Neutral Citation Number: [2024] EWHC 2089 (Admin)

Case No: AC-2024-000242

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2024

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

R (on the application of Weston Homes plc)	**Claimant**
- and -	
(1) Secretary of State for Levelling Up, Housing and Communities	**1st Defendant**
(2) Uttlesford District Council	**2nd Defendant**

- -
- -

James Maurici KC and Joel Semakula (instructed by **Winckworth Sherwood LLP**) for the **Claimant**
Estelle Dehon KC and **Nina Pindham** (instructed by **Government Legal Department**) for the **1st Defendant**
The **2nd Defendant** did not appear and was not represented.

Hearing dates: 11-12 June 2024

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Approved Judgment

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

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THE HON. MR JUSTICE HOLGATE

Mr Justice Holgate:

1. The claimant, Weston Homes plc ("Weston"), brings this challenge under s.288 of the Town and Country Planning Act 1990 ("TCPA 1990") to the Inspector's decision letter dated 15 December 2023 on behalf of the defendant, the Secretary of State for Levelling Up, Homes and Communities, refusing Weston's application under s.62A of the TCPA 1990 for planning permission. The application was for the erection of 96 dwellings, parking, landscaping and public open space, access to Parsonage Road and pedestrian and cycle routes to Smiths Green Lane. The local planning authority ("LPA") for the site is Uttlesford District Council ("UDC").

2. The background to this case can be seen from the decision letter under challenge and an earlier decision letter on a planning appeal dated 9 August 2022 ("the 2022 DL" or "the 2022 appeal") to which I refer below.

3. The development plan includes the "saved policies" of the Uttlesford District Local Plan, which was adopted as long ago as 20 January 2005, and was intended to cover the period 2000 to 2011. The deposit draft for that plan was issued in October 2001. The plan was prepared under the former regime set out in the TCPA 1990, as amended by the Planning and Compulsory Purchase Act 2004. The plan was prepared in the context of the Regional Spatial Strategy ("RSS") for the East of England (2004) and the Essex and Southend-on-Sea Replacement Structure Plan (2000). Subsequent legislation has abolished structure plans and RSSs.

4. In November 2023 UDC issued for consultation a draft of a new local plan ("the 2023 draft Plan") covering the period 2021 to 2041 to replace the 2005 Plan (under reg.18 of the Town and Country Planning Act (Local Planning) (England) Regulations 2012 (SI 2012 No. 767)). By the time of the Inspector's decision a year later the 2023 draft Plan had still not reached the next stage under reg.19.

5. Section 62A (1) and (2) of the TCPA 1990 enables an applicant to choose to submit his application for planning permission to the Secretary of State instead of the LPA if that authority is "designated by the Secretary of State for applications of a description specified in the designation" and "the application falls within that description."

6. Section 62B enables the Secretary of State to designate an authority for the purposes of s.62A if he considers that there are respects in which the authority is not adequately performing their functions of determining applications under Part II of the TCPA 1990 by reference to criteria in a document laid before Parliament under subsection (2).

7. "Improving Planning Performance – the criteria for designation" deals with the performance of a LPA separately in the determination of applications for "major development" and "non-major development." The criteria relate to the speed with which applications are dealt with and the quality of decision-making (measured by the proportion of decisions overturned on appeal).

8. On 7 February 2022 the Secretary of State issued a designation notice in respect of UDC. He considered data for the 2-year period ending on 31 March 2020 and subsequent appeal decisions to 31 December 2020 on the quality of decision-making by LPAs on applications for planning permission for major development. He decided

that UDC was not performing adequately in that respect and therefore designated the council under s.62B in relation to major development applications. The designation came into effect on 8 February 2022 and remains in force until revoked.

9. Weston's development site lies to the north of Takeley, the largest village in Uttlesford District, and to the south of ancient woodland known as Prior's Wood. To the east lies Smiths Green Lane, designated as a "protected lane" under policy ENV9 of the local plan, which deals with local historic landscapes. To the west lies Parsonage Road. Both roads run in a north-south direction. UDC designated the Smiths Green Conservation Area on 2 November 2023. It comprises land either side of Smiths Green Lane located to the east and south of the proposed development site. It includes some Grade II listed buildings, Hollow Elm Cottage to the east of the development site and of Smiths Green Lane, and Goar Lodge and Beech Cottage, to the south of the development site. To the north of Parson's Wood and Maggots Field lies Warish Hall and Moat Bridge, Grade I listed buildings dating back to the thirteenth century.

10. On 9 June 2021 Weston made a detailed application for planning permission for 190 dwellings (also referred to as a proposal for 191 dwellings) distributed between three areas: 126 dwellings on the western section of Bull Field (south of Prior's Wood), 26 dwellings on Maggots Field and the eastern section of Bull Field (to the west of Smiths Green Lane) and 38 dwellings on a parcel known as Jacks to the east of Smiths Green Lane. Access to the housing on the western part of Bull Field was to be obtained from Parsonage Road. This access would run through an area known as 7 Acres (adjacent to Parsonage Road) which currently accommodates the Weston Group Business Centre and was also proposed to be developed for an additional 3568 sqm of flexible employment space and a health care medical facility. Access to the housing on Maggots Field, the eastern part of Bull Field and Jacks was to be obtained from Smiths Green Lane.

11. UDC refused the 2021 application on 20 December 2021 and Weston appealed against that refusal to the Secretary of State under s.78 of the TCPA 1990. A public inquiry was held between 21 June and 6 July 2022 and the Inspector issued his decision letter dismissing the appeal on 9 August 2022 (the 2022 DL).

12. In order to address the reasons why the 2022 Inspector dismissed the 2022 appeal, Weston produced a revised scheme the subject of its s.62A application to the Secretary of State made on 12 June 2023. This proposal omitted any development on Jacks, Maggots Field and the eastern part of Bull Field. Accordingly, no new access from Smiths Green Lane was proposed. The sole access would be from Parsonage Road. The number of dwellings proposed was reduced to 96, of which 39 (40%) would be affordable. The proposal included the provision of public open space in the eastern part of the site. A suite of application documents was accompanied by supporting material.

13. On 3 August 2023 the Planning Inspectorate ("PINS") sent out a notification requiring consultees to submit representations by 7 September 2023. At that stage UDC was unable to demonstrate a 5-year supply of housing land. Accordingly, the presumption in favour of sustainable development applied unless disapplied under para. 11(d) of the National Planning Policy Framework ("NPPF"). Paragraph 11 of the NPPF provides that:

> "Plans and decisions should apply a presumption in favour of sustainable development.
>
> For **plan-making** this means that:
>
> a) ….;
>
> b) ….
>
> For **decision-taking** this means:
>
> c) approving development proposals that accord with an up-to-date development plan without delay; or
>
> d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date[8], granting permission unless:
>
> i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed[7]; or
>
> ii. any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole."

Paragraph 11(d)(i) refers to the policies identified in footnote 7 which reads:

> "The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 181) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 68); and areas at risk of flooding or coastal change."

14. On 30 August 2022 the members of UDC's Planning Committee decided that they would have refused to grant planning permission if the application had been made to UDC. The Council submitted its formal representations to PINS on 4 September 2023, objecting to the proposal because of harm to landscape character, the countryside and visual impact. The officer's report had advised that harm to heritage assets would be outweighed by the benefits of the scheme. UDC's formal representations did not present an objection on heritage grounds. They expressed concerns about the adequacy of the buffer between the proposed development and the ancient woodland at one pinch point (see [139] below).

15. PINS wrote to Weston on 12 September 2023 saying that the representations it had received had been uploaded to its website and inviting any response on those matters "as soon as possible and in good time for the hearing."

16. On 25 September 2023 the Inspector provided under the statutory code his Issues Report, referring to the hearing that would take place on Monday 2 October 2023 and setting out what he considered the main issues to be and the matters to be considered. On the same date the Inspector provided an agenda for the hearing.

17. Late on Friday 29 September 2023 Weston submitted lengthy evidence replying to the representations uploaded by PINS on 12 September 2023. Because other parties had insufficient time to consider that material and to respond, the Inspector adjourned the hearing on 2 October 2023 until 13 November 2023. The Inspector required any responses to the material submitted on 29 September to be sent to PINS by 6 November.

18. On 20 October 2023 UDC sent to PINS and to Weston a copy of its latest housing monitoring report. This showed a housing land supply for the district of 5.14 years. The document was submitted for the forthcoming hearing. It was copied to Mr. David Poole, the Senior Planning Manager at Weston, and the project lead for the s.62A application and hearings.

19. The adjourned s.62A hearing did take place on 13 November 2023.

20. On 22 November 2023 the Inspector sought clarification from UDC (copying in Weston) on settlement boundaries in the emerging replacement local plan and the designation of the conservation area. UDC responded later that day.

21. The decision notice and statement of reasons refusing the s.62A application was issued on 15 December 2023.

22. To complete the picture, I note that on 28 June 2023 UDC had granted detailed planning permission for flexible employment development and, it seems, the medical centre on 7 Acres. On 13 March 2024 another Inspector granted an application under s.62A of the TCPA 1990 for 40 dwellings on Jacks. The present challenge therefore relates to the development in the heart of the site promoted in the 2022 appeal on the western part of Bull Field.

23. The remainder of this judgment is set out under the following headings:

Legal principles	Paras. 76 - 99
Ground 1	Paras. 100 - 134
Ground 4	Paras. 135 - 152
Ground 3	Paras. 153 - 163
Ground 5	Paras. 164 - 167
Ground 2	Paras. 168 - 175
Conclusions	Paras. 176 - 180

The 2022 decision letter

24. The Inspector considered the main issues to be the effects of the proposal on the character and appearance of the surrounding area, on the significance of nearby designated and non-designated heritage assets, and on the ancient woodland at Prior's Wood and whether the presumption in favour of sustainable development was disapplied under para. 11(d) of the NPPF.

