Neutral Citation Number: [2022] EWHC 2044 (Admin)

Case No: CO/1221/2022

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 August 2022

Before :

MRS JUSTICE LANG DBE

- -

Between :

WORTHING BOROUGH COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendants**
(2) PERSIMMON HOMES (THAMES VALLEY) LIMITED	

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- -

Isabella Tafur and Daisy Noble (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
Hugh Flanagan (instructed by the **Government Legal Department**) for the **First Defendant**
Paul Cairnes QC and James Corbet Burcher (instructed by **Shoosmiths LLP**) for the **Second Defendant**

Hearing dates: 20 & 21 July 2022

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Approved Judgment

Mrs Justice Lang:

1. The Claimant ("the Council") applies, pursuant to section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), for a statutory review of the decision of an Inspector, appointed by the First Defendant, on 25 February 2022, in which he allowed the appeal of the Second Defendant ("the developer") against the Council's refusal of outline planning permission, for a mixed use development on land north west of Goring Station, Goring-by-Sea ("Goring"), Worthing, West Sussex ("the Site").

2. I granted permission, on the papers, for the claim to proceed, on 9 May 2022.

Grounds of challenge

3. The Council submits that the Inspector erred in the following respects:

   i) In his treatment of the impact of the development on the gap between the settlements of Goring and Ferring, specifically in failing to provide adequate reasons in respect of those impacts or consequent assessment of the development against Policy SS5 of the emerging Local Plan ("eLP").

   ii) In failing to take account of the conflict with Policies SS1 and SS4 of the eLP and/or failing to provide adequate reasons as to the assessment of the development against those policies or the weight to attribute to any conflict.

   iii) In failing to take account of a material consideration, namely the reasons for the absence of a specific gap designation in the adopted development plan.

   iv) In his treatment of the impacts of the development on the South Downs National Park ("the National Park"), specifically in failing to comply with his duty in section 11A of the National Parks and Access to Countryside Act 1949 ("the 1949 Act") and/or paragraph 176 of the National Planning Policy Framework ("the Framework"); and/or in failing to provide adequate reasons and/or reaching an irrational conclusion in respect of the impact of the development on the National Park.

Planning history

4. The Site is 19.96 hectares (ha) in size (just under 50 acres). It currently forms part of Chatsmore Farm, which covers 30 ha (about 74 acres) in total, and is owned by the developer. There is a watercourse, called the Ferring Rife, which runs horizontally across Chatsmore Farm; the Site lies to the south of Ferring Rife. The Site is currently in agricultural use, and comprises an open field. Significantly for planning purposes, the Site lies outside the built-up area boundary in the Worthing Core Strategy 2011 ("WCS") and the eLP.

5. The Site's eastern boundary is adjacent to Goring railway station and the built-up area of Goring. It is bordered along its southern boundary by a railway line. It is within the setting of the National Park, which lies beyond the northern boundary of Chatsmore Farm, separated by the A259 Littlehampton Road. Land beyond the Site's western

boundary falls outside the administrative area of Worthing, and forms part of the village of Ferring, in the district of Arun. This includes a parcel of open land which is part of Chatsmore Farm, but not part of the Site.

6. On 10 August 2020, the developer applied for outline planning permission, with all matters of detail reserved, for development as follows:

> "Mixed use development comprising up to 475 dwellings along with associated access, internal roads and footpaths, car parking, public open space, landscaping, local centre (uses including A1, A2, A3, A4, A5, D1, D2, as proposed to be amended to use classes E, F and Sui Generis) with associated car parking, car parking for the adjacent railway station, undergrounding of overhead HV cables and other supporting infrastructure and utilities"

7. The Council refused planning permission on 1 March 2021, for six reasons. For the purposes of this claim, the material reasons were as follows:

> "01. The proposed development is outside of the built-up area as defined in the Worthing Core Strategy and the emerging Submission Draft Worthing Local Plan and is not allocated for residential development. The proposal is therefore contrary to policy 13 of the Worthing Core Strategy and emerging policies SS4, SS5 and SS6 of the Submission Draft Worthing Local Plan, resulting in the coalescence of settlements and the loss of an important area of green space that contributes to local amenity, sense of place and wildlife. Furthermore, it is considered that the adverse impacts of the development would demonstrably outweigh the benefits as substantial adverse landscape and visual effects would arise from the development affecting the local area and the wider landscape, including the landscape setting to the National Park (therefore adversely affecting its statutory purpose to conserve and enhance its natural beauty and cultural heritage), Highdown Hill scheduled Monument and the Conservation Area.
>
> 02. The application is considered to be premature as the development proposed is so substantial, and its cumulative effect would be so significant, that to grant permission would undermine the plan-making process in particular its overall spatial strategy about the location of new development, its landscape evidence and proposed green space designations that are central to the emerging Submission Draft Worthing Local Plan. The proposal therefore fails to comply with paragraph 49 of the National Planning Policy Framework."

Policies

8. Development in Worthing is tightly constrained by the National Park to the north and the sea to the south. The coastal plain between Brighton (to the west) and Chichester (to the east) is densely developed. The WCS identifies four areas of open countryside (two to the east and two to the west of Worthing town) which "represent long established breaks in development between settlements" and are highly valued (WCS, paragraphs 2.3, 3.10 of the explanatory text). This Site is one of those four areas. It was a designated gap in the West Sussex Structure Plan (2004) and the previous Local Plan, but the WCS adopted a general countryside policy instead of gap policies. That reflected the prevailing guidance and practice at the time (see the Inspectors' Panel Report dated 6 August 2007 on the draft of the South East Plan 2009).

9. Policy 13 of the WCS forms part of the Council's development strategy under the section titled "Sustainable Environment", and it contributes to the strategic objectives set out in paragraphs 8.1 and 8.2 of the explanatory text, including conserving and enhancing the natural environment. Policy 13 provides, so far as is material:

> "**Policy 13**
>
> **The Natural Environment and Landscape Character**
>
> Worthing's development strategy is that new development needs can be met within the existing built up area boundary and, with the exception of the West Durrington strategic allocation, will be delivered on previously developed sites, therefore:
>
> - Residential development outside of the existing built up area boundary will only be considered as part of a borough-wide housing land review if there is a proven under-delivery of housing within the Core Strategy period.
>
> - Other proposals that support countryside based uses, such as agriculture and informal recreation may be considered if they are deemed essential and/or can contribute to the delivery of the wider strategic objectives. If development in these areas is proposed it must take into account and mitigate against any adverse effects on visual and landscape sensitivity.
>
> ……"

10. The Council intends to replace the WCS with the new Worthing Local Plan in the near future. The eLP underwent public examination in November 2021, following which the Local Plan Inspector ("LP Inspector") issued a post-hearing advice letter on 9 December 2021, identifying the steps required to make the eLP sound and legally compliant. As at the date of the Inspector's decision, the steps that remained to be taken were drawing up the schedule of main modifications, based on the post-advice

hearing letter; the Inspector's final report; and the adoption of the modified plan by the Council, if it so chooses.

11. It was agreed between the parties at the appeal, in the Statement of Common Ground, that the relevant policies in the eLP were Policies SS1, SS4, SS5 and SS6.

12. The overall strategy is set out in Policy SS1 which provides:

> "**SS1 SPATIAL STRATEGY**
>
> Up to 2036 delivery of new development in Worthing will be managed as follows:
>
> The Local Plan will:
>
> a) seek to provide for the needs of local communities and balance the impact of growth through the protection and enhancement of local services and (where appropriate) the safeguarding of employment sites, leisure uses, community facilities, valued green/open spaces and natural resources;
>
> b) help to deliver wider regeneration objectives, particularly in the town centre and seafront, through the allocation of key urban sites;
>
> c) seek to increase the rate of housing delivery from small sites.
>
> d) The strategy for different parts of the Borough is as follows:
>
> > i) Land within the Built Up Area Boundary - development will be permitted subject to compliance with other policies in the Local Plan. Development should make efficient use of previously developed land but the density of development should be appropriate for its proposed use and also relate well to the surrounding uses and the character of the area. Within the existing urban fabric nine key regeneration sites are allocated for development.
> >
> > ii) Edge Of Town Sites - six edge of town sites are allocated for development.
> >
> > iii) Open Spaces / Countryside / Gaps - valued open space and landscapes outside of the Built Up Area Boundary are protected. This includes important gaps between settlements, the undeveloped coastline and the features which provide connectivity between these areas."

