Neutral Citation Number: [2023] EWHC 1854 (Admin)

Case No: CO/2594/2022 & CO/2591/2022

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/07/2023

Before :

THE HON. MRS JUSTICE STEYN DBE

- -

Between :

PROTECT DUNSFOLD LTD	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES **(2) SURREY COUNTY COUNCIL** **(3) UKOG (234) LTD** **4) WAVERLEY BOROUGH COUNCIL** **(5) DUNSFOLD PARISH COUNCIL**	**Defendants**

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- -

Estelle Dehon KC and Alex Shattock (instructed by **Leigh Day**) for the **Claimant**
James Strachan KC and Robert Williams (instructed by **Government Legal Department**) for the **First Defendant**
David Elvin KC and Matthew Dale-Harris (instructed by **Hill Dickinson LLP**) for the **Third Defendant**
The Second, Fourth and Fifth Defendants did not appear and were not represented

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And Between :

WAVERLEY BOROUGH COUNCIL	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendants**

(2) SURREY COUNTY COUNCIL
(3) UKOG (234) LTD

- -
- -

Jenny Wigley KC (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
James Strachan KC and Robert Williams (instructed by **Government Legal Department**) for the **First Defendant**
David Elvin KC and Matthew Dale-Harris (instructed by **Hill Dickinson LLP**) for the **Third Defendant**
The Second Defendant did not appear and was not represented

Hearing date: 8 June 2023
- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 20 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HON. MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

A. Introduction

1. Protect Dunsfold Ltd ('Protect Dunsfold') and Waverley Borough Council ('Waverley') bring claims pursuant to s.288 of the Town and Country Planning Act 1990 ('the 1990 Act') challenging a decision of the Minister of State for Housing, taken on behalf of the Secretary of State, to grant planning permission for proposed development at Land South of Dunsfold Road and East of High Loxley Road, Dunsfold, Surrey ('the Site'). The decision was taken on 7 June 2022. The Secretary of State accepted the recommendation made by his Inspector, in a report dated 8 March 2022 ('the Inspector's Report' or 'IR'), to allow an appeal under s.78 of the 1990 Act brought by the third defendant ('UKOG') against the refusal of planning permission for the proposed development by Surrey County Council ('Surrey').

2. The proposed development consists of:

> "the construction, operation and decommissioning of a well site for the exploration and appraisal of hydrocarbon minerals from one exploratory borehole (Loxley-1) and one side-track borehole (Loxley-1z) for a temporary period of three years involving the siting of plant and equipment, the construction of a new access track, a new highway junction with High Loxley Road, highway improvements at the junction of High Loxley Road and Dunsfold Road and the erection of a boundary fence and entrance gates with restoration to agriculture."

3. On 2 March 2023, Lane J granted Protect Dunsfold permission to pursue two grounds and Waverley permission to pursue one ground which is to the same effect as Protect Dunsfold's first ground. Accordingly, the claimants contend that:

   i) the decision is unlawful by reason of the failure of the Inspector and the Secretary of State to have regard to the requirement in the first sentence of paragraph 176 of the National Planning Policy Framework (20 July 2021, 'the Framework'), that "*[g]reat weight should be given to conserving and enhancing landscape and scenic beauty in … Areas of Outstanding Natural Beauty*", or policy RE3 of the Waverley Borough Local Plan ('WBLP'), or alternatively to give reasons for departing from that policy ('Ground 1: Alleged failure to give great weight to harm to the AONB');

   In addition, Protect Dunsfold contends that:

   ii) The decision is unlawful by reason of the failure of the Secretary of State to explain substantial inconsistencies with his decision in the Ellesmere Port appeal, published on the same day as the challenged decision ('Ground 2: Alleged inconsistency with the Ellesmere Port decision').

B. The facts

4. Protect Dunsfold is a company limited by guarantee incorporated on 28 May 2019 to represent the views of local residents opposed to hydrocarbon development in the

Dunsfold area. Waverley is the Borough Council, and Surrey is the County Council, for the area in which the proposed development is located.

5. The Site forms part of a large agricultural field in use for grazing. The proposed access would cross this and adjacent fields to join the main road network on High Loxley Road which connects to Dunsfold Road. Dunsfold Road defines the southern edge of the Surrey Hills Area of Outstanding Natural Beauty ('AONB'). The Site lies just to the south of Surrey Hills AONB, forming part of the setting of the AONB, and it is within an Area of Great Landscape Value ('AGLV').

6. UKOG applied for planning permission on 26 April 2019. Against the recommendation of officers, Surrey refused planning permission on 15 December 2020. The reasons for refusal were:

> "1. It has not been demonstrated that the highway network is of an appropriate standard for use by the traffic generated by the development, or that the traffic generated by the development would not have a significant adverse impact on highway safety contrary to Surrey Minerals Plan Core Strategy 2011 Policy MC15.
>
> 2. It has not been demonstrated that the applicant has provided information sufficient for the County Planning Authority to be satisfied that there would be no significant adverse impact on the appearance, quality and character of the landscape and any features that contribute towards its distinctiveness, including its designation as an Area of Great Landscape Value, contrary to Surrey Minerals Plan Core Strategy 2011 Policy MC14(iii)."

7. UKOG appealed the refusal of planning permission and an inquiry was held (remotely) before an Inspector appointed by the Secretary of State over nine days, starting on 27 July 2021. Waverley participated in the inquiry as a main party, pursuant to rule 6 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000. Protect Dunsfold did not appear at the inquiry but submitted representations in support of Surrey's refusal.

8. The Inspector identified the "*main issues*" as:

> "• the effect of the proposal on landscape character and appearance of the area, including that of the Surrey Hills Area of Outstanding Natural Beauty (AONB) and Area of Great Landscape Value (AGLV);
>
> • the effect on living conditions for residential and commercial activities local to the site, with particular regard to noise and disturbance; and
>
> • the effect on highway safety, including the suitability of the road network and traffic movements associated with the operation." (IR §11.2)

9. The impact of the proposed (exploratory stage) development on greenhouse gas emissions was not a main issue but Waverley's submissions addressed the negative impact on greenhouse gas emissions of onshore gas production. Protect Dunsfold's representations did not address greenhouse gas emissions or climate change issues more generally. Other third parties, Ms Finch and the Weald Action Group raised issues as to the compatibility of an application for hydrocarbon exploration and appraisal with the UK's targets for reducing reliance on fossil fuels. UKOG adduced a statement addressing the extent of greenhouse gas emissions that would be caused by the proposed development from Tom Dearing, an associate director at RPS and a Chartered Environmentalist. Mr Dearing predicted that the unmitigated emissions would be either 28,778 tonnes of CO_2e or 29,111 tonnes of CO_2e, depending on the method of calculation. Mr Dearing's evidence was uncontested and he was not called to give oral evidence.

10. On 5 January 2022, the appeal was recovered for the Secretary of State's determination under s.79 of the 1990 Act. The Inspector sent his report to the Secretary of State on 8 March 2022, with a recommendation that the appeal be allowed. On 7 June 2022, the Secretary of State made the challenged decision allowing UKOG's appeal.

C. The legal and policy framework

Section 288 appeals

11. This appeal is brought pursuant to s.288 of the 1990 Act. The principles that guide the court in handling a challenge under section 288 were reiterated by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government (Practice Note)* [2017] EWCA Civ 1643, [2018] PTSR 746 at [6] ('the *St Modwen* Principles'):

> "(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 Ltd v Secretary of State for the Environment* (1978) 42P & CR 26, 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 v Porter (No 2)* [2004] 1WLR 1953, 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 (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1KB 223) to give material considerations whatever weight [it] thinks fit or no weight at all: see the speech of Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1WLR 759, 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 in *Newsmith Stainless Ltd v Secretary of State for Environment, Transport and the Regions (Practice Note)* [2001] EWHC Admin 74 at [6]; [2017] PTSR 1126, para 5 (renumbered)).

(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 JSC in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983, paras 17-22.

(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 LJ in *South Somerset District Council v Secretary of State for the Environment (Practice Note)* [2017] PTSR 1075, 1076—1077; (1992) 66P & CR 83, 85.

(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 Ltd v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB) at [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 LJ [in] *Fox Strategic Land and Property Ltd v Secretary of State for Communities and Local Government* [2013] 1 P & CR 6, paras 12—14, citing the judgment of Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65P & CR 137, 145." (Emphasis added.)

12. At [7], Lindblom LJ emphasised that there is no place for "*hypercritical scrutiny*" of planning decisions (including decision letters of the Secretary of State and Inspector's reports), cautioning against "*the dangers of excessive legalism*".

13. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865, Lord Carnwath JSC (with whom the other Justices agreed) held at [25]:

> "… the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly."

The National Planning Policy Framework

14. Paragraph 152 of the Framework provides:

> "The planning system should support the transition to a low carbon future in a changing climate, taking full account of flood risk and coastal change. It should help to: shape places in ways that contribute to radical reductions in greenhouse gas emissions, minimise vulnerability and improve resilience; encourage the reuse of existing resources, including the conversion of existing buildings; and support renewable and low carbon energy and associated infrastructure." (Emphasis added.)

15. Paragraph 176 of the Framework provides (omitting footnote):

> "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." (Emphasis added.)

