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Case No: CO/1065/2021

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

Birmingham Civil Justice Centre
Priory Courts, 33, Bull Street, Birmingham B4 6DS

Date: 29 November 2021

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

Melton Borough Council	**Claimant**
- and -	
Secretary of State for Housing, Communities and Local Government	**Defendant**
- and –	
Matthew Atton	**Interested Party**

- -
- -

Timothy Leader (instructed by **Legal Services Melton BC**) for the **Claimant**
Thea Osmund-Smith (instructed by the **Government Legal Department**) for the **Defendant**
James Corbet Burcher (instructed by Shakespeare Martineau) for the **Interested Party**

Hearing date: 7 October 2021

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Judgment Approved by the court for handing down (subject to editorial corrections)

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HHJ WORSTER :

1. This is the application of a local planning authority for the statutory review of the decision of a Planning Inspector made on 11 February 2021 pursuant to the Court's powers under section 288 of the Town and Country Planning Act 1990. The Inspector's decision was to allow the Interested Party's appeal against the Council's refusal to grant planning permission for 9 dwellings. The facts are somewhat unusual.

The Local Plan as adopted

2. On 10 October 2018, the Melton Borough Council ("the Council") passed a resolution adopting the Melton Borough Local Plan 2011-2036 ("the Local Plan"). The Local Plan sets out a number of planning policies. Policy SS1 is a general policy which promotes sustainable development. Policy SS2 deals with Development Strategy. It sets out the overall provision for the development of homes in the Council's area, and divides it between Melton Mowbray, which would require approximately 65% of the housing need, and "Service Centres and Rural Hubs" which would accommodate the remaining 35%.

3. Policy SS2 appears after paragraph 4.2.16 of the Local Plan. The relevant sub-paragraph of the Policy in the Local Plan as adopted is as follows:

> *Service Centres and Rural Hubs will accommodate approximately 35% of the Borough's housing residential requirement (1822) on a proportionate basis. This will be delivered by planning positively for the development of sites allocated within and adjoining Service Centres and Rural Hubs by 2036, and by encouraging small scale residential "windfall" development, where it would represent sustainable development under Policy SS1 above or would enhance the sustainability of the community in accordance with Policy SS3 – Sustainable Communities".*

The important word for the purposes of this application is "windfall".

4. The Local Plan goes on to identify the sites which are allocated for development. These fall into two categories; allocated and reserve. Policy C1(A) identifies the sites where new housing will be delivered within the Local Plan. Stathern is a "Service Centre" for the purposes of policy SS2, and C1(A) identifies two sites, STAT 1 and STAT 2, which between them make provision for 75 dwellings. These are the allocated sites.

5. Policy C1(B) identifies reserve sites. It provides as follows:

> *Proposals for new housing development on the reserve sites listed in this policy … will be permitted where*
>
> *a) It helps to meet the identified housing requirement and develops the needs of the settlement; and*
>
> *b) It will secure the sustainability of the settlement; and*
>
> *c) It is demonstrated that a) and b) cannot be achieved through allocation under Policy C1(A) and other permissions granted.*
>
> *Where proposals on reserve sites are submitted, assessment will be carried out taking into account the following:*

> *i. The degree to which the allocated requirement is unmet within a settlement;*
>
> *ii. The likelihood that the allocated sites and outstanding permissions in the relevant settlement category (Melton Mowbray or Service Centre) will be delivered; and*
>
> *iii. Evidence of the extent of community support through allocation of reserve sites in the Neighbourhood Plans and/or bespoke approaches to measuring support.*

6. The reserve sites include STAT 3, Land west of Blacksmiths End, Stathern, with a capacity of 45 dwellings. It is the proposal to develop part of this reserve site and build 9 houses which is the subject of these proceedings.

