Neutral Citation Number: [2023] EWHC 92 (Admin)

Case No: CO/3847/2021

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 January 2023

Before:

TIMOTHY MOULD KC
(sitting as a Deputy High Court Judge)

- -

Between:

MRS HEINI WATHEN-FAYED	**Claimant**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendant**
-and –	
(1) HORIZON CREMATION LIMITED	
(2) TANDRIDGE DISTRICT COUNCIL	
	Interested Parties

- -
- -

Paul Brown KC (instructed by **Fladgate LLP**) for the **Claimant**
Jonathan Darby (instructed by **Government Legal Department**) for the **Defendant**
Peter Goatley KC and Sioned Davies (instructed by **Addleshaw Goddard**) for the **First Interested Party**
The Second Interested Party did not appear and was not represented at the hearing.
Hearing date: 14 June 2022

- -

APPROVED JUDGMENT

This judgment was handed down remotely at 2pm on Friday 20 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Timothy Mould KC (sitting as a Deputy High Court Judge):

Introduction

1. This is an application under section 288 of the Town and Country Planning Act 1990 **['the TCPA']** to quash the decision of an inspector appointed by the Defendant allowing a planning appeal by the First Interested Party **['Horizon']** and granting planning permission, subject to conditions, for a crematorium with a ceremony hall, memorial areas, a garden of remembrance and associated parking and infrastructure **['the proposed development']** on land off Oxted Road, Oxted Surrey RH8 9NJ **['the site']**. The inspector made his decision by letter dated 30 September 2021 **['the DL']**. On 20 December 2021, Mr Timothy Corner KC (sitting as a Deputy High Court Judge) granted permission for the claim to proceed.

2. The site is located in the Metropolitan Green Belt. The Second Interested Party **['Tandridge']** had refused Horizon's planning application for the proposed development for three reasons which were set out in its notice of refusal dated 2 October 2020. In summary, those reasons were that the proposed development was inappropriate development in the Green Belt and there were no very special circumstances which clearly outweighed its harmful effects. In addition, the proposed development failed to respect the character and appearance of the site and its surroundings, including the protected landscape of the Surrey Hills Area of Outstanding Natural Beauty. The inspector allowed Horizon's planning appeal essentially on the basis that, in his view, the proposed development would meet an existing and growing community need for cremation facilities; would provide other social, economic and environmental benefits; and that these factors, taken together, clearly outweighed its harmful effects and demonstrated the very special circumstances required to justify the grant of planning permission for inappropriate development in the Green Belt.

3. The Claimant is a local resident and a member of the Oxted and Limpsfield Residents Group **['the OLRG']**. The OLRG is a formally constituted residents' association with over 2500 members. Since it was formed in 2008, a number of its members have been elected to serve as Tandridge Councillors. The OLRG had written to Tandridge raising objections to the proposed development. The Claimant supported the OLRG in raising those objections.

4. The inspector heard Horizon's appeal at a local inquiry which, due to the pandemic, was held virtually over four days between 10th August 2021 and 13th August 2021. Although the Claimant did not appear at the local inquiry, the OLRG did so through its acting chair, Catherine Sayer, who is also leader of Tandridge and a local ward councillor. The Claimant says that she was content that the OLRG would represent her interests at the inquiry.

5. In his detailed grounds of resistance, the Defendant declined to accept that the Claimant was a *"person aggrieved"* for the purposes of section 288(1) of the TCPA. However, in his skeleton argument on behalf of the Defendant, Mr Jonathan Darby informed the court that the Defendant no longer sought to challenge the Claimant's standing to bring her claim. That was also the position adopted by Mr Peter Goatley KC for Horizon at the hearing before me. Consequently, it is unnecessary for me to consider the

submissions on the question of standing made by counsel in their skeleton arguments and I do not do so.

6. The Claimant raises two grounds of challenge to the validity of the inspector's decision –

(1) The inspector failed properly to consider whether the provision of the proposed crematorium on the site would be contrary to section 5 of the Cremation Act 1902 **['the 1902 Act']** which was a material consideration to his determination of the First Interested Party's appeal.

(2) The inspector erred in concluding firstly, that having regard to the relevant policies of the National Planning Policy Framework **['the Framework']** and relevant guidance in Planning Practice Guidance **['the Practice Guidance']**, there was no need for a sequential assessment of sites for the proposed development; and secondly, that there were no reasonable alternative sites upon which to bring forward the proposed development.

7. Before turning to the facts, it is convenient to refer to the relevant provisions of the 1902 Act and departmental guidance upon which Mr Paul Brown KC for the Claimant founds his submissions in support of the first ground of challenge. I shall also refer to the provisions of the Framework and the Practice Guidance upon which Mr Brown relies in support of the second ground of challenge.

Cremation Act 1902

8. The long title to the 1902 Act states that it is *"[a]n Act for the regulation of the burning of Human Remains and to enable Burial Authorities to establish crematoria"*.

9. Section 2 of the 1902 Act defined the expression *"crematorium"* –

> "*In this Act* –
>
> .....
>
> *The expression "crematorium" shall mean any building fitted with appliances for the purpose of burning human remains, and shall include everything incidental or ancillary thereto*".

10. Section 5 of the 1902 Act states that –

> "*No crematorium shall be constructed nearer to any dwelling-house than two hundred yards, except with the consent, in writing of the owner, lessee or occupier of such house, nor within fifty yards of any public highway, nor in the consecrated part of the burial ground of any burial authority*".

11. Section 8 of the 1902 provides –

> "*Every person who…shall knowingly carry out or procure or take part in the burning of any human remains except in accordance with…the provisions of this Act, shall…be liable, on*

> *summary conviction, to a penalty not exceeding level 3 on the standard scale*".

12. In April 1978 the Department of the Environment issued a non-statutory memorandum entitled *"The siting and planning of crematoria"* **['the guidance']** whose stated purpose was *"to assist local authorities and others contemplating the construction of crematoria"*. The guidance remains extant.

13. Under the heading *"The Site"*, paragraph 5 of the guidance advised that *"[s]ufficient land is required to provide an appropriate setting for the crematorium, adequate internal access roads, car-parking space and space for disposal of ashes"*. Paragraph 13 advises further on the disposal of ashes –

> "*13. The area for the disposal of ashes, by strewing or by burial, should form a pleasantly treated part of the grounds. There now appears to be an increasing preference for burying ashes. Where strewing is adopted the ground will sour from the continuing application of ash and the plans should include more than one plot, if space for them can be provided (as these plots would be subject to the statutory requirements mentioned in paragraphs 17 and 18)…*".

14. Paragraphs 17 to 53 of the guidance are headed *"The Building"*. Paragraphs 17 and 18 offer the following advice about the provisions of the 1902 Act –

> "*17. The Cremation Act 1902 (Section 5) provides that no crematorium shall be constructed nearer to any dwelling house than 200 yards (184.880m), except with the consent in writing of the owner, lessee or occupiers of such house, nor within 50 yards (45.720m) of any public highway, nor in the consecrated part of a burial ground.*
>
> *18. By section 2 of the Act 'crematorium' means 'any building fitted with appliances for the purpose of burning human remains, and shall include everything incidental or ancillary thereto'. The Department is advised that the crematorium buildings, chapels and parts of the grounds used for the disposal of ashes come within this definition, but not ornamental gardens, carriageways or house for staff*'.

15. Paragraph 19 of the guidance identifies the primary elements of the crematorium building. Each is then described in greater detail in the paragraphs that follow. I should set out paragraph 49 which is headed *"Ancillary space"* –

> "*49. Adjoining the crematory there should be a small staff room, a workroom, lavatory and w.c. accommodation, a fan room, suitable accommodation for the pulverising machinery and for the storage of ashes and space for the central heating plan. It is inevitable that there will be some vibration and noise from the machinery; none of it ought to be audible in the chapel, and it is important that these rooms should be sited away from the chapel.*

> *Acoustic insulation will reduce noises from the fan room. The air inlet into the fan room should be through an opening at least 3m above ground level into an outside wall facing on to a yard so as to be as far as possible away from places used by mourners; the opening should be grilled or louvered so as to reduce noise. A cleaners' room should also be provided and at the larger crematoria an office may be desired for the senior operator. Information about the space required for meters should be obtained well in advance and their installation so arranged that the meters can be read without entering the crematory*".

16. In *R(Ghai) v Newcastle City Council and others* [2010] EWCA Civ 59; [2011] QB 591, the issue before the Court of Appeal was whether the appellant's desire to be cremated in accordance with his religious beliefs as a Hindu could reasonably be achieved in a structure which was a *"building"* within the meaning of section 2 of the 1902 Act: see [12] in the judgment of Lord Neuberger of Abbotsbury MR. The appellant's beliefs demanded that he be cremated in a structure which had at least one substantial aperture to enable sunlight to fall directly onto his body as it was being cremated by fire. Having reviewed the evidence as to the likely design of such a structure, the Court held that it would constitute a *"building"* within the meaning of section 2 of the 1902 Act.

17. Mr Brown drew attention to the approach to the meaning of words in an enactment as stated by the Master of the Rolls in [26] of his judgment –

> "*26. Deciding what a word means in a particular context can often be an iterative process, and the ultimate decision should not be affected by whether one starts with a prima facie assumption as to the meaning of the word and then looks at the context, or one starts by looking at the context and then turns to the word. However, if one approaches the issue by making a preliminary assumption as to the meaning of a word such as "building", then, in agreement with what Etherton LJ said in argument, I do not think that it would be right to take a somewhat artificially narrow meaning of the word, and then see whether the context justifies a more expansive meaning. It is more appropriate to take its more natural, wider, meaning, and then consider whether, and if so to what extent, that meaning is cut down by the context in which the word is used*".

18. Although the question of what is meant by the phrase *"everything incidental and ancillary thereto"* in section 2 of the 1902 Act did not arise directly in *Ghai's* case, in [29] the Master of the Rolls made the following observations about the purpose of section 5 of the 1902 Act –

> "*…If prohibiting publicly visible cremations was intended by the legislature, one would have expected to find some statement or provision to that effect, and it would have been only too easy to say so, either in the long title to the Act or by so providing in one of its provisions, especially as that aspect, or a point close to it, had been raised by the [Disposal of the Dead (Regulations) Bill*

> *1884]. Section 5 directly addresses the issue of the proximity of cremations to dwellings and highways, and, if it was intended to address the issue of the privacy of a cremation (rather than public health or privacy of residents and risk of congestion), it represents the limit of the protection the legislature thought it right to provide*".

19. It is also helpful to refer to [34] and [35] of the judgment of the Master of the Rolls in which he set out the assistance that he obtained from the 1902 Act itself in resolving the issue before the Court –

> "*34. In order to answer the issue to be determined on this appeal, it is right to consider what assistance can be got from the Act. At least for present purposes, the relevant aims of the Act, which can be gathered from its provisions, were to ensure that cremations were subject to uniform rules throughout the country, to enable the Secretary of State to regulate the manner and places in which cremations were carried out, to require a crematorium to be a building which was appropriately equipped, and to ensure that a crematorium was not located near homes or roads. The Act also envisaged that crematoria would be "constructed". These facets of the Act suggest to me that, provided it is relatively permanent and substantial, so that it can properly be said to have been "constructed", and provided it could normally be so described, a structure will be a "building" within the Act.*
>
> *35. In the light of these factors, I consider that there is no reason not to give the word "building" its natural and relatively wide meaning in section 2 of the Act, as discussed in paragraphs 21 to 26 above*".