16. Paragraph 211 of the Framework provides (omitting footnotes):

> "When determining planning applications, great weight should be given to the benefits of mineral extraction, including to the economy. In considering proposals for mineral extraction, minerals planning authorities should:
>
> a) as far as is practical, provide for the maintenance of landbanks of non-energy minerals from outside National Parks, the Broads, Areas of Outstanding Natural Beauty and World Heritage Sites, scheduled monuments and conservation areas;
>
> b) ensure that there are no unacceptable adverse impacts on the natural and historic environment, human health or aviation safety, and take into account the cumulative effect of multiple impacts from individual sites and/or from a number of sites in a locality;
>
> c) ensure that any unavoidable noise, dust and particle emissions and any blasting vibrations are controlled, mitigated or removed at source, and establish appropriate noise limits for extraction in proximity to noise sensitive properties;
>
> d) not grant planning permission for peat extraction from new or extended sites;
>
> e) provide for restoration and aftercare at the earliest opportunity, to be carried out to high environmental standards, through the application of appropriate conditions. Bonds or other financial guarantees to underpin planning conditions should only be sought in exceptional circumstances;
>
> f) consider how to meet any demand for the extraction of building stone needed for the repair of heritage assets, taking account of the need to protect designated sites; and
>
> g) recognise the small-scale nature and impact of building and roofing stone quarries, and the need for a flexible approach to the duration of planning permissions reflecting the intermittent or low rate of working at many sites." (Emphasis added.)

17. Paragraph 215 of the Framework provides, so far as relevant:

> "Minerals planning authorities should:
>
> a) when planning for on-shore oil and gas development, clearly distinguish between, and plan positively for, the three phases of development (exploration, appraisal and production), whilst ensuring appropriate monitoring and site restoration is provided for; …"

Surrey Minerals Plan 2011

18. Policy MC12 of the Surrey Minerals Plan 2011 provides:

> "Planning applications for drilling boreholes for the exploration, appraisal or production of oil or gas will be permitted only where the mineral planning authority is satisfied that, in the context of the geological structure being investigated, the proposed site has been selected to minimise adverse impacts on the environment. The use of directional drilling to reduce potential impacts should be assessed.
>
> Planning applications for drilling to appraise potential oil or gas fields will only be permitted where the need to confirm the nature and extent of the resource, and potential means of its recovery, has been established. Well sites, including the re-use of wellheads used at the exploratory stage, should be located such that there are no significant adverse impacts.
>
> Commercial production of oil and gas will only be permitted where it has been demonstrated that the surface/above ground facilities are the minimum required and there are no significant adverse impacts associated with extraction and processing, including processing facilities remote from the wellhead, and transport of the product." (Emphasis added.)

19. Policy MC14 of the Surrey Minerals Plan 2011 provides, so far as relevant:

> "Mineral development will be permitted only where a need has been demonstrated and the application has provided information sufficient for the mineral planning authority to be satisfied that there would be no significant adverse impacts arising from the development. …" (Emphasis added.)

Waverley Borough Local Plan

20. Policy RE3 of the WBLP provides:

> "New development must respect and where appropriate, enhance the distinctive character of the landscape in which it is located.
>
> i. Surrey Hills Area of Outstanding Natural Beauty
> The protection and enhancement of the character and qualities of the Surrey Hills Area of Outstanding Natural Beauty (AONB) that is of national importance will be a priority and will include the application of national planning policies together with the Surrey Hills AONB Management Plan. The setting of the AONB will be protected where development outside its boundaries harm public views from or into the AONB.
>
> ii. The Area of Great Landscape Value
> The same principles for protecting the AONB will apply in the Area of Great Landscape Value (AGLV), which will be retained for its own sake and as a buffer to the AONB, until

> there is a review of the Surrey Hills AONB boundary, whilst recognising that the protection of the AGLV is commensurate with its status as a local landscape designation." (Emphasis added.)

21. The Surrey Hills AONB Management Plan (referenced in Policy RE3) includes Policy P1 which states:

> "In balancing different considerations associated with determining planning applications and development plan land allocations, great weight will be attached to any adverse impact that a development proposal would have on the amenity, landscape and scenic beauty of the AONB and the need for its enhancement." (Emphasis added.)

D. The Inspector's Report

22. At IR §§3.1-3.14, the Inspector addressed the climate change and energy policy context. He stated:

> "3.5 This is a period of considerable and rapid change in the energy industry. Climate change concerns are driving a transition from fossil fuels to renewable and low carbon sources. I am very conscious of the considerable concern of many objecting to this proposal that the exploration and production of new fossil fuel resources should not be contemplated today, irrespective of the licences granted by the government, through the Oil and Gas Authority.
>
> 3.6 While I address the main issues against policy below, it is nonetheless important to understand the current policy position on this matter specifically.
>
> 3.7 The Overarching National Policy Statement for Energy (EN1) set out, in 2011, that the UK must reduce its dependence on fossil fuels, which nonetheless were considered to still be needed as part of the transition to a low carbon economy. The development plan for this area includes the Surrey Minerals Plan 2011 (the SMP) in which Policy MC12 deals specifically with Oil and Gas Development. This plan was informed by a Climate Change Strategy from 2008, but I am conscious that this has been updated in 2020, and the new strategy refers to a 'climate emergency' and delivering net zero carbon by 2050. Nonetheless, the SMP identifies the Weald Basin as one of only two locations in southern England where commercial deposits of hydrocarbon are thought to exist and noted a number of exploration and production sites across the County.
>
> 3.8 It recognises three separate stages of development, exploration, appraisal and production, and the expectation that exploratory wells will consider locations minimising their

intrusion, controlling vehicular activity and routeing and controlling noise and light emissions. The policy itself requires that the drilling of boreholes for any of these phases will only be permitted where the authority is satisfied that, in the context of the geological structure being investigated, the site has been selected to minimise adverse impacts on the environment.

3.9 This separation of the three stages of development is consistent with the more recent national policy and guidance. The National Planning Policy Framework (the Framework), recently updated in July 2021, does set out that the planning system should support the transition to a low carbon future, but still requires that mineral planning authorities plan positively for the three phases of development, and differentiates specific requirements only for coal. It records the need to ensure there is a sufficient supply of minerals for the energy that the country needs and that great weight should be given to the benefits of mineral extraction, including to the economy, although it explicitly sets out expectations regarding the natural environment, noise, restoration and aftercare, amongst other matters.

3.10 As I said above, this is a rapidly changing area and the latest government position is perhaps most clearly set out in the Energy White Paper 2020. Although I note the recent publication of the Government's Net Zero Strategy, this does not change the position as regards conventional gas production; that it will continue to play a part in the transition from a fossil fuel economy to one based on clean energy.

3.11 The Energy White Paper, while it acknowledged that onshore gas represents a much smaller proportion of the domestic supply to potential offshore sources, still clearly states the transitional importance of natural gas supplies. While it projects a decrease in production of up to 80% by 2050, the projection for demand is forecast to reduce but continue for 'decades to come'. That gas will come from somewhere, and currently the UK is reliant on imports, both by pipeline from Europe and as Liquefied Natural Gas (LNG) by sea.

3.12 As recently as March 2021, the Climate Change Committee (CCC) advice to the Secretary of State for Business, Energy and Industrial Strategy (BEIS), in addressing the context for onshore petroleum production in the UK, noted that even if consumption falls in line with the recommended path, there will be a challenge to meet the UK's fossil fuel demand, given the decline in North Sea production. It is suggested that this means the UK will continue to need additional gas supplies beyond that available from Europe and the North Sea until 2045 and potentially beyond 2050. This also identified a role for fossil gas with

> Carbon Capture and Storage (CCS) to assist in scaling up hydrogen use." (Emphasis added.)

23. At IR §4.4 the Inspector noted that the probability of the exploration being successful was quoted by UKOG as 60-70% and 30-40% for the secondary target. Independent analysis suggested this would be "*the second largest gas accumulation found in UK onshore history*". It was described by UKOG as a "*meaningful regional project size*".

24. The Inspector summarised the submissions made by the parties and other persons appearing at the Inquiry at IR §§5.1-10.4. At IR §5.25 the Inspector recorded UKOG's submission that Surrey "*agrees that its own Climate Change Strategy is not predicated upon restricting hydrocarbon exploration*". The Inspector noted that Surrey's case included the following "*material points*":

> "6.8 All parties accept that the whole appeal site is within the setting of the AONB. This point is significant in statutory and policy terms for a number of reasons, as accepted by the appellant's landscape witness in cross examination.
>
> …
>
> 6.11 Additionally, there is a further emphasised importance to AONB setting, and the great weight to be accorded to harm to it, in the new addition to the Framework (para 176), discussed in the planning balance section below.
>
> …
>
> 6.16 In addition to being within the setting of the AONB, the site is in an AGLV designated under WLP Policy RE3. The policy text protects the setting of the AONB (at para (i)) and states (at para (ii)) that the AGLV is to be retained for its own sake and as a buffer until there is a review of the AONB boundary…
>
> 6.21 It is clear form all the above that the appeal site is valued in landscape terms. It is within the setting of the AONB, it acts as a buffer to the AONB, it shares characteristics with the AONB (with no detracting features), it includes important features of the AONB and it is within views to and from the AONB. Its important role in these respects is recognised in the PPG, the AONB Management Plan and in the Framework itself.
>
> …
>
> 6.76 As to the site's location in the setting of the AONB, the appellant's planning witness agreed that Framework, para 176, recognises that insensitive development within the setting of the AONB is capable of causing adverse impacts on the AONB itself. Further, he accepted that the effect of para 176 is that great weight is required to be accorded to any such adverse impacts in accordance with the first part of para 176. Plainly (and again, as

> shown in the landscape evidence) this proposal does constitute insensitive development in the setting of the AONB and its adverse impacts on the AONB (particularly in terms of view to and from the AONB) should be accorded great weight in the planning balance."