7. The nature of a reserve site is, as its name suggests, that it is held in reserve. The fact that it is identified within the Local Plan means that it may come forward for development, but that the circumstances will be limited, or more limited than the allocated sites. That much is apparent from paragraph 5.4.7 of the Local Plan which says this:

> *Whilst the Local Plan as a whole includes a methodology for monitoring and trigger points for review (Appendix 5), it is considered good practice to build in flexibility within the plan itself to allow for a more robust approach and 'insulate' the need for review arising from relatively minor shortcomings on delivery, e.g. if an allocated site should become unavailable, or problems of a detailed nature are identified at application stage resulting in delay or non-delivery, or if sites cannot deliver as many new homes as envisaged. The Plan therefore includes 'reserve sites' in Melton Mowbray and Service Centre settlements where there are further suitable, available, and deliverable / developable sites to offer this flexibility and additional resilience. These are identified separately in Appendix 1 and are the subject of Policy C1(B), which also outlines the limited circumstances in which they could come forward. A limited amount of' flexibility is provided within Policy C1(A) through the allocations (a surplus of 756 homes) with further flexibility provided by the reserve sites (a surplus of 562 homes), and the windfall allowance.*

8. Windfall sites are defined for the purposes of the Local Plan as sites which *"... have not been specifically identified for housing development through the planning process but which may come forward over the course of the plan period*". Whilst the issue is not directly relevant to my decision, there is an issue as to whether STAT 3, the land west of Blacksmiths End, is a windfall site. The Council submits that it is not a windfall site; the Interested Party does not agree.

9. On behalf of the Council Mr Leader submits that these policies should be considered as forming part of an "integrated strategy" and are not separate or potentially opposing options for development. Policy SS2 allows for development on allocated or small scale windfall sites. The allocated sites are those within C1(A) and C1(B), and the terms of C1(B) provide for when development on a reserve site will be permitted.

Publication

10. The Council accept that it is the "custodian" of the Local Plan, and is subject to certain duties in relation to it. The first duty is to publish the Local Plan as adopted.

Regulation 26 of the Town and Country Planning (Local Planning) (England) Regulations 2012 (as amended) provides that:

> *As soon as reasonably practicable after the local planning authority adopt a local plan they must*
>
> *(a) make available in accordance with regulation 35*
>
> *(i) the local plan;*

11. Regulation 35 provides that:

> *(1) A document is to be taken to be made available by a local planning authority when*
>
> *(a) …*
>
> *(b) published on the local planning authority's website*

The importance of publishing the adopted local plan is of obvious importance. In particular it allows the public to see what the plan is for their neighbourhood, and it enables those who are making applications for planning permission to understand the basis upon which the planning decision will be taken. Both the public and potential applicants for planning permission are entitled to rely upon the accuracy of the published plan.

12. The Council published the Local Plan on 11 October 2018. No doubt it intended to publish the plan as it had been adopted, but there was an error in the wording of Policy SS2. Instead providing that the planned development would be met by the development of allocated sites, and by encouraging *… small scale residential "windfall" development …* where that would represent sustainable development under Policy SS1, the policy as published omitted the word "windfall" and provided as follows:

> *This will be delivered by planning positively for the development of sites allocated within and adjoining Service Centres and Rural Hubs by 2036, and by encouraging small scale residential development, where it would represent sustainable development under Policy SS1 above*

13. That omission changes the meaning of the policy. No longer does the small scale residential development referred to have to be on a windfall site. On the face of the policy as published it contemplates small scale residential development on any site, so long as it would represent sustainable development under Policy SS1. In this case the proposal was for the partial development of a reserve site. This version of Policy SS2 remained on the Council's website until March 2021, a month or so after the Inspector's decision.

The Planning application

14. On 3 October 2019, the Interested Party applied for planning permission for 9 dwellings on the reserve site off Blacksmith's End in Stathern. The application was made on the basis that the published version of Policy SS2 applied, and sought to demonstrate (amongst other things) that this was a small scale development which was sustainable for the purposes of policy SS1.

