(1) Longshot's challenge to lawfulness of Paragraph 12.71

Submissions

56. Mr Katkowski QC's first argument, that Paragraph 12.71 was unlawful by virtue of the drafting strictures contained in paragraph 24 of Annex A of PPG12, can be summarised in the following propositions: (i) Regulation 7 of the Town and Country Planning (Development Plan) (England) Regulations 1999 required a local plan to contain *"a reasoned justification of the policies formulated in the plan"*, and for the reasoned justification to be set out so as to be *"readily distinguishable"* from the other contents of the plan. (ii) PPG12, published on 18th January 2000, laid down that *"…the reasoned justification should only contain an explanation behind the policies and proposals in the plan. It should not contain policies and proposals that will be used in themselves for taking decisions on planning application"* (paragraph 24 of Annex A). (iii) The Mole Valley Local Plan (including paragraph 12.71) was adopted by the Council in October 2000. (iv) The requirement to demonstrate *"need"* in paragraph 12.71 of the Local Plan, however, fell foul of paragraph 24 of Annex A of PPG12 because it amounted to *"policy"* and not *"reasoned justification"* for policy, and was, therefore, unlawful and of no effect. He said any analysis was necessarily binary: words in a development plan can be either *"policy"* or *"reasoned justification for policy"*, but not both.

57. Before Mr Katkowski QC cast doubt on the lawfulness of paragraph 12.71 on the second day of the hearing, all counsel regarded it as axiomatic that applicants such as Longshot had to demonstrate a *"need"* for further golf facilities in accordance with paragraph 12.71.

58. Mr Edwards QC submitted that Longshot were precluded from questioning the legality of the Mole Valley Local Plan now and all such challenges are ruled out of time by virtue of the 'preclusive' provisions in sections 284 and 287 of the 1990 Act.

Analysis

59. Preclusive provisions preventing late challenges to the validity of development plans are common in planning legislation. Their purpose is to promote certainty in planning. Section 284(1)(a) of the 1990 Act introduced a clear preclusive provision in relation to challenges *inter alia* to Local Plans: *"Except in so far as*

may be provided by this Part, the validity of (a)…a local plan……shall not be questioned in any legal proceedings whatsoever". Sections 287(1), 287(4) and 287(5)(a) of the 1990 Act provide that any challenge to a Local Plan *"must be made within six weeks"* of the date of publication of the first notice of approval of the Local Plan by way of statutory review to the High Court.

60. There was, however, a legislative wrinkle. Sections 284(1)(a) and 287(1)(a) of the 1990 Act were repealed as from 28th September 2004 to make way for the advent of the new regime for development plans introduced by the 2004 Act. The relevant Commencement Order, which brought paragraphs 8 to 9 of Schedule 6 into force, was the 2004 Act (Commencement No.2, Transitional Provisions and Savings) Order 2004 (S.I. 2004/2202)). However, by a transitional provision contained within article 4 of the Commencement Order, the provisions in Schedule 2 to the Order (which include those parts of sections 284 and 287 of the 1990 Act which were to be repealed by the Schedule 6 paragraphs 8-9 of the 2004 Act) continued to have effect for the purposes of Schedule 8 of the 2004 Act. It followed, therefore, that the preclusive provisions for any challenge to a Local Plan contained arising from the operation of section 284(1)(a) and section 287(1) of the 1990 Act remained in force for the purposes of the transitional period and for the duration of any saving direction made by the Secretary of State under Schedule 8. It should be noted that similar preclusive provisions are to be now found in section 113(e) of the 2004 Act.

Adoption of Mole Valley Local Plan in October 2000

61. The Mole Valley Local Plan as a whole (*i.e.* including paragraphs 12.71 and 12.72) was adopted by the Council in October 2000, following completion of the normal statutory process of preparation, consultation and examination of the draft plan. By virtue of sections 284 and 287 of 1990 Act, therefore, any party wishing to question the validity of the Mole Valley Plan had to do so within six weeks thereof.

Conclusion on Longshot's first new argument

62. In my judgment, it follows from the above analysis that the effect of the transitional legislative provisions is clear: no party may now question or challenge the legality of the Mole Valley Local Plan, or any part thereof. It is too late. A decade has passed since adoption. Accordingly, Longshot can no longer challenge the validity of the Local Plan.

Construction

63. For the sake of completeness, however, I turn briefly to consider Mr Katkowski QC's submission on lawfulness on its merits. His submission was that the last sentence of paragraph 12.71 ("*Applicants proposing new courses will be required to demonstrate that there is a need for further facilities"*) fell foul of the drafting stricture laid down in paragraph 24 of Annex A of PPG12, namely that the "*reasoned justification"* should only contain explanation and not "*policies and proposals"* that will be used in themselves for taking decisions on planning application. He would, presumably, make the same submission about the last two lines of paragraph 12.72 ("*future golf course proposals will be directed away from these areas of high landscape quality"*).

64. In my view, however, on their true construction, neither of the passages in paragraphs 12.71 or 12.72 cited above can properly be said to be *"reasoned justification"* for the policy; rather, they are more properly to be categorised as explanations of *"how"* the Council intends to implement the policy (see paragraph 1.10 of the Local Plan set out below). In this regard, paragraphs 12.71 or 12.72 are to be contrasted to paragraph 12.70 which does contain *"reasoned justification" simpliciter* for the policy, namely that *"this part of Surrey is [i.e. already] very well served with golf courses"*. Thus, in my view, paragraphs 12.71 or 12.72 do not directly offend against the express terms of paragraph 24 of Annex A of PPG12.

65. Nevertheless, Paragraphs 12.71 and 12.72 may be regarded as somewhat problematic because they appear to rub against the grain of paragraph 24 of Annex A of PPG12, which is to ensure that the penumbra of text outside the *"policy"* box should only contain *"reasoned justification"* and other *"descriptive or explanatory matter"* and should not contain policies and proposals actually used for taking decisions on planning applications. It is not, however, necessary to resolve this latter academic issue in view of the preclusive provisions preventing any late challenge to validity relied upon by the Claimant (described above).

66. In any event, the provisions of paragraph 12.71 and 12.72 may properly be considered to be *"material considerations"* which the Council majority ought to have taken into account but failed to do so (see further below).

(2) Longshot's argument that paragraph 12.71 not 'saved'

Submissions

67. Mr Katkowski QC's second ingenious new argument was that paragraph 12.71 was not 'saved' by virtue of paragraph 1(3) of Schedule 8 the 2004 Act and therefore is no longer of effect. His argument was in essence as follows: (i) The 2004 Act brought about a new local development plan-making process which included a three-year transitional period from 28th September 2004, after which existing Local Plans ceased to have effect (see paragraph (1)(b) and 1(2)(a) of Schedule 8 of the 2004 Act). (ii) The Secretary of State was empowered to make a direction dis-applying paragraph 1(2)(a) for the purposes of such *"policies"* as were specified in the direction (see paragraph 1(3)). (iii) The Secretary of State only had power to direct that *"policies"* be saved, but no other part of the Local Plan (see paragraph 1(3)). (iv) This was confirmed by the DCLG *Protocol for handling proposals to save adopted Local Plan, Unitary Development Plan and Structure Plan polices beyond the three year saved period* (published in August 2006) which provided *"…it is not the plan that is saved but the policies in the plan"* (see also paragraph 9.3 of PPS12 published in 2008). (v) The Secretary of State made a direction in respect of the Mole Valley Local Plan on 25th September 2007 which *"saved"* various specified *"policies"* in the Plan, including REC12. (vi) Paragraph 12.71 was not, on this *hypothesis, "policy"* but only *"reasoned justification"* or *"other descriptive or explanatory matter"* for the REC 12 *"policy"* and, in any event could not lawfully be regarded as *"policy"* (see above). (vii) Accordingly, Paragraph 12.71 was not *"saved"*, or capable of being

"saved", and was, therefore, no longer a 'live' part of the Development Plan in law after September 2007 in any event.

68. Mr Edwards QC contended that *"reasoned justification", "proposal maps"* and *"other descriptive or explanatory matter"* were, in law, integral to and inseparable from the *"policy"* and to be treated one and the same thing. Accordingly, in so far as the REC12 *"policy"* was saved, the *"supporting text"* was *de facto* saved with it.

Analysis

69. It is necessary to analyse the relevant legislation provisions applicable to Local Plans and the terms of the Mole Valley Local Plan itself.

What comprises a Local Plan in law?

70. Section 36 of the 1990 Act lays down what must and what may be included within a Local Plan. Section 36(2) provides that a Local Plan *"shall contain a written statement formulating the authority's detailed policies for the development and use of land in their area"*, including policies in respect of (a) *"the conservation of the natural beauty of the land"*, (b) *"improvement of the physical environment"* and (c) *"management of the traffic"*. Section 36(6) provides:

> *"(6) A local plan shall also contain –*
> *(a) a map illustrating each of the detailed policies; and*
> *(b) such diagrams, illustrations or other descriptive or explanatory matter in respect of the policies as may be prescribed,*
> *and may contain such descriptive or explanatory matter as the authority think appropriate."*

71. The Town and Country Planning (Development Plan) Regulations 1999 lays down certain requirements in relation to the form and content of statutory plans. Article 6 of the 1999 Regulations provides that the map required by section 36(6) (a) of the 1990 Act *"shall be called the proposals map"* and *"shall be a map of the authority's area"* reproduced from, or based upon, an Ordnance Survey map and show National Grid lines. Article 7 of the 1999 Regulations provides that a *"local plan … shall contain a reasoned justification of the policies formulated in the plan".* The inclusion of a reasoned justification for policies in a local plan is, therefore, mandatory.

72. It follows, therefore, that there are four components to a Local Plan:

(1) a *"written statement"* formulating the authorities detailed policies for development and use of land in their area (section 38(2) of the 1990 Act);

(2) a *"proposals map"* illustrating each of the detailed policies (section 36(6)(a) 1990 Act; article 6 of the Town and Country Planning 1999 Regulations);

(3) a *"reasoned justification"* prescribed by regulation 7 of the Town and Country Planning 1999 Regulations and *"such diagrams, illustrations or other descriptive or explanatory matter"* in respect of policies as may (otherwise) be prescribed (section 36(6)(b) 1990 Act); and

(4) *"such descriptive or explanatory matter"* as the authority think appropriate (section 36(6) 1990 Act).

73. Elements (1), (2) and (3) above are mandatory, whereas (4) is at the discretion of the local planning authority. Thus, every Local Plan must comprise a *"written statement"* accompanied by *"a proposals map"* and *"a reasoned justification",* but a local planning authority may additionally include *"such other descriptive or explanatory matter"* as the authority thinks appropriate.

Mole Valley Local Plan

74. The Mole Valley Local Plan contains explanation and guidance as to the manner in which the policies and supporting text are laid out and to be interpreted. Paragraphs 1.10 and 1.11 of the introduction to the Local Plan provide :

> *"1.10 The Plan's policies are printed in bold type and boxed within a shaded background to distinguish them from the supporting text which provides a reasoned justification for each policy and indicates how it will be implemented by the Council. To interpret the policies fully, it is necessary to read the supporting text.*
>
> *1.11 When considering proposals for development, the Council will have regard to all the relevant policies in the Plan."*

75. The clear intention of the draftsman of the Mole Valley Local Plan was that boxes of text each represent the *"policy"* (indeed they are each headed *"POLICY REC…" etc.*) and the surrounding paragraphs comprise *"the supporting text"* which it is necessary to read in order to interpret the policy fully (*i.e.* the *"reasoned justification"* for the policies and explanations as to *"how"* the policies are to be implemented by the Council) (see paragraphs 1.10 and 1.11 cited above).