25. The Inspector noted at IR §1.6 that Statements of Common Ground had been submitted to address, among other matters, landscape. The *Statement of Common Ground – Landscape and Visual Matters* ('the Landscape SoCG') included, under the heading "*Areas of Agreement*":

> "6.2 All parties are in agreement with the overall sensitivity of the landscape resource as identified by the Appellant and included in Appendix B-F of this document that include:
>
> 1) Site and context characteristics including landscape fabric, biodiversity of the site and its context; and perceptual and sensory of the site and its context, included in WW5 Grafham to Dunsfold Wooded Low Weald LCA (Part of AGLV and Surrey Hills AONB setting) – **High**
>
> 2) Wooded Low Weald LT and WW5 – Graham to Dunsfold Wooded Low Weald LCA (Part of AGLV and Surrey Hills AONB setting – **High**
>
> 3) Wooded Low Weald LT and WW2 – West Dunsfold Wooded Low Weald LCA (Part of AGLV and Surrey Hills AONB setting) – **High**
>
> 4) Surrey Hills AONB Greensand Hills and Wooded Weald Hascombe – WW4 Pink Hills to Park Hatch Wooded Low Weald LCA and GW8 Loxhill to Catteshall Wooed Greensand Hills LCA – **Very High**".

26. The parties agreed that the assessment methodology used by UKOG, described in the Landscape and Visual Appraisal, "*broadly follows the relevant guidelines*": *Statement of Common Ground – Landscape and Visual Matters,* §3.2. The Landscape and Visual Appraisal recorded that the effect of the proposed development is assessed through consideration of a combination of the overall sensitivity to the proposed form of development and the overall magnitude of change that would occur. "*Sensitivity is made up of judgements about the 'value' attached to the receptor, which is determined at baseline stage, and the 'susceptibility' of the receptor…*": Landscape and Visual Appraisal, §A2.12. "*Table EDP A2.1: Landscape Sensitivity Criteria*" recorded the criteria for the "*Landscape Receptor Value*" to be recorded as "*Very High*" as:

> "Nationally/internationally designated/valued countryside and landscape features; strong/distinctive landscape characteristics; absence of landscape detractors."

27. The Inspector's conclusions are recorded at IR §§11.1-11.130. At IR §11.1 he expressly recorded that he had reached his conclusions taking "*account of the evidence in this case, including the submissions and representations on which I have reported above*".

28. The Inspector addressed the first main issue, the effect of the proposal on the landscape character and appearance of the area, including that of Surrey Hills AONB and the AGLV, at §§11.3-11.65. The Inspector concluded on this issue:

> "11.63 Taking all these matters into account, if the impacts I have found regarding landscape character, visual effects and tranquillity, were permanent or of medium to long-term duration, then this proposal would clearly conflict with the policy aims and objectives for the mineral planning authority and the AONB. However, it is a compelling fact that any harm would be reversed in terms of these matters under the restoration scheme. Nonetheless, I consider that there would be harm to the landscape character and appearance of the area, including the AONB, and therefore conflict with SMP Policy MC14, which seeks to ensure no significant adverse impacts from the development. However, the weight I give to this is tempered by the short-term nature of the proposals.
>
> 11.64 I also find conflict with Policy MC12, as the evidence before me does not demonstrate that the site has been selected to minimise such adverse impacts. The weight I give to this conflict is tempered by an acknowledgement that there would be environmental constraints associated with sites within an area that would meet the significant technical constraints, especially noting the influence of the Dunsfold Aerodrome/Dunsfold Park development, which lies within the optimal location, and the alignment of the crestal area for both the primary and secondary targets.
>
> 11.65 Such policy conflict must be weighed against supporting policies and the benefits of the scheme in the planning balance."

29. In reaching these conclusions, the Inspector observed:

> "**Landscape and Visual Context**
>
> …
>
> 11.6 The site is within National Character Area 121, Low Weald, and the WW5: Grafham to Dunsfold Wooded Low Weald landscape character area, as defined by the Surrey County Council Landscape Character Assessment (2015). Following my site visits, I consider that it generally accords with the key landscape characteristics, including the undulating landform, blocks of woodland, scattered farmsteads and the land rising north to form the setting to wooded greensand hills. Indeed, a recognised element of this landscape is its position just to the

south of the Surrey Hills AONB, whose boundary currently extends to the edge of the Dunsfold Road.

11.7 The site also lies within the setting of the AONB; this was not only accepted by the main parties, but is a function of the wider landscape designation of the AGLV. This designation was retained in the WLP under the policy relating to the AONB, Policy RE3. In this, the AGLV is designated for its own sake, which I read as its landscape value, but also as a buffer to the AONB, subject to a review of the AONB boundary. That review is not complete, and yet work has been done in assessing the relevant areas of the AGLV and their common characteristics.

…

Landscape and Visual Sensitivity

11.10 As agreed by the main parties in the Landscape SoCG, the sensitivity of the landscape outside of the AONB was agreed to be high, while that of the AONB, very high. I see no reason to disagree.

…

11.21 In this case, the site is agricultural grassland, it is part of a wider context with an agricultural character, and has some features of the protected AONB but other detractors. Within this context, there is undoubtedly some value to this part of the AGLV in its role providing a setting to the AONB, some recreational value, not directly, but in terms of maintained rural character in wider views, and some cultural association, albeit not immediately visible, but associated with certain features within the woodlands and potentially medieval or older remains. However, these elements do not represent significant differences to the wider AGLV or rural landscape areas more generally. Overall, I cannot recommend that this be considered a valued landscape in Framework terms. However, it clearly retains protection, both in policy terms and within the revised Framework which seeks that development within the setting of an AONB should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas.

Landscape and Visual Effects

…

11.39 The activity would be seen from the AONB, both from footpaths rising towards the upper slopes and from the strategic viewpoint within it. The outlook from the strategic viewpoint is an important one as much of the footpath in this part of the AONB is within woodland. There is an enhanced value to the

> sudden vista which opens up, as it provides an important context to the high escarpment and landscape change from the low weald. The landscape experienced in this outlook is typical of that of the AGLV designation providing the setting to the AONB. The framed view offers a layered context with the dispersed woodland blocks, open fields and a strong rural character; there is limited influence from settlements or the road network. The aeroplanes on Dunsfold Aerodrome are a clear and obvious anachronistic element. However, the proposal would introduce HGV traffic crossing the area of open space in the foreground of this, and on removal of the Burchett's, a view of the large compound site. Taking account of the high sensitivity and importance of this contextual element of the setting to the experience of those within the AONB, I consider the effect to be major/moderate adverse.
>
> …
>
> 11.52 On that basis, I am satisfied that the effects of this proposal would be short-term, and while there may be evidence of the construction elements and hedgerow loss for a period after the end of the temporary permission, very significant improvement should have been made and the level of harm accordingly reduced.
>
> 11.53 Nonetheless, I have identified significant harms to the character and appearance of the landscape from the proposal. The scale of this harm is tempered by its short-term nature, but the impacts are to the AONB, its setting and the AGLV. The Framework has recently been up-dated confirming that development within the setting of an AONB should be sensitively located and designed to avoid or minimise impacts." (Emphasis added.)

30. The Inspector addressed the second main issue, the effect on living conditions and local businesses, at IR §§11.66-11.79. At §11.79 he stated:

> "Overall, I consider that the introduction of the access gates, compound and drilling operation could have the potential to introduce a negative perception of the venue if association is made by future clients, although actual impacts would be limited. In light of the temporary nature of the proposal, and the mitigation measures that would be secured through conditions, I consider that this would contribute a moderate level of additional weight to my earlier findings of harm to the overall character and appearance of the area. In this regard, it would be contrary to Policy MC14 of the SMP, which seeks to ensure there would be no significant impacts arising from the development."

31. The Inspector addressed the third main issue, the effect on highway safety, at IR §§11.80-11.103, and "*other matters*" at §§11.104-11.111, before turning to address the overall planning balance at §§11.112-11.130. The Inspector stated:

> "11.112 I have set out that, while I have not found harm in transport terms, I consider that the proposal would result in harm to the landscape character and appearance of the area and degrade the qualities of the setting of the AONB. Although I do not find this to be a valued landscape in Framework terms, it is a landscape that is clearly valued by local residents and the associated businesses. It has value too from its function as an AGLV, and as setting to, and buffer on the edge of the AONB. Furthermore, while I have found only limited effects on the AONB itself, it is of high sensitivity and that harm too must be weighed in the balance. However, the wholly reversible nature of the proposals and possible long-term benefits must be weighed against any harm.
>
> 11.113 I have found that the temporary period over which there would be activity on the site, the limited period over which the rigs would be present and the proposals and controls to ensure restoration, limit that harm. Nonetheless, I find that there would be adverse impacts contrary to both WLP and SMP policies in that regard. Developments must be considered against their compliance with the development plan unless material considerations suggest otherwise.
>
> 11.114 Accordingly, it is necessary to consider the benefits of the proposal, and the compliance with local and national policy and guidance in relation to mineral resources to understand whether the adverse impacts are unacceptable.
>
> …
>
> 11.119 As set out in the Background section to this report, this country is actively seeking to substantially reduce the use of hydrocarbons, including fossil gas, with a considerable focus on the move to a net-zero position. Nonetheless, planning policy at present stops short of a moratorium on conventional fossil gas production, although the benefits of such production must now be considered in light of the very substantial reductions, re-alignment of energy sources and the global need to respond to climate change imperatives.
>
> …
>
> 11.122 To my mind, the projected 44-70 bcf represents a locally significant resource, although it would represent a small proportion of the UK's energy demand, even allowing for the significant reductions forecast. The weight to give to such benefits must be tempered by this. Nonetheless, the appellant

argues that the security of supply and the offsetting of the need, and carbon implications, of importing gas, particularly LNG, weighs heavily in favour of such domestic sources.

11.123 I have noted the arguments of WBC, the Parish Councils and many interested parties, including the Weald Action Group, that the continued extraction of fossil fuels is incompatible with the increasing commitments being made both in the UK and globally, to comply with climate agreements and maintain global temperature rise to 1.5oC. To achieve such a target will require a very substantial change in our energy mix and use, and the reduction in the use of fossil fuels is at the forefront of this change.