25. Given that 7 Acres and Jacks are enclosed by mature planting and developments, the Inspector concluded that the proposal would have a minimal effect on those areas in terms of landscape character and visual impact (DL 23). But Bull Field (west and east), Maggots Field and Prior's Wood are of a more open character and make an important contribution to the semi-rural, agrarian nature of the area to the north of the built-up areas of Takeley and Smiths Green. This part of the site forms a strong demarcation between the countryside and existing urban development to the south. It forms an integral and functional part of the countryside (DL 23). In addition, Bull Field and Maggots Field give "a sense of grandeur to Prior's Wood" (DL 24). The development would have a significant adverse effect on local landscape character and visual amenity contrary to policy S7 of the Local Plan and the NPPF (DL 27 to DL 28). The proposal would also have an adverse effect on the open characteristics of the Countryside Protection Zone to the south of Stanstead airport and conflict with policy S8 of the Local Plan (DL 33 to DL 34).

26. The Inspector concluded that the proposal would cause "a medium level of less than substantial harm" to the settings of the listed buildings, Hollow Elm Cottage, Goar Lodge and Beech Cottage and a "moderate to high level of less than substantial harm" to the Warish Hall moated site and remains of Takeley Prior Scheduled Monument

(but not the listed buildings there) (DL 65 to DL 66). There would also be lesser degrees of harm to other listed buildings.

27. Next the Inspector considered whether the trees within Prior's Wood would be harmed by the proposed development (DL 71). No trees would be removed or suffer *direct* impact as a result of the proposed development, in particular the cycleway or the vehicular access road. This was agreed in the statement of common ground (DL 73 to DL 76). Taking into account the proposed Prior's Wood Management Plan, the Inspector also concluded that the access road, cycleway and housing would not have any *indirect* effect on the ancient woodland, applying the Standing Advice issued by Natural England and the Forestry Commission (DL 70 to DL 77). Accordingly, there was no conflict with Policy ENV8 of the local plan (DL 78).

28. At DL 88 to DL 98 the Inspector carried out the specific balancing exercise required by para. 202 of the NPPF (para. 208 of the current NPPF) in respect of "less than substantial harm" to designated heritage assets. In DL 93 the Inspector assessed a number of the proposal's "public benefits" as "significant" and attracting "significant weight." In DL 97, after giving significant weight to the shortfall in housing land supply, how much of that shortfall would be met by the proposed development, and to the benefits previously identified, he decided that those considerations did not outweigh the great importance and weight to be given to the preservation of the settings of the listed buildings. The Inspector found that that amounted to a clear reason for refusal and so, by virtue of para. 11(d)(i) of the NPPF, the presumption in favour of sustainable development did not apply (DL 97 to DL 98).

29. In DL 104 the Inspector struck the overall planning balance. While the proposal would not harm the grade I listed building at Warish Hall, or Smiths Green Lane as a protected lane, or the trees in the ancient woodland, and would bring public benefits, those matters were outweighed by harm to the landscape character and visual impact to the appearance of the area, harm to the open character of the CPZ and harm to other designated heritage assets. For these reasons, and applying also s.38(6) of the Planning and Compulsory Purchase Act 2004, the appeal was dismissed (DL 104 to DL 106).

The 2023 decision letter

30. In DL 18 the Inspector set out what he considered to be the main issues in the application:

> "18. These are:
>
> 1) whether having regard to national and local planning policies, the proposed development is in a sustainable location;
>
> 2) the effect of the development on the character and appearance of the area, including the effect on the significance of heritage assets;
>
> 3) the effect that the development would have on the ancient woodland adjacent to the application site;

> 4) the impacts of the proposed development on highway safety and the road network, including by reason of cumulative impacts of other developments;
>
> 5) whether adequate provision would be secured for any additional need for facilities, including transport, education, community and health facilities, and open space arising from the development; and
>
> 6) whether having regard to the supply of housing the tilted balance set out in NPPF paragraph 11(d) applies, and if so the effect of sub-paragraphs (i) and (ii) on the acceptability of the proposal."

31. On the first issue, the Inspector found that the development of the proposed site, outside the development limits of Takeley, conflicted with the general countryside protection policy in S7 of the Local Plan. However, the development would be reasonably accessible to a range of facilities in compliance with para. 93 of the NPPF (para. 97 in the current version) and would enhance the sustainability of community and residential environments in Takeley and nearby. In general terms the site provided an accessible and sustainable location for additional new dwellings adjacent to the built up area (DL 19 and DL 26).

32. On the second issue, the Inspector found that the revised scheme would still cause a medium level of less than substantial harm to the settings of the listed buildings, namely Goar Lodge, Beech Cottage and Hollow Elm Cottage (DL 37 to DL 38). But it would cause no significant harm to the character of the protected lane or to the Conservation Area (DL 43 to DL 44). In contrast to the 2022 DL, the Inspector decided at DL 75 that the harm to heritage assets weighed against public benefits "produces no clear reason for refusal."

33. However, in relation to local character and appearance, the Inspector concluded that the s.62A proposal would still cause demonstrable harm to the open and agrarian character of the application site through a permanent loss of open space and a built form that would unacceptably detract from the amenity value of Prior's Wood, contrary to policy ENV3 of the local plan. There would be an urbanising effect, contrary to policies S7 and S8 of the local plan. The Inspector was concerned that the revised scheme still did not retain the grandeur of Prior's Wood (DL 27, DL 34 and DL 37). The urbanising effect of the previous scheme would be reduced but not materially so (DL 35).

34. The Inspector dealt with the third issue at DL 46 to DL 55, which will need to be considered in more detail under ground 4. In summary, the Inspector differed from the 2022 Inspector in that he found the 15m depth of the buffer zone between the ancient woodland at Prior's Wood and the housing development to be inadequate as regards indirect, but not direct, effects upon the trees (DL 50 to DL 55).

35. In relation to the fourth issue, the Inspector concluded that the proposed development would not have any significant impact on the transport network in terms of capacity, congestion or safety (DL 56 to DL 62).

36. In relation to the fifth issue, the Inspector was satisfied that the proposal would make adequate provision to address any additional need for transport, education, community and health facilities and open space (DL 63 to DL 68).

37. On the sixth issue, this was not a case where the presumption in favour of sustainable development applied because the LPA was unable to demonstrate a 5-year supply of housing land. Here they could (DL 70). The Inspector then expressed doubts as to whether the most important policies for determining the application were out-of-date. But he said that it was too simplistic to say that the plan as a whole was out-of-date. On that basis too, the presumption in favour of sustainable development in para. 11(d) of the NPPF did not apply (DL 71 to DL 74).

38. Nevertheless, the Inspector did apply the tilted balance test. He examined the benefits of the proposal at DL 77 to DL 81. At DL 82 the Inspector referred to the significant harm that the scheme would cause to the open and agrarian character of the site and to the character and appearance of Prior's Wood, the urbanising effect of the development and the harm to heritage assets. At DL 83 he referred to the loss of or deterioration in trees in the ancient woodland unless the buffer zone of 15m were to be enlarged. At DL 84 the Inspector concluded for the purposes of para. 11(d)(ii) of the NPPF that the adverse impacts of the proposal would significantly and demonstrably outweigh its benefits and therefore, for this reason also, the presumption in favour of sustainable development did not apply. The Inspector also considered that the harm that the development would cause to ancient woodland (protected by para. 180c of the NPPF, a "footnote 7 policy") provided a clear reason for refusal of permission, so as to disapply the presumption pursuant to para. 11(d)(i) of the NPPF.

39. At DL 87 to 90 the Inspector referred to biodiversity net gain ("BNG"), a subject which will need to be examined in more detail under ground 1.

A summary of the grounds of challenge

40. Weston advanced its grounds of challenge in the following order:

Ground 1

(a) the Inspector erred in law in DL 80 and in DL 87 to DL 90 when he reduced the weight to be given to the BNG estimated for the proposal by taking into account a future legal requirement for BNG to be provided under s.90A and sched. 7A to the TCPA 1990 (introduced by the Environment Act 2021 with effect from 12 February 2024) contrary to the decision of Eyre J in *NRS Saredon Aggregates Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] Env. L.R. 18; [2024] JPL 616.

(b) Alternatively, the reasons given by the Inspector in relation to his assessment of the proposal's BNG were legally inadequate (see ground 6).

Ground 4

In breach of the principles in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137 at 145, the Inspector reached findings

inconsistent with those of the 2022 Inspector, without complying with his obligation to give legally adequate reasons for differing from that Inspector. This ground relates to the assessment of the effect of the proposal on the trees in the ancient woodland, Prior's Wood.

Ground 3

The Inspector acted in breach of his duty to act fairly by failing (a) to discharge his inquisitorial role; and/or (b) to give *Weston* a fair opportunity to deal with points he made in his decision letter without those matters having previously been raised in consultation responses, or in the Issues Report dated 25 September 2023, or in the hearings.

Ground 5

The Inspector erred unlawfully by treating Prior's Wood as a non-designated heritage asset.

Ground 2

The Inspector erred in law by treating the proposal's provision of land for the expansion of a nearby primary school as simply amounting to mitigation for an effect of the scheme to develop 96 dwellings, rather than as a significant public benefit. This is an error of law applying the principles in *E v Secretary of State for the Home Department* [2004] QB 1044. In addition, the Inspector failed to give reasons for departing from the view of the 2022 Inspector that the provision of the land for the school was a significant public benefit. He also acted unfairly by failing to indicate that there was an issue in relation to the 2022 Inspector's finding on this matter, so that Weston could deal with it at one of the hearings or by way of written representations.

Ground 6

The Inspector failed to give adequate reasons for his decision. This was a "sweep up" ground of challenge which does not call for separate treatment in this judgment.

41. I am grateful to all counsel for their helpful submissions.

The statutory framework

Legislation

42. The statutory framework is comprised essentially of (i) relevant provisions in the TCPA 1990, (ii) the Town and Country Planning (Section 62A Applications) (Procedure and Consequential Amendments) Order 2013 (SI 2013 No. 2140) ("the 2013 Order"), (iii) the Town and Country Planning (Section 62A Applications) (Written Representations and Miscellaneous Provisions) Regulations 2013 (SI 2013 No. 2142) ("the 2013 Regulations") and (iv) the Town and Country Planning (Section 62A Applications) (Hearings) Rules 2013 (SI 2013 No. 2141) ("the 2013 Rules"). Because this regime has not often been considered by the courts and because it informs the content of any common law duty to act fairly, I will summarise the legislation in some detail.