13. Policy SS4 sets out policy in regard to the land outside the built-up area boundary. Mr Peck, planning officer at the Council, explained in his proof of evidence that, during the Local Plan examination, the Council proposed amendments to the eLP, in the light

of discussions that were taking place. The text underlined and crossed through below shows the amendments that the Council proposed during the Inquiry in its "Note on overlap and inter-relationship between Policies SS4, SS5 and SS6", dated November 2021 ("the Amendments Note"):

"**SS4 COUNTRYSIDE AND UNDEVELOPED COAST**

a) Outside of the Built Up Area Boundary land excluding sites designated as Local Green Spaces under SS6) will be defined as 'countryside and undeveloped coast'.

b) Development in the countryside will be permitted, where a countryside location is essential to the proposed use.~~, it cannot be located within the Built Up Area Boundary, and it maintains its character and function for natural resources.~~ Applications for the development of entry-level exception sites, suitable for first time buyers will be supported where these:

- comprise of entry-level homes that offer one or more types of affordable housing;

- be adjacent to existing settlements and proportionate in size to them; and

- comply with any local design policies and standards.

c) Development to support recreation uses on the coast will normally be permitted subject to:

i. built facilities being located within the adjacent Built Up Area Boundary;

ii. the need to maintain and improve sea defences.

d) Any development in the countryside and undeveloped coast should not result in a level of activity that has an adverse impact on the character or biodiversity of the area.

e) Improvements to green infrastructure, including (but not restricted to) enhanced pedestrian, cycle, equestrian access, and better access for those with mobility difficulties will be supported.

f) The setting of the South Downs National Park and the Designated International Dark Skies Reserve must be respected and opportunities to improve access to the National Park will be sought through joint working with other organisations including the Park Authority, West Sussex County Council, Highways England and landowners."

14. Policy SS5 designates four Green Gaps, one of which is Chatsmore Farm, and thus includes the Site. The Goring-Ferring Gap, which also separates Goring and Ferring, lies to the south west of Chatsmore Farm, extends down to the coast.

15. Paragraph 3.50 of the explanatory text in the eLP explains that the Green Gaps help "to preserve the separate characters and identities of different settlements" which is "particularly important given the compact nature of Worthing and how few and fragile the breaks in development are on the coastal strip…". Paragraph 3.52 describes the designated Gaps as "a critically important component of Worthing's landscape setting".

16. The text of Policy SS5, underlined and crossed through to show the proposed amendments in the Amendments Note, read as follows:

> "**SS5 LOCAL GREEN GAPS**
>
> The four areas listed below are designated as Local Green Gaps between the settlements of Worthing & Ferring and Worthing & Sompting/Lancing, and will be protected in order to retain the separate identities and character of these settlements.
>
> a) Goring-Ferring Gap;
>
> b) Chatsmore Farm;
>
> c) Brooklands Recreation Area and abutting allotments; and
>
> d) Land east of proposed development (site A15) at Upper Brighton Road.
>
> Outside of those areas designated as Local Green Space, all applications for development (including entry level exception sites) within Local Green Gaps must demonstrate that individually or cumulatively:
>
> ~~Development within these Gaps will be carefully controlled and will only be permitted in exceptional circumstances. Any development must be consistent with other policies in this Plan and ensure (individually or cumulatively):~~
>
> i) ~~it does not lead to the coalescence of settlements;~~ It would not undermine the physical and/or visual separation of settlements;
>
> ii) ~~it is unobtrusive and does not detract from the openness of the area;~~ It would not compromise the integrity of the gap;
>
> iii) it conserves and enhances the benefits and services derived from the area's Natural Capital; and

> iv) it conserves and enhances the area as part of a cohesive green infrastructure network."

17. The LP Inspector supported these amendments in his post-hearing advice letter of 9 December 2021:

> "21. The requirement in Policy SS5 to demonstrate 'exceptional circumstances' within LGGs is ……unjustified and ineffective and thus should be removed, The suggested changes to criteria i) and ii) also better reflect the perceived purpose of the LGG designation and are more consistent with similar policies in neighbouring areas. They also remove reference to coalescence and openness, which are akin to Green Belt policy. I agree that modifications are necessary to these criteria to be justified and ensure effectiveness."

18. The LP Inspector did not cast any doubt upon the appropriateness of the designation of Chatsworth Farm as a Green Gap.

19. Policy SS6 (Local Green Space) designates Local Green Spaces, including Chatsmore Farm. The LP Inspector, in his post-hearing advice letter dated 9 December 2021, advised that Chatsmore Farm was an "extensive tract of land" and therefore did not meet criterion (c) of paragraph 102 of the Framework, and was contrary to the Planning Practice Guidance. He invited representations from the Council on revisions to the boundary to identify smaller distinct areas. In the light of this advice, the Council accepted at the appeal that it could not rely on this designation, and the Inspector afforded it no weight [decision letter ("DL") 26].

20. The schedule of main modifications, as approved by the LP Inspector, reflected the changes proposed in the LP Inspector's post-hearing advice letter. It was published in April. A public consultation took place in April/May 2022. The LP Inspector's report is still awaited; it is expected in July 2022.

21. The eLP proposes 12 main major allocations for residential development, delivering 1,753 houses. The LP Inspector removed one proposed allocation and did not make any recommendations for further allocations. He did not accept the Second Defendant's representation that this Site should be allocated for housing.

The Inspector's decision

22. The Inspector (Mr Rory Cridland LLB (Hons) PG Dip, Solicitor) held an Inquiry and made a site visit. In his DL, he identified the main issues at DL8 as follows:

> "(i)whether the appeal site offers an acceptable location for development having regard to local and national planning policy, the need for housing, the Council's emerging local plan and the effect of the proposed development on local green space;

> (ii) the effect of the proposed development on the landscape, including the setting of the South Downs National Park (SDNP); and
>
> (iii) whether the residual cumulative impact on the road network would be severe."

23. This was an amalgamation of the main issues agreed by the parties and the Inspector at the case management conference.

The WCS

24. The Inspector found that, despite the fact that the WCS was adopted prior to the Framework and against a different policy background, the WCS remained one of the cornerstones of the development plan; continued to serve a useful planning purpose; and its aim of protecting the countryside was generally in accordance with the aims in paragraph 174 of the Framework (DL12-15). He afforded it full weight (DL33)

Housing

25. The agreed assessment of housing need was 885 dwellings per annum. The Inspector found that there was an exceptionally high unmet need for market housing and a substantial unmet need for affordable housing (DL17). There was also substantial unmet need in neighbouring areas (DL19). The Inspector did not seek to determine the extent of the shortfall, which was in dispute. He noted that the Council could not demonstrate a 5 year housing land supply and will continue to be unable to do so after adoption of the eLP.

The eLP and prematurity

26. The Inspector found that under the current development plan, the Site was not designated as a local green space, or local or strategic gap (DL22).

27. The Inspector applied the policy guidance in the Framework, paragraphs 48 and 49, to the eLP. The Inspector acknowledged that Chatsmore Farm was identified as a local Green Gap, in the eLP which restricted development (DL23). As the proposed development would develop a significant portion of the proposed gap and reduce the visual separation of the settlements, there would be some potential conflict with Policy SS5. However, it was unclear what form the final policy would take, in the light of the comments by the LP Inspector in the post-hearing letter of advice, and the fact that the eLP was still subject to consultation. He concluded that this "considerably limits the weight which it should be afforded" (DL27).

28. The Inspector found that, although the eLP was at a reasonably advanced stage, it was still "some way off adoption", and the effect of the proposed development of the Green Gap protected by Policy SS5 was not so substantial, nor its cumulative effect so significant, that granting permission would undermine a fundamental aspect of the eLP's strategic balance as a whole.

29. The Inspector gave no weight to Policy SS6 because the Council accepted the view of the LP Inspector that Chatsmore Farm could not properly be designated as a Local Green Space as it is an extensive tract of land.

Landscape

30. The Inspector accepted that the Site consists of a physical gap between the settlements and appears as a break in the surrounding development (DL38). He concluded that, although the development would diminish the sense of separation between Goring Ferring, it would be located towards the southern end of the Site close to where a merging of the settlements has already taken place. This would limit the overall visual impact and with around 14 ha of land remaining undeveloped, the physical or visual separation of the settlements would not be undermined (DL42).

31. It was common ground that the Site is in the setting of the National Park. The Inspector found that the development would be visible from the National Park and result in a clearly perceptible and noticeable change to the existing "breathtaking views" from the National Park, towards the sea. He accepted the developer's assessment that the level of harm to these views would be "moderate adverse" and not significant (DL44 – 48).

32. At DL49, the Inspector found that the development complied with the policy advice in paragraph 176 of the Framework that development within the setting of a national park should be sensitively located and designed to avoid or minimise adverse impacts. Therefore he did not consider that the setting of the National Park or views from within it would be "materially affected".