REC12 – policy and supporting text

76. The relevant section of the Mole Valley Local Plan is that headed *"GOLF COURSES"* (see above). It comprises eleven paragraphs set around a box of text headed *"POLICY REC12 – DEVELOPMENT OF GOLF COURSES"*. Paragraphs 12.70 to 12.72 appear before the box and paragraphs 12.73 to 12.81 appear after the box. It is clear that that the *"policy"* properly so called is in the box and the *"supporting text"* is paragraphs 12.71 to 12.81.

Paragraph 1 of Schedule 8 of the 2004 Act

77. A new local development plan-making regime was brought into effect by the 2004 Act. Existing Local Plans ceased to have effect at the end of a three-year transitional period which started on 28th September 2004. The Transitional Provisions were contained in Schedule 8 of the 2004 Act. Paragraph 1 of Schedule 8 referred to *"policies".* Sub-paragraph 1(2) laid down the procedure whereby *"a new policy"* had to replace *"an old policy"* by the end of the transitional period. Sub-paragraph 1(3) provided for a carve-out by the Secretary of State who had the power to *"…direct for the purposes of such policies as are specified in the direction sub-paragraph 2(a) does not apply".*

78. On 27th September 2007, the Secretary of State made a direction under sub-paragraph 1(3) of Schedule 8 to the 2004 Act in relation to *"Policies Contained in*

the Mole Valley Local Plan". Schedule (1) of the direction listed over 100 *"'saved' policies"*, including *"ENV68 Adequate Water Resources"* and *"REC12 Development of Golf Courses"*.

What is saved?

79. The issue for determination is: what precisely is *"saved"* when the Secretary of State *"saves"* a *"policy"*? There are three possible alternatives. First, is it simply the strict words of the policy itself, *i.e.* solely the text within the curtilage of the policy box, shorn of any explanatory or other such wording outside the box to which no future resort can be had (as Mr Katkowski QC contends)? Or, secondly, does the word *"policy"* have a broad meaning which includes any *"reasoned justification"* for the policy or any other explanatory material in relation to it (as Mr Edwards QC contends)? Or, thirdly, if *"policy"* has a narrower meaning, does the saving of a *"policy"* carry with it by necessary implication the preservation of any *"supporting text"* which is to be read with it?

80. The first alternative is self-explanatory. The second alternative suggests that the word *"policies"* is to be construed broadly and consistently in both section 36 of the 1990 Act and paragraph (1) of Schedule 8 of the 2004 Act to include any illustrative *"map"* or *"reasoned justification"* or any *"other descriptive or explanatory matter"* specifically included by the Local Planning Authority in the Local Plan in respect of such *"policies"*. A direction made under paragraph 1(3) of Schedule 8 of the 2004 Act must be taken to *"save"* the *"policy"* as broadly construed, *i.e.* including its *"supporting text".* The third alternative suggests that although the word *"policies"* has a narrow meaning and only the *"policy"* wording itself is capable of being *"saved"* (because *"the policy"* is *"the policy"* not the *"reasoned justification" etc.* for the policy), it must have been the legislative intention that, when interpreting or implementing *"saved policies"*, regard could, and indeed should, be had to any *"map"* or *"reasoned justification"* or *"other descriptive or explanatory matter"* in respect of such *"saved policies"*.

81. In my judgment, the first alternative of what is *"saved"* advocated by Mr Katkowski QC is plainly wrong. Either the second or third alternative is correct. It probably matters not which, however, since both the second and third alternatives have the same practical effect in bringing the requirement to demonstrate *"need"* under paragraph 12.72 into play. In my view, the third alternative is probably to be preferred as being more correct and consonant with general principles of construction. Either way, the requirement to demonstrate *"need"* in paragraph 12.71 is part of the policy matrix. Further, and in any event, the requirement to demonstrate *"need"* in paragraph 12.71 is, at the very least, a material consideration. For this reason, Mr Katkowski QC's argument is, to a large extent, academic. Nevertheless, I deal with it on its merits.

Answers to Longshot's argument

82. My reasons for rejecting Mr Katkowski QC's first (minimalist) alternative as follows. First, it makes no sense to preserve naked *"policies"* shorn of their intellectual underpinning, interpretative context and expressly factual matrix and justifications. It makes even less sense to seek to preserve the stark wording of policies only, but then somehow proscribe any resort in the future to any *"map"*

or *"reasoned justification"* or *"other descriptive or explanatory matter"* or *"supporting text"* which it was intended by the framers of the policy should be had as a necessary aid to understanding, interpreting and implementing the policy. In my view, there is no conceptual difficulty in saving only *"the policy"* but permitting, and expecting, consideration of it in its appropriate textural context.

83. Second, section 36 of the 1990 Act introduced mandatory requirements for *"policies"* to be formulated in writing and to be accompanied by *"a proposals map"* and *"a reasoned justification"* in respect of such *"policy",* and the liberty for local planning authority to include additionally *"such other descriptive or explanatory matter"* as it deemed appropriate. It makes no sense to suggest that, when drafting paragraph 1(3) of Schedule 8 of the 2004 Act, Parliament intended *"saved policies"* to stand alone unsupported, unexplained and shorn of any reasoned justifications, rationale or aids to their interpretation.

84. Third, the *"policies"* in question are those of the local planning authorities and Parliament must be taken to have in mind how the *"policies"* in their adopted form were intended and stated by such local authorities to be read, interpreted and to have effect. In the present case, paragraph 1.10 of the Mole Valley Local Plan stated in terms that *"[t]o interpret the policies fully, it is necessary to read the supporting text*".

85. Fourth, the contrary construction would lead to potentially absurd results. For instance, the interpretation of a policy might differ before and after 27th September 2007 depending on whether or not resort was had to the *"reasoned justification"* or other explanatory wording or whether or not resort could be had to any illustrative map. Further, a policy might be difficult to understand, interpret or implement without resort to the *"supporting text"*.

86. Fifth, Mr Katkowski QC's 'novel' construction as Mr Edwards QC termed it, does not accord with common sense, or the manner it appears the question of 'saved' policies has hitherto invariably been approached by everyone, including the planning officers and counsel in this case.

Conclusion on Longshot's second new argument

87. Thus, for the reasons set out above, I reject Mr Katkowski QC's construction. In my judgment, the direction of the Secretary of State made on 25th September 2007 *"saving"* certain listed *"policies"* contained in the Mole Valley Local Plan, had the effect, in law, of preserving all the *"supporting text"* to policy REC12, including *"reasoned justification"* for the policy and the explanation of *"how [REC12] will be implemented by the Council"* contained in paragraphs 12.71 and 12.72, together with the *"illustrative map",* so that appropriate resort could be had to these materials when interpreting and applying the policy.

88. If I am wrong about the above, I do not think that Mr Katkowski QC's construction gains him any advantage in practice. The question of the Council first being satisfied that there is a demonstrable *"need"* for a new golf course in the Mole Valley is clearly part of the policy matrix. It might be said merely to be making explicit what is implicit: namely that applicants have to demonstrate a *"need"* for a new golf course in this protected area. Similarly, the same might be

said in relation to the *desideratum* of the Council *"directing away"* golf courses from AONB and AGLV. In any event, these provisions are clearly material considerations.

MEANING OF 'NEED'

89. I turn next to consider the central question of the meaning of *"need".* The word *"need"* appears in paragraph 12.71 of the Mole Valley Local Plan which provides: *"Applicants proposing new courses will be required to demonstrate that there is a need for further facilities*". As emphasised by Lord Reed in *Tesco Stores Ltd v. Dundee City Council* (*supra*) at paragraph [21] above, a local planning authority is required to proceed on the basis of a proper interpretation of the relevant provisions of the development plan which is a matter of textual interpretation for the court (*i.e.* construing the language in its context) not of planning judgment.

Planning "need"

90. The word *"need"* is a necessarily 'elastic' concept to be considered in its particular planning context. The word *"need"* in planning law is commonly used in the context of an identifiable *"need"* (*i.e.* macro-economic "*demand"*), for public infrastructure. In this context, it may be relatively easy to state in purely objective terms, against the background of policy statements, that there is a *"need"* for another runway, reservoir, road or bridge *etc.* This is because the measurement is essentially in pure quantitative terms. In lower level planning contexts, however, the exercise becomes more nuanced and both quantitative and qualitative considerations may come into play. Thus, recognised standards of provision for supermarkets, shopping centres, pharmacies, banks, *etc.* include quantitative measures of the *"need"* for 'x' number within 'y' catchment area or *per* 'z' thousand head of population, since planning law recognises that such *"needs"* are capable to a degree of quantitative and objective evaluation. But qualitative elements also come into the picture, such as lengths of queues at checkouts, the types of produce and goods on offer, how far members of the public have to drive to access such facilities. The analysis of *"need"* for recreational facilities, such as cinemas, bars, football pitches, gyms, and golf clubs *etc.* would be likely to require a greater element of qualitative considerations. In this context, it is far from a hard-edged question.

91. But whichever level or type of development one is dealing with, a clear distinction is always drawn between public *"need"* (*i.e.* what is in the public planning interest), and private *"demand"* (i.e. what is in the developers interest by having this particular type of development). The latter is not to be equiparated to the former. Furthermore, the fact that a development might bring benefits to some members of the public, does not automatically mean that there is a demonstrable public *"need"*.

Policy matrix

92. It is important to step back and look at the policy matrix as a whole. This case involves a piece of land which is about as protected piece of open land as possible under current planning law. The Cherkley development site is protected by at least four overlapping policies, namely those pertaining to (a) AONB, (b) AGLV, (c)

Green Belt and (d) the Mole Valley Local Plan. Each of these protective policies carries with it a 'policy matrix'. To a significant degree these policy matrices overlap and have common themes. The question of *"need"* features expressly or implicitly as a policy consideration in several of these policy matrices, not just in paragraph 12.71 of the supporting text to REC12. For instance, paragraph 116 of the NPPF which protects AONB, requires an assessment of *"the need for the development"* and *"any national considerations"* to justify encroaching on AONB. PPG2, which protects the Green Belt, requires proof of *"essential facilities"* to justify encroachment on the Green Belt. The word *"need"* appears in the NPPF in terms redolent with public interest. It is a general term which would apply to any development**.**

93. In my view, the sum of these policy matrices is (even) greater than the parts. They must be viewed holistically and read as a whole. The corollary of the multi-elevated or protected status of this land is that an applicant faces not merely the individual policy hurdles, but an altogether higher cumulative fence to cross.

Dictionary definition of "need"

94. The word *"need"* in Old English was *'nēd'* or *'nēod'* (noun) or *'nēodiun'* (verb) and is of Germanic origin. The Concise Oxford English Dictionary lists three potential meanings of *"need"* as a verb: (1) *'require (something) because it is essential or very important rather than just desirable'*; (2) *'expressing necessity or obligation'*; (3) *'be necessary'.* The Concise Oxford English Dictionary lists three potential meanings of *"need"* as a noun: (1) *'circumstances in which something is necessary, necessity'*; (2) *'a thing that is wanted or required'*; (3) *'the state of lacking a basic necessity such as food, or of requiring help'*. Children sometimes use the word *"need"* infelicitously and say *'I need…'* when they really mean *'I want…'*. The spectrum of potential meaning of the word *"need"* is potentially wide: it stretches from *"necessity"* through *"required"* to merely *"desired"*.

95. Words, however, take their colour and meaning from their general and specific context. The general and specific context in this case is particularly important.