20. Counsel have not discovered any further reported cases on the interpretation of *"crematorium"* in sections 2 and 5 of the 1902 Act. Mr Darby helpfully drew my attention to *Wright v Wallasey Local Board* (1887) 18 Q.B.D 783, a case concerning a prescribed separation distance of 100 yards between burial grounds and dwellings in section 9 of the Burial Act 1855. At page 785 of the law report, A.L. Smith J said that the clear purpose of the 100 yard limit was *"with a view to the health of the public"*.

Flood Risk Assessment – National Planning Policy and Practice Guidance

21. Paragraphs 159 to 169 inclusive of the Framework (as published on 20 July 2021) are headed *"Planning and flood risk"*. The overarching policy is given in paragraph 159 –

> "*159. Inappropriate development in areas at risk from flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere*".

22. The sequential approach to the location of development, and the role of the sequential test, are set out in paragraphs 160 to 162 of the Framework –

> "*160. Strategic policies should be informed by a strategic flood risk assessment, and should manage flood risk from all sources. They should consider cumulative impacts in, or affecting, local areas susceptible to flooding, and take account of advice from the Environment Agency and other relevant flood risk management authorities, such as lead local flood authorities and internal drainage boards.*
>
> *161. All plans should apply a sequential, risk-based approach to the location of development – taking into account all sources of flood risk and the current and future impacts of climate change – so as to avoid, where possible, flood risk to people and property. They should do this, and manage any residual risk, by:*
>
> *(a) applying a sequential test…:*
>
> ….
>
> *162. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding*".

23. Paragraph 167 sets out policy on determining applications for planning permission –

> "*167. When determining any planning applications, local planning authorities should ensure that flood risk is not increased elsewhere. Where appropriate, applications should be supported by a site-specific flood-risk assessment . Development should only be allowed in areas at risk of flooding where, in the light of this assessment (and the sequential and exception tests, as applicable) it can be demonstrated that:*
>
> *(a) within the site, the most vulnerable development is located in areas of lowest flood risk, unless there are overriding reasons to prefer a different location;*
>
> *(b) the development is appropriately flood resistant and resilient such that, in the event of a flood, it could be quickly brought back into use without significant refurbishment;*
>
> (*c) it incorporates sustainable drainage systems, unless there is clear evidence that this would be inappropriate;*

> *(d) any residual risk can be safely managed; and*
>
> *(e) safe access and escape routes are included where appropriate, as part of an agreed emergency plan*".

24. Footnote 55 to paragraph 167 gives further guidance on the circumstances in which a site-specific flood risk assessment should be provided –

> "*A site-specific flood risk assessment should be provided for all development in Flood Zones 2 and 3. In Flood Zone 1, an assessment should accompany all proposals involving: sites of 1 hectare or more; land which has been identified by the Environment Agency as having critical drainage problems; land identified in a strategic flood risk assessment as being at increased flood risk in future; or land that may be subject to other sources of flooding, where its development would introduce a more vulnerable use*".

25. The parties drew attention to the following paragraphs in the Practice Guidance series on the topic of *"Flood risk and coastal change"* –

> "***018 What is the sequential, risk-based approach to the location of development?***
>
> *This general approach is designed to ensure that areas at little or no risk of flooding from any source are developed in preference to areas at higher risk. The aim should be to keep development out of medium and high flood risk areas (Flood Zones 2 and 3) and other areas affected by other sources of flooding where possible.*
>
> *…*
>
> *019 What is the aim of the Sequential Test for the location of development?*
>
> *The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. The flood zones as refined in the Strategic Flood Risk Assessment for the area provide the basis for applying the Test. The aim is to steer new development to Flood Zone 1 (areas with a low probability of river or sea flooding).*
>
> *…*
>
> *Within each flood zone, surface water and other sources of flooding also need to be taken into account in applying the sequential approach to the location of development.*
>
> *…*
>
> **030 What is a site-specific flood risk assessment?**

A site-specific flood risk assessment is carried out by (or on behalf of) a developer to assess the flood risk to and from the development site. Where necessary the assessment should accompany a planning application submitted to the local planning authority. The assessment should demonstrate to the decision-maker how flood risk will be managed now and over the development's lifetime, taking climate change into account, and with regard to the vulnerability of its users.

The objectives of a site-specific flood risk assessment are to establish:

whether a proposed development is likely to be affected by current or future flooding from any source;

whether it will increase flood risk elsewhere;

whether the measures proposed to deal with these effects and risks are appropriate;

the evidence for the local planning authority to apply (if necessary) the Sequential Test, and;

whether the development will be safe and pass the Exception Test, if applicable.

031 What level of detail is needed in a flood risk assessment?

The information provided in the flood risk assessment should be credible and fit for purpose. Site-specific flood risk assessments should always be proportionate to the degree of flood risk and make optimum use of information already available, including information in a Strategic Flood Risk Assessment for the area and the interactive flood risk maps available on the Environment Agency's website.

…

033 How should the Sequential Test be applied to planning applications?

See the advice on the sequential approach to development and the aim of the sequential test.

The sequential test does not need to be applied for individual developments on sites which have been allocated in development plans through the Sequential Test, or for applications for minor development or change of use (except for a change of use to a caravan, camping or chalet site, or to a mobile home or park home site).

Nor should it normally be necessary to apply the Sequential Test to development proposals in Flood Zone 1 (land with a low probability of flooding from rivers or the sea), unless the Strategic Flood Risk Assessment for the area, or other more recent information, indicates there may be flooding issues now or in the future (for example, through the impact of climate change).

For individual planning applications where there has been no sequential testing of the allocations in the development plan, or where the use of the site being proposed is not in accordance with the development plan, the area to apply the Sequential Test across will be defined by local circumstances relating to the catchment area for the type of development proposed. For some developments this may be clear, for example, the catchment area for a school. In other cases it may be identified from other Local Plan policies, such as the need for affordable housing within a town centre, or a specific are identified for regeneration. For example, where there are large areas in Flood Zones 2 and 3 (medium to high probability of flooding) and development is needed in those areas to sustain the existing community, sites outside them are unlikely to provide reasonable alternatives.

When applying the Sequential Test, a pragmatic approach on the availability of alternatives should be taken. For example, in considering planning applications for extensions to existing business premises it might be impractical to suggest that there are more suitable alternative locations for that development elsewhere. For nationally or regionally important infrastructure the area of search to which the Sequential Test could be applied will be wider than the local planning authority boundary.

Any development proposal should take into account the likelihood of flooding from other sources, as well as from rivers and the sea. The sequential approach to locating development in areas at lower flood risk should be applied to all sources of flooding, including development in an area which has critical drainage problems, as notified to the local planning authority by the Environment Agency, and where the proposed location of the development would increase flood risk elsewhere.

…

034 Who is responsible for deciding whether an application passes the Sequential Test?

It is for local planning authorities taking advice from the Environment Agency as appropriate, to consider the extent to which Sequential Test considerations have been satisfied, taking into account the particular circumstances in any given case. The

> *developer should justify with evidence to the local planning authority what area of search has been used when making the application. Ultimately the local planning authority needs to be satisfied in all cases that the proposed development would be safe and not lead to increased flood risk elsewhere*".

Horizon's application for planning permission

26. On 31 March 2020 Horizon applied to Tandridge for planning permission for the proposed development. The planning application was supported by a design and access statement, paragraph 3.7 of which stated –

> "*The location of the crematorium is governed by the 1902 Cremation Act requiring it to be '200 yards' from residential buildings and 50 yards from any highway. This limits the building to one small area on the site. These constraints inform the layout, shape and form of the building, creating a building bespokely designed to this specific site*".

27. The small area in question was shown on a site plan. The footprint of the proposed crematorium building covered the majority of the residual, broadly triangular area in the centre of the site which remained following the application of the separation distances mentioned in paragraph 3.7 of the design and access statement. The proposed car park and memorial garden were proposed to be located on those parts of the site which fell within those stated separation distances. In other words, both the car park and the memorial garden were proposed to be located within 200 yards of neighbouring residential buildings, or within 50 yards of a highway, or both. The ground floor layout of the proposed crematorium building was shown in greater detail on the floor plan submitted with the planning application. An illustrative landscape masterplan showed the proposed location and layout of the car park and memorial garden.

28. The site lies within the Metropolitan Green Belt and an area designated by the Environment Agency as Flood Zone 1 (areas with a low probability of sea or river flooding). A Strategic Flood Risk Assessment **['the SFRA']** prepared in December 2017 for Tandridge, Reigate and Banstead Borough Council and Mole Valley District Council identified areas which were assessed as being at risk of ground water flooding. The site lies within one such area. The diagram included as appendix F to the SFRA indicates that within such an area, there is a risk of groundwater flooding to both surface and sub-surface assets, with a possibility of groundwater emerging at the surface locally.

29. In support of its planning application, Horizon submitted a site specific flood risk assessment entitled *"Drainage Strategy and Flood Risk Assessment"* **['the FRA']** prepared on its behalf by a firm of consulting civil and structural engineers. Section 3 of the FRA was headed *"Flooding"* and included the following advice –

> "…
>
> *3.3 Sequential Test*

> *The Sequential Test ensures that a sequential approach is followed to steer new development to areas with the lowest probability of flooding. As this site is entirely within Flood Zone 1, the sequential test is not relevant*".
>
> …
>
> *3.6 Flooding from Groundwater*
>
> *A review of the SFRA shows the site has potential for groundwater flooding at the surface. Site investigation will be carried out to establish the groundwater levels on the site. The proposed development will be designed to take cognisance of these recorded levels*.
>
> …
>
> *Based on the review of available information, the site is not at risk of flooding. The proposals to develop the site will not have a significant impact on the current surface water regime*".

30. Horizon also supported its application for planning permission with a further document entitled *"Oxted Crematorium, Barrow Green Road, Oxted Site Search Appraisal"* prepared in March 2020 **['the SSA']**. The stated purposes of the SSA were to explain how the site came to be chosen for the proposed development and the processes that went into identifying it. In order to inform and guide the site search process and the comparative evaluation of candidate sites, paragraph 2.9 of the SSA took as a reference point a document published by the Federation of Cremation and Burial Authorities entitled *"Recommendations on the Establishment of Crematoria"*. From the advice given in that publication, Horizon drew up five *'basic criteria'* which included the following –

> "*2.9.3 The crematorium cannot be constructed within 200 yards of a dwelling or 50 yards of the public highway*".

31. In paragraph 2.10 of the SSA, Horizon then set out an expanded list of criteria that the selected site needed to meet. Those criteria included the following -

> "*2.10.4 The site had to allow the positioning of the crematorium buildings over 200 yards (183m) from residential properties and 50 yards (46m) from the public highway, to comply with the requirements of the Cremation Act 1902*";

and

> "*2.10.8 The site must not flood*".

32. Paragraphs 3.43 to 3.49 of the SSA set out Horizon's appraisal of the site. Paragraphs 3.44 and 3.49 stated –

> "*3.44 There are existing houses at the junction of Barrow Green Lane and the A25 and along the lower section of Tandridge Hill Road. This reduces the developable area for a crematorium within the site to a narrow parcel just to the east of the centre of the site.*
>
> *…*
>
> *3.49 From a practical perspective the site works well. There are no pylons and the site does not flood*".