15. The application was considered by the Council's Planning Committee on 23 January 2020. The Officer's Report for that meeting also approached the application on the

basis that the published version of Policy SS2 applied. The Officer's Report considered that the proposal represented:

> *a sustainable and proportionate addition to Stathern and would provide a suitable mix of dwellings that are well related to the existing built form of the village… .*

16. Paragraph 5.2 of the report is headed "Principle of Development" and begins with these words (in bold):

> *The site adjoins the built up area of Stathern and is for 9 dwellings. Development of this nature is therefore in compliance with the approach of SS2 in principle, though attention is required to be given to its site specific implications …*

17. The report expressly confirmed that the proposal "accords with Policy SS2 of the Adopted Melton Plan". It goes on to recognise that the requirements of Policy CI(B)(c) had not been met because the allocated sites in Stathern were likely to come forward. STAT 1 was under construction and STAT 2 was the subject of an application. It dealt with that conflict in the following way:

> *Taken together, there is considered to be a conflict of the applicable planning policy in [this] case, with SS1 and SS2 supporting the proposal (in principle) but C1(B) opposing.*
>
> *In terms of decision making, it is considered that the fact that compliance is achieved under SS1/2 is sufficient and is not overridden (or undermined) by the contrary position of C1(B), i.e. that compliance with the Local Plan can be secured by different "routes".*

18. The report supported the development of 9 dwellings on this reserve site as a departure from CI(B) and considered that approval would not set a precedent for the approval of further small developments within STAT 3, which would be considered on their merits and in the context of the overall proportionality of development within Stathern.

19. There was local opposition to the application, and in the event the Planning Committee refused the application. The reasons given in the Decision Notice are as follows:

> *The application proposes a development of dwellings that is contrary to Policy C1(B) of the adopted Melton Local Plan 2018. The development is allocated as a reserve site that should only be considered should other allocated sites not come forward for development. No evidence has been provided to indicate that other sites are incapable of delivery. The Borough can demonstrate in excess of five year supply of deliverable housing sites.*

20. Article 35(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 requires that the Decision Notice sets out the full reasons for refusal, specifying all policies and proposals in the development plan which are relevant to its decision. The notice does not state that the proposal is contrary to Policy SS2.

21. The Interested Party appealed. Once again he relied upon the published version of Policy SS2 in his Statement of Case. The Council's Statement of Case did the same. By paragraph 6.7.1 it expressly agreed that Policy SS2 was intended to support sustainable small scale residential development, and at paragraph 6.1.2 it confirmed that it did not

contest that Policy SS1 and Policy SS2 supported small scale residential development in Stathern. That agreement flowed through to the Statement of Common Ground as between the Council and the Interested Party of 14 January 2021. Paragraph 7.2 recorded agreement that the proposal accorded with "all other policies within the Local Plan" (i.e. including Policy SS2) and at paragraph 7.8 that "Development at Service Centres will be delivered through a combination of allocated sites and by encouraging small scale residential development". I also note that paragraph 7.11 records that:

> *[T]he allocated sites at Stathern total 75 dwellings. However, policies SS1 and SS2 do not seek to impose an upper limit on the development that will be delivered at Stathern.*

22. On 20 January 2021 the Council filed its Appeal Questionnaire. That attached the adopted version of Policy SS2, which included the word "windfall". The discrepancy between the version of the Policy the parties were working from, and the version attached to the Council's Appeal Questionnaire, does not seem to have been appreciated by the parties or by anyone else until a member of the public pointed it out at the hearing before the Inspector. Given that the main issue in the case was whether the proposed development accorded with the Local Plan, the Inspector was concerned to clarify the point, and he asked the Council to confirm which was the correct wording. He deals with the issue in his witness statement of 29 April 2021 in the following way:

> *4. I sought clarification on the matter and asked the … Interested Party and the Council … to reach agreement. I then received an email from the Interested Party's Representative during the hearing attaching the full text of the Melton Borough Local Plan 2011-2036 (2018).*
>
> *5. Following receipt of that email, I verbally asked the Council to confirm that the wording of Policy SS2 that does not refer to "windfall" was the correct one to use. The council …confirmed that it was, and at no point in time during the hearing did the Council indicate that the proposal was not in accordance with Policy SS2.*

