Neutral Citation Number: [2018] EWHC 3065 (Admin)

Case No: CO/2242/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2018

Before :

DAVID ELVIN QC

(Sitting as a Deputy Judge of the High Court)

- -

Between :

WEST OXFORDSHIRE DISTRICT COUNCL **Claimant**

- and -

(1) THE SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVENRMENT
(2) ROSCONN STRATEGIC LAND LIMITED **Defendants**

- -
- -

George Mackenzie (instructed by **Sharpe Pritchard LLP**) for the **Claimant**

Daniel Stedman Jones (instructed by the **Government Legal Department**) for the **First Defendant**

Thea Osmund-Smith (instructed by **Addleshaw Goddard LLP**) for the **Second Defendant**

Hearing date: 6 November 2018

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APPROVED JUDGMENT

THE DEPUTY JUDGE (David Elvin QC):

1. This is an application under s. 288 of the Town and Country Planning Act 1990 to quash a decision of the First Defendant's Inspector, Mr Matthew Nunn, given by letter dated 30 April 2018 ("**the DL**"). The decision followed a four day public inquiry conducted by the Inspector in February 2018. In the DL, the Inspector allowed the appeal by the Second Defendant ("**Rosconn**") against the refusal of planning permission by the Claimant ("**the Council**") on 30 June 2017 and granted outline planning permission for a development comprising "up to 29 dwellings and a new access off Oxford Road with all other matters reserved" ("**the Development**") on land south of Oxford Road, Enstone, Oxfordshire, OX7 4N ("**the Site**").

2. Permission to apply under s. 288 was granted by Robin Purchas QC (sitting as a Deputy Judge of the High Court) on 26 July 2018.

3. The Council's reasons for refusing permission included the following, which were live issues on the appeal and which are those most relevant to the current challenge:

> "(1) The site is located in the countryside beyond the existing settlement edge of the village of Enstone. The development would encroach unacceptably into a largely unspoilt part of the Glyme valley in this location and would not form a logical complement to the existing scale and pattern of development in this location. It would fail to relate satisfactorily to the village or the existing rural environment which provides the setting for the village, and it would not easily assimilate into its surroundings, resulting in the loss of an important area of open space that makes a positive contribution to the character of the area. It would be highly prominent in public view from nearby roads, from the allotments to the north, and from public rights of way to the north. There would be a substantial impact on the character and appearance of this location arising from the extent and scale of built form and creation of the access visibility splay, and the countryside would be urbanised and its tranquillity disturbed to

> a significant and harmful degree. The proposal is therefore contrary to West Oxfordshire Local Plan 2011 policies BE2, BE4, NE1, NE3 and H2, emerging West Oxfordshire Local Plan 2031 policies OS2, H2, EH1, and EH3, and the relevant policies of the NPPF, in particular paragraphs 17, 58 and 109.
>
> (2) The location of the site is within and extensive area of countryside that provides a rural setting for the village of Enstone. The proposed development would significantly encroach into the countryside and would have an urbanizing effect on the setting of the neighbouring Listed Buildings, Hillside and Bridge House. This would lead to less than substantial harm to the setting and significance of the assets which is not outweighed by public benefits. The proposal is therefore contrary to West Oxfordshire Local Plan 2011 Policies H2 and BE8, emerging West Oxfordshire Local Plan 2031 Policies OS2 and EH7, and the relevant paragraphs of the NPPF, particularly paragraphs 132 and 134 of the NPPF."

The Decision Letter

4. In the DL the Inspector identified the main issues for his consideration as follows:

> "7. … the main issues are:"
>
> i. the effect of the proposal on the character and appearance of the area, including the landscape;
>
> ii. the effect of the proposal on the significance of nearby heritage assets; and
>
> iii. in the absence of a five year supply of deliverable housing sites, whether any adverse impacts of the development would significantly and demonstrably outweigh the benefits of the scheme; or whether specific policies indicate development should be restricted."

5. The formulation of these issues is not challenged by the Council. They undoubtedly comprised the planning issues of substance which formed the key area of controversy at the appeal. For reasons which will become apparent in due course, these issues were considered by reference to national, development plan and emerging development plan policies. With certain exceptions, which I will consider in due course, Mr Mackenzie for the Council accepts that the

Inspector did not omit any matters of substance in planning terms from his consideration.