33. On 11 May 2020 the OLRG wrote to Tandridge a detailed letter of objection to Horizon's planning application. One of the OLRG's objectives is to maintain the protection offered by the Green Belt in Tandridge. In summary, the OLRG opposed the proposed development as inappropriate to the Green Belt, detrimental to the character and appearance of the local area and unnecessary. The OLRG contended that the SSA was both inadequate and superficial. It was said that there was no demonstrable need for a new crematorium to serve Tandridge and that existing or permitted facilities had the capacity to meet wider needs. There were no very special circumstances which clearly outweighed the harmful impact of the proposed development.

34. One of the objections raised by the OLRG was that the site was prone to surface water flooding, a flood risk which had not been taken into account by Horizon and required careful consideration by Tandridge with the benefit of specialist advice from the Environment Agency and the lead local flood authority, Surrey County Council. Paragraphs 41 to 43 of the OLRG's letter of 11 May 2020 raised the issue of surface water flooding. The ORLG stated that the area in and around the site was known locally to suffer from frequent surface water flooding. That posed a problem for the proposed development which had not been properly considered. The suitability of the site for the proposed development in light of the risk of flooding could not be addressed without input from the Environment Agency and the Local Lead Flood Authority.

35. Paragraphs 89 to 94 of the OLRG's letter set out a number of criticisms of the SSA, which was said to be superficial and self-serving. The OLRG did not refer in their letter to the requirements of the 1902 Act; nor did they raise any specific doubts as to whether the proposed development was able to satisfy the separation distances from neighbouring dwellings and local highways which the SSA had taken as one of the basic criteria for the location of the proposed new crematorium.

36. On 24 June 2020, Mercia Crematoria Developments Limited **['Mercia']** wrote to Tandridge objecting to the proposed development. Mercia informed Tandridge that it was an experienced developer of new crematoria. It had identified the need for a new crematorium in the area to the north of Tandridge and a suitable site near Farleigh which it considered suitable to meet that need in the most sustainable way. A planning application was said to be in preparation.

37. Amongst the objections that Mercia raised against the proposed development was to question Horizon's assertion that the site was able to accommodate the proposed development without contravening section 5 of the 1902 Act. The letter said this –

> "*Section 5 of the Cremation Act 1902 requires new crematorium buildings (including everything incidental or ancillary to them) to be constructed at least 200 yards from any dwelling (except with the owner/occupier/lessee's written consent) nor within 50 yards of a public highway (which includes public rights of way). The proposed building runs along these lines – with the walls and doors opening out into these zones. Furthermore, the entrance porch (porte cochere) is a requirement of Government (DoE) and industry (FBCA) guidance for new crematoria and these have been deliberately detached from the main building in a contrived attempt to avoid claims that these elements may also be located within these zones.*
>
> *The applicant also appears to have overlooked the requirement in the Cremation Act 1902 for incidental or ancillary spaces/features around the crematorium building to also be located outside the statutory minimum spacings to dwellings and public highways. The service yard, pedestrian access to the crematorium building and the memorial gardens (which allow for the scattering of ashes and are a requirement of current Government guidance) are all located well within 200 yards of an existing dwelling out of necessity as there is simply no space available for such purposes within the small triangle of land at the centre of the site. It is therefore not clear how the operation of the proposed development would be lawful even with the contrived design. This again is evidence that the site is simply too constrained to deliver a new crematorium that functions appropriately for its future users and the surrounding area*".

38. Mercia also raised the issue of flood risk. It asserted that the site was *"at medium risk of ground water flooding and so equivalent in nature to being located within Flood Zone 2 with respect to coastal and fluvial flooding"*. Mercia contended that Tandridge should apply the sequential test to the proposed development. It argued that the proposed development failed that test due to the availability of its own, sequentially preferable proposal on land near Farleigh.

39. On 30 June 2020, Horizon wrote to the planning officer at Tandridge in response to a question as to how it was proposed to inter ashes during operation of the proposed development. Horizon said that its usual policy was to allow families to scatter ashes directly on to the ground in the memorial garden. However, it was willing to accept the imposition of a planning condition restricting this practice, if that was shown to be necessary to avoid contamination of groundwater beneath the site. Horizon drew attention to a crematorium in Scotland where a similar issue had arisen. The solution had been to contain ashes in watertight and secure polymer caskets which were placed in secure cairns at the site. This enabled families to memorialise ashes without interment in the ground. In the event that ashes were left on-site without instruction from the family, they were securely stored pending arrangements for their collection.

40. On 24 July 2020, Horizon's planning consultants wrote again to Tandridge seeking to address concerns raised by the planning officer about the degree to which the proposed

development complied with the requirements of the 1902 Act. A particular issue was whether the memorial gardens would comply with the Act. In an internal email dated 23 July 2020 which was forwarded to Tandridge, Horizon said –

> "*…As you know, we are amending our plans so that even on the strictest interpretation of the guidance we are in full compliance with the terms of the Act. However, [the planning officer] has raised the question of whether the memorial gardens would comply with the Act*".

Horizon's email then referred to paragraph 18 of the guidance (which I have set out in [15] above) and continued –

> "*Horizon does not dispose of ashes in its memorial gardens. We will not do so here in Oxted and would accept a planning condition to that effect. The scattering of ashes would not be allowed. Instead, mourners would be able to store ashes in the memorial gardens in suitably designed receptacles. Consequently, should families choose to remove ashes from the gardens at some point this would be perfectly possible. As a result, we are compliant with the guidance, because the memorial gardens are classed as "ornamental gardens" and not "parts of the grounds used for the disposal of ashes*".

41. Horizon said that families who chose to keep ashes in the memorial gardens would have two options –

> "*1. They can lease receptacles that hold one or two urns above ground. At our Clyde Coast facility, the receptacles are made of stone with a concrete base and constructed to look like cairns. At the facility we are currently building at Cannock, the receptacles will be made of Corten steel on a concrete base, again to reflect the architecture of that site. Each receptacle is then lined with a sealed steel liner. Into this is placed the ashes which themselves are placed in a sealed poly container that does not degrade.*
>
> *2. Families that might otherwise choose to scatter ashes are offered a place in a secure communal storage area. Again this is constructed above ground and sits about 70cm high. At the Clyde Coast, it is constructed of stone with a concrete base. It is then lined in steel and divided into large sealed compartments, each one of which will hold 30 urns. Ashes are stored in individual poly containers within each steel compartment. The position of ashes is recorded using an alpha numeric system with each set of remains given an individual number that is recorded centrally and marked on both the poly container and within the storage area.*
>
> *The advantages of this system are two-fold:*

> 1. *There is no contamination of the ground by human remains.*
>
> 2. *Should families subsequently change their minds about how they want ashes to be stored they are able to retrieve the remains of their relative*".

42. Horizon's email concluded that although it had yet to carry out the detailed design for these individual and communal areas for the storage of ashes, the fundamental method of construction would be as so described. In her email of 24 July 2020, Horizon's planning consultant referred to a number of amendments made to the submitted design for the crematorium and then said –

> "*In the memorial garden, as [Horizon] set out in the email I sent you yesterday, the intention is not to allow the scattering of ashes at all but instead have modest ash storage structures and pillars which can incorporate urns. A similar system is being used at Horizon's site at Cannock.*
>
> *I attach the illustrative layout plan for the garden that has been prepared by the landscape architect for your consideration….As there will be no disposal of ashes in this area, it is not necessary for this garden to be outside the 200 yard zone set by the 1902 Cremation Act*".

The planning officer's report

43. Horizon's planning application was determined by the planning officer at Tandridge under delegated powers. The planning officer's report on the proposed development **['the report']** recorded that neither the Environment Agency nor Surrey County Council as lead local flood authority objected to the grant of planning permission, subject to the imposition of conditions. The planning officer stated that third parties had objected to the proposed development. Amongst the points of objection were the allegation that the site was prone to surface water flooding, particularly at the position of the proposed crematorium buildings; and the contention that the crematorium, its associated gardens and outdoor areas were within 200 yards of the nearest dwelling and so the requirements of section 5 of the 1902 Act had not been satisfied. The planning officer addressed each of those two issues in the report.

44. The planning officer considered the issue of compliance with the 1902 Act in paragraphs 35 to 41 of the report. Having set out the provisions of sections 2 and 5 of the 1902 Act, in paragraphs 37 to 41 the planning officer said –

> "*37. Third party representations have contended that the development would not meet the siting restrictions. These comments state that whilst the buildings may meet the 200 yard distance requirement relative to neighbouring residential properties, the ancillary elements (car parking, gardens etc) would not. Restrictions upon development arising from non-planning legislation are not normally a material consideration. In this instance, however, restrictions which could jeopardise the deliverability of the development would be material insofar as it*

> *would undermine the case for very special circumstances. This case, assessed later in this report, argues that the proposed development would satisfy a pressing social/community need. The inability to deliver the development would undermine therefore the case for very special circumstances.*
>
> *38. However, it is not considered that the proposed development would be clearly prohibited by other non-planning legislation. The distance restrictions set out in Section 5 are not determinative in that it clearly states that a crematorium may be constructed within 200 yards (182.3m) of a neighbouring residential property with the consent of the owner and/or occupiers of the dwelling.*
>
> *39. Furthermore, it is important to note that the Cremation Act 1902 does not define the terms 'incidental' or 'ancillary'. The legislation predates the Town and Country Planning Act 1947 which established the planning system, and it is far from clear that the definition/legal use of these terms within the planning system would be applicable to that of the earlier Act. There is little case law to address this specific point.*
>
> *40. It is useful to note the Department of Environment publication 'The Siting and Planning of Crematoria' dating from 1978. This clarified that a crematorium would include buildings and parts of grounds used for the disposal of ashes but not 'ornamental gardens, carriageways or houses for staff'. This would seem to exclude parking areas, access routes and memorial gardens.*
>
> *41. On the basis of the above, this report considers that the proposal would meet the restrictions set out in relevant, non-planning legislation and assesses the proposal as a deliverable site*".

45. The planning officer considered the issue of flood risk in paragraphs 91 to 96 of the report. The planning officer referred to the overarching policy now stated in paragraph 159 of the Framework. Reference was made to policy DP21 of the Tandridge District Local Plan Part 2: Detailed Policies 2014 which advised that development proposals should seek to secure opportunities to reduce both the cause and impact of flooding. The report continued as follows –

> "*93. The site is located within the Environment Agency classification as Flood Zone 1 (low probability). This signifies a less than 1 in 1000 annual probability of river or surface water flooding and is suitable for development and various land uses. The principle of development of this land, therefore, is accepted.*
>
> *94. The introduction of built form and hard surfacing and the change in land use must be accompanied by surface water drainage and sustainable drainage systems (SuDS) as set out in*

> *Policy CSP15 of the Core Strategy. The Stage 1 Geoenvironmental report identifies the low risk of flooding but notes potential water monitoring considerations with respect to the site itself and those connected to the Oxted Sandpits to the north.*
>
> *95. The drainage and landscaping strategies will assist in the overall drainage of the site and ensure surface water run-off may be adequately controlled. The Environment Agency and Surrey County Council (in its capacity as the Lead Local Flood Authority) have not objected to the proposal subject to appropriate conditions.*
>
> *96. The proposed development is thus considered to accord with planning policies in relation to flood risk and drainage matters*".