33. The Inspector also found that there were substantial adverse impacts on localised views in the area, at DL50 – DL56.

Planning balance

34. The Inspector assessed the overall planning balance at DL82 – DL92. It was common ground that the tilted planning balance at paragraph 11(d) of the Framework was engaged because the Council could not demonstrate a 5 year supply of deliverable housing sites. The Inspector concluded that, notwithstanding the conflict with the development plan, there were material considerations, in particular the significant contribution to meeting the need for housing, which justified the grant of planning permission.

Legal and policy framework

Applications under section 288 TCPA 1990

35. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

36. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Council must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

37. The principles to be applied when considering a challenge under section 288 TCPA 1990 were summarised 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] – [7]:

> "6. In my judgment at first instance in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) (at paragraph 19) I set out the "seven familiar principles" that will guide the court in handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:
>
> > "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission 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" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
> >
> > (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An 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 (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).
> >
> > (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning

authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, 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 (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment (1993)* 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

> (7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

> 7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasized the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in *Mansell*, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63)."

38. The reasons in a decision letter are required to meet the standard set out in *South Buckinghamshire District Council v Porter (No 2)* [2004] 1 WLR 1953, per Lord Brown, at [36]:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for

> example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

39. A local planning authority may be substantially prejudiced by a decision to grant permission where the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to indicate what, if any, impact they may have on future applications (per Lord Brown in *South Bucks*, at [30], citing the judgment of Lord Bridge in *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, at 167).

The development plan and material considerations

40. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

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

41. In *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447, Lord Clyde explained the effect of this provision, beginning at 1458B:

> "Section 18A [the parallel provision in Scotland] has introduced a priority to be given to the development plan in the determination of planning matters….
>
> By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a

presumption that the development plan is to govern the decision on an application for planning permission….. By virtue of section 18A if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted….

Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it. As Glidewell L.J. observed in *Loup v. Secretary of State for the Environment* (1995) 71 P. & C.R. 175, 186:

> "What section 54A does not do is to tell the decision-maker what weight to accord either to the development plan or to other material considerations."

Those matters are left to the decision-maker to determine in the light of the whole material before him both in the factual circumstances and in any guidance in policy which is relevant to the particular issues.

…..

In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal

> does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

42. This statement of the law was approved by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983, per Lord Reed at [17].

43. It was not in dispute before me that policies in an emerging plan may be material considerations for a decision-maker to take into account when deciding whether or not to grant planning permission. The public law requirement to take into account material considerations was considered by the Supreme Court in *R (Friends of the Earth Ltd & Ors) v Heathrow Airport Ltd* [2020] UKSC 52, per Lord Hodge and Lord Sales, at [116] – [122]. A decision-maker is required to take into account those considerations which are expressly or impliedly identified by statute, or considerations which are "obviously material" to a particular decision that a failure to take them into account would not be in accordance with the intention of the legislation, notwithstanding the silence of the statute. The test whether a consideration is "so obviously material" that it must be taken into account is the *Wednesbury* irrationality test.

44. The test for irrationality was described by the Divisional Court (Leggatt LJ and Carr J.) in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649:

> "98. …. The second ground on which the Lord Chancellor's Decision is challenged encompasses a number of arguments falling under the general head of 'irrationality' or, as it is more accurately described, unreasonableness. This legal basis for judicial review has two aspects. The first is concerned with whether the decision under review is capable of being justified or whether in the classic *Wednesbury* formulation it is 'so unreasonable that no reasonable authority could ever have come to it': see *Associated Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223, 233–234. Another, simpler formulation of the test which avoids tautology is whether the decision is outside the range of reasonable decisions open to the decision-maker: see eg *Boddington v British Transport Police* [1999] 2 AC 143, 175, per Lord Steyn. The second aspect of

> irrationality/unreasonableness is concerned with the process by which the decision was reached. A decision may be challenged on the basis that there is a demonstrable flaw in the reasoning which led to it—for example, that significant reliance was placed on an irrelevant consideration, or that there was no evidence to support an important step in the reasoning, or that the reasoning involved a serious logical or methodological error."

The Framework

45. The Framework is national planning policy and so is a material consideration in planning decisions (paragraph 2).

46. Paragraph 11 sets out the way in which the presumption in favour of sustainable development should be applied to plan-making and decision-taking *(for ease, the footnotes have been inserted into the body of the text in italics)*:

> "11. Plans and decisions should apply a presumption in favour of sustainable development.
>
> For **plan-making** this means that:
>
> a) all plans should promote a sustainable pattern of development that seeks to: meet the development needs of their area; align growth and infrastructure; improve the environment; mitigate climate change (including by making effective use of land in urban areas) and adapt to its effects;
>
> b) strategic policies should, as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas
>
> *[FN 6: As established through statements of common ground (see paragraph 27).]*,
>
> unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area
>
> *[FN 7: The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 181) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and*

> *other heritage assets of archaeological interest referred to in footnote 68); and areas at risk of flooding or coastal change.]*;
>
> or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole.
>
> For **decision-taking** this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date,
>
> *[FN 8: This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 74)*; *or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years.]*,
>
> granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or
>
> *[FN 7: The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 181) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 68); and areas at risk of flooding or coastal change.]*
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

47. Paragraphs 48 to 50 advise upon the approach to be taken to emerging plans when determining applications for planning permission:

"**Determining applications**

…

48. Local planning authorities may give weight to relevant policies in emerging plans according to:

a) the stage of preparation of the emerging plan (the more advanced its preparation, the greater the weight that may be given);

b) the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and

c) the degree of consistency of the relevant policies in the emerging plan to this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given) ….

49. However, in the context of the Framework - and in particular the presumption in favour of sustainable development - arguments that an application is premature are unlikely to justify a refusal of planning permission other than in the limited circumstances where both:

a) the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or phasing of new development that are central to an emerging plan; and

b) the emerging plan is at an advanced stage but is not yet formally part of the development plan for the area.

50. Refusal of planning permission on grounds of prematurity will seldom be justified where a draft plan has yet to be submitted for examination; or - in the case of a neighbourhood plan - before the end of the local planning authority publicity period on the draft plan. Where planning permission is refused on grounds of prematurity, the local planning authority will need to indicate clearly how granting permission for the development concerned would prejudice the outcome of the plan-making process."

48. Section 5, titled "Delivering a sufficient supply of homes" provides at paragraph 60:

"60. To support the Government's objective of significantly boosting the supply of homes, it is important that a sufficient amount and variety of land can come forward where it is needed, that the needs of groups with specific housing

> requirements are addressed and that land with permission is developed without unnecessary delay."

49. Section 5 goes on to consider in detail the requirements for strategic plan-making, identifying land for homes, and maintaining supply and delivery (paragraphs 61 – 77).

50. The Glossary, at page 67, defines "Green infrastructure" as follows:

> "**Green infrastructure:** A network of multi-functional green and blue spaces and other natural features, urban and rural, which is capable of delivering a wide range of environmental, economic, health and wellbeing benefits for nature, climate, local and wider communities and prosperity."

51. This definition is wide enough to include Green Gaps and Local Green Spaces. The benefits of high quality open spaces are referenced at paragraph 98, and Local Green Spaces are specifically addressed at paragraphs 101-103.

52. The overarching environmental objective of protecting and enhancing the natural environment contributes to the achievement of sustainable development: see paragraph 8(c).

53. Paragraph 20(d) provides:

> "Strategic policies should set out an overall strategy …. and make sufficient provision for:
>
> …..
>
> d) conservation and enhancement of the natural …..environment, including landscapes and green infrastructure…."

54. The effective use of land, including use of brownfield land, is promoted in paragraph 119:

> "119. Planning policies and decisions should promote an effective use of land in meeting the need for homes and other uses, while safeguarding and improving the environment and ensuring safe and healthy living conditions. Strategic policies should set out a clear strategy for accommodating objectively assessed needs, in a way that makes as much use as possible of previously-developed or 'brownfield' land."

55. In the section titled "Conserving and enhancing the natural environment", paragraph 174(b) provides:

> "174. Planning policies and decisions should contribute to and enhance the natural and local environment by
>
> …

> b) recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services - including the economic and other benefits of the best and most versatile agricultural land, and of trees and woodland;
>
> …"

56. Paragraph 176 can be found under Ground 4 below.

Ground 1

Submissions

57. The Council submitted that the Inspector failed to provide adequate reasons in respect of:

    i) the impact of the development on the gap between the settlements of Goring and Ferring; and

    ii) the assessment of the development against Policy SS5 of the eLP.

58. On (i), the Inspector found that there was a physical and visual gap, which was important, and which would be diminished by the development. However, he reached the contradictory conclusion that the development would not undermine the physical or visual separation between Goring and Ferring. The Council is therefore left in genuine doubt as to the reasons for the conclusion on this main issue.