23. The Inspector also referred to the issue at paragraph 3 of the Decision Letter:

> *During the course of the hearing, it became apparent that there were differing versions of the adopted Melton Borough Local Plan … in that the version supplied to me with the appeal questionnaire, and that obtained by some members of the public, differed to that which the Appellant had provided within their statement and that which the Council had referred to in their officer's report. Having sought clarification on this, a revised copy of the [Local Plan] was provided to me during the hearing with the, as adopted, wording of Policy SS2.*

Understandably the Inspector then proceeded to hear the appeal on the basis of the Local Plan as published. It was not until some weeks later that the Council realised the error, and the published version of Policy SS2 was taken down from the Council's website.

24. Mr Leader accepts that the Council should shoulder "the bulk of the blame" for this error, but stopped short of accepting all of it. He submitted that there was a "certain lack of curiosity" on the part of the Interested Party in not asking the Council what the document attached to its Appeal Questionnaire was. He submits that had that enquiry

been pursued, the true nature of the document would have become clear, and the error revealed.

25. The member of the public who pointed out the discrepancy between these two versions of the plan is to be congratulated. But I do not accept that any blame for this error can be laid at the door of the other parties. The Inspector is blameless. This was the Council's document. He asked the parties to agree the position, which they did, and then he asked the Council to confirm which was the correct version. He was plainly entitled to accept the answer he was given. Indeed, in the circumstances it is unimaginable that he would do otherwise. As for the Interested Party, it is possible that in a perfect world that it might have dug deeper. But there was no reason for it to question what the Council was saying. The Inspector had asked the question and been given an unequivocal answer. It is too much to expect for the Interested Party to have done more.

The Inspector's decision

26. The Inspector allowed the appeal and granted planning permission for the development of 9 houses on the land off Blacksmith's End in Stathern on the basis of an outline application with all matters reserved for subsequent approval. At DL8 he identified the main issue as whether the proposal accords with the provision of the Melton Borough Local Plan 2011-2036 (2018).

27. The decision recognises that STAT 3 was a reserve site as defined by policy C1(B), and that it was common ground that it was not a windfall site. At DL12 he recorded the Council's confirmation that the development would not give rise to any planning "harm" and recorded its objection in the following terms:

> *… its objection to the development relates to a matter of planning policy in that it is considered that the proposal would not accord with the provisions of Policy C1(B). The crux of this is related to the delivery of two other allocated sites in Stathern, from Policy C1(A), one of which is currently under construction (STAT2) and whether there is a need for the development of the site.*

As the Interested Party emphasises, the objection was not that this development was contrary to Policy SS2.

28. The Inspector then reviewed the operation of Policy C1(B). At DL14 he noted that there was no cap on development in the Local Plan or the Framework. At DL 15 he described Policy C1(B) as:

> *… a positively worded policy which doesn't explicitly restrict the granting of planning permission for the development of the site. What the policy does do though is set out considerations which would be taken into account. This includes that proposals would help to meet the identified housing requirement and the development needs of the settlement, and that it would secure the sustainability of the settlement.*

29. The core of the decision is at DL 18-23:

> *18. … the evidence before me indicates that the minimum housing requirements for Stathern would be met through either the main site allocations together with the existing permissions or schemes which have already been built out.*