46. Paragraphs 126 and 127 of the report considered alternative sites. Reference was made to the difficulties in finding a suitable site for a crematorium in the Tandridge area given that such a site is unlikely to be available in an urban setting, by virtue of the separation distances required by section 5 of the 1902 Act and, conversely, that a high proportion of the district lies within the Green Belt. Paragraph 127 stated –

> "*127. Within this context, development should be allowed only in very special circumstances. Best practice would suggest that site identification should accord with a sequential approach and consideration. The application includes a Site Selection Report which sets out that the application site is the preferred option. This report does not consider, however, the Farleigh Road site mentioned by third parties*".

47. The candidacy of the Farleigh Road site as an alternative location for a new crematorium was a key theme of the written objections which Mercia raised in response to Horizon's planning appeal. On 18 June 2021 Mercia wrote to the planning inspectorate advancing the case for its proposed new crematorium at Farleigh (at that time also subject to a pending planning appeal following Tandridge's refusal of planning permission in November 2020) as a deliverable alternative to the appeal scheme; and as an *"important material consideration"* in the inspector's determination of Horizon's planning appeal.

48. Mercia went on to enumerate four *"concerns"* about the proposed development on the basis of which it argued that Horizon's planning appeal should be dismissed. Two of those points of concern are relevant to the grounds of appeal advanced by the Claimant. Firstly, in relation to flood risk –

> "3. *Whilst not identified by the LPA as part of the decision making process, the appeal site is located on land shown to be at medium risk of groundwater flooding as set out in Tandridge District Council's SFRA. Policy DP21 of the Local Plan Part 2: Detailed Policies, requires a sequential approach to developing on sites found to be at medium or high risk of flooding within the Council's SFRA. To emphasise this point further, the proposed*

> *consultation on revisions to the NPPF (January 2021) seeks to make it abundantly clear in an amended paragraph 161 that the aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source (my emphasis) It is thus patently wrong in policy terms to only consider the sequential approach in relation to fluvial and coastal flooding only.*
>
> *In accordance with Policy DP21, development proposed on land at medium risk of flooding should be subject to a sequential test to determine whether there are suitable alternative sites for development at lower flood risk. This process was not however undertaken as part of the Council's assessment and determination of the planning application. This is a significant oversight and failed to take account of a matter that is clearly a material consideration. This is all the more serious as in this case there is a site available that is at a lower risk of flooding from any source – Mercia's own site at Old Farleigh Road – which is an available and deliverable alternative to accommodate a crematorium facility. In this case however, the application proposals have not been supported by a sequential assessment undertaken by the applicant which should by itself necessitate refusal in line with paragraph 161 of the NPPF. In any event however, a sequential test could not be passed given the alternative site that exists. The proposals therefore fail to comply with Policy DP21 and relevant national planning policy in the NPPF and should be refused for this reason alone*".

49. Mercia's other, relevant objection concerned the ability of the proposed development, if permitted, to satisfy the requirements of section 5 of the 1902 Act –

> "*4. The siting of new crematoria is regulated by Section 5 of the Cremation Act 1902. This prevents the construction of a new crematorium (defined in the legislation as a crematorium building and everything incidental or ancillary to it) within 50yds of a public highway or 200yds of a dwelling. Undertaking cremations in breach of these siting criteria is a criminal offence with potential penalties as set out in Section 8 of the Cremation Act 1902. In order to address the need that exists for additional crematorium capacity in the area, it is crucial that any new crematorium is deliverable and able to lawfully carry out cremations in order to meet the need.*
>
> *The appeal scheme however is remarkably contrived as evidenced by the array of lines drawn on the site plan to indicate the various distance restrictions to dwellings and public highways. In practice, this leaves a small triangular shaped area within the centre of the site where the appellant has tried to 'squeeze' in a crematorium building. However, this contrived exercise results in all means of pedestrian and service access to*

> *the building being within the restricted zones and even windows and doors would open out in a way that appears to breach the restrictions. The entrance porte cochere and even the memorial gardens for the scattering of ashes are also within the restricted zones and these are features clearly ancillary to the operation of the crematorium building and specifically required by the Department of Environment's 1978 guidance document 'The Siting and Planning of Crematoria'.*
>
> *In practice, therefore, Mercia has significant concerns about whether the proposed new crematorium could be lawfully constructed or operate lawfully even if granted planning permission. Whilst the lawfulness of an operation under other legislation can sometimes be argued as immaterial to a scheme's planning merits, in this case however it would go to the very heart of whether the appeal scheme is deliverable and thus whether it could actually address the compelling need that the appellant claims. Moreover, it is certainly obvious that the appeal site would provide no opportunity for lawful expansion of the crematorium in the future in order to respond to continuing likely increases in cremation demand thus in turn increasing the likelihood of another greenfield site in the Green Belt being required in future years for development.*
>
> *In contrast however, Mercia's appeal scheme on the site near Farleigh sees the crematorium building located over 300yds from the nearest dwelling and comfortably outside the 50yd restriction to public highways. Indeed, given that Mercia's site is generously proportioned and free of many of the siting restrictions inherent to the appeal site, there would be ample space for a crematorium to expand if needed without contravening siting restrictions contained in the Cremation Act 1902 in order to meet increased demand in future years. Mercia's proposed crematorium is therefore a viable, deliverable alternative scheme that could, without question, address current and future crematorium need in the locality*".

50. The planning consultant who gave expert evidence on behalf of Horizon to the local inquiry provided a brief written response to Mercia's points of concern. That written response included the following evidence –

> "*Reference is made to flooding. The appeal proposals have been subject to flood risk assessment and there is no requirement for a sequential test to be undertaken on this site. There are no objections from the statutory consultees to the site in respect of flooding.*
>
> *The appeal site proposals accord with the Cremation Act 1902*".

The inspector's decision

51. In DL3, the inspector recorded it as being common ground between the main parties to the planning appeal that, under the policy of the Framework, the proposed development was inappropriate development in the Green Belt. By definition, it was harmful to the objectives of the Green Belt and should not be permitted unless justified on the basis of very special circumstances which clearly outweighed its harmful effects. In DL4, the inspector identified the main issues in the planning appeal as –

    (1) The proposed development's effects in respect of the purposes of Green Belt policy.

    (2) The proposed development's effects on the character and appearance of the area, including the setting of the Surrey Hills Area of Outstanding Natural Beauty.

    (3) Whether the harm to the Green Belt and any other harm would be clearly outweighed by the need for and benefits of the proposal, so as to amount to the very special circumstances required to justify the scheme.

52. I note that the inspector identified neither the ability of the proposed development to satisfy the requirements of the 1902 Act nor the site's exposure to the risk of flooding as among the main issues in the determination of the planning appeal.

53. The inspector's reasons included the following paragraphs in which he described the location of the crematorium building and its associated facilities within the site –

> "*8. The highest point of the appeal site is the southwest corner, with the land falling towards the lowest point to the northeast. The land also falls away from the A25 to the north. The main crematorium building comprises three pitched-roof sections linked by flat-roofed walkways. Located quite centrally within the site, its siting and design conform with the various laws and regulations governing crematoria.*
>
> *9. The crematorium, including its car parking and operational areas, would be to the east side of the site served by the new access onto Barrow Green Road. The western third of the site is to be kept free of development and managed as meadow. Thus, the crematorium and its operational areas would be set within the lower part of the site, with woodland planting screening the sides visible from the surrounding roads*".

54. The inspector set out his reasons on the first and second main issues in DL10 to DL29. He then turned to a number of other matters. In DL32 and DL33 he addressed the issue of flood risk –

> "*32. Objections to the proposal from interested parties refer to the absence of a sequential approach to flood risk. As set out in Framework paragraph 162, this is to steer new development to areas with the lowest risk of flooding from any source and for this not to be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower*

> *risk of flooding. The site is mapped by the Environment Agency as within Flood Zone 1, an area of low probability of flood risk, where the PPG advises it is not normally necessary to apply the Sequential Test, unless the Strategic Flood Risk Assessment (SFRA) for the area, or other more recent information, indicates there may be flooding issues now or in the future.*
>
> *33. The proposal's Flood Risk Assessment (FRA) refers to the Council's SFRA showing the site having potential for groundwater flooding at the surface. The FRA says that site investigation will be carried out to establish the groundwater levels on the site, and development designed to take cognisance of these. I note the Lead Local Flood Authority (Surrey County Council) has raised no objections to the scheme subject to conditions. Were I to conclude the sequential test was necessary due to a medium degree of flood risk from groundwater sources, the PPG advises a pragmatic approach on the availability of alternatives. The proposed new crematorium to the north of Farleigh in Tandridge District is proposed as such. However, this has been refused planning permission and an appeal decision is pending. Currently, I consider there to be no reasonably available sites at a lower risk of flooding to this scheme. In any case, I am satisfied with the conclusions of the proposal's FRA that there is not the requirement for such a sequential test to be undertaken. Subject to conditions, I find no substantiated objection to this proposal on grounds of flood risk*".

55. The inspector then turned to the third main issue, the question whether there had been shown to be very special circumstances to justify the proposed development. In DL34, DL35 and DL36 he said –

> "*34. Under the Cremation Act 1902, crematoria normally need to be located at least 200 yards away from the nearest dwelling and 50 yards away from a public highway. These constraints make a Green Belt location difficult to avoid in this part of Surrey, given the extent of its coverage outside of the built-up areas.*
>
> *35. The appellant had selected the site based on a Site Search Appraisal (SSA) that looked at an area wider than both Tandridge and the Green Belt. This had found no suitable sites outside the Green Belt. The SSA sieved further sites applying criteria that included availability, chance of gaining planning permission, Cremation Act compliance, accessibility, utilities and flood risk*
>
> *36. The principle of a Green Belt location was not disputed at the Inquiry. The Council had accepted the SSA conclusions in*

> *determining the application, and the availability of more suitable sites formed no part of the reasons for refusal….".*

56. Having carried out a detailed assessment of the third main issue in DL34 to DL49, the inspector drew his overall conclusions –

> "*50. The overall degree of harm in respect of Green Belt purposes to prevent encroachment and preserve openness would in this case be moderate. Nevertheless, paragraph 148 of the Framework requires I attach substantial weight to this harm, along with the harm implicit from the scheme's acknowledged inappropriateness within the Green Belt. Added to this is a moderate degree of further harm to the character and appearance of the area, through the scheme partially closing an open view to the chalk escarpment, adversely impacting upon the setting of the AONB.*
>
> *51. However, cremation facilities meet an essential community need which in this area is currently not being fully met, either quantitatively or qualitatively, with demand forecast to increase steeply. The proposal would make a significant contribution towards meeting this existing and growing need. This is a need to which I attach very substantial weight. Along with the incidental social, economic and environmental benefits the scheme would provide, I find that the other considerations in this case clearly outweigh the harm that I have identified. Accordingly, I consider that the very special circumstances exist which justify the development. The proposal would therefore accord with Green Belt Policy DP10, and the development plan as a whole, satisfying also national policy as set out in the Framework*".