43. Section 62A of the TCPA 1990 provides *inter alia*:

> "**62A When application may be made directly to Secretary of State**
>
> (1) A relevant application that would otherwise have to be made to the local planning authority may (if the applicant so chooses) be made instead to the Secretary of State if the following conditions are met at the time it is made—
>
> (a) the local planning authority concerned is designated by the Secretary of State for applications of a description specified in the designation; and
>
> (b) the application falls within that description.
>
> (1A) Only prescribed descriptions of application may be specified in a designation under subsection (1).
>
> (2) In this section *"relevant application"* means—
>
> (a) an application for planning permission, or permission in principle, for the development of land in England, or
>
> (b) an application for approval of a matter that, as defined by section 92, is a reserved matter in the case of an outline planning permission for the development of land in England,
>
> but does not include an application of the kind described in section 73(1) or an application of a description excluded by regulations.
>
> (3) … "

44. Section 62B deals with the designation of a local authority referred to in s.62A(1)(a):

> **"62B Designation for the purposes of section 62A**
>
> (1) An authority may be designated for the purposes of section 62A only if—
>
> (a) the criteria that are to be applied in deciding whether to designate the authority are set out in a document to which subsection (2) applies,
>
> (b) by reference to those criteria, the Secretary of State considers that there are respects in which the authority are not adequately performing their function of determining applications under this Part, and

> (c) the criteria that are to be applied in deciding whether to revoke a designation are set out in a document to which subsection (2) applies.
>
> (1A) A document to which subsection (2) applies may set out different criteria for each description of application prescribed under section 62A(1A).
>
> (2) This subsection applies to a document if—
>
> (a) the document has been laid before Parliament by the Secretary of State,
>
> (b) the 40-day period for the document has ended without either House of Parliament having during that period resolved not to approve the document, and
>
> (c) the document has been published (whether before, during or after the 40-day period for it) by the Secretary of State in such manner as the Secretary of State thinks fit.
>
> (3) In this section "the 40-day period" for a document is the period of 40 days beginning with the day on which the document is laid before Parliament (or, if it is not laid before each House of Parliament on the same day, the later of the two days on which it is laid).
>
> (4) …"

45. Regulation 3 of the 2013 Regulations prescribes the "descriptions" of applications for which a LPA may be designated under (s.62A(1) and (1A)). A LPA may be designated for either or both of the following categories: "major development applications" and "non-major development applications" (reg.3(1)). In summary, major development applications are applications for planning permission, or for approval of a reserved matter under an outline permission for, "major development", save for certain excluded applications (reg 3(2)). "Major development" and "non-major development" are defined by reg.3(5):

> "(5) In this regulation –
>
> *"major development"* means development which involves one or more of the following –
>
> (a) the winning and working of minerals or the use of land for mineral-working deposits;
>
> (b) waste development;
>
> (c) the provision of dwellinghouses where –
>
> (i) the number of dwellinghouses to be provided is 10 or more; or

(ii) the development is to be carried out on a site having an area of 0.5 hectares or more and it is not known whether the development falls within sub-paragraph (c)(i);

(d) the provision of a building or buildings where the floor space to be created by the development is 1,000 square metres or more; or

(e) development carried out on a site having an area of 1 hectare or more.

"*non-major development*" means development which is not major development;

"waste development" means any operational development designed to be wholly or mainly for the purpose of, or material change of use to, treating, storing, processing or disposing of refuse or waste material."

The application in the present case was for "major development" because it proposed more than 10 dwellings.

46. Section 76D of TCPA 1990 provides that a s.62A application is to be determined by an Inspector subject to s.76E. Under s.76E the Secretary of State may direct that he will determine a s.62A application rather than an Inspector.

47. Under s.319A of TCPA 1990 the Secretary of State must make a determination as to the appropriate mode for considering an application under s.62A, that is a local inquiry, a local hearing, or by written representations (s.319A(1)-(2)). But as to a local inquiry, see [57] below.

48. The decision of the Secretary of State or an Inspector on a s.62A application is "final". There is no right of appeal (s.62A(5)). But such a decision falls within the scope of the statutory review procedure under s.288 of the TCPA (see s.284(1)(f), s.284(3)(ya), and s.288).

49. Article 4 of the 2013 Order lays down how a s.62A application must be made, the contents of an application and additional information, including plans and drawings. Article 7 requires a design and access statement to accompany a s.62A application for major development and certain forms of non-major development.

50. Article 9 of the 2013 Order requires the applicant to give notice of his application to owners and tenants of the land to which the application relates. By article 10 the applicant must provide a certificate of having complied with art.9.

51. Where the Secretary of State receives an application which complies with (*inter alia*) arts. 4, 7 and 10 he must send an acknowledgement to the applicant and notify him if the application is considered not to be valid, as soon as reasonably practicable (art.8).

52. Under art.11 of the 2013 Order the Secretary of State must within 5 working days of deciding that an application is valid, or as soon as reasonably practicable thereafter, notify the LPA of the application, sending a copy of the application and any accompanying documents. Under art.12 the LPA must send the Secretary of State a completed "questionnaire" and any documents referred to in that questionnaire.

53. By art.12A of the 2013 Order a "special development application" includes an application for EIA development accompanied by an environmental statement and an application which does not accord with the statutory development plan. A "standard application" refers to all other applications. In the case of a standard application for major development, art.13(2) requires the Secretary of State to publish on his website, within 5 days after receipt, the information required by art.13(4) (e.g. address and description of development and the time period for making any representations to the Secretary of State) and to arrange for a notice to be published in a local newspaper giving at least 21 days for representations about the scheme to be made (art. 12A and schedule 2).

54. Article 17 of the 2013 Order sets out consultation requirements in relation to statutory consultees. The Secretary of State may not determine the s.62A application until at least 21 days after the consultee was given a copy of the application (art.17(4)). Article 18 requires the LPA to be consulted. The authority must generally have at least 21 days from when it was notified of the application under art.11(2) within which to make representations before the s.62A application may be determined (art.18(1)). By art.17(6) and art.18(1), the Secretary of State must take into account any representations from the LPA and statutory consultees made within the stated periods.

55. Article 19 of the 2013 Order imposes a duty on statutory consultees and LPAs to give a "substantive response" under arts.17 or 18 generally within 21 days from the date on which they were consulted.

56. By art.21 of the 2013 Order, within 5 working days of the end of the "representation period" in art 17(4) or art 18(1) (see art.2(1) of the 2013 Order), the Secretary of State must make copies available on his website of the LPA's questionnaire and any accompanying documents and any representations received by the LPA.

57. Article 22 of the 2013 Order provides that before determining a s.62A application the Secretary of State must consider the application at a hearing or on the basis of written representations. The 2013 Order does *not* provide for the holding of a local inquiry. For the purposes of s.319A(1) and (3) of the TCPA 1990, the Secretary of State must decide which procedure is to be followed within 5 working days beginning with the day after the end of the "representation period" (reg.4 of the 2013 Regulations).

58. Article 23 of the 2013 Order lays down time periods within which the Secretary of State must give the applicant notice of his decision. Whether a s.62A application is dealt with at a hearing or by way of written representations, the time periods for issuing a decision, are generally the same as those which apply to the determination of planning applications by LPAs (see art.34 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No. 595)). So for a major development of the kind with which this case is concerned, the relevant period is 13 weeks beginning with the day immediately following the Secretary of State's receipt of the application, unless the applicant and the Secretary of State agree in writing to an extension.

59. Article 24 of the 2013 Order sets out requirements for the contents of the decision notice. Where planning permission is refused, "the notice must state clearly and precisely the full reasons for refusal, specifying all policies and proposals in the

development plan which are relevant to the decision" (art.24(1)(b)). The decision notice must also contain a statement explaining whether, and if so how, in dealing with the application, the Secretary of State has worked with the applicant in a positive and proactive manner based on seeking solutions to problems arising in dealing with the application (art.24(1)(c)).

60. Where a s.62A application is considered in a hearing, the relevant procedural rules are the 2013 Rules.

61. The date fixed by the Secretary of State for the hearing must not be later than 5 weeks after the end of the representation period, unless he considers that impractical, in which case he must state earliest date he considers to be practicable. The minimum amount of notice which the Secretary of State must give of the date, time and place of the hearing is 2 weeks for a major development and 5 working days for a non-major development (rule 4 of the 2013 Rules). These time limits are substantially shorter than the comparable periods specified for hearings of planning appeals (Town and Country Planning (Hearings Procedure) (England) Rules 2000 (SI 2000 No.1626)).

62. Rule 5 requires the Inspector at least 5 working days before the hearing, to prepare a report setting out what, in his opinion, are the issues to be considered in relation to the application and to publish the report on the Secretary of State's website.

63. Rule 6(2) lists the categories of person entitled to appear at a hearing, including the applicant, the relevant LPA, any authority or person consulted under arts.17 or 18 of the 2013 Order and any persons who made representations within the representation period and at that time asked to be heard.

64. Rule 7 of the 2013 Rules lays down the procedure to be followed at a hearing:

> "**7.— Procedure at hearing**
>
> (1) Except as otherwise provided in these Rules the inspector must determine the procedure at a hearing.
>
> (2) At the start of the hearing the inspector must summarise the main issues set out in the report published by the Secretary of State under rule 5.
>
> (3) Subject to paragraphs (4) and (5), a person entitled to appear at a hearing is to be given the opportunity to make oral representations but the length of representations may be limited by the inspector.
>
> (4) The inspector may refuse to permit the making of oral representations on any matter which he considers to be irrelevant or repetitious.
>
> (5) The inspector may—
>
> (a) require any person appearing or present at a hearing who, in his opinion, is behaving in a disruptive manner to leave; and

(b) refuse to permit that person to return; or

(c) permit that person to return only on such conditions as the inspector may specify,

but any person not permitted to return or who does not return after being required to leave, may submit written representations to the inspector before the close of the hearing.

(6) The inspector may proceed with a hearing in the absence of any person entitled to appear at it.