59. On (ii), although the Inspector found that the Site was a designated Green Gap under Policy SS5, he failed to reach findings on the question whether the development would conflict with the policy objective of retaining the separate identities and character of Goring and Ferring.

60. In response the First Defendant submitted that the Inspector's reasons met the standard required, as set out in *South Bucks*.

61. On (i), the Inspector's findings were not inconsistent or contradictory. At DL42, he gave two express reasons why the physical and visual separation of the settlements would not be undermined. First the location of the built form towards the southern end of the Site where a merging of the settlements has already taken place. Second, the remainder of the Chatsmore Farm site (around 14 ha) would remain open and undeveloped.

62. On (ii), the Inspector gave adequate reasons. At DL27, he concluded that there would be potential conflict with Policy SS5 in the light of the impact of the development on the Green Gap. His conclusion at DL27 should be read together with his conclusions at DL42 that the gap would be impacted but not to the extent that the physical or visual separation of the settlements would be undermined.

63. The Second Defendant also submitted that the Inspector's reasons met the required legal standard. The Inspector provided very detailed reasons for his planning judgments. The Council's submissions erroneously treated Policy SS5 of the eLP as if it was an adopted policy for the purposes of section 38(6) PCPA 2004.

Conclusions

64. Both parts (i) and (ii) of Ground 1 are reasons challenges to which the principles set out by Lord Brown in the *South Bucks* case apply.

65. On part (i), the impact of the development on the gap between the settlements of Goring and Ferring was a principal important controversial issue between the parties. At the Inquiry, it was addressed in evidence and in submissions. Therefore the Inspector was required to provide adequate reasons to explain his conclusions on this issue.

66. The Inspector accepted that the Site consists of a physical gap between the settlements and appears as a break in the surrounding development (DL38). He adopted the words of the eLP Inspector that Chatsmore Farm is "well related visually to the SDNP and thus provides an opportunity for the open countryside to penetrate the built-up area" (DL39). He accepted the importance of maintaining an area of separation between the two settlements, as did the Inspectors in the previous appeal decisions in 1963 and 1974 (DL40 – 41).

67. However, at DL42, he found that, although the development would diminish the sense of separation between Goring and Ferring, it would be located towards the southern end of the Site, close to where a merging of the settlements has already taken place. In his view:

> "This would limit the overall visual impact and with around 14 ha of land remaining undeveloped, the physical or visual separation of the settlements would not be undermined."

68. Therefore he concluded, at DL43:

> "….whilst I acknowledge the appeal site is of landscape and amenity value to the local community, and that its loss would result in some harm in this respect, I am not persuaded that the proposed development would materially undermine the landscape value of the 'gap'."

69. I accept the Defendants' submissions that the Inspector's reasons on this issue did meet the standard in the *South Bucks* case. The Inspector gave two express reasons why the physical and visual separation of the settlements would not be "materially undermined". First, the location of the built form towards the southern end of the Site where a merging of the settlements has already taken place. Second, the remainder of the Chatsmore Farm site would remain open and undeveloped. Whilst the Council may disagree with the Inspector's assessment, the Inspector's reasoning is sufficiently clear.

70. On part (ii), the Inspector recognised that Policy SS5 of the eLP identified the Site as a Green Gap and restricted development in order to retain the separate identities and character of Goring and Ferring (DL 23). He acknowledged that, since the development would develop a significant portion of the proposed Gap and reduce the visual separation of the settlements, it would potentially conflict with Policy SS5. However, as it was unclear what form the final policy will take, the weight that could be afforded to the conflict with Policy SS5 was limited.

71. In my view, the Inspector did make a provisional finding on the question whether the development would conflict with Policy SS5 – he found that it would potentially conflict with it because the Site would be developed and the visual separation between the two settlements reduced. He expressed his views provisionally, as a "potential" conflict, because he considered that the terms of the policy had not yet been finalised. His views on the extent to which the physical or visual separation of the settlements would be undermined by the development were set out at DL42, as I have described above. Therefore, in my judgment, his reasons met the standard set out in the *South Bucks* case.

72. For these reasons, Ground 1 does not succeed.

Ground 2

Submissions

73. The Council submitted that the Inspector erred in failing to take account of the conflict with Policies SS1 and SS4 of the eLP. Alternatively, he failed to provide adequate reasons for his assessment of the development against those policies, or the weight which he attributed to any conflict with them.

74. It was a key aspect of the Council's case before the Inspector that the development was in conflict with the spatial strategy in Policy SS1, in particular, the restriction on development on land outside the built-up area boundary (see e.g. the Council's closing submissions, paragraphs 27-28). The Council argued that this conflict attracted significant weight.

75. The Inspector made no mention of Policy SS1 in the DL. He referred to Policy SS4 at DL25 and DL27, but only in the context of the LP Inspector's comments about them in the post-hearing letter of advice. Conflict with these policies was a material consideration to weigh against the grant of planning permission, even if the Inspector did not consider the development to be premature.

76. The reasons are inadequate because the Council is unable to ascertain from the DL whether the Inspector found that there was a conflict, and if so, how much weight should be attributed to it.

77. The First Defendant submitted that the Inspector gave adequate consideration to the eLP policies at DL22-31. They did not require the same detailed treatment as development plan policies.

78. Although the Inspector did not expressly mention Policy SS1, it can be inferred that he had regard to it. At DL29 he referred to the impact on the "eLP's strategic balance as a whole", which is set out in Policy SS1. He expressly referred to Policies SS4, SS5 and SS6 which develop the principles set out in Policy SS1. The Inspector chose to focus on the specific policies, rather than the general ones.

79. The Council's Closing Submissions made reference at paragraph 29 to the fact that Policy SS4 was continuing the policy in Policy 13 of the WCS, which the Inspector had already considered. There was no need for him to address it further.

80. Alternatively, applying *Simplex (GE) Holdings Ltd v SSE* (1989) 57 P & CR 306, the outcome would necessarily have been the same, even if Policies SS1 and SS4 had been expressly considered, as the issues raised by them were already in play by reason of Policy 13 of WCS and Policies SS5 and SS6.

81. The developer supported the First Defendant's submissions. It submitted that it was not surprising that the Inspector did not refer to Policy SS1 as it was not cited by the Council as a reason for refusal in the decision notice, nor referred to in its Statement of Case. The Council's Closing Submissions only referred to it briefly, as the Council's primary focus was on Policy 13 of the WCS which is in similar terms, though more restrictive. As Policy 13 was accorded full weight, it was difficult to see how Policy SS1 could attract material weight in any planning balance exercise.

82. As to reasons, the Inspector duly considered the eLP overall and determined it was a material consideration that should only be afford limited weight for the reasons given. Therefore more detailed reasons were not required. The Inspector was not required to refer to every material consideration and every argument in his reasons, applying the principles set out in the *South Bucks* case.

Conclusions

83. Policy SS1 of the eLP sets out the "core principles" of the Council's proposed new spatial strategy. It intends to deliver development within the built-up area boundary, and in six edge of town sites, whilst protecting valued open space and landscapes outside the built-up area boundary, including important gaps between settlements.

84. Paragraphs 3.8 to 3.10 of the draft explanatory text to Policy SS1 explain the strategy in the following way:

> "**Strategy for Worthing**
>
> 3.8 As previously highlighted, the most significant constraining factor when considering future development is land availability. Worthing is tightly constrained and there is little scope to grow beyond the current Built Up Area Boundary without merging with the urban areas of Ferring (to the west) and Sompting/Lancing (to the east) and without damaging the borough's character and environment. Furthermore, the town is relatively compact and there are very few vacant sites or

> opportunity areas within the existing Built Up Area that could deliver significant levels of growth.
>
> 3.9 Therefore, the reality is, that when compared to many other local authority areas, there are relatively few options for growth. As a result, in many respects, the spatial strategy taken forward in this Plan is similar to that incorporated within the Worthing Core Strategy (2011) which placed a strong emphasis on regeneration and transforming key previously developed sites within the urban area. This approach reflects the NPPF which encourages local authorities to make as much use as possible of brownfield sites to meet development needs. However, in response to the need to meet as much as possible of the housing need for Worthing, one key change has been the need to now look more positively at potential development options located around the edge of the borough.
>
> 3.10 The spatial strategy seeks to achieve the right balance between planning positively to meet the town's development needs (particularly for jobs, homes and community facilities) with the continuing need to protect and enhance the borough's high quality environments and open spaces within and around the town. The overarching objective is therefore to maximise appropriate development on brownfield land and add sustainable urban extensions adjacent to the existing urban area. The core principles, set out in the policy below, take account of the characteristics of the borough and provide a clear direction for development in and around the town. The spatial strategy will help to steer new development to the right locations whilst at the same time helping to protect those areas of greatest environmental value / sensitivity."