57. The inspector granted planning permission for the proposed development subject to 18 conditions. In DL53, the inspector said that he had imposed condition 6 in order to ensure sustainable drainage arrangements –

> "*6) The development hereby permitted shall not commence until details of the design of a surface water drainage scheme have been submitted to and approved in writing by the local planning authority. The details shall include:*
>
> *a) The results of infiltration testing completed in accordance with BRE Digest: 365 and confirmation of groundwater levels.*
>
> *b) Evidence that the proposed final solution will effectively manage the 1 in 30 and 1 in 100 (+40% allowance for climate change) storm events, during all stages of the development.*
>
> *c) Detailed drainage design drawings and calculations to include: a finalised drainage layout detailing the location of drainage elements, pipe diameters, levels, and long and cross*

> *sections of each element including details of any flow restrictions and maintenance/risk reducing features (silt traps, inspection chambers etc).*
>
> *d) A plan showing exceedance flows (i.e. during rainfall greater than design events or during blockage) and how property on or off site will be protected.*
>
> *e) Details of drainage management responsibilities and maintenance regimes for the drainage system.*
>
> *f) Details of how the drainage system will be protected during construction and how runoff (including any pollutants) from the development site will be managed before the drainage system is operational.*
>
> *The development shall thereafter be carried out, and ground infiltration of surface water drainage thereafter only permitted, in accordance with the approved surface water drainage scheme*".

Legal principles

58. The principles upon which the court acts in deciding a challenge brought under section 288 of the Town and Country Planning Act 1990 **['the 1990 Act']** to the validity of a planning appeal decision were stated by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746 at [6]. For the purposes of the present claim, I need only refer to the following familiar principles –

> (1) Decisions of inspectors in planning appeals are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to rehearse every argument relating to each matter in every paragraph.
>
> (2) The inspector's reasons for his or her decision must be intelligible and adequate, enabling the informed reader to understand why the appeal was decided as it was and what conclusions the inspector reached on the "principal important controversial issues". The inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration.
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the inspector. They are not for the court, save only in a case in which the claimant establishes that the inspector has acted irrationally. In determining a planning appeal, the inspector is free to give material considerations whatever weight he or she thinks fit or, indeed, no weight at all. Essentially for that reason, an application under section 288 of the

1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision.

59. For the purpose of determining Horizon's planning appeal, the inspector was under a duty to have regard to any material considerations: see section 70(2) of the 1990 Act, read together with section 79(4)(a) of that Act.

60. It will not ordinarily be a material consideration to the determination of a planning application that the applicant would, if granted planning permission, need to overcome legal obstacles in order to implement the authorised development. The principle was stated by Lord Keith in *British Railways Board v Secretary of State for the Environment* [1993] 3 PLR 125, 133E-H –

> "*The function of the planning authority is to decide whether the proposed development is desirable in the public interest. The answer to that question is not to be affected by the consideration that the landowner of the land is determined not to allow the development so that permission for it, if granted, would not have reasonable prospects of being implemented. That does not mean that the planning authority, if they decide that the proposed development is in the public interest, is absolutely disentitled from taking into account the improbability of permission for it, if granted, being implemented. For example, if there were a competition between two alternative sites for a desirable development, difficulties of bringing about implementation on one site which were not present in relation to the other might very properly lead to the refusal of planning permission for the site affected by the difficulties and the grant of it for the other. But there is no absolute rule that the existence of difficulties, even if apparently insuperable, must necessarily lead to refusal of planning permission for a desirable development. A would-be developer may be faced with difficulties of many kinds, in the way of site assembly or securing the discharge of restrictive covenants. If he considers that it is in his interests to secure planning permission notwithstanding the existence of such difficulties, it is not for the planning authority to refuse it simply on their view of how serious the difficulties are*".

61. However, as Lord Keith acknowledged in that extract from his speech in the *British Railways Board* case, there will be cases in which it will be reasonably open to the local planning authority determining a planning application (or an inspector deciding a planning appeal) to have regard to difficulties of implementation as a material consideration. There will also be planning applications or appeals in which, on the facts of the case, the local planning authority or the inspector, as the case may be, would act unreasonably in determining the planning application were they not to have regard to difficulties of implementation. In such a case, the allegation may properly be made that the decision maker has failed to have regard to a material consideration: see *R(Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PYSR 221 at [30]-[32]. *London Historic Parks and Garden Trust v Minister of State for Housing*

[2022] EWHC 829 (Admin) is an example of such a case: see Thornton J's judgment at [109]-[111].

62. The inspector was under a duty to give his reasons for his decision: see rule 19(1) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) Rules 2000 (SI 2000 No. 1625). In *Bolton Metropolitan District Council v Secretary of State for the Environment* (1995) 71 P&CR 309, 314-315, Lord Lloyd of Berwick emphasised that whilst the planning appeal decision maker is under a duty to have regard to every material consideration, he or she need not mention them all. Lord Lloyd explained what is required of the decision maker in the following passages of his speech, which were cited as authoritative by Lord Brown of Eaton-under-Heywood at [34] of his speech in *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953 –

> "*34. …"…What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the 'principal important controversial issues'. To require him to refer to every material consideration, however insignificant, and to deal with every argument, however peripheral, would be to impose an unjustifiable burden…Since there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for drawing any inference" – the inference suggested being 'that the decision-maker has not fully understood the materiality of the matter to the decision' – " will necessarily be limited to the main issues, and then only, as Lord Keith pointed out [in R v Secretary of State for Trade and Industry, Ex p Lonrho plc [1989] 1 WLR 525, 540], when 'all other known facts and circumstances appear to point overwhelmingly' to a different decision.*"

Ground 1 – the Cremation Act 1902

Submissions

63. For the Claimant, Mr Brown submitted that the question whether the proposed development, if permitted, could be delivered without contravening the separation distances between crematoria and neighbouring dwellings prescribed by section 5 of the 1902 Act was an important material consideration in the determination of Horizon's planning appeal.

64. Mr Brown submitted that although statutory restrictions which might impede the actual implementation of a planning permission are ordinarily treated as immaterial to the determination of a planning application, the position was different in a case where, as here, the ability to deliver the proposed development in a timely way is relied upon as a key factor weighing in its favour. Horizon's case on appeal before the inspector was that the ability of the proposed development to meet the identified need for new crematoria provided the very special circumstances required clearly to outweigh the harm to the Green Belt. If it was not possible to deliver the proposed development in compliance with section 5 of the 1902 Act, it could not justifiably be said that the

proposed development was capable of meeting that need; and Horizon's case for the grant of planning permission would be greatly undermined. Mr Brown relied upon *London Historic Parks and Garden Trust v Minister of State for Housing* [2022] EWHC 829 (Admin) at [107]-[111].

65. It was therefore necessary for the inspector properly to address the question whether the proposed development could be delivered at the site without contravening section 5 of the 1902 Act. Mr Brown submitted that on a true construction of the definition of "crematorium" in section 2 of the 1902 Act, the separation distances prescribed by section 5 of that Act would apply not only to the main crematorium building, but also to the memorial gardens which were to be used for the disposal of ashes and to the car parking areas. It was immaterial that the memorial gardens and car parking areas did not physically form part of the main crematorium building, since they were nevertheless incidental or ancillary to the crematorium facility. Both were plainly within 200 yards of neighbouring dwellings. Moreover, the doors of the Ceremony Hall of the crematorium building, when opened, would be within 200 yards of neighbouring dwellings. For these reasons, delivery of the proposed development would contravene section 5 of the 1902 Act.

66. These issues had been raised by Mercia in written representations but the inspector had failed to address them. If on the other hand, it was to be inferred that the inspector had addressed them and concluded that the proposed development could be delivered in compliance with section 5 of the 1902 Act, he had erred in law.

67. For the Defendant, Mr Darby acknowledged the principle that a restriction in non-planning legislation which might jeopardise deliverability of the proposed development was capable of being a material consideration, at least insofar as it was shown to undermine the case for very special circumstances. Mr Darby submitted, however, that the ability to deliver the proposed development at the site without contravening section 5 of the 1902 Act had not been a main issue in the planning appeal. Neither Tandridge nor any other party appearing at the local inquiry had argued that the proposed development could not be delivered without contravening section 5 of the 1902 Act.

68. The planning officer had considered that question in the report in the light of both the contentions advanced by Mercia in its letter of 24 June 2020 and the information provided by Horizon on the same date about its proposals for the storage of ashes at the site. The planning officer had concluded that the proposed development would be deliverable in accordance with the restrictions imposed by section 5 of the 1902 Act. Tandridge had not changed its position on that issue at the local inquiry. Mr Darby drew attention to the inspector's reasoning in DL8 and DL34-35. It was submitted that the inspector had clearly considered Mercia's written representations and satisfied himself that the proposed development would not contravene the restrictions imposed by section 5 of the 1902 Act. The inspector had taken that question into consideration and given proper and adequate reasons for his conclusion.

69. Mr Darby submitted that the inspector had been correct in law to conclude that the proposed development could be delivered at the site without contravening section 5 of the 1902 Act. He emphasised the need to take a purposive approach to the definition of *"crematorium"* in section 2 of the 1902 Act. The words *"everything incidental or ancillary thereto"* related to a building or buildings fitted with appliances for the

purpose of burning human remains. They could not sensibly be read to extend to ornamental or memorial gardens or car parking. Paragraph 18 of the guidance supported that interpretation. It drew the distinction between the crematorium buildings, chapels and parts of the grounds used for the disposal of ashes on the one hand; and ornamental gardens, carriageways and staff housing on the other. That distinction was consistent with the purpose of section 5 of the 1902 Act, which was to protect public health.

70. For Horizon, Mr Goatley advanced essentially similar submissions to Mr Darby in response to ground 1.

Discussion

71. Decision letters are written principally for parties who know what the issues between them are and what evidence and arguments have been deployed on those issues. In order to resolve the competing submissions of the parties, therefore, it is necessary to understand what was actually in issue before the inspector in relation to the restrictions imposed by section 5 of the 1902 Act.

72. At the outset, Horizon had recognised that the site's ability to accommodate the proposed development without contravening section 5 of the 1902 Act was a key criterion in its selection. One of the five basic criteria against which Horizon selected the site for the proposed development was the restriction on construction of the crematorium within 200 yards of the nearest dwelling and 50 yards of the public highway. In the design and access statement submitted in support of its planning application, Horizon stated that the location of the crematorium was governed by those restrictions imposed by the 1902 Act, the effect of which was to limit the building to one small area of the site.

73. In its letter of objection date 24 June 2020, Mercia also raised the restrictions imposed by section 5 of the 1902 Act. Mercia argued that in order to comply with those restrictions, Horizon had been driven to a layout and design for the proposed crematorium building which was contrived and substandard when considered against government and industry guidance. Mercia did not contend that the crematorium building itself could not be constructed without contravening section 5 of the 1902 Act. Mercia did, however, contend that the restrictions imposed by the 1902 Act applied not only to the main crematorium building but also to incidental and ancillary features around that building. It was said that Horizon had overlooked the fact that the proposed location of the service yard, pedestrian access and the memorial gardens, which were to be used for the scattering of ashes, meant that such features would be located within 200 yards of neighbouring dwellings.

74. Horizon's response to Mercia's contentions was not simply to dismiss them as immaterial to the determination of its planning application for the proposed development. Instead, in its correspondence with Tandridge on 30 June 2020 and 24 July 2020, Horizon sought to answer concerns about the ability of the site to accommodate the proposed development without contravening the 1902 Act and the guidance. In particular, Horizon provided Tandridge with a detailed account of its proposed arrangements for the sealed storage and management of ashes at the site, which were said to avoid the need to permit the scattering of ashes in the memorial gardens. In its correspondence of 24 July 2020, Horizon stated that ashes would not be

disposed of in the memorial gardens and that the scattering of ashes would not be allowed at the site.