(7) The inspector may adjourn a hearing and, if the date, time and place of the adjourned hearing are announced at the hearing before the adjournment, no further notice is required."

65. Rule 9 sets out the procedure to be followed after a hearing in relation to a standard application, where the decision is to be taken by an Inspector under s.76D of TCPA 1990:

"**9.— Procedure after hearing: standard applications**

(1) This rule applies where a hearing has been held for the purposes of a standard application

(2) After the close of the hearing, the inspector must prepare a written statement setting out his decision and his reasons for it.

(3) When making his determination, the inspector—

(a) must take into account—

(i) any representations made to the Secretary of State pursuant to any notice of, or information about, or consultation in relation to, the application, under articles 9, 13, 14, 16, 17 or 18 of the 2013 Order which are received within the representation period; and

(ii) any representations made at the hearing.

(b) may disregard any representations or information received after the hearing has closed.

(4) If, when making his determination, an inspector proposes to take into consideration any new representations or information (not being a matter of government policy) which was not raised at the hearing and which he considers to be material to his decision, the inspector must not come to a decision without first —

(a) notifying in writing the persons entitled to appear at the hearing of the matter in question; and

> (b) affording them an opportunity of making written representations to him."

PINS Guidance

66. Ms. Rebecca Phillips is a Professional Lead for Planning Appeals in PINS. She made a witness statement on behalf of the defendant in which she explains that the s.62A procedure has been designed to be "front-loaded and efficient." The object is to speed up decision-making in response to planning applications while achieving high quality in those decisions (para. 15). Front-loading refers to an expectation that applications are intended to include all the necessary information and arguments. Generally, when an application is made, it should be "decision ready." Applicants should not anticipate having an opportunity to submit further information (para. 17).

67. Ms. Phillips says that front-loading is important because an Inspector is making a decision at first instance, not on appeal. Inspectors do not function in the same way as planning officers working in a LPA. Inspectors are not able to liaise with specialist officers in the same organisation. They cannot consult with other departments, for example, highways, conservation, environmental health or legal, to address changes to a proposed scheme or mitigation. Instead, the statutory scheme provides for a single round of consultation (para. 19). The expectation of PINS is that an applicant will have obtained adequate pre-application advice from the LPA and other statutory consultees. An applicant may also seek pre-application advice from PINS.

68. The front-loading approach is not to be found in the legislation. Rather it is an administrative practice set out in the non-statutory "Procedural guidance for section 62A Authorities in Special Measures" issued by PINS.

69. As to the role of the applicant, paras.2.5.1 to 2.5.4 of the Guidance state:

> "2.5.1. It is not the purpose of this guidance to set out excessively prescriptive requirements for applicants seeking pre-application advice. The Planning Inspectorate, however, will expect applicants to provide the following information:
>
> - a completed pre-application form (…..)
> - relevant plans drawn to scale showing the location of the site, and confirmation of the relevant LPA
> - relevant plans or information
> - a supporting statement identifying what the main issues are considered to be, what consultation has been carried out to date and a summary of stakeholder comments, and how it is intended that the pre-application process will shape the development of the proposal.
>
> 2.5.2. Consultation must take place early in the process so that stakeholders may positively influence proposals before submission.

> 2.5.3. For major developments, applicants are strongly encouraged to carry out community consultation separately, alongside discussions with the Planning Inspectorate and the LPA.
>
> 2.5.4. Meaningful consultation should also take place with statutory consultees. For example, if the application site is known to be in an area identified to be at risk from flooding then it is strongly advised that initial investigations are prepared and pre-application consultation is undertaken with relevant consultees. Any advice provided by a consultee should be included in the pre- application documents submitted to the Planning Inspectorate. It may also be necessary to liaise with the LPA in respect of certain matters, such as the content and structure of any section 106 agreements where applicable."

70. Paragraph 3.2.1 of the Guidance give a pre-submission checklist:

> "3.2.1. Before submitting an application for a development proposal directly to the Planning Inspectorate under Section 62A, applicants are strongly encouraged to:
>
> - identify what the main issues are likely to be with reference to the development plan, the National Planning Policy Framework, supplementary guidance documents and issues raised by pre-application community consultation or advice
>
> - ensure that all the issues identified are adequately and appropriately addressed in the application submission. This should be included within a Planning Statement or in an accompanying letter submitted with the application
>
> - carryout pre-application discussions with any key stakeholders including statutory consultees; and where appropriate, prepare a draft planning obligation or unilateral undertaking to address issues which will be raised by the development proposal (see 8.3 Appendix 3 Community Infrastructure Levy and Planning Obligations)"

71. Section 4.2 of the Guidance deals with the role of the LPA:

> "4.2.2. The LPA is also a statutory consultee and must provide a substantive response to the consultation within 21 days. This should include:
>
> - the policies and any guidance, that are considered relevant

- responses from any internal and non-statutory consultees

- set out any amendments to the scheme, or additional information the LPA, considers to be necessary

- a recommendation, with reasons, for whether planning permission should be granted or refused

- provide detailed comments on any submitted planning obligations, or set out any matters that the LPA considers should be secured through an obligation; and

- a list of conditions in the event that planning permission is granted

4.2.3. The LPA should work constructively with the applicant to ensure any Section 106 agreement is completed within the required timescales."

72. Paragraph 4.3.3. of the Guidance deals with the timing of consultation responses:

> "4.3.3. Consultation responses and representations must be received by the deadline given (usually 21 days from the start of consultation). Any representations submitted after this date may not be taken into account."

73. Section 4.4 of the Guidance deals with amendments to an application and agreements for extending the time for determining a s.62A application:

> "4.4.1. When submitting an application to the Planning Inspectorate, applicants must ensure that it is ready for determination. A decision will be made on the application as submitted. There is no specific provision in the process for amendments or revision to the application once it has been submitted. Applicants should ensure that the relevant information is submitted with the application, as we will not accept any additional information once the application has been submitted, other than in exceptional circumstances.
>
> 4.4.2. The expectation is that the application, once submitted, is ready for determination.
>
> 4.4.3. In exceptional circumstances where an agreement for an extension of time, in which to determine the application is necessary, the Case Officer will set out to the applicant:
>
> - the reasons for the extension of time
>
> - any additional information considered necessary

- the date required for the submission of any additional material; and

- the revised determination date for the application

4.4.4. On receipt of agreement from the applicant to the extension of time, a revised timetable for determining the application will be published at Section 62A Planning Applications (…..)."

74. Paragraph 5.1.1. of the Guidance set out circumstances in which PINS will determine whether a hearing is necessary:

> "5.1.1. At the end of the consultation period the Planning Inspectorate will determine the procedure to be followed. Planning applications relating to development of a significant scale, and which raise issues which cannot be clearly understood from the written submissions will require a hearing. It is expected that the vast majority of applications for non-major development will be determined by written representations."

75. Paragraph 5.1.2. of the Guidance sets out PINS' view on the purposes of a hearing for considering a s.62A application:

> "5.1.2. In the event that a hearing is required its purpose will be for the Inspector to allow any who wish to make oral representations and for the Inspector to put questions to address any points of fact or outstanding queries they may have. It is not a forum for parties to seek to test the evidence of others through cross-examination or direct questioning. In most cases it is expected that the designated LPA will provide a suitable venue for the hearing. It is expected that the Local Planning Authority and Applicant will be represented at the hearing."

Legal principles

76. In order to support certain of their submissions, both parties have sought to compare the s.62A process with either the determination of a planning application by a LPA or the determination of a s.78 appeal by an Inspector following a hearing. In my judgment, there are similarities and dissimilarities with each. But ultimately, the touchstone must be the statutory framework laid down by Parliament for s.62A applications. The Guidance issued by PINS should be compliant with that framework and any public law principles applicable to the procedure. Wherever possible, the Guidance should be interpreted so as to conform to that framework and those principles.

77. The statutory requirements for the contents of an application, and for consultation on an application, are similar, whether the application is made to a LPA or, under s.62A, to the Secretary of State. Both an LPA determining a planning application and an

Inspector determining a s.62A application are making a determination "at first instance". But there are some major, structural differences between the procedures.

78. A decision by a LPA to refuse an application for planning permission is not final. It may be the subject of an appeal on the merits to the Secretary of State under s.78 of the TCPA 1990. A LPA determining a planning application may potentially have to defend its decision (or a failure to make a decision) on appeal. But a decision on a s.62A application is final in that there is no right of appeal. There is only an ability to make an application to the High Court for statutory review. It is not surprising to find, therefore, that PINS has set an objective of achieving a high quality of decision-making on s.62A applications (see [66] above). Unless there is complete agreement by all concerned that a planning application should be granted on the terms proposed by the applicant, the Inspector is the sole and final decision-maker resolving the issues as between the parties. Unlike a LPA, he is not responsible for local policies.

79. An Inspector reaching a decision under s.62A is not in the same position as an Inspector determining an appeal against a LPA's decision to refuse an application for planning permission. He will not have the benefit of a prior exchange of proofs of evidence from expert witnesses instructed by the principal parties or of joint statements setting out matters of common ground. Instead, he can expect to receive a consultation response from the LPA along the lines indicated in para. 4.2.2 of PINS' guidance (see [71] above).

80. In the case of an application to a LPA, the matter will be determined by committee members, unless that decision is delegated under the authority's constitution to an officer. But delegation generally only occurs with more minor matters. Where a committee determines an application, they will receive a written report from an officer advising them of such subjects as the key features of the site and surrounding area, the development proposed, relevant planning policies and the issues which arise, together with information and an appraisal to help them address those issues. The officer's report represents a key document in decision-making by LPAs. Depending upon the extent to which the members agree or disagree with it, the report may form the basis for inferring the reasons for the committee's decision (*Dover* at [42]). Recognising the particular characteristics of decision-making by democratically accountable authorities and the function in that process of reports prepared by professional officers, the courts have developed principles for dealing with applications for judicial review of LPA decisions (see e.g. *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452; *R (Plant) v Lambeth Borough Council* [2017] PTSR 453).

81. Although a LPA is obliged to give reasons for any decision to refuse planning permission, there is no general duty to give reasons where it decides to grant permission. Such an obligation only arises where there is an explicit statutory requirement, for example under EIA legislation, or in the special circumstances discussed in *R (CPRE Kent) v Dover District Council* [2018] 1 WLR 108.