11.124 However, current guidance and policy, while acknowledging these changes, forecasts a transition period where fossil gas would still play a part as infrastructure requirements and other energy sources are aligned with a low carbon future.

11.125 The Framework currently emphasises that minerals are essential to provide for the energy the country needs and the economic advantage they deliver. In addition, despite the strong arguments of others, current government policy recognises the continuing need for fossil fuels for many years, albeit at significantly reduced levels, including for natural gas. Under existing policy, the need for future sources of gas has not currently been discounted, rather it is accepted that natural gas will remain part of the energy mix in the UK during the process of transition to a clean energy future, although it is not specific regarding onshore gas deposits or the exploitation of new reserves.

11.126 As a consequence, there are benefits to the scheme. The exploration and production of gas is, in principle, consistent with and encouraged by current national policies. The appellant has indicated that while the deposit is known to exist, this appraisal phase is necessary to determine if it is viable, and quote the probability of success at between 60-70%.

11.127 Without the exploration phase, it would not be possible to identify the extent and viability of the resource and so achieve the benefits on which national policy still acknowledges great weight to be given. Therefore, although this proposal would be short-term, and would not, in itself, deliver commercial quantities of gas, nonetheless, there are positive benefits that must accrue from this exploration/appraisal phase. I cannot accord the great weight sought by the Framework for extraction of minerals, but accord significant weight to this exploration and appraisal phase, with a reasonable likelihood of confirming a viable resource for extraction.

> 11.128 Finally, the operation in terms of exploration and possible production, would contribute to the economy in terms of jobs and potentially some local spend, albeit I have found the weight to be given to this benefit quite limited.
>
> 11.129 Overall, although I have found harm and conflict with SMP Policies, the overall thrust of government policy currently, as well as the vision of the SMP, are supportive of the utilisation of mineral resources within acceptable environmental constraints. The harms I have noted can be tempered by their short-term nature and by mitigation through conditions, specifically those associated with noise, lighting and the coordinated working with neighbouring businesses. As such, the weight I give to the harms, while significant for short periods such as when the drilling rigs are in place, can nonetheless be considered overall as moderate.
>
> 11.130 Consequently, I would recommend that on the basis of current policy, the benefits [of] the proposal would outweigh the harm I have identified and a decision otherwise than in accordance with the development plan is warranted." (Emphasis added.)

E. The Secretary of State's decision

32. In his decision, the Secretary of State entirely agreed with the Inspector's analysis and recommendations on the landscape issue at IR §§11.3-11.64. The decision stated, under the heading "Conclusion on the Landscape and Visual Impacts":

> "18. The Secretary of State agrees for the reasons given [at] IR11.22-11.64 and at IR11.112 that the proposal would result in harm to the landscape character and appearance of the area and degrade the qualities of the setting of the AONB (IR11.112). He further agrees that while there are only limited effects on the AONB itself, it is of a high sensitivity (IR11.112). As such he agrees that the proposal conflicts with SMP Policy MC14 (IR11.63) and WLP policies in that regard (IR11.113). However, he further agrees that for the reasons given at IR11.63, 11.113 and 11.129 that the weight given to this harm is tempered by the short-term nature of the proposals."

33. The Secretary of State also entirely agreed with the Inspector's analysis and recommendations as to the effect on living conditions and businesses at IR §§11.66-11.79. With respect to the wedding business, the Secretary of State agreed that:

> "21 … in light of the temporary nature of the proposal, and the mitigation measures that would be secured through conditions, the potential for negative perceptions of the venue would contribute a moderate level of additional weight to the harm to the overall character and appearance of the area. He further

> agrees that in this regard the proposal would be contrary to Policy MC14 of the SMP in this regard (IR11.79)."

34. The decision continues:

> "*Conclusion on Landscape Character and Appearance and Effect on Living Conditions and Local Businesses*
>
> 22. For the reasons given above, and at IR11.129, the Secretary of State agrees with the Inspector that the harms he has identified can be tempered by their short-term nature and by mitigation through conditions, specifically those associated with noise, lighting and the coordinated working with neighbouring businesses. He further agrees that the weight given to the harms, while significant for short periods such as when the drilling rigs are in place, can nonetheless be considered overall as moderate."

35. The Secretary of State agreed with the Inspector on the highway issue (IR §§11.80-11.103), noting that the development would not have any significant adverse impacts on highway safety or the effective operation of the highway.

36. The Secretary of State disagreed with the Inspector as to the weight to be given to the benefits of the proposed development, in the following terms:

> "25. For the reasons given at IR11.114-11.115 and IR11.128 the Secretary of State agrees with the Inspector that the operation in terms of exploration and possible production, would contribute to the economy in terms of jobs and potentially some local spend and agrees that the weight to be given to this benefit is limited (IR11.128).
>
> 26. Whilst the Secretary of State has considered the exploratory and appraisal application before him on its own merits, for the reasons given at IR11.116 the Secretary of State agrees that exploration and appraisal are a necessary part of mineral development and without it, the currently acknowledged benefits of production cannot be realised. For the reasons given at IR11.117-11.127 the Secretary of State agrees that there is a reasonable likelihood of confirming a viable resource for extraction, and that while the proposal would not, in itself, deliver commercial quantities of gas, nonetheless, there are positive benefits that must accrue from the exploration/appraisal phase (IR11.127). He further agrees (IR11.129) that the overall thrust of government policy, as well as the vision of the SMP, are supportive of the utilisation of mineral resources within acceptable environmental constraints. <u>While he has had regard to the Inspector's analysis at IR11.127 and acknowledges that the project is not itself an extraction project, and would be short term, he considers that the exploration/appraisal phase is a necessary precursor to extraction without which it would not be possible to identify the extent and viability of the resource so as</u>

> to consider and possibly achieve the potential benefits. Whilst he again agrees with the Inspector that granting permission for this proposal does not create any presumption in favour of consent for subsequent phases (IR11.117), the Secretary of State affords great weight to the benefits of the proposed development in line with the Framework." (Emphasis added.)

37. The Secretary of State agreed with the Inspector's recommendation, stating:

> "**Planning balance and overall conclusion**
>
> 32. For the reasons given above, the Secretary of State considers that the appeal scheme is in conflict with SMP Policies MC12 and MC14 relating to oil and gas development and minimising the impact of mineral development, and is in conflict with the development plan overall. He has gone on to consider whether there are material considerations which indicate that the proposal should be determined other than in line with the development plan.
>
> 33. Weighing against the appeal are harm to the landscape character and appearance of the area, including degrading the qualities of the setting of the AONB and failure to demonstrate the site has been selected to minimise adverse impacts; and harm to local businesses. The Secretary of State affords these matters collectively moderate weight.
>
> 34. In favour of the appeal the Secretary of State affords the benefits of the gas exploration/appraisal phase great weight, and the economic benefits limited weight.
>
> 35. Overall, the Secretary of State considers that the material considerations in this case indicate a decision which is not in line with the development plan – i.e. a grant of permission.
>
> 36. The Secretary of State therefore concludes that the appeal should be allowed, and planning permission granted, subject to conditions." (Emphasis added.)

F. Ground 1: Alleged failure to give great weight to harm to the AONB

38. The claimants submit that the Secretary of State, and the Inspector, failed to have regard to the requirement imposed by the first sentence of §176 of the Framework to give "*great weight*" to conserving and enhancing landscape and scenic beauty in the AONB (which is also incorporated into the development plan by Policy RE3 of the WBLP, read with Policy P1 of the Surrey Hills AONB Management Plan).

39. Ms Jenny Wigley KC, Counsel for Waverley, whose submissions on this issue were adopted by Protect Dunsfold, submits that *Monkhill Ltd v Secretary of State for Housing Communities and Local Government* [2021] EWCA Civ 74, [2021] PTSR 1432 shows that the effect of the first sentence of §176 of the Framework is that where a decision-

maker finds harm to the AONB, they must increase the weight to be given to that harm. At [19], Lindblom LJ set out paragraphs [51]-[52] of Holgate J's judgment at first instance:

> "51. It is necessary to read the policy in paragraph 172 [now 176] 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. …" (Emphasis added.)

40. Lindblom LJ expressed his agreement with Holgate J's conclusion and reasons at [25] and observed at [30]:

> "…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."

41. The claimants acknowledge that *Bayliss v Secretary of State for Communities and Local Government* [2014] EWCA Civ 347 establishes that the term "*great weight*" does not have to be recited "*as some form of incantation*" when considering harm to an AONB. Nonetheless, they submit it is striking that there is no acknowledgement in the

Inspector's report or Secretary of State's decision of the required weight to be given to the assessed harm to the AONB. There are references within the Inspector's report to §176 of the Framework, but those references are to the new addition to the policy contained in the last sentence of that paragraph. Harm to the *setting* of the AONB does not attract "*great weight*", so references to the last sentence of §176 of the Framework are no indication that the policy in the first sentence was applied.

42. The claimants accept that the policy in the first sentence is of long provenance, and the Inspector and Secretary of State will have been aware of it, but contend that the starting assumption that they would have taken into account the policy is rebutted by clear "*contrary indications*".

43. Ms Wigley submits that the Inspector identified three broad areas of harm, namely (i) to the landscape (including to the AONB), (ii) in policy terms due to the choice of site (in breach of MC12), and (iii) to the perception of the wedding business. It follows from the finding in IR §11.63 of conflict with policy MC14 of the Surrey Minerals Plan that the Inspector found the harm to the AONB constitutes a "*significant adverse impact*". When the Inspector addressed the planning balance, *increased* weight should have been accorded to the assessed harm to the AONB. But the approach taken was to address all three harms together, and determine that collectively those harms attracted moderate weight. In doing so, the Inspector (and the Secretary of State who agreed with him) treated harm to the AONB on a par with other harm to landscape character and appearance, and failed to increase the weight accorded to the harm to the AONB compared to the weight accorded to other harms which did not attract the requirement to give great weight.