6. The Inspector dealt with the policy context by introducing it in the following terms (omitting footnotes):

> "*Planning Policy Context*
>
> 8. The relevant legislation requires that the appeal be determined in accordance with the statutory development plan unless material considerations indicate otherwise. The statutory development plan comprises the 'saved' policies of the West Oxfordshire Local Plan 2011, adopted in 2006 ('the Local Plan'). The Council's remaining reasons for refusal cite Policy BE2 (general development standards), Policy BE4 (open space within and adjoining settlements), Policy BE8 (development affecting the setting of a listed building), Policy NE1 (safeguarding the countryside), Policy NE3 (local landscape character) and Policy H2 (general residential development standards).
>
> 9. The National Planning Policy Framework ('the Framework') sets out the Government's planning policies and is a material consideration in planning decisions. Importantly, the Framework does not change the statutory status of the development plan for decision making. However, the Framework advises at Paragraph 215 that due weight should be given to relevant policies in existing plans according to their degree of consistency with the Framework.
>
> 10. The Local Plan is 'time expired' being designed to provide policy guidance up to 2011. That said, the mere age of a plan does not mean it loses its statutory standing as the development plan. Nonetheless, there is no dispute that the Council cannot demonstrate a deliverable five year supply of housing, as required by the Framework. The Council is prepared accept that, in a worst case scenario, it can only demonstrate a 4.9 year supply of housing, although the appellant says it is much less than that. However, for the purposes of this appeal, the appellant has agreed to accept the Council's case. In addition, the Local Plan fails to make provision for housing beyond 2011, and so in that respect is out of date.
>
> 11. In these circumstances, the second bullet point of Paragraph 14 of the Framework is potentially engaged in this appeal. This is clear that where the development plan is absent, silent or out of date, permission should be granted unless any adverse impacts

> of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. However, this so called 'tilted balance' in favour of granting permission may be dis-applied where specific policies in the Framework indicate development should be restricted. I return to this matter in due course."

7. References to the NPPF in the DL are to the original version of the NPPF published in 2012 since the DL was issued nearly 3 months prior to the publication of the revised NPPF on 24 July 2018.

8. The Inspector then turned to the policies relied upon by the Council dealing first with the saved policies of the adopted 2006 Local Plan ("**ALP**"):

> "12. Turning to policies cited by the Council, Policies BE2 and H2 are criteria based policies setting out general development standards. BE2 requires, amongst other things, that development should respect, and where possible improve the character and quality of its surroundings. It also states that development will only be permitted if the landscape surrounding and providing a setting for an existing village is not adversely affected, and that in the open countryside any appropriate development will be easily assimilated into the landscape, and wherever possible, be sited close to an existing group of buildings. Policy H2 requires development not to erode the character and appearance of the surrounding area, including public and private open space. The overall approach of these policies is generally consistent with the Framework and they can be given full weight in this appeal.
>
> 13. Policy BE4 relates to open space and requires, amongst other things, that proposals for development within or adjoining the built up area should not result in the loss or erosion of an open area which makes an important contribution to the distinctiveness of a settlement, and/or the visual amenity or character of the locality. The second part of the policy requires that, when assessing any proposals which could affect existing open space, consideration will be given to the opportunity to remedy deficiencies in provision, and exchange the use of one site for another to substitute for any loss of open space.
>
> 14. The appellant contends that Policy BE4 is not of direct relevance to this appeal, and states that it is inconsistent with the Framework because it is not criteria based and could be applied to any open land that adjoins an existing built-up area, thereby imposing a 'blanket' landscape protection on all such land. However, the policy specifically refers to areas that make an

'important contribution' to a settlement's distinctiveness, and so provides a criterion for judging areas of open space. I do not find the overall approach to be in conflict with the Framework, and so the Policy can be afforded full weight.

15. Policy BE8 states that development should not detract from the setting of a listed building. Whilst it is generally consistent with the underlying aims of the Framework to conserve and enhance the historic environment, this policy does not accurately reflect the wording of the relevant legislation nor does it reflect aspects of the Framework's approach to heritage assets, for example, in terms of weighing of public benefits. This limits the weight that can be accorded to this policy.