82. Essentially, these same principles govern the circumstances in which an Inspector (or the Secretary of State) determining a s.62A application by the written representations procedure is obliged to give reasons for his decision.

83. There is no general obligation on a LPA to hold a hearing before it determines an application for planning permission (see e.g. *R (Spitalfields Historic Building Trust) v Tower Hamlets London Borough Council* [2023] PTSR 31 at [138]). Some authorities allow members of the public and interest groups to make brief representations to a planning committee, but it would be highly unusual for an LPA to hold anything resembling a hearing before an independent Inspector.

84. There is no obligation on the Secretary of State or an Inspector to hold a hearing in relation to a s.62A application. Instead, once the process of receiving representations and consultation responses is completed, there is a discretion as to whether to proceed by way of written representations or a hearing (art.22 of the 2013 Order). The Secretary of State must make that choice within 5 working days after the end of "the representation period" (reg.4 of the 2013 Regulations).

85. If the Secretary of State chooses to proceed by written representations, the procedure in either reg.6 or reg.7 of the 2013 Regulations applies, according to whether the matter will be decided by an Inspector or by the Secretary of State respectively. In either case, the decision-maker need only take into account representations which have been made in response to the various publicity, notification and consultation provisions. The regulations do not require any further process to be followed before reaching a determination. Unlike the process followed by an LPA, no officer's report will be produced analysing the material which has been submitted. The decision-maker may proceed straight to issuing a decision notice. But if the decision-maker takes into account any new information (not being a matter of Government policy) after the end of the representation period, he must notify the applicant and any party who has made representations in time, giving them an opportunity of making written representations to him (see regs.6(3) and 7(3)). Rule 9(4) of the 2013 Rules contains a similar provision for hearings.

86. Where a hearing is held, the Inspector has some additional legal obligations as compared with the written representations procedure. First, persons entitled to appear at the hearing (see rule 7(3) of the 2013 Rules) are also entitled to make oral representations, subject to the controls available to the Inspector in rules 7(1), (3), (4) and (5). Second, he is under a duty to prepare a written statement setting out his decision "and his reasons for it" (rule 9(2) of the 2013 Rules). That duty to give reasons applies not only to a decision to refuse an application, but also to a decision to grant planning permission. Third, the Inspector must take into account not only the written representations duly received, but also the representations made at the hearing (rule 9(3)).

87. Where a duty to give reasons exists, the standards for the legal adequacy of the reasons given, whether on the determination of a s.62A application, or a LPA's decision on a planning application, are essentially the same (*Save Britain's Heritage v Number 1 Poultry* [1991] 1 WLR 153; *South Bucks District Council v Porter (No. 2)* [2004] 1 WLR 1953).

88. The upshot of this analysis is that where a s.62A application is dealt with by written representations, there is at first sight some similarity with the first instance decision-making process of a LPA. But there are major differences. There is no right of appeal against the determination of a s.62A application. There is no democratic element or separation of functions between officers and members. The Inspector is a professional

decision-maker with no involvement in local planning policies or in defending a position taken on a planning application. The process is closer in nature to a s.78 appeal than to decision-making by a LPA.

89. The same is even more so in the case of a s.62A determination following a hearing. Here, the procedural rules lay down a structured approach to the prior preparation of representations and participation in that hearing. There is also an obligation to give reasons in all cases, whichever way the decision goes.

90. The fact that a decision on a s.62A application may only be challenged by statutory review under s.288 of the TCPA 1990 (see s.284(1) and (3)(ya) and 288(4)), and not by judicial review as in the case of a decision by a LPA, introduces a further distinction. Under s.288 a person aggrieved may apply to the High Court to quash the decision on the grounds that it is not within the powers of the TCPA 1990, or "that any of the relevant requirements have not been complied with" in relation to that decision and that person has been substantially prejudiced thereby (s.288(1) and (5)). Requirements applicable to a decision on an application made to the Secretary of State under s.62A contained in the 2013 Order, the 2013 Regulations and the 2013 Rules are "relevant requirements" for the purposes of s.288(1) and (5) (see s.288(9)). Accordingly, a breach of one of those requirements which relates to a s.62A decision may give rise to a ground for quashing that decision, subject to satisfying the substantial prejudice test.

91. Where a decision has been arrived at as a result of a breach of a duty to act fairly, it may be said that, in terms of s.288 of the TCPA 1990, the decision is not within the powers of the Act, or that a "relevant requirement" has not been complied with, in that the requirements of natural justice are, implicitly, "relevant requirements" (*Fairmount Limited v Secretary of State for the Environment* [1976] 1 WLR 1255, 1263 C-E).

92. It was common ground between the parties that the legal principles in *St Modwen Limited v Secretary of State for Communities and Local Government* [2018] PTSR 746 at [6] to [7] governing a challenge under s.288 of the TCPA 1990 are applicable in the present case. In the light of the above analysis, I agree that they apply (without modification) to a challenge to a decision under s.62A of the TCPA 1990 where a hearing has been held.

Fairness

93. The procedural rules governing the s.62A process, including the hearing, are designed to promote fairness and efficiency. Such rules are not exhaustive of the requirements of fairness, but where those rules have been satisfied, the burden lies on the claimant to show that the duty to act fairly has been breached (*Hopkins Developments Limited v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at [62] and *Pearce v Secretary of State for Business, Energy and Industrial Strategy* [2022] Env. L.R. 4 at [171]).

94. The underlying principle is well-established. What the requirements of fairness demand will depend upon the character of the decision-making body, the kind of decision it has to make and the statutory (or other) framework in which it operates (see *Lloyd v McMahon* [1987] AC 625 at 702-3).

95. As Lord Mustill said in *R v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531 at 560E:

> "What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken."

96. The procedural rules in the present case do not give an express right to any party, including the applicant, to respond to any representations adversely affecting his interest. But the requirement for the Secretary of State to make copies of representations received available on his website enables participants to see the information or submissions which have been put forward, so that they may be able to respond. Indeed, in the present case PINS invited Weston to respond to certain representations which had recently been uploaded to the website (see email of 12 September 2023). So, despite what appeared to be suggested at one point, the procedural rules do not preclude an applicant from responding to consultation responses, as Weston did in the present case, subject to any issues on timing.

97. However, fairness is not a "one-way street." Here, Weston submitted a substantial volume of material responding to the views of consultees at 4.55pm on Friday 29 September 2023. The hearing was due to begin at 10am the following Monday. The timing of this submission gave other parties, and indeed the Inspector, insufficient time to absorb the new material so as to be ready to address it at the hearing. Mr. James Maurici KC explained on behalf of Weston that his clients had had to deal with a new technical highways issue raised by the highway authority and that they could not secure a meeting with that authority to discuss it until the afternoon of 29 September. But even so, that does not explain why Weston could not have provided all the other new material to PINS significantly earlier. It would also have been good practice to alert PINS, and the Inspector, to the highway issue and that the meeting could not have been arranged sooner. The Inspector should have been told how the matter was proposed to be handled so that he would have a proper opportunity to consider the material and any case management issues before the hearing.

98. Having said all this, some of the Inspector's comments at DL5 to DL7 were unfortunate. He does not appear to have been aware of the problem caused by the highway authority. From what the court was told, the lateness of the material submitted on 29 September 2023 does not appear to have been entirely the fault of the claimant. Perhaps an adjournment of the hearing would have been necessary in any event. It is also pertinent to have in mind art.24(1)(c) of the 2013 Order (see [59] above). That does not appear to have been followed in this case.

99. Whether a party can legitimately complain about not being allowed by an Inspector to rely upon a representation is fact-sensitive. For example, in *R (Low Carbon Solar Park 6 Limited) v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 770 Admin, HHJ Jarman KC rejected a developer's complaint that it had not been allowed to rely upon its late assessment of the significance of heritage assets in response to a consultee's representation which had pointed out that that exercise had not been undertaken. On the evidence, that was a matter which the

developer ought to have addressed before making his s.62A application and therefore in the application documents.

Ground 1

100. This ground of challenge is concerned with the Inspector's handling of BNG.

101. At the time of the Inspector's decision the relevant national policy was contained in para. 174 of the NPPF, which stated that:

> "Planning policies and decisions should contribute to and enhance the natural and local environment by:
>
> …
>
> (d) minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures;"

The policy encourages the provision of BNG. It does not set a numerical target as a requirement for the grant of planning permission.

102. UDC's local plan did not set any targets or requirements for requiring development proposals to deliver BNG.

103. Section 98 of and sched. 14 to the Environment Act 2021 ("the 2021 Act") inserted s.90A and sched. 7A into the TCPA 1990. Section 90A simply gives effect to sched. 7A. The schedule provides for grants of planning permission in England to be subject to a condition to secure that the biodiversity gain objective is met (para.1(1)). Paragraph 2(1) provides that that objective is met if "the biodiversity value attributable to the development" (as defined) exceeds the pre-development biodiversity value of the onsite habitat by at least "the relevant percentage", namely 10% (para. 2(3)).

104. The biodiversity value of any habitat refers to "its value as calculated in accordance with the biodiversity metric" (para. 3). That metric is a document published by the Secretary of State and laid before Parliament, "for measuring, for the purposes of this Schedule, the biodiversity value … of habitat …" (para. 4).

105. Paragraphs 13 to 21 of sched.7A contain provisions requiring the grant of planning permission to be subject to a deemed condition preventing the commencement of development until a biodiversity gain plan has been submitted to and approved by the planning authority.

106. The requirement to provide a 10% BNG secured by condition on the grant of planning permission was brought into force on 12 February 2024. But it does not apply to a planning permission granted in relation to an application made before that date (regs. 2 and 3 of The Environment Act 2021 (Commencement No.8 and Transitional Provisions) Regulations 2024 (SI 2024 No.44)). Accordingly, the new legislative requirement could not have applied to any planning permission granted on Weston's s.62A application lodged on 12 June 2023.

