LAND AT 55 VASTERN ROAD, READING RG1 8QT

Appeal reference: APP/E0345/W/21/3276463

APPEAL BY BERKELEY HOMES (OXFORD AND CHILTERN) LTD

APPELLANT'S ADDITIONAL LEGAL AUTHORITIES

Legal authorities concerning supplementary planning documents

1. Town and Country Planning (Local Planning) (England) Regulations 2012, Regulation 5 and 6.

2. *William Davis Ltd v Charnwood Borough Council* [2017] EWHC 3006 (Admin) [general reference in closing footnote].

3. *R (Skipton Properties Ltd) v Craven DC* [2017] EWHC 534 (Admin) [general reference in closing footnote].

Legal authorities concerning the precautionary principle

4. *R (Kenyon) v SSHCLG* [2020] EWCA Civ 302, [2021] Env. L.R. 8, [66]-[67].

5. *Preston New Road Action Group v SSCLG* [2018] EWCA Civ 9, [2018] Env. L.R. 18, [94].

Town and Country Planning (Local Planning) (England) Regulations 2012/767
Preamble

Version 1 of 1

8 March 2012 - Present

Subjects
Planning

Made: 08 March 2012

Laid before Parliament: 15 March 2012

Coming into force: 06 April 2012

The Secretary of State, in exercise of the powers conferred by sections 17(7), 19(2)(j), 20(3), 28(9) and (11), 31(6) and (7), 33A(1)(c) and (9), 35(2) and 36 of the Planning and Compulsory Purchase Act 2004[1], makes the following Regulations:

Notes

1 Section 17(7) was amended by section 180(3)(d) of the Planning Act 2008 (c.29). Section 33A was inserted by section 110 of the Localism Act 2011 (c.20). *See* section 122(1) for the definition of *"prescribed"* .

reg. 5 Local development documents

Law In Force

Version 1 of 1

6 April 2012 - Present

Subjects
Planning

5.— Local development documents

(1) For the purposes of section 17(7)(za)[1] of the Act the documents which are to be prepared as local development documents are—

(a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—

(i) the development and use of land which the local planning authority wish to encourage during any specified period;

(ii) the allocation of sites for a particular type of development or use;

(iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and

(iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;

(b) where a document mentioned in sub-paragraph (a) contains policies applying to sites or areas by reference to an Ordnance Survey map, any map which accompanies that document and which shows how the adopted policies map would be amended by the document, if it were adopted.

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are—

(a) any document which—

(i) relates only to part of the area of the local planning authority;

(ii) identifies that area as an area of significant change or special conservation; and

(iii) contains the local planning authority's policies in relation to the area; and

(b) any other document which includes a site allocation policy.

Notes

1 Subsection 17(7)(za) was inserted by section 180(3) of the Planning Act 2008 (c.29).

reg. 6 Local plans

Law In Force

Version 1 of 1

6 April 2012 - Present

Subjects
Planning

6. Local plans

Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a local plan.

Part 3 Local development documents and directions by the Mayor of London > reg. 6 Local plans

Neutral Citation Number: [2017] EWHC 3006 (Admin)

Case No: CO/2920/2017

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

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

Date: 23/11/2017

Before :

MR JUSTICE GILBART

- -

Between :

WILLIAM DAVIS LTD **BLOOR HOMES LTD** **JELSON HOMES LTD** **DAVIDSONS HOMES LTD** **BARWOOD HOMES LTD**	**Claimants**
- and -	
CHARNWOOD BOROUGH COUNCIL	**Defendant**

- -
- -

Gwion Lewis and **Matthew Fraser** (instructed by **Bird, Wilford and Sale, Loughborough**) for the **Claimants**
Paul Stinchombe QC (instructed by **Kathryn Harrison, Legal Services, Charnwood Borough Council**) for the **Defendant**

Hearing dates: 25th October 2017

- -

Approved Judgment

GILBART J :

1. I shall refer to a number of statutes, regulations, documents and policies in this judgement, by the following acronyms

Statutes and Regulations

TCPA 1990	Town and Country Planning Act 1990
PCPA 2004	Planning and Compulsory Purchase Act 2004
LP Regs 2012	Town and Country Planning (Local Planning) (England) Regulations 2012

Types of statutory document (defined in *PCPA 2004* and *LP Regs 2012*)

LDD	Local Development Document
DPD	Development Plan Document
SPD	Supplementary Planning Document

Secretary of State's Guidance and Policy

NPPF	National Planning Policy Framework (2012)
NPPG	National Planning Practice Guidance (policy advice of the SSCLG, published on the internet and revised from time to time

Charnwood Borough Council Documents

CLPCS	Charnwood Local Plan 2011-2028 Core Strategy
HSPD	Housing Supplementary Planning Document

Other

CBC	Charnwood Borough Council
LPA	Local Planning Authority
SSCLG	Secretary of State for Communities and Local Government

2. This application for judicial review, made by five housing developers active in the East Midlands, relates to the publication by CBC of a policy document entitled "Housing Supplementary Planning Document" (HSPD) in May 2017. Permission to make the application was granted by Singh J on 25th July 2017.

3. The Claimants argue that policy HSPD 9 within the document should have been issued in the form of a DPD and not in the form of an SPD. As I shall come to, those descriptions are precisely defined in the *Planning and Compulsory Purchase Act 2004* and related Regulations. DPDs must, if objection is taken to them, be subject to independent examination by the Secretary of State for Communities and Local Government, whereas SPDs are not.

4. I shall address the issues as follows:

   i) the terms of the CLPCS and HSPD;

   ii) the developmnt plan in the context of the Planning Code;

   iii) identifying the development plan;

   iv) procedures for adoption/approval;

   v) cases for the Claimants and Defendant;

   vi) discussion and conclusions.

(i) *The terms of the CLPCS and HSPD*

5. CBC adopted its CLPCS in November 2015. It is part of the development plan for the purposes of the Planning Acts, and contains the strategic policies for the period 2011-2028. The document contains policies, which are set out in bold text in boxes, and supporting text, which appears in numbered paragraphs. That distinction is of importance- see the observations of Richards LJ in *R (Cherkley Campaign Ltd) v Mole Valley District Council & Anor* [2014] EWCA Civ 567 at [21]- [23]. The CLPCS was the subject of the procedures defined in *PCPA 2004* and Part 6 of the *LP Regs 2012*.

6. Policy CS1 of the Development Strategy Chapter stated that CBC would make provision for at least 13,940 new homes between 2011 and 2028. The priority location for growth was the Leicester Principal Urban Area, where housing provision would be made for at least 5500 new homes. The majority of the remaining growth was to be at Loughborough and Shepshed, where there were to be at least 5000 new homes, with 3000 homes west of Loughborough, of which 2440 were to be delivered by 2028, and approximately 1200 homes within and adjoining Shepshed. Another 3000 homes were to be provided in 7 "Service Centres" (in fact small towns and larger villages), and at least 500 homes on sites within other settlements.

7. The Housing Chapter contained both policies and supporting text. One of the matters addressed was that of the types and sizes of homes needed. The text [5.3] referred to the growing need for small households, due to greater longevity, and to the fact that more couples bore children when older. It anticipated increases in the numbers of people over 56 years in age, and particularly so of those aged over 85 [5.4]. It then assessed the profile of the housing stock in the Borough, and considered that the current numbers of 2 bedroom homes should be increased, which required that 30-35% of the housing as delivered should consist of smaller homes of two bedrooms [5.6]. But there was also a need to increase the number of smaller and medium sized homes, preferably provided in houses rather than flats or apartments [5.7]. However, some medium and large family homes would also be required.

8. At [5.8] the document stated

> "We expect new housing development to take account of local housing needs and the current mix of homes available in the local area. We will work with our partners to identify the mix of homes required from new developments. This will be done through masterplanning on strategic sites, Neighbourhood Plans for our existing communities and by using evidence from the Strategic Housing Market Assessment, local housing needs surveys and household projections when considering planning applications."

9. The document then turned to the question of affordable housing, and then at [5.13] stated that the evidence it had obtained showed that 180 houses per annum were required to meet outstanding and newly arising needs. It wanted to see an increase in the amount of affordable homes being delivered [5.14], and stated that it would make sure that new developments should fund an element of housing without comprising the viability of the housing scheme in question. It stated that CBC had considered the types of housing development to be expected, and the impact which land values would have on viability [5.14]. It went on to say that Policy CS3 identified the size of development where CBC would require the inclusion of affordable housing, and the proportion of affordable homes which CBC would seek [5.14]. At [5.15] it did not want the level of affordable housing it sought to be such as prevent sustainable development from happening, and stated that if a developer considered that the requirement for affordable housing would deprive the scheme of viability financially, then a viability appraisal would be required [5.15].

10. Policy CS 3 reads as follows

> "Strategic Housing Needs
> We will manage the delivery of at least 13,940 new homes between 2011 and 2028 to balance our housing stock and meet our community's housing needs
> We will do this by:
>
> - Seeking the following targets for affordable homes within housing developments, having regard to market conditions, economic viability and other infrastructure requirements:
>   - 30% affordable housing within the sustainable urban extensions north east of Leicester and west of Loughborough and the direction of growth north of Birstall;
>   - On sites of 10 dwellings or more in the following urban areas and service centres

Location	Target
Thurmaston Shepshed	25%
Birstall Loughborough Anstey Barrow upon Soar Mountsorrel Silsby Syston	30%
Quorn	30%

Rothley	

- On sites of 5 dwellings or more in the following rural locations

East Goscote Thurcaston	30%
(list of 26 settlements)	40%

- Seeking an appropriate mix of types, tenures and sizes of homes, having regard to identified housing needs and the character of the area;
- ……..
- Securing the delivery of affordable homes on-site and integrated with market housing unless there are exceptional circumstances which contribute to the creation of mixed communities
- ……..
- Monitoring the delivery of affordable homes through our Annual Monitoring Report."

11. The policies were the subject of the Examination of the Core Strategy by an inspector of the SSCLG, and found to be sound (for the procedure see s 20 *PCPA 2004* and Part 6 "Local Plans" of the *LP Regs 2012*, both considered *below*.)

12. In January 2017 CBC issued a draft HSPD for consultation. It contained policies and supporting text on the topics of, inter alia, "Affordable Housing" and "Housing Mix." The Housing Mix text again explored the topic of sizes, types and tenures of housing. It included reference to a 2017 "Housing and Economic Development Needs Assessment." At [3.7] of the final version, it stated that that needs assessment had assessed the optimum mix of property sizes to meet housing needs over the next 25 years. At HSPD 9 it included a policy entitled "Housing Mix," which read

"in accordance with Core Strategy Policy CS3 the following broad proportions will be used in order to deliver an appropriate mix of sizes of homes:

Size	**Affordable**	**Market**
1 bed	60-70%	0-10%
2 bed		30-35%
3 bed	25-30%	45-55%
4+ bed	5-10%	10-20%

Where development proposes (sic) a significantly different mix to that identified in the table it must be justified through evidence of identified housing needs and character of the area in accordance with Policy CS3 taking into account;

- evidence of housing need including reference to the housing register;
- existing mix and turnover of properties;
- nature of the development site;
- character of the wider area the site is located within;
- detailed design considerations; and
- economic viability."

13. CBC has stated in its pre-action response that no viability assessment was carried out in respect of policy HSPD 9. It contended that it would be assessed on a case by case basis.

14. The HSPD was the subject of procedures under Part 5 of the *LP Regs 2012* (of which more below). The housebuilders objected to the proposed policy. As well as pursuing objections based on matters of planning judgement and the merits, arguing that the policies were too prescriptive, specific arguments were made that this was not an appropriate topic for an SPD, and that such a policy could not be made via an SPD, but could only be made within a DPD.

(ii) *The Development Plan in the context of the Planning Code*

15. *TCPA 1990* (the principal Act) and related legislation comprise the Planning Acts. This is not an area which readily admits the application of precepts from private law. I refer to the well known words of Lord Scarman in *Pioneer Aggregates (UK) Ltd v The Secretary of State for the Environment* [1985] 1 AC 132 HL at 140. As he made clear, it is a comprehensive code. The issue before the House of Lords was whether it was possible for a planning permission to be abandoned by conduct. Lord Scarman (with whom the other members of the Appellate Committee agreed) held that there was no such general principle of abandonment in planning law, but in doing so he addressed the wider question of how one treats issues dealt with by the Planning Code. At page 140 Lord Scarman said this:

> "Planning control is the creature of statute. It is an imposition in the public interest of restrictions upon private rights of ownership of land. The public character of the law relating to planning control has been recognised by the House in *Newbury District Council v. Secretary of State for the Environment* [1981] AC 578. It is a field of law in which the courts should not introduce principles or rules derived from private law unless it be expressly authorised by Parliament or necessary in order to give effect to the purpose of the legislation. The planning law, though a comprehensive code imposed in the public interest, is, of course, based on the land law. Where the code is silent or ambiguous, resort to the principles of the private law (especially property and contract law) may be necessary so that the courts may resolve difficulties by application of common law or equitable principles. But such cases will be exceptional. And, if the statute law covers the situation, it will be an impermissible exercise of the judicial function to go beyond the statutory provision by applying such principles merely because they may appear to achieve a fairer solution to the problem being considered. As ever in the field of statute law it is the duty of the courts to give effect to the intention of Parliament as evinced by the statute, or statutory code, considered as a whole."

16. A central feature of the Planning Code is the development plan; see s 70(2) *TCPA 1990* and s 38(6) *PCPA 2004*. By s 70(2) TCPA 2004, which deals with the consideration of applications for planning permission, regard must be had to the development plan, and by s 38(6) PCPA 2004

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

17. The effect of those provisions is important; the existence of a policy in a properly adopted development plan is not a mere material consideration. An up to date development plan policy will, in the normal course of events, attract significant weight, as s 38 PCPA 2004 shows. While the weight it attracts in any given case is for the decision maker, it cannot be disregarded. That decision maker will be the local planning authority at first instance, and then the SSCLG, on a called in application under s 77 *TCPA 1990* or by him or one of his Inspectors on appeal under s 78 *TCPA 1990*.

18. The law on decision making in the Planning Code is now well settled (perhaps save only whether there is a duty to give reasons for the grant of a planning permission. This matter does not raise that issue). The significance of the development plan is readily apparent from the relevant principles. In determining a planning application, the LPA or SSCLG must act as follows. (In the case of LPAs, while reasons to grant permission are generally not given, the principles also apply to the deliberations by which it reached its conclusion; typically, the reasoning will be in the officer's report, and/or in the Minutes of the relevant committee). The decision maker must

i) have regard to the statutory development plan (see s 70(2) *TCPA 1990);*

ii) have regard to material considerations (s 70(2) *TCPA 1990*);

iii) determine the proposal in accordance with the development plan unless material considerations indicate otherwise (s 38(6) *PCPA 2004*);

iv) apply national policy unless he gives reasons for not doing so- see Nolan LJ in *Horsham District Council v Secretary of State for the Environment and Margram Plc* [1993] 1 PLR 81 following Woolf J in *E. C. Gransden & Co. Ltd. v. Secretary of State for the Environment [1987]* 54 P & CR 86 and see Lindblom J in *Cala Homes (South) Ltd v Secretary of State for Communities & Local Government* [2011] EWHC 97 (Admin), [2011] JPL 887 at [50];

v) consider the nature and extent of any conflict with the development plan: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 at [22] per Lord Reed;

vi) consider whether the development accords with the development plan, looking at it as a whole- see *R(Milne) v Rochdale MBC (No 2)* [2000] EWHC 650 (Admin), [2001] JPL 470, [2001] Env LR 22, (2001) 81 P & CR 27 per Sullivan J at [46]- [48]. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. It must assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it; per Lord Clyde in *City of Edinburgh Council v. the Secretary of State for*

Scotland [1997] UKHL 38, [1997] 1 WLR 1447, 1998 SC (HL) 33 cited by Sullivan J in *R(Milne) v Rochdale MBC (No 2)* at [48].

19. The interpretation of policy is for the Court, but its application to the context of a particular proposal is for the decision maker.

20. It has always been the case since the original *TCPA 1947* that the policies of a proposed development plan should be the subject of consultation, and where objection is made, independent examination. *PCPA 2004* and the related *LP Regs 2012* made considerable changes to the mechanics of the system for bringing forward policies, whether those which have the status of development plan policies for the purposes of the legislative code, or have a less significant role.

21. Albeit that the procedures for the adoption of a development plan have altered over the years, it is still a fundamental feature of the system that policies which form part of the development plan must be subjected to proper scrutiny, including independent scrutiny.

22. As will be apparent from the above, the SSCLG sits at the apex of the system of planning control. As well as determining appeals and called in applications, he also has the role of issuing policy, and of exercising general supervision. The *PCPA 2004* includes, for example, default powers for him to intervene if an LPA fail or omit to do anything necessary for it to do in connection with the preparation of a DPD (s 27) or, if he considers that a LDD is unsatisfactory (s 21), or of direction with regard to the revision of LDDs (s 26).

23. In drawing up DPDs or LPDs, LPAs must have regard to national policies and advice issued by the SSCLG (s 19(2)) and such other matters as he prescribes (s 19(2)(j)). Every DPD must be submitted to the SSCLG for independent examination (s 20(1)) by a person appointed by the SSCLG (s 20(4)) to whom he may issue directions to take or not take any step, or to require that person to consider any specified matters, or to give an opportunity (or further opportunity) to be heard, or to take any specified procedural step (s 20(6A)). There is also a specific statutory requirement that anyone exercising a function in relation to LDDs must do so with the objective of contributing to sustainable development (s 39(2)) and must have regard to national policies and advice issued by the SSCLG (s 39(3)).

24. National policy for the purposes of s 19 (2) and s 39(3) includes that given in NPPF (National Planning Policy Framework) and in NPPG, which resides on the Department of Communities and Local Government website. The effect of the provisions relating to the SSCLG and national policy is to seek to ensure that policies in DPDs reflect national policy, albeit as applied to local circumstances. In that context, it is relevant to note what national policy (in the form of NPPF) says about the preparation of local plans, and issue of the mix and type of housing.

25. Before turning to later passages in NPPF it is to be noted that it emphasises the importance of what it calls "Achieving Sustainable Development" at paragraphs [5]-[17]. Paragraph [14], which is of critical importance within NPPF, tells LPAs that the presumption in favour of sustainable development means in the case of plan making that;

i) LPAs should positively seek opportunities to meet the development needs of their area;

ii) Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless

a) any adverse impacts would significantly and demonstrably outweigh the benefits, when assessed against the policies in NPPF as a whole, or

b) specific NPPF policies indicate that development should be restricted.

26. NPPF [150]- [182] deal with the making of Local Plans. Housing is addressed at [159], whereby LPAs should have a clear understanding of housing needs in their area, and should prepare a Strategic Housing Market Assessment, which should identify the scale and mix of housing and the range of tenures likely to be needed by the local population over the plan period, which among other matters addresses the need for all types of housing, including affordable housing and the needs of different groups in the community, and caters for housing demand and the scale of housing supply necessary to meet it. The examination of Local Plans is dealt with at [182]. It sets out policy that the plan should be "positively prepared|"– i.e. that it is based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, and that it is consistent with national policy, which is said to require that the plan should enable sustainable development in accordance with policies in NPPF.

27. The policies on housing appear at section 6 of the NPPF at [47]-[55]. It is important in the context of this matter to note the words of [47], whereby in order to "boost significantly the supply of housing" LPAs should

> "use their evidence base to ensure that their Local Plan meets the full objectively assessed needs for market and affordable housing in the housing market areas, as far as is consistent with the policies set out in (NPPF)……"

28. Paragraph [50] states that, with the purpose of delivering a wide choice of high quality homes, widening opportunities for home ownership and creating sustainable, inclusive and mixed communities, LPAs should

i) plan for a mix of housing based on current and future demographic trends, market trends and the needs of different groups in the community,

ii) identify the size type, tenure and range of housing that is required in particular locations, reflecting local demand, and

iii) where they have identified that affordable housing is needed, "set policies for meeting this need on site……. Such polices should be sufficiently flexible to take account of changing market conditions over time."

29. I have spent a few paragraphs on the terms of NPPF, because of the relevance of national policy to plan making by the LPA. Is it the case that the effect of NPPF is that issues over the type and mix of housing should be addressed via Local Plans, or can it await an SPD? I shall return to that topic in my conclusions.

(iii) Identifying the Development Plan

30. By s 38(1) and (3) of the *PCPA 2004* a development plan is defined, for the purposes of the issues at play here, as consisting of

i) The regional strategy (if any), and

ii) The development plan documents (taken as a whole) which have been adopted or approved.

31. A DPD is defined in s 37 *PCPA 2004* as

> "a local development document which is specified as a development plan document in the local development scheme."

32. By s 17(7) PCPA 2004, regulations may prescribe which descriptions of documents are to be prepared as local development documents ((17) (7) (za)). A document can only be a local development document if adopted as such by an LPA, or approved by the SSCLG under sections 21 or 22.

33. Under the *LP Regs 2012* Regulation 5 and 6:

> " Local development documents
>
> 5. (1) For the purposes of section 17(7)(za)(1) of the Act the documents which are to be prepared as local development documents are—
>
> (a) any document prepared by a local planning authority individually or in cooperation with one or more other local planning authorities, which contains statements regarding one or more of the following—
>
> (i) the development and use of land which the local planning authority wish to encourage during any specified period;
>
> (ii) the allocation of sites for a particular type of development or use;
>
> (iii) any environmental, social, design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and
>
> (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission;
>
> (b) ……

(2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are—

(a) any document which—

(i) relates only to part of the area of the local planning authority;

(ii) identifies that area as an area of significant change or special conservation; and

(iii) contains the local planning authority's policies in relation to the area; and

(b) any other document which includes a site allocation policy.

Local plans

6. Any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b) is a local plan."

34. By regulation 8(1), a "local plan or a supplementary planning document" (the use of the alternative conjunction will be noted) "must……. indicate whether the document is a local plan or a supplementary planning document."

35. Policies in an SPD must not conflict with the adopted development plan (Reg 8(3)) whereas those in a local plan must be consistent with it (8(4)), but while it may contain a policy which supersedes one in the development plan, if it does so, it must state that fact and identify the superseded policy (8(4) and (5)).

(*iv*) *Procedures for adoption/approval*

36. I have referred above to s 20 *PCPA 2004*, which requires that every development plan document is referred to the SSCLG for "independent examination…. by a person appointed by the (SSCLG)" (s 20(2) and (4)). That process involves giving to those who have made representations seeking change in a development plan document the right to appear before that person and be heard (s 20(6)). That independent person, if he concludes that relevant requirements are met and the plan is sound, must recommend adoption with reasons (s 20(7)) or if he does not, must recommend non-adoption with reasons (s 20(7A)). He can recommend modifications to the LPA (s 20(7B and C). The recommendations and reasons must be published. The SSCLG may intervene (s 21 and s 27).

37. The critical parts of the *LP Regs 2012* relating to approval and adoption appear at Parts 5 (SPDs) and 6 ("Local Plans"). An SPD must be made the subject of public participation (Regs 12 and 13) but consideration of any objections is for the LPA itself, by means of an adoption statement (Regs 11 and 12).

By contrast, the adoption of a "local plan" requires steps to carry out the obligations in s 20 *PCPA 2004*.They include notification of the proposed preparation of a local plan. That is addressed in Regulation 18, whereby

"18. (1) A local planning authority must—

a) notify each of the bodies or persons specified in paragraph (2) of the subject of a local plan which the local planning authority propose to prepare, and

b) invite each of them to make representations to the local planning authority about what a local plan with that subject ought to contain.

(2) The bodies or persons referred to in paragraph (1) are—

a) such of the specific consultation bodies as the local planning authority consider may have an interest in the subject of the proposed local plan;[1]

b) such of the general consultation bodies as the local planning authority consider appropriate;[2] and

c) such residents or other persons carrying on business in the local planning authority's area from which the local planning authority consider it appropriate to invite representations.

(3) In preparing the local plan, the local planning authority must take into account any representation made to them in response to invitations under paragraph (1).

38. Anyone may make representations by a date specified (Reg 20). The principal Act (*PCPA 2004*) requires at s 20 that every development plan document (DPD) is submitted to the SSCLG for independent examination. The procedures are set out at Regs (17) to (31).

39. It follows that if a document is to be treated as a "local plan" it must go through the statutory procedures which apply.

(v) Cases for the Claimants and Defendant

40. The Claimants' case relied heavily on the decision of Jay J in (*R (Skipton Properties Ltd) v Craven District Council* [2017] EWHC 534, where he addressed an interim policy, not part of the development plan, on the proportions of affordable housing to be sought when planning permissions for housing were granted. Jay J there interpreted Regulation 5(1)(a)(i) and (iv) of the *LP Regs 2012* as applying to the level

[1] "Specific consultation bodies" are those defined as such in Reg (2), being the usual range of statutory consultees, whereas

[2] "general consultation bodies," includes voluntary bodies and community groups, but also bodies representing the interests of those carrying on business in the area (ibidem).

of contributions to affordable housing. The same principles apply to a policy on the mix of dwelling types.

41. This is a policy which falls squarely within Regulation 5(1)(a)(i), and Regulation 5(1)(a)(iv).

42. The Claimants seek to distinguish the decision of a deputy judge, Mr John Howell QC, in *R (RWE Npower Renewables Ltd) v Milton Keynes BC* [2013] EWHC 751 on his interpretation of that regulation, and Regulation 5(1)(a)(iv), which he interpreted narrowly, on the basis of avoiding overlap between it and the sub-paragraphs (i)-(iii) of Regulation 5(1).

43. On Ground 1 Mr Lewis contended that HSPD 9 was expressed in imperative terms (the prescribed percentages "will be used"). That went beyond what Policy 3 of the CLPCS 3 said. Further, the HSPD misquoted the CLPCS as broadly seeking that a third of the new housing would consist of 2 bedroom units. CS 3 said no such thing. It appeared in the text, and not in the policy: reliance was placed on the distinction emphasised in the *Cherkley Campaign* case (supra) at [21] per Richards LJ.

44. In fact HSPD 9 sought to prescribe different percentages for all house sizes, and as between market and affordable housing. It related to "the development and use of land which the local planning authority wish to encourage during any specified period" and therefore fell within Reg 5(1)(a)(i). But it also contained "development management and site allocation policies, which are intended to guide the determination of applications for planning permission" and therefore also engaged Reg 5(1)(a)(iv). On that basis it could only be promoted by way of a local plan as defined. Jay J was right in *Skipton* at [90] to hold that the fact of a policy's overlap with sub-paragraph (iii) did not negate the effect of it falling within (i) or (iv).

45. The Claimants relied on NPPF [158]-[159], and the references to "Local Plan" and "plan period" as showing that NPPF expected issues of housing mix to be addressed in the local plan, and therefore not in an SPD.

46. Objection was taken on this ground by two housebuilding objectors directly, and by others by implication.

47. On Ground 2, Mr Lewis argued that the viability of development was patently a material consideration. The Council, in seeking to argue that viability would be assessed at the application stage, was conflating two different issues

    i) The viability of a particular scheme;

    ii) The effects on all schemes of such a policy.

48. This, said the Claimants, amounted to a basic public law error.

49. On the issue of relief, the Claimant argues that the whole of the HSPD should be quashed, because it contains policies that should have been included in a DPD.

50. The case for the Defendant was as follows. Its central point was that if the HSPD fell exactly within the description given in Reg 5(1)(a)(iii), then it did not have to be treated as a Local Plan, whether or not there was overlap with the other categories. Mr

Stinchombe QC relied on the approach of Mr John Howell QC in *RWE Npower* at [65]- [83]. That approach is as follows

i) if a policy in a document simply repeats what is in the adopted local plan or in another Local Development Document, it does not then fall within Reg 5(1) at all ([68]-]69]);

ii) the reference to "development management" in sub-paragraph (iv) cannot extend to all matters of development management or development control, since that would mean that there could never be SPDs ([74]);

iii) sub-paragraph (iv) differs from (i) – (iii) because it deals with regulating the use of development generally, while the latter deal with particular developments or uses of land which the LPA is promoting (75]);

iv) the policy in question was seeking to encourage the granting of permission to wind turbines, so that sub-paragraph (iv) did not apply.

51. *RWE Npower* was to be preferred to *Skipton* on the interpretation of the Regulations. It was not necessary for Jay J to have decided on another interpretation because in the *Skipton* case there was no saved LP policy to which the policy in issue could be supplementary (see [94])

52. The SPD here does not seek to control the mix of ratios, but merely sets out the CBC preference or starting point. The fact that there is to be a mix of units is in the *CLPCS* with approximately one third being said to be 2 bedroom units. HSPD 9 is simply giving detail to supplement the Core Strategy (*CLPCS* [5.6]).

53. The policy does not fall within sub-paragraph (iv) as that does not extend to a policy relevant to the determination of a planning application (*RWE Npower* at [74])

54. The mix of housing is the pursuit of a social objective, which therefore puts it within sub-paragraph (iii).

55. The *CLPCS* has been adopted after passing through the process, including being found to be "sound." The objectives of policy CS3 to encourage housing in stated numbers and an appropriate mix of the same having regard to identified housing needs and character of the area. It is sensible for CBC to set out a more detailed specification of the needs and the mix so as to attain those objectives. It is sensible to do that by an SPD which can be updated following consultation.

56. On Ground 2 it is argued that the importance of economic viability was recognised, by the addition of it as a bullet point in the "Housing Mix guidance box" to acknowledge the relationship mix has with viability. Viability has therefore been addressed. The mix in HSPD 9 is therefore the Council's starting point as a reflection of the latest evidence base.

57. If relief is granted, only HSPD9 should be quashed. The rest of the SPD is severable.

(vi) Discussion and conclusions

58. As is readily apparent from the submissions made to me, the central issue is whether the policies in HSPD 9 were such that they ought to have been in a DPD as a "Local Plan."

59. The relevant provisions were analysed with characteristic thoroughness by Jay J in *R (Skipton Properties Ltd) v Craven District Council* [2017] EWHC 534, where he considered whether a policy on affordable housing contributions was required by the *LP Regs 2012* to be adopted as a development plan document, or alternatively as a supplementary planning document. The relevant LPA contended that it was not a development plan document. At [18] ff he described the effect of the *LP Regs 2012*

> "18 Regulation 2 of the 2012 Regulations defines "local plan" as "any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the Act these documents are prescribed as DPDs" (see also regulation 6). Further, "supplementary plan document" ("SPD") means "any document of a description referred to in regulation 5 (except an adopted policies map or a statement of community involvement) which is not a local plan".
> 19 By regulation 5:
> "**Local Development Documents**
> (1) For the purposes of section 17(7)(a) of the Act the documents which are to be prepared as [LDDs] are –
> (a) any document prepared by a local planning authority individually or in co-operation with one or more local planning authorities which contains statements regarding one or more of the following -
> (i) the development and use of land which the local planning authority wish to encourage during any specified period;
> (ii) the allocation of sites for a particular development or use;
> (iii) any environmental, social design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and
> (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission.
>
> …
>
> (2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are –
> (a) any document which -
> …
> (iii) contains the local planning authority's policies in relation to the area;
> …"
> 20 Thus, the effect of regulations 2 and 6 is that the local plan (and, therefore, the development plan) comprises documents of the description referred to in regulation 5(1)(a)(i), (ii) or (iv), or 5(2)(a) or (b). Documents which fall within the description referred to in regulation 5(1)(a)(iii) or (1)(b) cannot be DPDs.
> 21 SPDs are subject to regulations 12 and 13 of the 2012 Regulations, and specific public consultation requirements. DPDs are subject to the different consultation requirements of regulation 18.

> 22 SPDs, which are not a creature of the PCPA 2004, are defined negatively (see regulation 2(1)) as regulation 5 documents which do not form part of the local plan, i.e. are not DPDs. By the decision of this court in R (RWE Npower Renewables Ltd) v Milton Keynes Borough Council [2013] EWHC 751 (Admin) (Mr John Howell QC sitting as a DHCJ), not all documents which are not DPDs are SPDs. As I have said, SPDs are only those documents which fall within regulation 5(1)(a)(iii) or (1)(b) of the 2012 Regulations. Documents which are neither DPDs nor fall within any of the provisions of regulation 5(1) are capable of being LDDs but – in order to differentiate them from DPDs and SPDs - are "residual LDDs". At paragraphs 57-59 of this judgment in RWE, Mr Howell QC made clear that it is not the location of a document within the prescribed categories which is critical; what matters is that the document fulfils the separate criteria of section 17(3) and (8) of the 2004 Act.
> 23 Thus, there are three discrete categories, namely:
>
> > (1) DPDs: these are LDDs which fall within regulation 5(1)(a)(i), (ii) or (iv). They must be prepared and adopted as a DPD (as per the requirements of Part 6 of the 2012 Regulations). They must be subject to public consultation (regulation 18) and independent examination by the Secretary of State (section 20 of the PCPA 2004). As I have said (see paragraph 16 above), an issue potentially arises as to whether a document which does not fall within these regulatory provisions may nonetheless be a DPD because a local planning authority chooses to adopt it as such.
> >
> > (2) SPDs: these are LDDs which are not DPDs and which fall within either regulation 5(1)(a)(iii) or (1)(b). They must be prepared and adopted as SPDs (as per the requirements of Part 5 of the 2012 Regulations). SPDs do not require independent examination but they do require public consultation (regulations 12 and 13).
> >
> > (3) Residual LDDs: these are LDDs which are neither DPDs or SPDs. They must satisfy the criteria of section 17(3) and (8) of the PCPA 2004, and must be adopted as LDDs (as per (2) above). There are no public consultation and independent examination requirements: see paragraphs 44-46 of the decision of this Court on R (Miller Homes) v Leeds City Council [2014] EWHC 82 (Admin). At paragraph 17 above, I said that LDDs are material considerations in planning applications although they do not have the status of DPDs. I consider that the same logic should hold that LDDs which are SPDs carry greater weight in such applications than do residual LDDs."