General context - planning law

96. The general context is, of course, the broad horizon of planning law itself. As presaged at the beginning of this judgment, the *raison d'etre of* planning law is the regulation of the private use of land is the public interest (see paragraphs 1 and 2 above).

Specific context - REC12

97. The specific context is the policy relating to the golf courses. A close textural analysis of paragraphs 12.70 to 12.81 and REC 12 is useful. Two themes emerge from these provisions. First, an explicit recognition of the ample sufficiency of golf courses already in the Mole Valley District. Second, the importance of protecting the special rural landscape in the District from the impact of further golf courses developments. These two themes emerge from the following passages in particular. Paragraph 12.70 spells out the actual number of golf courses in the District and expresses the clear view *"… this part of Surrey is already very well served with golf course".* Paragraph 12.70 goes on to conclude:

"According to recognised standards of provision there is no overriding need to accommodate further golf courses in the District." The use of the word *"need"* in this passage is instructive: it points to *"need"* being used in the sense of the *"necessity", viz. "no overriding need"* meaning no overriding 'necessity'. Paragraph 12.71 speaks of the *"paramount importance"* of protecting the District's Green Belt and countryside. This is backed up by the subsequent emphasis in paragraph 12.72 that the Council is *"particularly concerned"* about the effect of further golf facilities on the *"the special qualities"* of the Surrey Hills AONB and the AGLV and the indication that future golf course proposals *"will be directed away"* from these areas.

Geographical component to "need"

98. In my view, there is plainly a geographical or community component to the meaning of *"need"* in this context. Paragraph 12.70 talks of *"this part of Surrey"* already being "*very well served with golf courses".* It is clear that the applicants need to demonstrate *"need"* for further golf facilities in *this* particular *locale*, *i.e.* to demonstrate that there is a palpable *"need"* for further such recreational facilities *"in the District"*, and, in particular, to provide for, or service, the reasonable requirements of the burghers of Leatherhead and Dorking and the surrounding area. I do not, of course, suggest that the fact that people from further afield (*i.e.* from London, the home counties or even abroad) may understandably have a desire to play golf in the rolling hills of Surrey, is irrelevant. But, in my view, the interests of the immediate community which the Mole Valley District Council serves is a more important component of the meaning of *"need"*. This is also consonant with what I perceive to be the general thrust of planning law.

Qualitative component to "need"

99. In my view, there is also a qualitative component to the meaning of *"need"* in this context. The *"need"* demonstrated has to be sufficiently strong to overcome the considerations expressed in paragraphs 12.70 to 12.72, *viz.* paragraph 12.70 speaks of there being *"no overriding need"* for further golf courses in the District given existing numbers; paragraph 12.71 speaks of the *"paramount importance"* of protecting the District's Green Belt and countryside; and paragraph 12.72 speaks of the Council's *"particular[] concern[]"*as to their effect on the Surrey Hills AONB and the AGLV and that future golf course proposals *"will be directed away"* from these areas.

Does "need" equate to "demand/viability /want"?

100. Mr Findlay QC submitted on behalf of the Council that, as a matter of interpretation, the only policy requirement to which *"need"* could relate is the first policy criteria that applies to new golf courses alone, *i.e.* economic sustainability; that there should be a very elastic use of the concept of *"need"* since the word appeared without restriction; that it was sufficient for applicants to demonstrate *"viability"* as mentioned in the policy box itself; and that it was sufficient to show that there was a *"need"* for the golf course in the sense that it would be sustainable and not require non-golfing activities to subsidise it.

101. Mr Katkowski QC contended that *"need"* could be equated to *"demand"*; and that it was sufficient that an applicant could demonstrate a demand for a new golf course in the sense of requisite financial backing and membership for it. In the

present case, he submitted, it was enough that Longshot had demonstrated a viable *"demand"* in the economic sense for another exclusive 'high end' of 'five-star' golf club, *i.e.* which would have the requisite financial support and attract the requisite cohort of 400 equity members envisaged to make a going concern. When pressed, Mr Katkowski QC went as far as saying that the Council decision-makers could conclude that there was a *"need"* for a new golf course if they merely concluded *"that it is wanted in some way"* (paragraph 7 of his note on 'Need').

Answer on meaning of "need"

102. I reject Mr Findlay QC and Mr Katkowski QC's constructions of the word *"need"*. They are inimical to the philosophy of planning law. They run counter to the specific context in which the word appears in the Mole Valley Local Plan. They do not accord with common sense. Their approach would be recipe for a planning free-for-all.

103. In my judgment, the word *"need"* in paragraph 12.71 means *"required"* in the interests of the public and the community as a whole, *i.e. "necessary"* in the public interest sense. *"Need"* does not simply mean *"demand"* or *"desire"* by private interests. Nor is mere proof of *"viability"* of such demand enough. The fact that Longshot could sell membership debentures to 400 millionaires in UK and abroad who might want to play golf at their own exclusive, 'world class', luxury golf club in Surrey does not equate to a *"need"* for such facilities in its proper public interest sense. Paragraph 12.71 in the Local Plan requires applicants proposing new golf courses in the Mole Valley to demonstrate that further golf facilities are *"necessary"* in this part of Surrey in the interests of the public and community as a whole.

Efficacy of "supporting text"

104. What is the efficacy of the *"supporting text"* outside the box compared with the actual policy wording inside the Policy REC12 the box? If the second alternative construction above is correct, and therefore the word *"policies"* is to be construed broadly to include any *"reasoned justification"* or any *"other descriptive or explanatory matter"* little problem presumably arises, since all the text presumably stands *pari passu* and is of equal efficacy: it is all to be treated as *"policy"*. If however, the word *"policies"* has a narrower meaning and only the *"policy"* wording itself is capable of being *"saved"* but resort can nevertheless be had to the *"supporting text"* in order to interpret the policy (as *per* the third alternative above), the further question arises as the effect, in law, of the requirement in paragraph 12.71 that "*applicants will be required to demonstrate that there is a need for further [golf] facilities"*.

105. In my judgment, it matters not that the wording "…*applicants will be required to demonstrate that there is a need for further [golf] facilities"* appears outside the policy box rather than inside the box. Paragraph 1.10 provides a perfectly rational explanation for the role of the *"supporting text"* outside the box, namely to provide *"reasoned justification"* for the policies and indicate *"how"* policies will be implemented by the Council, and further states that it is necessary to read the *"supporting text"* in order "*to interpret the policies fully"*. It matters not that the requirement to demonstrate *"need"* could equally well have featured in the box and that given the strictures of paragraph 24 of Annex A of PPG12 (that *"the*

reasoned justification… should not contain policies and proposals that will be used in themselves for taking decisions on planning application") it might have been preferable if it had. It also matters not that Policy REC12 might have been more conventionally drafted. The lawfulness of the wording is no longer open to challenge given the preclusive provisions in the 1990 Act (see above). Reading the wording inside and outside the box as a whole, the intention of the framers of the policy is clear: given (a) the apparent sufficiency of golf courses in this part of Surrey and (b) the need to protect the special landscape of the Surrey Hills *etc.*, applicants will have to demonstrate a *"need"* for further such facilities and proposals for new golf courses will be considered against certain listed criteria. As stated above, in the light of (a) and (b), it might reasonably be said that the requirement to demonstrate the *"need"* for further such facilities is simply making explicit what is implicit.

106. Nevertheless, Paragraphs 12.71 and 12.72 may be regarded as somewhat problematic because they appear to rub against the grain of paragraph 24 of Annex A of PPG12, which is to ensure that the penumbra of text outside the *"policy"* box should only contain *"reasoned justification"* and other *"descriptive or explanatory matter"* and should not contain policies and proposals actually used for taking decisions on planning applications. It is not, however, necessary to resolve this latter academic issue in view of the preclusive provisions preventing any late challenge to validity relied upon by the Claimant (see above).

Could the Council majority rationally have concluded there was "need"?

107. Matters of planning judgment are within the exclusive province of the local planning authority *(*see Lord Hoffmann in *Tesco Stores* cited above). The question arises, however: Could the Council majority rationally have concluded on the evidence that there was *"need"* for another golf course in Surrey? If the Council majority had understood the meaning word *"need"* in its proper 'public interest' sense, they would have concluded that Surrey clearly did not *"need"* another golf course. The evidence was and is overwhelming that Surrey already has, by any standards, more than enough of golf courses. The generally accepted figure is said to be 141. There are 11 existing golf courses in the Mole Valley District alone, of which four are in the Leatherhead Ward itself (where Cherkley Estate is located). There is even a private members' golf course next door to Cherkley at Tyrrell's Wood on land abutting the Cherkley Estate. There are said to be no less than 60 golf courses within a 30-minute drive of Cherkley.

108. The *plethora* of golf courses in Surrey was apparent to the decision-makers.

Mole Valley Local Plan – paragraph 12.70

109. Paragraph 12.70 in the Mole Valley Plan stated that there were seven established golf courses in the Mole Valley District concentrated principally around Dorking and Leatherhead and in the Newdigate area a new course has been opened in recent years and another permitted. Paragraph 12.70 also stated:

> *"More generally this part of Surrey is very well served with golf courses. According to the recognised standards of provision there is no overriding need to accommodate further golf courses in the District."*

Planning officers advice – no proven need for additional golf facilities in Surrey

110. The planning officers explained the Mole Valley Local Plan was written against a background of a considerable expansion of golf courses in Surrey but there was now more up-to-date information: (i) research by the English Country Golf Union suggested that 90% of golf clubs in the UK had membership vacancies and 80% no longer had a waiting list; (ii) a recent review by the Council's property manager concluded that local golf clubs were *"vulnerable"* to the current economic downturn; (ii) a local specialist acting for a local club confirmed that many local golf clubs were *"struggling to survive",* including Strawberry Hill, Twickenham, Guildford, Horton Park and Chessington. The planning officers advised that there was *"sufficient capacity"* in existing golf clubs to provide for any new members wishing to play the sport locally and that Longshot had not provided any information to disprove this assessment.

Evidence

111. The following striking information from the web was put forward by the Claimant at the hearing and was not seriously challenged or objected to:

(1) There are more golf courses in Surrey in the 'Top 100' than any other county in the UK (http://www.top100golfcourses.co.uk). There are 115 golf clubs affiliated to the Surrey County Golf Union comprising 140 golf courses (http://www.surreygolf.org). Sunningdale is in Berkshire but is part of the Surrey County Golf Union. The 'Top 100' golf clubs affiliated to the Surrey County Golf Union include the following rated courses: Sunningdale (Old) (3rd), Sunningdale (New) (7th), Walton Heath (Old) (8th), Wentworth (West) (12th), St George's Hill (14th), Queenwood (26th), Walton Heath New (28th), Addington (30th), Worplesdon (33rd), Hankley Common (34th), Hindehead (68th), Wisley (73rd), Wentworth (Edinburgh) (81st), Coombe Hill (89th), Tandridge (100th) (http://www.top100golfcourses.co.uk).

(2) It is possible to find out how many golf courses there are within a radius of 10, 15, 20 and 50 miles of Cherkley Court (postcode KT22 8QX). As the crow flies: within 50 miles of Cherkley there are 627 golf courses; within 20 miles of Cherkley there are 192 golf courses; within 15 miles of Cherkley there are 118 golf courses; within 10 miles of Cherkley there are 49 golf courses (http://www.Golfshake.com).