107. The Statutory Biodiversity Metric under para. 4 of sched. 7A to the TCPA 1990 (dated 29 November 2023) defines "biodiversity units" for the purposes of applying the 10% BNG requirement. There are three types of unit: area habitat biodiversity units, hedgerow biodiversity units and watercourse biodiversity units. Mr. Maurici referred the court to Natural England's User Guide to the Biodiversity Metric (published in March 2023) which states that the three types of biodiversity units cannot be summed. He says that in order to see whether a development meets the 10% BNG requirement, where applicable, it is not permissible to combine the scheme's "scores" for each type of biodiversity unit. In other words, the 10% requirement is to be satisfied for each unit type. There was no dispute about this point.

108. In the *NRS Saredon* case the proposed development was not subject to the new statutory requirement. The developer proposed BNG in excess of 10%. The Inspector noted that "the net gain would be nearly 4 times that required by forthcoming legislation." But he went onto say that some of that gain "is required to meet national policy and future legislative requirements …" Consequently the Inspector gave only "moderate weight" to the BNG enhancement. Eyre J decided that the Inspector reduced the weight he would otherwise have given to the BNG in that case because some of the gain would be necessary in any event by reason of the future legislative requirements [55]. The judge held that that involved an error of law, because that future requirement did not apply to the development proposed [56].

109. The court asked the parties about the potential relevance of future policy or legislative changes in the light of *R (Cala Homes (South) Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639, where the point was conceded by the developer's counsel (see [20] and [33]). However, Ms. Estelle Dehon KC for the Secretary of State accepted that *NRS Saredon* had been correctly decided in relation to the wording of the decision letter in that case. I consider that she was correct on this point. By reg.3 of SI 2024 No.44 Parliament has enacted an explicit transitional provision stating that the BNG planning condition in para. 13 of sched.7A *does not apply* where an application for planning permission for relevant development was made before 12 February 2024.

110. Weston submitted that the Inspector in the present case made the same legal error as in *NRS Saredon*. The Secretary of State disputes that reading of the decision letter. However, the interpretations which during the hearing Ms. Dehon placed on parts of the decision have given rise to other issues on whether the Inspector fell into legal error and, ultimately, to a challenge that the reasoning in the decision is legally inadequate.

111. In the section of the decision letter dealing with the planning balance the Inspector said this about the environmental benefits of the scheme at DL 80:

> "80. Most of the list of claimed environmental credentials of the proposed development amounts to no more than policy-compliant measures and are neutral factors in the planning balance. The net biodiversity gain in excess of 10% I put at moderate only, given there was uncertainty over the estimated net gain for the watercourse units."

112. At DL 84 the Inspector applied the tilted balance in para. 11 of the NPPF. He concluded that the adverse impacts of the proposed development would significantly and demonstrably outweigh its benefits. After having struck the planning balance against the grant of planning permission at DL 84, the Inspector then dealt with "other matters" at DL 87 to DL 92, before finally stating at DL 93 that "for the above reasons" permission should be refused.

113. It was in the context of dealing with "other matters" that the Inspector returned to BNG at DL87 to DL90:

> "87. The proposal would secure a biodiversity net gain (BNG). The ecological assessment found that the proposed development would result in an on-site increase of 15.53% in habitat units, an increase of 68.04% in hedgerow units, and an increase of 2.48% in watercourse units.
>
> 88. The applicant accepted that its claim of a BNG of 10% was incorrect. BNG is measured using the a "biodiversity metric", a tool used by a competent person, normally an ecologist. It stretches credulity a little to suppose that the assessment was signed off as it would have been by an expert in the field who was not conscious that the net gain for the river units was well below 10%, yet the overall picture produced and presented in the assessment was maintained that there was indeed more than a 10% net gain.
>
> 89. Prior to January 2024 when mandatory biodiversity net gain (BNG) requirements are scheduled to be effective, the net gain requirement for a project depends on local plan and expectations in NPPF, paragraph 174(d) of which seeks to minimise "impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures". No doubt this causes the applicant to state that "it has been established that a net gain of 1% is compliant with the NPPF", (and as presumably the corrected net gain assessment shows a net change in river units of +2.48%, the proposal complies with the NPPF).
>
> 90. Technically the applicant may be correct but such a defence of the figures is clearly against the direction of travel of the policy and legislation about to come into force."

114. I begin with DL 80. What is the meaning and effect of the second sentence of that paragraph? It is necessary to read the text as a whole. In the first sentence the Inspector treated those environmental benefits which were simply "policy compliant" as "neutral factors in the planning balance." The second sentence only deals with BNG "*in excess* of 10%", to which the Inspector gave "*only*" moderate weight. The Inspector did not refer explicitly to BNG below 10% in DL 80. That paragraph was where he would have been expected to deal with that aspect, because it formed part of the section where the Inspector decided how much weight to give to each

consideration as inputs to the planning balance struck in DL 84. How then did he deal with it?

115. The only place in DL80 where the Inspector could have dealt with BNG below 10% is the first sentence of that paragraph. There are three possible explanations.

116. First, although the Inspector did not expressly mention BNG below 10%, he did take it into account, because he regarded it as a requirement of one of the "policy measures" referred to in the first sentence of DL 80 (that is a policy measure expressed through legislation). On that basis (a) he treated the proposal's BNG below 10% as a neutral factor in the planning balance and (b) Mr. Maurici is correct in submitting that the decision letter is flawed by the error identified in the *NRS Saredon* case.

117. Second, the Inspector did not take into account BNG below 10% in the first sentence of DL80. There is no other reference to that factor in the paragraphs leading up to the striking of the planning balance in DL84 and it was not taken into account in that balance. This would have been an error of law.

118. Third, the Inspector did not treat the BNG below 10% as a benefit. But the Inspector did not say this and he did not give an explanation for taking that stance. On this basis there was a clear failure to give legally adequate reasons.

119. Ms. Dehon relied upon DL 90. She says that although it appears in a section of the decision letter which follows the striking of the planning balance, on a fair reading of the document as a whole, the Inspector would have had well in mind his reasoning in DL 87 to DL 90. But where does this take us? In DL 89 the Inspector addressed the estimated BNG for watercourse units of 2.48% and he acknowledged that this would satisfy para.174(d) of the NPPF according to a planning appeal decision relied upon by Weston. DL 90 is therefore critical.

120. The Inspector said that Weston's case was only "technically correct" and was "*clearly against* the direction of travel of the policy and the legislation about to come into force". Ms Dehon did not suggest that there was any relevant change in planning policy. So it is clear that the policy being referred to by the Inspector is that expressed through sched. 7A to the TCPA 1990. The Inspector then gave less weight to BNG below 10% than he otherwise would have done applying para.174(d) of the NPPF, because it did not meet the new legislative requirement. That involves giving the new legislation retrospective effect, contrary to the transitional provision in SI 2024 No. 44 and the decision in *NRS Saredon*.

121. In any event, DL 90 is flawed because the Inspector did not say, as he was obliged to do, what was the effect of treating the watercourse BNG as being "clearly against" the direction of travel of the new legislation. This could have meant that he considered it to be a neutral factor as in the first sentence of DL 80, or it could have meant that he gave this type of BNG some weight. Even on Ms Dehon's argument, the decision letter does not tell us which it is and, if the latter, how much weight. So on any view, the reasons given were legally inadequate, applying the tests in *Save* and *South Bucks District Council*.

122. For all these various reasons ground 1 must be upheld. The defendant did not suggest that, in those circumstances, the decision letter should not be quashed.

123. But what of the Inspector's treatment of BNG in excess of 10% (for the area habitat units and the hedgerow units) which he assessed as having "only" moderate weight in DL 80? Why did the Inspector ascribe less weight to BNG over 10% than he otherwise would have done? Ms. Dehon submitted that the reason he gave, "uncertainty over the estimated net gain for watercourse units", had nothing to do with the effect of the 2021 Act. It was only concerned with the merits of the material which Weston had put before the Inspector. Even if that is right, I should say for the avoidance of doubt that that does not address the legal flaw already identified in relation to BNG below 10%.

124. The Inspector's reasoning is difficult to follow and occupied much time during the hearing. He refers to "uncertainty" in relation to only one of the three types of biodiversity units, watercourse units. The decision letter gives a figure of 2.48% BNG for those units (DL 87). But that does not explain why only moderate weight was given "to the net biodiversity gain *in excess* of 10%." For habitat units the figure was 15.53% and for hedgerow units it was 68.04%. The Inspector did not suggest that there was any uncertainty about those assessments in excess of 10% BNG.

125. The matter does not stop there. Ms. Dehon KC submitted that the second sentence of DL 80 referred to a claim by Weston that aggregating all the biodiversity units the development would achieve BNG of more than 10% overall, albeit that it was not required to do so. But Mr. Maurici responded that that approach did not accord with the Biodiversity Metric (see above) and had never formed part of Weston's case. Ms. Dehon did not refer to any document showing that Mr. Maurici was incorrect on that point.

126. In any event, even if Weston had made the case attributed to it by Ms. Dehon, no rational explanation has been advanced as to why uncertainty over the amount by which an aggregate figure *exceeded* 10% should justify reducing weight to "moderate." Even for schemes to which the 2021 Act applies the requirement is to achieve BNG of 10%.

127. But when Ms. Dehon resumed her submissions on the second day, and we looked at the relevant source documents before the Inspector, the uncertainty to which the Inspector referred was unclear.

128. On 23 August 2023 Place Services, the LPAs ecology consultants, pointed out that the BNG for habitats and hedgerows exceeded 10%. They then said that the LPA should consider whether it was satisfied with BNG for watercourses below 10%. The consultants also pointed out that the figures provided by Weston's consultants in two different documents did not tally.

129. Place Services were commenting on documents produced in June 2023. Paragraphs 56 and 57 and table 2 of the "Updated Ecological Appraisal" suggested that Weston had sought to exceed the 10% parameter in relation to *each* of the biodiversity types and was claiming a figure of 11.6% for river or watercourse units. On the other hand, the Biodiversity Net Gains Report gave the figure which appears in the decision letters of 2.48% for river units.