> *19. As such, I find that the proposal goes against the objectives of Policy C1(B), albeit that the positive wording of the policy does not explicitly indicate that permission should be refused for the development of part of a reserve allocated site.*
>
> *20. Notwithstanding that, Policy SS2 sets out very clear support for small scale residential development where it would represent sustainable development under Policy SS1, for which the Council have confirmed the appeal proposal would accord with. In my view, this is the most significant factor as the proposal is only for nine dwellings, and this scale of development is clearly supported by Policies SS1 and SS2 in particular.*
>
> *21. Whilst Policy SS2 also looks to distribute the overall housing requirements on a proportionate basis across the Borough as a whole, I consider that the delivery of nine additional dwellings would not result in such a disproportionate level of housing to suggest that permission should be refused even when the other sites and permissions which have been drawn to my attention are taken into account.*
>
> *22. In coming to that view, I also acknowledge the concerns raised over the possible cumulative effect of future proposals, including possible other proposals on the remainder of the STAT3 site. However, even if such proposals were to come forward in the future they would need to be considered with the above in mind, and in particular the cumulative effect of the development of the site. I am also very conscious that this is not the proposal before me, and I must determine the appeal proposal on its individual merits.*
>
> *23. Taking all of the above into account, I consider that whilst there is some conflict with the objectives of Policy C1(B), there is clear and overriding support for a small-scale scheme through Policies SS1 and SS2. In my view, this support, together with the fact that the housing targets are minimum targets and not a ceiling for development, is the determinative factor in my decision. As such I consider that the proposal would accord with the MLP when taken as a whole. It would also accord with the overarching aims of the Framework.*

The Inspector then turned to "other matters".

30. Having recognised its error, the Council brought this claim. The argument before me centred on the two "grounds" outlined in Mr Leader's skeleton argument at paragraphs 2 and 3. Firstly that the Inspector was misdirected by the parties and based his decision on a document which was not the adopted policy. Consequently he failed to have regard to, or to understand and apply the relevant development plan. Secondly that this lack of understanding caused him to fail properly to apply policy SS2 and led to his misinterpretation of Policy C1(B). In essence the complaint is that C1(B) is a restrictive policy and should not have been interpreted as a "positively worded" policy, even on the basis of the plan as published.

Ground 1

31. Mr Leader's analysis begins with three propositions of law. The first is expressed in the following passage from the judgment of Lord Greene MR in *Associated Picture Houses v Wednesbury Corporation [1948] 1 KB 223 at 228;*

> *If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters.*

Secondly this passage from the judgment of Lindblom J (as he then was) in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at [19.4]

> *A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in Tesco Stores v Dundee City Council [2012] UKSC 13 at paragraphs 17 to 22)*

Thirdly section 70(2) of the Town and Country Planning Act 1990, which provides that:

> *In dealing with an application for planning permission or permission in principle the authority shall have regard to the provisions of the development plan, so far as material to the application*

32. For these purposes the development plan was the plan adopted by a resolution of the planning authority; see section 23(5) and 38(3)(b) of the Planning and Compulsory Purchase Act 2004, and section 38(6) of the 2004 Act provides that:

> *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.*

33. The importance of a development plan was emphasised by Lord Reed in his judgment in *Tesco* at [18]:

> *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 a good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities.*

34. Mr Leader's argument is a simple one. The Inspector did not have regard to the adopted local plan because he was given a materially inaccurate version of it by the parties. Consequently he failed to have regard to a material consideration, and took account of an immaterial consideration. Statute requires that it is the adopted plan which is considered.

E v SSHD

35. The Defendant and the Interested Party characterise the case as a mistake of fact rather than one of misdirection. Ms Osmund-Smith submits that the Inspector made a mistake of fact in that he erroneously based his decision on the wrong version of Policy SS2. That was the true position. Similarly Mr Corbet Burcher submits that the reality of the Council's complaint is that the Inspector made a material error of fact.

36. The requirements for such a claim were set out by Carnwath LJ (as he then was) in his judgment in *E v Secretary of State for the Home Department* [2004] QB 1044 at [66]:

> *First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.*

Given the Council's acceptance that it must shoulder most of the blame, Mr Leader accepts that it could not satisfy the third requirement.

37. As I understand his submissions, Mr Leader accepts that the claim could be characterised as a mistake of fact claim for the purposes of *E*, but that the Council have elected to pursue a claim based on misdirection; see paragraph 39 of his skeleton argument. Plainly that was a decision made in recognition of the fact that a claim based upon a mistake of fact would fail. Ms Osmund-Smith submits that it is unsatisfactory that the outcome of a case is determined by the Claimant's choice as to how it is put. That may be so, but that does not necessarily mean that it is not open to the Council to pursue a claim on that basis.