(3) Of the 49 golf clubs within 10 miles of Cherkley, 12 are rated 4-star or better: Tyrrell's Wood is 4-star (and ½ mile next door to Cherkley); Walton Heath is 4-star (and 2 ¾ miles from Cherkley); Cuddington is 4.5-star (and 5 ½ miles from Cherkley); Wisley is 5-star (and 8 miles from Cherkley); St George's is 4.5-star (and 8 miles from Cherkley); Coombe Hill is 4.5-star (and 10 miles from Cherkley); and it should be noted that Queenwood is 5-star (and 12 miles from Cherkley) (http://www.Golfshake.com).

112. Mr Findlay QC candidly (and correctly) accepted in the course of argument that, in the light of the evidence as to sufficiency (or some might say superfluity) of golf courses in Surrey, Longshot would not have a leg to stand on if merely seeking planning permission for an 'ordinary' golf course.

Longshot's answer – exclusive 5-star golf club

113. Longshot's answer to this evidence was exclusivity. Longshot's planning application described their proposed scheme as being an *"exclusive private members golf course"*. Longshot argued that *"need"* was not an issue because they were operating within a very specific range – the very top end - of the golf market where there was a demand and the financial model was viable. The development they proposed for Cherkley was aimed at the most exclusive, luxury end of the golf market. Longshot's golf club consultants, 360 Golf, based the Cherkley plan on the same model as the 5-star golf club, Queenwood, which they had also been involved in setting up. Cherkley was to have 5-star facilities, a 'world class' course laid out by a leading designer (David McLay Kidd), high levels of service, an exclusive membership restricted to 400 (to create prestige and easy access at peak times) and a debenture-holder cost structure commensurate with the exclusivity of the facilities. 360 Golf said that there was demand for another such top-end club in this part of the world and it would be a viable. As the planning officers noted, Longshot and 360 Golf's financial model included a significant proportion of the membership coming from overseas members who would also use the hotel (see p. 85 of OR1).

114. Longshot sought to make a virtue out of a necessity. However, in my view, the greater the emphasis placed by Longshot on exclusivity, the weaker their argument on *"need"* logically becomes, if *"need"* is properly understood in its 'public or community need' sense rather than merely 'private demand' sense. There is a natural tension between the two concepts which are antithetical.

Planning officers rejected Longshot's construction

115. The planning officers robustly rejected Longshot's approach on construction on grounds which were, in my judgment, entirely sound in law. The requirement to show *"need"* for further golf facilities to be built in protected landscape could not be side-stepped by resort to an argument that this golf course was going to be *über*-exclusive. It was still a golf course. The planning officers said:

> *"Policy REC12 does not draw a distinction between different categories of golf provision. It was written to protect the countryside, particularly sensitive landscapes such as Cherkley, from proliferation of golf courses. The issue of need is therefore relevant whatever golf courses and market being targeted."* (OR1, p. 86)

116. The planning officers advised as follows. First, there was no *"proven need"* for additional golf facilities from the information available to the Council and the applicant had not indicated otherwise *"other than to state that they can sell their product to a targeted market."* (OR1 at p. 85). Second, it might, in any case, be reasonable to judge that the 'high end' of the market could be catered for in a less sensitive location *"or where there is an existing ailing course that can be reinvigorated"* (OR1 at p. 85). Third, the proposal was contrary to Policy REC11 which covers the building of recreational facilities in the countryside because there was no proof of an *"identified deficiency"* for such facilities (OR1 at p. 86). The planning officers summarised the position in very clear and unequivocal terms as follows:

> *"Because the Cherkley estate lies within a nationally important protected landscape or immediately adjacent to it, questions of need are even more significant. The proposal as it stands does not provide sporting or recreational facilities that are locally in short supply. Instead they are providing for a very specific and exclusive market that is mobile and even international in character. Therefore it is reasonable to conclude that the golf course and its associated facilities could be provided in another location where the landscape is less sensitive and important. For these reasons the proposal fails the tests of Policy REC11, REC12 and Policy CS16."*

117. In my view, the planning officers were right in their advice in OR1. Longshot's attempt to equate private *"demand"* to public *"need"* was legally flawed. The planning officers' correct legal advice as to the meaning of *"need"* was, however, not heeded by the Council majority when it came to its Decision and Reasons. In my view, it should have been.

Reasons

118. The question of *"need"* is dealt with only briefly in the Reasons given by the Council majority for its Decision. For convenience, paragraph [8] is set out below again:

> *"[8] The development was considered to provide opportunities to meet a need for recreation facilities in the countryside and the applicant had been able to demonstrate in the supporting documents, such as the 'report on Viability of Golf at Cherkley' and the 'Hotel Viability Study', that they would be able to secure enough interest in the facilities to make it viable in the short and the long term. Therefore, the terms of Mole Valley Local plan policy REC12 and its supporting text were considered to have been met in that a need for the facilities had been demonstrated…"*

119. In my judgment, the Council majority failed properly to interpret, or understand, the true meaning of the word *"need"* in paragraph 12.71 of the Local Plan. It is clear from paragraph [8] of its Reasons that the Council majority failed to apply the right legal test. This represents a demonstrable error of law. In my view, that the Council majority misdirected themselves in law in four respects. First, they applied an inappropriately low test of *"need"*, which paid little or no regard to the high hurdles set in the policy explained above. Second, they applied a meaning of *"need"* which was not directed specifically towards the demonstration of a *"need"* for golf courses as the policy required, but towards an altogether more amorphous and diluted target, namely *"to provide opportunities to meet a need for recreation facilities in the countryside"*, *i.e.* recreation facilities generally (see the first two lines of paragraph [8]). Third, their overriding concern appeared to be *"viability"* of the scheme rather than a demonstrable *"need"* for it. Fourth, there is a *non sequitur* in paragraph [8]: the second sentence does not follow the first. The opportunity *"to meet a need"* for recreation facilities in the countryside generally and the *"viability"* of this scheme, does not mean that the terms of the policy were met, *i.e.* that a need for the facilities had been demonstrated.

120. The Council decision-makers should have asked themselves whether the applicant, Longshot, had demonstrated a real *"necessity"* or *"requirement"* for a further golf course in the Surrey Hills, such as to justify overcoming the twin policy obstacles (or material considerations), *viz.* (i) this part of Surrey was already *"very well served"* with golf courses and there is *"no overriding need"* to accommodate further golf courses in the District (paragraph 12.71); and (ii) in view of the particular concern as to the effect of golf courses on the special landscape qualities of the Surrey Hills AONB and AGLV future golf courses *"will be directed away"* from these areas (paragraph 12.72).

121. The Council majority failed to appreciate that fundamental distinction between (a) that which can in its context properly be regarded as a *"need"* in the public interest sense, and (b) mere commercial *"demand"* for such facilities. It is clear that the Council majority failed to have this distinction in mind when coming to their decision. The Council majority failed to heed the legal advice of the planning officers that the 'exclusive' nature of the proposed golf facilities did not obviate the need to show the *"need"* for such facilities. A golf course is still a golf course, however 'exclusive' it might be. Mr Findlay QC sought to argue that the large number of golf courses in Surrey was 'mere background'. It isn't. It is the point. Given the sheer number of golf courses already in Surry, there is no demonstrable objective *"need"* for another to be built in this protected landscape, however manicured its greens might be. The Council majority failed to understand the tension inherent between the concepts of *"exclusive demand"* and *"public need".* As explained above, the former is the antithetical to the latter.

Decision perverse

122. In any event, in my judgment, the Council majority's decision to grant planning permission for further golf facilities at Cherkley was perverse. It simply *"does not add up"*. There was no evidence upon which the Council majority could properly base a conclusion that there was a *"need"* in the public interest sense for further golf facilities in this part of Surrey. All the evidence pointed inexorably to one conclusion: the sheer number of golf courses of all hews in the Mole Valley area and in Surrey generally was such that there was clearly no *"need"* for any further golf facilities in this part of Surrey. The evidence is overwhelming and all one way. Mr Findlay QC accepted as much.

Conclusion on 'need'

123. In my judgment, for the reasons given above, the Council majority erred in law in that (i) they misunderstood the meaning of *"need"* or failed to direct themselves correctly as to its meaning; (ii) there was no evidence upon which they could rationally come to the conclusion that the requirement to demonstrate a *"need"* for further golf facilities had been satisfied; and (iii), in any event, in so far as one can understand the reasons, the decision was perverse. Accordingly, the Decision granting Longshot planning permission to develop Cherkley was unlawful and should be quashed on each of these grounds.

'DIRECTING AWAY'

124. The Claimant further contended that the Council majority also failed to comply with paragraph 12.72 of the supporting text to REC12 which provides:

> *"The Council is particularly concerned about the effect on the special landscape qualities of the Surrey Hills Area of Outstanding Natural Beauty and the Area of Great Landscape Value and future golf course proposals will be directed away from these areas of high landscape quality."*

125. The statement in paragraph 12.72, that future golf course proposals *"will be directed away"* from the Surrey Hills in view their special landscape quality, is made in unequivocal terms. This provision re-enforces the wording in the policy REC12 box which provides that new golf courses in the Surrey Hills AONB and AGLV will *"only"* be permitted if they are consistent with *"the primary aim of conserving and enhancing the existing landscape"* (paragraph [C]).

126. Mr Findlay QC submitted that the reference to golf courses being *"directed away"* in paragraph 12.72 finds expression in the second criterion applied to new golf courses, namely, the requirement to conserve and enhance AONB and AGLV areas. He also submitted that, in any event, it was only a statement of intent and not a requirement. I agree with his first point, but it is does not advance his argument: the rationale of new golf courses being *"directed away"* from AONB and AGLC is simply to protect those sensitive landscape areas. I disagree, however, with his second point: the reference is expressed in unequivocal mandatory terms. It is a requirement. It is, moreover, a material consideration.

127. There is little evidence that Council majority properly addressed their mind specifically to the requirement in paragraph 12.72 that this golf course proposal could or should if possible be *"directed away"* from the special Surrey Hills area. It appears that the Council majority failed to heed the planning officers' advice on this (or any other) question:

> *"…[I]t is reasonable to conclude that the golf course and its associated facilities could be provided in another location where the landscape is less sensitive and important .*"

128. When proposing her motion at the Committee meeting on 4th April 2012 to reject the planning officers' advice, Councillor Dickson is recorded as having argued that *"[t]he golf course is an intrinsic part of the business plan and it cannot be located elsewhere".* The argument disguised a fallacy: it was false to assume that it was necessary to locate a hotel and spa at Cherkley or that Cherkley was the only place where such combined facilities could be located in England. There was no evidence that this was in fact the case. Councillor Dickson's argument was no answer to paragraph 12.72.

129. The Council majority's Reasons entirely failed to address the question of whether the golf course could and should be *"directed away"* from the designated area at all.

Conclusion on 'directing away'

130. In my judgment, for the reasons given above, the Council majority further erred in law in that they failed, properly or at all, to consider the policy requirement or material consideration in paragraph 12.72 that the golf course and its associated facilities could be provided in another location where the landscape was less sensitive and important. Accordingly, the Decision granting Longshot planning permission to develop Cherkley was unlawful and should be quashed on this further ground.

GROUND 3 – BREACH OF POLICIES ON PROTECTED LANDSCAPE

131. I turn to Ground 3, under which the Claimant contended that the Council majority failed properly to apply the policy tests in respect of the impact of Longshot's proposed development on protected landscape.