60. I entirely agree with that analysis, which seems to me to be unassailable. After addressing the arguments of the parties, the following passage (paragraphs [75]- [94]) appears where Jay J considers the effect of the regulations on the type of policy document that should be deployed to deal with issues relating to affordable housing:

> "75 First, if the document at issue contains statements which fall within any of (i), (ii) or (iv) of regulation 5(1)(a), it is a DPD. This is so even if it contains statements which, taken individually, would constitute it an SPD or a residual

LDD. This conclusion flows from the wording "one or more of the following", notwithstanding the conjunction "and" between (iii) and (iv).

76 Secondly, I agree with Stewart J" (in *Miller*) "that "regarding" imports a material nexus between the statements and the matters listed in (i)-(iv). Stewart J referred to "document" rather than to "statements", but this makes no difference. There is no material distinction between "regarding" and other similar adjectival terms such as "relating to", "in respect of" etc.

77 Thirdly, I agree with Mr Howell QC" (in *RWE Npower*) "that there may be a degree of overlap between one or more of the (i)-(iv) categories, although (as I have already said) a document which must be a DPD (because it falls within any of (i), (ii) and/or (iv)) cannot simultaneously be an SPD. This last conclusion may well flow as a matter of language from the true construction of regulation 5(1)(a)(iii), but it certainly flows from the straightforward application of regulations 2(1) and 6.

78 Fourthly, it would have been preferable had regulation 5(1)(a)(iii) followed (iv) rather than preceded it. However, the sequence does not alter the sense of the provision as a whole. Nor do I think that much turns on the relative order of (i) and (iv).

79 Fifthly, I note the view of Mr Howell QC that regulation 5(1)(a) pertains to statements which contain policies. This reflects section 17(3) of the 2004 Act – LDDs must set out the local planning authority's policies relating to the development and use of land in its area. I would add that section 17(5) makes clear, as must be obvious, that an LDD may also contain statements and information, although any conflict between these and policies must be resolved in favour of the latter. Regulation 5(1)(a) fixes on "statements" and not on policies. However, in my judgment, the noun "statements" can include "policies" as a matter of ordinary language, and any LDD properly so called must contain policies. It follows that any document falling within (i)-(iv) must contain statements which constitute policies and may contain other statements, of a subordinate or explanatory nature, which are not policies.

80 Sixthly, the difference in wording between regulation 5(1)(a)(i) and (iv) featured in the argument in *Miller* but not on my understanding in the argument in *RWE*. For the purposes of (i), the statements regarding the development and use of land etc. *are* the policies, or at the very least include the policies. On a strict reading of (iv), the statements at issue are "regarding … development management and site management policies". In other words, the statements are not the policies: they pertain to policies which exist in some other place. I will need to examine whether this strict reading is correct.

81 Seventhly, given that we are in the realm of policy, "however expressed", it seems to me that by definition we are dealing with statements of a general nature. A statement which can only apply to a single case cannot be a policy. To my mind, the difference between a policy which applies to particular types of development and one which applies to all developments is one of degree not of kind. The distinction which Mr Howell QC drew in *RWE* (see paragraph 75 of his judgment, and paragraph 69(6) above) is nowhere to be found in the language of

the regulation, save to the limited and specific extent that regulation 5(1)(a)(ii) uses the adjective "particular". Looking at regulation 5(1)(a)(i), I think that this could not be a clearer case of a policy of general application ("development and use of land"), subject only to the qualification of the development being that which the authority wishes to encourage.

82 Eighthly, regulation 5(1)(a) must be viewed against the overall backdrop of the 2004 Act introducing a "plan-led" system. Local planning authorities owe statutory duties to keep their local development schemes and their LDDs under review: see, for example, section 17(6) of the 2004 Act.

83 Does the NAHC 2016 fall within regulation 5(1)(a)(i)? Mr Bedford draws a distinction between affordable housing and residential development. On his approach, affordable housing is a concept which is adjunctive to that which is "development" within these regulations or the 2004 Act; and, moreover, the NAHC 2016 predicates a pre-existing wish or intention to carry out residential development. I would agree that if the focus were just on the epithet "affordable", there might be some force in the point that it is possible to decouple the NAHC 2016 from the scope of regulation 5(1)(a)(i), which is concerned only with "development".

84 I was initially quite attracted by Mr Bedford's submissions, and the attraction did not lie simply in their deft and effective manner of presentation. On reflection, I am completely satisfied that they are incorrect, for the following cumulative reasons.

85 First, the Defendant wishes to promote affordable housing throughout its area in the light of market conditions. It no longer has an affordable housing policy in its adopted local plan, but there is such a policy (differently worded) in its emerging local plan. In the meantime, the Defendant wishes to promote affordable housing in conformity with the overarching policy direction of paragraphs 17 and 50 of the NPPF and the 2014 Ministerial Statement. Indeed, the language of the NPPF is reflected in the NAHC 2016 itself. Affordable housing policies are ordinarily located in local plans because they relate to the development and use of land.

86 Secondly, affordable housing forms a sub-set of residential development. The latter may be envisaged as the genus, the former as the species. It is artificial to attempt to separate out "affordable housing" from "residential development". This entails an excessive and unrealistic focus on narrow aspects of tenure. As Mr Jones convincingly pointed out, the NAHC 2016 ranges well beyond tenure (which is simply another way of expressing what affordable housing is) into matters such as size of dwelling, distribution of types of housing across developments etc.

87 Thirdly, the correct analysis is that the NAHC 2016 promotes residential development which includes affordable housing. The latter is expressed as a percentage of the former. The setting of that percentage will inevitably have an impact on the economics of all residential development projects, because it impinges directly on developers' margins. Setting the percentage too high would kill the goose laying these eggs. Setting the percentage too low would lead to

insufficient quantities of the affordable housing the Defendant wishes to encourage. The common sense of this is largely self-evident, and is reflected both in the language of paragraph 50 of the NPPF and paragraph 2 of the NAHC 2016 itself – "[s]uch policies should be sufficiently flexible to take account of changing market conditions over time".

88 Fourthly, it is incorrect to proceed on the basis that (in accordance with Mr Bedford's primary submission) residential development should be taken as a given, with the affordable housing elements envisaged as a series of restrictions and constraints. Arguably, some support for this approach may be drawn from paragraph 26 of *Miller*, although that case turned on its own facts. This approach ignores the commercial realities as well as what the NAHC 2016 specifically says about the need for pre-application discussions, with insufficient attention to affordable housing requirements likely leading to the refusal of an application. In my judgment, all elements of a housing package which includes affordable housing are inextricably bound.

89 Fifthly, the language of regulation 5(1)(a)(i) mirrors section 17(3) of the 2004 Act, "development and use of land". These terms are not defined in the 2004 Act. "Development" is defined in section 55 of the Town and Country Planning Act 1990 and includes "material change of use". "Use" is not defined, although such uses which cannot amount to a material change are. Mr Bedford submitted that regulation 5(1)(a)(i) is tethered to section 55; Mr Jones submitted that the concept is broader. In my judgment, even on the assumption that section 17(3) of the 2004 Act should be read in conjunction with section 55 of the 1990 Act, nothing is to be gained for Mr Bedford's purposes by examining the latter. "Use" is not defined for present purposes, still less is it defined restrictively. I would construe section 17(3) as meaning "development and/or use of land". If residential development includes affordable housing, which in my view it does, there is nothing in section 55 of the 1990 Act which impels me to a different conclusion.

90 I mentioned in argument that there may be force in the point that the NAHC 2016 sets out social and economic objectives relating to residential development, and that this might lend support to the contention that the more natural habitat for an affordable housing policy is regulation 5(1)(a)(iii) rather than (i). On reflection, however, there is no force in this point. There is nothing to prevent a local planning authority including all its affordable housing policies in one DPD. Elements of these policies may relate to social and economic objectives. However, these elements do not notionally remove the policy from (i) and locate it within (iii). The purpose of regulation 5(1)(a)(iii) is to make clear that a local planning authority may introduce policies which are supplementary to a DPD subject only to these policies fulfilling the regulatory criteria. The Defendant has made clear that it may introduce an SPD, supplementary to its new local plan, which sets out *additional* guidance in relation to affordable housing.

91 In any event, on the particular facts of this case it is clear that the NAHC 2016 could not be an SPD even if I am wrong about it being a DPD. This is because there is nothing in the saved policies of the 1999 Local Plan to which the NAHC is supplementary, despite Mr Jones' attempts to persuade me otherwise. This is hardly surprising, because the whole point of the NAHC 2016 is to fill a gap; it cannot logically supplement a black hole. That it fills a gap is, of course, one of

the reasons I have already identified in support of the analysis that the NAHC 2016 is a DPD.

92 In my judgment, the correct analysis is that the NAHC 2016 contains statements in the nature of policies which pertain to the development and use of land which the Defendant wishes to encourage, pending its adoption of a new local plan which will include an affordable housing policy. The development and use of land is either "residential development including affordable housing" or "affordable housing". It is an interim policy in the nature of a DPD. It should have been consulted on; an SEA should have been carried out; it should have been submitted to the Secretary of State for independent examination.

93 Strictly speaking, it is unnecessary for me to address regulation 5(1)(a)(iv). However, in deference to the full argument I heard on this provision, I should set out my conclusions as follows:

(1) despite the textual difficulties which arise (see paragraph 78 above), and notwithstanding the analysis in *Miller* (which addressed the claimant's formulation of its case), I cannot accept that it is necessary to identify a development management policy which is separate from the statements at issue. As I have already pointed out, the whole purpose of regulation 5 is to define LDDs *qua* policies, by reference to statements which amount to or include policies. A sensible, purposive construction of regulation 5(1)(a)(iv) leads to the clear conclusion that the NAHC 2016 could fall within (iv) if it contains development management policies (subject to the below).

(2) I would construe the "and" in regulation 5(1)(a)(iv) disjunctively. This is in line with regulation 5(1)(a)(iii) (see the first "and", before "economic") and the overall purpose of the provision. As Mr Howell QC has rightly observed, a conjunctive construction would lead to absurdity. It would have been better had the draftsperson broken down (iv) into two paragraphs ("development management policies which …"; "site allocation policies which …") but the upshot is the same.

(3) I agree with Mr Howell QC, for the reasons he has given, that it is possible to have LDDs which are outside regulation 5 but that it is impossible to have DPDs which are outside the regulation. This is another reason for supporting a disjunctive construction.

(4) I disagree with Mr Howell QC that regulation 5(1)(a)(i) and (iii) applies to particular developments or uses of land, whereas (iv) is general (see paragraph 79 above).

(5) The real question which therefore arises is whether the NAHC 2016 contains development management policies which guide or regulate applications for planning permission. It may be seen that the issue here is not the same as it was in relation to regulation 5(1)(a)(i) because there is no need to find any encouragement; this provision is neutral.

(6) I would hold that the NAHC 2016 clearly contains statements, in the form of development management policies, which regulate applications for

> planning permission. I therefore agree with Stewart J's *obiter* observations at paragraph 37 of *Miller*.
>
> 94 There is force in Mr Bedford's objection that a disjunctive reading of regulation 5(1)(a)(iv) leaves little or no space for (ii) and site allocation policies, given the definition of the latter in regulation 2(1). However, this is an anomaly which, with respect, is the fault of the draftsperson; it cannot affect the correct approach to regulation 5(1)(a)(iv). There is more limited force in paragraph 74 of the judgment of Mr Howell QC in RWE, but I would make the same point. Regulation 5(1)(a)(i) and (iv) do not precisely overlap (see paragraph 93(5) above); (iii) is in any event separate because it only applies in relation to statements of policy objectives which are supplemental to a specific DPD. Further, anomalies pop up, like the heads of Hydra, however these regulations are construed. These, amongst others, are good reasons why the 2012 Regulations should be revised."

61. I agree with that analysis. Insofar as it differs from that of Mr John Howell QC in *RWE*, I prefer that of Jay J, which in my judgement reflects the basic underlying policy of the legislation and of the code, namely that the development plan is the place in which to address policies regulating development. That is what this policy undoubtedly did, albeit that CBC describe it as a starting point. As Mr Lewis pointed out, the policy in HSPD 9 undoubtedly requires the applicant for permission to show that the mix set out in the policy is not the one to use.

62. Mr Stinchcombe's first argument – i.e. that the policy relates only to matters falling within sub-paragraph (iii) - is unsustainable. The mix of housing proposed in an application could lead to a refusal on the grounds that it is unacceptable, or on an outline application could lead to the imposition of a condition applying a particular mix. In either case, the way in which that land would be developed is affected. A housing mix policy is thus "a statement regarding.… the development of land" and falls within sub-paragraph (i). It also falls within the scope of development management and probably within the scope of site allocation. It will undoubtedly be used "in the determination of planning applications." It thus falls within sub-paragraph (iv) as well.

63. That being so, it is unnecessary to interpret (iii). There is nothing in the Regulations which require the interpretation of the sub-paragraphs in an exclusive manner. I agree with Jay J that the drafting of these Regulations is very poor, and can lead to confusion, or to lengthy arguments on interpretation with not much regard being had to the realities of development control. It is in that context that I refer to the concept of the Planning Code, and within it to the role of the development plan, and to the importance given by the code to proper examination of the development plan, and to the fair consideration by an independent person of objections and representations made. From the point of view of all types of participant in the planning process, the process of development plan approval and adoption is important. Individual planning applications, appeals and inquiries will, save in unusual cases, be focussed on the effect of developing the site in question. Development plan processes, including the independent examination, also look at issues relating the wider pattern of development, and at policies which apply across the Local Plan Area, as well as the site specific issues relating to sites where there is objection to their inclusion or omission. The Code, including that in its current form, maintains that principle.

64. If the CBC arguments were to prevail, then arguments on the overall mix of housing across the LP area, and across differing sites, would have as their "starting point" or "preference" as Mr Stinchcombe put it, or a "presumption" as Mr Lewis put it, a particular mix of housing which the LPA would want to see achieved. Whatever the choice of noun, that is a policy which could, and if my interpretation of the Regulations is correct, should have been open for debate within the Local Plan context. Although the text of the *CLPCS* referred to a mix, it was, no doubt quite deliberately, omitted from the policy, CBC then accepting that it should not figure within it. While I accept that subsequent evidence has come forward from a strategic housing assessment, that cannot be a reason for using an SPD as the vehicle for making an alteration.

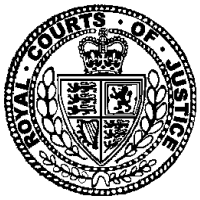
65. I have not referred to the guidance in *NPPF* as an aid to interpreting the legislation. If my interpretation and that of Jay J is in error, NPPF cannot be relied on to argue for a different approach. But it is appropriate to note as a postscript that the terms of NPPF, cited above, make it plain that this should have been the subject of a DPD in accordance with Regulations 5 and 6. I refer in particular to the terms of paragraphs [14], [47], [50] [159] and [182]. The Claimants, while mentioning the role of statutory guidance, have pinned their colours to the interpretation issue. But it is worth noting that if CBC is correct, then the topic of housing mix can and probably should be omitted from any Local Plan policy, even though it must form part of the strategic housing assessment which informs such a policy. That will amount to a significant departure from the policies in *NPPF*.

66. As to Ground 2 this is really another argument in favour of the first ground. The economic arguments are important both at the stage of policy formulation, and at the application stage. If an overall policy sets a particular percentage contribution then it must assume some role within determination of an application, and of any arguments (including viability) advanced in support of that application.

67. On the other hand, economic viability as an issue gets more broad brush once one leaves a particular site and seeks to argue the issue more generally. But as *NPPF* shows, issues such as demand, market conditions and sustainability are all relevant to Local Plan preparation. It is otiose to set housing targets, or seek to encourage the housebuilding industry to provide homes, without addressing whether the policies one seeks to put in place would frustrate those objectives.

68. CBC concede that it will always consider the economics of development, but also concedes that there was no such assessment before the policy was issued. I consider that this ground is made out.

69. As to relief, the only arguments which I heard of any substance related to HSPD 9. I am not willing to strike down other policies whose provenance was not contested before me. I shall therefore limit the relief granted to the quashing of that policy.



Neutral Citation Number: [2017] EWHC 534 (Admin)

Case No: CO/5521/2016

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

Leeds Combined Court Centre
1 Oxford Road, Leeds LS1 3BG

Date: 20/03/2017

Before:

MR JUSTICE JAY

- -

Between:

R (oao SKIPTON PROPERTIES LIMITED)	**Claimant**
- and –	
CRAVEN DISTRICT COUNCIL	**Defendant**

- -
- -

Gregory Jones QC and Caroline Daly (instructed by **Walton & Co**) for the **Claimant**
Michael Bedford QC (instructed by **Solicitor to the Council**) for the **Defendant**

Hearing dates: 7th and 8th March 2017

- -

Approved Judgment

MR JUSTICE JAY:

Introduction

1. By this application for judicial review, Skipton Properties Ltd ("the Claimant") challenges the decision of Craven District Council ("the Defendant") dated 2nd August 2016 to adopt a document entitled "Negotiating Affordable Housing Contributions August 2016" ("NAHC 2016").

2. It is the Claimant's case that, pursuant to the Town and Country Planning (Local Planning) (England) Regulations 2012 [SI 2012 No 767] ("the 2012 Regulations") the NAHC 2016 was required to be adopted as a development plan document, alternatively as a supplementary planning document; and that the failure to comply with antecedent statutory conditions renders the purported adoption unlawful. Further, it is contended that the NAHC 2016 was adopted in breach of Directive 2001/42/EC ("the SEA Directive") and the Environmental Assessment of Plans and Programmes Regulations 2004 [SI 2004 No 1633] ("the SEA Regulations").

3. Before I examine the issues joined in the pleadings, I propose to set out the Essential Factual Background to this dispute as well as the governing legal framework.

Essential Factual Background

4. The Claimant is described in the Statement of Facts and Grounds as a local landowner and residential property developer. There is disagreement between the parties as to the scale of its operations. According to the witness statement of the Defendant's planning officer, Ms Sian Watson, dated 2nd February 2017, "since … [2012] the Claimant's developments have (with one exception) involved sites of more than 10 dwellings". She draws my attention to planning applications made for 37 and 65 dwellings in May 2013 and July 2016 respectively. In December 2015 the Claimant sought planning permission for a development of 3 dwellings on a site in Cowling. Mr Brian Verity, the Claimant's managing director, does not contradict these basic facts, but states as follows:

> "The changes made to the NAHC 2016, as compared to previous Council policy documents in respect of affordable housing, are also of direct interest to [the Claimant]. The introduction of vacant building credit and the requirement that off-site affordable housing contributions be provided in schemes of 6-10 dwellings in rural areas are both of relevance to [the Claimant's] commercial position in the area. Firstly, we are acutely aware of the fact that these two important policy changes will have an impact on the decisions made by all local housing developers in respect of the number, nature and location of sites to bring forward, which could have a profound effect on the housing market in Craven District Council. Secondly, the off-site contributions for 6-10 dwellings may

> well cause [the Claimant] to consider bringing forward smaller sites in the future."

5. The Craven District (Outside the Yorkshire Dales National Park) Local Plan was adopted in July 1999. Under the objectives section of the Housing Chapter, one such objective was "to encourage and enable the development of affordable housing for rent and purchase in locations where it is required including rural areas". Policy H11 ("Affordable Housing on Large/Allocated Sites in District and Local Services Centres") was deleted in September 2007 (or, put another way, was not expressly saved by the Secretary of State), leaving the Defendant without a policy in its adopted development plan for the provision of affordable housing (save in one very specific respect). I am told by Ms Watson that the Defendant is preparing a new local plan, but that it will not be submitted for independent examination by the Secretary of State until later this year.

6. On 29th May 2012 the Defendant adopted the "Interim Approach to Negotiating Affordable Housing Requirements" ("IANAHR 2012"). It superseded the Affordable Housing Guide 2008 and stated, in so far as is material to this application:

> "The Interim approach is to require affordable housing at 40% provision on sites of 5 or more dwellings, subject to site specific financial viability. Strategic Housing will provide guidance to applicants on how this will be delivered, including type, size and tenure issues.
>
> …
>
> Applicants would … be advised that the failure to make provision for affordable housing may be a reason that is used to refuse planning permission."

7. The IANAHR 2012 was subsequently updated, altered and expanded. A series of supplements to the original document were published in July 2012, January 2013 and August 2014. The original document and the supplements were then amalgamated into a single document in January 2015. A new version of this document with improved format and content was published in October 2015, entitled "Negotiating Affordable Housing Contributions (October 2015)". This document was further updated following the publication of the 2015 Strategic Housing Market Assessment, and a new version entitled "Negotiating Affordable Housing Contributions (December 2015)" ("NAHC 2015") was promulgated on 5th January 2016. It should be noted that none of the post-IANAHR 2012 documents was separately adopted by the Defendant.

8. The NAHC 2015 contained the following statements:

> "This document sets out the council's interim approach to negotiating affordable housing contributions, in connection with planning applications for residential development. The approach (which is not a development plan policy) was adopted for development control purposes by the Council's Policy Committee on 29th May 2012. Guidance explaining the

> approach has been updated, improved and expanded over time. This latest version will be used as a stop-gap measure, by planning and housing officers, until an affordable housing policy has been prepared as part of the new local plan.
>
> …
>
> **Our approach**
>
> In view of the above, the Council will commence negotiations with developers on the basis that, in developments of 5 dwellings or more, 40% of the units to be built on-site shall be affordable housing. On occasion, it may be appropriate to negotiate the payment of a cash-sum contribution, by the developer, in lieu of on-site affordable housing provision. All contributions will be subject to site-specific financial viability …"

9. The Defendant's "Draft Text, Policies and Policies Map with Sustainability Appraisal, Interim Report and Sustainability Appraisal of Policies Consultation Document", dated 4th April 2016, forming part of the consultation process in respect of the new local plan, stated (in relation to proposed affordable housing guidance):

> "The council will publish additional practical guidance on the provision of affordable housing in the form of a supplementary planning document (SPD). This will include guidance on the limited circumstances in which off-site provision or financial contributions will be considered *in lieu* of on-site provision."

10. On 19th July 2016 the Defendant's Policy Committee received a report from the Strategic Manager for Planning and Regeneration which recommended a "revised approach" to negotiating affordable housing contributions in connection with planning applications for residential development. In November 2014 the Government had sought by Ministerial Statement to introduce changes to national policy on requiring affordable housing contributions from small sites. These changes were successfully challenged in judicial review proceedings, but the Government's position prevailed on appeal: see SSCLG v West Berkshire Council [2016] EWCA Civ 441, 11th May 2016. According to the Defendant's draft NAHC 2016 (appended to the July 2016 report):

> "3.2 The main effects of national affordable housing policy and guidance are as follows:
>
> - A new national site-size threshold has been introduced. Local Planning Authorities should no longer seek affordable housing contributions from developments of 10 dwellings with a maximum combined floor space of 1,000 sqm or less.
>
> - In designated rural areas … authorities may choose to implement a lower threshold of 5 dwellings or less, but only

> cash contributions (as opposed to on-site provision) should be sought from developments of 6-10 dwellings.
>
> - Vacant building credit has been introduced. Authorities should apply the credit where developments include the re-use or re-development of empty buildings, so that affordable housing contributions relate only to net increases in floor space.
>
> 3.6 Paragraph 3.2 above, explains that changes to national policy and guidance are intended to lift the burden on small developers. It should be noted, therefore, that replacing the 5 dwelling threshold, adopted in 2012, with a 6 dwelling threshold will represent an improvement for landowners for landowners and developers in designated rural areas … It is therefore considered that the recommendations of paragraphs 2.1 to 2.3 above, are likely to support the appropriate development of new homes, by small developers, in rural areas."

I should add that the Defendant has not yet amended its draft local plan (see paragraph 9 above) to reflect the Court of Appeal's decision. The position adopted in the draft NAHC 2016 (and, indeed, the final version) may not necessarily be reflected in the next draft of the local plan.

11. The principal change between the NAHC 2015 and the NAHC 2016 was explained at paragraph 3.3 of the July 2016 report:

> "The revised approach and guidance, contained in the appendix to this report, is based on the December 2015 version, but incorporates new site-size thresholds (page 2), cash-sum contributions (page 7) and vacant building credit (page 8). A contributions flow chart has also been added to help explain how affordable housing contributions are now determined (page 14). The following table appears on page 2 of the appendix and sets out a general approach to affordable housing negotiations.

<table>
<tr><th>Proposed development</th><th>Affordable housing contribution</th></tr>
<tr><td>More than 10 dwellings</td><td rowspan="2">40% of the units to be built on-site should be affordable housing</td></tr>
<tr><td>More than 1,000 sqm</td></tr>
<tr><td>6-10 dwellings in designated</td><td>A cash contribution should be paid,</td></tr>
</table>

rural area	once a reasonable proportion of the units is occupied, in lieu of on-site affordable housing provision
Less than 6 dwellings, but more than 1,000 sqm, in designated rural area	
All contributions will be subject to vacant building credit and site-specific financial viability	

"

12. The rationale for the change was explained at paragraph 3.5 of the July 2016 report:

> "Under the council's current approach, which was adopted on 29th May 2012, on-site provision has been sought from all developments of 5 dwellings or more, with cash contributions only accepted in exceptional circumstances. This approach has worked well and the council has secured on-site provision from six developments of 6-10 dwellings in designated rural areas, delivering approximately four affordable homes per year on average. Though relatively small in number, these homes will have a significant impact on sparsely populated rural areas, helping local people stay living and working in the communities in which they have been brought up. Whilst changes in national policy and PPG mean that the council can no longer require affordable homes to be built on sites of 6-10 dwellings, cash contributions can be required in designated rural areas, which could avoid a disproportionate effect on rural communities …"

13. On 29th July 2016 the Defendant's Policy Committee resolved to recommend to Full Council that, owing to significant changes in national planning policy "which necessitated the Council to determine whether affordable housing commuted sums should be sought for developments of 6-10 dwellings (or less than 6 dwellings with a combined floor space of more than 1,000 sqm) in designated rural areas before such sums can be secured from developers", it was recommended:

> "(1) That, the lower threshold for affordable housing contributions in designated rural areas and, in those areas, seek cash contributions from developments of 6-10 dwellings is implemented.
>
> (2) That, there is a requirement that affordable housing contributions are paid in respect of developments of less than 6 dwellings with a combined floor space of more than 1,000 sqm.

> (3) That, the approach and guidance set out in the document entitled 'NAHC (draft July 2016)' … is approved."

14. This recommendation was confirmed, and adopted, by Full Council at its meeting on 2nd August 2016; and published on the Defendant's website two days later.

The Legal Framework

Primary Legislation

15. The Planning and Compulsory Purchase Act 2004 ("PCPA 2004") differentiates between "development plan documents" ("DPDs") and "local development documents" ("LDDs"). The scheme of the PCPA 2004 is that DPDs are a sub-set of LDDs. The latter comprises all the local planning authority's policies relating to the development and use of land in its area (section 17(3)), but these do not acquire that status until adopted as such (section 17(8)). By section 38(3)(b), "the development plan consists of the DPDs (taken as a whole) which have been adopted or approved in relation to the area in question". The effect of section 38(6) is that applications for planning permission must be "made in accordance with the [development] plan unless material considerations indicate otherwise".

16. The PCPA 2004 does not provide the touchstone for discriminating between DPDs and LDDs. The applicable criteria are determined by secondary legislation. Section 17(7) provides:

> "Regulations under this section may prescribe –
>
> (za) which descriptions of documents are, or if prepared are, to be prepared as LDDs;
>
> (a) which descriptions of LDDs are DPDs;
>
> (b) the form and content of the LDDs;
>
> (c) the time at which any step in the preparation of any such document must be taken."

Even so, I do not overlook section 37(3) which defines a DPD as a "[LDD] which is specified as a [DPD] in the local development scheme". An issue arises as to whether a document which may fall within the prescribed description of an LDD (but is not prescribed as a DPD within regulations made under section 17(7)(a)) may still be treated by a local planning authority as a DPD.

17. Under the PCPA 2004, DPDs must be subject to independent examination by the Secretary of State (section 20). LDDs are not so subject. The combined effect of section 17(3) of the PCPA 2004 and section 70(2)(c) of the Town and Country Planning Act 1990 ("the 1990 Act") is that LDDs are (if they are not also DPDs) material considerations in the determination of planning applications, although they do not carry the weight of the statutory development plan (c.f. section 38(6)).

Secondary Legislation

18. Regulation 2 of the 2012 Regulations defines "local plan" as "any document of the description referred to in regulation 5(1)(a)(i), (ii) or (iv) or 5(2)(a) or (b), and for the purposes of section 17(7)(a) of the Act these documents are prescribed as DPDs" (see also regulation 6). Further, "supplementary plan document" ("SPD") means "any document of a description referred to in regulation 5 (except an adopted policies map or a statement of community involvement) which is not a local plan".

19. By regulation 5:

> "**Local Development Documents**
>
> (1) For the purposes of section 17(7)(a) of the Act the documents which are to be prepared as [LDDs] are –
>
> (a) any document prepared by a local planning authority individually or in co-operation with one or more local planning authorities which contains statements regarding one or more of the following -
>
> (i) the development and use of land which the local planning authority wish to encourage during any specified period;
>
> (ii) the allocation of sites for a particular development or use;
>
> (iii) any environmental, social design and economic objectives which are relevant to the attainment of the development and use of land mentioned in paragraph (i); and
>
> (iv) development management and site allocation policies, which are intended to guide the determination of applications for planning permission.
>
> …
>
> (2) For the purposes of section 17(7)(za) of the Act the documents which, if prepared, are to be prepared as local development documents are –
>
> (a) any document which -
>
> …
>
> (iii) contains the local planning authority's policies in relation to the area; …"

20. Thus, the effect of regulations 2 and 6 is that the local plan (and, therefore, the development plan) comprises documents of the description referred to in regulation 5(1)(a)(i), (ii) or (iv), or 5(2)(a) or (b). Documents which fall within the description referred to in regulation 5(1)(a)(iii) or (1)(b) cannot be DPDs.

21. SPDs are subject to regulations 12 and 13 of the 2012 Regulations, and specific public consultation requirements. DPDs are subject to the different consultation requirements of regulation 18.

22. SPDs, which are not a creature of the PCPA 2004, are defined negatively (see regulation 2(1)) as regulation 5 documents which do not form part of the local plan, i.e. are not DPDs. By the decision of this court in R (RWE Npower Renewables Ltd) v Milton Keynes Borough Council [2013] EWHC 751 (Admin) (Mr John Howell QC sitting as a DHCJ), not all documents which are not DPDs are SPDs. As I have said, SPDs are only those documents which fall within regulation 5(1)(a)(iii) or (1)(b) of the 2012 Regulations. Documents which are neither DPDs nor fall within any of the provisions of regulation 5(1) are capable of being LDDs but – in order to differentiate them from DPDs and SPDs - are "residual LDDs". At paragraphs 57-59 of this judgment in RWE, Mr Howell QC made clear that it is not the location of a document within the prescribed categories which is critical; what matters is that the document fulfils the separate criteria of section 17(3) and (8) of the 2004 Act.

23. Thus, there are three discrete categories, namely:

(1) DPDs: these are LDDs which fall within regulation 5(1)(a)(i), (ii) or (iv). They must be prepared and adopted as a DPD (as per the requirements of Part 6 of the 2012 Regulations). They must be subject to public consultation (regulation 18) and independent examination by the Secretary of State (section 20 of the PCPA 2004). As I have said (see paragraph 16 above), an issue potentially arises as to whether a document which does not fall within these regulatory provisions may nonetheless be a DPD because a local planning authority chooses to adopt it as such.

(2) SPDs: these are LDDs which are not DPDs and which fall within either regulation 5(1)(a)(iii) or (1)(b). They must be prepared and adopted as SPDs (as per the requirements of Part 5 of the 2012 Regulations). SPDs do not require independent examination but they do require public consultation (regulations 12 and 13).