85. Policy SS4 of the eLP defines areas outside the built-up area boundary, as "undeveloped coast" or "countryside" (such as the Site in this case). It sets out the policy criteria to be met for development in these areas.

86. Policy SS1 of the eLP was not expressly referred to in the Council's reasons for refusing planning permission, though the reference to the plan's "overall spatial strategy about the location of new development" was, by implication, a reference to Policy SS1 as it sets out the overall spatial strategy. Policy SS4 was expressly referred to in the Council's reasons. Both policies were listed as relevant in the Planning Statement of Common Ground.

87. In the list of main issues, agreed at the case management stage, a main issue in the appeal was whether this was an appropriate location for the development having regard to the Council's eLP. That was incorporated into the Inspector's summary of main issues at DL8.

88. The Council's Closing Submissions stated in the opening sentence that the proposed development conflicted with Policies SS1, SS4 and SS5 of the eLP. They clearly set out its case that the proposed development in an area designated as countryside, with

restrictions on development, did not comply with the strategy set out in Policies SS1 and SS4 (see paragraphs 27 - 32).

89. The Council drew the Inspector's attention to the evidence and submissions before the LP Inspector, and the unsuccessful attempt by the developer to have the Site allocated for housing development. The Council submitted to the LP Inspector that it was apparent from the LP Inspector's post-hearing advice letter that he did not have any outstanding concerns about the soundness of the Council's overall spatial strategy, in particular, the principle of restricting development outside the built-up area boundary.

90. The Council went on to submit, at paragraph 41, that "Policies SS1, SS4 and SS5 of the eLP are material considerations of significant weight in this appeal".

91. In light of the above references, at paragraphs 86 to 90, I do not accept the Defendants' submissions that the Policies SS1 and SS4 of the eLP were not a significant part of the Council's case at the Inquiry.

92. In his decision, the Inspector made no mention of Policy SS1 and only made passing references to SS4, in the context of the LP Inspector's post-hearing advice letter, which referred to proposed modifications to SS4. Although the Inspector referred, at DL29, to the impact on the "eLP's strategic balance as a whole", which is set out in Policy SS1, this was only in the context of the prematurity issue where he was rejecting the Council's second reason for refusing permission.

93. After concurring with the Council that Policy SS6 on Green Spaces was not applicable, the Inspector went on to consider Policy SS5 on Local Green Gaps. He found that the proposed development was in conflict with it, but he gave that conflict limited weight because of uncertainty as to its final form. Nonetheless, under the heading "Overall Planning Balance", at DL83, he took into account the weight he accorded to the conflict with Policy SS5. In my view, this was the correct approach to take to relevant policies in the eLP.

94. In my view, the Inspector should have taken a similar approach to Policies SS1 and SS4, by assessing the proposal against the emergjng development plan, and weighing any conflict in the overall planning balance. These policies were clearly material, quite apart from the issue of the Green Gap, as the developer's proposal to build a substantial housing estate on greenfield land which was outside the built-up area boundary, directly conflicted with them. The emerging plan was at a relatively advanced stage. The Inspector's examination had been concluded, and it was apparent from the LP Inspector's post-hearing letter of advice that he did not express any concerns about the drafting of Policy SS1, unlike Policies SS4-6. So there was no basis upon which to assume that there would be any material modifications to Policy SS1.

95. Overall, I consider that the omission of any proper consideration of Policies SS1 and SS4 was an error on the part of the Inspector. He made no attempt to justify their exclusion in his decision, so it seems that was probably an oversight rather than a deliberate decision. Alternatively, I accept the Council's submission that the Inspector failed to provide any, or any adequate, reasons in regard to the assessment of the development against Policies SS1 and SS4, and the weight that he attributed to any conflict.

96. I am unable to accept the Defendants' submissions that there was no need for the Inspector to consider Policies SS1 and SS4 because they were merely a continuation of Policy 13 of the WCS, to which the Inspector gave full weight, and that even if he had considered them, the outcome of the balancing exercise would necessarily have been the same, applying the test in *Simplex (GE) Holdings Ltd v SSE* (1989) 57 P & CR 306.

97. It was not in dispute before me that policies in an emerging plan may be material considerations for a decision-maker to take into account when deciding whether or not to grant planning permission. As paragraph 48 of the Framework confirms, weight may be given to relevant policies in emerging plans when determining applications for planning permission (depending upon the stage of preparation, the extent of any unresolved objections, and the degree of consistency with the Framework).

98. The First Defendant relied upon the case of *West Oxfordshire DC v Secretary of State for Housing, Communities and Local Government & Anor* [2018] EWHC 3065 (Admin), in which David Elvin QC, sitting as a Deputy High Court Judge, held at [77] and [79], that the failure by the Inspector to have regard to the emerging local plan policies or to give substantial weight to them was not a material error as the issues which they raised had already been considered and given full weight as part of the adopted local plan policies and the Framework. In my judgment, this was a conclusion reached in the light of the facts of that particular case, which are clearly distinguishable from this case. In *West Oxfordshire*, the Judge agreed with counsel for the Secretary of State that the eLP was of marginal importance in the inquiry ([42]); it was not a principal important controversial issue ([38]); and there was no issue arising under the eLP which was new and which was not covered by the existing local plan and the Framework ([80]). In contrast, in this case, the conflict with the eLP was a main issue at the Inquiry, and it did add a further dimension to the consideration of the spatial strategy in the adopted WCS, for reasons which I set out below.

99. In the appeal, the developer submitted that the current strategy, as set out in Policy 13 of the WCS, was an out-of-date and restrictive policy which should be given limited weight as it failed to accord with the Framework's stated aim of significantly boosting the supply of housing, made no allowance for balancing benefits against harm, and provided no solution to remedy the under-provision of housing.

100. The explanatory text to Policy 13 stated:

> "8.10 The development strategy set out in this Core Strategy (and as supported by the Strategic Housing Land Availability Assessment) is clear in that all of the borough's development requirements can be delivered within the existing built up area boundary. Furthermore, with the exception of the West Durrington strategic development, all major developments are expected to be located on previously developed sites. This will comply with the requirements of PPS3 – Housing, to locate the majority of new housing on previously developed land."

101. The Inspector acknowledged, at DL15, that the WCS pre-dated the Framework and was adopted under a different policy background. Therefore it was primarily

protective in nature, and it was intended to meet a significantly lower housing requirement. Nonetheless, the Inspector concluded that Policy 13 should be given full weight as it remained "one of the cornerstones of the adopted development plan" and "it continues to serve a useful planning purpose".

102. The significance of the eLP is that the Council is proposing to adopt a new local plan which continues to restrict development outside the built-up area boundary, and the boundary continues to exclude the Site. Unlike the position when it adopted the WCS in 2011, it is proceeding in that manner in full knowledge of the current policies in the Framework, including the increased requirements relating to housing, which it acknowledges it has not met, and will not be able to meet under the eLP.

103. The LP Inspector, whose task it is to consider the soundness of the eLP, has apparently accepted the Council's proposed spatial strategy in Policy SS1, including the restrictions on development outside the built-up area boundary, as detailed in Policy SS4. The eLP proposes 12 main major allocations for residential development, delivering 1,753 houses. The LP Inspector removed one proposed allocation, and has not made any recommendations for further allocations. He did not accept the developer's representation that this Site should be allocated for housing, nor did he cast any doubt on its designation as a Green Gap.

104. This Inspector acknowledged the geographical constraints on development in Worthing (DL18), and that Worthing lies within one of the most densely developed areas in the UK. He accepted that "even if the Council was to develop every blade of grass within its administrative area, meeting this need is likely to prove challenging for the foreseeable future" (DL21).

105. Policy 13 of the WCS was intended to cater for the development needs that prevailed at the time the WCS was adopted, in 2011. While the Inspector attributed full weight to Policy 13, he found that a departure was justified because the Council could not meet its present day housing requirements (DL87) which, of course, were not envisaged when Policy 13 was adopted. However, the spatial strategy embodied in Policies SS1 and SS4, unlike that in Policy 13, was predicated on an understanding that the Council would not (and could not) meet its current housing requirements. Contrary to the Defendants' submissions, Policies SS1 and SS4 were not merely another layer of policy which continued the effect of Policy 13. They were also the product of a new balancing exercise, carried out in the context of the Framework, which balanced current housing needs and environmental considerations in the Borough, and had been the subject of recent examination by another Inspector. Therefore, it was irrational not to treat them as material considerations, which ought to be considered in reaching a decision. In my view, the Inspector had to assess the proposed development against Policies SS1 and SS4 through a different lens to that which he applied to Policy 13 of the WCS, because the circumstances in which the draft plan and the adopted plan came into existence were quite different.