44. Ms Estelle Dehon KC, leading Counsel for Protect Dunsfold, submits that the decision-maker must proceed from the starting point that national policy requires that great weight should be attached to conserving and enhancing landscape and scenic beauty in the AONB, albeit there may then be factors that diminish the weight to be accorded. She contends that this is the obvious way to approach the process of reasoning where priority is given, and contrary to the Secretary of State's submission that it is formulaic and mechanistic, submits that it is analogous to the approach taken when applying s.38(6) of the Planning and Compulsory Purchase Act 2004 ('the 2004 Act').

45. The claimants submit that the contrast with the way in which the Inspector and the Secretary of State addressed the weight to be given to the *benefits* of the proposal is stark. The requirement in §211 of the Framework to give "*great weight*" to the benefits of mineral extraction, which was also a long-standing policy, was identified and addressed in express terms by both the Inspector and the Secretary of State.

46. I agree with Mr James Strachan KC, leading Counsel for the Secretary of State, that it is important to approach this ground with the *St Modwen* Principles (paragraph 11 above), particularly 1, 2, 5 and 6, in mind. The assumption that national planning policy is familiar to the Secretary of State and his inspectors (principle 6), and the presumption that a specialist planning inspector will have understood it, expressed by Lord Carnwath in *Hopkins Homes* (paragraph 13 above), applies with particular force to the policy of giving great weight to conserving and enhancing landscape and scenic beauty in AONBs, which can be traced back to the first version of the Framework published in 2012 (and beyond), and which is within the basic toolbox of any decision-maker in this field.

47. In *Bayliss*, Sir David Keene observed at [17] that, in circumstances where the Inspector expressly stated that he had had regard to the parties' submissions about the Framework ([8]), and reliance had been placed by a party and other objectors on paragraph 115 of the Framework,

> "it is to be assumed that the Inspector took account of that guidance unless his decision letter clearly indicates otherwise."

48. Sir David Keene further observed:

> "18. For my part, I cannot see that there is any such contrary indication in his decision letter. There is no doubt that he was not required to use the words 'great weight' as if it were some form of incantation. … Moreover, 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. Here the Inspector found that the impact on the adjacent part – and I stress the fact that this was the adjacent part – of the AONB would be 'limited'.
>
> 19. So did he fail to reflect the policy approach to the protection of the AONB? I am not persuaded that there was any such failure on his part. It has to be borne in mind that the designation of land as an AONB and its significance is not novel. The concept and importance of this national approved designation are well known and well understood in the planning world. That, in my view, is why the Inspector referred explicitly and separately to the effect on the AONB in his decision as something to be taken into account above and beyond the impact on landscape generally. As Hickinbottom J said in his judgment at paragraph 17:
>
> > '… paragraph 59 makes clear that the Inspector had well in mind the special nature of the AONB and harm the development may have upon it. The only reason for him considering harm to the AONB discretely was that he understood that such harm was to be inherently given particular weight as required by the NPPF.'
>
> (The 'NPPF' being of course what I have referred to as the Framework.)" (Emphasis added.)

In *Monkhill*, at [31]-[32], Lindblom LJ agreed with Sir David Keene's observations in *Bayliss* at [18] that the decision maker is entitled to attach different weights depending upon the degree of harmful impact anticipated.

49. In *R (Co-Operative Group Ltd) v West Lancashire Borough Council* [2021] EWHC 507 (Admin), Holgate J stated at [38]:

> "… It is clear from a collection of authorities, which includes: *O'Connor v Secretary of State for Communities and Local Government* [2013] EWCA Civ 263, *Bayliss v Secretary of State for Communities and Local Government* [2014] EWCA Civ 347, *Mordue v Secretary of State for Communities and Local Government* [2016] 1WLR 2682, and *Palmer* that it is not essential to the legal validity of a decision by an inspector, or by a local planning authority, that a policy phrase such as 'substantial weight', or 'great weight' is mentioned explicitly in a decision letter or an officer's report. The court will proceed on the basis that the decision maker has understood and applied the policy lawfully, particularly well-trodden policy, in the absence of any positive indication to the contrary. …"

50. In this case, the Inspector expressly recorded Surrey's (undisputed) submissions that great weight is to be accorded to harm to the AONB (IR §6.11), and Surrey's note reminding him that this was a point with which UKOG's planning witness had agreed (IR §6.76) (see paragraph 24 above), before stating in terms that he had taken account of those submissions. No one contended that the Inspector should depart from the policy in the first sentence of §176 of the Framework, and there is nothing in the Inspector's Report or the decision to suggest the Inspector or the Secretary of State chose to do so. It follows that unless there are clear, positive indications to the contrary I should assume – and indeed consider the only reasonable assumption is – that the Inspector applied that policy.

51. In *Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243, [2016] 1 WLR 2682, Sales LJ observed at [28]:

> "Paragraph 134 of the NPPF appears as part of a fasciculus of paragraphs, set out above, which lay down an approach which corresponds with the duty in section 66(1). Generally, a decision maker who works through those paragraphs in accordance with their terms will have complied with the section 66(1) duty. When an expert planning inspector refers to a paragraph within that grouping of provisions (as the inspector referred to paragraph 134 of the NPPF in the decision letter in this case) then - absent some positive contrary indication in other parts of the text of his reasons - the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned."

52. In this case, the Inspector did not merely refer to a paragraph within a *grouping* of provisions, he referred to the very paragraph of the Framework to which the claimants contend he failed to have regard: see his conclusions at IR §11.21 and IR11.53 (paragraph 29 above). In my judgment, the fact that he did so is a strong indication that he in fact had the whole of §176 of the Framework (which is short, consisting of only three sentences) in mind. It is true that in his conclusions he only referred to the policy

in the last sentence of §176 of the Framework, not to the policy in the first sentence of that paragraph. But I agree with the Secretary of State that it is unsurprising that he considered it appropriate to refer expressly to a policy that had recently been added to the Framework, while regarding it as unnecessary to address a policy of very long-standing in relation to which there was no dispute.

53. In addition, the Inspector's Report contains his focused analysis of the harm to the AONB (see IR §11.39: paragraph 29 above). As in *Bayliss*, the Inspector considered harm to the AONB itself discretely (see IR §11.53: paragraph 29 above). I accept the claimants' contention that the endorsement in *Bayliss* at [19] of Hickinbottom J's observation (paragraph 48 above) should not be treated as a general principle of law that mere mention of harm to the AONB automatically demonstrates that the policy in the first sentence of §176 has been applied. Nonetheless, focusing on the way the Inspector addressed the issues in his report, it seems to me that the reason he considered harm to the AONB discretely was that he understood the long-established policy in the first sentence of §176 regarding the weight to be accorded to such harm.

54. I reject the claimants' contention that the contrast with the way in which the Inspector (and the Secretary of State) addressed the weight to be given to the *benefits* of the proposed development is an indication that he failed to apply the policy in the first sentence of §176 of the Framework. The Inspector addressed the weight that should be given to the benefits in accordance with §211 of the Framework because there was an issue as to whether the "*great weight*" to be given to the benefits of *extraction* of minerals applied where the proposal concerned the earlier stage of exploration and appraisal, and Waverley and others argued that extraction of fossil fuels was incompatible with the UK's commitments. The Inspector took the view that "*significant*" rather than "*great*" weight should be accorded to the exploration and appraisal phase (IR §11.127: paragraph 31 above). Similarly, the decision addressed the issue because it was the one point on which the Secretary of State disagreed with the Inspector, taking the view that as the exploration/appraisal phase is a necessary precursor to extraction, "*great*" rather than "*significant*" weight should be accorded to the benefits of the proposal (decision §26: paragraph 36 above). By contrast, there was no dispute about the applicability of the AONB policy in the first sentence of §176.

55. The claimants' contention that the *omission* of any reference to the requirement that great weight should be attached to conserving and enhancing landscape and scenic beauty in the AONB itself amounts to a positive indication of failure to apply the policy is inconsistent with the clear position on the authorities that the policy phrase "*great weight*" did not need to be used: see *Bayliss*, [18], and *Co-Operative Group*, [38] (paragraphs 48-49 above). Insofar as they contend that in assessing the weight to be given to harm to the AONB a decision-maker must expressly proceed from the requirement to give such harm great weight (explaining any factors that diminish the weight to be accorded in the particular instance), this too is contrary to the authorities that make clear explicit reference to the policy phrase "*great weight*" is not essential. I also agree with the Secretary of State that such a formulaic and mechanistic process, needlessly requiring the incantation of well-known policy, is contrary to the courts' oft-stated cautions against "*the dangers of excessive legalism*" (*St Modwen*, [7]: paragraph 12 above).

56. The fact that harm is to the AONB increases the weight to be attributed to it. But the harm to the AONB from a temporary development such as this clearly can, in principle,

attract moderate weight in the overall planning balance: see *Bayliss*, [18] and *Monkhill*, [31]-[32] (paragraph 48 above). This is not disputed. That the Inspector regarded the short-lived nature of the harm as a key factor in concluding that only moderate weight should be given to the assessed harm is manifest in his conclusions. The fact that he expressed his conclusion as to the weight to be given to the assessed harm to the AONB, collectively with the other harms that he had found, does not provide a positive indication that he failed to apply the policy in the first sentence of §176.

57. Finally, although this point is not necessary to my decision, I agree with Mr David Elvin KC, leading Counsel for UKOG, that reading the Inspector's Report in a reasonably flexible way, it is apparent that in referring to the "*high sensitivity*" of the AONB, in assessing the overall planning balance, the Inspector was indicating that he viewed the harm to the AONB as carrying greater weight than would otherwise have been the case given the "*limited effects*" which he had identified (IR §112: paragraph 31 above).