Claimant's submissions

132. Mr Edwards QC, on behalf of the Claimant, raised four arguments under Ground 3.

(1) First, the Council majority failed properly to construe and apply: (i) the NPPF, paragraphs 115 and 116, and in particular the *"exceptional circumstances"* and *"public interest"* tests in paragraph 116 and, in the event that members considered those paragraphs were not engaged (contrary to the views of the planning officers), no adequate summary of reasons were given for this conclusion; (ii) the requirement that new golf courses be *"directed away from the AGLV and AONB"* as required by para.12.72; and (iii) the requirement of policy REC12 that new golf courses will only be permitted if they are *"consistent with the primary aim of conserving and enhancing the existing landscape"* in that their conclusion that "*the landscaping and mitigation measures contained in the application were sufficient to ensure that the overall landscape character would not be compromised"* is not capable of satisfying the requirement to *"conserve and enhance the existing landscape"*. As such, the Council majority failed to have regard to those policies as material considerations and to determine the application in accordance with the development plan as required by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act.

(2) Second, alternatively, if the majority of members did properly construe those development policies and the NPPF, there was no rational or discernable basis for their decision in that all the evidence pointed to a different conclusion.

(3) Third, in any event, the decision of the Council majority that those policies were met, given the information before them, was irrational in that the decision simply *"does not add up"* in the Sedley J sense.

(4) Fourth, the Council majority gave no adequate summary of their reasons for the decision in this respect as required by Article 31(1)(a) of the 2010 Order

particularly given the range of information to the contrary and the high level of importance given to AONB and AGLV in planning policy.

Council's and Longshot's response on Ground 3

133. Mr Findlay QC and Mr Katkowski QC submitted in response in summary as follows: (i) there was no *"major development"* within the AONB and paragraph 116 of NPPF did not apply; (ii) as a matter of construction, the last criterion in REC12 (paragraph [C]) only requires absence of harm: the *"and"* is disjunctive; and, in any even, does not preclude the conclusion that "*the landscaping and mitigation measures contained in the application were sufficient to ensure that the overall landscape character would not be compromised"*; (iii) in any event, members found there were landscape *"benefits"* to the proposed scheme; (iv) members were quite entitled to form their own view after their site visit and the Council majority view could not be said to be perverse (*c.f.* Sullivan J in *Newsmith Stainless Ltd (supra)*); (v) the Claimant was wrong to assert that *"all the evidence"* pointed to a different conclusion to that reached by the Council majority; there was evidence of landscape enhancements flowing from the scheme; and (vi) the Reasons on the landscape issue were full.

Policy framework

Landscape protecting policies - NPPF

134. Cherkley Court is situated within in protected landscape comprising an AONB and AGLV (see above). Such landscape areas are protected by Section 11 of the NPPF which provides as follows:

> *"11. Conserving and enhancing the natural environment*
>
> *109. The planning system should contribute to and enhance the natural and local environment by:*
>
> - *Protecting and enhancing valued landscapes…"*
>
> *115. Great weight should be given to conserving the landscape and scenic beauty in..[AONB], which have the highest status of protection in relation to landscape and scenic beauty. …*
>
> *116. Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated that they are in the national interest. Consideration of such application should include an assessment of:*
>
> - *The need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;*
> - *The cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and*
> - *Any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."*

135. The approach laid down by the NPPF in relation to protected landscapes is, therefore, straightforward:

(1) Local planning authorities must give *"great weight"* to conserving the landscape and scenic beauty in AONB *etc.*

(2) Local planning authorities should refuse planning permission for major developments in designated areas except in *"exceptional circumstances"* and where they are in the *"national interest"*.

(3) Consideration of what amounts to *"exceptional circumstances"* and *"national interest"* will include assessment of (a) the *"need"* for the development, including any national considerations, and its impact upon the local economy; (b) the opportunity for developing elsewhere, or meeting the *"need"* in some other way; and (c) any detrimental effect and the extent to which that could be moderated.

Mole Valley Local Plan

136. The approach to protected landscapes is re-enforced by paragraph (C) of Policy REC 12 of the Mole Valley Local Plan which provides:

> *"Proposals for new golf courses should be designed to respect the local landscape character. New golf courses in the Surrey Hills Area of Outstanding Natural Beauty and the Area of Great Landscape Value will only be permitted if they are consistent with the primary aim of conserving and enhancing the existing landscape."*

137. The supporting text provided in paragraph 12.72 which I set out again for convenience:

> *"12.72 New courses are likely to have an impact on the District's landscape because of their extensive size, formal appearance, considerable earth works and new buildings. The Council will seek to ensure that proposals for golf courses do not reduce the distinctiveness and diversity of the District's landscape. The Council is particularly concerned about the effect on the special landscape qualities of the Surrey Hills Area of Outstanding Natural Beauty and the Area of Great Landscape Value and future golf course proposals will be directed away from these areas of high landscape quality."*

Proposed golf course

138. The proposed golf course will extend to some 83 hectares (205 acres) and some 40% of the open parkland. Each hole will have 5 rectangular flat tees, varying in size from 80 to 200 square metres. The greens (comprising fine, closely mown, specialist grass) will range in size between 400 and 700 square metres. The total area of tees and greens will be approximately 22,360 square metres. There will be 5,460 square metres of bunkers. In addition to the tees, greens and bunkers, there will be signage, flags, possibly nets, benches and distance markers, tee markers *etc.*

139. Only the 15th fairway and 16th tee will be physically located within the AONB, on 40-acre field. The remainder of the golf course will be located adjacent within the AGLV but congruent to the AONB itself. It should be noted that the Surrey Hills AONB Board has stated that, in the view of the landscape value of the AGLV to the AONB, the AGLV should be included within the AONB.

Evidence

Experts' unanimous view – harmful

140. The experts' unanimous and unequivocal view was that the development would be harmful to the landscape. This included the Council's own retained consultants (Environmental Dimension Partnership), Natural England, the National Trust, the Adviser to the Surrey Hills AONB and other landscape consultees. In a letter dated 26th January 2012, the Chairman of the Surrey Hills Board wrote to the Council expressing the Board's serious concern at the proposal. The Chairman explained that it is unusual for the Board to express a view on a planning application, but was making an exception in the present case:

> *"…because the proposal involves such a large stretch of vulnerable landscape of great beauty…The Board resolved to express to your Authority its serious concern that a golf course is proposed to be introduced into this part of the Surrey Hills AONB and AGLV as it would be very likely to undermine its natural beauty and reduce the extent of unspoilt countryside in an important part of the Surrey Hills".*

141. In their 'Landscape and Visual Impact Assessment' Report dated 28th March 2012, Environmental Dimension Partnership expressed their conclusions against the proposed development in trenchant terms. It is worth quoting four passages in particular (emphasis already in text):

> *"6.36 Given the rarity of this landscape pattern, its characteristic nature with reference to the wider Surrey Hills, and the inherent sensitivity of the AONB, it is considered that effects upon the AONB, where this type of panorama is available, would lead to effects which would be* ***major****. These effects would be* ***adverse, long-term and permanent. …"***
>
> *"6.43 Considering the high sensitivity of the AGLV in this location, and particularly the Northern Parkland and 40 acre field, the changes would result in a high magnitude of change at a local level, which would reduce to medium/ high within more distant locations where visibility of these parts of the landscape would be reduced. This would lead to effects of* ***at least major/ moderate level****. These effects would be* ***adverse, long-term*** *and* ***permanent****.* ***…"***
>
> *"7.3 The assessment finds that the change of use from grazed chalk downland to managed recreation land, notwithstanding the efforts proposed to reduce the development footprint, would result in changes to the defining characteristics of the landscape of such magnitude that the landscape character would be fundamentally, and probably irreversibly, altered."*
>
> *"7.4 Such changes to the landscape character would realise significant effects upon both the Surrey Hills AONB and the Surrey AGLV. Whilst physical effects would be much greater upon the AGLV than the AONB, the contribution the development site makes to the appearance of the chalk downland plateaux within both the near and distant views is of key consideration. …"*

Planning officers' advice on landscape issues

142. The Council's planning officers' advice was measured and clear as to adverse impacts of the proposal on the landscape in Report OR1 and OR2. In the body of OR1 the planning officers stated:

> *"Summary*
> *There are undoubtedly landscape benefits to be achieved from the proposed development and there is a commitment to manage the components of that landscape in appropriate ways. However, the price to be paid is the imposition of a golf course on over 40% of the open parkland, with all the artificial elements associated with this form of development such as greens, tees, bunkers and fairways. However well designed, in a highly exposed location such as this, conspicuous from public highways and rights of way, it is very difficult to disguise these features. In such circumstances the proposal would be contrary to a number of established planning policies and the landscape impacts must be given considerable weight when determining the application.*
>
> *The applicant views the golf course as a means of saving a declining landscape, but under its previous management the visual qualities of the estate had improved. The quality of the Northern Parkland is underlined by its status as an AGLV and one independent landscape study suggests that it has characteristics that are the same as the adjacent AONB. The independent landscape assessment commissioned by the Council endorsed this view. This is a landscape of special quality, natural beauty and character that would not be enhanced and conserved by overlaying upon it the features of a golf course.*
>
> *The impact on the AONB is disputed. The applicant argues that the visual impact on the AONB would be limited and the area of intensively managed turf within and immediately adjacent to the AONB would be confined 25% of the land. However, both Natural England and the AONB Planning Adviser disagree and they consider that adverse impact on the AONB can be caused by development on the Northern Parkland as well as changes to 40 Acre Field. The independent landscape assessment also raised concerns about the impact within and adjacent to the AONB and the wider landscape and views from other parts of the AONB. It also stated that there had been no indication that the design for the golf course within the AONB had been different from the design within the AGLV.*
>
> *The policy basis for considering the application is explicit in stating that development proposals should respect or enhance the landscape character and there is considerable evidence to suggest that it does not. This view is supported by the independent landscape assessment and comments received from Natural England, the AONB Planning Advisor, the County's Landscape Adviser and the National Trust in particular. The conclusion is that the proposal would be harmful to the landscape character of the AGLV and AONB and is therefore contrary*

> *to PPS2, PPS7, Core Strategy Policies CS1 and CS13, 'saved' Mole Valley Local Plan Policies REC4 and REC12."*

143. In their conclusions to OR1, the planning officers recommended refusal of permission, *inter alia*, because (1) the proposed golf course would be *"seriously detrimental"* to the visual amenities of the locality and contrary to the relevant policies, and (2) *"no justification"* had been provided as to why the proposed golf course could not be located elsewhere (see above).

OR2

144. In Report OR2, the planning officers advised members in equally clear terms that were no exceptional circumstances or public interest reasons justifying this proposed incursion into protected landscape:

> *"The NPPF emphasizes the importance of protecting valued landscapes. Protection of such landscapes needs to be commensurate with their status and appropriate weight should be given to their importance. The NPPF is explicit in that planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. In this case, it cannot be demonstrated that there are any exceptional circumstances for allowing the development proposal in such a valued landscape and there is little to suggest the proposal is in the public interest. The proposal is therefore considered to be contrary to the advice contained in the NPPF."*

Reasons

145. The Council majority did not follow the planning officers' recommendations on harm to the landscape. The Council majority stated in paragraphs [6], [7] and [8] of the Reasons that: (i) the landscaping and mitigation measures contained in the application *"were sufficient"* to ensure that *"the overall landscape character"* would not be compromised; (ii) the design met the terms of planning policies designed *"to protect… the character of the countryside",* namely Core Strategy policy CS13, Local Plan policy ENV22 and REC12 and Surrey Hills Management Plan policies LU2 and LU3; (iii) the management plan *"could meet"* commitments to safeguard and enhance the natural environment within the NPPF, Core Strategy policy CS13, Local Plan policy ENV22 and REC12 and Surrey Hills Management Plan policies LU2 and LU3; and (iv) the character of the countryside *"could be safeguarded"* even within and adjacent to the AONB.