(3) Residual LDDs: these are LDDs which are neither DPDs or SPDs. They must satisfy the criteria of section 17(3) and (8) of the PCPA 2004, and must be adopted as LDDs (as per (2) above). There are no public consultation and independent examination requirements: see paragraphs 44-46 of the decision of this Court on R (Miller Homes) v Leeds City Council [2014] EWHC 82 (Admin). At paragraph 17 above, I said that LDDs are material considerations in planning applications although they do not have the status of DPDs. I consider that the same logic should hold that LDDs which are SPDs carry greater weight in such applications than do residual LDDs.

National Policy

24. The National Policy Planning Framework ("NPPF") provides:

> "17. Within the overarching roles that the planning system ought to play, a set of core land-use planning principles should underpin both plan-making and decision-taking. These 12 principles are that planning should:
>
> ● be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area …
>
> …
>
> ● proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs. Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth. Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities;
>
> …
>
> 50. To deliver a wide choice of high quality homes, widen opportunities for home ownership and create sustainable, inclusive and mixed communities, local planning policies should:
>
> • plan for a mix of housing based on current and future demographic trends …
>
> • identify the size, type, tenure and range of housing that is required in particular locations, reflecting local demand; and
>
> • where they have identified that affordable housing is needed, set policies for meeting this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified …
>
> …
>
> 156. Local planning authorities should set out the **strategic priorities** for the area in the Local Plan. These should include strategic policies to deliver:
>
> * the homes and jobs in the area.
>
> …

> 174. Local planning authorities should set out the policy on local standards in the Local Plan, including requirements for affordable housing …
>
> …
>
> Glossary
>
> [I note the definitions of "affordable housing", "development plan", "local plan" and "supplementary planning documents", but in my view these do not merit direct citation]"

25. At paragraph 9 above, I mentioned the Defendant's draft local plan which will go out to consultation in due course. The precise terms on which it will be consulted are unclear. By paragraph 216 of the NPPF, decision-makers may give weight to emerging plans, with the degree of weight dependent on the stage of preparation, the extent to which there are unresolved objections to relevant policies, and the degree of consistency between such plans and the NPPF itself.

Strategic Environmental Assessment

26. Regulation 2(1) of the SEA Regulations defines the "plans or programmes" to which this regime applies as:

> "plans and programmes … which
>
> (a) are subject to preparation or adoption by an authority at … a local level,
>
> (b) are prepared by an authority for adoption, through a legislative procedure by Parliament or Government; and in either case
>
> (c) are required by legislative, regulatory or administrative provisions …"

27. By regulation 5:

> "(1) Subject to paragraphs (5) and (6) and regulation 7, where –
>
> (a) the first formal preparatory act of a plan or programme is on or after 21st July 2004; and
>
> (b) the plan or programme is of the description set out in either paragraph (2) or paragraph (3)
>
> the responsible authority shall carry out, or secure the carrying out of, an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of

that plan or programme and before its adoption or submission to the legislative procedure.

(2) The description is a plan or programme which -

(a) is prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, and

(b) sets the framework for future development consent of projects listed in Annex I or II of Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC.

…

(4) Subject to paragraph (5) and regulation 7 -

(a) the first formal preparatory act of a plan or programme, other than a plan or programme of the description set out in paragraph (2) or (3), is on or after 21st July 2004;

(b) the plan or programme sets the framework for future development consent of projects; and

(c) the plan or programme is subject to a determination under regulation 9(1) … that it is likely to have significant environmental effects,

the responsible authority shall carry out, or secure the carrying out, of an environmental assessment, in accordance with Part 3 of these Regulations, during the preparation of that plan or programme and before its adoption or submission to the legislative procedure.

…

(6) An environmental assessment need not be carried out –

(a) for a plan or programme of the description set out in paragraph (2) or (3) which determines the use of a small area at local level; or

…

unless it has been determined under regulation 9(1) that the plan, programme or modification, as the case may be, is likely to have significant environmental effects, …"

28. By regulation 9:

> "(1) The responsible authority shall determine whether or not a plan, programme … referred to in –
>
> (a) paragraph (4)(a) and (b) of regulation 5;
>
> (b) paragraph (6)(a) of that regulation;
>
> (c) paragraph (6)(b) of that regulation,
>
> is likely to have environmental effects.
>
> (2) Before making a determination under paragraph (1) the responsible authority shall -
>
> (a) take into account the criteria specified in Schedule 1 to these regulations; and
>
> (b) consult the consultation bodies.
>
> (3) Where the responsible authority determines that the plan, programme … is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), it shall prepare a statement of its reasons for the determination."

The NAHC 2016

29. The NAHC 2016 makes clear that it contains the Defendant's "interim approach" to negotiating affordable housing contributions, which approach was first adopted on 29th May 2012. According to its drafters, it is not in the nature of a development plan policy (the "not" is italicised). Further:

> "This current version incorporates a ministerial statement issued in 2014 and related to changes to planning practice guidance. It will be used as a stop-gap measure, by planning and housing officers, whilst an affordable housing policy is being prepared as part of the new local plan."

30. The NAHC 2016 recognised the conclusion of the Defendant's Strategic Housing Market Assessment ("the 2015 SHMA") that there was a high need for affordable housing in Craven. It also recognised that the 2014 Ministerial Statement, upheld by the Court of Appeal in May 2016, allowed local planning authorities in designated rural areas the option of lowering the threshold from 10 dwellings to 5 dwellings/1,000 sqm, with any affordable housing contributions being taken as cash payments.

31. The following provisions of the NAHC 2016 are relevant to the issues which arise:

(i) Paragraph 3: this sets out the general approach, and reflects the table I have included at paragraph 11 above.

(ii) Paragraph 4: this defines "affordable housing" with reference to the definition in the glossary section of the NPPF.

(iii) Paragraph 6: as regards the "size and tenure of affordable housing units", the general approach to securing the local housing needs as set out in the 2015 SHMA is to prioritise small affordable homes for "forming and growing households". There should also be an affordable housing mix of about 75% affordable rented and 25% intermediate housing for sale.

(iv) Paragraph 7: affordable housing units should, as a general rule, be spread through developments rather than concentrated in particular areas.

(v) Paragraph 8: the design requirements should be as laid down by the HCA and in the Defendant's own document, "Design Guidance for Affordable Housing Providers". Paragraph 8 also specifies minimum space standards.

(vi) Paragraphs 10-12 deal with the detail of housing transfer prices, cash-sum contributions and vacant building credit.

32. I set out the salient parts of paragraph 16 of the NAHC 2016 separately:

> "**Planning Applications**
>
> Anyone proposing a development of 6 or more dwellings, or more than 1,000 sqm, should discuss affordable housing requirements with the council's housing development team at a pre-application meeting.
>
> …
>
> If an applicant believes that affordable housing requirements are not financially viable, he/she should submit a financial viability appraisal before submitting a planning application …
>
> …
>
> Applicants are urged to take the opportunities offered to engage in pre-application discussions, as insufficient attention to affordable housing requirements is likely to result in a refusal of planning permission."

The Issues

33. The parties are agreed that the following five issues arise for my consideration:

(1) Did the Defendant act unlawfully in failing to adopt the NAHC 2016 as a DPD in accordance with regulation 5(1)(a)(i) or (iv) of the 2012 Regulations? (Ground 1)

(2) Did the Defendant act unlawfully in failing to adopt the NAHC 2016 as an SPD in accordance with Regulation 5(1)(a)(iii) of the Town and Country Planning (Local Planning) (England) Regulations 2012? (Ground 2)
(3) If the answer to (1) or (2) is yes, did the Defendant breach the SEA Directive and Regulations in failing to carry out an environmental assessment? (Ground 3)
(4) What is the proper scope of this claim?
(5) Does s. 31(2A) of the Senior Courts Act 1981 apply to this Claim?

The Rival Contentions

The Claimant's Case

Issue 1

34. Mr Gregory Jones QC for the Claimant submitted that the NAHC 2016 contains statements which fulfil all the requirements of regulation 5(1)(a)(i). The NAHC 2016 is intended to be the Defendant's interim policy in relation to affordable housing, implemented in direct response to paragraph 50 of the NPPF, and to the option accorded to local planning authorities in the Ministerial Statement of 2014, pending the preparation and finalisation of the new local plan. Specifically, the NAHC 2016 was promulgated in response to a clearly perceived need for affordable housing, and, accordingly, encourages it. The various components of the policy document, including references to size and tenure, distribution of housing units, and design, relate to or are regarding "development and use of land": the link between the statements on the one hand and their target on the other ("the development and use of land") need not be particularly tight. Further, these are matters which the Defendant wishes to encourage "during any specified period", being an admittedly indeterminate period of time which will end once the new local plan has been adopted.

35. In his skeleton argument, Mr Jones encapsulated his submission in this manner:

> "The logical implication of this … viewed in the round, it is clear that the NAHC does contain statements that seek to encourage residential development in a form that accords with the requirements of the NAHC 2016 until such time as a new local plan is adopted."

When, during oral argument, I pointed out that this formulation rather tended to circularity, Mr Jones recast his headline submission slightly. His principal submission was that the NAHC 2016, properly construed and seen in context, encourages residential development of a particular type: namely, affordable housing. In the alternative, Mr Jones submitted that the NAHC 2016 encourages residential development more generally, because the fixing of the percentage allocation of affordable housing to market housing has a direct impact on the latter, and on the commercial attractiveness of residential development generally.

36. In the alternative, Mr Jones submitted that the NAHC 2016 contains statements that regulate the development or use of land more generally, and that it therefore falls within regulation 5(1)(a)(iv). The document sets forth the conditions which must be satisfied in order for planning permission to be granted: if these are not fulfilled, it is probable that permission will be refused. The NAHC 2016 applies in respect of all residential development in the Defendant's administrative area and can therefore be envisaged as a general development management policy.

37. Mr Jones accepted that the NAHC 2016 contains no statements regarding site allocation policies, but he submitted that the conjunction "and" in regulation 5(1)(a)(iv) is disjunctive rather than conjunctive – in the sense that, in order to be caught by the provision, it is unnecessary for both elements to be satisfied.

38. If the NAHC 2016 falls within either regulation 5(1)(a)(i) or (iv), Mr Jones submitted that it is a DPD which ought to have been made the subject of consultation under regulation 18 of the 2012 Regulations, and have been submitted to the Secretary of State for independent examination of its soundness under regulation 20.

Issue 2

39. Mr Jones' primary case is that the NAHC 2016 is a DPD, but he submitted in the alternative that it is an SPD because is clearly contains objectives which the Defendant seeks to attain in relation to the provision of affordable housing: these are the financial conditions, and the size and tenure, design, and spatial objectives I have previously mentioned.

40. Mr Jones observes that the Defendant's skeleton argument raises for the first time the objection that there is no or insufficient nexus between any statements in the NAHC 2016 which might *prima facie* fall within regulation 5(1)(a)(iii) and any saved policies in the 1999 Local Plan. His riposte to this objection was two-fold: first, that the NAHC 2016 contains statements which pertain to saved policy H12; secondly, that it contains statements which qualify one or more of the more general aspects of the Housing Chapter of the 1999 Local Plan.

41. If the NAHC 2016 falls within regulation 5(1)(a)(iii), Mr Jones submitted that it is an SPD which ought to have been made the subject of consultation under regulations 12 and 13 of the 2012 Regulations.

Issue 3

42. It is common ground that, if the Claimant succeeds on Ground/Issue 1, the Defendant should have undertaken an SEA.

43. In the event that the Claimant succeeds on Ground/Issue 2 (having, by definition, failed on Ground/Issue 1), Mr Jones submitted that the NAHC 2016 *qua* SPD falls within the ambit of regulation 5(2) of the SEA Regulations because it is a "plan or programme" that is "prepared for town and country planning or land use", and it "sets the framework for future development consent of [urban development projects]". That being the case, it was incumbent on the Defendant to carry out, or secure the carrying out, of an environmental assessment under regulation 5(1).

44. The rubric "plan or programme" applies only to documents "required by legislative, regulatory or administrative provisions" (see article 2(a) of the SEA Directive). Mr Jones relied on the decision of the CJEU in Inter-Environnement Bruxelles ASBL v Région de Bruxelles-Capitale [2012] Env L.R. 30 in support of the proposition that

the statutory preconditions for the adoption of an SPD satisfied the criterion of "required" notwithstanding that the SPD itself was not a mandatory document. In the alternative, Mr Jones submitted that the NAHC 2016 is a plan required by "administrative provisions", namely provisions in the NPPF.

45. As for the separate rubric, "sets the framework for future development consent of [urban development projects]", Mr Jones submitted, in reliance on the decision of the Supreme Court in R (Buckinghamshire County Council) v Transport Secretary [2014] UKSC 3, that the NAHC 2016 satisfies this test because it constrains subsequent consideration of applications for planning permission within the terms of Lord Carnwath JSC's analysis.

Issue 4

46. As I have pointed out at paragraph 11 above, when a comparison is made between the NAHC 2015 and the NAHC 2016, it is clear that the main substantive difference relates to paragraph 3 and the approach to cash-sum contributions *in lieu* of on-site provision in certain specified circumstances. There are also minor consequential changes. Whereas the NAHC 2015 was published, but not adopted, by the Defendant, the NAHC 2016 was adopted and then published two days later.

47. Mr Jones submitted that in these circumstances it is open to the Claimant to seek to challenge the entirety of the NAHC 2016, and not just those portions which were new. Given the procedures adopted by the Defendant in August 2016, and that the NAHC 2015 was impliedly abrogated the instant after the NAHC 2016 came into effect, there was nothing to preclude a challenge to the entirety of the later document. The fact, which is not accepted, that the Claimant's real grievance might relate not to the new parts is nothing to the point.

Issue 5

48. Mr Jones submitted that, had the Defendant not acted unlawfully, it was not "highly likely" that the outcome would not have been substantially different (see the familiar wording of section 31(2A) of the Senior Courts Act 1981). If I were to find in his favour on Ground 1 (and, therefore, on Ground 3 too), it would follow that the Defendant was in breach of the various regulatory requirements by failing to consult on the NAHC 2016, in failing to carry out an SEA, and in failing to submit the document for independent assessment by the Secretary of State. In such circumstances, the court simply cannot speculate as what the outcome would or might have been had these omissions not occurred. Mr Jones submitted that the analysis should be the same were he to succeed only on Ground 2, with or without Ground 3; although he would have to accept that the point would not be as powerful.

49. In terms of the comparative exercise predicated by section 31(2A), Mr Jones submitted that I should examine the outcome with reference to what would have obtained had the unlawfulness not occurred rather than on the basis of any comparison between the NAHC 2016 and the NAHC 2015.

The Defendant's Case

Issue 1

50. Mr Michael Bedford QC for the Defendant submitted, by way of introductory observation, that the distinction between DPDs, SPDs and residual LDDs "is, at times, opaque". He also submitted that Mr Jones' approach to regulation 5(1)(a)(i) was so broad that it left little space for SPDs (within (iii)) and for residual LDDs, which are outside the frame of these regulations altogether.

51. His first submission was that regulation 5(1)(a) is concerned, in essence, with *policies*, and that the NAHC 2016 is not intended to be such a document: it lays down an interim approach, and must therefore be treated as no more than a material consideration for planning purposes, rather than as generating a statutory presumption pursuant to section 38(6) of the 2004 Act. Given that the Defendant is not intending to circumvent the statutory scheme, and is developing its local plan in line with the substantive and procedural requirements which the 2004 Act and national policy has prescribed, there can be no sound reason in principle why, pending this plan coming to fruition, the Defendant cannot adopt, promulgate and adhere to guidance of this nature as a form of stop-gap measure. On my understanding, Mr Bedford deployed this submission in relation to both Grounds 1 and 2; but, as it features as a preliminary point, I raise it at this stage.

52. Secondly, Mr Bedford submitted that the NAHC 2016, as its introductory section makes clear, addresses the Defendant's "interim approach to negotiating affordable housing contributions, in connection with planning applications for residential development". The focus is on the contributions rather than on residential development. For the purposes of regulation 5(1)(a)(i), residential development is not being encouraged. The premise upon which the NAHC 2016 proceeds is that a developer may propose a particular development (this is treated as a given), and then the Defendant will address the issue of affordable housing, in particular cash-sum contributions. Thus, in no relevant sense is residential development being encouraged or promoted: the developer has already decided to apply for permission to undertake such development. Although the "development and use of land" within this part of the regulation covers residential development (see Use Class C3, for individual dwellings), it does not embrace affordable housing. This is not the development and use of land; rather, it is concerned only with the terms and tenure for the occupation of residential development.

53. In answer to Mr Jones' alternative argument on regulation 5(1)(a)(iv), Mr Bedford's submissions passed along the following tracks:

    (1) on the assumptions that (a) the "and" in this sub-paragraph should be read disjunctively, and (b) paragraphs 75-76 of the judgment of Mr Howell QC in RWE are correct, it cannot be said that the NAHC 2016 is a policy guiding applications for planning permission *generally*. It is concerned only with the issue of affordable housing provision, which amounts to a specific policy not dissimilar from the sort of policy under scrutiny in RWE itself.

(2) In the alternative, the "and" in this paragraph should be read conjunctively, which is its more natural and ordinary meaning. This chimes with the more sensible, purposive construction of the provision inasmuch as a disjunctive interpretation lends no separate life to the second limb of regulation 5(1)(a)(iv): this is because all site allocation policies will already be DPDs on account of the wording of paragraph 5(1)(a)(ii), there being no material difference in the regulatory language. Recognising that this alternative analysis is inconsistent with paragraphs 193-197 of RWE (on the basis that development management policies *simpliciter* would be outside the regulatory scheme, because they could not be DPDs), Mr Bedford did not shrink from submitting that Mr Howell QC was wrong, and should not be followed. This is the issue I mentioned at paragraph 16 above. Regulation 5(1)(a) does not establish an exhaustive code. Not merely are there residual LDDs, local planning authorities may decide that particular documents should form part of the local plan, and be processed as such. Section 37(3) is wide enough to enable this to happen.

Issue 2

54. Mr Bedford accepted in principle that the NAHC 2016 contained statements regarding social, design and economic objectives (see the wording of regulation 5(1)(a)(iii)). Indeed, he deployed this in support of his construction of paragraph (i): a case which is apt, at least in principle, to be accommodated within one provision must (at the very least) be less apt to be accommodated within another (it being impossible for the case to fall within both provisions). His submission, however, was that these various objectives are not relevant to "the attainment of the development and use of land mentioned in paragraph (i)", which must be a reference to a specific DPD to which the putative SPD is subordinate. Given that there is no saved affordable housing policy in the 1999 Local Plan, it must follow that there is nothing to which this putative SPD can be supplementary. The very general statements in the saved local plan cannot be recruited for this purpose, nor can policy H12 which relates very specifically to rural exception sites and 100% affordable housing.

Issue 3

55. On the footing that the NHC 2016 is an SPD, Mr Bedford remarked that it was not readily apparent how and why the provision of affordable housing could have likely environmental effects; it was neutral in this regard.

56. Mr Bedford advanced two submissions on the language of regulation 5(2) of the SEA Regulations, as interpreted by relevant European and domestic jurisprudence. First, he submitted that the NAHC 2016 was a voluntary plan which was not "required by legislative, regulatory or administrative provisions". Secondly, he submitted that it did not "set the framework for future development consent". All environmental effects would be fully and properly considered under the rubric of separate assessment under the EIA Regulations, where appropriate.

Issue 4

57. Mr Bedford submitted that those parts of the NAHC 2016 which differed from the NAHC 2015, and could properly be regarded as "new", were limited in scope (see paragraph 11 above). The Claimant did not challenge the NAHC 2015, and is now far too late to do so. The NAHC 2015 must therefore be regarded as a valid document. In substance, albeit perhaps not in form, the majority of the NAHC 2015 has been carried through into the NAHC 2016; and should be seen as immune from challenge.

Issue 5

58. Mr Bedford submitted that the "outcome" for the Claimant "if the conduct complained of had not occurred" would have been substantially the same. This is because: (i) the correct comparison for these purposes is between the NAHC 2016 and the NAHC 2015 (had the former not been adopted, the latter would have remained in place), (ii) the Claimant has no interest in the smaller sites covered by the changes to paragraph 3 of the NAHC 2016, and/or (iii) any knock-on effects on the housing market brought about by the policy under current scrutiny are wholly contingent on the 2014 Ministerial Statement, which has not been challenged. Further, and in relation only to Ground 3, Mr Bedford submitted that, even were an SEA to be required, no likely environmental effects could stem from the provision of affordable housing.

59. Both Counsel referred me to authority in support of the submissions they made. I will address relevant authority during the course of the next section of this judgment.

Analysis and Conclusions

Introduction

60. Although he formulated the point slightly differently, I agree with Mr Bedford that the quest for the true construction and meaning of regulation 5(1)(a) is unnecessarily challenging. Frankly, those responsible for these regulations should consider redrafting them.

61. Were the 2012 Regulations primary legislation, the interpretative exercise would have to proceed on the assumption that Parliament is all-knowing and infallible, and that they can only be viewed as an entirely coherent entity without any internal inconsistencies. No doubt secondary legislation aspires to like standards, but in my view the same assumption does not have to be made. Inconsistencies and anomalies may exist. It is often a question of the lesser of two evils.

62. Regulation 5(1)(a) has been subjected to close analysis by Mr Howell QC in RWE, but interpretative problems remain. Despite all the difficulties, and the weight and breadth of submission brought to bear on the issues, I have been able to come to the clear conclusion that the NAHC 2016 is a DPD because it falls within regulation

5(1)(a)(i). The robustness of this conclusion may not relieve me entirely of the need to touch on other provisions, but the pressure is less great.

63. It is common ground, and in any event correct, that the allocation of the NAHC 2016 to its correct legal category raises a question of law rather than of planning judgment: see R (oao Wakil) v Hammersmith and Fulham LBC [2012] EWHC 1411 (QB), paragraphs 81 and 82. The NAHC states in terms that it is not a DPD, possibly protesting too much; but, in any event, the decision is for me, not for the Defendant.

64. I reject Mr Bedford's submission that the NAHC 2016 is an "interim approach" and not a policy. It obviously is a policy, as it was in the 1999 Local Plan (H11, now deleted), and will be in the Defendant's new local plan. It goes without saying that the content of the policy has changed, and will change, over time; but in terms of category or concept we are talking about policies and not about anything else.

65. Mr Bedford did not submit in the alternative that, if the NAHC 2016 is a policy, it is a residual LDD. However, that must be the logic of his case, and I proceed on that basis.

Issue 4

66. I note the ordering of the issues as agreed by the parties, but it is convenient to begin with Issue 4, the scope of the claim. If Mr Bedford's submission were correct, the Claimant may only seek to challenge that which is "new" or different in the NAHC 2016, when it is placed against the NAHC 2015. However, his submission is incorrect. The Defendant decided to adopt the NAHC 2016 as a fresh document. It was probably right to do so, but that is neither here nor there. I asked Mr Bedford for assistance as to the status of the NAHC 2015 once the NAHC 2016 had been adopted. He accepted that the earlier document had been impliedly abrogated. In my view, the position could not be otherwise.

67. Mr Bedford relied on the following passage in paragraph 67 of Mr Howell QC's judgment in RWE:

> " … But in my judgment regulation 5(1) is not concerned with documents containing statements that merely repeat the policies already contained in the adopted local plan or in another [LDD] by way of background or for the sake of clarity."

I entirely agree. However, in the instant case the NAHC 2016 did not merely repeat earlier statements of policy by way of background or for the sake of clarity. In RWE, the earlier statements retained their legal vigour; in the instant case, they no longer exist. Mr Bedford's riposte that this is to elevate form over substance would have appeal were it not for the fact that his clients decided to take this particular course.

68. The Claimant is therefore entitled to challenge the whole of the NAHC 2016. The Defendant does not dispute its standing to do so. The fact that the Claimant may not be particularly interested in the so-called "new" elements of the Defendant's policy is irrelevant because (a) the whole document falls under scrutiny, (b) an ordinary

member of the public within the Defendant's area would have sufficient interest to bring this challenge, and the Claimant has commercial corporate interests of a general nature, and (c) the Claimant may have an indirect commercial interest in so far as the NAHC impacts on residential development generally. This last point will be developed below.

Issue 1

69. Regulation 5(1)(a) has been addressed in two decisions of this court.

70. In RWE, the challenge was to the Defendant's "Wind Turbines Supplementary Planning Document and Emerging Policy" ("Wind SPD"). RWE's main arguments were that this document was not an SPD, but a DPD; and that it conflicted with Milton Keynes' adopted DPD.

71. The following paragraphs in Mr Howell QC's judgment are relevant to Issue 1:

(1) A putative LDD which does not fall within the descriptions of documents referred to in regulation 5 may still be an LDD, because of the combined effect of section 17(3) and (8) of the 2004 Act. These are the "residual LDDs" discussed at paragraph 22 above (paragraphs 59-60).

(2) By contrast, the class of possible DPDs is limited to those prescribed in regulation 5 (paragraphs 193-197).

(3) "what all [LDDs] … contain are "policies" relating to the use and development of land. What regulation 5(1)(a) is thus concerned with are statements that contain policies, which are described in sub-paragraphs (i) to (iv)" (paragraph 67).

(4) In order to ascertain whether a document encourages the development and use of land, regard must be had to the type of statements a document contains, not on what the effect of such statements may be in practice (paragraph 70).

(5) The Wind SPD was not a DPD within regulation 5(1)(a)(i) because, on the facts of that case, any statements of encouragement merely repeated the statements in Milton Keynes' adopted DPD (paragraph 69).

(6) The Wind SPD was not a DPD within regulation 5(1)(a)(iv) because the new parts of the Emerging Policy were all connected with a particular form of development that Milton Keynes' adopted DPD already sought to encourage, namely proposals to develop wind turbines; they were not connected with regulating the development or use of land generally (paragraph 76). Specifically (at paragraph 75):

> "In my judgment the difference, between (a) documents containing statements regarding matters referred to in sub-paragraphs (i) to (iii) of regulation 5(1)(a) of the 2012 Regulations and (b) a document containing statements regarding a development management policy which is intended to guide the determination of applications for planning

> permission, is that the former are all connected with particular developments or uses of land which a local planning authority is promoting whereas the latter is concerned with regulating the development or use of land generally."

Mr Howell QC's reason for this conclusion was that any different construction of regulation 5(1)(a)(iv) would render (i), (ii) and (iii) effectively otiose (paragraph 74).

(7) Mr Howell QC endorsed what was common ground before him, namely that the "and" in regulation 5(1)(a)(iv) should be read disjunctively – "were it otherwise a document containing a simple development control policy … could not form part of the local plan for the purpose of the 2012 Regulations and become part of the development plan" (paragraph 72).

72. In Miller, the challenge was to an interim policy which constituted a departure from Leeds City Council's adopted Policy N34, which served to safeguard some non-Green Belt land. Miller contended that the interim policy was a DPD, alternatively an SPD, relying on all the various categories in regulation 5(1)(a) and (2)(b).

73. The following paragraphs in Stewart J's judgment are relevant to Issue 1:

(1) "regarding" (in the stem of regulation 5(1)(a)) signifies a relatively loose relationship between the "document" and the matters contained in (i)-(iv) (paragraph 23).

(2) The Interim Policy did not encourage the development and use of land. Specifically (at paragraph 26):

> "… The court must look at the substance as to whether the LPA wishes to encourage the development and use of land; the court must also have regard to the subjective element in the verb 'wish'. There will be situations where an LPA wishes to encourage the development and use of land, for example to regenerate an area. The Interim Policy is very different. It sets out criteria which are an attempt by the LPA to comply with the NPPF. These criteria encourage and discourage development, albeit that the overall net effect is to release further land. Nor does the fact that there is reference in subparagraph (v)(a) of the Interim Policy to regeneration change the character of the document as a whole."

(3) The Interim Policy did not fall within regulation 5(1)(a)(iv) because Policy N34 was not a development management policy: it was a safeguarding policy, rather than a policy which *regulated* the development or use of land. Thus, statements in the Interim Policy were not regulating a development management policy (paragraphs 36-37).

(4) It was unnecessary to decide whether the "and" in regulation 5(1)(a)(iv) was conjunctive or disjunctive. Even if disjunctive, Miller's case could not succeed (paragraph 38).

(5) It was common ground that Policy N34 was not restricted to a particular land use (paragraph 36). By implication, therefore, Stewart J was proceeding on the basis of Mr Howell QC's distinction between particular and general policies.

(6) "The material word [in regulation 5(1)(a)(iv)] is "regulating". Regulating land may include a number of features for example density of housing, housing mix etc." (paragraph 37). I agree with Mr Bedford that this was *obiter*.

74. Having set out relevant authority on this topic, I begin with a number of observations of a general nature.

75. First, if the document at issue contains statements which fall within any of (i), (ii) or (iv) of regulation 5(1)(a), it is a DPD. This is so even if it contains statements which, taken individually, would constitute it an SPD or a residual LDD. This conclusion flows from the wording "one or more of the following", notwithstanding the conjunction "and" between (iii) and (iv).

76. Secondly, I agree with Stewart J that "regarding" imports a material nexus between the statements and the matters listed in (i)-(iv). Stewart J referred to "document" rather than to "statements", but this makes no difference. There is no material distinction between "regarding" and other similar adjectival terms such as "relating to", "in respect of" etc.

77. Thirdly, I agree with Mr Howell QC that there may be a degree of overlap between one or more of the (i)-(iv) categories, although (as I have already said) a document which must be a DPD (because it falls within any of (i), (ii) and/or (iv)) cannot simultaneously be an SPD. This last conclusion may well flow as a matter of language from the true construction of regulation 5(1)(a)(iii), but it certainly flows from the straightforward application of regulations 2(1) and 6.

78. Fourthly, it would have been preferable had regulation 5(1)(a)(iii) followed (iv) rather than preceded it. However, the sequence does not alter the sense of the provision as a whole. Nor do I think that much turns on the relative order of (i) and (iv).

79. Fifthly, I note the view of Mr Howell QC that regulation 5(1)(a) pertains to statements which contain policies. This reflects section 17(3) of the 2004 Act – LDDs must set out the local planning authority's policies relating to the development and use of land in its area. I would add that section 17(5) makes clear, as must be obvious, that an LDD may also contain statements and information, although any conflict between these and policies must be resolved in favour of the latter. Regulation 5(1)(a) fixes on "statements" and not on policies. However, in my judgment, the noun "statements" can include "policies" as a matter of ordinary language, and any LDD properly so called must contain policies. It follows that any document falling within (i)-(iv) must contain statements which constitute policies and may contain other statements, of a subordinate or explanatory nature, which are not policies.

80. Sixthly, the difference in wording between regulation 5(1)(a)(i) and (iv) featured in the argument in Miller but not on my understanding in the argument in RWE. For the purposes of (i), the statements regarding the development and use of land etc. *are* the policies, or at the very least include the policies. On a strict reading of (iv), the statements at issue are "regarding … development management and site management

policies". In other words, the statements are not the policies: they pertain to policies which exist in some other place. I will need to examine whether this strict reading is correct.

81. Seventhly, given that we are in the realm of policy, "however expressed", it seems to me that by definition we are dealing with statements of a general nature. A statement which can only apply to a single case cannot be a policy. To my mind, the difference between a policy which applies to particular types of development and one which applies to all developments is one of degree not of kind. The distinction which Mr Howell QC drew in RWE (see paragraph 75 of his judgment, and paragraph 69(6) above) is nowhere to be found in the language of the regulation, save to the limited and specific extent that regulation 5(1)(a)(ii) uses the adjective "particular". Looking at regulation 5(1)(a)(i), I think that this could not be a clearer case of a policy of general application ("development and use of land"), subject only to the qualification of the development being that which the authority wishes to encourage.

82. Eighthly, regulation 5(1)(a) must be viewed against the overall backdrop of the 2004 Act introducing a "plan-led" system. Local planning authorities owe statutory duties to keep their local development schemes and their LDDs under review: see, for example, section 17(6) of the 2004 Act.

83. Does the NAHC 2016 fall within regulation 5(1)(a)(i)? Mr Bedford draws a distinction between affordable housing and residential development. On his approach, affordable housing is a concept which is adjunctive to that which is "development" within these regulations or the 2004 Act; and, moreover, the NAHC 2016 predicates a pre-existing wish or intention to carry out residential development. I would agree that if the focus were just on the epithet "affordable", there might be some force in the point that it is possible to decouple the NAHC 2016 from the scope of regulation 5(1)(a)(i), which is concerned only with "development".

84. I was initially quite attracted by Mr Bedford's submissions, and the attraction did not lie simply in their deft and effective manner of presentation. On reflection, I am completely satisfied that they are incorrect, for the following cumulative reasons.

85. First, the Defendant wishes to promote affordable housing throughout its area in the light of market conditions. It no longer has an affordable housing policy in its adopted local plan, but there is such a policy (differently worded) in its emerging local plan. In the meantime, the Defendant wishes to promote affordable housing in conformity with the overarching policy direction of paragraphs 17 and 50 of the NPPF and the 2014 Ministerial Statement. Indeed, the language of the NPPF is reflected in the NAHC 2016 itself. Affordable housing policies are ordinarily located in local plans because they relate to the development and use of land.