130. In their Consultation Response produced at the end of September 2023, Ecology Solutions, the author of both documents, stated that the figures in the Updated Ecological Appraisal (including also those for habitat and hedgerow units) had all been incorrect, and the correct figures were those set out in the Biodiversity Net Gain Report. I note that the Inspector quoted the correct figures for all three biodiversity types in DL 87. Ecology Solutions said that the figures in the Updated Ecological Appraisal had been included as the result of a clerical error.

131. Neither the Inspector nor any party queried the veracity of that explanation during the s.62A process. The ecology representative was available at the hearing on 14 November 2023 to answer any questions.

132. On Ms. Dehon's explanation of the second sentence of DL 80, it is wholly unclear what the Inspector meant by "uncertainty over the estimated net gain for the watercourse units." Any uncertainty had on the face of it been removed by Weston accepting that the set of figures in the Updated Ecological Appraisal were incorrect. Weston relied on figures which were less favourable to its case for all three types of biodiversity units. The decision letter gives no clue as to what the uncertainty was in relation to the BNG for watercourse units, or why that uncertainty justified giving only moderate weight to the BNG in excess of 10% for habitat and hedgerow units, or even to the figure for watercourse units. Weston put forward as the correct figure one which was less, not more, favourable to its case.

133. The poor drafting of this part of the decision letter resulted in a disproportionate amount of time being spent during the hearing trying to understand the text. The absence of a logical chain of reasoning amounts to irrationality (see e.g. *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [98]). Alternatively, the discussion in [123] to [132] above provides a second basis upon which I hold that the reasoning in this part of the decision letter is legally inadequate.

134. For these various reasons, I uphold ground 1.

Ground 4

135. It is common ground that the principles in the *North Wiltshire* case are applicable to s.62A decisions made by the Secretary of State or by an Inspector following a hearing. There is a legal obligation to give reasons for the decision, whether it is to grant or to refuse planning permission. Consistency in decision-making is important to developers, LPAs and the public because it serves to maintain public confidence in the operation of the development control system (*St. Modwen* at [6]).

136. Previous planning decisions are capable of being material considerations in the determination of a subsequent planning application or appeal. It does not follow that alike cases must be decided alike. A subsequent decision-maker must always exercise his own judgment. He is free, upon consideration, to disagree with the judgment of another. But before doing so he should have regard to the importance of consistency and give reasons for his departure from, or disagreement with, the previous decision. However, if an earlier decision is distinguishable in some relevant respect it will not usually be a material consideration because of the consistency principle (*North Wiltshire* at p.145).

137. Weston's complaint essentially related to the Inspector's treatment of the effect of the development on the trees in Prior's Wood.

138. Here, there can be no doubt that the consistency principle was engaged in relation to the effect on the trees in the ancient woodland. Both the 2022 and 2023 Inspectors were dealing with the same woodland and an area of proposed residential development common to both schemes. The proposals involved the same buffer zone, cycleway and access road. The same issues arose in both decisions as to the effect of the proposed development on the trees in the woodland. If the 2023 Inspector differed materially from the 2022 Inspector in relation to those issues, he was obliged to give legally adequate reasons for reaching a different judgment.

139. The Inspector in the 2022 appeal identified the concern raised that that proposal failed to provide a sufficient buffer zone between the access road, cycleway and dwellings and the ancient woodland (DL 70). The Standing Advice referred to in [27] above recommends a buffer zone of at least 15m from the boundary of the woodland. The 2022 proposal provided a 15m buffer zone, save that (1) a cycleway and (2) a 35m length of the access road connecting 7 Acres and Bull Field at a pinch point, would both run through the buffer zone (DL 74). Nevertheless, it was common ground in the 2022 appeal that no trees in Prior's Wood would be lost or impacted on *directly* as a result of the proposed development (DL 73 to DL 74). The 2022 Inspector agreed with that assessment (DL 76).

140. As regards *indirect* effects on trees in the woodland, the 2022 Inspector said this at DL 77:

> "77. In addition, I am content from the submitted written evidence and what I heard at the Inquiry, that neither the proposed road or cycleway within the buffer or proposed housing in the vicinity, would lead to indirect effects on the ancient woodland as identified in the Standing Advice, given the proposed measures set out in the Prior's Wood Management Plan."

Thus, the 2022 Inspector was satisfied with the adequacy of the mitigation provided by the Prior's Wood Management Plan.

141. The 2023 Inspector expressly referred to the 2022 Inspector's conclusion in 2022 DL 77 on indirect effects (see 2023 DL 48). He referred to the commonality of the access road, pinch point and woodland management plan in the two schemes (DL 49). In DL 50 the 2023 Inspector summarised the concerns raised by the Woodland Trust:

> "50. However, the Woodland Trust although not a statutory consultee, raised detailed concerns that whilst the number of dwellings proposed is reduced, there was still potential for human activity and recreational disturbance, fragmentation of the ancient woodland from adjacent semi-natural habitats, noise, light and dust pollution, threats to long-term retention of trees from increased safety concerns, and long-term deterioration of the woodland resulting from the cumulative effects of these impacts."

142. In DL 51 the 2023 Inspector accepted that, although the woodland management plan would assist in preventing the deterioration in the woodland, a larger buffer zone than 15m "may be required where other impacts would extend beyond this distance."

143. DL 54 is the key paragraph where the 2023 Inspector explained why he was differing from the 2022 Inspector. It reads:

> "54. There was disagreement as to whether the appropriate buffer was satisfactorily addressed in the previous appeal although I have taken account of those parts of the evidence previously submitted that were put before me for consideration. It seems to me that the Inspector's findings focussed more on direct impacts and the level of incursion due to development proposed within the buffer, in particular with regard to impacts on the root protection system (paragraphs 73-77) than on indirect impacts. My own view is that more weight should be given to the potential indirect impacts of the proposed development. Although the proposed dwellings are in the region of 15m to 20m from the woodland canopy edge, a new vehicular route would cross the buffer, to afford access for two-way traffic to the current scheme for up to 96 dwellings. There would be a significant increase in movements of motorised (as well as non-motorised) traffic in close proximity to the woodland which clearly have the potential to cause indirect effects including air pollution. This demands in my view a larger buffer than the minimum 15m set out in the standing advice for root protection."

For those reasons, at DL 55 the Inspector concluded that the proposal could not be approved without a larger buffer zone.

144. Thus, it can be seen that the 2023 Inspector's concern related to only indirect impacts and not direct impacts, such as damage to tree roots. The 2023 Inspector considered that more weight should be given to the "potential indirect impacts" than the 2022 Inspector had given. But, with respect, the 2022 Inspector had gone further. He had said that the 2022 scheme would not lead to indirect effects on the ancient woodland given the woodland management plan. It was therefore not a matter of the 2022 Inspector having decided to give *less* weight to indirect effects. The 2023 Inspector therefore needed to identify what he considered those effects to be.

145. The matters upon which the Inspector specifically relied in DL 54 were the new vehicular route crossing the buffer providing access for two-way traffic to up to 96 dwellings and the significant increase in motorised, as well as non-motorised, traffic in close proximity to the woodland, "which clearly have the potential to cause indirect effects including air pollution." The only indirect effect identified by the Inspector was air pollution. The access road for motorised traffic breaches the proposed buffer zone only over the 35m length at the pinch point. The only other access route through the buffer is the cycleway. Not surprisingly, there does not appear to have been any suggestion that use of the cycleway would cause air pollution.

146. In the 2022 appeal Weston and UDC agreed in a statement of common ground that the technical air quality assessment carried out showed "no impact on Prior's Wood" (i.e. no air pollution). That material was put before the 2023 Inspector and Weston submitted that there was no justification for the Woodland Trust's contention that the buffer zone be extended (part of the September 2023 representations).

147. In their representations in the s.62A process dated 7 September 2023 the Woodland Trust referred to a possible need to extend a buffer zone beyond 15m where assessments show impacts over a greater distance, referring to, for example, air pollution from a significant increase in traffic. But the Trust did not produce any technical assessment. The hearing on 2 October 2023 was adjourned to 13 November 2023, to enable parties to address Weston's reply in September 2023 to earlier consultation responses. But the court was told that nobody produced any additional material on air quality or *indirect effects* or sought to criticise the air quality assessment previously agreed with UDC.

148. Essentially, air quality impacts from traffic is a technical issue. The 2023 Inspector was not obliged as a matter of law to agree with the air quality assessment. But that assessment had not been disputed by any party or questioned by the Inspector during the s.62A process. Elementary fairness would have required the 2023 Inspector to raise with Weston at the hearing any concerns he had regarding the technical analysis carried out, if he did in fact have any such concerns. But I note that the decision letter did not identify any.

149. Furthermore, the 2023 Inspector wholly failed to give any reasons for disagreeing with the 2022 Inspector on air quality, so as to comply with the *North Wiltshire* principle.

150. In my judgment the errors identified thus far are sufficient for Weston to succeed on ground 4. But, in addition, I note Weston's submission that the representations from the Woodland Trust in 2023 were essentially the same as those they had put before the 2022 Inspector. I do not see how the 2023 Inspector could properly say that the Trust's representations in 2023 raised "detailed" concerns (DL 50). They were merely of a broad brush or generalised nature. The only matter in the Trust's representations that Ms. Dehon identified as being additional compared to their 2022 representations was the possibility of those generalised concerns having a cumulative effect. But that aspect was so insignificant in the Inspector's mind that it did not find its way into DL 54. Given the focus of DL 54 upon air quality, I am in no doubt that the obligation to give reasons laid down in *North Wiltshire* was not satisfied in this case.

151. Ms. Dehon faintly suggested that the court should exercise its discretion against quashing the decision on ground 4, relying upon *Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041. It is impossible for the court to say that, absent the legal errors identified above (disregarding [150] above), the 2023 Inspector's decision would inevitably have been the same. Those errors fed into, and tainted, the judgments reached in DL 84, DL 86 and the final conclusion.

152. For these reasons ground 4 must be upheld.

Ground 3

153. Weston raises a number of complaints that the Inspector acted unfairly in his handling of the s.62A process.

154. As we have seen, the statutory procedural rules for a planning inquiry provide a framework within which both the parties and the Inspector operate. The rules are not exhaustive of the requirements of fairness. It remains the duty of the Inspector to conduct the proceedings so that each party has a reasonable opportunity to adduce evidence and to make submissions on the material issues, whether identified at the outset or during the course of the hearing (*Lloyd v McMahon*, *ex parte Doody* and *Hopkins* [61]-[62]. In my judgment, those principles also apply to a hearing held for the purposes of a s.62A application. But what is to be considered a "reasonable opportunity" is fact sensitive and should be viewed in the context of the s.62A process.