Analysis

'Major development'

146. Paragraph 116 of section 11 of the NPPF provides that *"Planning permission should be refused for major developments in these designated areas…".* The NPPF does not define *"major developments"* but, in my view, it clearly covers

something on the scale of an 18-hole golf course. Mr Findlay QC and Mr Katkowski QC submitted that, since only a small proportion of the proposed golf course (the 15th fairway and 16th tee) would actually be located within the designated AONB, paragraph 116 of Section 11 of NPPF had no application. A tee and a fairway could not be described as a *"major development"* in an AONB.

147. The planning officers advised, however, that paragraph 116 of the NPPF did apply and that the *"exceptional circumstances"* and *"public interest"* tests applied. In my judgment, the planning officers were right. Paragraph 116 of the NPPF is plainly intended to include *"major developments"* which physically overlap with designated areas or visually encroach upon on them. In the present case, it would be artificial, and frankly myopic, to focus simply on the one tee and hole physically within the curtilage of the AONB and ignore the other 17 tees and holes course along the border of the AONB. It would also be contrary to the spirit of Section 11 of the NPPF since the policy is pre-eminently concerned with visual perspectives. In my view, the visual impact of the *whole* proposed golf course on the AONB was clearly relevant and a material consideration. It was also relevant that the adjoining AGLV was considered of AONB quality (and might be redesignated as such in the near future.) There is no evidence or indication that the Council majority considered this issue at all. The Reasons certainly do not suggest the contrary view, *i.e.* the non-application of paragraph 116 of the NPPF.

"Exceptional circumstances" and "public interest" tests

148. Paragraph 116 of the NPPF provides that planning permission should be refused for major developments in designated areas *"…except in exceptional circumstances and where it can be demonstrated that they are in the national interest"* and specifies the sort of matters to be assessed in this exercise.

Planning officer's advice

149. The planning officers' advice in relation to the paragraph 116 tests was clear and unequivocal:

> "*In this case, it cannot be demonstrated that there are any exceptional circumstances for allowing the development proposal in such a valued landscape and there is little to suggest the proposal is in the public interest."* (see OR2 also cited above)

150. In its application Longshot argued that the visual impact of the golf course on the AONB would be limited because of the mitigation measures. However, as pointed out by the planning officers in OR1, there was no getting away from the fundamental fact that the scheme involved the imposition of an artificial golf course development over 40% of the open parkland at Cherkley, a highly exposed location, conspicuous from public highways and rights of way, and it was very difficult to disguise such features. The mitigation measures simply did not address this fundamental mischief. It was for this reason that the planning officers advised that, in the light of the evidence from the Council's own independent landscape assessment, Natural England, the AONB Planning Advisor, the County's Landscape Adviser and the National Trust, the proposal would be harmful to the landscape character of the AGLV and AONB and was therefore contrary to PPS2,

PPS7, Core Strategy Policies CS1 and CS13, 'saved' Mole Valley Local Plan Policies REC4 and REC12.

Reasons silent on 'exceptional circumstances'

151. The Reasons are silent on this issue. There is no reference in the Reasons to paragraph 116 of the NPPF. There is no mention in the Reasons of any *"exceptional circumstances"* or *"national interest"* reasons for allowing the development. There is no explanation in the Reasons as to why the Council majority might have disagreed with the planning officers' advice on this issue. Nor do the Reasons contain anything which might be regarded as complying with paragraph 116 or satisfying either of the *"exceptional circumstances"* or *"national interest"* tests. Paragraphs [6], [7] and [8] of the Reasons touch on landscape issues generally, but are primarily directed towards approving the landscape mitigation measures. Paragraph [3] of the Reasons deals with *"sustainable development"* and the benefit which the development would bring to the local economy, providing jobs for local people and accommodation and facilities for visitors to the District; but there is no suggestion that the economic benefits were exceptional and it merely concludes that the development was considered overall *"to balance"* the needs of the economy with those of *"nature and landscape conservation".* The concluding paragraph, Paragraph [11], contains similar sentiments.

152. Decision-makers have to have *regard* to material considerations but do not have to mention them *(R(Bolton MDC) v. Secretary of State for the Environment* [1995] 94 LGR 387). However, the fact that the Reasons do not even elucidate why the Council majority disagreed with the planning officer's advice or point to what *"exceptional circumstances"* or *"national interest"* they relied upon is telling: it points to the fact that the Council majority simply failed to have the relevant paragraph 116 tests in mind when coming to their decision.

Longshot's argument

153. Mr Katkowski QC sought to side-step paragraph 116 of the NPPF by arguing that, since the Council majority (a) rejected the conclusion that the development was harmful to the landscape and (b) was 'mindful' of the benefits that the scheme would bring, no error of law arose. In my view, this is heretical. Absence of harm does not obviate the need to apply the paragraph 116 "*exceptional circumstances"* or *"national interest"* tests. Further, it is no answer to say that because part of the specified assessment *process* laid down by paragraph 116 of the NPPF was carried out (*i.e.* the analysis specified in the three bullet points) the test did not have to be applied, *i.e.* that the requirement specifically to decide that sufficient *"exceptional circumstances"* or *"national interest"* reasons existed justifying the development in protected landscape was somehow fulfilled. It is palpably evident that the matter was simply never considered by the Council majority or featured in their thinking as a policy requirement or material consideration. The assessment process carried out was, in any event, incomplete (see above).

'Exceptional circumstances'

154. In summary, in my judgment, the Council majority erred in law because it failed to ask itself the relevant questions under paragraph 116 of the NPPF, *i.e.* whether *"exceptional circumstances"* existed or whether the *"national interest"* was

demonstrated. Paragraph 116 of the NPPF was clearly engaged in this case: the scheme represented a *"major development"* in an AONB. Paragraph 116 is also expressed in mandatory terms: such applications *"should be refused"* except in *"exceptional circumstances"* or where the *"national interest"* is demonstrated. Further, if the Council majority had properly and conscientiously applied the relevant tests under paragraph 116 of the NPPF, they would have concluded that there were no *"exceptional circumstances"* and *"national interest"* reasons justifying allowing this development in this protected landscape. None were put forward by the planning officers because it was obviously difficult to think of any.

Perversity – landscape

155. Aesthetic and other planning judgments are peculiarly a matter for the planning decision-makers (*c.f.* Sullivan J in Ex parte *Newsmith Stainless Ltd* (*supra)* at paragraphs [6]-[8]). However, in my judgment, the Council majority could not rationally have come to the conclusion in paragraph [7] of their Reasons that the overall landscape character *"would not be compromised"* (with our without the site visit which they made). The decision simply flew in the face of the unanimous and trenchant views expressed by the landscape experts that the effects would be *"major… adverse, long-term and permanent"* and the changes were of "*of such magnitude"* that the landscape character would be *"fundamentally, and probably irreversibly, altered"* (see *e.g.* the passages quoted above). The planning officers also advised unequivocally that the proposals would be *"seriously detrimental"* to the visual amenity.

"*Conserving and enhancing the existing landscape"*

156. In any event, in my judgment, the Council majority failed to have proper regard to Paragraph [C] of Policy REC12. Paragraph [C] provides in terms that new golf courses would *"only"* permitted in the Surrey Hills AONB and AGLV if consistent with the primary aim of *"conserving and enhancing the existing landscape"*. I agree with Mr Edwards QC that the Council majority's conclusions that the proposed development would involve change and mitigation is inconsistent with the REC12 requirement of *"conserving and enhancing the existing landscape"*. Further, in the light of the unanimous evidence from the landscape experts (see above), it is difficult to see how the Council majority could have concluded that the development was consistent with the primary aim under REC12 of *"conserving and enhancing the existing landscape"*. It involved fundamental *"change"* by the imposition of an artificial construct of a golf course which, by definition, was not *"enhancing"* the natural landscape. The *"and"* is disjunctive in my view.

157. In my judgment, the Council majority simply failed to understand this policy requirement. It received only scant mention treatment in the Reasons at paragraph [7] "*…and the character of the countryside could be safeguarded even within and adjacent to the Area of Outstanding Natural Beauty".* This was, in my judgment, inadequate consideration of this clear and important policy imperative.

'Directed away'

158. Further, there is no evidence that the Council majority had any regard to the specific paragraph 12.72 requirement that new golf courses should be *"directed away"* from protected landscape in the AONB and AGLV (see above). The same

reasoning as set out on this topic under Ground 2 applies also here under Ground3.

Conclusion on landscape

159. In conclusion, I accept all the Claimant's arguments on Ground 3. First, in my judgment, the Council majority failed to consider whether there were *"exceptional circumstances"* or *"public interest"* reasons justifying allowing this development to take place in the protected landscape of the Surrey Hills AONB and AGLV and therefore, failed to comply with paragraph 116 of the NPPF ground. Second, the Council majority's conclusion that the overall landscape character *"would not be compromised"* by the imposition of a golf course on the Surrey Hills AONB and AGLV was perverse. Third, the Council majority failed to have regard to the policy of aim of *"conserving and enhancing the existing landscape"* in breach of Paragraph [C] of Policy REC12. Fourth, the Council majority failed to consider whether this proposed new golf course could and should be *"directed away"* to a less sensitive area. For each of these reasons, the Council majority's decision should be quashed.

GROUND 5 – WATER

160. Under Ground 5, the Claimant contended that the Council failed to have regard to the adequacy of water resources in breach of Policy ENV68. The Claimant made two essential submissions: (i) the Council failed properly to understand or apply Policy ENV68; and (ii) the Council failed to have sufficient information whatsoever to permit a conclusion that the requirements of Policy ENV68 were met.

161. Policy ENV68 was a relevant policy to the determination of the planning application in question, since, as noted in the supporting text, golf courses make substantial demands on water resources. Policy ENV68 required the decision-maker to satisfy itself as to the adequacy of water resources before the grant of permission. Local Plan Policy ENV68 (Adequate Water Resources) provided as follows:

> *"**POLICY ENV68**: Development will only be permitted where the Council, after consultation with the Environment Agency and the relevant water supply companies, considers that adequate water resources are available, or where their provision is not considered detrimental to existing abstractions, river flows, water quality, fisheries, amenity or nature conservation."*

162. The supporting text to Policy ENV68 stated at paragraph 4.286:

> *"The provision and development of water resources to ensure the supply of water to new development is becoming increasingly difficult in the Thames Region. The scale of development envisaged in the District should not pose a problem but there are some developments such as golf courses that can make substantial demands on water."*

163. Longshot's water consultants, Irriplan Ltd, did not raise any concerns about the adequacy of water supplies, save to point out in paragraph 5 of their report dated 26th September 2011 that *"until a pump test is carried out there can be no guarantee that a borehole will yield the sought for quantities of water". This* does not assist the Claimant. The fact that something is not *"guaranteed"* does not mean that it is not, in fact, *"available"* within Policy ENV68.

164. The Claimant submitted that the Council failed properly to satisfy itself that the adequate water resources were *"available"* before granting of planning permission. The plan was for water to be supplied by a borehole into an aquifer (the subject of Condition 57). However, no pump test had been carried out prior to the grant of planning permission to determine whether there was, in fact, sufficient water available and what the environmental effects of extracting water (*e.g.* on the River Mole) might be. The Claimant also contended that the Council planning officers had failed to grapple with the question of the adequacy of water resources in their Reports to the planning committee, OR1 and OR2, neither of which made any mention of Policy ENV68.