86. Secondly, affordable housing forms a sub-set of residential development. The latter may be envisaged as the genus, the former as the species. It is artificial to attempt to separate out "affordable housing" from "residential development". This entails an excessive and unrealistic focus on narrow aspects of tenure. As Mr Jones convincingly pointed out, the NAHC 2016 ranges well beyond tenure (which is simply another way of expressing what affordable housing is) into matters such as size of dwelling, distribution of types of housing across developments etc.

87. Thirdly, the correct analysis is that the NAHC 2016 promotes residential development which includes affordable housing. The latter is expressed as a percentage of the former. The setting of that percentage will inevitably have an impact on the economics of all residential development projects, because it impinges directly on developers' margins. Setting the percentage too high would kill the goose laying these eggs. Setting the percentage too low would lead to insufficient quantities of the affordable housing the Defendant wishes to encourage. The common sense of this is largely self-evident, and is reflected both in the language of paragraph 50 of the NPPF and paragraph 2 of the NAHC 2016 itself – "[s]uch policies should be sufficiently flexible to take account of changing market conditions over time".

88. Fourthly, it is incorrect to proceed on the basis that (in accordance with Mr Bedford's primary submission) residential development should be taken as a given, with the affordable housing elements envisaged as a series of restrictions and constraints. Arguably, some support for this approach may be drawn from paragraph 26 of Miller, although that case turned on its own facts. This approach ignores the commercial realities as well as what the NAHC 2016 specifically says about the need for pre-application discussions, with insufficient attention to affordable housing requirements likely leading to the refusal of an application. In my judgment, all elements of a housing package which includes affordable housing are inextricably bound.

89. Fifthly, the language of regulation 5(1)(a)(i) mirrors section 17(3) of the 2004 Act, "development and use of land". These terms are not defined in the 2004 Act. "Development" is defined in section 55 of the Town and Country Planning Act 1990 and includes "material change of use". "Use" is not defined, although such uses which cannot amount to a material change are. Mr Bedford submitted that regulation 5(1)(a)(i) is tethered to section 55; Mr Jones submitted that the concept is broader. In my judgment, even on the assumption that section 17(3) of the 2004 Act should be read in conjunction with section 55 of the 1990 Act, nothing is to be gained for Mr Bedford's purposes by examining the latter. "Use" is not defined for present purposes, still less is it defined restrictively. I would construe section 17(3) as meaning "development and/or use of land". If residential development includes affordable housing, which in my view it does, there is nothing in section 55 of the 1990 Act which impels me to a different conclusion.

90. I mentioned in argument that there may be force in the point that the NAHC 2016 sets out social and economic objectives relating to residential development, and that this might lend support to the contention that the more natural habitat for an affordable housing policy is regulation 5(1)(a)(iii) rather than (i). On reflection, however, there is no force in this point. There is nothing to prevent a local planning authority including all its affordable housing policies in one DPD. Elements of these policies may relate to social and economic objectives. However, these elements do not notionally remove the policy from (i) and locate it within (iii). The purpose of regulation 5(1)(a)(iii) is to make clear that a local planning authority may introduce policies which are supplementary to a DPD subject only to these policies fulfilling the regulatory criteria. The Defendant has made clear that it may introduce an SPD, supplementary to its new local plan, which sets out *additional* guidance in relation to affordable housing.

91. In any event, on the particular facts of this case it is clear that the NAHC 2016 could not be an SPD even if I am wrong about it being a DPD. This is because there is

nothing in the saved policies of the 1999 Local Plan to which the NAHC is supplementary, despite Mr Jones' attempts to persuade me otherwise. This is hardly surprising, because the whole point of the NAHC 2016 is to fill a gap; it cannot logically supplement a black hole. That it fills a gap is, of course, one of the reasons I have already identified in support of the analysis that the NAHC 2016 is a DPD.

92. In my judgment, the correct analysis is that the NAHC 2016 contains statements in the nature of policies which pertain to the development and use of land which the Defendant wishes to encourage, pending its adoption of a new local plan which will include an affordable housing policy. The development and use of land is either "residential development including affordable housing" or "affordable housing". It is an interim policy in the nature of a DPD. It should have been consulted on; an SEA should have been carried out; it should have been submitted to the Secretary of State for independent examination.

93. Strictly speaking, it is unnecessary for me to address regulation 5(1)(a)(iv). However, in deference to the full argument I heard on this provision, I should set out my conclusions as follows:

(1) despite the textual difficulties which arise (see paragraph 78 above), and notwithstanding the analysis in Miller (which addressed the claimant's formulation of its case), I cannot accept that it is necessary to identify a development management policy which is separate from the statements at issue. As I have already pointed out, the whole purpose of regulation 5 is to define LDDs *qua* policies, by reference to statements which amount to or include policies. A sensible, purposive construction of regulation 5(1)(a)(iv) leads to the clear conclusion that the NAHC 2016 could fall within (iv) if it contains development management policies (subject to the below).

(2) I would construe the "and" in regulation 5(1)(a)(iv) disjunctively. This is in line with regulation 5(1)(a)(iii) (see the first "and", before "economic") and the overall purpose of the provision. As Mr Howell QC has rightly observed, a conjunctive construction would lead to absurdity. It would have been better had the draftsperson broken down (iv) into two paragraphs ("development management policies which …"; "site allocation policies which …") but the upshot is the same.

(3) I agree with Mr Howell QC, for the reasons he has given, that it is possible to have LDDs which are outside regulation 5 but that it is impossible to have DPDs which are outside the regulation. This is another reason for supporting a disjunctive construction.

(4) I disagree with Mr Howell QC that regulation 5(1)(a)(i) and (iii) applies to particular developments or uses of land, whereas (iv) is general (see paragraph 79 above).

(5) The real question which therefore arises is whether the NAHC 2016 contains development management policies which guide or regulate applications for planning permission. It may be seen that the issue here is not the same as it was in relation to regulation 5(1)(a)(i) because there is no need to find any encouragement; this provision is neutral.

(6) I would hold that the NAHC 2016 clearly contains statements, in the form of development management policies, which regulate applications for planning permission. I therefore agree with Stewart J's *obiter* observations at paragraph 37 of Miller.

94. There is force in Mr Bedford's objection that a disjunctive reading of regulation 5(1)(a)(iv) leaves little or no space for (ii) and site allocation policies, given the definition of the latter in regulation 2(1). However, this is an anomaly which, with respect, is the fault of the draftsperson; it cannot affect the correct approach to regulation 5(1)(a)(iv). There is more limited force in paragraph 74 of the judgment of Mr Howell QC in RWE, but I would make the same point. Regulation 5(1)(a)(i) and (iv) do not precisely overlap (see paragraph 93(5) above); (iii) is in any event separate because it only applies in relation to statements of policy objectives which are supplemental to a specific DPD. Further, anomalies pop up, like the heads of Hydra, however these regulations are construed. These, amongst others, are good reasons why the 2012 Regulations should be revised.

Issue 3

95. It is unnecessary for me to address Issue 3 on the alternative premise that the NAHC 2016 is an SPD rather than a DPD. I am satisfied that it is not.

Issue 5

96. Mr Bedford submitted that I should refuse relief in this case because, if the NAHC 2016 quashed, the Defendant will revert to the NAHC 2015. On his submission, the correct approach to section 31(2A) of the Senior Courts Act 1981 is that I should proceed on the premise that the NAHC 2016 was never adopted.

97. In my judgment, this submission cannot be accepted. I am required to refuse relief, namely a quashing order, if "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred". This is a backward-looking provision. However, and contrary to Mr Bedford's argument, the "conduct complained of" here is the various omissions I have listed (the failure to consult, assess and submit for examination), not the decision to adopt. "The conduct complained of" can only be a reference to the legal errors (in the Anisminic sense) which have given rise to the claim.

98. Had the Defendant not perpetrated these errors, by omission, I simply could not say what the outcome would have been, still less that it would highly likely have been the same.

Disposal

99. I grant an order under section 31(1)(a) of the Senior Courts Act 1981 quashing the NAHC 2016.

Coda

100. Like Stewart J, I am not oblivious to the practical difficulties facing local planning authorities assailed by constant changes in the legislative regime and national policy. However, a local planning authority is required to keep its local plans under review. The correct course is to press on with the timeous preparation of up-to-date local plans, and in the interregnum between draft and adoption, deploy these as material considerations for the purpose of the rights and duties conferred by the 2004 Act.

KENYON v SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT

COURT OF APPEAL (CIVIL DIVISION)

Lewison, David Richards and Coulson LJJ: 5 March 2020

[2020] EWCA Civ 302; [2021] Env. L.R. 8

Air pollution; Air quality management areas; Brownfield sites; Environmental impact assessments; Planning authorities' powers and duties; Planning permission; Precautionary principle; Residential development; Screening directions; Screening opinions

H1 *Environmental Impact Assessment—residential development on brownfield site—screening direction—Town and Country Planning (Environmental Impact Assessment) Regulations 2011 reg.2—air quality—Air Quality Management Area (AQMA)—cumulative effects on AQMA—whether there was an evidential basis for finding that there were no likely significant effects from proposed development—precautionary principle—whether failure to acknowledge requirement for precautionary approach where development would increase traffic and air pollution*

H2 The appeal site (Site A), situated near Pontefract, was originally a brickworks quarry, but was subsequently used as a recreation ground and a small sports stadium. In 2008, the fourth respondent (SC) applied to the second respondent local planning authority (WC) for planning permission for 150 homes on Site A. WC granted permission in 2010, but it was subsequently quashed by consent in 2012. WC resolved to grant permission again in 2013 but that was once again quashed by consent in 2016. In September 2016, the appellant (JK), a local resident who was concerned about air pollution levels, requested an EIA screening direction from the first respondent SSHLG. Subsequently, in November 2016, WC provided a screening opinion which stated that the proposed development was not EIA development within the meaning of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 reg.2 because it was not likely to have significant effects on the environment. Accordingly, an environmental statement to assess the environmental effects of the development was not required. That screening opinion was referred to in SSHLG's decision issued in December 2016. In that decision, SSHLG referred to WC's screening opinion and the selection criteria in Sch.3 of the 2011 Regulations when determining that the proposal was unlikely to have significant effects on the environment and directing that no environmental impact assessment was required. JK sought to review SSHLG's screening direction. At first instance, the challenge was rejected and JK appealed. On appeal, JK argued that:

H3 (1) There was an insufficient evidential basis for the finding that the proposed development would have "no likely significant effects on the environment" such that an EIA was not required.

H4 (2) The judge at first instance had failed to acknowledge that a precautionary approach to EIA decision-making was required in circumstances where it was accepted that the proposal would lead to an increase in traffic and air pollution within the nearby Air Quality Management Area (AQMA).

H5 (3) The judge had erred in concluding that SSHLG had considered cumulative effects in circumstances where "he had failed to provide any material evidence".

H6 (4) The judge had failed to have regard to the fact that SSHLG relied upon the proposal being in an urban area to reach a conclusion that increasing air pollution in that locality, including in an AQMA, would not potentially have a "significant effect on the environment" and therefore require an EIA to be undertaken.

H7 (5) The judge had erred in regarding Site A as an existing development site, when as a matter of local and national policy, and as a matter of fact for the purposes of air quality, the site was to be regarded as a greenfield site.

H8 **Held,** in dismissing the appeal:

H9 (1) The judge was entitled to reach the conclusion that there was a proper evidential basis for the screening decision. There was nothing unusual about the proposed development, which was a routine development of 150 dwellings. The screening direction adopted the approach required by the 2011 Regulations. It addressed each of the headings required by Sch.3 of the Regulations. It took into account all relevant matters and SSHLG explained how the conclusion had been reached. In addition, SSHLG and WC were both well aware of the AQMA. Although Site A was not within the AQMA, the screening opinion and direction both contained references to it. SSHLG and WC were also aware that the increased traffic from the completed development of Site A would have an effect on the AQMA. They concluded that, notwithstanding that information, it was not likely to have a significant effect on the environment. That was a matter for their planning judgement.

H10 (2) The precautionary principle would only apply if there was "a reasonable doubt in the mind of the primary decision-maker". It was contrary to this principle to argue that merely because somebody else had taken a different view to that of the primary decision-maker, it could not be said that there was no reasonable doubt. Neither SSHCLG nor WC doubted that the proposed development was not likely to lead to significant effects. In those circumstances, there was no room for the precautionary principle to operate.

H11 (3) The screening opinion took into account five other potential development sites in the area. In addition, the consented housing developments on two of those sites and the application for housing in respect of a third site were also considered by SSHLG. Accordingly, SSHLG and WC had reached their conclusions taking into account all relevant considerations, including the nature, location, and scale of the proposed development and the other developments in the area (both planned and actual).

H12 (4) Nowhere in the screening direction or other relevant documents was there any suggestion that the potential air pollution from the completed development of Site A was treated differently because it would occur in an urban environment, as opposed to a rural location. The screening direction made it plain that the pre-existing urban environment was part of the context in which the development

was going to take place and was therefore a relevant factor to be taken into account when considering whether the effect was likely to be significant.

H13 (5) It was contrary to common sense to suggest that Site A should somehow be designated or treated in the same way as a greenfield site. It was formerly a brickworks quarry and fell within the NPPF 2012 definition of previously developed land. Furthermore, the description of Site A as "an existing developed site" did not have any impact on SSHLG's decision or the judge's judgment. The screening direction would have been the same, regardless of whether Site A was so designated. Site A was still the same distance away from the AQMA and was not in the open countryside away from all forms of traffic. Accordingly, its designation was irrelevant to the screening direction

H14 **Cases referred to:**

Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321; [2012] Env. L.R. 22; [2012] J.P.L. 1128

Clarke Homes Ltd v Secretary of State for the Environment CA (Civ Div) [2017] P.T.S.R. 1081; (1993) 66 P. & C.R. 263; [1993] E.G. 29 (C.S.)

Hockley v Essex CC [2013] EWHC 4051 (Admin); [2014] Env. L.R. 24

Leeds United Football Club Ltd v Chief Constable of West Yorkshire [2013] EWCA Civ 115; [2014] Q.B. 168; [2013] 3 W.L.R. 539

Mackman v Secretary of State for Communities and Local Government [2013] EWHC 3396 (QB)

Mackman v Secretary of State for Communities and Local Government [2015] EWCA Civ 716; [2016] Env. L.R. 6; [2015] J.P.L. 1370

R. (on the application of Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157; [2011] N.P.C. 22

R. (on the application of Birchall Gardens LLP) v Hertfordshire CC [2016] EWHC 2794 (Admin); [2017] Env. L.R. 17

R. (on the application of Champion) v North Norfolk DC [2015] UKSC 52; [2015] 1 W.L.R. 3710; [2016] Env. L.R. 5

R. (on the application of Evans) v Secretary of State for Communities and Local Government [2013] EWCA Civ 114; [2013] J.P.L. 1027

R. (on the application of Jones) v Mansfield DC [2003] EWCA Civ 1408; [2004] Env. L.R. 21; [2004] 2 P. & C.R. 14

R. (on the application of Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869; [2013] P.T.S.R. 406; [2013] Env. L.R. 7

South Somerset DC v Secretary of State for the Environment [2017] P.T.S.R. 1075; (1993) 66 P. & C.R. 83; [1993] 26 E.G. 121 CA (Civ Div)

H15 **Legislation referred to:**

TFEU art.191

Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) regs 2(1), 3(1)(4), 4(7), 5(4)(5)(7), 6, 7, Schs 1, 2, 3, paras 1, 2 and 3

H16 *M. Willers QC* and *P. Stookes* (instructed by Richard Buxton) appeared on behalf of the appellant.

C. Patry (instructed by the Government Legal Department) appeared on behalf of the first respondent.

The second, third and fourth respondents did not appear and were not represented.

JUDGMENT

COULSON LJ:

1. Introduction

1 This appeal concerns a development site on the outskirts of Hemsworth, near Pontefract in West Yorkshire (Site A). On 16 December 2016, the first respondent directed that the proposed development of Site A was not EIA development within the meaning of reg.2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (the 2011 Regulations) such that an environmental statement to assess the environmental effects of the development was not required. The appellant's application for judicial review of that screening direction was refused by Mrs Justice Lang DBE (the judge) on 18 December 2018 ([2018] EWHC 3485 (Admin)). The appellant appeals against that decision with leave of Lindblom LJ.

2 The arguments on appeal ranged far and wide and included, somewhat surprisingly, a close review of the evidence before the first respondent and, subsequently, the judge. It was difficult to discern any substantial points of principle from any of this: speaking for myself, I wondered if the most important point to arise from the appeal hearing was the need to ensure that appeals in cases of this kind do not become another weary trot around a well-worn course.

3 Unusually, I start with the law (Section 2 below) because that informs the factual background and the relevant decisions (Sections 3 and 4) as well as the judge's judgment (Section 5). Having set out the issues raised by the appellant in s.6, I then go on to deal with each Ground of Appeal in ss.7–11. There is a short summary of my conclusions at s.12.

2. The Law

2.1 The Regulatory Framework

4 At the relevant time, the 2011 Regulations prescribed the procedures to be followed when planning permission was sought for what might be "EIA Development". That is defined in reg.2(1) as being either "Schedule 1 development" or "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location". It is common ground that this was not Sch.1 development. It is also common ground that this was Sch.2 development because, although it was for 150 dwellings (and Sch.2 only applies to developments in excess of that number), Site A was greater than five hectares. Despite the fact that the part of Site A which was being developed was less than five hectares (because of the retention of a belt of trees to the south), Sch.2 still applied. These factors (namely the fact that the number of dwellings was just below the applicable minimum and the size of Site A was only just above the applicable minimum because of the land that was not being developed) explain the repeated references in the screening opinion and screening direction under review to the comparatively small scale of this proposed residential development compared to

those which more usually arise under Sch.2. In that regard, I also note that Sch.2 is primarily concerned with the extraction, energy and chemical industries, and infrastructure projects such as shopping centres and car parks.

5 Regulation 3 provides a prohibition on granting planning permission without consideration of environmental information and reg.3(1)(a) provides that reg.3 applies "to every application for planning permission for EIA development received by" the planning authority. Regulation 3(4) provides:

> "The relevant planning authority or the Secretary of State or an inspector shall not grant planning permission or subsequent consent pursuant to an application to which this regulation applies unless they have first taken environmental information into consideration, and they shall state in their decision that they have done so."

6 Regulation 4 stipulates when development is to be treated as "EIA development":

> "(1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.
> (2) The events referred to in paragraph (1) are—
> (a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or
> (b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development.
> (3) A direction of the Secretary of State shall determine for the purpose of these Regulations whether development is or is not EIA development …
> (6) Where a local planning authority or the Secretary of State has to decide under these Regulations whether Schedule 2 development is EIA development the authority or Secretary of State shall take into account in making that decision such of the selection criteria set out in Schedule 3 as are relevant to the development.
> (7) Where a local planning authority adopts a screening opinion under regulation 5(5), or the Secretary of State makes a screening direction under paragraph (3)—
> (a) that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion; and
> (b) the authority or the Secretary of State, as the case may be, shall send a copy of the opinion or direction and a copy of the written statement required by sub-paragraph (a) to the person who proposes to carry out, or who has carried out, the development in question.
> (8) The Secretary of State may make a screening direction either—
> (a) of the Secretary of State's own volition; or
> (b) if requested to do so in writing by any person …"

7 Regulation 5 permits an applicant for planning permission to request the local planning authority to adopt a screening opinion. Regulation 5(7) permits an applicant to ask the first respondent to make a screening direction if the local planning authority does not adopt a screening opinion within the specified

timescales, or if they determine that the proposed development is "EIA Development". The procedure to be followed is set out in reg.6.

8 Schedule 3 to the 2011 Regulations identifies three selection criteria which must be considered for screening a Sch.2 development:

(i) characteristics of development;
(ii) location of development; and
(iii) characteristics of the potential impact.

In relation to (i) above, para.1 of Sch.3 provides that "the characteristics of development must be considered having regard, in particular to … e) pollution and nuisances". As to (ii) above, para.2 of Sch.3 states that "the environmental sensitivity of geographical areas likely to be affected by development must be considered, having regard in particular to: (a) the existing land use; (b) the relative abundance, quality and regenerative capacity of natural resources in the area; (c) the absorption capacity of the natural environment … paying particular attention to the following areas … vi) areas in which the environmental quality standards laid down in EU legislation have already been exceeded; vii) densely populated areas …". As to (iii) above, para.3 of Sch.3 is concerned with the characteristics of the potential impact including "the extent of the impact, the trans frontier nature of the impact, the magnitude and complexity of the impact, the probability of the impact and the duration, frequency and reversibility of the impact".

9 As set out in reg.2, the test to be applied in considering whether an Environmental Statement is required is whether the development is likely to have significant effects on the environment. In *R. (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869 at [43], Pill LJ said:

> "43. What emerges is that the test to be applied is: 'Is this project likely to have significant effects on the environment?' That is clear from European and national authority, including the Commission Guidance at B3.4.1. The criteria to be applied are set out in the Regulations and judgment is to be exercised by planning authorities focusing on the circumstances of the particular case. The Commission Guidance recognises the value of national guidance and planning authorities have a degree of freedom in appraising whether or not a particular project must be made subject to an assessment. Only if there is a manifest error of assessment will the ECJ intervene (*Commission v UK*). The decision maker must have regard to the precautionary principle and to the degree of uncertainty, as to environmental impact, at the date of the decision. Depending on the information available, the decision maker may or may not be able to make a judgment as to the likelihood of significant effects on the environment. There may be cases where the uncertainties are such that a negative decision cannot be taken. Subject to that, proposals for ameliorative or remedial measures may be taken into account by the decision maker."

Earlier at [26]–[27] of his judgment, Pill LJ explained that "likely" meant "a real risk".

10 The questions of whether there is sufficient information to issue a screening opinion/decision, and whether a proposed development was likely to have significant effects on the environment, are matters of judgment for the decision-maker: see *R. (on the application of Birchall Gardens LLP) v Hertfordshire CC* [2016] EWHC

2794 (Admin) at [66] and [67], and *Evans v Secretary of State* [2013] EWCA Civ 114. In the latter case, Beatson LJ said:

> "22. The assessment of the significance of an impact or impacts on the environment has been described as essentially a fact-finding exercise which requires the exercise of judgment on the issues of 'likelihood' and 'significance': see *Bowen-West v Secretary of State* [2012] EWCA Civ 321 at [40] *per* Laws LJ, and *Jones v Mansfield* [2003] EWCA Civ 1408 at [17] and [61] *per* Dyson and Carnwath LJJ. Carnwath LJ stated that, because the word 'significant' does not lay down a precise legal test but requires the exercise of judgment on planning issues and consistency in the exercise of that judgment in different cases, the function is one for which the courts are ill-equipped."

The paramount importance of the judgment of the decision-maker is also stressed by Beatson LJ at [26]–[27] of his judgment in *Evans*, when he rejected the contention that the mere fact that there were differing views as to the likely environmental effect meant that the screening direction had to be positive. He said:

> "26. Mr Wolfe submitted that in the light of the views of English Heritage, the Suffolk Preservation Society, and the Council this [the absence of doubt] could not be the case. That, however, comes very close to suggesting that once there are differing views on a question, there must be a full EIA. It is also very similar to the submission made unsuccessfully in *Loader*'s case that a full EIA process is required in all cases where the effect would influence the development consent decision. As Pill LJ stated (at [46]), accepting that submission would devalue the entire EIA concept, which involves a formal and substantial procedure often involving considerable time and resources. It is also clear from both the national and the EU indicative guidance that the full EIA process will only be required in a very small proportion of the total number of Schedule 2 developments.
>
> 27. To require the EIA process where there are differing views would also largely make the Secretary of State's role redundant. As to the *Waddenzee* case, that was concerned with the Habitats Directive. The reference to a reasonable doubt is to a reasonable doubt in the mind of the primary decision-maker. There is no support in that case for the view that, where somebody else has taken a different view to the primary decision-maker, it is not possible to demonstrate that there is no reasonable doubt. It is not suggested in this case that the Secretary of State or his officer had any such doubt."

11 Reference was also made in argument to *R. (Champion) v North Norfolk DC* [2015] UKSC 52 where, at [51], Lord Carnwath said that

> "application of the precautionary principle, which underlies the EIA Directive, implies that cases of material doubt should generally be resolved in favour of EIA".

That observation was in the context of the interaction between the likely effects of the proposed development, on the one hand, and mitigating measures at the screening stage, on the other.

12 A decision as to whether a proposed development is or is not likely to have significant effects on the environment can only be struck down on *Wednesbury* grounds: see [31] of the judgment of Pill LJ in *Loader*.

2.2 The Courts' Review of Screening Opinions/Directions

13 The limited nature and scope of a screening opinion was emphasised by Moore-Bick LJ in *R. (on the application of Bateman) v South Cambridgeshire DC* [2011] EWCA Civ 157. He said at [20]:

> "20. Having dealt with those points I can return to the substance of the argument, which is that the planning officer failed to demonstrate that she had considered the likely effect of the development in relation to traffic movements, the landscape and noise or, if she had, to explain why an EIA was not required in this case. When considering a submission of this kind I think it important to bear in mind the nature of what is involved in giving a screening opinion. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission; that comes later and will ordinarily include an assessment of environmental factors, among others. Nor does it involve a full assessment of any identifiable environmental effects. It involves only a decision, almost inevitably on the basis of less than complete information, whether an EIA needs to be undertaken at all. I think it important, therefore, that the court should not impose too high a burden on planning authorities in relation to what is no more than a procedure intended to identify the relatively small number of cases in which the development is likely to have significant effects on the environment, hence the term 'screening opinion'."

In the same case, Mummery LJ said:

> "40. In my judgment, the decision not to have an EIA is a significantly different kind of decision from a refusal or grant of planning permission. The reasons for a preliminary administrative decision whether or not to have an EIA do not have to satisfy the same standards of information and reasoning as would apply to a substantive decision on a planning application. The degree of 'grappling' is different, more provisional and less exacting …".

14 *Bateman* was a case in which the Court of Appeal concluded (by a majority) that the reasons given for the negative screening opinion (which amounted to 1.5 sentences) were inadequate. However, as has been pointed out in subsequent cases, this was unsurprising on the facts, given that there was no explanation for why the expansion of a grain storage facility from 90,000 tonnes to 300,000 tonnes, and from 12–60 large silos, was not likely to have a significant effect on the environment.

15 As to the practical limits of any screening decision, Lindblom J (as he then was) said in *Hockley v Essex CC* [2013] EWHC 4051 (Admin):

> "102. There has to be a sensible limit to what a screening decision-maker is expected to do. This view is supported in the cases to which I have referred, notably, for example, in *Bateman* (see paragraph 24 above). Conjecture about future development on other sites that might or might not act with the development in question to produce indirect, secondary or cumulative effects

> is not in the screening decision-maker's remit. I do not think the precautionary approach extends to that. And when it is suggested in a claim for judicial review that a screening decision was deficient because some potential cumulative effect was left out, it is not enough for a claimant simply to point to other developments in the locality that have been or might be approved, and to leave it to the court to work out whether any aggregate effects were unlikely to be significant. Unless it is obvious that relevant and potentially significant effects on the environment have been overlooked, the court will need some objective evidence to show this was so. It will need to be satisfied that the authority responsible for the screening decision was aware, or ought to have been, of the potential cumulative effects; that the screening opinion could not reasonably have been negative if those potential effects had been considered; and that this was, or should have been, apparent to the authority at the time."

16 Other authorities have demonstrated that a screening direction is a preliminary assessment rather than an examination paper expected to contain a record of each and every issue and each and every conclusion: see *Mackman v SSCLG* [2013] EWHC 3396 at [65]–[72]. In the same case in the Court of Appeal ([2015] EWCA Civ 716, Sullivan LJ said:

> "18. The majority of the Court of Appeal in *Bateman* concluded that the reasons given for the negative screening opinion in that case were inadequate. Mr. Mackenzie submitted that the reasons given in *Bateman* were less inadequate than the reasons given in the screening opinion as the present case. As in *Bateman*, there was no clear statement of Mrs. Denmark's reasons for her conclusion that the proposed development was not likely to have significant environmental effects. The 'reasons' amounted to no more than a bare conclusion.
>
> 19. While there is some force in this submission, the circumstances of this case are very different from those in *Bateman*. In *Bateman* the screening opinion had concluded (unsurprisingly) that the main impacts of a proposal to expand a grain storage facility with a capacity of 90,000 tons in 12 silos to a capacity of 300,000 tons in 60 additional silos each about 18 metres high and 23 metres in diameter, were likely to be 'increase in traffic movements, landscape impact and noise disturbance to local residents' (see paragraph 6 of the judgment of Moore-Bick LJ). In those circumstances, an explanation as to why those impacts on the environment were not likely to be significant was called for, and was not contained in the screening opinion.
>
> 20. In paragraph 78 of her judgment Lang J correctly said that the level of detail in a screening opinion would depend upon the complexity of the issues to be considered in the particular case, so that the test was whether the reasons were adequate for this particular application. She accepted that the reasons were brief, but concluded that they were not inadequate 'in the circumstances of this particular case which was not complex or borderline'."

In *Mackman*, the challenge to the screening opinion was dismissed. I note in passing that Sullivan LJ said at [9] that it had been rightly accepted in that case "that the mere fact that cumulative impact had not been expressly referred to in the screening opinion did not mean that it had not been taken into account".

3. The factual background

17 Site A was used as a brickworks quarry for the first seventy years of the last century. Subsequently, there was some infilling with waste, but there were no records of the materials used or any possible contamination risks. At one stage, the previous industrial use and the infilling gave rise to potential issues relating to contaminated land, and this was part of the appellant's original application for judicial review. However, that aspect of the challenge had fallen away by the time of the hearing before the judge.

18 Between 1970 and 2007, Site A was a recreation ground and there was a small sports stadium there, known as the Hemsworth Sports Complex. In January 2008, the fourth respondent applied to the second respondent council for outline planning permission for 150 homes. That planning permission was granted on 24 November 2010 but quashed by consent on 14 February 2012.

19 On 5 September 2013, the second respondent again resolved to grant permission in respect of Site A and such permission was issued on 31 March 2016. That permission too was subsequently quashed by consent on 1 July 2016.

20 On 5 September 2016, the appellant requested an EIA screening direction from the first respondent, setting out why he said that an EIA was necessary. On 21 November 2016, the second respondent provided a screening opinion which stated that the proposal was not EIA Development and that therefore no environmental statement assessing the environmental effects of the development was required. That screening opinion was subsequently referred to in the first respondent's decision under review, so it is appropriate to set it out in some detail:

> **"Characteristics of development**
>
> ……
>
> *The cumulation with other development*
>
> 3.6 The site forms a housing allocation within the Council's adopted Site Specific Policies Local Plan and has an indicative capacity of 179 dwellings on an area of approximately 6ha. It is noted that new housing has recently been constructed to the boundaries of the site. Application no: 09/00883/FUL was for 25 houses located adjacent to Kirkby Road, to the north east of the application site. A further development of 14 dwellings providing social housing has been completed to the north of the site (application no: 09/01522/FUL). There is a housing allocation in the Council's Site Specific Policies Local Plan (HS53, Kirkbygate, Hemsworth) located to the southern boundary of the application site off Kirkbygate which has an indicative capacity of 25 dwellings. The Council is currently considering an application on this site for 24 dwellings (15/01592/FUL).
>
> 3.7 Slightly further afield, there is a housing allocation located off Grove Lane to the north east of the application site which has full planning permission for 25 dwellings and work on site have commenced. A further permission for 7no. dwellings (13/0153/OUT and 16/01932/REM) on land at Broad Oaks has also been granted permission.
>
> 3.8 There are 2 further housing allocations within the Site Specific Policies Local Plan within Hemsworth but these are not in the immediate vicinity of the application site. There is an allocation to the west of the site off Ashfield

Road (HS54) which has an indicative capacity of 74 houses and a site to the north west of the town centre at West End (HS55) which has an indicative capacity of 160 dwellings.

3.9 Applications for a new Community Building at Bullenshaw Road, Hemsworth (08/00007/FUL) and new Sports Facilities (comprising a flood lit all weather multi use pitch, and a full sized grass football pitch), changing rooms and car park at Sandygate, Hemsworth (08/00872/FUL) have been approved, the developments have been completed and are in use.

3.10 Given the scale of the current proposal, which is an allocated housing site within the Local Development Plan, together with the above mentioned development and possible future development within the vicinity of the site, it is considered that in the context of the wider settlement, there would not be likely to be any significant cumulative environmental impacts.

…..

Pollution and nuisances

3.13 Issues of noise, odour, emissions, dust, land contamination and air quality are assessed in the 'characteristics of potential impact' section at paragraphs 3.20–3.27 but these are considered to not be likely to have significant effects on the environment.