16. Policy NE1 requires proposals for development in the countryside to maintain or enhance the value of the countryside for its own sake, including its beauty, its character and distinctiveness. The Framework does not require protection of the countryside for its own sake, although it requires the planning system to contribute to protecting and enhancing the natural environment, as well as recognising the intrinsic character and beauty of the countryside. Therefore, it is partially consistent with the Framework and can be afforded moderate weight.

17. Policy NE3 states that development will not be permitted if it would harm the local landscape character of the District, and that proposals should respect and, where possible, enhance the intrinsic character, quality and distinctive features of the individual landscape types. The overall aims of the policy are generally consistent with the Framework, and it can be accorded full weight."

9. He then referred to the policies in the emerging local plan ("ELP"):

"*Emerging Policy*

18. A new Local Plan is currently being prepared, but this has been subject to delays. The Council, in its remaining reasons for refusal, cites Policy OS2 (locating development in the right places), Policy H2 (delivery of new homes), Policy EH1 (landscape character), Policy EH3 (public realm and green infrastructure) and Policy EH7 (historic environment) from the emerging Local Plan.

19. I understand that the first sessions of the Local Plan Examination took place in November 2015. The Examination was subsequently suspended to allow further work to be undertaken to ensure a sound housing strategy. Proposed modifications were published for consultation and further Examination sessions took place in the summer of 2017. Arising

> from these sessions, further reports and modifications were forwarded to the Examining Inspector. The Inspector has recently issued a letter with his interim findings.
>
> 20. I acknowledge that the Examination is at a relatively advanced stage, and the Inspector has indicated that, subject to further modifications, the emerging Local Plan is likely to be capable of being found legally compliant and sound. All that said, and importantly, the Examination is not concluded and the consultation process on main modifications is still in progress. Further liaison is required with the Inspector in respect of the wording of some of the further modifications. Importantly, the Inspector has yet to produce his final report. In these circumstances, and in accordance with Paragraph 216 of the Framework, I consider only limited weight can be given to the Emerging Local Plan."

10. The account which the Inspector gave of the progress of the ELP is not challenged. The submission draft of the ELP had been the subject of main modifications in November 2016 and further modifications were discussed but not finalised during the course of the plan's examination. Draft further main modifications ("**FMMs**") were prepared by the Council in September 2017 but at the date of the inquiry they had not been finalised, assessed, or consulted upon.

11. As DL 19 and 20 noted, the ELP Inspector had written on 16 January 2018 setting out his interim position on the ELP in the following terms:

> "Following the Stage 2 and Stage 3 hearing sessions, and the completion of consultation on the additional technical evidence which the Council commissioned, I write to set out my thoughts on the plan at this stage and on the way forward with the Examination. My comments are based on all that I have read, heard and seen to date, although I emphasise that the Examination is not yet concluded, consultation on further main modifications is yet to take place and, consequently, these comments are without prejudice to my final conclusions on the plan.
>
> In the light of the discussions at the Stage 2 and 3 hearing sessions the Council published on the Examination website a Schedule of Suggested Further Main Modifications (September

> 2017) and has subsequently proposed some additional Further Main Modifications in Appendix 1 of its response to the consultation on the additional technical evidence.
>
> Other than in respect of the strategy/site allocations for the Burford – Charlbury sub-area, my concerns about which I detail below, I conclude that, subject to further modifications to the effect of those now proposed by the Council, the plan as previously proposed to be modified (doc CD5) is likely to be capable of being found legally-compliant and sound. I will set out my reasoning for this conclusion in my final report on the Examination. In the meantime I intend to liaise with the Council in respect of the precise wording of some of the suggested further modifications with a view to them then being subject to Sustainability Appraisal and Habitats Regulations Assessment (insofar as is necessary) followed by full public consultation."

12. He then dealt in detail with the Burford-Charlbury sub-area which is not relevant for present purposes and made recommendations as to what he thought needed to be done to make the ELP sound in this respect. He concluded:

> "Assuming that the Council would be content to adopt the plan subject to these modifications I should be grateful if you and your colleagues would prepare their precise wording for my consideration. In order to expedite the Examination I am very hopeful that these, along with the other already suggested Further Modifications, can be the subject of SA/HRA (insofar is as necessary) and then full public consultation as soon as possible.
>
> Should this not be the case I would be grateful if you would advise me of the Council's position as a matter of urgency…"

13. It follows that the ELP still required to have the FMMs finalised in consultation with the Inspector and then be subject to Sustainability Appraisal/SEA and public consultation. Accordingly, although not all the proposed FMMs were major changes, at the stage of the s. 78 inquiry it was not known how consultees would respond to their final form. I note that the submission version of the policies in issue had undergone significant changes during the modifications process in 2016 and, as mentioned, more were proposed for 2018. I am told that the ELP has now been adopted but I was not provided with any further

information as to what occurred after the planning inquiry.