58. For the reasons that I have given, I conclude that the Inspector's reasoning, which so far as this ground is concerned was adopted by the Secretary of State, does not give rise to a substantial doubt as to whether he went wrong in law. Accordingly, I dismiss Waverley's claim and Ground 1 of Protect Dunsfold's claim.

G. Ground 2: Alleged inconsistency with the Ellesmere Port decision

The law relevant to Ground 2

59. In relation to this ground, too, it is important to bear in mind the *St Modwen* principles (paragraph 11 above). Principles 1, 2 and 7 are of particular relevance.

60. It is well established that previous decisions of the Secretary of State or his inspectors on planning appeals are capable of being material considerations: see *Baroness Cumberlege of Newick v DLA Delivery Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305 [2018] PTSR 2063, Lindblom LJ, [29].

61. However, there is an important distinction between a consideration to which regard *must* be had ('a mandatory consideration') and one to which the decision-maker *may* have regard if in his judgement and discretion he thinks it right to do so. A decision can only be held to be unlawful for failure to have regard to a material consideration if it was a mandatory consideration. A consideration may be mandatory because a statute identifies (whether expressly or impliedly) that it is a matter to which regard must be had. Or, applying the familiar *Wednesbury* irrationality test, a consideration may be mandatory because it is "*so obviously material*" that it must be taken into account. See *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190, Lord Hodge DPSC and Lord Sales JSC (with whom the other Justices agreed), [116]-[121], and *Baroness Cumberlege*, Lindblom LJ, [21]-[25] (endorsed by the Supreme Court in the *Friends of the Earth* case at [119]).

62. In *Baroness Cumberlege*, Lindblom LJ observed at [28]:

> "It is well established, as a general principle, that policies issued to guide the exercise of administrative discretion are an essential means of securing consistency in decision-making, and that such policies should be consistently applied: see, for example, the

judgment of Lord Dyson JSC in *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2012] 1 AC 245, paras 26, 34. And that principle certainly applies in the sphere of land use planning, where, under the statutory code, decisions on applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise: section 38(6) of the Planning and Compulsory Purchase Act 2004. As Lord Clyde said in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2AC 295, para 140:

> 'Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured. National planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems.'"

63. The classic statement of the principle of consistency in planning decision-making is that of Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P & CR 137 at 145:

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons tor departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for

> the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? …"

64. The *North Wiltshire* case concerned decisions which Mann LJ described as "*indistinguishable*". Two applications were made, about eight years apart, for planning permission to build a house and garage within the walled garden of Notton Lodge. Both were refused by the planning authority and considered on appeal by inspectors. A critical issue on both appeals was whether the appeal site was within or outside the physical limits of the village of Notton, as that had an effect on the applicable policies (which remained unchanged). In the earlier decision, the inspector found that the appeal site was outside the village. In the later decision, the inspector found that the appeal site (which was smaller than, but encompassed within the earlier appeal site) was in the village. The later decision was unlawful as the inspector had failed to take into account, or give any reasons for departing from, the earlier decision.

65. In *Baroness Cumberlege*, the Court of Appeal addressed the question how the court should approach the principle of consistency of decision-making in planning decision-making in circumstances where the court was

> "concerned with a previous appeal decision of the Secretary of State issued after the close of the inquiry in the case under consideration, and not relied upon by any of the parties in further representations to the Secretary of State before he made the challenged decision."

That is the position in this case.

66. The Court held that there is no "*absolute rule*" that the Secretary of State is never obliged to have regard to a previous decision that has not been placed before him. Such a rule would be inconsistent with the general obligation on a decision-maker, in accordance with the *Tameside* duty, to acquaint himself with the relevant information to enable him to decide relevant questions correctly: *Baroness Cumberlege*, Lindblom LJ, [32]-[33].

67. Ms Dehon submits that in *Baroness Cumberlege* the Court of Appeal approved as correct the *obiter dictum* of HHJ Belcher (sitting as a judge of the Administrative Court) in *Dear v Secretary of State for Communities and Local Government* [2015] EWHC 29 (Admin) at [32] that "*the Secretary of State should be cognisant of decisions in his name whether or not flagged up in the materials before him*". That is plainly wrong. Lindblom LJ made clear that it was unnecessary to the judgment in *Dear,* in which the materials had been "*clearly flagged*" ([33]) and he continued at [36]:

> "Like the judge, I would not accept that, as a matter of law, the Secretary of State ought to be aware of every previous decision taken in his name, whether by himself or a ministerial predecessor or by one of the inspectors to whom his decision-making function is largely delegated. In my view that concept is unrealistic and unworkable, given the number of decisions on planning appeals that have been made, year upon year, since the modern statutory code came into existence under the Town and

> Country Planning Act 1947. There will, however, be circumstances in which, having regard to the interests of consistency in decision-making, the court is prepared to hold that the Secretary of State has acted unreasonably in not taking into account a previous decision of his own. Whether this is so in a particular case will always depend on the facts and circumstances: [2017] PTSR 1513, paras 102-104. A possible example would be a case in which, within a short span of time, the Secretary of State has called in applications for his own determination, or recovered jurisdiction in appeals, in cases of a sufficiently similar kind, to which the same policies of the development plan apply." (Emphasis added.)

68. In *Baroness Cumberlege*, Lindblom LJ stated the following three general propositions at [34] (in agreement with the judge's conclusions at [2017] PTSR 1513, [100]-[105]):

> "… First, because consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision bearing on the issues in the appeal he is considering. This may sometimes be so even though none of the parties has relied on the previous decision or brought it to the Secretary of State's attention: para 100. And it may be necessary in those circumstances, in the interests of fairness, to give the parties an opportunity to make further representations in the light of the previous decision. Secondly, the court should not attempt to prescribe or limit the circumstances in which a previous decision can be a material consideration. It may be material, for example, because it relates to the same site, or to the same or a similar form of development on another site to which the same policy of the development plan relates, or to the interpretation or application of a particular policy common to both cases: see para 92 of Holgate J's judgment in the *St Albans City and District Council* case [2015] EWHC 655. Thirdly, the circumstances in which it can be unreasonable for the Secretary of State to fail to take into account a previous appeal decision that has not been brought to his notice by one of the parties will vary. But in tackling this question, it will be necessary for the court to consider whether the Secretary of State was actually aware, or ought to have been aware, of the previous decision and its significance for the appeal now being determined: paras 100, 101 and 105 of the judgment. As the judge said at para 101:
>
> > 'Before the close of the 'adversarial' part of the proceedings, the Secretary of State and his inspectors can normally rely, not unreasonably, on participants to draw attention to any relevant decision[, but] that does not mean that they are never required to make further inquiries about any matter, including about other . . . decisions that may be significant.'" (Emphasis added.)

69. The challenged decision in *Baroness Cumberlege* concerned "*the Newick appeal*". The Secretary of State's decision on the Newick appeal was made, on the recommendation of his inspector, nine weeks after he had made another decision, again on the recommendation of his inspector, in "*the Ringmer appeal*". In the Ringmer appeal, the inspector had concluded that a local development plan policy (CT1) "*should be regarded as up to date for the purposes of the appeal*" (emphasis added). The Secretary of State had agreed. In the Newick appeal, the inspector had concluded that policy CT1 was *out-of-date*, and the Secretary of State, again, agreed.

70. The Court of Appeal held:

> "41. … The decision in the Ringmer appeal was undoubtedly a material consideration in the Newick appeal. And there was, between the two decisions, an obvious and unexplained difference in the Secretary of State's approach to the status of policy CT1, which was a matter of basic importance in both appeals.
>
> 42 There were, I think, at least three factors that, taken together, made it unreasonable for the Secretary of State not to have regard to the Ringmer decision before determining the Newick appeal, and, in particular, before reaching a conclusion on the question of whether policy CT1was up to date.
>
> 43 First, the two proposals were for the same form of development in the same district … They were subject to the same district-wide policies in the development plan, including the relevant policies of the joint core strategy and the 'saved policies' of the 2003 local plan, one of which was policy CT1. Each was on the edge of a rural settlement for which a neighbourhood plan had been prepared. The schemes were of similar scale; … And the applications for planning permission had been before the council for determination at the same time. …
>
> 44 Secondly, both appeals had been recovered for determination by the Secretary of State for the same reason … Implicit in the decision to recover appeals in such cases was the need for a consistent approach to their determination.
>
> 45 Thirdly, the appeals were before the Secretary of State at the same time, and the two decision-making processes were largely concurrent. … So both inspectors' reports were with the Secretary of State at the same time, before he issued his decision on the Ringmer appeal. …
>
> 46 It would not have been difficult for those whose task it was to prepare decision letters on behalf of the Secretary of State to find out whether another decision had recently been made by him in which effectively the same issues had been dealt with. But I think it is right to go further. In the particular circumstances here, no

> reasonable Secretary of State, aware of his responsibility for securing consistency in development control decision-making, would have failed to take reasonable steps to ensure that his own decisions on cases of the same kind, in the same district, taken within the same period, and which, for the same reason, he had recovered to determine himself, were consistent with each other - or, if they were not consistent, that the inconsistency was clearly explained. In determining the Newick appeal, he was, in my view, obliged to have regard to his very recent decision in the Ringmer case, even though none of the parties had sought to rely on that decision or brought it to his attention. In the circumstances the onus lay on him to inform himself of the decision, and to have regard to it.
>
> …
>
> 56 The two cases were, as Mann LJ put it in the *North Wiltshire District Council* case 65P & CR 137, 145, 'like cases', in the sense of their being, on the face of it, indistinguishable on an issue of critical importance in their determination - the interpretation and application of a relevant and significant policy in the development plan …" (Emphasis added.)