106. If, as is likely, the Inspector found that the proposed development was in conflict with Policies SS1 and SS4, he should then have determined the appropriate weight to accord to any such conflict, and treated it as a material consideration in the overall planning balance. It is not possible for this Court to predict the Inspector's assessment and conclusions on such a multi-faceted issue, so as to conclude that the outcome would necessarily be the same. The *Simplex* test is not met here.

107. For these reasons, Ground 2 succeeds.

Ground 3

Submissions

108. The Council submitted that the Inspector failed to take into account a material consideration, namely, the reasons for the absence of a specific gap designation in the WCS. This failure meant that the Inspector focussed upon the absence of a specific gap designation as a reason to downgrade the importance of the Site as a strategic gap.

109. While the WCS does not contain a specific gap policy, the Council's case was that Policy 13 served to protect important gaps between settlements (Council's Closing Submissions, paragraph 12). The Council explained that the Site had previously been identified in the former Worthing Local Plan (2003) and the West Sussex Structure Plan (2004) as a designated gap. The omission of a specific gap policy in the WCS was a reflection of the prevailing guidance and practice at the time of the WCS's preparation, rather than a reflection of the unimportance of the Site in this respect (Council's Closing Submissions, paragraphs 13 – 14).

110. The WCS was prepared and adopted in the context of the South East Plan (2009). The Panel appointed to examine the South East Plan had made clear that gap policies should only be used in local plans where gaps between settlements could not be protected by other landscape and countryside policies (South East Plan Panel Report, page 58).

111. In light of that guidance, the approach adopted by the Council in the WCS was to use Policy 13 to protect the strategic gaps between settlements, including the Site. Policy 13 was the highest level of protection that such gaps were given in the WCS, consistent with the advice issued in respect of the South East Plan.

112. The reasons for the absence of a specific gap policy were an obligatory material consideration in circumstances where the Inspector specifically relied on the absence of such a policy to downgrade the importance of the Site as a strategic gap: see DL22 and DL31. In circumstances where the Inspector attributed such significance to the lack of a specific type of policy, which directly affected the treatment of the Site in policy terms, it was necessarily relevant to consider the reasons for such an absence when those reasons had been the subject of evidence and submissions during the course of the inquiry.

113. The First Defendant submitted that the Inspector was entitled, and indeed required, to proceed on the basis of the absence of any gap designation in the current statutory development plan, without being obliged to take into account historic reasons as to why that state of affairs might have come into existence. It was agreed in the Planning Statement of Common Ground that the site was not designated as a strategic gap in the adopted Development Plan.

114. Further and in any event, the Inspector acknowledged the historic position by reference to the West Sussex Structure Plan, at DL22. The Inspector here was addressing the Council's case on the historic background as set out in its Closing

Submissions at paragraphs 13 - 14, which included discussion of the reasons why the strategic gap policy was not maintained. Therefore it cannot be said that this historic context was left out of account in any event.

115. Nor was there any error in the Inspector's conclusion that the site does not "benefit from any other specific form of protection in planning policy terms over and above that set out in Policy 13 of the WCS" (DL31). The Inspector here recognised that Policy 13 is protective in nature (as he also did at DL15), while noting that the Site did not, by reason of Policy 13 or any other adopted development plan policy, form part of a designated strategic gap. That observation was entirely accurate.

116. The developer's submissions were in similar terms to the First Defendant's submissions.

Conclusions

117. Applying section 70(2) TCPA 1990 and section 38(6) PCPA 2004, the Inspector had to determine the appeal in accordance with the development plan, unless material considerations indicate otherwise.

118. The Inspector correctly identified that Policy 13 of the WCS was the only policy protection afforded to the Site in the development plan (DL22 and DL31). The Council made no complaint about his analysis of Policy 13, and the protection that it afforded to the Site as an area of open land which fell outside the built-up area boundary.

119. In my judgment, the historic context to the adoption of the WCS, in particular the reason why it did not include a strategic gap policy, was not a material consideration which the Inspector was obliged to take into account in making his decision. The general principle is that, when interpreting development plan policy, a decision-maker should not stray beyond the plan itself and anything incorporated in it. As Patterson J. stated in *JJ Gallagher v Cherwell District Council* [2016] EWHC 290 (Admin), at [46]:

> "46. The starting point to be taken when interpreting planning policy seems to me to be the wording of the policy itself, assisted, if necessary, with words from the supporting text. If the words of the policy with the supporting text are not clear or are ambiguous then, but only then, it may be permissible to have regard to documents incorporated within the plan itself. That is consistent with the approach in the case of *Phides*. It would be entirely unrealistic to expect any party reading the development plan, whether a member of the public, developer or land owner to have to resort to an investigation of other background documents. That is particularly so given the public interest in the role of planning. It follows that even if the policy is ambiguous or not clear I do not accept that it is appropriate to have resort to the various versions of the inspector's report to clarify the meaning as the first defendant invites the court to do. The extent to which one can have regard to other documents in

> determining the meaning of policy is not, in my judgment, at large but is circumscribed by the development plan and what is incorporated within it."

120. In these circumstances, the Council's account of the reasons why the WCS did not include a strategic gap policy could not amount to anything more than background information.

121. For these reasons, Ground 3 does not succeed.

Ground 4

Submissions

122. The Council submitted that the Inspector erred in his treatment of the proposed development on the National Park. In particular, he failed to take account of the harm to the National Park and its setting; failed to comply with his duty under section 11A of the 1949 Act; and failed to apply paragraph 176 of the Framework. His conclusion was irrational. Further or alternatively, he failed to provide adequate reasons for his conclusions as to the impact of the development on the National Park.

123. The Site is located within the setting of the National Park and a key issue in the appeal was the effect of the development on the "breathtaking views" from the elevated position on Highdown Hill within the National Park. The Inspector found that the development would result in "moderate adverse" impacts on view from Highdown Hill and Highdown Rise (DL44, DL46 – 48). Despite this finding, the Inspector concluded that neither the setting of the National Park, nor views from within it, would be "materially affected" (DL49). In consequence, he failed to weigh <u>any</u> harm to the National Park or its setting in the overall planning balance, and thus failed to comply with his duty under section 11A of the 1949 Act, or to apply paragraph 176 of the Framework. The complaint was not that he did not refer to section 11A; rather that he failed to apply it.

124. The First Defendant submitted that the Inspector dealt fully with the impact of the development on the National Park, and his conclusions were a reasonable exercise of planning judgment, and adequately reasoned. He plainly complied with his duty under section 11A of the 1949 Act, and applied paragraph 176 of the Framework. These were matters for his evaluative judgment.

125. Although Mr Hutchinson (the developer's planning witness) took a precautionary approach and afforded "up to moderate weight to the adverse effects of the development", Mr Self (the developer's landscape witness) concluded that the proposals "would not materially impact on the setting" of the National Park.

126. The absence of any objection from the South Downs National Park Authority was significant.

127. The developer submitted that the Inspector carefully assessed the relevant landscape and visual effects and plainly identified "moderate adverse and not significant harm" in respect of views from within the National Park. It was therefore clear that the harm

to the National Park was properly assessed by the Inspector, under the 1949 Act and paragraph 176 of the Framework. Given the evidence before him and his own Site visit, he was properly informed to reach the planning judgment that he made, and did not act irrationally. His reasoning was clear, intelligible and adequate.

Section 11A of the 1949 Act and paragraph 176 of the Framework

128. An Inspector determining an application for planning permission for development in the setting of a National Park is subject to the duty in section 11A of the 1949 Act, which provides as follows:

> "(2) In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in subsection (1) of section five of this Act and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park."

129. The purposes specified in section 5(1) of the 1949 Act are as follows:

> "(1) The provisions of this Part of this Act shall have effect for the purpose—
>
> (a) of conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection; and
>
> (b) of promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public."

130. The areas specified are those designated as National Parks (section 5(3)).

131. The duty under section 11A applies in considering whether planning permission should be granted for development in the setting of a National Park, to the extent that it "affects" land within the National Park. The government's Planning Practice Guidance makes it clear that the duty in section 11A "is relevant in considering development proposals that are situated outside National Parks…but which might have an impact on their setting or protection" (PPG Reference ID 8-039-20190721). A decision-maker must therefore have regard to the importance of conserving and enhancing the natural beauty of the National Park, which may be adversely affected by development within its setting.

132. In the section of the Framework titled "Conserving and enhancing the natural environment", paragraphs 176 and 177 set out the policy requirements for areas, including National Parks, which have the highest status of protection. Paragraph 176 is relevant here, and provides as follows:

> "176. Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the

> Broads and Areas of Outstanding Natural Beauty which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of development within all these designated areas should be limited, while development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas."