14. The policy context paragraphs of the DL show a careful approach to the terms of the policies and it is not suggested that there were any relevant policies omitted from that consideration. Complaint is made by the Council as to how the Inspector dealt with the policies of the ELP but, before I turn to the grounds, it is first necessary to examine how the DL proceeded to deal with the issues of substance.

15. The Inspector first dealt with the issue of impacts to character and appearance:

> "*Character and Appearance*
>
> 21. The appeal site forms a single, pastoral field that slopes southwards towards the River Glyme, forming part of its valley. The northern boundary, fronting the Oxford Road (A44), is enclosed by dry stone walling, vegetation and mature trees. 'Westbourne House', a detached residence, lies to the west. Directly to the east is Hillside, a Grade II listed residential property, separated from the site by a close-boarded fence. Also to the east is 'Bridge House', another Grade II listed residence, the garden of which abuts the southern boundary of the site. The River Glyme meanders in an east-west direction along the bottom of the valley, with dense mature trees either side. To the north of the Oxford Road lies an area of allotments, and the wider area comprises an undulating landscape of pastoral and arable fields. The site is located on the edge of the village of Enstone, which comprises Church Enstone to the north-east and Neat Enstone to the south-east.
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> …
>
> 23. Whatever character 'label' is attached, the character of the site and surroundings is clear from site inspection. From my own observations, I consider that the site can be regarded as reasonably attractive, comprising a sloping pastoral field, but it is nothing out of the ordinary. It is not covered by any specific landscape designations, and the Council has accepted it is not a 'valued landscape' in terms of the Framework. In terms of scenic quality, the site contains few landscape features of intrinsic value. The site is reasonably well contained, notwithstanding its position outside the settlement boundary of Enstone. There are

trees and mature vegetation around the edges of the site, especially to the northern and southern boundaries.

24. In my judgement, the site's character is affected by adjacent development: in particular the existing properties along the eastern and western sides. On the northern boundary is the Oxford Road (A44), along with the Bicester Road (B4030) junction. The site is perceived in the context of the surrounding development. Consequently, I do not regard it as an essential or intrinsic component of the wider open countryside. Nor do I find it an open area that makes an important contribution to the distinctiveness of Enstone, in terms of Policy BE4 of the Local Plan. The site itself has no public access, no public rights of way and does not perform a formal recreational function. In terms of tranquillity, it is affected by the busy Oxford Road to the north.

25. In terms of views in the wider landscape, I observed the site from various points, in longer range views, including from the opposite side of the valley. From Lidstone Road to the south, the site is relatively conspicuous because of its sloping topography. However, it is seen in the context of a much larger panorama, and forms only a small component of it. The development would certainly be seen as expanding the settlement edge of Enstone, but the proximity of existing built development reduces the site's sensitivity.

26. From the north, the site is visible from the allotments, as well as from public footpaths 202/19 and 202/18 (Shakespeare's Way). As one walks along these footpaths, views of the site are heavily filtered by the intervening vegetation, and impeded by the rolling topography. Indeed, existing established trees along the northern boundary of the site provide a strong degree of containment and additional tree planting is proposed that would provide a robust green edge to the proposal. Overall, the visual intrusion of built development would be limited when viewed from these points because of the benefit of distance, the site's sloping topography, the intervening vegetation and width of view.

27. A concern raised by the Council is the impact on the setting of the village of Enstone. It is contended, amongst other things, that the development would introduce a dense form of development into the lower elements of the Glyme Valley, and that it would push Enstone beyond its 'leading edge' into open countryside. Also, that it would subsume Westbourne House - at present an outlier - into the main fold of the village. However, as acknowledged by the Council, there is already development within the lower valley comprising the residences of Hillside and Bridge House, as well as the Artyard Cafe. I do not find the amalgamation of Westbourne House into the main part of the

village to be intrinsically problematic. I see no reason why the scheme should not be adequately assimilated in the locality.