71. Ms Dehon submits that the effect of *Baroness Cumberlege* is that if a decision under consideration is sufficiently similar to a previous decision for the decisions to be regarded as "*alike*", then it necessarily follows that the earlier decision is a mandatory consideration in determining the later decision. This is not an accurate analysis of *Baroness Cumberlege*. The question for the court is whether the earlier decision is one which no reasonable decision-maker would have failed to take into account in the circumstances. An assessment of the similarity of the matters for determination in each decision is a key aspect of the assessment, but the question I have identified does not collapse into no more than a question whether the decisions are sufficiently alike. Although I have referred to earlier and later decisions, I accept that the question may be at least equally relevant where decisions are made contemporaneously.

The Ellesmere Port decision

72. The Ellesmere Port decision concerned an appeal against the decision of Cheshire West and Cheshire Council to refuse an application for planning permission for:

> "mobilisation of well test equipment, including a workover rig and associated equipment, to the existing wellsite to perform a workover, drill stem test and extended well test of the hydrocarbons encountered during the drilling of the EP1 well, followed by well suspension"

at the Ellesmere Port Wellsite, Portside North, Ellesmere Port.

73. The inquiry sat for 12 days between 15 January and 6 March January 2019. On 27 July 2019, the appeal was recovered for the Secretary of State's determination. In report dated 6 January 2020 ('EPIR'), the inspector recommended that the appeal be

dismissed. The Secretary of State's decision ('EP decision'), dated 7 June 2022 (the same date as the challenged decision), was made by the Minister of State for Housing, Stuart Andrew MP (the same Minister who made the challenged decision). He agreed with the inspector's recommendation and dismissed the appeal.

74. The main issues for the Ellesmere Port inquiry were:

> "(a) Whether the proposed development would have an unacceptable effect on:
>
> (i) Human health and well-being;
>
> (ii) Landscape, visual or residential amenity;
>
> (iii) Noise, air, water, highways;
>
> (iv) Biodiversity and the natural environment.
>
> (b) Whether the proposal fails to mitigate and adapt to the effects of climate change, ensuring development makes the best use of opportunities for renewable energy use and generation;
>
> (c) The effect the development would have on the regeneration of Ellesmere Port." (EPIR §592; EP decision, §14)

75. The Council's refusal of planning permission had been based on the effect of the proposed decision on climate change and the Council submitted:

> "This Inquiry is about the effects of shale gas exploration on climate change." (EPIR §58)

The inspector stated with respect to "*main consideration (b)*":

> "The wording of this main consideration is taken directly and fully from the decision notice … It is the reason why the Council considered the appeal proposal to be contrary to the provisions of LP policy STRAT1. It is the sole reason why planning permission for the development was refused." (EPIR, §661)

76. The inspector addressed three Written Ministerial Statements ('WMSs') issued in 2015, 2018 and 2019, and a report commissioned by the Secretary of State for Energy and Climate Change from Professor David MacKay and Dr Timothy Stone ('the MacKay and Stone report'), entitled *Potential Greenhouse Gas Emissions associated with Shale Gas Extraction Use*, dated 9 September 2013. The WMSs and the MacKay and Stone report were all concerned with the production of shale gas.

77. The Ellesmere Port Inspector's Report stated:

> "738. To conclude this further assessment, the evidence is that the appeal proposal would give rise to unmitigated GHG [Greenhouse Gas] emissions of between 3.3 to 21.3 kt CO_2 equivalent although the actual release is more likely to be

> towards the top end of the range in my view. Given the finding in the CCC net zero report that every tonne of carbon contributes towards climate change, the proposal would not shape Ellesmere Port in a way that contributes to a radical reduction in GHG emissions. The proposed development would therefore conflict with Framework paragraph 148 [now 152].
>
> 739. The proposal may well be supported by the 2018 WMS as the appellant contends [469] and, although the appellant does not rely upon it, by the 2015 WMS too. However, in my view, limited weight may be given to these WMSs. Since Framework paragraph 209(a) has been quashed there is no shale gas policy within the Framework to set against the climate change policy in Framework paragraph 148. For the reasons set out more particularly by the Council [151 to 153] the 2019 WMS does not amount to such a policy." (Emphasis added.)

78. The statement that Framework paragraph 209a has been quashed was a reference to an order made by Dove J following his judgment in *Stephenson v Secretary of State for Housing, Communities and Local Government* [2019] EWHC 519 (Admin) [2019] PTSR 2009 (referred to in the EPIR and EP decision as *'Stephenson'* or the '*Talking Fracking judgment*'). Dove J quashed paragraph 209a of the 2018 version of the Framework which had provided:

> "Minerals planning authorities should: (a) recognise the benefits of onshore oil and gas development, including unconventional hydrocarbons, for the security of energy supplies and supporting the transition to a low-carbon economy; and put in place policies to facilitate their exploration and extraction." (Emphasis added.)

79. The Ellesmere Port Inspector's report stated:

> "746. On this main consideration my conclusion, which I commend to the Secretary of State, is that the appeal proposal would mitigate the effects of climate change as far as practicable and would thus not conflict with the relevant development plan policy [688]. However, the unmitigated GHG emissions, which the appellant acknowledges would be inevitable from this, and, as I understand it, any, shale gas exploration proposal, would be contrary to Framework paragraph 148. This is a material consideration of significant weight in the planning balance [738 to 740].
>
> …
>
> 769. The appellant identifies very few benefits arising from the development beyond those which flow from government energy and planning policy [463, 466 and 487]. These have been addressed above … and, of course, the specific national planning policy as it related to shale gas expressed through Framework paragraph 209a which has now been quashed.

…

781. Moreover, the development would not contribute directly to radical reductions in GHG emissions; it would have the opposite effect. It would therefore be inconsistent with Framework paragraph 148 which, as a very recent expression of government policy, attracts great weight [738]. For the reasons given, I conclude that the 2019 WMS does not amount to a policy that can be set against that Framework paragraph in the way that the now quashed Framework paragraph 209(a) would have been [733 to 739]." (Emphasis added.)

80. The Ellesmere Port decision (which post-dated the publication of the 2021 version of the Framework) stated:

"*Energy, shale gas and climate change policy*

15. The Secretary of State … has considered the proposal against national shale gas policy, including various Written Ministerial Statements (WMS); the November 2019 BEIS WMS (IR8), May 2018 BEIS WMS, May 2019 MHCLG WMS and September 2015 DECC WMS. The WMSs remain extant. In assessing the weight they carry, he has taken into account that specific shale gas policy in the Framework was quashed in 2019 by the Talk Fracking judgment, following which paragraph 209(a) of the 2019 version of the NPPF was withdrawn (IR704 refers).

16. On the basis of the evidence put before this inquiry, and for the reasons given at IR690-732, the Secretary of State agrees with the Inspector at IR732 that neither the 2015 nor the 2018 WMSs can be said to reflect the latest climate change science put before the inquiry. The Secretary of State considers that they must therefore, in this case, be read accordingly. He notes that the MacKay and Stone report was published in September 2013 and underpins the 2015 WMS and the 2016 Climate Change Committee ('CCC') reports (IR691) and while the 2018 WMS references the (CCC) report, it too relies on the MacKay and Stone report for evidential justification (all IR691). He has taken into account that scientific information is available that post-dates the MacKay and Stone report and was presented to the Inspector at the inquiry (IR709-716). The Secretary of State further agrees with the Inspector for the reasons given at IR717-727 that the evidence on greenhouse gas (GHG) emissions in this case casts doubt on the extent to which the MacKay and Stone report can be considered consistent with the 2019 CCC net zero report and the latest science that it reports upon (IR727). Overall, based on the evidence before him, the Secretary of State considers that the weight which can be afforded to the 2015 and 2018 WMSs should be reduced. He further considers that while the proposal does draw some support from the element of paragraph 152 of the Framework regarding transition to a low

carbon future, the weight attaching to that support should be reduced.

17. The Secretary of State has further considered the Inspector's assessment of the May and November 2019 WMSs at IR733-745. He agrees with the conclusion at IR734 that paragraph 210 of the Framework is not directly relevant to the determination of this appeal. However, as exploration is a necessary precursor of exploitation, and the Secretary of State considers that this paragraph of the Framework does cover shale gas, he considers that paragraph 211 is a material consideration, as is paragraph 209 (differing from the Inspector's view at IR711 and 734). He notes that the November 2019 WMS, which introduced an 'effective moratorium', states that 'the shale gas industry should take the Government's position into account when considering new developments', and considers overall that this WMS is a material consideration in this case, albeit not one which carries more than limited weight.

18. Taking the matters set out in paragraphs 15-17 into account, the Secretary of State considers that on the basis of the evidence put forward in this case, national policy support for the benefits of shale gas exploration in this case should carry no more than moderate weight.

19. He has gone on to consider whether the proposal is in conflict with paragraph 152 of the Framework as a whole. The Secretary of State agrees with the Inspector's reasoning at IR717-726 and IR738, and has taken into account that government legislated to give effect to the headline recommendation that by 2050 emissions of GHGs should be reduced to net-zero (IR729 - The Climate Change Act 2008 (2050 Target Amendment) Order 2019 refers). He agrees with the Inspector that taking into account the unmitigated GHG emissions in this case, and given the finding in the CCC net zero report that every tonne of carbon contributes towards climate change, the proposal would not shape Ellesmere Port in a way that contributes to a radical reduction in GHG emissions. Taking into account his conclusion on the element of paragraph 152 regarding transition to a low carbon future in paragraph 16 above, he considers that the proposal would conflict with Framework paragraph 152 as a whole. For the reasons given at IR746, he agrees with the Inspector that this is a material consideration, albeit one that in his view should carry moderate weight in the planning balance.