…

Characteristics of potential impact

3.20 The application site has been fenced off and has not been used for sport and recreation for a number of years. The proposed residential development of the site will result in additional traffic and there will be an impact in respect of traffic generation, access, servicing, parking and highway safety issues associated with the development (in both its construction phase and once completed). It is noted that, should the proposal for residential development not come forward, bringing the site back into use as a sports facility would have an impact in terms of additional traffic associated with the use of the site. It is considered, given the scale of development proposed, that the impacts from the complete development would not be likely to have significant effects on the environment. The construction phase will result in additional traffic from construction workers and particularly from large construction vehicles associated with deliveries and removal of any wastes and/or contaminated materials from the site. Although the current proposal would result in additional traffic movements and other associate impacts, it is considered, given the limited site area and scale of development, that the traffic and other associated issues will not be likely to have a significant impact on the environment.

….

3.23 The site has not been used for some time but could be brought back into use and there would be a degree of traffic associated with this use. The site is not located in an Air Quality Management Area (AQMA) although it is noted that there is an AQMA at the road junction at Cross Hill, Hemsworth and traffic from the development, both during construction and once completed, is likely to add to standing traffic at this junction. The vehicle emissions include nitrogen dioxide and carbon dioxide which can have an

adverse impact on the environment. However, in view of the scale and location of the proposal, it is considered that the impact on air quality would not be likely to have any significant effects on the environment.

3.24 The proposed housing would not result in significant increases in odour and emissions. Emissions relating to associated traffic have been discussed above. The housing will result in additional noise both during construction and once completed and there will also be additional light emissions when compared to the previous use of the site for sport and recreation. The site is located in a predominantly residential area within the settlement boundary and, given the scale and location of the development, and it is considered that any noise and light emissions would not result in a significant environmental impact … 3.28 There are considered to be no significant, potential effects of the development when assessed against the criteria within Schedule 3, Part 3 sections (a) to (e) of the 2011 Regulations, which includes: (i) the extent of the impact (geographical area and size of population), (ii) the transfrontier nature of the impact, (iii) the magnitude and complexity of the impact, (iv) the probability of the impact, (v) the duration frequency and reversibility of the impact.

4.0 Conclusions

4.1 Having regard to Schedule 3 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 and the advice in Circular 02/99, the following conclusions are drawn in relation to the proposals:-

i) Taking account of the nature and scale of the development, it is considered that its impacts would not be likely to give rise to significant environmental effects.

ii) It is considered that the locality is not sensitive or vulnerable to the extent that the proposed development would be likely to have significant environmental effects; and

iii) The development is considered to not be one with particular complex and hazardous effects.

5.0 Opinion

5.1 On the basis of the above, and in accordance with regulations 7 and 5(4), (5) of the 2011 Regulations, it is considered that the proposals *do not* constitute EIA development."

21 In a letter dated 16 December 2016, the first respondent informed the appellant of his decision that, although he considered that the proposed development fell within Sch.2 of the 2011 Regulations, "having taken into account the selection criteria in Schedule 3 to the 2011 Regulations, [the first respondent] does not consider that the proposal is likely to have significant effects on the environment, see the attached written statement which gives the reasons for direction as required by Regulation 4(7) …" (the screening direction).

22 The written statement attached to the screening direction took its structure and headings directly from Sch.3 of the 2011 Regulations ([8] above). It referred expressly to the second respondent's screening opinion set out in [20] above. It was in the following terms:

"1(a)–(f) regarding characteristics of development
The proposal is for residential development of 150 homes (outline with means of access only).
2(a)–(c) (i)–(viii) regarding location of development
The application site of the proposal is a 6.01 hectares brownfield site. It is set within an urban environment immediately surrounded by other housing/commercial property, and beyond is further housing/commercial properties and community facilities.
3(a)–(e) regarding characteristics of potential impact
The proposed development exceeds the criterion/threshold of five hectares for Schedule 2, Category 10(b) development. The Council considers the proposed development, including in terms of issues of noise, odour, emissions, dust, land contamination and air quality, is not likely to result in significant effects, and therefore that the proposal is not EIA development. More specifically in relation to land contamination resulting from past land use, the Council is of the view that issues can be controlled through condition. The Council has also considered cumulative impact, and is of the view that given the nature of the proposal i.e. residential dwellings in the wider environmental context of an urban area, the application is not likely to result in significant effects.
The Secretary of State notes the Council's recent screening opinion for the proposed development, and for the information supplied with the application, and has had due regard to Planning Practice Guidance on assessing environmental impacts. Whilst there are land contamination issues on the application site, this has been investigated and measures/mitigations are within supporting information to the proposal, and the Council has referred to conditions should the proposal receive permission. In view of this, the Secretary of State considers this issue does not result in significant effect, over and above that which is normally present at an existing developed site.
The application will also result in impact from an increase in traffic in the locality, and from noise/dust/odour, from both the construction and operational phases but the Secretary of State notes the application site is not in any designated area nor is it an AQMA. In respect of these issues, the Secretary of State has considered the evidence before him, and is of the view that the proposal will not result in a likely significant effect, above that which any urban development proposal on an existing developed site would normally present. Overall, he is of the view there are no likely significant impacts resulting from the proposed development and EIA is not required."

23 In response to a request from the appellant, the respondent subsequently disclosed his "screening analysis", which was the basis for the screening direction of 16 December 2016. This was set out in detail in the judge's judgment at [17]. The relevant parts seem to me to be:

"Waste and pollution
6 Will the Project release pollutants or any hazardous, toxic or noxious substances to air?
Consideration: During clearance of the site and construction, there is potential for pollutants to be released in to the air however this would be managed through standard legislation/regulation. See also Q4 regarding contaminated

land. It is not considered the operational stage will release hazardous substances in to the air beyond those associated with a standard urban development of housing.

…

8 Are there any areas on or around the location which are already subject to pollution or environmental damage (e.g. contamination, or where existing legal environmental standards at any level are exceeded such as AQMAs etc) which could be affected by the project?

Consideration: The site is not evidenced as within any Air Quality Management Area (AQMA). However, there is an AQMA at a junction of Cross Hill, and traffic for the development is likely to add to existing traffic using this junction. However given the scale of the proposed development, is not considered to have likely significant effects.

…

Social

14 Is the project in a location where it is likely to be highly visible to many people?

Consideration: At its southern boundary, the application site is not visible to individuals due to an area of trees which screens the site from neighbouring houses. To the west, north and east there is housing, and some commercial property, and the application site will be visible to residents and business users through the gaps which exist between buildings. It is not considered that there will be any likely significant effects.

…

17 Are there existing, land uses on or around the location e.g. homes, gardens, other private property, industry, commerce, recreation, public open space (including parks), community facilities, agriculture, forestry, tourism, mining or quarrying, hospitals, schools, places of worship, community facilities which could be affected by the project?

Consideration: see Q14. Beyond the roads (which included residential and commercial buildings) that surround the application site are churches, community facilities and schools. During the construction phase, these may be impacted from pollution/particle emission and emissions from plant and machinery. During the operation phase, there may also be some impact from urban emissions (vehicles) but this would not be over and above what would be expected in a normal urban area and it is not considered that there will be any likely significant effects.

18 Are there any areas on or around the location which are densely populated or built-up, which could be affected by the project?

Consideration: see Q14 and Q17. It is considered the local area is not as densely populated or built up as in inner-cities, and while there may be some impact from construction and operational phases, this would not be over above what would be expected in a normal urban area and it is not considered that there will be any likely significant effects.

Transport

19 Are there any transport routes on or around the location which are susceptible to congestion which could be affected by the project?

Consideration: see Q15 above. Surrounding roads are B roads. There are no major roads (motorways) in close proximity to the application site. Although

patterns of local road use will be affected, by an increased number of residents, the proposal is not likely to be a significant generator or new trips onto the network.

…

Cumulative Impact

21. Are there any existing or future land uses on or around the location or beyond (e.g. trans-frontier) which could be affected by the project (e.g. including because of cumulative impact)?

Consideration: See Q8, 14, 17 & 18. Beyond this proposal at this application site, there has been new housing of 25 and 14 dwellings constructed on the boundaries of the site to the north/north east respectively. It is also noted that there is currently a proposal for 24 houses to the southern boundary with the Council which is presently at the consultation stage. The Secretary of State has considered these applications in terms of their size and scale and the context of the local area. The local area is urban—residential with some commercial and given this together with the size and scale of the development completed/proposed, the Secretary of State considers that while there may be some cumulative impact, this would not be to the extent that it would be likely to result in significant cumulative impact."

24 On receipt of the screening direction and screening analysis, the appellant commenced judicial review proceedings on 24 January 2017. Three grounds of challenge to the direction were identified:

a) Ground 1: A failure to consider the cumulative effects of the proposal.
b) Ground 2: Unlawful reliance upon conditions to remedy adverse environmental harm (a point in respect of the potentially contaminated nature of the land).
c) Ground 3: Failure to consider other relevant environmental consequences.

25 On 15 August 2018, Sir Ross Cranston, sitting as a High Court Judge, granted permission for judicial review on Ground 1 only. Moreover, he limited that permission to the issue of air quality. It is important to stress that both Ground 1 as drafted, and Sir Ross's detailed observations upon it, were based on the appellant's argument about the *cumulative* effects of the proposed development of this and five other sites in the same area (known as Sites B, C, D, E and F) on air quality generally. Although the original application and Sir Ross's observations refer to the proximity of the Hemsworth Air Quality Management Area (AQMA), that was only in the context of the cumulative effects of this site, together with the other five sites, on air quality.

26 The appellant did not challenge the decision limiting Ground 1 to the cumulative effect on air quality, but made a renewed application for permission on Grounds 2 and 3. At the hearing before the judge, the appellant abandoned Ground 3. The judge dealt with Ground 2 on a rolled-up basis but, having considered it, she refused permission to commence judicial review proceedings in respect of Ground 2. That decision is not challenged on appeal. Thus, the hearing below, and this appeal, should have been concerned only with the issue of cumulative effects of the six sites (including Site A), insofar as they related to air quality.

4. Subsequent and Unreferenced Information

27 Both before the judge, and again on appeal, there were references to other documents which were not available to (and therefore did not inform) the first respondent's screening direction of 16 December 2016. These include the Air Quality Assessment produced by REC on behalf of the fourth respondent which (although dated November 2016) was not submitted to the second respondent until January 2017; and the second respondent's 2018 and 2019 Air Quality Annual Status Reports (which dealt with, amongst other things, the Hemsworth AQMA). The 2019 report was not created until June 2019, and so had not been before the judge either.

28 In judicial review proceedings it is generally inappropriate for parties to seek to rely on documents (and to advance arguments based on those documents) which were not available to the decision-maker. Taken at its highest, such an approach undermines the entire process of judicial review. It runs the risk that the court will be asked to conduct a kind of rolling review, in which nothing is ever finalised or settled, and it does not matter what information was available at the time the decision was taken. This serves only to encourage the all-too-prevalent attitude that, in judicial review applications, it is always possible to "have another go". The parties' references to the Reports noted in the preceding paragraph were designed to do exactly that, with each side seeking to rely on particular paragraphs in support of their submissions about the rationality (or otherwise) of a decision made without sight of any of them.

29 The only exception to this general principle arises in debates about the appropriate remedy, should the challenge prove to be well-founded. This most often occurs when a respondent argues that, even if there was a technicality which rendered the original decision unlawful, it should not be quashed or set aside because subsequent events have shown it to be the right decision on the merits. It was on that basis, for example, that the first respondent originally sought to rely on the REC report. In my view, this process needs to be tightly controlled; otherwise the sort of risks identified in the previous paragraph will eventuate (because the parties so often try and rely on such material for any purpose, even if strictly the evidence goes to a fall-back argument only). Moreover, for the reasons explained below, I consider that it is unnecessary to consider any fall-back argument in this case.

30 For these reasons, therefore, I have not had any regard to the documents that were not in existence or available at the time of the screening direction of 16 December 2016. In addition, I have also discounted an earlier document, namely the Officer's Report to the Council's Planning Committee dated 5 September 2013, despite the fact that the judge herself set out some of this Report at [35] of her judgment. The reason for discounting it is because there was no reference to this Report (whether express or implied) in either the second respondent's screening opinion, or the first respondent's subsequent screening decision. Whilst Ms Patry may be right to say that the second respondent could be assumed to be aware of the contents of this Report, there was no evidence that it played any part in the particular decision-making process under review. It is therefore not appropriate to have any regard to the Report when considering the rationality of the screening direction.

5. The Judgment

31 Having set out the legal framework at [7]–[14] and the documents containing and relevant to the screening direction at [15]–[18], the judge then identified the nature of the complaint in relation to air quality at [19]–[23]. She set out the law at [27]–[32].

32 Her overall conclusion was at [34]. She said:

> "34. In my judgment, the Claimant's submissions that the Defendant failed properly to consider pollution and air quality and, failed adequately to assess cumulative effect, were based on an unduly forensic and nit-picking reading of the assessments. It is well-established that planning decision letters should be read fairly and in good faith, and as a whole, in a straightforward manner, without excessive legalism or criticism (see *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, per Lord Bingham at 271; *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83, per Lord Hoffmann LJ at 84). In my view, screening assessments should be read in the same manner."

The detailed reasons for that view were then set out in the following paragraphs of the judgment.

33 Having set out various extracts from the documentation, the judge said at [41]:

> "41. Thus, the Defendant was expressing his considered judgment, on the evidence, that there would not be significant cumulative impact on, *inter alia*, air quality. This was a careful and detailed assessment. It is reasonable to assume that the Defendant and his advisers were well aware of the causes and effects of air pollution and the need to address it."

34 Thereafter, dealing with the limits of a screening opinion and direction, the judge said:

> "44. Obviously, a screening opinion or direction can only be based upon the information known to the assessor at the relevant time, and that may be incomplete. In this case, the Defendant received a substantial amount of information from Dr Stookes of Richard Buxton in September 2016, and from the Council, whose screening opinion was dated 21 November 2016. Unsurprisingly, the application for planning permission for a nursing home about 500 metres from the Site (referred to as Site G) was not included, since the application was made as late as 18 November 2016. Planning permission was granted on 18 April 2017, which post-dated the Council's screening opinion and the Defendant's screening direction. I do not consider that the Defendant can be fairly criticised for not referring to it, and absent any unlawfulness, the screening direction must stand. Generally, in cases where an unforeseen subsequent development proposal may alter the assessment of cumulative environmental effects, the solution is for there to be a further screening and/or for the cumulative environmental effects to be considered in the course of the application for planning permission for the subsequent development proposal …
> 46. The Defendant's written statement summarised the Defendant's assessment and conclusions, expressly referring to air quality, traffic, and cumulative impact. He concluded, in the final paragraph, that there would be an impact

from an increase in traffic in the locality. He took into account, as he was entitled to do, that the Site was not in a designated area nor was it an AQMA. He concluded that the impact from the increase in traffic would not have significant environmental effects. In reaching that key conclusion, which the Claimant overlooked, he took into account that this was an urban development proposal on an existing developed site, which he was entitled to do. In my view, any such assessment can properly have regard to both the location of the site and the existing development on site (if any), when considering the environmental impact of a new development. For example, the outcome of the assessment could be affected if the proposal was for development on a previously undeveloped site situated in open countryside. It follows that I disagree with the Claimant's submission that the Defendant concluded that assessment was not required because the increase was not significant for an urban area. That is a misreading of the decision, in my view."

6. Issues on Appeal

35 It appears that, although the principal ground that was argued before the judge concerned the cumulative effect of this and the other five sites (Sites B-F), the submissions ranged rather more widely during the hearing before her. In particular, the appellant's skeleton argument below advanced a new case on the basis that, leaving aside the other five sites, the effect of increased traffic from Site A alone on the nearby AQMA meant that it was likely that the development would have a significant effect on the environment. It appears that no point was taken before the judge that the appellant did not have permission to raise that challenge. This argument was not about cumulative effect at all: it was solely about the proximity of Site A to the AQMA.

36 This "challenge-creep" continued on appeal. The appellant's Grounds of Appeal raise no less than five separate arguments, only one of which (Ground 3) can be linked back to the sole ground for which permission was originally granted. In this court, the appellant contended that the judge erred in the following respects:

(a) Ground 1: There was an insufficient evidential basis for her finding that the first respondent could reach the conclusion that the proposed development would have "no likely significant effects on the environment" such that an EIA was not required.

(b) Ground 2: The judge failed to acknowledge that a precautionary approach to EIA decision-making was required in circumstances where it was accepted that the proposal would lead to an increase in traffic and air pollution within the nearby AQMA.

(c) Ground 3: The judge erred in concluding that the first respondent had considered cumulative effects, in circumstances where "he had failed to provide any material evidence".

(d) Ground 4: The judge failed to have regard to the fact that the first respondent relied upon the proposal being in an urban area to reach a conclusion that increasing air pollution in that locality, including in an AQMA, would not potentially have a "significant effect on the environment" and therefore require an EIA to be undertaken.

(e) Ground 5: The judge erred in regarding the Site as an existing development site when, as a matter of local and national policy, and as a matter of fact for the purposes of air quality, it was regarded as a greenfield site.

37 Grounds 1 and 3 raise evidential matters, to the effect that there was no or no sufficient evidence before the first respondent to enable him to come to the conclusion that an EIA was not required because the proposed development of Site A was not likely to have a significant effect on the environment. Those two Grounds therefore raise directly the question of what approach this court should take to the judge's judgment, given that these evidential challenges had been raised before and rejected by the judge. Although Mr Willers QC submitted that he was not asking this court to "start from scratch" in relation to these matters, that disavowal was negated by the fact that, throughout his submissions, he made copious references to the screening opinion and decision, but never once referred to the judge's judgment, much less indicate where or how it was that the judge erred in law.

38 The best that Mr Willers could do, in answer to a question from the court, was to say that, because her conclusion was wrong, the judge must have had regard to evidence that was irrelevant, alternatively failed to have regard to evidence that was relevant. But he did not identify the evidence wrongly missed or wrongly relied on. Beyond expressly disavowing the notion that the judge's conclusions were perverse, he did not further address the judge's careful evaluative judgment, as summarised at [31]–[34] above.

39 In my view, this relaxed attitude to the judge's rejection of the judicial review challenge, and her reasons for that decision, was unsatisfactory. In this case an experienced planning judge has considered the application for judicial review, evaluated the relevant material, and ruled that there was sufficient evidence for the decision made. On an appeal, it is incumbent upon an appellant to demonstrate that the judge erred in law in reaching such a conclusion. That requires considerably more than an attempt to reargue the case from the documents all over again. In my view, that point alone is enough to justify dismissing Grounds 1 and 3, with Ground 1 suffering from the additional difficulty that it was not a judicial review challenge for which permission had originally been sought or granted.

40 As to the other Grounds, Ground 2 was not argued before the judge, which might again be thought to justify its immediate rejection. Ground 4 was the subject of the judge's conclusion at [46], that the submission on which it relied was based on a misreading of the screening direction. It would again appear that, in order to challenge that conclusion, the appellant would need to show that this view of the direction was not open to the judge or somehow amounted to an error of law. I am not at all sure that this was how Mr Willers could or did put the point. He did not press Ground 5 in any event, accepting that whether or not Site A could be described as "previously developed land" made no difference to air quality considerations.

41 Since I have formed a clear view on the merits of these five Grounds, I propose to address them in detail, notwithstanding the myriad difficulties of principle to which I have referred in the preceding paragraphs. However, in another case, those observations might be thought to be sufficient to dismiss this appeal outright.

42 I deal with Grounds 1 and 3 first because it seems to me that, rightly or wrongly, they lie at the heart of the appeal. I then go on to deal more briefly with the other Grounds.

7. Ground 1: No Evidential Basis for a Finding of "No Likely Significant Effects"

43 An appellant seeking to argue that the decision-maker (and, by extension, the judge) reached a conclusion for which there was no evidential basis invariably faces an uphill task. Such a task is made even more difficult in a situation like the present case, given that the screening direction is a preliminary, broad-based assessment of environmental impacts, undertaken by those with relevant training and planning expertise.

44 The judge concluded that there was a proper evidential basis for the screening decision. Was she wrong in law so to do? In my view, the answer to that is in the negative: the judge was quite entitled to reach that conclusion, and nothing has been identified on appeal to demonstrate that she was even arguably in error.

45 As a starting point, I note that in her judgment at [34], the judge described the appellant's approach on Ground 1 as "unduly forensic and nit-picking". Despite the habitual skill and charm of Mr Willers' advocacy, I consider that the same description could be applied to his submissions on appeal. He spent a good deal of time identifying particular paragraphs in particular documents and seeking to point out the potential gaps and omissions within them. Some of this came down to an alleged failure to cross-reference properly. In my judgment, that is not a proper approach to a judicial review application of this sort, let alone an appeal. Furthermore, I consider that the sections of the relevant documents which I have set out in [20]–[23] above make plain that, contrary to the appellant's submissions, there was an evidential basis for concluding that there was no likely significant effect on the environment.

46 Mr Willers' principal submission on Ground 1 came to this. Site A was close to the AQMA. It was inevitable that, if Site A was developed, there would be more traffic entering the AQMA. In those circumstances, the proximity to the AQMA was a particular characteristic of Site A which made it irrational to conclude that the development was not likely to have a significant effect on the environment, without at least obtaining further information. As he put it at one stage of his oral submissions, "it is all about the AQMA".

47 I cannot accept that submission for a variety of reasons. Many of those reasons are articulated in the judgment below and set out in the passages I have cited in [31]–[34] above.

48 The first point to note is that this was, on any view, a routine development of residential houses. There was nothing unusual about the proposed development. Indeed, as I have said, the starting point must be that, because this was not a development for more than 150 dwellings, and the actual amount of land being developed was 4.6 hectares, the proposed development of Site A was only just big enough to be within Sch.2 in any event. I consider that this was an important element of the screening direction, which was repeatedly encapsulated by both the first and second respondents in the shorthand phrase "the limited site area and scale of development".

49 Secondly, I agree with Ms Patry that the screening direction adopted the approach required by the 2011 Regulations. It addressed each of the headings required by Sch.3. It took into account all relevant matters. There was nothing missing. The first respondent explained, step by step, how he had reached his conclusion.

50 Thirdly, the first and second respondents were well aware of the AQMA. Although Site A was not within the AQMA, the screening opinion and direction both contain references to the AQMA centred on Hemsworth. It cannot be said that the AQMA somehow slipped the minds of the first and second respondents when addressing the issue of likely environmental effects.

51 Fourthly, the first and second respondents were also aware that the increased traffic from the completed development of Site A would have an effect on the AQMA. This can be seen in a number of places, but perhaps most obviously in para.3.23 of the screening opinion, and the consideration of Question 8 in the screening analysis, where there are express references to the development leading to an increase in traffic at the junction of Cross Hill in the centre of Hemsworth, where the AQMA was located. But there is no evidence that this increased traffic would be likely to have a significant effect on the environment: on the contrary, para.3.20 of the screening opinion states that it would not.

52 Given all of those factors, it is idle to suggest that in some way the first and second respondents, as experienced and knowledgeable planning officials, were not well aware of the likely impact of the traffic from Site A (following its development) on the AQMA. In the exercise of their planning judgment, they concluded that notwithstanding this information, this was not likely to have a significant effect on the environment. In my view, that was a matter for their planning judgment and therefore a matter for them. Contrary to Mr Willers' submission, this was not a case that was remotely close to the extreme facts in *Bateman*: see [14] above.

53 Mr Willers' related submission was to ask rhetorically: if the first respondent had decided that there would be a likely effect, but that it was not significant, where was the evidence on which he relied in arriving at that conclusion? This shaded into a suggestion that the reasons for the screening direction were inadequate, because in explaining why any effect was not likely to be significant, the direction (as he put it) "does not go far enough".

54 I disagree. The authorities to which I have referred make clear that the first and second respondents were not required to set out in detail all the information and statistics, of which they would have been well aware, and which might be relevant to the question of air pollution. I am thinking in particular of the published data as to trip frequency, standard emissions and exceedances, and the like. The first and second respondents must be taken to be familiar with all such information. Armed with that knowledge, they concluded that, in this case, the increase in traffic was not likely to have a significant effect on the environment. This was because of the comparatively modest scale of the development. That was a matter for them, and not something that had to be justified by reference to lengthy written reasons in respect of concepts, formulae and other matters which were very familiar to them.

55 Having regard to Mr Willers' rhetorical question, it is not unreasonable to turn it back on the appellant and ask what the evidence was that might suggest that this comparatively modest residential development was likely to have a significant effect on the environment. Mr Willers appeared to accept that there was no such evidence, but suggested that there did not need to be any. He submitted that there was an automatic assumption to that effect, given the proximity of Site A to the AQMA. Indeed, he went so far as to say that, in respect of any development of over five hectares close to an AQMA, it was irrational to conclude that it was not likely to have a significant effect.

56 In my view, that simply does not follow. The effect on the environment, and whether it is likely to be significant or not, must depend on the facts of each case, and in particular the nature, scale and size of the development, its proximity to the AQMA and the like. It is a sliding scale, or spectrum. It cannot be right that, as a matter of principle, every development close to an AQMA should automatically be regarded as likely to have a significant effect on the environment, without any specific evidence to point to that conclusion. In my judgment, proximity to an AQMA is not some sort of trump card which will always give rise to the need for an EIA.

57 On this issue, the judge's conclusion was in these terms:

> "47. It was legitimate for the authors of the screening analysis and the written statement to address the issues by reference to the lists of categories and factors in schedule 3 to the 2011 Regulations. On a fair reading, all aspects of air quality and cumulative impact were considered and taken into account in reaching the overall conclusion that there were no likely significant effects on the environment arising from the proposed development, and so an EIA was not required."

For the reasons that I have given, I respectfully agree with her.

58 Accordingly, I would reject Ground 1 of the appeal. There was a sufficient evidential basis for the conclusion that—notwithstanding the proximity of the AQMA—the proposed development was not likely to have a significant effect on the environment and there was no error of law on the part of the judge in reaching that same conclusion.

8. Ground 3: No Assessment of Cumulative Effects

59 The thrust of this complaint concerns the five other potential development sites in the area. In my view, these were properly taken into account. Thus:

(a) The second respondent's screening opinion expressly considered all the consented developments, and sites allocated for housing development, in the local development framework, at [3.6]–[3.10] (see [20] above).
(b) Site B is directly adjacent to this site. Planning permission for 25 dwellings was granted as long ago as September 2009. That development had been completed by the time the screening direction was issued. Site B was considered at para.3.6 of the screening opinion.
(c) Site C is a small site adjacent to the southern boundary of the site. It was allocated for residential development in the adopted local development framework and planning permission was granted for 24 homes on 16 February 2017. Site C was considered at para.3.7 of the screening opinion.
(d) Site D is to the north of this site. Planning permission was granted in October 2009. The development of 14 houses was complete by the date of the screening direction. Site D was considered at para.3.7 of the screening opinion.
(e) Site E is a site some distance to the north of this site, allocated for residential development in the local development framework. Site E was addressed at para.3.8 of the screening opinion.

(f) Site F is a site some distance to the west of this site, allocated for residential development in the local development framework. Site F was addressed at para.3.8 of the screening opinion.

(g) At para.3.10 of the screening opinion, taking all these five sites into account, along with Site A, the second respondent concluded that "there would not be likely to be any significant cumulative environmental impacts".

60 In addition, the consented housing developments on sites B and D and the application for housing in respect of site C, were also considered by the first respondent in the screening analysis under the heading Q21 "cumulative impact" ([23] above). The same conclusion resulted.

61 Accordingly, I consider that it is beyond argument that the first and second respondents reached their conclusions, that there were no likely significant effects arising from the proposed development of Site A, taking into account all relevant considerations, including the nature, location, and scale of the proposed development and the other developments in the area (both planned and actual), such that an EIA was not required. There was a plain evidential basis for that conclusion. It is equally clear that, in accordance with the approach in *Loader*, that was a conclusion which was open to the first and second respondents as a matter of planning judgment.

62 Accordingly, I would reject Ground 3 of the appeal.

9. Ground 2: The Precautionary Principle

63 The source of the appellant's argument can be found in the EU Directive (2011/92/EU of 13 December 2011) concerned with the assessment of the effects of public and private projects on the environment. At Recital (2), it states:

> "Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principle that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluters should pay …"

The precautionary principle is also referred to in the passage from the judgment of Pill LJ in *Loader* set out in [9] above.

64 The appellant's submission was that, because there was what he describes as "inevitable uncertainty" about the air pollution created by the proposed development, the decision-maker, and the judge, failed to have proper regard to the precautionary principle.

65 I consider that this argument to be misconceived. In addition, as I have said, it is an unfair criticism of the judge, since I can find no evidence that this point was ever raised below, and certainly not in the terms in which it was advanced before us.

66 The precautionary principle will only apply if there is "a reasonable doubt in the mind of the primary decision-maker" (see Beatson LJ in *Evans*). It is contrary to the principle outlined there to argue that, merely because somebody else has taken a different view to that of the primary decision-maker, it cannot be said that there was no reasonable doubt.

67 In the present case, neither the first nor the second respondent had any doubt that the proposed development was not likely to lead to significant effects. In circumstances where there was no doubt in the mind of the relevant decision-maker,

there is no room for the precautionary principle to operate. The argument therefore fails at the first hurdle.

68 In discussions between my Lord, Lewison LJ, and Mr Willers, a point arose as to the difference between a situation where, as here, the first respondent had no doubt that there was no likely significant effect, and the situation where it might be argued that he should have had such a doubt. That latter proposition was at the forefront of Mr Willers' submission: he candidly accepted that "I cannot say there was material doubt. But I can say that there ought to have been a material doubt".

69 It seems to me that the answer to that issue is this. A decision-maker in this situation has three options: they can decide that an EIA is necessary; they can decide that an EIA is not necessary; and finally, they may not know whether an EIA is necessary or not. It is in that third situation that the precautionary principle applies. It is difficult to see how it could apply to the second option, save perhaps for the rare case where, although the decision-maker had no doubt, the absence of any such doubt was irrational on *Wednesbury* principles. But that would just bring the debate back to the lawfulness or otherwise of the underlying decision and, for the reasons I have given, I do not doubt the lawfulness of the screening decision in this case.

70 Accordingly, I would reject Ground 2 of the appeal.

10. Ground 5: The Alleged Mischaracterisation of the Site

71 I deal with this before Ground 4 because, logically, it raises a prior issue.

72 Underlying Ground 5 is the complaint that the first respondent (and the judge) erred in law by characterising the proposed development of Site A as a proposal relating to "an existing developed site" whereas, in truth, it should have been regarded as a greenfield site. I do not consider that to be correct, and to be fair to Mr Willers, although he did not formally abandon it, he did not press it either.

73 It seems to me to be contrary to common sense to suggest that Site A should somehow be designated or treated in the same way as a greenfield site. It was formerly a brickworks quarry which was subsequently used for landfill with no restoration procedures. At one point the recreation ground had a small athletics track and associated buildings on it. Site A therefore fell within the NPPF 2012 definition of previously developed land (PDL) and, since none of the exclusions from the definition of PDL could apply to Site A, it was rightly considered to be an existing developed site.

74 Moreover, I consider this to be the obvious conclusion, in the light of the other points raised in the appellant's original judicial review application. As noted in [24] above, the challenge originally raised questions about the contaminated nature of the land. That arose directly out of the landfilling operations and the previous use(s) of Site A. To suggest that Site A is somehow both contaminated and a greenfield site is a logical impossibility.

75 Finally, I do not accept that the description of Site A as "an existing developed site" had any impact on the first respondent's screening direction or the judge's judgment. The screening direction would have been the same, whether Site A was so designated or not. Site A was still the same distance away from the AQMA. It was still not in the open countryside away from all forms of traffic. Accordingly, its designation was irrelevant to the screening direction of 16 December 2016, an

argument from which Mr Willers did not demur. I would therefore reject Ground 5.

11. Ground 4: Urban Area

76 That characterisation of Site A then informs the approach to Ground 4, which is the relevance or otherwise of the fact that Site A, an existing developed site, was in an urban area. The appellant argues that the screening direction was unlawful because the first respondent treated the fact that Site A was in an urban area as requiring a different, lower test to be applied in respect of the likely effect on the environment.

77 The two separate passages in the screening direction which are relied on by the appellant in support of Ground 5 are as follows:

> "… In view of this, the Secretary of State considers this issue does not result in significant effect, over and above that which is normally present as an existing developed site … In respect of these issues, the Secretary of State has considered the evidence before him, and is of the view that the proposal will not result in a likely significant effect, above that which any urban development proposal on an existing developed site would normally present."

78 The appellant's broad suggestion (based on these two sentences, taken in isolation) is that the first respondent was prepared to allow pollution in and around Site A because it was located in an urban area, which he would not have countenanced had Site A been within a rural area. The argument, encapsulated at [51] of the appellant's skeleton argument, was that, because the accepted increase in air pollution caused by the proposed development will occur in an urban area, there should be greater concern about the effects of that increase, not less.

79 The judge squarely addressed and rejected that submission at [46]: see [34] above. She said that, ultimately, the argument was based on a misreading of the first respondent's screening direction.