165. In his helpful statement, the Council's Principal Conservation Officer, Mr Rodney Shaw, explained that he was well aware of the requirements of Policy ENV68 and, having carefully looked into the issue, he was satisfied that water was not going to be a problem. I accept his evidence. The Environmental Statement stated that the intention was to take the water from the Lower Greensand aquifer which was classified *"water available", i.e.* water likely to be available *"at all flows, including low flows"*. The Environment Agency confirmed in its report dated 15th December 2011 that *"[t]he groundwater resources of the target aquifer (Lower Greensand) are not heavily used near Cherkley court…",* but stated that a licence would not be issued if the borehole could not sustain the required yield. Mr Shaw said that he did not read the latter as casting doubt on the water resources in this area as a whole. In my view, he was right. In stating that a licence would not be issued if the borehole could not sustain the required yield, the Environment Agency was merely pointing out the obvious. There was, moreover, no requirement to have a licence in place *before* applying for planning permission (as planning officer's Report OR4 pointed out). Moreover, the fact that the precise water yield from the borehole could only be determined after testing, did not suggest that adequate water was not available.

166. Mr Shaw also followed up a query raised by the Kent branch of the Campaign for Rural England as to the effect of abstraction, by calling the Environment Agency and discussing the matter with the relevant officer there, Mr Steve Barrow. Mr Barrow confirmed that there was adequate water available in the Lower Greensand to service the proposed golf course and there were no adverse environmental impacts.

167. The pertinent matters regarding the adequacy of water supplies were appropriately summarized on p. 83 of the first planning officer's Report OR1:

> *"Concerns have been raised about the impact of the proposals for water abstraction on the ecology of the area. The Environment Agency has provided advice to the applicant and, on the basis of that advice,*

proposes to obtain their water from a deep borehole into the Lower Greensand. The Agency has indicated that there are examples of other similar abstractions that take place from the Lower Greensand and that there are no other similar abstractions taking place in this part of the Lower Greensand. They do not consider that there will be direct environmental impacts as a result of water abstraction from the borehole. However, the applicant will need to provide the Agency with details of the water quantities they will wish to abstract and will need to apply for consent to drill and test. The Agency would place conditions on the pumping test. If this is successful, an abstraction license would be required which, if granted, would have conditions attached. The license would be reviewed after a period of 10-12 years and that review would take account of any know environmental impacts."

168. I do not consider the absence of an express reference to Policy ENV68 itself in report OR1, or the other planning officer's reports, to be material in any way. I accept Mr Shaw's evidence that he did not include an express reference to Policy ENV68 simply because water was, rightly, not considered a problem.

Conclusion on water

169. In conclusion, therefore, in my judgment, the Council planning officers did not ignore Policy ENV68. They adhered to it. In my view, they put before the Council ample evidence to enable Council members to consider that adequate water resources would be *"available"* to sustain the proposed development in accordance with Policy ENV68. For the above reasons, I reject the Claimant's Ground 5.

GROUND 1: GREEN BELT

170. Under Ground 1, the Claimant contended that the Council majority failed to have proper regard to the Green Belt Policy. The Claimant made two essential submissions: (i) the Council majority failed properly to construe Green Belt policy as set out in NPPF and as reflected in the Development Plan and, accordingly, failed to have regard to material considerations and to determine the application in accordance with section 70(2) of the 1990 Act and section 38(6) of the 2004 Act; alternatively, (ii) the Council majority failed to give adequate reasons for their conclusion in respect of the Green Belt Policy, in breach of article 31(1)(a) of the 2010 Order.

NPPF

171. The National Planning Policy Framework ("NPPF") must be taken into account in the preparation of local and neighbourhood plans, and is a *"material consideration"* in planning decisions (see sections 19(2)(a) and 38(6) of the 2004 Act and section 70(2) of the 1990 Act).

NPPF – Protecting Green Belt Land

172. Green Belt policy is aimed at preventing *"urban sprawl"* by keeping land *"permanently open"*. Section 9 of the NPPF provides as follows:

"9. Protecting Green Belt land

79. The Government attaches great importance to Green Belts. The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence.

80. Green Belt serves five purposes:

...

- *To assist in safeguarding the countryside from encroachment;*

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

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

87. A local planning authority should regard the construction of new buildings as inappropriate in Green Belt. ..."

173. Local planning authorities must ask three separate sequential questions when applying Green Belt policy:

(1) Is *"inappropriate development"* proposed?

(2) Do *"very special circumstances"* exist?

(3) Do such circumstances *"clearly outweigh"* the potential harm caused by the inappropriateness of the development and any other harm?

174. Local planning authorities are also required to give *"substantial weight"* to *any* harm which might be caused to the Green Belt by the *"inappropriate development".*

175. It is only if a local planning authority has conscientiously considered each of these three questions and answered each *"Yes"*, and given substantial weight to any harm caused, can it be said properly to have applied Green Belt policy as laid down in the NPPF. In my view, the Council majority did not properly consider or answer any of these questions when making its decision on the Green Belt policy, certainly not the second and third (see below). There was a total failure to consider *"very special circumstances".* It is also not clear that the Council gave substantial weight to the harm caused.

Mole Valley Local Plan and Green Belt policy

176. Paragraph 12.71 of the Mole Valley Local Plan re-enforces the Green Belt Policy with two further protective layers. First, paragraph 12.71 of the Local Plan

refers to the Green Belt policy in the strongest terms: the protection of the District's Green Belt and countryside is stated to be *"of paramount importance".* Second, paragraph 12.71 goes on to impose the threshold requirement that applicants proposing new golf courses in the Surrey Hills must demonstrate that there is *"a need for further [golf] facilities".* The requirement to show *"need"* pursuant to paragraph 12.71 is dealt with under Ground 2 above. It also arises under Green Belt policy itself (see further below). As I have said, these policy matrices should be read holistically.

New buildings

177. Local planning authorities are to regard the construction of new buildings as *"inappropriate development"* in Green Belt (paragraph 89 of NPPF above). Longshot's proposed development at Cherkley Court included the construction of the following *"new buildings"*: (i) the underground spa, (ii) part of the underground swimming pool, (iii) the maintenance/ service hub building and (iv) new guest rooms including the Glass House Cottages.

Planning officers' advice in 0R1

178. The main planning officers' advice on the 'New Build Elements' in the context of Green Belt issues is contained in OR1 (at pp. 59-62). The planning officers, in effect, divided the *"new buildings"* into three categories.

(1) The first category comprised the extensions to existing buildings, Cherkley Court, Garden House and Garden House Cottage, the nearby detached plant enclosures, and the orangery link which the planning officers advised *"will be small in scale"* and *"will not have an impact at openness".*

(2) The second category comprised the Health Club extension and the new Glass House Cottages which would re-use the floorspace and volume of other buildings previously permitted (*inter alia* by a 2003 permission) and *"the re-use was a sufficient very special circumstance to justify what is otherwise inappropriate development"*.

(3) The third category comprised the other buildings, including the partly underground swimming pool, the underground spa and the partially underground maintenance/ service hub buildings. The planning officers rejected the case advanced by Longshot, that the *"very special circumstances"* exception applied put forward on the basis these new buildings were wholly or partially underground and would not be disproportionate to the existing buildings. The planning officers advised as follows: (i) whilst the spa would be partially underground, *"it would be of a considerable size and would generate a significant amount of activity"*; (ii) the maintenance facility was also *"not a small building"* and *"would have a wide vehicular access for service vehicles in the roof"*; (iii) the spa and swimming pool (which would be marketed to and open to 275 members of the public) might be needed commercially to make the venture financially viable but (a) *"commercial"* requirements are not *"planning"* requirements, (b) these are uses which can be located in *"built up"* areas in the locality which do not impact on the Green Belt, and (c) REC11 presumes against recreation facilities in the Green Belt which are not incidental to outdoor recreation facilities".

179. The planning officers also pointed to the case of Hersham Golf Club (appeal reference APP/K3605/A/10/2142827) in which the issue of underground buildings in the Green Belt had been tested on appeal and said that similar conclusions could be drawn in the present case, namely that, notwithstanding the location of some elements below ground level, there was nevertheless an impact on the openness of the Green Belt.

180. The planning officers expressed considerable concern at the activity and movement of vehicles that the spa and swimming pool would generate which they said would be harmful to openness in the Green Belt and concluded that there were insufficient *"very special circumstances"* to justify the development which therefore failed the Green Belt policy tests in PPG2:

> *"Despite the spa's position underground, it is considered that the activity associated with the spa and swimming pool in the Green Belt would be harmful to openness, especially in an area that is isolated and where people would have to rely on the private car rather than private transport to access the site. The new build elements are inappropriate development that is harmful to openness. It is considered that there are insufficient very special circumstances to justify those elements of new development in the Green Belt and as such they fail Green Belt policy tests in PPG2. The golf course maintenance facility and service hub building will have a dual use, and whilst accepting that the service hub element will help to minimise the movement of vehicles around the site, it is considered that this element of the proposal is not genuinely ancillary to the golf course and therefore fails the PPG2 policy test with regard to essential facilities.*

181. The planning officers also had regard to the fact that Natural England might in the future include the whole site within the AONB:

> *"In addition, as Natural England may, in the future, consider including the whole site within the AONB and an independent assessment suggests that this land within the site is of AONB quality, some weight can be given to Policies LU2 and LU3 of the Surrey Hills Management Board. Part of these policy considerations relate to respecting the tranquility of the area. Clearly, the spa/health club and swimming pool will attract visitors and their cars to the site and this will be contrary to the Surrey Hills adopted policy".*

Recommendation in OR1

182. The planning officers' recommendation in OR1 in relation to Green Belt policy was unequivocal: the new buildings, together with the activity generated by the proposed uses, would represent *"inappropriate development in the Green Belt, in conflict with the aims of PPG2"* and there were no *"very special circumstances"* advanced which clearly outweighed the harm caused by reason of inappropriateness and the level of activity generated (see pp. 106-107 of OR1 cited above).

183. The planning officers advised that facilities such as golf courses in the context of Green Belt require proof that *"they were, indeed, 'essential facilities'"* (see OR1, p. 54). There was no evidence of such *"need"* (see above).

Reasons

184. The Council majority's reasons for differing with the planning officers' advice and conclusions in relation to Green Belt policies is set out at paragraph [5] of the Reasons:

> *"[12] The development was considered not to compromise significantly the Green Belt policies contained in the NPPF and the Council's Core Strategy by: re-using existing buildings, utilising floorspace granted under previous, extant permissions and locating additional floorspace underground. The design of the development in terms of siting, scale and detailing was considered to retain substantially the openness of the site sufficiently to overcome concerns set out in the officers' report, having regard to the other benefits that would be achieved."*

Analysis

185. It is clear that the Council majority failed to apply the *"very special circumstances"* test when deciding that the Green Belt policy had not been breached. Nowhere is there any mention of the Council majority recognising that there was *"inappropriate development".* Nowhere is there any mention of the Council majority being satisfied that there were *"very special circumstances"* justifying the *"inappropriate development"* in the Green Belt. Nowhere is there any explanation as to why the Council majority disagreed with the planning officers' advice. The test simply does not feature, either expressly or inferentially, either in paragraph [12] above or elsewhere in the Reasons. This notable omission is not cured by a mere general reference to the NPPF in the introductory paragraph of the Reasons (see above). The NPPF covers a vast array of policies.

Meaning of "very special circumstances"

186. The *"circumstances"* must be *"very special"* as opposed to common or garden planning considerations (*R(Dartford BC) v. First Secretary of State and Lee* [2004] EWHC 2549 (Admin)). They must also be *"not merely special, in the sense of being unusual or exceptional, but very special"* (*R(Chelmsford DC) . First Secretary of State and Draper* [2003] EWHC 2978 (Admin). The absence of harm or the fact that the harm caused is 'slight' *"will rarely be sufficient to constitute very special circumstances"* (*R(South Buckinghamshire v. Secretary of State for the Environment* (CO/184/1998) and the cases cited in the Encyclopedia of Planning Law & Practice, 5-034.51).