28. The Council also objects to the scheme on the basis that, historically the entrance to Enstone was marked by two public houses on either side of the road, namely 'The Plough' (now Hillside) and 'The Harrow' (now the Artyard Cafe). It is contended that developing the appeal site would mean that Hillside would be situated well within the village rather than at its extremity. However, more recent modern development has now significantly changed the experience. This includes the residential development fronting Bicester Road, the car park on rising ground associated with the Artyard Cafe, as well as the traffic paraphernalia associated with the Oxford Road - including road barriers, signage, the speed camera and so on. This has resulted in a more urbanised experience on the approach to Enstone with the consequence that these two historic properties no longer stand out as the prominent 'entrance' markers to the village as they may have in the past.

29. Whilst the proposal would result in the loss of an open field and the new housing would create a substantially more suburban appearance, I am satisfied that the proposed dwellings could be designed to be of a high quality and of an appropriate scale, and that the palette of materials of the buildings could reflect those of the existing locality. In my judgement, there is no reason to suppose that new residential development would not blend with the other existing houses in the locality.

30. Drawing all these matters together, in terms of character and appearance, I consider that the appeal scheme would have a relatively localised impact on the character of the area. The proposal would have a modest effect on the wider landscape because of the site's relatively self-contained nature and the existing development around its edge. In these circumstances, I do not find there to be any fundamental conflict with the underlying aims of Policies BE2 and H2 of the Local Plan, both concerned with general development standards. And whilst the development would result in the loss of an open area, I do not consider that it makes an important contribution to the distinctiveness of Enstone in terms of Policy BE4.

31. There would, however, be some conflict with Policies NE1 and NE3 concerned with safeguarding the countryside and local landscape character, because the scheme would result in the loss of undeveloped countryside. Thus it would not maintain or enhance the value of the countryside for its own sake. Nor could the proposal be said to respect or enhance the intrinsic character, quality and distinctive features of an individual landscape type. The conflict with these policies must be considered in the overall planning balance."

16. The Inspector then dealt with the impact of the proposals on heritage assets. It is not necessary for me to quote this section in detail since the Council no longer maintains its complaint regarding the application of ELP heritage policy EH7. However, the Inspector considered the issues in the light of NPPF policies, with no express mention of either ALP or ELP policies. Mr Mackenzie accepted, as he had in his closing speech to the inquiry, that ELP EH7 merely replicated the policies in the NPPF and added nothing of significance.

17. The Inspector assessed the impact of the proposals on two heritage assets (Bridge House and Hillside, both Grade II listed buildings) and concluded:

> "37. For these reasons, I consider that the level of harm to both heritage assets would be limited and should therefore be placed at the lower end of the 'less than substantial' spectrum. In accordance with the Framework, the harm to heritage assets, although less than substantial, needs to be weighed against the public benefits of the proposal."

18. At DL 38 to 43 the Inspector dealt with other matters, such as a previous appeal decision which he distinguished, and the "Enstone Marvels", then dealt with flood risk, highways, light pollution, and ecology from which I need only quote the following:

> "40. Some concerns were raised regarding the light spillage from the development, in that it would erode the ability to appreciate the dark skies in the locality. One of my site visits took place during the hours of darkness, and I witnessed the absence of light pollution in the vicinity of the site. I am satisfied, however, that any new lighting could be designed so as to avoid excessive light spillage, thus ensuring that light pollution does not impair the existing dark skies. This could be secured by condition.
>
> …
>
> 42. In terms of ecology, the site is not subject to any statutory designations. I am satisfied that appropriate mitigation measures could be undertaken, secured by condition, to ensure there is no negative effect on nature conservation interests, or any protected

> species present within the site. There is also the opportunity for ecological enhancement and habitat creation through new planting."