75. It is clear from the report that Tandridge's planning officer treated the ability of the site to accommodate the proposed development without contravening section 5 of the 1902 Act as a material consideration in determining Horizon's planning application. In paragraph 37 of the report, the planning officer advised that although a statutory impediment to delivery of the proposed development would not ordinarily be material to the determination of the planning application, the position was different in the present case. The statutory restrictions imposed upon the siting of crematoria by section 5 of the 1902 Act were material here because the case for the proposed development was founded upon its ability to meet a pressing social and community need for a new cremation facility to serve the local area. If it were the case that the site was unable to accommodate the proposed development without contravening the requirements of section 5 of the 1902 Act, that would undermine the primary justification advanced by Horizon for the existence of very special circumstances to outweigh the policy objection resulting from its location in the Green Belt.

76. The planning officer's analysis was legally impeccable. It followed the principles stated by Lord Keith in *British Railways Board*, to which I have referred in paragraph 60 above. In paragraphs 38 to 41 of the report, the planning officer went on to conclude that implementation of planning permission for the proposed development would not be impeded by the restrictions on the siting of crematoria imposed by section 5 of the 1902 Act. That conclusion was founded, at least in part, on the view that in the light of the guidance, the proposed parking areas, internal access roads and the memorial gardens were not to be regarded as incidental or ancillary to the crematorium and so not subject to the restrictions imposed by section 5 of the 1902 Act.

77. Following Horizon's appeal against the refusal of planning permission, in its letter of 18 June 2021 Mercia drew its concerns about the ability of the site to accommodate the proposed development without contravening the restrictions imposed by the 1902 Act to the attention of the inspector. Mercia advanced essentially similar objections to those that it had previously raised with Tandridge. In particular, Mercia called into question whether the proposed development would be deliverable given that all means of pedestrian and service access to the crematorium building, car parking and the memorial gardens for the scattering of ashes would necessarily be located within 200 yards of neighbouring dwellings. Mercia's argument remained that these elements of the proposed development were properly to be regarded as ancillary or incidental to the crematorium and so subject to the restrictions imposed by section 5 of the 1902 Act. Mercia also raised the point that, when opened, windows and doors of the crematorium building itself would appear to intrude into the *"restricted zones"*.

78. Neither Horizon nor Tandridge made the case to the inspector that Mercia's concerns about the ability of the site to accommodate the proposed development without contravening the 1902 Act were immaterial to his determination of Horizon's planning appeal. As before, Horizon's written response, briefly stated, was that the proposed development was in accordance with the requirements of the 1902 Act. Tandridge did not seek to depart from the conclusions on that question which were recorded in paragraph 41 of the report. The OLRG did not address the question whether the proposed development could be delivered at the site without contravening the

restrictions imposed by the 1902 Act in either its written representations to Tandridge or to the inspector.

79. In summary, the position of the parties when the inspector came to make his decision on the planning appeal was as follows –

(1) It was not in issue that, in the circumstances of the present case, the ability of Horizon to deliver the proposed development at the site without contravening the restrictions imposed by section 5 of the 1902 Act was a material consideration to the determination of the planning application on appeal.

(2) Nor were the reasons why it was a material consideration in issue between the parties. Those reasons were given by the planning officer in paragraph 37 of the report; that is to say, that the inability to deliver the proposed development would undermine Horizon's case for very special circumstances which was founded upon the ability of the proposed development at the site to meet a pressing social and community need.

(3) Subject to one point of concern raised by Mercia, it was not in issue before the inspector that the site was able to accommodate the crematorium building itself in compliance with section 5 of the 1902 Act. Although Mercia criticised the design and layout of the crematorium building as contrived, it did not contend that the crematorium building constructed at the location shown on the plans would be nearer than 200 yards to neighbouring dwellings. In other words, Mercia did not contend that construction of the crematorium building at the location on the site shown on the plans would contravene section 5 of the 1902 Act.

(4) The residual point of contention raised by Mercia in relation to the crematorium building was that windows and doors would, when open, be within 200 yards of the nearest neighbouring dwelling and so appear to contravene section 5 of the 1902 Act.

(5) Both the appellant, Horizon, and the local planning authority, Tandridge, took the position that the site was able to accommodate the proposed development as a whole without contravening the restrictions imposed by the 1902 Act. Although the proposed internal access roads and parking areas, and the memorial gardens, would be located within 200 yards of the nearest dwelling-house, neither Horizon nor Tandridge considered that the provision of these elements of the proposed development at their proposed locations within the site would contravene section 5 of the 1902 Act.

(6) Mercia in its written representations disagreed with Horizon and Tandridge that the proposed development as a whole could be accommodated at the site in compliance with the restrictions imposed by the 1902 Act. Mercia did so on the basis that means of access, car parking areas and the memorial gardens were incidental or ancillary to operation of the crematorium building. The guidance required them to be provided. They fell within the scope of section 5 of the 1902 Act by virtue of the extended definition of *"crematorium"* in section 2 of that Act.

(7) Mercia supported its contention that the memorial gardens should properly be regarded as incidental or ancillary to operation of the crematorium on the basis that they were the proposed location for the scattering of ashes. Mercia maintained that argument despite the fact that Horizon had informed Tandridge that the scattering of ashes would not be allowed at the site and that alternative arrangements would be made for the sealed storage of ashes at the site, which would ensure that there was no possibility of contamination of the ground by human remains.

80. The issues actually in dispute before the inspector in relation to the 1902 Act were accordingly limited. Firstly, there was the issue whether the fact that windows and doors of the crematorium building would, when open, be within 200 yards of the nearest neighbouring dwelling led to a contravention of section 5 of the 1902 Act. Secondly, there was the issue whether the proposed development as a whole was able to be delivered at the site in compliance with section 5 of the 1902 Act, having regard to the proposed location of the internal access roads, car parking areas and memorial gardens within 200 yards of neighbouring dwellings. The local planning authority, Tandridge, had concluded that the location of these elements of the proposed development was not subject to the restrictions imposed by the 1902 Act. Mercia maintained its argument that each of those elements of the proposed development fell to be considered as incidental or ancillary to the operation of the crematorium and accordingly subject to the restrictions imposed by section 5 of the 1902 Act.

81. I have already drawn attention to those paragraphs of the inspector's reasoning in which he referred to locational restrictions on the siting of crematoria imposed by the 1902 Act. In DL8, the inspector referred to the location of the main crematorium building quite centrally within the site, stating that its siting and design conform with *"the various laws and regulations governing crematoria"*. In DL9, the inspector went on to describe the proposed location of the crematorium's car parking and operational areas on the eastern side of the site. In DL34, DL35 and DL36, the inspector began his assessment of the question whether there were very special circumstances to justify the grant of planning permission by reference to the restrictions imposed by the 1902 Act. In DL34, he identified the separation distances prescribed by section 5 of the 1902 Act between crematoria, dwellings and highways. In DL35, he recorded that the site had been selected by Horizon as a candidate on the basis that it was able to accommodate the proposed development in compliance with those restrictions. In DL36, the inspector stated that in determining Horizon's planning application, Tandridge had accepted the conclusions of the SSA: one of those conclusions was that the site was able accommodate the proposed development in compliance with the restrictions imposed by the 1902 Act.

82. In my view, it is clear from the inspector's reasoning that he both understood and accepted that, were he to find the site to be unable to accommodate the proposed development without contravening the restrictions imposed by the 1902 Act, that finding would be material to his determination of the planning appeal. He began his assessment of the question of very special circumstances with consideration of those statutory restrictions. I see no reason to doubt that he did so because he recognised that if it had been shown that the site was unable to accommodate the proposed development without contravening the 1902 Act and so unable to contribute to meeting the pressing

social and community need for cremation facilities, that would be a material factor in his determination of the case for very special circumstances.

83. I do not think that the Claimant is correct that the inspector failed to give consideration to the potential impact of the restrictions imposed by the 1902 Act on the delivery of the proposed development. On my reading of the inspector's decision, he did address the question whether the 1902 Act restrictions would impede delivery of the proposed development at the site in the paragraphs to which I have drawn attention. In my view, it is clear that he found no reason to conclude that delivery of the proposed development at the site would contravene the restrictions imposed by the 1902 Act.

84. The penultimate and final sentences of DL8 are a clear finding that the main crematorium building could be constructed at its proposed location on the site without offending section 5 of the 1902 Act. I see no basis for drawing the adverse inference that, in making that clear finding, the inspector ignored Mercia's concern about the windows and doors of that building opening out into the restricted area. On the contrary, the inspector's reference to the siting and design of the main crematorium being in conformity with the legislation governing crematoria is fairly to be read as addressing that point of concern. As I have already said, subject to that point, Mercia did not in fact contend that the construction of the crematorium building itself would be prejudiced by the restrictions imposed by section 5 of the 1902 Act. I read DL8 as indicating that the inspector did not consider the point to undermine his view that the location of the crematorium building was in compliance with section 5 of the 1902 Act. The inspector was under no duty to say more than he did on that point.

85. The focus of Mr Brown's submissions on behalf of the Claimant was the inspector's alleged failure properly to address Mercia's objections in relation to the access roads and car parking areas, the memorial gardens and the scattering of ashes. I accept that the inspector did not address those objections in express terms in his decision. The question for me is whether it is to be inferred that he ignored those objections and so failed to fulfil his statutory duty under subsection 70(2) of the 1990 Act.

86. The authorities show that I should be slow to draw that inference unless persuaded that Mercia's objections in relation to the access roads, car parking areas, the memorial gardens and the scattering of ashes were among the main issues in dispute before the inspector. Even then, I should be cautious about drawing that adverse inference unless the facts and circumstances demanded that the inspector addressed those objections in terms in his decision.

87. The inspector addressed the ability of the site to accommodate the proposed development in DL34 to DL36. In the first sentence of DL34, he referred to the restrictions on the location of crematoria enacted by section 5 of the 1902 Act, including the restriction on locating crematoria within 200 yards of the nearest dwelling. In DL35, the inspector referred to Horizon's appraisal of the site's ability to satisfy those statutory requirements in the SSA. In DL36, he referred to Tandridge's acceptance of the conclusions of the SSA. As all parties were aware, in the report, the planning officer had reached the conclusion that the site was able to accommodate the proposed development without contravening those statutory requirements; and that the planning officer had reached that conclusion following consideration of essentially the same contentions advanced by Mercia in its written representations in the planning appeal.

88. The inspector's summary in DL34 and DL35 of the position of the main parties, Horizon and Tandridge, was accurate. On the evidence of the SSA and the planning officer's report, both main parties had considered the question whether the site was able to accommodate the proposed development in compliance with the statutory restrictions on the location of crematoria in relation to neighbouring dwellings. Both main parties had indeed concluded that the site was able to do so. The inspector had plainly read both the SSA and the planning officer's report and was familiar with the conclusions of both Horizon and Tandridge on that question.

89. It is also clear from DL34 to DL36 that the inspector had considered but saw no reason to depart from the main parties' conclusion that the proposed development was able to be accommodated at the site in compliance with the locational restrictions imposed by the 1902 Act. I see no reason to doubt that the inspector did so with Mercia's contentions in relation to the access roads, car parking areas and memorial gardens well in mind. From the perspective of the informed reader, the clear inference to be drawn from the inspector's reasons in DL34 to DL36 is that the inspector simply did not agree with the written objections raised by Mercia in relation to the question of compliance with the 1902 Act. He did not accept Mercia's contention that those elements of the proposed development were incidental or ancillary to the operation of the crematorium building within the terms of section 2 of the 1902 Act. On a fair reading, he accepted and agreed with the reported conclusion of Tandridge's planning officer, that the location of those elements was not subject to the restrictions imposed by section 5 of the 1902 Act.