Reasons

187. It is not altogether easy to unbundle Paragraph [12] of the Reasons which is expressed in somewhat brief and delphic terms. It is apparent, however, that the rationale for the decision on Green Belt policy is very limited in nature. It is confined to a finding that the re-use of existing permissions, the location of floorspace underground and the overall design is such as to ameliorate the

development's impact on openness *"…sufficiently to overcome concerns set out in the officers' report, having regard to the other benefits that would be achieved".* It is not clear, however, that this grapples with or addresses the main *"concerns"* expressed by the planning officers in OR1, namely the level of vehicle activity that would inevitably be generated by proposed scheme, in particular by the spa and swimming pool (see above).

188. I pause to query whether the fact that *"new buildings"* may be located underground and proportionate in size and design can ever properly be regarded as *"very special circumstances"* outweighing the harm caused, as opposed to merely relevant to the degree of *"inappropriateness"* of the new buildings, *i.e.* harm caused. In any event, such considerations can only address physical harm to the Green Belt and cannot address *"other harm"*, *i.e.* caused by vehicular and other activity.

189. The reference to the *"other benefits"* that would be achieved would appear to be the somewhat prosaic benefits listed in paragraph [3] of the Reasons in the context of *"sustainable development"*, namely economic benefits, jobs for local people, accommodation and facilities for local visitors. *"Economic benefits"* are also referred to again in paragraph [11] of the Reasons. There is no suggestion, however, that such *"economic benefits"* are in any way out of the norm, or other than might be expected for such commercial developments, or that the same would need some exceptional economic or employment demand in the locality. In my judgment, the reference to *"other benefits"* in paragraph [5] is a far cry from the *"very special considerations"* that need to be demonstrated to justify *"inappropriate development"* in the Green Belt. It is clear, in my view, that the Council majority simply did not consider whether any *"very special considerations"* existed, let alone whether such considerations *"clearly outweighed"* the harm caused to the Green Belt by the *"inappropriate development"*.

190. Nowhere in OR1 did the planning officers suggest that the economic benefits, *i.e.* jobs, that this golf/ spa development would bring to the local economy might represent *"very special circumstances"* such as to justify the development in the Green Belt. Nor was it suggested that local jobs *etc.* could amount to *"very special circumstances".*

191. The only *"very special circumstances" in* fact advanced by the applicants (and which were the subject of analysis by the planning officers) related to the underground siting and scale of the buildings (see p. 61 of OR1 referred to above). In my view, if relevant at all, the cross-reference to *"other benefits"* in the Reasons represented, at best, a 'fig-leaf' attempt to justify an 'overall planning decision'. There was no consideration given to *"very special considerations".*

Other flaws

192. In my judgment, the Council majority's decision and reasoning in relation to Green Belt policy was flawed for other reasons. The first and second questions referred to above were not properly addressed (as well as the third). The Reasons fail to acknowledge clearly, and unequivocally, that the proposed new buildings

development amounted to *"inappropriate development"* harmful to Green Belt (the first question). The Reasons also failed to acknowledge clearly, or at all, that *"substantial weight"* must be given to <u>any</u> harm which the proposed *"inappropriate development"* might cause to the Green Belt (the second question). There is no indication that the Council majority gave *"substantial weight"* to the potential harm which *by definition* the proposed new buildings would cause to the Green Belt. It was no answer to the requirement to find *"very special reasons"* to state, somewhat equivocally, that the proposed new development *"was not considered to compromise <u>significantly</u> the Green Belt policies*" (see above). Further, there is no indication that, at any stage, the Council majority gave *"substantial weight"* to any harm caused. Thus, even if the Council majority considered the potential harm to the openness of Green Belt caused by the proposed development was less serious than the planning officers believed, the proposed development nevertheless comprised *"inappropriate development"* and the decision-makers were enjoined to give *"substantial weight"* to any harm caused.

"Need" for golf facilities under Green Belt policy

193. As the planning officers advised (in OR1, p. 54), recreational facilities such as golf courses are not generally regarded as in conflict with the policy of preserving the openness of the Green Belt. Applicants must, however, be able to demonstrate a *"need"* for the facilities in terms of the size and type *"in order to show that they are, indeed, "essential facilities" and therefore not inappropriate development"*. If *"need"* cannot be demonstrated, applicants must satisfy the *"very special circumstances"* test (see above).

194. In the present case, the Council majority did not demonstrate, adequately or at all, they were able to conclude that there was a *"need"* for a further golf course in this part of the Surrey Hills. They were unable to do so for the reasons which I have held under Ground 2 above. The Council majority should have satisfied themselves that Longshot could show *"very special circumstances"* existed which *"clearly outweighed"* the harm caused by the inappropriateness of the proposed golf course facilities themselves, and any other harm caused. The Council majority failed to do so because they formed a mistaken understanding of the meaning of *"need"*. This failure amounts to a further error of law.

<u>Conclusion on Green Belt</u>

195. In my judgment, the Council majority failed conscientiously to consider the three questions set out above, in particular whether *"very special circumstances"* existed which *"clearly outweighed"* the harm. The Reasons were inadequate. The Council majority at best paid lip-service to the Green Belt policy but did not apply it. The Council majority failed to take a proper policy-compliant approach to Green Belt considerations. I therefore grant permission for judicial review on Ground 1 and would quash the Council's decision to grant planning permission on Ground 1 also.

GROUND 8 – GLASS HOUSE COTTAGES

196. Under Ground 8, the Claimant contended that the Council Defendant failed properly to determine that part of the proposed development comprising the proposed Glass House Cottages in the context of Green Belt policies and, thereby, failed to have regard to a material consideration and failed to determine the application in accordance with s.38(6) of the 2004 Act.

197. The Claimant's original argument was based on a Deed of Variation executed between the Trustees of the Beaverbrook Foundation and the Council on 18th November 2010. This Deed formed part of the permission granted by the Council in 2010 to change the use of Cherkley Court back into a single family dwelling and contained a covenant that the Glass House Cottages (for which planning permission had been granted in 2003) would not be constructed or occupied. As the planning officers made clear, however, the 2010 permission was not in fact implemented and, accordingly, the 2003 permission remained extant (see p. 5 of OR1). For this reason, the Deed of Variation argument was not pursued by the Claimant.

198. At the hearing, the Claimant took a simple point: that the planning officers and Council majority had overlooked the Glass House Cottages when considering the Green Belt policy and there had, therefore, been a failure to take account of a material consideration. It was common ground that the Glass House Cottages represented *"new buildings"* and, therefore, *"inappropriate development"* within the Green Belt. Accordingly, it was necessary to consider whether there were *"very special circumstances"* justifying the whole development, including the Glass House Cottages.

199. The Glass House Cottages comprised a two-storey building with a ground floor footprint of 173 square metres replacing various older structures.

Analysis

200. It is fair to say that there is no specific mention of the Glass House Cottages by the planning officers in the relevant section of OR1 entitled 'New Build Elements – Recreational and Green Belt issues and Very Special Circumstances' (see paragraph 11.4 of OR1). There is also no specific reference to the Glass House Cottages in the Reasons. There are, however, numerous references to the Glass House Cottages elsewhere in OR1 and discussion of them in the general context of planning permission (see pp. 223-229, 251-252 and 264-265 of OR1). There is specific reference on p. 52 of OR1 to the Glass House Cottages being *"new build"* dwellings. Importantly, on the opposite page (p. 53 of OR1) under the heading of 'Main Planning Issues' in paragraph 11.1 of OR1, there is reference as to whether:

> *"3. the new-build elements of the proposal <u>including</u> the formation of the golf course <u>[etc.]</u>... can be justified in terms of Very Special Circumstances as required by the provision of PPG2 'Green Belts' and REC22 regarding hotels in the countryside. "*

201. It is tolerably clear that by use of the word "*including"* the planning officers were intending to include all relevant new buildings including the Glass Houses

Cottages. The same inclusive intention can also be inferred in relation to the use of the word "*including"* in the phrase *"[t]he other buildings… are also new development in the Green Belt which is, by definition, harmful to the Green Belt"* in the relevant section 11.4 on p. 60 of OR1 dealing with Green Belt new build issues (see above). For these reasons, therefore, in my view it cannot reasonably be said that the Glass House Cottages were overlooked the planning officers when advising on Green Belt issues. Accordingly, the Glass Houses Cottages must be regarded as having been compendiously referred to in the Reasons as part of *"the development".*

202. In any event, I do not think that the Council majority would have refused planning permission for the whole development simply because of the Glass House Cottages. Thus, an otherwise lawful the grant of planning permission would not have been vitiated by this issue alone (*c.f.* Staughton LJ in *Simplex GE (Holding) v. Environment Secretary* [1988] 57 P&CR 306 at p. 329). Longshot indicated that if the Glass House Cottage issue was the only matter standing in the way of the grant of planning permission, it would be prepared to give an undertaking not to develop the Glass House Cottages.

Conclusion on 'Glass House Cottages

203. Accordingly, whilst I grant permission for judicial review on Ground 8, I dismiss this Ground for the reasons set out above. However, if view of my conclusions on Grounds 2, 3 and 1 above that the Council majority's grant of planning permission was unlawful for these reasons, the above issues arising under Ground 8 are academic.

GROUND 4: INADEQUATE REASONS

204. The Claimant did not pursue Ground 4, failure to give adequate reasons, as a separate ground by as applicable to each of the other heads. For the sake of completeness, however, and for the avoidance of doubt, I deal with the Reasons challenge compendiously under this separate head in so far as it is not covered under each of the Grounds above.

205. In my judgment, the Council majority's Reasons for granting planning permission, whilst lengthier than many, were nevertheless inadequate in respect of the Grounds 1, 2 and 3 individually and when read as a whole. They did not comply with the principle enunciated by Sullivan LJ at paragraph [15] of *Siraj (supra)* that a fuller summary of the reasons for granting planning permission may well be necessary where members have granted planning permission contrary to a planning officer's recommendation in order to allow members of the public to ascertain the lawfulness of the decision.

206. It is fair to say that the planning officers who were tasked with drafting the Reasons were faced with a very difficult drafting exercise: they had to seek to justify a decision by a bare majority of members which was not only contrary to their recommendation in OR1 and also contrary to their own personal views. In the circumstances, they made a creditable effort. They tried vainly to fill in the

numerous legal bunkers by resort to 'employment benefits' and the overall planning 'balance'. The difficulty of the task that they faced, however, is evident from the terseness and inadequacy of the Reasons themselves. In my view, they were tasked with defending the indefensible.

RESULT

207. In the result, for the reasons set out above, I uphold the Claimant's challenge on **Ground 2** ('need') and **Ground 3** ('landscape') and **Ground 1** ('Green Belt'), but not **Ground 5** ('water') or **Ground 8** ('Glass House Cottages').

208. I therefore quash the Decision by the Mole Valley District Council on 21st September 2012 to grant planning permission to Longshot Cherkley Court Limited to develop Cherkley Court and Cherkley Estate, near Leatherhead in Surrey, into exclusive golf and hotel facilities on the grounds that the Council's decision was variously legally flawed, contrary to planning policy, failed to take account of material considerations, irrational and the Reasons given for it were inadequate. I will hear submissions from counsel on the appropriate form of Order.

Postscript - 19th hole

209. I am grateful to all counsel and their legal teams for their able assistance in this interesting case, and pay tribute to the courteous and civilised manner in which the matter has been conducted throughout on all sides.