38. Whilst *E* was a decision involving two asylum cases, Carnwath LJ was considering principles applicable in administrative law generally, and whether an error of fact (as opposed to an error of law) was a ground for review; see [37]. His judgment reviews the developments in the area, and a number of cases which illustrate the point that issues of "law" in this context have not been narrowly understood by the Court.

39. At [44] Carnwath LJ considered whether a decision reached on an incorrect basis of fact can be challenged on an appeal limited to points of law. In the following paragraphs he reviewed the decision of the House of Lords in *R v CICB* [1999] 2 AC 330, and in particular the speech of Lord Slynn. The Claimant in that case was a victim of crime and had reasonably assumed that the Police report which was put to the Board would include the report made by the police doctor, which set out her injuries. However, the doctor's report was omitted, and the Board was left with the impression that there was nothing in the medical evidence to support her case. Its decision therefore was based upon a mistake of fact as to the evidence. On the special facts of the case, the decision was quashed, although not on the basis of error of fact, but because of a breach of the rules of natural justice leading to unfairness.

40. Having continued a review of the cases, at [61] Carnwath LJ referred to a passage from the (then) current edition of de Smith:

> *The taking into account of a mistaken fact can just as easily be absorbed into a traditional legal ground of review by referring to the taking into account of an irrelevant consideration, or the failure to provide reasons that are adequate or intelligible, or the failure to base the decision on any evidence.*

41. At [62] he expressed doubt as to whether these traditional grounds provided an adequate explanation for the cases where error of fact formed the basis for a successful challenge. He took them in turn.

    i) *Failure to take account of a material consideration is only a ground for setting aside a decision, if the statute expressly or impliedly requires it to be taken into account (Re Findlay [1985] AC 318, 333-4, per Lord Scarman). That may be an accurate way of characterising some mistakes; for example, a mistake about the*

> *development plan allocation, where there is a specific statutory requirement to take the development plan into account (as in Hollis). But it is difficult to give such status to other mistakes which cause unfairness; for example whether a building can be seen (Jagendorff), or whether the authority has carried out a particular form of study (Simplex).*
>
> *ii) Reasons are no less "adequate and intelligible", because they reveal that the decision-maker fell into error; indeed that is one of the purposes of requiring reasons.*
>
> *iii) Finally, it may impossible, or at least artificial, to say that there was a failure to base the decision on "any evidence", or even that it had "no justifiable basis" ... . In most of these cases there is some evidential basis for the decision, even if part of the reasoning is flawed by mistake or misunderstanding.*

42. At [63] he expressed the view that the *CICB* case points the way to a "separate ground of review, based on the principle of fairness", and prefaced his analysis of the four requirements for such a claim at [66] with this:

> *In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of CICB.*

43. The prior analysis of the extent to which the "traditional grounds" explain the cases, and the description of "mistake of fact giving rise to an unfairness" as a separate head of challenge, indicates that this new ground is in addition to the traditional grounds, and separate from it. The intention is not to cut down the circumstances in which the court will intervene. Consequently I do not understand the requirements set out under paragraph [66] of *E* to apply to cases where there is a mistake of fact which can properly be characterised as an error of law, and which is pursued as such. It follows that if a challenge can be properly brought under a traditional ground, the fact that it can also be brought as a mistake of fact giving rise to unfairness should not prevent the claimant from arguing it as a point of law on that traditional ground, and without necessarily satisfying the four requirements set out in *E*.

44. On the Council's case, this is an example of case where the statute requires the local plan to be taken into account, and would appear to be within the class of claims referred to in paragraph [62(i)] of *E* as being adequately explained by the traditional grounds for judicial review and capable of being brought on the basis of an error of law.

Error of Law?