133. It was common ground before me that the requirement to give "great weight" in paragraph 176 applies to development both within a National Park and in its setting.

134. In *Howell v Secretary of State for Communities and Local Government* [2014] EWHC 3627 (Admin), Cranston J. rejected a submission that the duty "to have regard" in section 11A of the 1949 Act was comparable to the duty to "have special regard to the desirability of preserving the building or its setting" in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990. He said, at [46]:

> "46. In my judgment the *East Northamptonshire DC* case is not directly applicable in this case since the 1988 Act requires the planning authority not to have "special regard" to the matter as does section 66(1), but simply to have regard to it. In this respect the 1988 Act follows other planning legislation, for example, the Town and Country Planning Act 1990, s. 70(2); the National Parks and Access to the Countryside Act 1949, s. 11A(2); and the National Environment and Rural Communities Act 2006, s. 40(1). To have regard to a matter means simply that that matter must be specifically considered, not that it must be given greater weight than other matters, certainly not that it is some sort of trump card. It does not impose a presumption in favour of particular result or a duty to achieve that result. In the circumstances of the case other matters may outweigh it in the balance of decision-making. On careful consideration the matter may be given little, if any, weight."

135. The judgment in *Howell* makes no mention of the policy requirement to give "great weight" to conserving and enhancing landscape and scenic beauty" in paragraph 176 of the Framework.

136. In *Monkhill Ltd v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 74, [2021] PTSR 1432, which concerned the 2018 version of paragraphs 176 and 177 of the Framework (then numbered paragraph 172 and in slightly different terms), the Court of Appeal approved the analysis given by Holgate J. in the High Court, which was materially as follows:

> "19. Rejecting Monkhill's argument that the first part of paragraph 172 of the NPPF does not qualify under "limb (i)" because it does not state any test for a balancing exercise, and therefore cannot provide "a clear reason for refusing the

development proposed", the judge said (in paragraphs 51 to 53):

> "51. It is necessary to read the policy in paragraph 172 as a whole and in context. Paragraph 170 requires planning decisions to protect and enhance valued landscapes in a manner commensurate with their statutory status and any qualities identified in the development plan. Paragraph 172 points out that National Parks, the Broads and AONBs have "the highest status of protection" in relation to the conservation and enhancement of landscapes and scenic beauty. Not surprisingly, therefore, paragraph 172 requires "great weight" to be given to those matters. The clear and obvious implication is that if a proposal harms these objectives, great weight should be given to the decision-maker's assessment of the nature and degree of harm. The policy increases the weight to be given to that harm.
>
> 52. Plainly, in a simple case where there would be harm to an AONB but no countervailing benefits, and therefore no balance to be struck between "pros and cons", the effect of giving great weight to what might otherwise be assessed as a relatively modest degree of harm, might be sufficient as a matter of planning judgment to amount to a reason for refusal of planning permission, when, absent that policy, that might not be the case. But where there are also countervailing benefits, it is self-evident that the issue for the decision-maker is whether those benefits outweigh the harm assessed, the significance of the latter being increased by the requirement to give "great weight" to it. This connotes a simple planning balance which is so obvious that there is no interpretive or other legal requirement for it to be mentioned expressly in the policy. It is necessarily implicit in the application of the policy and a matter of planning judgment. The "great weight" to be attached to the assessed harm to an AONB is capable of being outweighed by the benefits of a proposal, so as to overcome what would otherwise be a reason for refusal.
>
> 53. Interpreted in that straight forward, practical way, the first part of paragraph 172 of the NPPF is capable of sustaining a clear reason for refusal, whether in the context of paragraph 11(d)(i) or, more typically where that provision is not engaged, in the

> general exercise of development management powers."
>
> 20. Holgate J. concluded that "the first part of paragraph 172 … qualifies as a policy to be applied under limb (i) of paragraph 11(d) …", and "is also capable of sustaining a freestanding reason for refusal in general development control in AONBs, National Parks and the Broads" (paragraph 63)."

137. Sir Keith Lindblom SPT then went on to say:

> "30. This, in my view, is plain on a straightforward reading of paragraph 172 in its context, having regard to its obvious purpose. The policy is not actually expressed in terms of an expectation that the decision will be in favour of the protection of the "landscape and scenic beauty" of an AONB, or against harm to that interest. But that, in effect, is the real sense of it – though this, of course, is not the same thing as the proposition that no development will be permitted in an AONB. If the effects on the AONB would be slight, so that its highly protected status would not be significantly harmed, the expectation might – I emphasise "might" – be overcome. Or it might be overcome if the effects of the development would be greater, but its benefits substantial. This will always depend on the exercise of planning judgment in the circumstances of the individual case.
>
> 31. In *Bayliss v Secretary of State for Communities and Local Government* [2014] EWCA Civ 347, at paragraph 18 of his judgment (cited by Ouseley J. in *Franks v Secretary of State for Communities and Local Government* [2015] EWHC 3690 (Admin), at paragraph 25), Sir David Keene said this of the concept of "great weight" in the equivalent policy in the first sentence of paragraph 115 of the original version of the NPPF, which was in almost exactly the same terms as the first sentence of the paragraph 172 of the July 2018 version:
>
> > "18. … [That] national policy guidance, very brief in nature on this point, has to be interpreted in the light of the obvious point that the effect of a proposal on an AONB will itself vary: it will vary from case to case; it may be trivial, it may be substantial, it may be major. The decision maker is entitled to attach different weights to this factor depending upon the degree of harmful impact anticipated. Indeed, in my view it would be irrational to do otherwise. The adjective "great" in the term "great weight" therefore does not take one very far. … ."

> 32. I agree. The most important point here, however, as Holgate J. recognised (in paragraph 53 of his judgment), is that the requirement in the policy in the first part of paragraph 172 for "great weight" be given to the conservation and enhancement of landscape and scenic beauty in an AONB does not prevent its application providing a clear reason for the refusal of planning permission."

138. The reasoning in *Bayliss* differs from the analysis since adopted in heritage cases where it has been held that, although the potential level of harm to a listed building will naturally vary from case to case, the duty to accord considerable weight to the harm in the balancing exercise, at whatever level it has been assessed, remains the same: see *East Northamptonshire DC v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137, [2014] 1 P & CR 22, per Sullivan LJ at [10] and [28]. Although Ms Tafur submitted that the same analysis should apply to the requirement to give "great weight" in paragraph 176 of the Framework, I consider that I am bound to follow the Court of Appeal authority in *Bayliss* to the contrary, unless or until the Court of Appeal takes a different view.

Conclusions

139. The Inspector's findings on this issue were set out at DL44 to DL49, as follows:

> "*Setting of the NP and views from within it.*
>
> 44. As noted above, the appeal site is visible from within the SDNP, with clear views of the appeal site possible from the Scheduled Monument at Highdown Hill as well as from parts of Highdown Rise and the car park at Highdown Gardens. It forms part of the middle distance, framed to either side by the settlements of Goring-by-Sea and Ferring, with longer range, extensive views towards the sea.
>
> 45. The SDNP Authority has not raised any specific concerns in relation to views from within the SDNP or with the impact of the proposed development on the setting of the National Park. Nevertheless, the Council consider that the overall effect of the proposal on views from Highdown Hill would be substantial adverse.
>
> 46. I do not agree. While I note that views are breath-taking from this vantage point, I observed that the appeal site itself is not prominent in those views and the focus is clearly on the sea. This accords with the Viewpoint Characterisation and Analysis Study (2015) [FN17: South Downs National Park: View Characterisation and Analysis (November 2015) (CD-G6).] which identifies Highdown Hill as a good vantage point from which to view the surrounding landscape and recognises that, notwithstanding the densely populated areas of Worthing and Ferring, extensive sea views are the main focus. Even though

> the proposed development would be visible in the mid-ground view, it would nevertheless be seen in the context of existing development-much of which already extends further north and in closer proximity to the SDNP than would the proposed development.
>
> 47. I accept that the addition of built form on the appeal site would result in a clearly perceptible and noticeable change to the existing view. However, these views already include intrusive development which affect the tranquillity from within the SDNP. The appeal site would be seen within this context. Extensive views towards the sea and the sense of tranquillity within this part of the SDNP would not materially alter and while I accept there would be change to the view, I concur with the appellant that the level of harm would be moderate adverse and not significant.
>
> 48. Turning then to the views from Highdown Rise and the public car park at Highdown Gardens [FN18: See LVIA Appendix C (Photographs 19 and 20) and Appendix I (Viewpoints 19 and 20) (CD-A11).], from these locations within the SDNP I acknowledge the proposed development would, from certain viewpoints, be more noticeable. However, as with views from Highdown Hill, it would be seen within the context of the existing development south of the A259 and would appear neither overly prominent, visually intrusive or materially affect views towards the sea.
>
> 49. Paragraph 176 of the Framework does not seek to restrict development within the setting of a national park but instead advises that it should be sensitively located and designed to avoid or minimise adverse impacts. In view of its location towards the southern end of the site, and the limited impact on views from within the SDNP, I consider that would be the case with the development proposed and do not therefore consider that the setting of the SDNP or views from within it would be materially affected."