80 I respectfully agree with that conclusion. Nowhere in the screening direction, or in the other documents which I have set out above, is there any sustainable suggestion that, in some way, the potential air pollution from the completed development of Site A was treated in a different way because it would occur in an urban environment, as opposed to a rural location. What the screening direction was doing was making plain that the pre-existing urban environment was part of the context in which the development was going to take place, and was therefore a relevant factor to be taken into account when considering whether the effect was likely to be significant or not. That was self-evidently the right approach. To put the point another way: Site A would not be generating traffic for the first time, and there were existing and future urban developments around it which also continued to generate traffic. It was in that context that the likelihood of significant environmental effects was considered and rejected.

81 In the context of Ground 5, I had wondered whether there was a slightly different point available to the appellant, to the effect that, because of the reference to the likelihood of effects "above that which any urban development proposal on an existing development site would normally present", the first respondent was applying the wrong test; that he was suggesting that the applicable test was whether the likely effect of the development would be *more* significant than that which

would normally be expected of an urban development on an existing development site. But Mr Willers did not whole-heartedly embrace that argument, and I have concluded that there is nothing in the point. It is not a fair reading of the screening decision and the other documentation, when taken as a whole. The reference to "over and above that which any urban development on an existing development site would normally present" was a matter of background/context. It was not seeking to change the test or to apply a test to an urban area that would not be applicable to a proposed development in a non-urban area or of an existing undeveloped site.

82 Finally, in relation to both the potential arguments about these two sentences raised under Ground 5 and discussed above, I am mindful of the clear guidance given to judges considering judicial review cases against over-analysing decisions and applying too strict an interpretation to individual words and phrases, and the need to approach the decision as a whole: see for example, Lord Bingham in *Clarke Holmes v Secretary of State for the Environment* (1993) 66 P. & C.R. 263 at 271 and Hoffmann LJ in *South Somerset DC v Secretary of State for the Environment* (1993) 66 P. & C.R. 83 at 84. This might be regarded as a classic example of taking individual sentences out of context and overlaying them with a significance which they were never intended to have. I consider that, in the round, the screening direction confirmed that there was likely to be an impact as a result of the completed development, but that such an impact was not likely to be significant.

83 I would therefore reject Ground 5 of the appeal.

12. Conclusions

84 This was, within the context of Sch.2, a relatively modest proposal to develop a site in an urban area which had had various uses over the years. The conclusion that the development was not likely to have a significant effect on the environment has not been shown to be in any way irrational. The judge was right to reject the judicial review challenge and, if my Lords agree, I would dismiss the appeal against her decision.

DAVID RICHARDS LJ:

85 I agree.

LEWISON LJ:

86 I also agree.

PRESTON NEW ROAD ACTION GROUP v SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

COURT OF APPEAL (CIVIL DIVISION)

Simon, Lindblom & Henderson, LJJ: 12 January 2018

[2018] EWCA Civ 9; [2018] Env. L.R. 18

Environmental impact assessments; Environmental policy; Fracking; Onshore exploration; Planning permission; Planning policy; Precautionary principle

H1 *Town and Country Planning—environmental assessment—permission for exploratory "fracking"—whether Inspector incorrectly interpreted and/or applied planning policy—whether failure to heed relevant principles on "cumulative effects" in relation EIA—whether failure to take into account potentially significant effects on the environment at the earliest possible stage—whether decision inconsistent in consideration of benefits and harmful effects of shale gas production—whether failure to apply the "precautionary principle"*

H2 The appellants (P) appealed against the High Court's dismissal of their applications for statutory review, under s.288 of the Town & Country Planning Act 1990. The applications related to decisions by the respondent (S) to allow appeals against refusal of planning permission for exploration works, including exploratory wells, and associated monitoring to test the feasibility of the commercial extraction of shale gas, on two sites, and for subsequent site restoration. The grounds of appeal were whether S had: (1) misconstrued and misapplied policy within the Minerals Core Strategy, Minerals Local Plan, National Planning Policy Framework (NPPF), and Fylde Local Plan; (2) failed to heed the relevant principles on "cumulative effects" in relation to Environmental Impact Assessment (EIA); (3) failed to act in accordance with the principle, under the EIA regime that potentially significant effects on the environment ought to be taken into account at the earliest possible stage; (4) been inconsistent through taking into account the benefits of shale gas production but leaving out of account the harmful effects it would have; and (5) failed to apply the "precautionary principle", in particular by discounting evidence of uncertainty over the possible effects of the development on human health and assuming that the regulatory regime would operate effectively.

H3 **Held**, in dismissing the appeal:

H4 (1) The inspector and S had not misinterpreted or misapplied and of the policy as alleged. No planning judgment had been unlawfully exercised and the essential requirements of a fair procedure in relation to consideration of the relevance of policy in the Fylde Local Plan had also been fulfilled.

H5 (2) The judge's approach to, and conclusions on, the approach to "cumulative effects" had been correct. The crucial points were that the scheme was a single, clearly defined project limited to exploration for shale gas on the two sites, and the associated monitoring, and the consent procedure for it was not a "multi-stage consent process". The consent procedure was confined to the approval or rejection of the present proposals for exploration and monitoring. That project did not include any subsequent commercial production, which would be the subject of a second, distinct and different project, should the exploration project prove the existence of a viable resource of gas. The grant of planning permission for the exploration and monitoring works did not, and could not, pre-empt or pre-judge the determination of any such future application. That possible future proposal would have to be considered on its own planning merits when the time came, in the light of the assessment contained in its own environmental statement. The effects of such an operation were, therefore, neither direct effects of the project under consideration nor "indirect, secondary [or] cumulative" effects of it. That analysis was also in accordance with Government Planning Practice Guidance. There was no question of the purpose of the EIA Directive being circumvented by splitting into separate parts or phases what was truly a single project. Those findings also addressed the question of the timing of the EIA.

H6 (3) There had been no defect in the assessment in the environmental statement. Greenhouse gas emissions associated with exploration, including the extended flow testing phase, had been fully assessed. Gas produced during that phase, when piped into the grid, would merge with existing supplies to consumers. It would be an indistinguishable part of the existing supply, not additional to that supply, and so not lead to an increase in greenhouse gas emissions.

H7 (4) The proposition that S took into account the potential benefits of shale gas production, but not the harm it would cause to the environment, did not reflect his relevant conclusions.

H8 (5) On the "precautionary principle" ground, the question for the court was whether, as a matter of planning judgment, the inspector could reasonably have reached the conclusions she did in the light of the evidence before her. Both the inspector and S had been satisfied that the relevant regulatory controls would operate effectively to prevent harm to the environment and to human health arising from the proposed development, where such harm lay beyond the reach of the statutory planning regime. Not only was this conclusion properly open to them on the evidence; it was also entirely consistent with the "precautionary" approach. For the purposes of a planning decision, it was a perfectly rational conclusion, that was not undermined by the existence of scientific doubt or dispute.

H9 **Cases referred to:**

Abraham v Wallonia (C-2/07) EU:C:2008:133; [2008] Env. L.R. 32

Afton Chemical Ltd v Secretary of State for Transport (C-343/09) [2011] C.M.L.R 16; ECJ (4th Chamber)

Bowen-West v Secretary of State for Communities and Local Government [2012] EWCA Civ 321; [2012] Env. L.R. 22

Brown v Carlisle City Council [2010] EWCA Civ 523; [2011] Env. L.R. 5

CILFIT Srl v Ministero della Sanita (283/81) EU:C:1982:335; [1983] 1 C.M.L.R. 472; ECJ

Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government [2012] EWCA Civ 379; [2012] Env. L.R. 34
Ecologistas en Acción v Ayuntamiento de Madrid (C-142/07) EU:C:2008:445; [2009] P.T.S.R. 458; [2009] Env. L.R. D4; ECJ (3rd Chamber)
Engbers v Secretary of State for Communities and Local Government [2016] EWCA Civ 1183; [2017] J.P.L. 489
Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 825; [2014] P.T.S.R. 1471; [2014] J.P.L. 1259
Friends of the Earth Ltd's Application for Judicial Review, Re [2017] NICA 41; [2018] Env. L.R. 7
Hopkins Development Ltd v Secretary of State for Communities and Local Government [2014] EWCA Civ 470; [2014] P.T.S.R. 1145; [2014] 2 E.G.L.R. 91
Mansell v Tonbridge and Malling BC [2017] EWCA Civ 1314; [2018] J.P.L. 176
R. (on the application of An Taisce (The National Trust for Ireland)) v Secretary of State for Energy and Climate Change [2013] EWHC 4161 (Admin)
R. (on the application of An Taisce (The National Trust for Ireland)) v Secretary of State for Energy and Climate Change [2014] EWCA Civ 1111; [2015] P.T.S.R. 189; [2015] Env. L.R. 2
R. (on the application of Blewett) v Derbyshire CC [2003] EWHC 2775 (Admin); [2004] Env. L.R. 29
R. (on the application of Frack Free Balcombe Residents Association) v West Sussex CC [2014] EWHC 4108 (Admin)
R. (on the application of Frack Free Ryedale) v North Yorkshire County Council [2016] EWHC 3303 (Admin); [2017] Env. L.R. 22
R. (on the application of Holding & Barnes Plc) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23; [2003] 2 A.C. 295; [2002] Env. L.R. 12
R. (on the application of Khan) v Sutton LBC [2014] EWHC 3663 (Admin)
R. (on the application of Littlewood) v Bassetlaw DC [2008] EWHC 1812 (Admin); [2009] Env. L.R. 21
R. (on the application of Mott) v Environment Agency [2016] EWCA Civ 564; [2016] 1 W.L.R. 4338; [2017] Env. L.R. 1
R. (on the application of TW Logistics Ltd) v Tendring DC [2013] EWCA Civ 9; [2013] 2 P. & C.R. 9; [2013] 1 E.G.L.R. 83
Secretary of State for Communities and Local Government v Hopkins Homes Ltd [2017] UKSC 37; [2017] 1 W.L.R. 1865; [2017] P.T.S.R. 623
St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643
Tesco Stores Ltd v Dundee City Council [2012] UKSC 13; [2012] P.T.S.R. 983; 2012 S.C. (U.K.S.C.) 278
West Midlands Probation Committee v Secretary of State for the Environment, Transport and the Regions (1998) 10 Admin. L.R. 297; (1998) 76 P. & C.R. 589; CA (Civ Div)

H10 **Legislation referred to:**
Town and Country Planning Act 1990 s.288
Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (Habitats)

Town and Country Planning (Inquiries Procedure) (England) Rules 2000 (SI 2000/1624) rr.14 & 17
Planning and Compulsory Purchase Act 2004 s.38
Climate Change Act 2008
Directive 2011/92 on the effects of public and private projects on the environment (EIA) art.3 and Annex IV
The Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (SI 2011/1824) reg.2 and Sch.4

H11 *Mr M. Willers QC* and *Ms E. Dehon*, instructed by Richard Buxton Environmental and Public Law, appeared on behalf of the appellant.
Mr D. Elvin QC and *Mr D. Blundell*, instructed by Government Legal Department, appeared on behalf of the first respondent.
Ms N. Lieven QC and *Mr Y. Vanderman*, instructed by Herbert Smith Freehills LLP, appeared on behalf of the third and fourth respondents.

JUDGMENT

LINDBLOM LJ:

Introduction

1 Did the Secretary of State for Communities and Local Government err in law in granting planning permission for exploration works to test the feasibility of extracting shale gas by the process of hydraulic fracturing—commonly known as "fracking"—at two sites in Lancashire? That is the basic question in these two appeals. It does not raise any novel or controversial issue of law.

2 Though they are concerned only with exploration for shale gas, and not with its commercial extraction, the proposals have attracted strong opposition in the local communities affected by them. Our task, however, is not to consider whether the Secretary of State's decision was right. Any view the court might hold about "fracking", or about the planning merits of these particular proposals, is entirely irrelevant. What we must do, and all we can do, is to decide whether the Secretary of State committed any error of law. To do this we must apply well established principles governing the review of planning decisions, recently confirmed by this court in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 (see my judgment, at [6]).

3 In the first appeal the appellant is the Preston New Road Action Group; in the second, Mr Gayzer Frackman. The appeals are against the order of Dove J, dated 25 April 2017, by which he dismissed applications made under s.288 of the Town and Country Planning Act 1990 challenging the decisions of the Secretary of State, the first respondent in both appeals, to allow appeals by Cuadrilla Bowland Ltd and Cuadrilla Elswick Ltd against refusals of planning permission by Lancashire County Council as mineral planning authority. I shall refer to both companies simply as "Cuadrilla". Their proposals were for exploration works, including exploratory wells, and associated monitoring to test the feasibility of the commercial extraction of shale gas, on two sites—one at Plumpton Hall Farm, off Preston New Road, near Fylde, the other at Roseacre Wood, Roseacre Hall, Roseacre and

Wharles, near Preston, and to restore the sites to agriculture once exploration has concluded.

4 In June 2015 the county council refused both applications for the Preston New Road site and the application for exploration works at Roseacre Wood, but granted planning permission for monitoring works at Roseacre Wood, subject to conditions. Cuadrilla appealed. An inspector appointed by the Secretary of State, Ms Wendy McKay, held an inquiry in February and March 2016. In a report dated 4 July 2016 she recommended that the appeals for the Preston New Road development and for the monitoring works at Roseacre Wood be allowed, and that for the exploration works at Roseacre Wood be dismissed. In his decision letter, dated 6 October 2016, the Secretary of State allowed the appeals for the Preston New Road development, and for the Roseacre Wood monitoring works. But instead of dismissing the appeal for the exploration works on that site, he decided to re-open the inquiry to enable Cuadrilla to submit further evidence on highway capacity and safety, and indicated that he was minded to allow the appeal if the new evidence was satisfactory. Both challenges came before Dove J at a "rolled-up" hearing on 15 and 16 March 2017. He dismissed both applications. The action group's appeal is against the judge's order where it concerns the development proposed at Preston New Road. Mr Frackman's relates to the proposals on both sites.

5 A full account of the relevant facts is to be found in Dove J's judgment, in [6]–[37]. It is not necessary to repeat that narrative here. I gratefully adopt it.

The issues in the appeals

6 The two appeals raise quite different issues. In the first appeal there are four live grounds, which give rise to these main issues:

(1) whether the Secretary of State misconstrued and misapplied Policy CS5 of the Joint Lancashire Minerals and Waste Development Framework Core Strategy ("the minerals core strategy") (ground 1 of the appeal);
(2) whether the Secretary of State misconstrued and misapplied Policy DM2 of the Joint Lancashire Minerals and Waste Local Plan: Site Allocation and Development Management Policies—Part One ("the minerals local plan") (ground 5);
(3) whether the Secretary of State misconstrued and misapplied the policy for "protecting and enhancing valued landscapes" in paragraph 109 of the National Planning Policy Framework ("the NPPF") (ground 3); and
(4) whether the Secretary of State's decisions were vitiated by procedural unfairness—because he concluded that Policy EP11 of the Fylde Local Plan was not engaged by the proposals without giving the parties the opportunity to comment on that conclusion (ground 4).

In the second appeal, the four main issues are these:

(1) whether, for the purposes of Directive 2011/92/EU, as amended ("the EIA Directive"), the Secretary of State failed to heed the relevant principles on "cumulative effects"—in particular, for the direct impact of the extended flow testing phase of the proposed development, and for the indirect impact of the production stage of the project (ground 1);
(2) whether he failed to act in accordance with the principle, under the regime for environmental impact assessment ("EIA"), that potentially significant

effects on the environment ought to be taken into account at the earliest possible stage (ground 2);

(3) whether his decisions are flawed by inconsistency because he took into account the benefits of shale gas production but left out of account the harmful effects it would have (ground 3); and

(4) whether he failed to apply the "precautionary principle", in particular by discounting evidence of uncertainty over the possible effects of the development on human health and assuming that the regulatory regime would operate effectively (grounds 4 and 5).

Issue (1) in the first appeal—Policy CS5 of the minerals core strategy

7 The development plan at the time of the Secretary of State's decisions comprised the minerals core strategy (adopted in February 2009), the minerals local plan (adopted in September 2013) and the saved policies of the Fylde Local Plan (adopted in 2003 and altered in 2005). It seems sensible to set out the relevant policies together.

8 Policy CS5 of the minerals core strategy is in section 6.5, under the heading "Achieving Sustainable Minerals Production". The relevant part of it states:

> "…
> Criteria will be developed for the site identification process, and also for considering other proposals brought forward outside the plan-making process, to ensure that:
>
> …
> (ii) features and landscapes of historic and cultural importance and their settings are protected from harm and opportunities are taken to enhance them;
>
> …
> (iv) proposals for mineral workings incorporate measures to conserve, enhance and protect the character of Lancashire's landscapes;
>
> …
> (vii) sensitive environmental restoration and aftercare of sites takes place, appropriate to the landscape character of the locality and the delivery of national and local biodiversity action plans. Where appropriate, this will include improvements to public access to the former workings to realise their amenity value.
> … ".

9 Policy DM2 of the minerals local plan, "Development Management", states:

> "Development for minerals or waste management operations will be supported where it can be demonstrated to the satisfaction of the mineral and waste planning authority, by the provision of appropriate information, that all material, social, economic or environmental impacts that would cause demonstrable harm can be eliminated or reduced to acceptable levels. In assessing proposals account will be taken of the proposal's setting, baseline environmental conditions and neighbouring land uses, together with the extent to which its impacts can be controlled in accordance with current best practice and recognised standards.

> In accordance with Policy CS5 and CS9 of the Core Strategy developments will be supported for minerals or waste developments where it can be demonstrated to the satisfaction of the mineral and waste planning authority, by the provision of appropriate information, that the proposals will, where appropriate, make a positive contribution to the:
>
> • Local and wider economy
> • Historic environment
> • Biodiversity, geodiversity and landscape character
> • Residential amenity of those living nearby
> • Reduction of carbon emissions
> • Reduction in the length and number of journeys made
>
> This will be achieved through for example:
>
> • The quality of design, layout, form, scale and appearance of buildings
> • The control of emissions from the proposal including dust, noise, light and water
> • Restoration within agreed time limits, to a beneficial afteruse and the management of landscaping and tree planting.
> • The control of the numbers, frequency, timing and routing of transport related to the development".

The "Justification" for the policy states, in para.2.2.1, that "[minerals] and waste developments … are essential for the nation's prosperity, infrastructure and quality of life", but acknowledges that "they have the potential to cause disruption to local communities and the environment due to the nature of their operations …". It says that "[these] impacts can often be addressed through the sensitive design and operation of the facility". Paragraph 2.2.3 says that "[a] balance needs to be struck between the social, economic and environmental impacts of, and the need for, the development", and "[thus], if the adverse impacts of the operations cannot be reduced to acceptable levels through careful working practices, planning conditions or legal agreements, then the operation will not be permitted"; and para.2.2.4 that "[the] impact of a development can be positive or negative; short, medium or long term; reversible or irreversible; permanent or temporary". Under the heading "Visual", para.2.2.8 says that "[careful] consideration of the siting of the development, the method of working and the layout and design of the site will be required to mitigate any visual impact". Paragraph 2.2.27 says that Policy DM2 "should be read within the context of [minerals core strategy] Policies CS5, CS9 and Appendix F".

10 In a section of the Fylde Local Plan headed "Building Design and Landscape Character", Policy EP11 states:

> "New development in rural areas should be sited in keeping with the distinct landscape character types identified in the Landscape Strategy for Lancashire and the characteristic landscape features defined in Policy EP10. Development must be of a high standard of design. Matters of scale, features and building materials should reflect the local vernacular style."

11 Paragraph 109 of the NPPF appears in s.11, "Conserving and enhancing the natural environment", in the part headed "Delivering sustainable development". So far as is relevant here, it states:

"109. The planning system should contribute to and enhance the natural and local environment by:

• protecting and enhancing valued landscapes, …

… ."

12 In the final section of her report, under the heading "Overall Conclusions—Landscape and Visual Impact [Preston New Road Exploration Works]", the inspector drew together her main conclusions on the effect that the proposed development would be likely to have on the landscape:

"12.149 I conclude that the development would not require the removal of any significant existing landscape features and any landscape change would not be of a permanent nature. However, having regard to aesthetic and perceptual considerations, there would be a significant impact upon the landscape during the first phase of the development that would last about two and a half years. These significant landscape effects would be limited to a distance of up to around 1km from the site. There would be no material indirect adverse landscape effects on any neighbouring local landscape character areas.
12.150 The significant impact on the landscape would be short-term during the first phase of the development, although there would be some varying degree of impact for the duration of the temporary permission. This would be wholly reversible and the site would be fully restored after 75 months. The mitigation proposed is reasonable and would represent a positive contribution, as far as can be achieved, to the appearance of the site. The restoration proposals would reinstate the localised landscape characteristics, such that there would be no lasting change to landscape character."

In paras 12.151 and 12.152 she turned to the part of Policy DM2 that concerns the effect of development on "landscape character", and then to Policy CS5:

"12.151 Policy DM2 supports development that makes a positive contribution to matters such as landscape character, "*where appropriate*". It also indicates that this might be achieved through the quality of design, layout, form, scale and appearance of buildings and restoration within agreed limits, to a beneficial after use and the management of landscaping and tree planting. Given the nature of the development, there are obvious limitations on what can be achieved in terms of design, layout and appearance.
12.152 Nevertheless, having regard to the limited direct landscape impacts, and the proposed mitigation, I consider that the scheme incorporates measures that would at least serve to conserve and protect Lancashire's Landscape Character. The impacts on positive landscape features would not be lasting changes. The restoration of the site at the end of the temporary period in a manner appropriate to the Landscape Character of the locality would be in accordance with Policy CS5. Although there are landscape impacts that would cause demonstrable harm which cannot be eliminated, I am satisfied that they have been reduced to an acceptable level. The development would therefore be in accordance with Policy DM2."

In para.12.153 she addressed the action group's contention that the proposed development would conflict with Policy EP11 of the Fylde Local Plan:

> "12.153 [The action group] submits that the siting of the development would not be in keeping with the distinct landscape character types identified in the landscape strategy for Lancashire and it is therefore in conflict with Policy EP11. However, it is hard to envisage any shale gas development that could be sited without a degree of conflict with that strategy. As indicated above, I do not consider that this policy can be sensibly applied to these schemes. … ."

In para.12.154, she stated her conclusion on the likely effects of the development on a "valued" landscape, in the context of the policy in paragraph 109 of the NPPF:

> "12.154 Although there would be an adverse impact upon a 'valued' landscape, this particular landscape is valued only at local level and does not have the highest status of protection. Given the temporary nature of the development, and the mitigation and restoration proposals, there would be no conflict in the long-term with the aim of the NPPF to conserve and enhance the natural environment."

As to "visual effects", she concluded in para.12.155:

> "12.155 Whilst there would be some significant adverse visual effects, only a low number of residential receptors would experience effects of that magnitude. These significant effects would only arise during the drilling, fracturing and initial flow testing phase over a period of some 29 months. The mitigation proposed is reasonable and the limitations in what can be achieved in that respect are acknowledged. There would be additional adverse visual impacts, including upon users of transport corridors over and above what has been identified in the LVIA. However, these would not amount to significant impacts. There would be little scope for any cumulative visual issues between the Preston New Road and Roseacre Wood during this phase, or with any other developments within the area."

She returned to Policy DM2 in para.12.156:

> "12.156 Policy DM2 supports minerals development where it can be demonstrated that the proposals would, where appropriate, make a positive contribution to the residential amenity of those living nearby. There are examples set out showing how this might be achieved. In terms of siting of the development, [the action group's] witness could not point to a better location for the developed part of the site. The development would be sited in a location where only a relatively small number of residential properties would experience a significant adverse impact. The reduction in height of the drill rig to 36m would serve to keep the development as low as practicable to minimise visual intrusion. A lighting scheme would be in place and other mitigation is proposed including the colour of the fencing and other structures. It seems to me that all appropriate measures to mitigate the impact on visual amenity have been included within the scheme. There would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2."

Finally, in para.12.157, she stated her conclusions on landscape and visual impact, recalling the county council's relevant reasons for refusal:

> "12.157 Based on the evidence given above in relation to the reasons for refusal pertaining to both landscape and visual issues, and my inspections of the site and surroundings, I conclude that the development at Preston New Road would not 'cause an unacceptable adverse impact on the landscape' nor would it 'result in an adverse urbanising effect on the open and rural character of the landscape and visual amenity of local residents' . The landscape and visual impacts associated with the scheme would not be unacceptable."

Those conclusions were repeated, largely verbatim, in the inspector's "Overall Conclusions", in paras 12.791–12.797, and, in substance, in paras 12.821–12.828—culminating in her conclusion, in para.12.828, that "there are no other material considerations that indicate other than that the [Preston New Road exploration works] should be permitted in accordance with the Development Plan, subject to the imposition of appropriate planning conditions".

13 In his decision letter the Secretary of State said, in [4], that "except where stated" he agreed with his inspector's conclusions on all four appeals. In [24] he said he agreed with the inspector, in para.12.18 of her report, that "Policy DM2 is consistent with the NPPF and should be given full weight, and … on its own it provides a sufficient basis to judge the acceptability of the appeal proposals in principle". He said in [50] that he had "given very careful consideration to the effect that the proposed development [at Preston New Road] would have on the character and appearance of the surrounding rural landscape and the visual amenities of local residents". In [51] he said he agreed with the inspector, in para.12.85 of her report, that "the landscape does have some value at local level", that "the appeal site displays a number of positive characteristics identified by the Lancashire Landscape Strategy", and that it is therefore "a 'valued' landscape in NPPF terms". In [52] he also agreed with the inspector that "the combined effect of the changes would result in a significant impact on the immediate landscape that would be perceived from a wider area of about 1km", and that "the adverse landscape effects of greatest significance would be experienced during the first phase of the development and this would be a short-term impact". He said (ibid.) that he had "taken into account that the particular effects associated with the proposed development would be reversed at the end of the temporary six-year period, and that any localised changes to landscape components would be fully remediated …". In [54] he said:

> "54. For the reasons given at IR12.117–12.120, the Secretary of State agrees with the Inspector that the proposal would not affect the outlook of any residential property to such an extent that it would be so unpleasant, overwhelming and oppressive that it would become an unattractive place to live (IR12.118). He agrees that the significant effects would only arise during the earlier phases and would therefore be limited in their duration and would not be experienced throughout the temporary six-year period (IR12.120). …".

He also agreed, in [55], that "any cumulative landscape and visual effects would be very limited and would certainly not be of any significance", and, in [56], that the imposition of a condition limiting the height of the drilling rig to 36 metres was appropriate. And he went on, in [57], to say this:

> "57. The Secretary of State has considered the Inspector's overall conclusions on landscape and visual impact. For the reasons given at IR12.149–12.153, he agrees with the Inspector at IR12.152 that although there are landscape impacts that would cause demonstrable harm which cannot be eliminated, they have been reduced to an acceptable level and the development would therefore be in accordance with Policy DM2. … For the reasons given at IR12.70 and IR12.155–12.156, he agrees with the Inspector at IR12.156 that there would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2. Overall he agrees with the Inspector's assessment at IR12.157 that the landscape and visual impacts associated with the scheme would not be unacceptable."

Under the heading "Planning balance and overall conclusions", he concluded, in [66], that "the proposal would be in accordance with the development plan taken as a whole", and, in [70], "that there are no material considerations indicating other than that the [Preston New Road exploration works] development should be permitted in accordance with the development plan, subject to the imposition of appropriate planning conditions …".

14 The approach the court must take when dealing with an argument that a planning decision-maker has misinterpreted or misapplied a planning policy requires no explanation beyond what has recently been said by the Supreme Court in *Suffolk Coastal District Council v Hopkins Homes Ltd* [2017] UKSC 37, [2017] 1 W.L.R. 1865 (see Lord Carnwath's judgment, at [22]–[26]), and by this court in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314 (see my judgment, at [41]). The court must remember that planning policies should not be construed as if they were provisions in a statute or a contract (see the judgment of Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] P.T.S.R. 983, at [17]–[22]). Its role here is limited (see the judgment of Lord Carnwath in *Suffolk Coastal District Council*, at [21]–[25]). It risks exceeding that role if it neglects the basic distinction between discerning the meaning of a planning policy—read in its "proper context" and with common sense—and bringing public law principles to bear on the application of that policy in a planning decision. It must not step too far in interpreting policies written for planning decision-makers, in language intended to inform their exercise of planning judgment, not for judges considering the lawfulness of a planning decision when challenged.

15 For the action group, Dr David Wolfe QC submitted that both the inspector and the Secretary of State misinterpreted and misapplied Policy CS5, and that Dove J was wrong not to accept that they did. The inspector had concluded that the policy would be complied with because the harm to the landscape would only be temporary. Dr Wolfe pointed out that the policy does not say that it only concerns harm likely to be lasting or permanent, but not harm that is likely to be only temporary. Nor, he submitted, can such a qualification be implied. Any likely harm within the scope of the second, fourth and seventh objectives stated in the policy, even if not harm to landscape of "historic [or] cultural importance", and whether it would be lasting or short-lived, would be a breach of the policy. In principle, there was no reason why the protection from harm afforded by the policy should be withheld if the harm, perhaps serious, would last only a short time and then be removed or repaired. The duration of harm to the landscape is one of the relevant

factors in the Guidelines for Landscape and Visual Impact Assessment methodology. In this case, submitted Dr Wolfe, the harm would not be transient. It would last about two and a half years while the exploration works were in place, and the site would only be restored after that if the commercial production of shale gas did not go ahead. This was, inevitably, a conflict with Policy CS5. The duration of any harm to the landscape, whether long or short, is to be taken into account under s.38(6) of the Planning and Compulsory Purchase Act 2004 as a material consideration to be weighed against any conflict with Policy CS5. In failing to acknowledge this breach of development plan policy, submitted Dr Wolfe, the inspector and the Secretary of State neglected the statutory imperative in s.38(6)—that the decision "must be made in accordance with the development plan unless material considerations indicate otherwise". This was a clear error of law.

16 That argument was rejected by Dove J He could not accept an interpretation of Policy CS5 in which the policy is read as prohibiting any harm to the landscape, including temporary harm. This was "a strategic policy within a hierarchy of policies created by the development plan[,] … setting out the strategic objectives to enable more detailed criteria to be developed for land allocation and decision-taking". It was "not designed or expressed for the purpose of being applied in a literal manner in decision-taking without regard … to other policies prepared pursuant to it to give detailed effect to the objectives [it] sets out" (at [84] of the judgment). Policy DM2 of the minerals local plan was "the articulation of [Policy] CS5 at the level of decision-taking … [,] obviously prepared, examined and adopted to give expression to [it] at [that] level" (at [85]). The language of Policy DM2, which contemplates "harm" being reduced to "acceptable levels" was "wholly inconsistent" with the action group's construction of Policy CS5. The Secretary of State had not failed to discharge the decision-maker's duty under section 38(6) (at [86]). Given that mineral development often entails the restoration of the land once extraction is finished, it would be "surprising", said Dove J, "if the duration of the development, and the duration of any harm, was irrelevant to the overall assessment of harm for the purpose of [Policy CS5]" (at [87]). The inspector had "correctly interpreted and applied" the policy in paras 12.152–12.156 of her report, as had the Secretary of State in paras 50–57 of his decision letter (at [88]).

17 I think those conclusions of the judge are sound, and I agree with them.

18 As was submitted to us by Mr David Elvin QC for the Secretary of State and Ms Nathalie Lieven QC for Cuadrilla, one must start with the purpose of Policy CS5 and the context in which it sits. There are three things to say about that. First, Policy CS5 is a policy specifically concerned, in part, with the working of minerals. It is a truism that minerals can only be worked where they are found, and, equally, that they can only be found where they lie (see the judgment of Ouseley J in *Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 2643 (Admin), at [67], and the judgment of Stephen Richards LJ in the appeal in that case ([2014] EWCA Civ 825, at [37])). The working of minerals will likely alter the landscape during the extraction phase, but such effects will often be reversed or repaired in the course of the site's restoration. The same may also be said of works required in the exploration for minerals. Secondly, the policy is, both in its status and in its terms, a strategic policy, whose aim is "Achieving Sustainable Minerals Production". It looks to a further policy to translate its objectives and requirements into "[criteria] … for considering … proposals brought forward outside the plan-making process …"—applications for planning

permission for development on unallocated sites. That further policy is Policy DM2 of the minerals local plan. These two policies should be read together, taking the two elements of the development plan to which they belong as a coherent whole (see the judgment of Lewison LJ in *R. (on the application of TW Logistics Ltd) v Tendring District Council* [2013] EWCA Civ 9, at [18]). Thirdly, therefore, to apply these two policies in such a way as to create unnecessary tension or conflict between them would be wrong. If a proposal is found to comply with Policy DM2 it is difficult to see how it could nevertheless be found to be in conflict with Policy CS5.