…

The Secretary of State has gone on to consider the Inspector's assessment against LP policy STRAT1 as a material consideration. For the reasons given at IR689-740 (but excluding the elements where he differs from the Inspector as set out in

> paragraph 17 above), he agrees with the Inspector that the appeal proposal would give rise to unmitigated GHG emissions of between 3.3 to 21.3 kt CO2 equivalent although the actual release is more likely to be towards the top end of the range (IR738). He further agrees that this is a material consideration that weighs significantly against the proposal in the planning balance (IR740)." (Emphasis added.)

81. The Secretary of State agreed with the inspector that "*the appeal site is embedded in a community that is specifically vulnerable to the adverse health effects that may be caused by stress and anxiety*" (EP decision §28) and, on the basis of the evidence before the inquiry, considered that "*these adverse impacts carry moderate weight against the proposal in the particular facts and circumstances of this case*" (EP decision §29).

82. Addressing the planning balance and his overall conclusion, the Secretary of State stated:

> "35. In the light of the evidence put forward in this case, and for the reasons set out above, the Secretary of State attaches moderate weight to national policy support for the benefits of shale gas exploration in this case. The short-term economic benefits and reuse of the existing well site each attract limited weight.
>
> 36. The Secretary of State considers that the unmitigated proportion of the GHG emissions carries significant weight against the proposal, and the conflict with paragraph 152 of the Framework as a whole also carries moderate weight. He further considers that the harm arising from the adverse effects of stress and anxiety on the local community in the particular circumstances of this case carries moderate weight.
>
> 37. Overall the Secretary of State considers that the material considerations in this case indicate a decision which is not in line with the development plan – i.e. a refusal of permission."

Analysis and decision

83. Protect Dunsfold submits that the decision under challenge and the EP decision are irreconcilable in their approach to unmitigated CO_2e emissions and to §152 of the Framework. In the context of this ground, Ms Dehon makes no criticism of the Inspector's Report: it is only the Secretary of State's decision that she contends is flawed.

84. There are a number of similarities between the decisions. They were made by the same Minister and issued on the same day. In circumstances where the Ellesmere Port decision was not – and could not have been – referred to by anyone at the inquiry, the fact that the decisions were made contemporaneously is significant in considering whether the Secretary of State would have known about the Ellesmere Port decision when making the Dunsfold decision: see *Baroness Cumberlege* at [36] and [45]. I

accept that through his officials and the Minister who made both decisions on his behalf, the Secretary of State would have been aware of the Ellesmere Port decision.

85. Both proposals were for exploratory and appraisal phases of natural gas extraction (albeit the Ellesmere Port proposal related to the working over of an existing wellsite and Dunsfold concerned the construction of a new wellsite). The proposals involved the emission of broadly similar quantities of GHG. The unmitigated GHG from the Ellesmere Port proposal was considered by the inspector and the Secretary of State to be towards the top end of a range from 3.3 to 21.3 kt of CO_2e, compared to a range of 28.77 to 29.11 kt of CO_2e for the Dunsfold proposal.

86. In both cases the appeals were recovered by the Secretary of State. The reason given for recovery of the Dunsfold appeal was that: "*the appeal involves proposals giving rise to substantial regional or national controversy*" (IR §1.5). While the reason given in respect of Ellesmere Port was that: "*the appeal involves proposals for exploring and developing shale gas which amount to proposals for development of major importance having more than local significance*" (EPIR §16). In broad terms, there is a degree of similarity in these reasons, but the reason given in respect of Ellesmere Port focused on a key difference between the proposals, namely that the Ellesmere Port proposal concerned shale (or unconventional) gas, whereas the Dunsfold proposal concerned conventional gas. Ms Dehon emphasises, and I accept, that conventional gas and shale gas are the same gas (i.e. natural gas, primarily methane). The distinction between them relates to the method of extraction.

87. In the Ellesmere Port decision, the Secretary of State concluded that, given the level of unmitigated gas emissions that would result from the proposed development, and the finding in the Climate Change Committee's net zero report that every tonne of carbon contributes towards climate change, the proposal conflicted with §152 of the Framework as a whole. That was a material consideration that he considered should carry moderate weight in the planning balance. Ms Dehon submits that, similarly, the Secretary of State should have recognised that every tonne of carbon from the proposed development at Dunsfold contributes towards climate change, and conflicts with §152 of the Framework, or given reasons for reaching a different conclusion.

88. Despite the similarities to which I have referred, in my judgment, the Ellesmere Port decision is not one which no reasonable decision-maker would have failed to take into account, in the circumstances, when making the challenged decision.

89. First, the sole reason the local planning authority refused permission for the Ellesmere Port proposal was climate change. Whether the proposal should be granted in light of local and national policy on climate change was one of the principal important controversial issues at the Ellesmere Port inquiry. In contrast, Surrey did not refuse the Dunsfold proposal on climate change grounds. Climate change was not one of the main issues at the Dunsfold inquiry. Climate change was raised as an issue (with the focus on production and subsequent use of conventional gas), and Mr Dearing's assessment of the GHG emissions from the Dunsfold proposal was adduced as relevant evidence, but no one suggested that the calculated emissions from exploration weighed against the development, or rendered the development contrary to §152 of the Framework, or any other policy. As Ms Dehon acknowledged, that point - whether it was a good one or not - was available to be taken at the inquiry if anyone had wished to do so.

90. The duty to give reasons is a duty to give reasons for the conclusions reached on the principal important controversial issues. The reasons need refer only to the main issues in the dispute, not to every material consideration: *St Modwen* principles 1 and 2. As the *North Wiltshire* and *Baroness Cumberlege* judgments show, a previous decision may be highly relevant to one of the main issues even if no party or objector has referred to it. But in this case, the question whether the emissions from the proposal rendered it contrary to policy, and weighed against the grant of permission, was not an issue at all, still less a principal, important or controversial issue. Neither the Inspector nor the Secretary of State can be criticised for not addressing a point no one raised.

91. Secondly, the policy context for the exploration and extraction of shale gas was different to the policy context for exploration and extraction of conventional gas, albeit the exploration phase at Ellesmere Port did not involve hydraulic fracturing (otherwise known as "*fracking*"). It is true that §152 and §211 of the Framework applied to both proposals, but the weight to be given to reliance on shale gas in the transition to a low carbon future (§152), and the weight to be given to the *benefits* of mineral extraction (§211), was reduced in the context of the Ellesmere Port proposal as a result of considering it "*against national shale gas policy*" (EP decision §15).

92. The evidence put before the Ellesmere Port inquiry showed that the weight to be given to the shale-specific WMS made by the Secretary of State for Energy and Climate Change on 16 September 2015, and the shale-specific WMS made by the Secretary of State for Business, Energy and Industrial Strategy on 17 May 2018 was reduced. The policy context for the Ellesmere Port proposal included the quashing of "*the specific shale gas policy in the Framework*" (EP decision §15). The WMS made by the Secretary of State for Business, Energy and Industrial Strategy on 4 November 2019 made clear that the Government was taking a "*precautionary approach*" to "*shale gas exploration*", and that "*the shale gas industry should take the Government's position into account*" – which included the imposition of an "*effective moratorium*" on hydraulic fracturing – "*when considering new developments*". That "*effective moratorium*" had a significant impact on the extent to which reliance on shale gas as part of the transition to net zero could be given weight.

93. This contrasts with the Inspector's analysis of the climate change and energy policy context with respect to conventional gas, when considering the Dunsfold proposal. It is striking that the claimants make no criticism of this analysis. The Inspector found that "*conventional gas production … will continue to play a part in the transition from a fossil fuel economy to one based on clean energy*" (emphasis added); and that the Framework requires mineral planning authorities to plan positively for the three phases of development, to ensure there is a sufficient supply of minerals for the energy that the country needs, and to give great weight to the benefits of mineral extraction (see paragraph 22 above).

94. Thirdly, this is not a case where the decisions relate to the same site (as in the *North Wiltshire* case), or to the same form of development in the same district (as in *Baroness Cumberlege*). I readily acknowledge that the circumstances in which an earlier decision may be regarded as a mandatory consideration are not prescribed or limited (*Baroness Cumberlege,* [34]). This factor alone is not determinative. But it is significant as, if the point had been taken that the calculated emissions weighed against the proposal, it would have required evaluation of the assessed level of emissions in the context of Surrey Minerals Plan and the level of emissions in Surrey.

95. The Ellesmere Port decision concerned a local community in Cheshire that was vulnerable in terms of health and deprivation. The inspector considered the emissions from the proposal in the context of Cheshire's Carbon Management Plan, noting that the council planned to reduce its own annual CO_2 emissions by 30% over a five-year period from 45.5 kt CO2 equivalent to 31.8 kt CO2 equivalent, giving "*an aspirational saving of some 13.7 kt each year*". The inspector observed:

> "On the Council's range, the proposed development would represent a once-only 'use' of between 29% and 79% of the Council's aspirational saving in about 100 days." (EPIR §724)

Whereas Surrey agreed that its own Climate Change Strategy was "*not predicated upon restricting hydrocarbon exploration*" (IR §5.25). This difference was, of course, reflected in the different reasons given for refusal by the local planning authorities.

96. In my judgment, the decisions are not sufficiently similar to trigger application of the consistency principle, and it is clear that in the circumstances the Ellesmere Port decision is not one which no reasonable decision-maker would have failed to take into account.

97. Given my conclusion, it is unnecessary to determine the Secretary of State's objection to this new point being raised on a statutory review: *Trustees of the Barker Mill Estate v Test Valley Borough Council* [2016] EWHC 3028 [2017] PTSR 408, Holgate J, at [77]; *R (ClientEarth) v Secretary of State for Business Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) [2020] PTSR 1709, Holgate J, at [192].

H. Conclusion

98. The claims are dismissed.