90. For these reasons, I can find no justification for drawing the adverse inference that the inspector failed to consider the objections raised by Mercia that the location of the access roads, car parking areas and memorial gardens would result in the contravention of section 5 of the 1902 Act and so impede the delivery of the proposed development in the event that planning permission was granted. In my judgment, the clear inference to be drawn from the inspector's reasoning in DL34 to DL36 is that he had considered Mercia's objections, but had reached the same conclusion as the local planning authority, Tandridge, in relation to them.

91. The inspector was not required to say more than he did in those paragraphs of his decision. The ability of the site to accommodate the proposed development in compliance with the 1902 Act was not in issue between the main parties to the planning appeal. It was not an issue which had been raised by OLRG or indeed by any party at the local inquiry. I accept Mr Darby's submission that in the light of those matters, and given the limited scope of the remaining points at issue as I have identified them, the written objections advanced by Mercia did not elevate the question of compliance with the 1902 Act to one of the main issues in dispute before the inspector. In my view, the inspector did not need to address Mercia's objections in express terms in order to fulfil his duty to give reasons.

92. It is nevertheless necessary for me to address Mr Brown's submission that if the inspector is to be taken to have concluded that the proposed development can be accommodated at the site in compliance with section 5 of the 1902 Act, then the inspector erred in his interpretation of the statutory restrictions imposed by that enactment. Mr Brown submitted that the memorial gardens, car parking areas and access roads were *"incidental or ancillary"* elements which, on its correct

interpretation, fall within the definition of *"crematorium"* in section 2 of the 1902 Act. Their proposed location at the site within 200 yards of neighbouring dwellings would inevitably contravene section 5 of the 1902 Act and impede actual delivery of the proposed development, even with the benefit of planning permission.

93. This is an issue of statutory construction. The applicable principles were recently summarised by the Court of Appeal at [30] in *Tidal Lagoon (Swansea Bay) plc v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 1579 –

> "*…The court's essential function is to ascertain the meaning of the statutory words having regard to the purpose of the provisions in question. It must interpret the statutory language, so far as it can, in a way that best gives effect to that purpose. To establish the intention of Parliament, regard must be had to the relevant context…".*

94. The statutory words under consideration in this case are the words *"everything incidental or ancillary thereto"* in the definition of *"crematorium"* enacted by section 2 of the 1902 Act. Mr Brown submitted that, as a matter of language, the extension of the definition to include *"everything incidental or ancillary thereto"* very considerably widens the scope of application of the restrictions imposed by section 5 of the 1902 Act on the location of crematoria. It was submitted that those restrictions must extend beyond the crematorium building itself, otherwise the extension of the statutory definition to all incidental or ancillary elements would be otiose. In accordance with the observations of the Master of the Rolls in [26] of *R(Ghai) v Newcastle City Council and others* [2010] EWCA Civ 59; [2011] QB 591, it was important to give the statutory words their natural meaning, however wide that might be, and only to narrow the scope of their application if that was justified by their legislative context. Here, it was submitted, the words *"everything incidental or ancillary thereto"* clearly extended (as Mercia had argued) to the access roads, car parking areas and the use of the memorial gardens for the disposal of ashes. Mr Brown argued that it was immaterial that Horizon did not propose to permit ashes to be scattered at the site. Horizon's proposals for the storage and deposit of ashes in sealed containers involved their disposal and were accordingly incidental or ancillary to the operation of the crematorium, and within the scope of the definition of *"crematorium"* in section 2 of the 1902 Act.

95. I accept that, on its natural meaning, the phrase *"everything incidental or ancillary thereto"* is wide in scope and indicates a legislative intention that the restrictions imposed by section 5 of the 1902 Act should not necessarily be limited in their application to the crematorium building itself. However, it is difficult to imagine that the definition was intended to be so wide as to bring any incidental component of a crematorium development within the scope of the section 5 restrictions. To take an obvious example, it is not anachronistic to think that, even in 1902, the promoters of a crematorium might have wished to carry out planting and landscaping along the boundaries of the site. Without doing violence to the natural meaning of the words, such planting or landscaping might properly be described as incidental or ancillary to the crematorium. Yet it seems obvious that Parliament cannot have intended that planting or landscaping for the purposes of enhancing the visual amenities of a crematorium and

blending the facility in with its surroundings, should be restricted to a zone at least 200 yards from the nearest dwelling-house.

96. In my view, therefore, it is necessary to identify some relevant factor or factors which serve to delineate the scope of those elements of a crematorium facility which the legislature intended, by means of the extended definition enacted under section 2 of the 1902 Act, to bring within the ambit of the restrictions imposed under section 5 of that Act.

97. Applying the principles stated by the Court of Appeal in the *Tidal Lagoon* case, the correct approach to that task is to have regard to the legislative purpose and the context in which the definition of *"crematorium"* in section 2 of the 1902 Act was enacted.

98. The long title to the 1902 Act states that it was enacted for the purpose of regulating *"the burning of human remains"*. That statutory purpose is evident from the terms of section 2 itself, which defines a *"crematorium"* as a building fitted with appliances *"for the purpose of burning human remains"*. The offence by section 8 of the 1902 Act is expressed in like terms. That offence is committed by a person who knowingly carries out, procures or takes part in *"the burning of any human remains'*. In my view, that statutory purpose sets the context for and explains why Parliament enacted the locational restrictions imposed by section 5 of the 1902 Act. The separation distances imposed by section 5 of the 1902 Act were imposed for the purpose of regulating the burning of human remains. They were intended to apply to any part of the process of burning human remains at a crematorium, irrespective of whether that operative element of the process was carried out within the main crematorium building itself.

99. In the light of that analysis, it seems clear to me that the phrase *"everything incidental or ancillary thereto"* in the statutory definition of *"crematorium"* refers to anything that is incidental or ancillary to the burning of human remains. The focus of inquiry is upon anything that is incidental or ancillary to that process, rather than more widely to elements of a crematorium facility which play no operative part in the burning of human remains.

100. In my view, that approach to the interpretation of the definition of *"crematorium"* in section 2 of the 1902 Act and the resulting application of the restrictions imposed by section 5 of that Act is properly reflected in paragraph 17 of the guidance, which drew a broad distinction between the crematorium buildings, chapels and parts of the grounds used for the disposal of ashes which were considered to fall within the extended statutory definition of *"crematorium"*; and ornamental gardens, carriageways and staff housing, which were considered not to do so. Paragraph 13 of the guidance records clearly what the authors of the guidance had in mind in referring to the *"disposal"* of ashes, namely, the strewing or burial of ashes on or in the open ground. I have no difficulty in understanding why, in the interests of public health and for the protection of neighbouring residential occupiers, it was considered advisable to treat the strewing or burial of ashes on or in the open ground as forming an incidental or ancillary part of the actual process of burning human remains.

101. My purposive interpretation of the extended definition of *"crematorium"* in section 2 is consistent with the fact that the 1902 Act as a whole is a piece of legislation whose primary purpose was to protect public health, whilst enabling the growing practice of

cremation which had developed during the later years of the Victorian era to be carried on in a uniform and regulated way. I have not derived any real assistance from *Ghai's* case. The issue of statutory interpretation in that case was very different to the one which I have to resolve. Nevertheless, the observations of the Master of the Rolls at [29] in *Ghai's* case emphasise the importance of respecting the limits of protection which the legislature saw fit to create under section 5 of the 1902 Act.

102. In my judgment, the purpose of the 200 yard separation distance between a crematorium and any neighbouring dwelling-house imposed by section 5 of the 1902 Act was with a view to protecting the health of the occupiers of that dwelling-house from the process of burning human remains carried on at the crematorium. In any given case, therefore, the question whether any building, structure or open area of the crematorium facility is to be treated as part of the crematorium within the meaning of section 2 of the 1902, and so subject to that 200 yard separation distance, falls to be answered by determining whether, on the evidence, that building, structure or open area is actually used in the process of burning human remains at that crematorium facility. Unless that is the case on the evidence, the building, structure or area under consideration is not subject to the 200 yard separation distance from neighbouring dwelling-houses imposed by section 5 of the 1902 Act.

103. In the present case, there was no evidence before the inspector to justify or substantiate Mercia's argument that the access roads and car parking areas were to be used for or to have any operative part to play in the process of burning of human remains at the proposed crematorium facility. In the absence of any such evidence, it was correct in law for the inspector to conclude that section 5 of the 1902 Act created no impediment to the proposed location of those elements of the proposed development within 200 yards of neighbouring dwellings. On the evidence, neither the access roads nor the car parking areas fell within the definition of *"crematorium"* in section 2 of the 1902 Act.

104. Mercia's contention that section 5 of the 1902 Act required the memorial gardens to be located further than 200 yards from neighbouring dwellings was founded upon the assertion that those gardens were to be used for the scattering of ashes. Mercia had first made that assertion in correspondence with Tandridge in June 2020. In response, Horizon had informed Tandridge that the scattering of ashes would not be permitted at the site and given details of the alternative arrangements which would be put in place for the storage of ashes in sealed containers pending their removal from the site. Although Mercia continued to assert in its written representations to the inspector that the memorial gardens were to be used for the scattering of ashes, Horizon's position remained as stated to Tandridge: the scattering of ashes was not to be permitted at the site.

105. In my view, the evidence before the inspector did not support Mercia's contention that the location of the memorial gardens was subject to the restrictions imposed by section 5 of the 1902 Act. There was no evidence that any part of the actual process of burning human remains at the proposed cremation facility would be carried out in the memorial gardens. There was therefore no factual basis for Mercia's assertion that the memorial gardens fell within the extended definition of *"crematorium"* in section 2 of the 1902 Act.

106. On the evidence, the factual position was quite different to that envisaged in paragraphs 13 and 17 of the guidance on which Mercia relied. The guidance simply does not address the actual arrangements proposed by Horizon for the storage of ashes in sealed containers pending their subsequent removal from the site.

107. I do not accept Mr Brown's submission that the proposed storage of ashes in sealed containers pending their removal should nevertheless be seen as the disposal of ashes as the end product of the process of burning human remains at this proposed cremation facility. In my view, that process will have been completed when, following each cremation carried out in crematorium building, the ashes have been sealed into their container for storage. The actual disposal of ashes, whether by scattering or burial, will form no part of the proposed use of the memorial gardens.

108. In my judgment, on the basis of the evidence before the inspector, it was lawful to conclude that the proposed use of the memorial gardens and arrangements for the sealed storage of ashes pending their removal from the site would not form part of the process of burning human remains at this cremation facility. They did not, therefore, fall within the scope of the statutory definition of *"crematorium"* in section 2 of the 1902 Act and were not subject to the restrictions imposed by section 5 of the 1902 Act. There was no impediment to the proposed location of the memorial gardens within 200 yards of neighbouring dwellings.