19 Even if one were to ignore Policy DM2 altogether—which, of course, one cannot—it would still not be possible to read Policy CS5 as standing in the way of every minerals development except those likely to cause no more than "de minimis" harm before restoration is complete. That is not what the policy says, and not what it means. The expressions "protected from harm", "protect" and "protected" in the policy are not to be read as foreclosing the exercise of planning judgment. On the contrary, they require planning judgment to be exercised, having regard to the particular facts and circumstances of the case in hand. The broad concept of "harm" is not defined in Policy CS5. The policy allows a planning judgment, in a particular case, that temporary effects on the landscape—even if likely to last for several years before their remediation—do not offend its objectives and do not constitute a conflict with it. The duration of any such harm, and the likely effectiveness of the site's restoration, are not material considerations outside the policy. They are, as Mr Elvin and Ms Lieven submitted, embraced within the policy itself. They go to the exercise of planning judgment required under the policy.

20 The connection between the two policies is not only plain from their content. It is clear also from the reference to Policy CS5 in Policy DM2 itself, and from para.2.2.27 of the supporting text. Upon the adoption of the minerals local plan, Policy CS5 did not become irrelevant for the purposes of development control decision-making. It contains concepts that bear on the determination of planning applications and appeals. But Policy DM2 refined those concepts into an approach to be adopted in decision-making, case by case, and specific considerations to be taken into account in deciding whether a particular proposal is acceptable or not. In describing that approach and in specifying those considerations, it is clearly intended to be relevant to all proposed "[developments] for minerals …", including—as is common ground between the parties here—exploration to establish whether a commercially worthwhile mineral resource exists in a particular location.

21 The county council did not specifically rely on Policy CS5 in refusing planning permission for the proposed development. It did rely, however, on Policy DM2. In para.12.18 of her report the inspector said that she "[concurred] with [the county council] that Policy DM2, on its own, provides a sufficient basis to judge the acceptability of the appeal proposals, in principle", and that "[the] policy is consistent with the NPPF and should be given full weight"—conclusions explicitly endorsed by the Secretary of State in [24] of his decision letter. Nonetheless, the inspector did not put Policy CS5 to one side. She tested the proposals' acceptability against it, as well as against Policy DM2. Her relevant conclusions, in para.12.152 of her report, were expressly endorsed by the Secretary of State in [57] of his decision letter.

22 The inspector's assessment in paras 12.149–12.157 of her report, adopted by the Secretary of State in [57] of his decision letter, was faithful to the terms of both policies, properly construed in their context. She made the planning judgments required by the policies. In doing so, she had regard to the nature, extent and duration of the impacts the development would have on the landscape, on landscape character and on visual amenity. She took into account the mitigation and ultimate restoration proposed within the project. And she clearly gave significant weight to the fact that the adverse effects would largely be temporary. She concluded, in para.12.152, that the proposals were in accordance with Policy CS5, and, in para.12.156, that because the harmful landscape and visual impacts had been "reduced to an acceptable level" they were not in conflict with Policy DM2. Her relevant findings and conclusions are legally unassailable.

23 The judge was, in my view, right to conclude as he did on this ground of the action group's challenge. The inspector and the Secretary of State did not misdirect themselves in their handling of Policy CS5. They did not misinterpret that policy, nor misapply it. In this respect, they discharged the s.38(6) duty lawfully. No relevant planning judgment was either neglected or exercised unreasonably. Nor were the relevant reasons inadequate or unclear—either in the inspector's report or in the Secretary of State's decision letter.

Issue (2) in the first appeal—Policy DM2 of the minerals local plan

24 The action group's argument here is, essentially, that the inspector and the Secretary of State misunderstood or simply ignored the second part, or "limb", of Policy DM2, and failed to grapple with the question of whether the proposed development would make a "positive contribution" of any relevant kind—including a "positive contribution" to the "[residential] amenity of those living nearby". Dr Wolfe submitted that this was required by the policy. Before Dove J it was also argued that the inspector misapplied the policy when she said, in para.12.118 of her report, that "even on the basis of around 11 residential receptors being affected in this way, the total number … that would experience a significant visual impact remains low", and that the development "would not affect the outlook of any residential property to such an extent that it would be so unpleasant, overwhelming and oppressive that it would become an unattractive place to live".

25 Dove J did not find those submissions persuasive. He said it was "obvious from the way in which [Policy DM2] is set out that it is possible that compliance with either of the parts of the policy will lead to the development proposal being supported" (at [96] of his judgment). The second part of the policy did "not establish a policy test for the acceptability of development which requires it to demonstrate a positive contribution to any or all of the socio-economic or environmental headings …". The language of the first part of the policy, said the judge, "clearly [called] for a planning judgment as to what level of demonstrable harm would be acceptable". The inspector reached a conclusion on that question in para.12.156 of her report—that "the harm arising from visual impact associated with the development had been reduced to an acceptable level". In doing so, "she took account of … the number of residential properties affected, the extent of the impact and the duration of that impact". The "formulation" she adopted in para.12.118 was "a rational approach to the question of the threshold of acceptability" (at [97]). Her planning judgment here was "entirely lawful" (at [98]).

26 Like the judge, I cannot accept that the inspector and the Secretary of State either misinterpreted Policy DM2 or failed to apply it lawfully, in accordance with s.38(6).

27 Policy DM2 does not withhold its support from proposals involving "… environmental impacts that would cause demonstrable harm" if such harm cannot be "eliminated". It supports proposals in which harm is minimized. That is the sense in which the first part of the policy countenances development whose harmful impacts on the environment can be either "eliminated" or "reduced to acceptable levels". This will always be a matter of planning judgment for the decision-maker. The policy also speaks of impacts being "controlled in accordance with current best practice and recognised standards", not of their having to be avoided or removed or repaired altogether. The text in the "Justification" for the policy—in particular, in paras 2.2.3, 2.2.4 and 2.2.8—is in similar terms. This approach clearly applies to all proposals to which the policy relates, and to the whole range of their potential impacts on the environment. As is implied by the words "account will be taken of the proposal's setting …", those impacts include the effects a development is likely to have on the landscape and, indeed, all its visual impacts.

28 When Policy DM2 refers, in its second part, to Policy CS5, and says that "developments will be supported … where it can be demonstrated to the satisfaction of the mineral and waste planning authority … that the proposals will, where appropriate, make a positive contribution" to the interests referred to, it is again acknowledging the need for a decision-maker to exercise planning judgment. In an appeal, planning judgment will be exercised by an inspector and the Secretary of State. The concept of a "positive contribution" is distinctly protean. The policy does not say what that expression means. It provides examples of considerations relevant to the decision-maker's exercise of planning judgment when assessing whether a proposal does promise a relevant "positive contribution". But, crucially, it does not require the refusal of planning permission for proposals that do not hold in prospect a "positive contribution", let alone a "positive contribution" in the form of some specific planning benefit. That is not how the policy works. This part of it is deliberately qualified by the important words "where appropriate". If, for whatever reason, it is not "appropriate" for a particular proposal to make a "positive contribution" of some kind, the policy does not rule out, or presume against, the grant of planning permission for it. If the policy had purported to do that, it would have been contradicting itself, because it would then, in effect, have been withdrawing its explicit support for development whose "… environmental impacts that would cause demonstrable harm can be … reduced to acceptable levels". The policy must be read as a whole. Read as a whole, it does not make a "positive contribution" a prerequisite to compliance. The second part of it does not create an additional requirement to the first.

29 Dr Wolfe asked rhetorically what would be the purpose of the second part of Policy DM2 if only the lower threshold for the policy's support need be surmounted—namely "demonstrable harm … reduced to acceptable levels", in the first part of the policy—and not also the higher threshold—namely "a positive contribution", in the second. The answer is twofold. First, the policy explicitly qualifies the applicability of its second part, but not its first, with the words "where appropriate". It thus acknowledges that in some cases a "positive contribution" will not be "appropriate", and need not be sought or required. Secondly, however, the second part of the policy has the effect of encouraging a "positive contribution" to be made where that is "appropriate", and it assists developers and third parties

by identifying the kinds of "positive contribution" the county council has in mind. Both the first and the second part of the policy have an obvious and different purpose. And the third explains, with examples, how its objectives will be "achieved".

30 Whether, in a particular case, harm has been "reduced to acceptable levels", whether or not it is also "appropriate" to seek or require a "positive contribution" from the developer, what that "positive contribution" may be—whether, in particular, it should take the form or some planning benefit, and whether the proposed development complies with Policy DM2 as a whole, are all, quintessentially, matters of planning judgment for the planning decision-maker.

31 There is nothing in the inspector's report or in the Secretary of State's decision letter to indicate, on their part, any misunderstanding or misapplication of Policy DM2. In para.1.156 of her report, for example, the inspector said that "Policy DM2 sets out the principles that will govern the management of development, and that applications will be supported where any material, social, economic or environmental impacts that would cause demonstrable harm can be eliminated or reduced to acceptable levels", and also that the policy "expresses support for applications which, for example, make a positive contribution to … landscape character; … and sets out some ways in which these goals can be achieved". In my view it cannot sensibly be suggested that she overlooked the second part of the policy or misdirected herself as to what it means. Her conclusions in paras 12.151, 12.152 and 12.156 faithfully reflect the language and purpose of the policy. She did not ignore the second part of it. On the contrary, in para.12.151, she stressed the critical words "where appropriate", which appear in that part of the policy. She went on, in the same paragraph, to acknowledge that in this particular case there were "obvious limitations on what can be achieved in terms of design, layout and appearance". But she then, in para.12.152, concluded that the scheme incorporated measures that would "at least serve to conserve and protect Lancashire's Landscape Character". In the last two sentences of that paragraph she said that "[although] there are landscape impacts that would cause demonstrable harm which cannot be eliminated", she was "satisfied that they have been reduced to an acceptable level", and that "[the] development would therefore be in accordance with Policy DM2". And in the final sentence of para.12.156 she said "[there] would be harm arising from the visual impact associated with the development but this has been reduced to an acceptable level such that there would not be conflict with Policy DM2".

32 Those conclusions must be read together with everything else the inspector said in paras 12.149–12.157. When that is done, their meaning is unmistakeable: that in the inspector's planning judgment—with which the Secretary of State expressly agreed in [57] of his decision letter—the proposals did not conflict with Policy DM2 taken as a whole, and not merely that they complied only with the first part of the policy, disregarding the second. The inspector did not fail to exercise any relevant planning judgment called for by the policy, and the planning judgment she did exercise is legally faultless. There is no error of law here.

33 Finally, it seems to me to be a misreading of what the inspector said in para.12.118 of her report to take it as a softening of the requirement in the first part of Policy DM2 for harmful impacts to be "reduced to acceptable levels". This was, as Dove J concluded (in [97] of his judgment), a legitimate and realistic application of that policy test, through the exercise of planning judgment in the

particular circumstances of this case—nothing more and nothing less. Here too I agree.

34 In my view, therefore, there is no basis on which the court could hold that the Secretary of State erred in law in his conclusion that the proposed development was "in accordance with the development plan taken as a whole", including, in particular, both Policy CS5 of the minerals core strategy and Policy DM2 of the minerals local plan. That conclusion is not upset by any misinterpretation or misapplication of relevant development plan policy, nor by any unlawful planning judgment.

Issue (3) in the first appeal—paragraph 109 of the NPPF

35 In para.12.81 of her report the inspector recorded the fact that the appeal site at Preston New Road was "not within an area formally designated for its natural scenic beauty or landscape qualities", and that "[there] would be no impact upon any designated landscape to which the NPPF, para.115, requires great weight to be given". She went on to say that "[although] the site does not fall within an area to which the highest status of protection should be afforded, the NPPF, para.109, also seeks to protect and enhance 'valued' landscapes". In para.12.85 she said that "the landscape does have some value at local level and the appeal site displays a number of positive characteristics identified by the Lancashire Landscape Strategy". For those reasons she "[considered] that it is a 'valued' landscape in NPPF terms". I have already quoted her relevant conclusion, in para.12.154, that "[given] the temporary nature of the development, and the mitigation and restoration proposals, there would be no conflict in the long-term with the aim of the NPPF to conserve and enhance the natural environment". The Secretary of State agreed, in [57] of his decision letter.

36 Dr Wolfe's argument here was similar to his submissions on the previous issue. He submitted that the inspector and the Secretary of State adopted an incorrect interpretation of the policy in the first bullet point in para.109 of the NPPF. The use of the concept of harm in "the long-term" to modify the simple and unqualified terms of the policy for the protection and enhancement of "valued landscapes" in paragraph 109 was, he said, unjustified. There was no such "temporal" restriction. Any harm to such a landscape, of whatever duration, was necessarily a breach of the policy. Having concluded in para.12.154 of her report that there would be "an adverse impact" on a locally "valued" landscape, the inspector ought to have concluded that the proposals were in conflict with the policy. In not doing so, she erred in law.

37 Dove J rejected that argument. Having in mind Lord Clyde's observations on the wide, strategic purpose of national planning policy in his speech in *R. (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment Transport and the Regions* [2001] UKHL 23, [2001] 2 A.C. 295 (at [140]), he concluded that the policy for "protecting and enhancing valued landscapes" in para.109 of the NPPF was "to be … understood as a high-order strategic objective of the planning system as a whole", to be achieved by means of "the planning policies which address the appraisal of landscape impact in the context of particular kinds of development". It was not to be interpreted "as providing that any harm, including temporary harm other than for a wholly insignificant or *de minimis* period, is a breach of [it]". It "calls for an overall

assessment of harm to the landscape, including short-term and any longer-term resolution of that harm and beneficial effects, in order to reach a planning judgment … as to whether or not the valued landscape has been protected and enhanced" (at [92]). The inspector had "properly understood and interpreted" the policy in her conclusion in para.12.154, and so had the Secretary of State in accepting that conclusion (at [94]).

38 Mr Elvin and Ms Lieven supported those conclusions of the judge; I think rightly. In my view the inspector and the Secretary of State interpreted the policy in para.109 of the NPPF correctly, and applied it lawfully, as one of the "material considerations" under s.38(6).

39 Paragraph 109 of the NPPF is a broad statement of national planning policy for the "natural and local environment". The introductory words declare what the "planning system" should do—that it "should contribute to and enhance the natural and local environment". The objective with which we are concerned is also expressed in general terms—"protecting and enhancing valued landscapes". The means by which the planning system is to achieve that objective are not stated. But the two ways in which it obviously might do so are plan-making and the determination of planning applications and appeals in accordance with the relevant provisions of the development plan (unless material considerations indicate otherwise). As Lord Clyde said in *Alconbury* (in [140] of his speech), "[national] planning guidance can be prepared and promulgated and that guidance will influence the local development plans and policies which the planning authorities will use in resolving their own local problems". This seems to me a good description of the policy in para.109 of the NPPF. Dove J recognized this.

40 In Lancashire, for minerals development, there are development plan policies that do what the "planning system" is encouraged to do by para.109. They are Policy CS5 of the minerals core strategy and Policy DM2 of the minerals local plan. It is in those policies that the county council, as mineral planning authority, has provided for the protection and enhancement of the landscape in decision-making on proposals for minerals development, including a landscape that is locally "valued". If a scheme complies with those policies, as the inspector and the Secretary of State concluded here, it is difficult to see how it could be regarded as being in conflict with national policy in paragraph 109.

41 As Dove J also recognized, the policy in para.109 does not compel a decision-maker to find conflict with it when the harmful effects of minerals development on a "valued" landscape would, in the course of the project, be reversed or mitigated. The policy is not framed in terms of preventing any harm at all to such landscape. When applied in the making of a planning decision, it requires from the decision-maker a planning judgment on the question of whether, in the circumstances, the general policy objective of "protecting and enhancing" such landscapes would be offended or not. It is for the decision-maker to consider whether any temporary harm to the landscape would breach the policy. The nature of the damage to the landscape, its duration, the importance of the "valued" landscape, and the degree of formal protection it has been given, if any, are likely to be relevant factors.

42 In this case the relevant exercise of planning judgment is to be seen in para.12.154 of the inspector's report. She acknowledged that "there would be an adverse impact upon a 'valued' landscape". But against this she weighed three considerations: first, that the landscape in question was "valued only at local level and does not

have the highest status of protection"; second, "the temporary nature of the development"; and third, "the mitigation and restoration proposals". Taken together, those three considerations were enough, in her view, to justify the conclusion that "there would be no conflict in the long-term with the aim of the NPPF to conserve and enhance the natural environment". Her use of the phrase "in the long-term" was appropriate. It was not intended as a gloss on the policy in para.109. It was simply to stress that, as the inspector said, the development would be "temporary" and that "mitigation" and "restoration" were part of the project. When tested against the policy in para.109, the proposals were, in her view, acceptable. This was a planning judgment of the kind with which the court will rarely interfere. There is no basis on which it could do so in this case.

Issue (4) in the first appeal—Policy EP11 of the Fylde Local Plan

43 In a statement of common ground prepared by the county council and Cuadrilla before the inquiry, and published, under rule 14 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, Policy EP11 was included in the list of development plan policies that the parties agreed "should be taken into account in the determination of [the Preston New Road exploration works] appeal" (paras 6.1 and 6.6.4(B) of the statement of common ground). At the inquiry, however, Cuadrilla's planning witness, Mr Mark Smith, maintained in his proof of evidence (at para.8.24) that Policy EP11 was not relevant to the proposed development. He was cross-examined on that evidence by counsel for the county council, Mr Alan Evans, and by counsel for the action group, Dr Ashley Bowes. The county council's planning witness, Mrs Katie Atkinson, was also cross-examined on this point by Ms Lieven, for Cuadrilla. Submissions were made on it in closing, by Dr Bowes, by Mr Evans, and by Ms Lieven. Cuadrilla's position at that stage, as Ms Lieven explained in her closing submissions, was that Policy EP11 was not a relevant policy.

44 In para.12.25 of her report, under the heading "The relevance of the Fylde Borough Local Plan", the inspector recorded Cuadrilla's argument that that the Fylde Local Plan "… does not purport to deal with minerals development and has no relevance to this form of development". She noted, however, that the statements of common ground produced by Cuadrilla and the county council "recognise the relevance to these appeals of policies in [the Fylde Local Plan]…". But she concluded, in para.12.31:

> "12.31 In relation to Policy EP11, [Cuadrilla] claim that this is obviously a policy aimed at built development and not an engineering operation such as shale gas exploration. … [The county council] accepts that the requirement that ["building materials should reflect the local vernacular style"] could not apply to the proposed development. However, it seems to me that it is not only that aspect of the policy that is obviously inapplicable, but also the main thrust of the policy is aimed at the assimilation of new built development, rather than the type of development that is the subject of these appeals. This is an instance where the most appropriate policy against which to consider the landscape character impact and the design of the proposed development falls within [the minerals local plan]. Policy EP11 cannot sensibly be applied to these schemes. …".

That last conclusion—that "Policy EP 11 cannot sensibly be applied to these schemes"—was repeated by the inspector in paras 12.153 and 12.823 of her report, which the Secretary of State incorporated in his own reasons, respectively, in [57] and [66] of his decision letter.

45 The action group's grievance, essentially, is that Cuadrilla changed their position on the relevance of Policy EP11 during the inquiry, that this had not been made clear before Ms Lieven closed their case, and was never the subject of an appropriate amendment to the statement of common ground; that its own case before the inspector had been based on the contention that the policy was relevant and was breached; that its closing submissions had been presented on the understanding that Cuadrilla conceded the relevance of the policy; that it was never given an opportunity, either by the inspector or by the Secretary of State, to make representations in the light of Cuadrilla's alleged volte-face; and that this was unfair and prejudicial to it, and enough to vitiate the Secretary of State's decisions.

46 Dove J rejected that argument. Dr Wolfe submitted to us that he was wrong to do so.

47 The judge reminded himself of relevant case law illustrating the principles of procedural fairness when applied in planning appeals—in particular, the decisions of this court in *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 470; [2014] P.T.S.R. 1145 and *Secretary of State for Communities and Local Government v Engbers* [2016] EWCA Civ 1183. He saw a distinction between cases in which an inspector differs from an agreed position reached between the parties and recorded in a statement of common ground, and a case such as this, in which one of the parties itself departs from a previously agreed position (paragraph 104 of his judgment). He concentrated on Beatson LJ's observations in *Hopkins Developments Ltd* about the "right to be heard" as a principle of natural justice—in particular (at [87]), that "what is required is an opportunity to be heard, an opportunity to participate in the procedure by which the decision is made", and (at [90]) that, as the authorities referred to by Jackson LJ had shown, "what is needed is knowledge of the issues in fact before the decision-maker …, and an opportunity to adduce evidence and make submissions on those issues". In Dove J's view, therefore, it was "necessary to examine whether, notwithstanding the terms of [the statement of common ground, the action group] was aware that there was an issue over the applicability of [Policy] EP11 and had an opportunity to present evidence and submissions on the point" (at [109]).

48 Dove J focused on Mr Smith's cross-examination by Dr Bowes, which he had quoted earlier in his judgment (at [34]). In the course of that cross-examination Mr Smith accepted that, on a "[strict] interpretation" of Policy EP11, "a development that was not in keeping with the landscape character types identified in the Landscape Strategy for Lancashire would conflict with [it]". But he then said that, "as [he had] explained in [cross-examination] from Mr Evans, that policy is principally directed toward new permanent build development not minerals …", and added that he "[did] not think this policy really gave any consideration to those temporary forms of development such as minerals". In answer to a further question from Dr Bowes, he acknowledged that Policy EP11 was "in the statement of common ground" as one of the "policies … relevant to consideration of the exploration application".

49 That exchange showed, said the judge, that there was "clearly an issue as to the relevance and applicability of [Policy] EP11". The action group had taken the "opportunity to provide evidence and submissions on that issue". It had done so "in pointing out to the [inspector] in [its] closing submissions that [Policy] EP11 was contained within the [statement of common ground], and also that Mr Smith had accepted a conflict with that policy". As Dove J said, Dr Bowes "properly and effectively took up the points in this regard with [Cuadrilla's] witness, called evidence from his own expert on the issue, and then incisively set out the case for the [inspector] in his closing submissions" (at [110] of the judgment). The relevant submissions made by Dr Bowes in closing, which the judge had also quoted (at [35]), had referred to the fact that Policy EP11 had been included in the list of "policies … engaged by the appeal scheme" in the statement of common ground (para.5 of Dr Bowes' closing submissions), reminded the inspector that "Mr Smith accepted in [cross-examination] that a conflict with [the Landscape Strategy for Lancashire] must … amount to a conflict with … [Policy] EP11" (at [19]), contended that "[the] proposal …, by definition, conflicts with the development plan policies adopted to promote that Strategy", and confirmed that "[accordingly], we say there [is] a clear and inescapable conflict with policies EP11 Fylde Local Plan (2005), DM2 Lancashire Waste and Minerals Plan (2013) and CS5 Lancashire Waste and Minerals Core Strategy (2009)" (at [29]).

50 In these circumstances, the judge found himself "unable … to conclude that there was any procedural unfairness in what occurred during … the inquiry". The action group had "participated in [the] debate" on the applicability of Policy EP11. Cuadrilla's position, as put to the inspector in their closing submissions, had been "clearly foreshadowed in their evidence and indeed challenged in that respect by [the action group's] counsel". The inquiry had been attended by representatives of the action group throughout, and the proceedings transmitted live on a webcast. But in any event the judge was "satisfied that there was no unfairness to [the action group] in the respect alleged …" (at [111]). He was "unimpressed" by the suggestion that it could have sought to make further submissions to the Secretary of State after the inquiry had been closed, in response to those made for Cuadrilla. Whether or not the Secretary of State would have disregarded such submissions, as he had a discretion to do under rule 17(4) of the inquiries procedure rules, was "moot" (at [112]).

51 I am in no doubt that the judge's approach here was correct, and I do not think his conclusion could realistically have been any different.

52 At the inquiry there plainly was an issue between Cuadrilla, on one side, and the county council and the action group, on the other, as to the relevance and applicability of Policy EP11 to these proposals. The inspector grasped that issue. She dealt with it under a specific heading in her conclusions, and resolved it, in paras 12.31 and 12.153 of her report, in favour of Cuadrilla. She accepted their contention that Policy EP11 was not relevant to proposals for hydrocarbon exploration, and that it "cannot sensibly be applied to these schemes". That conclusion was adopted by the Secretary of State. It has not been questioned in these proceedings. And it is legally secure.

53 The critical question, however, is not whether the relevance of Policy EP11 was a live issue at the inquiry. It is whether the action group had a fair opportunity, in the course of the inquiry, to address that issue. The judge concluded that the action group did have that opportunity, and that neither the inspector nor the Secretary

of State breached any principle of procedural fairness in not inviting further submissions from it after the inquiry had closed. That conclusion was consistent with the relevant legal principles, illuminated by Beatson LJ in *Hopkins Developments Ltd* (at [84]–[90]).

54 The fact that Dr Bowes took the opportunity to cross-examine Mr Smith as he did on the relevance and effect of Policy EP11 shows that the action group saw this as a matter that it should tackle in this way. The questions put to Mr Smith on Policy EP11 were perfectly proper questions, designed to establish his position on the relevance and effect of the policy, and the submissions made by Dr Bowes in closing, in the light of Mr Smith's evidence on the point, were perfectly proper submissions. Mr Evans' submissions for the county council were to similar effect. He too recognized the need to address the relevance of Policy EP11 as a controversial matter. But Mr Smith's answers in cross-examination—including that he "[did] not think [Policy EP11] really gave any consideration to those temporary forms of development such as minerals"—did not constrain Ms Lieven in submitting as she did in closing on behalf of Cuadrilla. Nor was the inspector compelled to accept Mr Smith's evidence, or the evidence of any other witness, on the relevance and effect of Policy EP11, or the submissions made on this issue by counsel for any of the parties. She had to make up her own mind on these matters, and so did the Secretary of State. Ultimately, the correct interpretation of Policy EP11, had it been controversial in these proceedings, would have been a matter for the court. But lest there be any doubt about that, I should say that in my view the policy was neither incorrectly understood nor unlawfully applied. The inspector's conclusions in paras 12.31 and 12.153, on which the Secretary of State depended in his own conclusions in paragraph 57 of the decision letter, are, in my view, unimpeachable.

55 As the judge recognized, the question here was whether the action group had "an opportunity to participate in the procedure by which the decision [was] made". It manifestly did. It exercised its "opportunity to participate" in the inquiry process as it chose, with the benefit of advice and representation by experienced planning counsel. It was able to tackle the relevance of Policy EP11 as an issue before the inspector and Secretary of State, and to do so effectively in the course of the inquiry. A fair procedure did not require it to be given a different opportunity to do that, or a renewed opportunity after the inquiry was closed. The opportunity it had was ample. The procedure was, at every stage, fair. Dr Bowes was not present at the inquiry throughout, though it seems that members of the action group were there when he was not, and the proceedings were broadcast. He was able to cross-examine Cuadrilla's witnesses, including Mr Smith, and at the end of the inquiry to make closing submissions—though not to go last, which was Cuadrilla's right as appellant. The essential requirements of a fair procedure were, in the circumstances, wholly fulfilled.

56 In my view, therefore, the appeal must fail on this ground too.

Issues (1), (2) and (3) in the second appeal—the lawfulness of the assessment under the regime for Eia and alleged inconsistency in the Secretary of State's approach

57 These three issues relate closely to each other and are best dealt with together.

58 Recital (2) to the EIA Directive states that "[pursuant] to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle …", and that "[effects] on the environment should be taken into account at the earliest possible stage …". Article 3(1) requires assessment of "the direct and indirect significant effects of a project …". Paragraph 5 of Annex IV states that "… [the] description of the likely significant effects on the factors specified in art.3(1) should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-term, medium-term and long-term, permanent and temporary, positive and negative effects of the project …". The corresponding provision in para.4 of Pt 1 of Sch.4 to the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 ("the EIA regulations"), is in materially the same terms. The definition of an "environment statement" in reg.2 of the EIA regulations is a statement "… that includes such of the information referred to in Part 1 of Schedule 4 as is reasonably required to assess the environmental effects of the development and which the applicant can, having regard in particular to current knowledge and methods of assessment, reasonably be required to compile".

59 For Mr Frackman, Mr Marc Willers Q.C. made three main submissions on these issues. The first was that the Secretary of State had neglected the relevant principles applied by the Court of Justice of the European Union in cases where, under the regime for EIA, a decision-maker has had to consider "indirect, secondary [or] cumulative effects" on the environment. In particular, he had failed to require an assessment that included both the direct impacts on the environment of the extended flow testing phase of the proposed development and the indirect impacts of the succeeding production stage if the exploration phase proved the existence of a viable resource of shale gas. Exploration was only being carried out "with a view to production". Production was "reasonably foreseeable", and was the "end product of exploration". That, in essence, is the argument on issue (1). Mr Willers sought to rely here on the decisions in *Abraham v Region Wallonne* (Case C-2/07) [2008] E.C.R. I-1197 and *Ecologistas v Ayuntamiento de Madrid* (Case C-142/07) [2009] P.T.S.R. 458 and decisions of the domestic courts to similar effect, among them the Court of Appeal's decision in *R. (on the application of Brown) v Carlisle City Council* [2011] Env. L.R. 5 and the first instance decision in *R. (on the application of Khan) v Sutton London Borough Council* [2014] EWHC 3663 (Admin). Secondly, he submitted, the judge erred in rejecting the argument that the Secretary of State had acted contrary to the EIA Directive and the EIA regulations by failing to ensure that environmental effects were taken into account and assessed "at the earliest possible stage" (see the decisions of the Court of Justice of the European Union in *R. (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* (C-201/02) [2004] Env. L.R. 27, at [51]–[53], and [62], and *Brussels Hoofdstedelijk Gewest v Vlaams Gewest* (C-275/09) [2011] Env. L.R. 26, at [33]). That is the argument on issue (2). And thirdly, Mr Willers submitted, the Secretary of State's approach was inconsistent in that he had taken into account the benefits of the production of shale gas without weighing against those benefits the harmful environmental impacts of production. That is the argument on issue (3).

60 Dove J rejected Mr Willers' argument on "indirect, secondary [and] cumulative" effects. He identified the legal principles in play and relevant European and domestic case law, including *Abraham*, *Ecologistas*, *Brown v Carlisle City Council* and *R.*

(on the application of Frack Free Ryedale) v North Yorkshire County Council and another [2016] EWHC 3303 (Admin). In his view "there were no indirect, secondary or cumulative impacts which had to be assessed arising from the suggestion that there might be some continuation of the use of the site for gas extraction after the completion of the development for which permission was sought". The proposal before the Secretary of State "had to be addressed on its own terms". It was "strictly limited in time and solely for the purpose of exploration of the potential gas resource" (at [126] of the judgment). And "any further gas extraction beyond that for which the application had been made would have to be the subject of a new planning application either … under section 70 of the 1990 Act, or alternatively … for a change of the conditions on the present consent under section 73 …". Either way, "a new [environmental statement] would have to be prepared describing the likely significant effects of that further application". There were "no indirect, secondary or cumulative effects to be evaluated in the present [environmental statement]", which was "therefore legally adequate" (at [127]).

61 In the judge's view there was a parallel between this case and *Frack Free Ryedale*. In that case the gas produced by the proposed works was to be burned at Knapton generating station under an existing planning permission, and within the existing limits permitted by the Environment Agency. The proposal involved no net increase in capacity. An argument that it was an integral part of a more substantial project, including Knapton generating station, was held to have been rightly abandoned (see at [39] of the judgment of Lang J in that case). Here, as Dove J said, "quite apart from the fact that this complaint was not raised either prior to or during the public inquiry, there is and was no evidence to support any suggestion that the provision of gas from the [appeal] site to the grid, and thereby to residential or industrial users, will lead to any increase in the consumption of gas and therefore the generation of greenhouse emissions in the UK". It was, he said, a "perfectly sensible assumption" on the evidence before the Secretary of State "that any gas provided to the grid during the extended flow phase [would] simply replace gas that would otherwise be consumed by residential and industrial users supplied by the grid …". There were thus "no indirect, secondary or cumulative [effects] of the kind suggested arising from the exploration phase which required inclusion within the [environmental statement]". A "clear distinction" was to be drawn between, on the one hand, the production of gas during the "extended flow phase when the wells would be connected to the grid" and, on the other, "the flaring which would occur during the initial flow testing phase". That flaring would "plainly [give] rise to the burning of gas and generation of greenhouse gases that would not otherwise arise" and was "therefore … properly the subject of assessment within the [environmental statement]" (at [128]).

62 The judge concluded, therefore, that the approach indicated by the Government's guidance in para.27-120-20140306 of the Planning Practice Guidance: Minerals published by the Government in March 2014 ("the PPG") was correct and in accordance with the requirements of the EIA Directive and the EIA regulations. As that guidance makes plain, the judge said, proposals for exploration should be considered on their own merits "without speculation or hypothetical assumptions in relation to future activities which will require their own consenting and EIA processes" (at [129]).