45. The Defendant argues that, properly understood, there was no error of law on the part of the Inspector. The Inspector's assessment of the development was based upon the material that the parties put before him and the submissions they made. That included what was (as it turned out) an incorrect version of the Local Plan. The planning judgement the Inspector made as to whether the scheme complied with the Local Plan is to be seen in that context. A section 288 appeal is not an opportunity for the Council to make a different case based on material that was not before the Inspector. Mr Corbet Burcher for the Interested Party takes the argument one step further. He submits that by

answering the Inspector's question about which was the correct version of Policy SS2 as it did, the Council effectively withdrew the correct (adopted) version of the Local Plan from consideration by the Inspector. It is also to be noted that the Council's case throughout the consideration of the application and the appeal was that the development accorded with Policy SS2. The basis for the refusal of the application by the Committee and its argument before the Inspector was that the development was contrary to Policy C1(B) – although ground 2 is to the effect that the Inspector misunderstood that policy because he had the wrong version of Policy SS2.

46. The general rule is that it is incumbent on parties to a planning appeal to place before the Inspector the material upon which they rely, and the Inspector is entitled to reach his decision on the basis of the material put before him; see Richards J (as he then was) in *West v First Secretary of State* [2005] EWHC 729 at [42-[45]. A court considering a challenge to a decision will generally confine its attention to the material placed before the Inspector and will not admit fresh evidence; see *Patel v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC 1963 (Admin) Collins J at [17] and [29], considered in *West* at [37] and [43]. There will be cases where fairness requires that the Inspector does something more, but this is not such a case. There can be no suggestion that the Inspector was required to do more than he did.

47. That rationale behind that general rule finds further expression in the judgment of John Howell QC sitting as a Deputy High Court Judge in *Winters v SSCLG* [2017] EWHC 357 at [42]. If a party to a planning appeal fails to dispute a contention made by another party, the Inspector is entitled to conclude that the contention is correct and an appeal relying upon that error of fact will fail. This is all consistent with the public interest in the finality of litigation and good administration.

48. Does the general rule as expressed in *West* apply when the material put before the Inspector omits a development plan which section 38(6) of the 2004 Act requires him to have regard to? I read the statute as requiring the Inspector to have regard to the plan as adopted, and not to some other version of the plan. Ms Osmund-Smith submits that to depart from the general rule would place an excessive burden on Inspectors, and allow parties who failed to put the relevant material before the Inspector to have a second bite. I follow her concern, although the circumstances of this case are quite out of the ordinary.

49. Notwithstanding the general rule in these cases, and the powerful rationale for it, I have concluded that the statutory requirement to have regard to the adopted plan trumps the generally accepted approach that decisions are to be reviewed on the basis of the material before the decision making tribunal (here the Inspector). It can properly be said that in failing to have regard to the Local Plan as adopted the Inspector has failed to take account of a material consideration as required by statute. The claim falls into the class of claims identified by Carnwath LJ at [62(i)] of *E*, and can be properly characterised as a challenge made on "traditional grounds". In other words it is an error of law rather than just an error of fact giving rise to unfairness, and is not a claim that can only be pursued on the basis of the principles set out in *E*.

50. The facts of this case illustrate that the difference between an error of fact and what can be properly characterised as an error of law for the purposes of judicial review may be a narrow one. The underlying reason for the error the Inspector made was the Council's mistake in putting forward the wrong policy, and its acceptance that the development accorded with policy SS2. On one level it would appear wrong to allow the Council to

set aside a decision based on that error when it was all its own fault. That consideration has weighed heavily in my consideration of this matter, and I can well see why the Secretary of State and the Interested Party take the position they do.

Ground 2

51. If the Council succeeds on ground 1, there is no need for me to consider ground 2. Had it failed on ground 1 however, I would have been against it on ground 2.

52. It is apparent from the decision letter that the Inspector reviewed the terms of the policies put before him. He was faced with what he recognised was a conflict between Policies SS1 and SS2 which he considered supported the application, and Policy C1(B) which opposed it. He is criticised for his approach to Policy C1(B) because he read it as being positively worded. Mr Leader submits that it is a policy which limits development, and cannot be read as the Inspector read it. I disagree.