140. The impact of the development on the National Park was a main issue in the appeal, by virtue of the Site's location within the setting of the National Park.

141. The main impact of the development was its effect on the views from within the National Park, in particular, from Highdown Hill and Highdown Rise. The South Downs National Park Authority commissioned a View Characterisation and Analysis Study (2015) to guide future planning and development management decisions. It recorded that the view from Highdown Hill, over the Downs, above the coastal plain and out to sea, "represents the breathtaking views that are noted in the first of the Park's special qualities". The Study set management aims to ensure that the special qualities of the National Park were retained, one of which was to ensure that development outside the National Park does not block or adversely affect views towards the sea at this location.

142. I agree that the absence of a planning objection from the South Downs National Park Authority is a matter to be taken into account when assessing harm (DL45). However, I do not consider that its absence detracts from the importance of this Study, particularly as it was common ground at the Inquiry that the proposed development would impact upon the views from the National Park which were assessed in the Study.

143. The developer commissioned Mr Self of CSA Environmental to prepare a Landscape and Visual Impact Assessment ("LVIA") which, among other matters, assessed the effect of the development upon the views from the National Park.

144. The criteria applied in assessing the visual magnitude of change were as follows:

> "**Visual magnitude of change**
>
> **Substantial** Large and dominating changes which affect a substantial part of the view.
>
> **Moderate** Clearly perceptible and noticeable changes within a significant proportion of the view.
>
> **Slight** Small changes to existing views, either as a minor component of a wider view, or smaller changes over a larger proportion of the view(s).
>
> **Negligible** Very minor changes over a small proportion of the views.
>
> **Neutral** No discernible change to the views."

145. The criteria applied in assessing the visual effects were as follows:

> "**Substantial** The proposals would have a significant impact on a view from a receptor of medium sensitivity … and would be an obvious and dominant element in the view.
>
> **Moderate** The proposals would impact on a view from a medium sensitive receptor … and would be a readily discernible element in the view.
>
> **Slight** The proposals would have a limited effect on a view from a medium sensitive receptor but would still be a visible element within the view …
>
> **Negligible** The proposals would result in a negligible change to the view but would still be discernible.
>
> **Neutral** No change in the view."

146. The summary of visual effects for the views from Highdown Hill and Highdown Rise assessed the magnitude of change as "moderate"; the visual effect in Year 1 as "moderate adverse"; and in Year 15 as "slight adverse". The sensitivity was assessed

as "high". The assessment also included detailed text, which I have not included here.

147. At DL47, the Inspector accepted the LVIA's assessment of the visual effect on the view as "moderate adverse", in preference to the Council's evidence that the effect would be "substantial adverse". He referred to the criteria for a "moderate" magnitude of change, namely, a clearly perceptible and noticeable change. Under the LVIA, a proposal is assessed as having "moderate" visual effects where it would "impact on a view from a medium sensitive receptor", and would be a "readily discernible element in the view". The table explains that the visual effects may be beneficial or adverse – here they were assessed as adverse.

148. In Mr Self's proof of evidence to the Inquiry, he stated, as part of his overall conclusion:

> "6.51 The release of a greenfield site for development will inevitably give rise to a certain level of landscape harm but for the reasons I have already given, the Appeal Scheme has been landscape led and has been carefully crafted to respond to both its landscape and townscape setting in a sensitive manner. As such, it creates a more appropriate and softer boundary to the urban area that presently exists. ….It will not introduce a form of development that is at odds with the prevailing character of the coastal plain and as such will not materially impact on the setting of the South Down National Park."

149. In his proof of evidence, Mr Hutchinson, the developer's planning witness, considered the adverse effects of the development on the setting of the National Park in the overall planning balance. He said:

> "8.51 As required, I attach great weight to conserving and enhancing landscape and scenic beauty in National Park, but in the present case the proposed scheme could be carried out without any significant harm. The development would not therefore conflict with the relevant NPPF policies relating to the setting of the National Park.
>
> 8.52 It is important to note that national policy in NPPF paragraph 176 does not establish a requirement for nil detriment in all cases. Instead, schemes should be designed to avoid or minimise adverse impacts. It states that:-
>
> > "176….. The scale and extent of development within all these designated areas should be limited, while development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas."
>
> 8.53 The evidence explains how a landscape led approach has been taken in the masterplanning of the site in order that any necessary mitigation is embedded into the proposals.

> 8.54 Even though Mr Self concludes that the proposals would not materially impact on the setting of the South Downs I have adopted a precautionary approach in light of NPPF paragraph 176 and would be prepared to afford up to moderate weight to the adverse effects of the development on the wider area including the setting of the National Park given its status."

150. Notwithstanding his earlier finding of moderate adverse visual effects, at DL49, the Inspector concluded that neither the setting of the National Park, nor views within it, would be materially affected. He confirmed this conclusion at DL57, and made no reference to the National Park when he considered the overall planning balance later in his decision.

151. The First Defendant defended the Inspector's approach on the basis that he must have accepted Mr Self's overall conclusion at paragraph 6.51 of his proof of evidence that the development would not "materially impact on the setting of the South Down National Park". There were, therefore, no adverse effects on the National Park which needed to be included in the overall planning balance. However, Mr Self explained, at paragraph 3.3, that his evidence should be read alongside the LVIA in which he had provided a "comprehensive assessment of the anticipated landscape and visual effects" of the proposals, which he did not replicate in his proof of evidence, but summarised the pertinent points. Thus, he made it clear that his proof of evidence was not intended to replace or depart from his assessment in the LVIA. His assessment in the LVIA was that the development would have moderate adverse effects on the views from the National Park.

152. In contrast to the First Defendant, the developer accepted, in the skeleton argument for this hearing, that the Inspector did assess harm:

> "5.31 The Inspector made his own evaluative judgment and plainly identified "*moderate adverse and not significant*" harm in respect of views from within the SDNP. It is therefore manifestly clear and obvious that harm to the SDNP was properly assessed and thereafter taken into account by the Inspector ….."

153. In my judgment, it is clear from DL47 that the Inspector accepted the assessment in the LVIA, namely, that there would be a perceptible change to the view and the level of harm would be moderate adverse. He also added the words "and not significant". Therefore, I consider it would be irrational for him to conclude at DL49 that there were no adverse effects at all. Further, I agree with the Council that the inconsistency between these two positions was not explained in his reasons.

154. In my judgment, the Inspector erred in law in failing to take into account his finding, at DL47, that "the level of harm would be moderate adverse and not significant" in the overall planning balance. I refer to the guidance given by Holgate J. in *Monkhill*, set out the judgment of the Court of Appeal at [19], where he explains that, as the Framework policy requires that "great weight should be given to conserving and enhancing landscape and scenic beauty", any assessed harm should be weighed against the benefits of the proposed development in the overall planning balance. This approach is, of course, standard practice in planning decision-making. The Inspector

missed out this step, despite the fact that it was flagged to him in Council's Closing Submissions (paragraph 99) and Mr Hutchinson's evidence (quoted above) on the planning balance, on which the developer relied in its Closing Submissions.

155. As a result, when conducting the overall planning balance, which was a crucial stage of the decision-making process, he failed to give any weight to the moderate adverse effects he had found, which was in breach of the policy requirement in paragraph 176 of the Framework to give them "great weight".

156. In my judgment, the Inspector also failed properly to discharge his duty under section 11A of the 1949 Act since, when performing the planning balance exercise in relation to a proposed development which affected views from the National Park, he failed to have regard to the statutory purpose of conserving and enhancing the natural beauty of the National Park. Although earlier on in his decision he had assessed the impact on and level of harm to the National Park, in compliance with the duty under section 11A, he failed to discharge his duty properly, by omitting any consideration of the statutory purpose when conducting the overall planning balance.

157. Applying the *Simplex* test, I cannot safely conclude that, if the correct approach had been adopted, the outcome would necessarily have been the same, particularly taking into account the cumulative effect of the errors under both Grounds 2 and 4.

158. For these reasons, Ground 4 succeeds.

Final conclusions

159. The claim for statutory review is allowed on Grounds 2 and 4 only. The decision of the Inspector is to be quashed by order of the Court.