155. Generally, a party is entitled to know the case which he has to meet and have a reasonable opportunity to adduce evidence and make submissions on that case. If there is procedural unfairness which materially prejudices a party that may be a good ground for quashing the decision. The Inspector will consider, in addition to the main issues he identifies for the hearing, any significant issues raised by the parties, including third party issues which are not in dispute between the main parties. The main parties should deal with these issues unless and until the Inspector says they need not do so. Lastly, an Inspector is not obliged to give the parties regular updates about his thinking as the application proceeds (*Hopkins* at [62]).

156. The general principle is that there is no breach of the duty to act fairly unless the error of the decision-maker has caused substantial prejudice to the claimant (*George v Secretary of State for the Environment* (1979) 77 LGR 689; *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578, 1595). That test reflects the language of s.288(5)(b) of the TCPA 1990 (see *Fairmount* at [1976] 1 WLR 1263). So where, for example, a claimant says that he has been deprived of an opportunity to produce evidence or make representations, the court would normally expect him to indicate the nature of the material that he was unable to present (see e.g. *R (Midcounties Co-operative Limited) v Wyre Forest District Council* [2009] EWHC 964 (Admin) at [104] to [116]).

157. Weston says that it did not have an opportunity to respond to UDC's updating of its housing land supply figures submitted to PINS in October 2023 ([18] above). Mr. Poole says that the Inspector had said at the hearing on October 2023 that no further submissions would be accepted as part of the application (para. 17 of first witness statement). I note that in his witness statements, the Inspector has not contradicted that evidence, although he has sought to contradict other material. In any event, in Mr. Poole's written speaking note for the hearing on 13 November 2023, Weston did take the opportunity to comment on the housing land supply figures.

158. It is now said that inadequate time was allowed for discussion of this topic, but there is no evidence that Weston applied to the Inspector for more time to be allocated. The Inspector says they did not. Finally, the evidence produced by Weston for this challenge does not say what, if anything, Weston would have wished to add. What would Weston have said the land supply figure ought to have been, if different to UDC's update in October 2023? If Weston would have said that the figure was below

5 years, so as to engage the presumption in para. 11(d) of the NPPF, the Inspector applied the tilted balance in any event.

159. Next the claimant complains about the Inspector's treatment of the effect of the 2023 proposal on the "grandeur" of Prior's Wood. This had been raised in relation to the 2022 scheme by the 2022 Inspector (DL 24). Weston sought to overcome that concern by the revisions incorporated in the 2023 scheme. The 2023 Inspector was not satisfied that that "grandeur" had been protected by the revised scheme (DL 34). In my judgment this concern was raised by Historic England in its representations dated 23 August 2023, referring to the effect of the scheme on the "prominence" of the wood (DL 37). Weston had ample opportunity to deal with the point. The Inspector was not obliged to give updates on his thinking as the hearing progressed.

160. Next, Weston complains that it was unfair for the Inspector to take the approach that Prior's Wood be considered as a non-designated heritage asset (DL 46) without giving the claimant an opportunity to deal with that suggestion. In fact, it is clear from Historic England's representations that they were advancing that approach (see also DL 37). It is apparent that Weston did have an opportunity to respond on this point, and that they took that opportunity (see e.g. DL 46).

161. Mr. Maurici accepted that the complaint raised in paras.63d and e of the skeleton for Weston add nothing to its case under ground 4. The points raised in paras. 63 f and g (Weston's offer in relation to school provision and BNG) are dealt with under grounds 2 and 1 respectively.

162. I do not accept the complaints made by Weston under para. 65 of its skeleton. Neither the procedural rules nor fairness required the Inspector to update the Issues Report, or his statement of issues at the first hearing on 2 October 2023. An Inspector conducting a s.78 appeal would not be required to take those steps. Participants in hearings and inquiries are expected to be responsive to the dynamics of the process as *Hopkins* makes plain. As regards the time made available by the Inspector, if that caused Weston concern that was a matter which it should have raised with the Inspector at the time and, if necessary, asked for a ruling. Ultimately, the position is that Weston has not shown the court that it has suffered material prejudice by being unable to adduce evidence or make submissions. Accordingly, the submissions in para. 65 of Weston's skeleton do not support the claim of procedural unfairness.

163. For these reasons I reject ground 3 of the challenge in relation to the complaints addressed above.

Ground 5

164. Weston complains about the Inspector's decision to treat Prior's Wood as a non-designated heritage asset. It is submitted that the Inspector failed to follow UDC's own Local Heritage List Policy as regards the process and criteria for considering the inclusion of an asset in the list.

165. The consultation response from Historic England dated 23 August 2023 expressed concern about the impact of the proposed scheme on Prior's Wood as a non-designated heritage asset. In Appendix G to Weston's Consultation Response Document lodged on 29 September 2023, the claimant responded to Historic

England's position at para. 18. Weston said that Prior's Wood had never been identified as a non-designated heritage asset, whether by the claimant, Place Services, UDC's Conservation Officer or the 2022 Inspector. Weston said nothing about the relevance or application of UDC's Local Heritage List Policy.

166. It is plain that the Inspector did have regard to Weston's response in its September 2023 document (DL 46). I see no merit in the complaint that the Inspector did not apply the UDC's Local Heritage List Policy. The claimant has not demonstrated that it was before the Inspector and/or that it was an obviously material consideration. I accept Ms. Dehon's submissions.

167. For these reasons, I reject ground 5.

Ground 2

168. Mr. Maurici accepted that the first part of Ground 2, relating to indirect effects of the proposed development on the trees in Prior's Wood, adds nothing to ground 4. I agree.

169. The remaining part of ground 2 is concerned with Weston's proposal to provide land for the extension of the Roseacres Primary School lying just to the south-west of the development site.

170. The 2022 Inspector accepted that the provision of land by Weston for the future expansion of the primary school was one of the significant benefits of that scheme and attracted significant weight (DL 93). That was the weight given to that factor in the overall planning balance.

171. In the s.62A application Weston proposed to provide both the school expansion land and a contribution of £506,993 for primary school provision (paras.2.23 and 2.24 of Weston's Consultation Response Document – September 2023).

172. In his decision letter, the 2023 Inspector said that the land being made available for the expansion of the school is substantially a matter "that would be exacted from the developer as a direct result of the scheme and neutral in weight," that is, it was not a benefit (DL 77). In other words, the Inspector treated the provision of the expansion land for the school as simply mitigation for the additional demands placed on the education system by the proposed development. In so doing he plainly failed to take into account as an obviously material consideration (a) the contribution of around £0.5m to deal with the effects of the development *in addition to the expansion land* and (b) the unchallenged finding of the 2022 Inspector that the school expansion land was a significant public benefit. The expansion land was not being provided as merely mitigation of the effects of the proposed development.

173. This is a further instance where the Inspector ought not to have differed from the conclusion of his colleague in 2022 without addressing that difference with explicit reasons (*North Wiltshire*). In addition, fairness required that he raise the matter with Weston so that it had an opportunity to deal with the point. The Secretary of State has not suggested that this was an issue which had been raised by any participant in the s.62A process so that, in effect, Weston was on notice to deal with it, without the Inspector being obliged to raise it with the parties.

174. The school land expansion was a matter which went into the overall planning balance. Applying *Simplex*, it cannot be said that absent the error, the Inspector would inevitably have reached the same decision on the s.62A application. That conclusion could not properly be drawn from the decision letter itself.

175. For these reasons I uphold ground 2 in relation to the school land issue.

Conclusions

176. I think there are some lessons to be drawn from this case. Given that there is no right of appeal from a s.62A decision, PINS' objective of achieving a high quality of decision-making (see [66] above) is important. The s.62A procedure is intended to be efficient and to avoid unnecessary delay. But there is a risk of cases being conducted with more haste and less speed. That could affect the quality of decision-making and give rise to legal challenges which could otherwise have been avoided. The court was provided with evidence of very tight timetables being set for a number of hearings in different cases. Those were cases which, by definition, had been thought to be unsuitable for the written representations procedure.

177. Quite properly, the Inspector considered that other parties should have the opportunity to respond to the material which Weston submitted on 29 September 2023. But by the same token Weston was entitled to respond to the consultation response which had been uploaded by PINS earlier that month. It would be beneficial for the Inspectorate to give further consideration as to how this process can be managed so as to avoid unnecessary delay while being fair.

178. For the reasons I have given, the claim for statutory review succeeds and the decision dated 15 December 2023 must be quashed.

179. I am also handing down judgment today in two other s.288 claims, *Vistry Homes and Fairfax Acquisitions* [2024] EWHC 2088 (Admin) which are unsuccessful. There are stark differences between the factors which determine the outcome. *Vistry* and *Fairfax* were cases involving *inter alia* substantial harm to the Green Belt and the challenge concerned issues over the weight to be given to two modest benefits in the planning balance in each case, including BNG. There was no error of law in the handling of those benefits. In the present case, there were clear and significant errors of law in the treatment of BNG and also the provision of land for the expansion of the school. In addition, the error in the Inspector's approach to trees in an ancient woodland, an irreplaceable habitat, went to an issue which he treated as a clear reason for refusal in itself, a matter of "particular concern". He thought that there would be "considerable harm" for the purposes of the overall planning balance. The error in ground 4 is a freestanding reason why the decision must be quashed (see DL 83, 85 and 86). But, for the avoidance of doubt, I also take the same view in relation to grounds 1 and 2.

180. The s.62A application will have to be redetermined. A different Inspector must hold a fresh hearing and redetermine the application. As I observed during the hearing, the Inspector in this case has made two witness statements in which he has sometimes descended into the arena inappropriately and taken on the mantle of an advocate, effectively making submissions to defend his decision. Where evidence from an

Inspector is truly necessary, it should generally be confined to neutral statements of fact.