53. It is not unusual to find that planning policies might pull in different directions in certain circumstances. What the Inspector had to do (as I rather inelegantly put it in the course of argument) was square the circle. The terms of SS2 were (apparently) clear in their support for small scale development so long as it was sustainable. True this was the development of part of a reserve site, but the Inspector was entitled to note that there was no cap on numbers in these policies, and that SS1/SS2 and the Framework generally encouraged sustainable development. It was argued that to allow the development of part of a reserve site left open the prospect of other such small developments of parts of reserve sites effectively nullifying the purpose of policy C1(B). The Inspector recognised that this development ran counter to C1(B), but made it plain that any further development had to be considered on its own merits, and with an eye to the overall proportionality and sustainability of development in Stathern.

54. The Inspector's interpretation and application of these policies was a matter of planning judgement. He understood the nature of the conflict, reviewed the competing considerations, and reached a coherent conclusion. On the basis of the material before him, his decision was well within the bounds of what was reasonable, and I would have rejected the Council's case on ground 2. I note that his approach is not dissimilar to the approach taken by the Council's officers when considering the application.

Remedy

55. In the course of argument on ground 1, Ms Osmund-Smith submitted that if I was against the Defendant on the issue of the characterisation of the claim, and that the requirements set out at paragraph [66] of the judgment of *E* did not directly apply, that given that this was a case where the Council had made the causative error, I should consider the paragraph [66] requirements in the exercise of my discretion. In other words, that I should refuse to grant the remedy sought.

56. Mr Leader made two points in reply. Firstly that this argument was not taken in the Defendant's written case. Secondly, that the question ought to turn on prejudice. If no prejudice was caused by the error of law then a remedy might be refused. But where the error of law did cause prejudice, a remedy ought not to be refused. As to the first point, Ms Osmund-Smith asks me to record that this is to be seen in the context of the Council's failure to engage with the points made by the Defendant and the Interested Party in reliance upon E, or to make detailed submissions on the effect of the case until Mr Leader's oral submissions at the hearing before me.

57. I have concluded that, notwithstanding that it was the Council's error which has led to this claim, the decision of the Inspector should be quashed. The following are relevant to that decision:

    (1) To withhold a remedy from a party who has established a material error of law is a strong thing.

    (2) The grant of a remedy in this case is not academic. The Inspector's decision sets no precedent, because those taking any future planning decisions will know that this decision was based upon an incorrect version of the Local Plan. But there is the general public interest to consider. It is undesirable for planning decisions to be made on an incorrect basis. Planning decisions ought to be taken (and seen to be taken) on the basis of the adopted plan. And as I have noted, there is a degree of local opposition to this development.

    (3) Set against that is the position of the Interested Party, who has lost the outline planning permission he obtained at the appeal. Mr Leader submits that if the Interested Party has a well founded case for planning permission on the basis of the adopted plan, then he will get his permission when the matter is reconsidered.

    (4) The Interested Party will also have wasted a considerable amount of time and money in making the application and pursuing the appeal on the basis of the published plan. An order for the costs of the planning application and the appeal to the Inspector would remedy much of that. Indeed, Mr Leader accepted that if the Council succeeded, it would be subject to some "discipline". The costs of this appeal are a matter for further argument, although my provisional view is that the Council should at least pay the costs to the date of permission.

    (5) Finality in litigation is also a matter of relevance. Mr Corbet Burcher relied upon finality in support of his submissions on the lawfulness of the decision, but it also has a relevance in the consideration of remedy.

58. Having found that the decision is liable to be set aside because of an error of law, there needs to be some good reason not to grant a remedy. I am not satisfied that there is such a reason. The genuine prejudice to the Interested Party (and the Defendant) can be compensated in costs. The loss of a planning permission obtained as a result of an error of law is, in truth, not prejudice, and in any event is outweighed by the general public interest in planning decisions being determined on the correct basis. It would be wrong to withhold a remedy to punish the Council for its error. The decision has to be a principled one.

59. The appeal is allowed and the decision of the Inspector is to be remitted for further determination. May I express my gratitude to Counsel for all parties for their very considerable assistance.