63 In my view the judge's approach and conclusions were correct. As Mr Elvin and Ms Lieven submitted, the court must focus on the nature of the consent

procedure for the project under consideration. The crucial point here is that the scheme before the Secretary of State was a single, clearly defined project limited to exploration for shale gas on the two sites, and the associated monitoring. And the consent procedure for it was not a "multi-stage consent process" (see paras [21]–[25] of Lord Hope's speech in *R. (on the application of Barker) v Bromley London Borough Council* [2007] 1 A.C. 470, which concerned an outline planning permission for major development at Crystal Palace and the subsequent reserved matters approvals required; and paras [32] and [33] of the judgment in *Brussels Hoofdstedelijk Gewest*, which concerned successive works of development at Brussels Airport). The consent procedure here was confined to the approval or rejection of the present proposals for exploration and monitoring. The project did not include any subsequent commercial production. That would be the subject of a second, distinct and different project—if, but only if, the exploration project proved the existence of a viable resource of gas. The granting of planning permission for the exploration and monitoring works did not, and could not, pre-empt or pre-judge the determination of that future application, if it were ever to be made. That possible future proposal would have to be considered on its own planning merits when the time came, in the light of the assessment contained in its own environmental statement. The purpose, and sole purpose, of the present project was to establish whether or not shale gas existed in a sufficient quantity and was capable, both technically and viably, of being extracted should planning permission later be granted for its extraction. If the appeals before the Secretary of State succeeded, and planning permission for the proposals before him were granted, there would not be any approval for the commercial extraction of gas. The effects of such an operation were, therefore, neither direct effects of the project under consideration nor "indirect, secondary [or] cumulative" effects of it.

64 As the Government has recognized in the written ministerial statement issued by the Secretary of State for Energy and Climate Change on 16 September 2015, "[we] do not yet know the full scale of the UK's shale resources nor how much can be extracted technically or economically". That, of course, is a statement of the national position. But, as Mr Elvin and Ms Lieven submitted, the scale of resources present in particular locations and the technical and economic feasibility of extraction in those locations are also uncertain. That was so here: hence the need for exploration. What any future extraction project might comprise was also, at this stage, a matter of conjecture. So it was not only unnecessary, and inappropriate, for the environmental effects of that unknown development to be included in the EIA for the present project. It was also impossible.

65 That logic is not disturbed by Mr Willers' submission that the purpose of the exploration project was not merely to establish the presence of a commercial resource of shale gas, but also to enable commercial extraction. The fact that commercial extraction would only be proposed if the exploration project proved the presence of a commercial resource does not mean that the two operations are necessarily and indivisibly parts of the same project. They are not. Extraction, if it is ever proposed, will only proceed after exploration and monitoring have been carried out. But this does not justify the concept that the two projects, if there are two, will have "cumulative" effects on the environment, or that the present project—for exploration—will have "indirect" or "secondary" effects that are, in truth, impacts associated only with a hypothetical future project—for extraction.

66 As the judge concluded, this straightforward analysis accords not only with common sense, but also with the Government's guidance in para.27-120-20140306 of the PPG, under the heading "Should mineral planning authorities take account of the environmental effects of the production phase of hydrocarbon extraction at the exploration phase?". The guidance emphasizes that "[individual] applications for the exploratory phase should be considered on their own merits" and "should not take account of hypothetical future activities, for which planning consent has not yet been sought, since the further appraisal and production phases will be the subject of separate planning applications and assessments". It also acknowledges that "[when] determining applications for subsequent phases, the fact that exploratory drilling has taken place on a particular site is likely to be material in determining the suitability of continuing to use that site only insofar as it establishes the presence of hydrocarbon resources".

67 A principle well established in both European and domestic authority is that the existence and nature of "indirect", "secondary" or "cumulative" effects will always depend on the particular facts and circumstances of the project under consideration (see Sullivan LJ's judgment in *Brown v Carlisle City Council*, at [21, and Laws LJ's judgment in *Bowen-West v Secretary of State for Communities and Local Government* [2012] Env. L.R. 22, at [28]). An equally robust principle is that an environmental statement is not expected to include more information than is reasonably required to assess the likely significant environmental effects of the development proposed, in the light of current knowledge (see, for example, the judgment of Patterson J in *Khan*, at [121]–[134]).

68 Dove J's conclusions on "indirect, secondary [and] cumulative" effects are entirely loyal to both of those principles. On the facts, in contrast with cases such as *Brown v Carlisle City Council*, the exploration and monitoring project under consideration here was a free-standing project of development, which did not depend on any other project, present or future, including any future proposals for the commercial extraction of shale gas. That is a material difference between this case and *Brown v Carlisle City Council*, where an environmental statement for the development of a freight distribution centre at an airport had not included an assessment of the effects of the associated improvements to the airport itself, which were part of the same project though the subject of a separate application for planning permission (see paras [29] and [30] of Sullivan J.'s judgment). In this case, the environmental statement for the project under consideration was a comprehensive environmental statement for that whole project, undertaken on the basis of what was known at the time, and without speculation as to the content and timing of some other future project, which might never happen. However broad a construction is placed on the expression "the direct and indirect significant effects of a project …" in art.3(1) of the EIA Directive, and the expression "any indirect, secondary, cumulative … effects of the project" in paragraph 5 of Annex IV, these concepts cannot be stretched to include effects that are not effects of the project at all (see paragraph 31 of Advocate General Kokott's Opinion in *Abraham*).

69 I do not see how Mr Willers' argument can gain any strength from European or domestic authority on EIA flawed by the splitting of projects into their constituent phases or parts—sometimes referred to as "salami slicing". The two decisions of the Court of Justice of the European Union most familiar in this context are *Abraham* and *Ecologistas*. The defect of the EIA in *Abraham* was that only the works of improvement to the infrastructure of the airport had been assessed, and

the increased numbers of flights that would be enabled by those improvements had not (see paras [26] and [42]–[46] of the court's judgment). The defect in *Ecologistas* was that the works for improving the Madrid urban ring road had been assessed separately, as a number of individual projects, rather than overall, as a composite whole (see paras [34]–[39] and [44]–[46] of the court's judgment). This case is quite different from those. In this case there is no question of the purpose of the EIA Directive being circumvented by splitting into separate parts or phases what is truly a single project. The assessment here was of the whole project, not merely parts of it.

70 The Non-Technical Summary of Cuadrilla's environmental statement explains, in subs.3.4.5, "Extended Flow Testing", that "[if] the flow of gas from the wells is assessed as being sufficient a period of extended flow testing may be undertaken", which "could last for 18 to 24 months per well"; and that "[natural] gas produced during extended flow testing … would not be burned in the flare stacks", but "… the well would be connected to the gas grid for use in homes or by business or industrial users". The assessment in ch.8 of the environmental statement, "Greenhouse Gas Emissions", embraces the full range of greenhouse gas emissions associated with the project. Paragraph 2 in that chapter states that "[both] direct and indirect GHG emissions have been assessed". Paragraph 3, in s.8.3, "Scoping and Consultation" confirms that "the assessment has taken into account the Scoping Opinion from [the county council] … and stakeholders", including Natural England, CPRE Lancashire, the Environment Agency and Public Health England. The "GHG emissions by source (ranged result in tCO_2e)" are set out in Table 8.3, in section 8.7, "Assessment". Paragraph 36 refers to Figure 8.3, "Percentage GHG emissions by source for the entire Project", which "shows the range of GHG emissions by emission source for all of the activities associated with the Project". It states that "[approximately] 70% of the Project greenhouse gas emissions can be attributed to flaring [i.e. the burning of gas in the flare stacks during the initial flow testing stage], which will be captured under the EU ETS"; that "[with] the embedded mitigation measures … proposed[,] fugitive gas emissions from the Site are expected to consist of un-combusted methane as a result of incomplete combustion in the flare, accounting for 13% of the total emissions"; and that "[the] embedded mitigation measures proposed are known to achieve an estimated reduction in fugitive emissions of 97%-98%". Paragraph 37 refers to Figure 8.4, "GHG emissions by Project stage …". It confirms that "[initial] flow testing is the most significant contributor due to flaring, accounting for approximately 87% of the Project carbon footprint". In the pie chart in Figure 8.4 the percentage of greenhouse gas emissions attributable to the extended flow testing phase is only 0.1104%. The "Chapter Summary—Greenhouse Gas Emissions" states:

> "…
> The greatest source (73%) of the project GHG emissions come from burning the gas in the flare. The total Project GHG emissions could be between 118,418 (lower range) to 124,397 (higher range) tCO_2e. The higher range is the equivalent of 0.002% of the current UK Carbon Budget set by the government and as such the Project's potential contribution to national GHG emissions is negligible. Furthermore, due to the conservative nature of the assessment there is potential for the actual GHG emissions to be even smaller."

71 There is, it seems to me, no force in Mr Willers' submission that the environmental statement was inadequate because it lacked an assessment of the effects of greenhouse gas emissions arising from the extended flow testing phase of the project—a point not raised before the inspector, and which emerged only in these proceedings. Because the extended flow testing phase would last some three years, Mr Willers described it as "production by any other name". In my view, however, the judge's conclusions on this argument in [128] of the judgment are plainly correct. There was no defect in the assessment in the environmental statement. Greenhouse gas emissions associated with exploration, including the extended flow testing phase, were fully assessed.

72 Gas produced during that phase, when piped into the grid, would merge with existing supplies to consumers. It would be an indistinguishable part of the existing supply, not additional to that supply. It would not, therefore, lead to an increase in greenhouse gas emissions (see the analogous conclusions in Lang J.'s judgment in *Frack Free Ryedale*, at [37]–[39]). As Ms Lieven emphasized, there was no evidence before the inspector and the Secretary of State to support a different conclusion. The idea that, in a project of exploration for shale gas such as this, as opposed to the commercial production of shale gas, the substitution of new gas for existing gas in the grid will raise the total consumption of gas by increasing gas usage, that significant additional greenhouse gas emissions are thus likely, and that there might be some conflict with the objectives of the Climate Change Act 2008, gains no credence in the report of the Committee on Climate Change, "Onshore Petroleum: The compatibility of onshore petroleum with meeting the UK's carbon budgets", published in March 2016, or in the Government's response, published in July 2016. As Mr Elvin and Ms Lieven submitted, the passages in the report on which Mr Willers relied do not serve to demonstrate that such consequences are likely. In Chapter 4, "Emissions relating to onshore petroleum extraction", the report states that "[exploration] emissions are generally small …", that "[small] volumes of gas may be generated during the development of the well, most of which is likely, at a minimum, to be burned in a flare", that "[it] should not be taken as a given that emissions from exploration will be low, especially for any extended well tests", and that "[appropriate] mitigation techniques should be employed where practical". Such statements do not undermine the integrity of the EIA undertaken for this project. They do not show that the burning of shale gas from the extended flow testing phase here would be likely to increase greenhouse gas emissions to any significant degree. The environmental statement effectively concludes to the contrary. It is not necessary to go as far as Mr Elvin said we could, and to accept, in the light of the Committee on Climate Change report, that domestically produced gas may in fact generate a lower level of greenhouse emissions than imported liquefied natural gas. It is enough for us to conclude, as in my view we can, that there is nothing before the court by way of evidence specific to this project of shale gas exploration to substantiate the shortcomings in the EIA asserted by Mr Willers.

73 In short, there is no evidence, let alone clear evidence, of any likely material increase in greenhouse gas emissions, or any other likely significant effect on the environment, that ought to have been addressed in the EIA but was not. In the circumstances, I cannot see how the court, adopting the conventional public law approach well settled in the relevant authorities, could find itself satisfied that the Secretary of State committed an error of law in accepting the assessment presented

in Cuadrilla's environmental statement (see Laws LJ's judgment in *Bowen-West*, at [36]–[42}, citing the judgment of Sullivan J., as he then was, in *R. (on the application of Blewett) v Derbyshire County Council* [2004] Env. L.R. 29, at [32] and [33]; and Lang J.'s judgment in *Frack Free Ryedale*, at [21]–[23]). Neither is there any demonstrable legal flaw within the assessment contained in the environmental statement, nor is the assessment demonstrably incomplete. The Secretary of State was entitled to regard the environmental statement as compliant with the definition in the EIA regulations, which looks to what an applicant may "reasonably" be required to provide. The judge's analysis was right.

74 It follows, in my view, that the second appeal cannot succeed on Mr Willers' main argument, on "indirect, secondary [or] cumulative" effects—issue (1). His submissions on the timing of assessment—issue (2), and on the alleged inconsistency in the Secretary of State's approach—issue (3), can be dealt with quite shortly.

75 The argument on the timing of assessment is, I think, misconceived. It fails on the same analysis as the argument on "indirect, secondary [or] cumulative" effects. The judge reminded himself of the European and domestic jurisprudence on EIA emphasizing the need for projects to be assessed in their entirety, rather than in partial or piecemeal fashion. It cannot sensibly be suggested that he overlooked a basic principle inherent in the need for a complete assessment: that such assessment must be timely—undertaken "at the earliest possible stage". These principles are not divorced from each other; they go together. Assessment must be complete. And to be complete, it must be timely. If a future project is truly separate from the project under consideration, the assessment of its likely significant effects in the environmental statement for the present project is both unnecessary and inappropriate. If it is also uncertain in its conception and content, an attempt to assess its effects in the environmental statement for the present project would also be futile and potentially misleading. Such an exercise would not be timely; it would be premature and untimely. One comes back then to the same basic point. If, in the future, a project emerges for the commercial production of shale gas on these two sites, it can only properly be the subject of assessment under the regime for EIA when it comes to be promoted as a real, not merely hypothetical, proposal in an application for planning permission (see the conclusions to similar effect in the judgment of Sir Michael Harrison in *R. (on the application of Littlewood) v Bassetlaw District Council* [2009] Env. L.R. 21, at [32]).

76 Mr Willers' argument alleging inconsistency in the Secretary of State's consideration of the possible future production of shale gas at the appeal sites is also, in my view, mistaken. Its premise is wrong. The proposition that the Secretary of State took into account the potential benefits of shale gas production, but not the harm it would cause to the environment, does not reflect his relevant conclusions.

77 In a section of the NPPF headed "Meeting the challenge of climate change, flooding and coastal change", para.93 says that "[planning] plays a key role in helping shape places to secure radical reductions in greenhouse gas emissions, minimising vulnerability and providing resilience to the impacts of climate change, and supporting the delivery of renewable and low carbon energy and associated infrastructure". In a subsequent section headed "Facilitating the sustainable use of minerals", para.147 says that, among other things, mineral planning authorities "should … when planning for on-shore oil and gas development, including

unconventional hydrocarbons, clearly distinguish between the three phases of development (exploration, appraisal and production) …".

78 In para.1.181 of her report, when summarizing relevant NPPF policy, the inspector noted the policies in paras 142–148, including the requirement that "decision makers should recognise a distinction between exploration, appraisal and production in the extraction of gas, including unconventional hydrocarbons". In para.12.686, under the heading "Conclusions on Climate Change", she concluded that "the projects would be consistent with the NPPF aim to support the transition to a low carbon future in a changing climate". She did "not consider that [para.93 of the NPPF] should be read in isolation, or applied out of context". Taking an "overall view of national policy", she was in "no doubt that shale gas is seen as being compatible with the aim to reduce [greenhouse gases] by assisting in the transition process over the longer term to a low carbon economy". And she was "satisfied that [Cuadrilla] have demonstrated … that all material, social, economic or environmental impacts that would cause demonstrable harm would be reduced to an acceptable level and that the projects represent a positive contribution towards the reduction of carbon". The proposed development would be in accordance with Policy DM2 of the minerals local plan and "relevant national policy." In para.12.757, under the heading "Economic benefits", she said:

> "12.757 I acknowledge that the [written ministerial statement of 16 September 2015] does make reference to the substantial benefits that exploring and developing our shale gas and oil resources could potentially bring. However, it seems to me that, in the light of the NPPF and [the PPG] guidance, the potential wider economic benefits of shale gas production at scale should be given very limited weight at this stage. … ."

In her "Overall conclusions", in para.12.826, she said that "[any] future proposal for production would require a further application and assessment" and "… little weight is attributed to the wider economic benefits that might be derived from shale gas production on a large scale". And in para.12.840, when dealing with the proposed monitoring works at Preston New Road, she acknowledged that "account should not be taken of hypothetical future activities relating to shale gas production over the wider area".

79 The Secretary of State concluded, in [28] of his decision letter that, in the light of the written ministerial statement of September 2015, "the need for shale gas exploration is a material consideration of great weight in these appeals …". In [36] and [37], under the heading "Climate change", he said:

> "36. The Secretary of State considers that the need for shale gas exploration set out in the [written ministerial statement] reflects … the Government's objectives in the [written ministerial statement], in that it could help to achieve lower carbon emissions and help meet its climate change target. …
> 37. Overall, the Secretary of State agrees with the Inspector's conclusion at IR12.686 that the projects would be consistent with the NPPF aim to support the transition to a low carbon future in a changing climate. He further agrees that [Cuadrilla] have demonstrated, by the provision of appropriate information, that all material, social, economic or environmental impacts that would cause demonstrable harm would be reduced to an acceptable level and

> that the projects represent a positive contribution towards the reduction of carbon, and that the proposed development would be in accordance with [Policy DM2 of the minerals local plan] and relevant national policy."

and in [47], under the heading "Economic benefits":

> "47. For the reasons given in IR12.749–12.769 and IR12.818, the Secretary of State agrees with the Inspector at IR12.769 that the local economic benefits of the exploration stage would be modest. He attributes little positive weight to these benefits. The Secretary of State notes that the Inspector considers little weight should be attributed to the national economic benefits which could flow from commercial production at scale at some point in the future, in the context of the exploratory works development which is the subject of these appeals. As the NPPF makes clear that each stage should be considered separately, the Secretary of State considers that in the context of these appeals, no weight should be attributed to the national economic benefits which could flow from commercial production in relation to these sites at scale at some point in the future."

80 As always, one must read the relevant passages in the inspector's report, and the corresponding conclusions in the Secretary of State's decision letter, fairly and as a whole—and not with the aim to find fault (see my judgement in *St Modwen*, at [7]). When that is done here, I cannot see how the Secretary of State's conclusions in [28], [36], [37] and [47] of his decision letter can be criticized. Those conclusions are cogent, and entirely compatible. They do not betray an unlawful approach.

81 One should not read more into [28], [36] and [37] than is actually there. The conclusion in [28], that the need for shale gas exploration should have "great weight", was one the Secretary of State was entitled to reach in the light of government policy. And it was consistent with his conclusions in [36] and [37] that the written ministerial statement and the NPPF encourage shale gas exploration as an activity consistent with the Government's objectives "to achieve lower carbon emissions and help meet its climate change target", and "to support the transition to a low carbon future in a changing climate"; and that the proposed development would "represent a positive contribution towards the reduction of carbon". The Secretary of State was not saying—nor could he—that this development would itself bring about a reduction in carbon emissions, or that such a benefit should weigh for it in the planning balance. Contrary to Mr Willers' submission, he did not give "significant weight", or any weight, to that supposition. He was merely recognizing, quite properly, that the development would help to achieve the objective of reducing carbon by establishing whether or not a commercially viable resource of shale gas existed on these sites. That makes sense. Exploration for shale gas is necessary before a commercial decision can be taken on the viability of production, and a planning decision on the merits of such development, if ever proposed. The Secretary of State's conclusion in [37] did not anticipate those future decisions. Rather, it acknowledged that such decisions would only be possible if the present proposals for exploration went ahead.

82 The conclusion in [47] of the decision letter, that "no weight" should be given to the "national economic benefits" of possible future "commercial production" was not at odds with those earlier conclusions. It was, however, a different conclusion from the inspector's in para.12.757 of her report, which was not that

"no weight" should be given to such benefits, but that they should have "very limited weight". The difference here was not simply one of degree; it was a difference of principle. The Secretary of State meant to stress it. He said that he noted—not that he agreed with—the inspector's conclusion as to weight, and he deliberately distanced himself from it. He plainly had in mind here the policy in para.147 of the NPPF, which is amplified in the guidance in para.27-120-20140306 of the PPG—in effect, that decision-makers must be careful to distinguish between "exploration" for hydrocarbons, "appraisal", and subsequent commercial "production" if proposed. He also referred to "commercial production" of shale gas on the appeal sites and its potential benefits—carefully and correctly—in uncertain terms: "… benefits which could flow from commercial production … at some point in the future" (my emphasis).

83 There is nothing legally wrong with any of that. The Secretary of State was, in my view, entitled to conclude as he did in those passages of his decision letter. As Mr Elvin and Ms Lieven submitted, there was nothing inconsistent in his conclusions, and nothing inconsistent between them and the approach taken in the EIA, which made no attempt to assess some future and still unknown proposal for shale gas production.

84 On all three of these issues, therefore, I think the second appeal must fail.

Issue (4) in the second appeal—the "precautionary principle"

85 Mr Willers submitted that the Secretary of State fell into error in his treatment of evidence on the possible effects of the proposed development on human health, and in assuming that the relevant regulatory regime would operate as it should; that there was "a real doubt" as to the health effects of shale gas production, which the Secretary of State failed to heed, and that these errors amounted to a failure to apply the "precautionary principle".

86 I am unable to accept those submissions. They were rejected by Dove J, who concluded that "the approach taken by the Inspector to the relationship between the decision-taking process and the planning regime and other regulatory regimes in paras 12.590–12.595 [was] entirely orthodox and unimpeachable" (at [137] of the judgment), and found himself "wholly unpersuaded that it [was] arguable that, taking account of the precautionary principle, it was irrational for the Inspector to recommend approval, and … [the Secretary of State] to accept that recommendation" (at [138]). I agree.

87 The argument here, essentially, is that the Secretary of State could not reasonably reach the conclusions he did on the possible health effects of the development—that his conclusions were irrational. Such a contention is never easy to sustain in a challenge to a planning decision. It is especially difficult when—as in this case—it goes to the decision-maker's exercise of planning judgment. Where a planning decision-maker accords appropriate respect to the position of a statutory environmental regulator, whose own decision-making, within its own statutory remit, is guided by expert scientific opinion, it will, I think, be rare for the court to interfere (see the judgment of Beatson LJ in *R. (on the application of Mott) v Environment Agency* [2016] EWCA Civ 564, at [67]–[82], and the judgment of Carnwath LJ, as he then was, in *Cornwall Waste Forum St Dennis Branch v Secretary of State for Communities and Local Government* [2012] EWCA Civ 379, at [34]).

88 The inspector devoted a lengthy passage of her report—in paras 12.636–12.662—to the issue of "Public Health and Public Concern". She concluded in para.12.655 that "[as] regards the hazards associated with potential exposure to air and water pollutants, [Cuadrilla] point out that such matters would be strictly controlled by [the Environment Agency] through the permitting system", and that "[this] would ensure that no levels which could have an impact on human health would be reached". She noted that the Annex to the written ministerial statement "provides support for that position". In the light of para.122 of the NPPF, and the court's decision in *R. (on the application of Frack Free Balcombe Residents Association) v West Sussex County Council* [2014] EWHC 4108 (Admin), she was "content that it could be assumed that the regulatory system would operate effectively to control such emissions", and that "[there] would be no health impacts resulting from these matters". In para.12.656 she said:

> "12.656 … [Dr David McCoy, an expert medical witness called at the inquiry on behalf of Friends of the Earth] identified noise and other nuisances as being the most likely causes of negative direct impacts on human health. I have given consideration to noise, visual amenity, and other potential impacts upon health and wellbeing elsewhere in this report. I do not believe that there will be additional negative health and wellbeing impacts on nearby communities associated with the matters raised by Dr McCoy. …".

In para.12.658 she said that the evidence of interested parties did "not lead [her] to find that the regulatory regime could not be relied upon to operate effectively in these cases". In para.12.659 she said Cuadrilla had accepted that "public concern is capable of being a material planning consideration", citing *West Midlands Probation Committee v Secretary of State for the Environment and Walsall Metropolitan Council* (1998) 76 P. & C.R. 589. Here, however, "the processes would be regulated and all pathways that could potentially impact upon human health would be monitored and appropriately controlled". She therefore agreed with Cuadrilla that "little weight should be given to these concerns". She did "not consider the expressed fear and anxiety can be regarded as being reasonably engendered or a justifiable emotional response to the projects in the light of the level of monitoring and controls that would be imposed upon the proposed activities". In para.12.661 she concluded that "[the] health impacts associated with these exploratory works appeals should be distinguished from those which might be associated with production at scale", and that "[the] available evidence does not support the view that there would be profound socio-economic impacts or the climate change impacts on health envisaged by Dr McCoy associated with these exploratory works". In para.12.662 she said:

> "12.662 I am satisfied that [Cuadrilla] have demonstrated, by the provision of appropriate information, that all potential impacts on health and wellbeing associated with the projects would be reduced to an acceptable level. The proposed development would be in accordance with [Policy DM2 of the minerals local plan, Policy CS5 and Policy CS9 of the minerals core strategy] and relevant national policy."

Those conclusions were repeated in her "Overall Conclusions", in paras 12.805–12.808 of her report.

89 The policy in para.122 of the NPPF, to which the inspector referred in para.12.655 of her report, states:

> "122. … [Local] planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. …".

The guidance in para.27-012-20140306 of the PPG is to the same effect.

90 In [34] of his decision letter, under the heading "Public health and Public concern", the Secretary of State said:

> "34. The Secretary of State has considered carefully the evidence and the representations that were put forward in respect of public health and public concern (IR12.636-12.662). He agrees with the Inspector for the reasons given at IR12.655 and IR12.658 that it could be assumed that the regulatory regime system would operate effectively to control emissions and agrees that there would be no health impacts arising from potential exposure to air and water pollutants. He has considered the potential health impacts of public concern. He agrees with the Inspector at IR12.659 that the processes would be regulated and all pathways that could potentially impact upon human health would be monitored and appropriately controlled, and therefore considers these concerns carry little weight in the planning balance. He agrees with the Inspector at IR12.661 that the available evidence does not support the view that there would be profound socio-economic impacts or climate change impacts on health associated with these exploratory works. He notes that there is no outstanding objection raised by Public Health England to the proposed development on public health impact grounds (IR12.644). Overall he agrees with the Inspector that [Cuadrilla] have demonstrated by the provision of appropriate information that all potential impacts on health and wellbeing associated with the projects would be reduced to an acceptable level, and further agrees that the proposed development would be in accordance with [Policy DM2 of the minerals local plan, Policy CS5 and Policy CS9 of the minerals core strategy] and relevant national policy (IR12.662)."

91 In attacking those conclusions, Mr Willers pointed to the evidence of Dr McCoy and various material that was before the inspector relating to health impacts, including a report written by Dr McCoy and Dr Patrick Saunders, entitled "Health & Fracking—The impacts & opportunity costs", published by Medact in 2015, a subsequent report written by Dr McCoy and Dr Alice Munro, entitled "Shale Gas Production in England—An Updated Public Health Assessment", published by Medact in 2016, and a document published in October 2015 by the Concerned Health Professionals of New York, entitled "Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (Unconventional Gas and Oil Extraction)". That last document adopted the opinion of the New York State Health Commissioner that "[the] overall weight of the evidence from the cumulative body of information contained in [the] Public Health Review demonstrates that there are significant uncertainties about the kinds of adverse health outcomes that may be associated with [high volume hydraulic fracturing], the likelihood of the occurrence of adverse health outcomes, and the effectiveness

of some of the mitigation measures in reducing or preventing environmental impacts which could adversely affect public health" (p.2).

92 It is not the court's task to review Dr McCoy's evidence or the content of the documents relating to human health relied on by objectors to the proposed development, or the evidence given by Mr Smith in his rebuttal proof of evidence. The question for the court is whether, as a matter of planning judgment, the inspector could reasonably reach the conclusions she did in the light of the evidence before her. In my view she undoubtedly could, not least because Dr McCoy himself expressed his conclusions in appropriately measured terms. In para.7.4 of his proof of evidence he said that "[from] the specific perspective of only shale gas exploration in two sites, my view is that while both projects *will* produce some health and environmental hazards, any negative direct impacts on human health will be concentrated in people living in the immediate surroundings of the two proposed sites and be most likely caused by the effects of noise and other nuisances"; and that "[depending] on the extent to which noise and other nuisances are effectively mitigated or tolerated, the level of negative impact may range from being negligible to being significant". As for "other hazards (notably water and air borne pollutants)", he said that "a negligible to low risk is due to the specific combination of the temporary and limited nature of shale gas exploration; and assumes that measures will be effectively applied to mitigate risk and harm".

93 Mr Willers did not point to any evidence before the inspector to negate the principle expressed in para.122 of the NPPF, that "[local] planning authorities should assume that [pollution control] regimes will operate effectively". That principle in national planning policy is not easy to reconcile with an argument that the Secretary of State has acted irrationally in making a planning decision on the assumption that other regulatory regimes, including those concerned with public health, will operate as they should. But even if the NPPF had not said so, that assumption would surely be a reasonable one for a planning decision-maker, unless there was clear evidence to cast doubt upon it. There was no such evidence here. Similar conclusions were reached by Gilbart J in *Frack Free Balcombe* (at [100]–[102]) and Patterson J in *R. (on the application of An Taisce (the National Trust for Ireland)) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin) (at [177]–[193]), in an analysis endorsed by the Court of Appeal ([2014] EWCA Civ 1111: see Sullivan LJ's judgment at [46]–[51]). As Mr Elvin and Ms Lieven submitted, the opposite conclusion is not supported by the decision of the Court of Justice of the European Union in *Afton Chemical Ltd v Secretary of State for Transport* (Case C-343/09) [2011] 1 C.M.L.R. 16—because in the United Kingdom a relevant regulatory regime, derived from the law of the European Union, already existed. In the circumstances, there was no "gap" in the relevant environmental controls. Nor is it possible for Mr Willers to argue, in effect, that statutory regulatory authorities with responsibilities relevant to human health were themselves unreasonable in failing to object to the proposals. There was, in fact, no objection from those authorities. And it was not for the inspector and the Secretary of State, in performing their responsibilities under the statutory planning code, to duplicate controls for which statutory responsibility lay elsewhere. On the evidence before them, they were able to conclude as they did: that there would be no adverse effects on health justifying the refusal of planning permission. Legally, that was an impeccable conclusion.

94 I therefore reject Mr Willers' argument that the conclusions of the inspector and the Secretary of State on health impacts are at odds with the "precautionary approach" or the "precautionary principle". The existence of "uncertainty in [relevant] scientific knowledge"—as Mr Willers put it—does not render unlawful the approach adopted by the inspector and the Secretary of State. Both were satisfied that the relevant regulatory controls would operate effectively to prevent harm to the environment and to human health arising from the proposed development, where such harm lay beyond the reach of the statutory planning regime. Not only was this conclusion properly open to them on the evidence; it was also entirely consistent with the "precautionary approach". For the purposes of a planning decision, it was a perfectly rational conclusion. And it was not undermined by the existence of scientific doubt or dispute. In my view the judge was right to reject the argument put to him on this ground.

95 This analysis is not disturbed by observations on the potential effects of fracking in the "Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes on his mission to the United Kingdom …" to the United Nations Human Rights Council for its meeting between 11 and 29 September 2017, first published on 5 September 2017 (see in particular paras 32–44). That document could not have been taken into account by the Secretary of State, because it came into existence only after his decision. But in any event it does not undermine any of the conclusions he reached on "Public Health and Public concern" for the purposes of making his decision on this particular project of shale gas exploration, on the evidence as it was before him. The observations made by the Special Rapporteur, whilst they refer to the Secretary of State's decisions in the present case, do not suggest that the Secretary of State failed to address concerns relating to human health, or environmental effects, with sufficient thoroughness and care, or that the "precautionary approach" or "precautionary principle" was not applied (see, in particular, paras 35, 40 and 42 of the report).

96 I should add, finally, that the conclusions to which I have come on this issue, and on the previous three issues where they impinge on EIA, are not, in my view, inconsistent in any way with the analysis in the recent decision of the Court of Appeal in Northern Ireland in *An Application by Friends of the Earth Ltd for Judicial Review* [2017] NICA 41. That case concerned the extraction of sand by dredging from the bed of Lough Neagh, an activity that had been proceeding for many years without planning permission, whose environmental effects had been acknowledged by the Department of the Environment as likely to be significant. Further assessment under the EIA Directive, and under Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, was required and was yet to be carried out. What the likely significant effects would actually be was still unknown at the time of the minister's decision not to issue a stop notice (see [2]–[13] of the judgment of the court, delivered by Weatherup LJ). It was in this specific context that Weatherup LJ observed that "[the] proper approach is to proceed on the basis that there is an absence of evidence that the operations are not having an unacceptable impact on the environment" (at [34]), that the minister, in making his decision, had failed to put into the balance "the absence of evidence that there is no harm", and that, in the circumstances, this was "the negation of the precautionary principle" (at [37]). The facts and circumstances in this case are materially different. Here, as I have said, no identified likely significant effect on

the environment, or specifically on human health, was ignored or went unassessed before the Secretary of State made his decisions. There was, in the circumstances here, no breach of the "precautionary principle".

A reference for a preliminary ruling?

97 I see no justification for a reference to the Court of Justice of the European Union in this case. The contentious matters are "acte clair", and there is no scope for reasonable doubt as to the answers to be given (see the judgment of the court in *CILFIT v Ministry of Health* (Case C-283/81) [1982] E.C.R. 3415, at [16]).

Conclusion

98 For the reasons I have given, I would dismiss both appeals.

HENDERSON LJ

99 I agree.

SIMON LJ

100 I also agree.