109. In the light of my conclusions, the circumstances of this case are plainly to be distinguished from those which led to the result in *London Historic Parks and Garden Trust v Minister of State for Housing* [2022] EWHC 829 (Admin). In that case, at [128] Thornton J held that on its true construction, section 8(1) of the London County Council (Improvements) Act 1900 did present an impediment to the delivery of the proposed UK Holocaust Memorial and Learning Centre at Victoria Tower Gardens. Thornton J founded her conclusion that section 8(1) of the local Act was a material consideration in that case on that basis: see [111] of her judgment. In the present case, I have reached the contrary conclusion in relation to section 5 of the 1902 Act. The site is able to accommodate the proposed development without contravening the requirement of that enactment that a crematorium should not be located within 200 yards of neighbouring dwelling-houses.

Conclusions on ground 1

110. For the reasons I have given, I conclude that on the evidence before the inspector, the definition of *"crematorium"* in section 2 of the 1902 Act did not extend to the access roads, car parking areas or the memorial gardens. The inspector was correct in law in concluding, as I have found that he did, that the location of those elements of the proposed development would not contravene section 5 of the 1902 Act, which therefore presented no impediment to the delivery of the proposed development and its ability to meet the pressing need for new cremation facilities. I reach the same conclusion in relation to Mercia's argument that the location of the crematorium building itself would contravene section 5 of the 1902 Act on the basis that its doors and windows would extend to within 200 yards of neighbouring dwellings. There was no evidence that the opening of doors and windows would in any way materially affect the process of burning human remains at this crematorium or the operation of the appliances for that purpose to be located within the main crematorium building.

111. I am satisfied, therefore, that the inspector did give proper consideration to Mercia's objections. He did consider the question of compliance with section 5 of the 1902 Act and reached the same conclusion on that issue as had the local planning authority, Tandridge, when it determined the planning application which was before him on appeal. The inspector gave proper, adequate and intelligible reasons for concluding that the site was able to accommodate the proposed development without contravening the restrictions imposed under section 5 of the 1902 Act. In short, he made it clear that he had reached the same conclusion on that issue as had the local planning authority. He was not obliged to say more than he did, in order to explain to the parties to the appeal that he was satisfied that the 1902 Act would not present an impediment to delivery of the proposed development, in the event that the appeal was allowed and planning permission was granted. Ground 1 is accordingly rejected.

Ground 2 – flood risk

Submissions

112. Mr Brown submitted that on a straightforward application of national planning policy and guidance to the circumstances of this planning appeal, a sequential assessment of the proposed development should have been carried out. A proper process of sequential assessment required consideration of the performance of the site in comparison with not only Mercia's site at Farleigh but also those alternative sites which had been considered in the SSA. In order to follow the sequential approach to flood risk required by the policy of the Framework, the question whether the site was sequentially preferable to those alternative sites in its exposure to the risk of flooding had to be considered in the context of a sequential assessment. The inspector had failed to address that question.

113. Mr Brown submitted that although the site was located within Flood Zone 1, the evidence before the inspector showed that it was at risk of groundwater flooding. The site was located within an area identified in the SFRA as being a risk of groundwater flooding with a possibility of groundwater emerging at the surface locally. The OLRG had provided evidence that the site was known locally to suffer from frequent surface water flooding. Mercia had contended that the SFRA pointed to a medium level of flood risk from groundwater sources. The FRA submitted in support of the proposed development had not addressed the evidence of the site's propensity to groundwater flooding. The FRA had asserted that because the site was located in Flood Zone 1, the sequential test was irrelevant. That was a misunderstanding of both the policy of the Framework and the Practice Guidance on flood risk assessment. Both the Framework and the Practice Guidance made it clear that a sequential assessment may be required even if a site is located within Flood Zone 1, in cases in which the SFRA shows that the site is at risk from sources of flooding other than coastal or fluvial flooding.

114. In the light of these circumstances, the inspector's conclusion that there was no need for a sequential assessment in the present case was founded upon a misunderstanding or misapplication of the policy of the Framework and of the Practice Guidance. The inspector had reached a conclusion which was irrational on the evidence before him, which on the proper application of national planning policy and practice guidance, plainly required that the site should be subject to sequential assessment for flood risk.

Finally, the inspector had failed to give proper, adequate or intelligible reasons for concluding that a sequential assessment was not required in this case.

115. A sequential assessment would have needed to consider the credentials of the site in comparison with the nine alternative sites identified in the SSA as not being exposed to flood risk. Moreover, in its evidence to the local inquiry Tandridge had identified two further alternative sites which did not flood. In order for the inspector to carry out a sequential assessment of the site and its suitability for the proposed development on the proper application of national planning policy and guidance on flood risk, he was required to consider whether any of those alternative sites were sequentially preferable to the site. The whole point of a sequential assessment was to steer the proposed development to sites at lower risk of flooding. That fundamental objective of national planning policy had not been properly addressed by the inspector in his determination of the planning appeal.

Discussion

116. The principal issue between Horizon on the one hand and the OLRG and Mercia on the other hand in relation to flood risk was whether the sequential test should have been applied to the proposed development. The site specific flood risk assessment for the proposed development, the FRA, had asserted that the sequential test did not apply because the site was located entirely within Flood Zone 1. The objectors contended that on a proper application of the policy stated in paragraph 162 of the Framework and in accordance with the Practice Guidance, the sequential test did apply. It did so because the stated aim of the sequential test was to steer new development to areas with the lowest risk of flooding from any source, not merely from coastal or fluvial sources. In the present case, there was clear evidence that the site was at risk of flooding from groundwater rising to the surface. That risk had been identified in the SFRA and was attested to by local experience that the site was known to be subject to surface water flooding.

117. The inspector addressed the question whether the sequential test should have been applied to the proposed development in DL32 and DL33. He stated his conclusion on that issue in the penultimate sentence of DL33, where he said that he was satisfied that the sequential test did not need to be applied to the proposed development.

118. It was plainly necessary for the inspector to approach the question whether the sequential test should be applied to the proposed development on a proper understanding of the relevant policy in the Framework. It was also reasonable to expect that the inspector would follow the approach set out in the Practice Guidance, at least unless he had a good reason to depart from it.

119. In DL32, the inspector summarised his understanding of policy aim of the sequential test. He said that the policy aim was to steer new development to areas with the lowest risk of flooding from any source. Development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. That summary seems to me to have been an accurate encapsulation of the policy aim of the sequential test as promulgated in paragraph 162 of the Framework.

120. The inspector went on in DL32 to summarise the approach to be taken to applying the sequential test where, as in the present case, development is proposed on a site which lies within Flood Zone 1. The inspector referred to paragraph 033 of the Practice Guidance on the topic of *"Flood risk and coastal change"* which I have set out in paragraph 25 of this judgment. Paragraph 033 was headed *"How should the Sequential Test be applied to planning applications?"*. The guidance given in answer to that question was that it would not normally be necessary to apply the sequential test to development proposals in Flood Zone 1, unless the SFRA for the area or other more recent information indicates that there may be flooding issues now or in the future. In DL32 the inspector recorded the advice of the Practice Guidance accurately in those terms.

121. Mr Brown submitted that paragraph 3.3 of the site specific flood risk assessment, the FRA, misstated the position. It asserted that as the site lay within Flood Zone 1, the sequential test was *"irrelevant"* to the proposed development. I accept that submission. However, the inspector's reasoning in DL32 shows that he was not misled by that paragraph of the FRA. On the contrary, in DL32 the inspector clearly recognised that, as a matter of national planning policy and practice guidance, the location of the site within Flood Zone 1 was not sufficient in itself to avoid the need to apply the sequential test to the proposed development. The inspector proceeded on a correct understanding of the position, that it was necessary to consider the risk of flooding from any source, not merely from coastal or fluvial sources. It was necessary to consider that risk on the basis of the findings of the SFRA and also of any other information which indicated that there may be present or future flooding issues at the site.

122. Since the site's location within Flood Zone 1 was not determinative of the question whether the sequential test should be applied to the proposed development, it fell to the inspector to decide that question in the exercise of his planning judgment. The inspector made that judgment in DL33. His reasoning in that paragraph reveals the basis on which he did so. Firstly, in accordance with paragraph 162 of the Framework and paragraph 033 of the Practice Guidance, the inspector considered the findings of the SFRA which indicated that the site had the potential for groundwater flooding manifesting itself at the surface of the site. Secondly, he took into account the advice of the FRA that a site investigation would be carried out to establish the groundwater levels on the site; and that the design of the proposed development would respond to the findings of that site investigation. Thirdly, the inspector took account of the position of the Lead Local Flood Authority, which had not raised any objection to the proposed development subject to the imposition of appropriate conditions. Fourthly, he took account of the objectors' contention that the findings of the SFRA and the evidence of surface water flooding at the site constituted a medium degree of flood risk.

123. I am unable to accept that the balance of these factors was so firmly weighted in favour of the application of the sequential test to the proposed development, that it was irrational for the inspector to reach the contrary conclusion. As I have already found, he approached that question on a correct understanding of the policy aim of the sequential test and of the practice guidance as to the application of that test to sites which are located within Flood Zone 1. He based his evaluation of the potential for flooding issues at site on the findings of the SFRA. In evaluating the degree of risk, he took into account both the evidence of the objectors and the reported position of the Lead Local Flood Authority. It will be recalled that the OLRG had urged Tandridge to

seek the views of that authority on the issue of flood risk. He took account of the arrangements proposed in the FRA for the purpose of managing the flood risk identified by the SFRA, through the design of the proposed development.

124. Mr Brown submitted that it was wrong in principle for the inspector to take account of the requirements imposed under condition 6 in determining whether the sequential test should be applied to the proposed development. The basis for that submission was that the policy aim of steering development to sites at lower risk of flooding would be frustrated if the assessment of flood risk is only undertaken after planning permission has been granted. In my view, that submission goes too far. I see no reason in principle why the ability effectively to manage the risk of flooding at the site through conditional controls should not be brought into account, for the purpose of making an overall planning judgment whether the sequential test should apply to a site located in Flood Zone 1. In the present case, it was plainly the judgment of the Lead Local Flood Authority that such conditional controls would enable the delivery and operation of the proposed development with effective management of groundwater flooding at the site. In my view, the planning inspector was entitled to take the controls imposed by condition 6 into account in reaching his conclusion that the sequential test need not be applied in this case.

125. For these reasons, in my judgment, the Claimant's criticisms of the inspector's determination of the question whether the sequential test needed to be applied to the proposed development are not justified. There is no force in the argument that the inspector misunderstood or misapplied the relevant policy of the Framework and the relevant advice of the Practice Guidance. The inspector's conclusion in the exercise of his planning judgment that the sequential test did not need to be applied to the proposed development cannot fairly be impugned as irrational. His reasoning in DL32 and DL33 is sufficient in law to explain why he reached that conclusion in the circumstances of this case.

126. In the light of those conclusions, it is unnecessary for me to address the Claimant's criticisms of the inspector's consideration of alternative sites in DL33. As the inspector indicated in that paragraph, the policy question whether there were reasonably available sites at lower risk of flooding would fall to be considered only in the event that the sequential test was to be applied. Nevertheless, I see no justification for questioning the validity of the inspector's judgment in DL33 in confining his consideration of the availability of alternative sites to Mercia's scheme at Farleigh. There is no evidence that the objectors advanced the candidacy of any other potential alternative site as preferable on the grounds of flood risk.

Conclusion

127. For the reasons I have given, ground 2 must be rejected.

Disposal

128. The claim is dismissed. I am most grateful to counsel and their respective teams for their assistance and the clarity with which their respective cases have been presented and argued.