19. None of these issues provided a basis for objection and, having dealt with planning obligations, the Inspector set out his overall conclusions and his view of the planning balance:

> "**Overall Conclusions and Planning Balance**
>
> 46. The relevant legislation requires that the appeal be determined in accordance with the statutory development plan unless material considerations indicate otherwise. The Framework states that proposals should be considered in the context of the presumption in favour of sustainable development, which is defined by economic, social, and environmental dimensions and the interrelated roles they perform. These dimensions give rise to the need for the planning system to perform a number of roles.
>
> 47. Paragraph 14 of the Framework explains how the presumption in favour of sustainable development applies. Where the development plan is absent, silent or the relevant policies are out of date, permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. Alternatively, specific policies in the Framework may indicate development should be restricted. Those relating to heritage assets are one such category. Hence the 'public benefits' test of Paragraph 134 relating to heritage assets is engaged in this case
>
> 48. In this case, the additional housing would be a weighty benefit for the area, by introducing much needed private and affordable housing for local people: 29 new units are proposed of which 50% would be affordable homes. It would boost the supply of housing in accordance with the Framework. It would create additional housing choice and competition in the housing market. It would create investment in the locality and increase spending in local shops. It would create jobs and investment during the construction phase, albeit for a temporary period.
>
> 49. The development would result in the loss of open pasture land, but the site is physically reasonably well contained, and visually well related to the built up area of the village. There is the potential for biodiversity enhancement through additional planting. I am satisfied that the planning obligations accord with

> the Framework and the relevant regulations and I have taken them into account in my deliberations.
>
> 50. As noted earlier, Paragraph 134 of the Framework requires the harm to the significance of heritage assets to be balanced against the public benefits of the scheme. In addition, Paragraph 132 requires that, when considering the impact of a proposed development on the significance of heritage assets, great weight should be given to their conservation. However, for the reasons explained, I consider that the level of harm to heritage assets would be limited and should be placed at the lower end of the 'less than substantial' spectrum. In this case, I find that the harm to heritage assets would be outweighed by the scheme's public benefits. As a consequence, I find that the so called 'tilted balance' of Paragraph 14 is not displaced in this instance.
>
> 51. There would be some conflict with Policies NE1 and NE3 of the Local Plan. Importantly, however, the Council cannot demonstrate a five year supply of housing. This diminishes the weight that can be attached to any conflict with these policies. The housing shortfall attracts substantial weight in favour of granting permission for the proposals, unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies of the Framework taken as a whole. I am satisfied that none of the reasons put forward for opposing the development establishes that the harm would be significant or would demonstrably outweigh the benefits. Therefore, notwithstanding any conflict with Local Plan policies, it follows that the appeal should succeed, subject to conditions. I deal with conditions below."

20. Having then dealt with conditions, the Inspector allowed the appeal.

Grounds of challenge

21. The Statement of Facts and Grounds impugn the DL as follows:

    i) The Inspector failed to have regard to a material consideration, namely the ELP (and specifically the five most material ELP policies OS2, H2, EH1, EH3 and EH7) and in doing so failed to give effect to s. 38(6) of the Planning and Compulsory Purchase Act 2004 in granting planning permission;

ii) the Inspector failed to make any findings as to whether the Proposals complied or conflicted with the ELP and accordingly failed to give any, or any adequate, reasons with regard to -

a) whether the Proposals complied with the ELP; or

b) whether any conflict or compliance weighed in the overall planning balance in the context of s. 38(6);

iii) The Council has plainly been substantially prejudiced by the Inspector's failure to give reasons with regard to matters a) and b) because the Council is unable to ascertain -

a) whether their case that the Scheme conflicted with the ELP was accepted or rejected;

b) whether, if it was rejected, why it was rejected;

c) whether, if it was in accordance with the policies, why it was considered to be such.

22. In the Council's skeleton argument it is stated that the key issues are:

i) whether it was lawful for the Inspector to have failed to properly apply NPPF para. 216 in determining the amount of weight that the ELP's relevant policies should attract in principle; and

ii) whether it was lawful for the Inspector to (i) have failed to consider the extent to which the Scheme conflicted with the relevant policies of the

ELP or (ii) to have failed to weigh any such conflict in the so-called overall planning balance.

23. However, although the Grounds refer to 5 policies, the only criticisms which were advanced before me related to ELP policies EH1 and EH3, with reference to H2 in respect the requirement to accord with the other policies in the ELP, although this had not been signalled in the Claimant's skeleton argument. No mention was made of OS2 and little was added by H2 in oral submissions (though they formed part of the Council's case on appeal) and, as I have already noted, it was conceded at the hearing that EH7 merely duplicated the policies in the NPPF. Since the purpose for referring to H2 was to note the need to accord with EH1 and EH3 it added little.

24. Indeed the Grounds and the Claimant's skeleton were silent on the basis on which the case was advanced by reference to the ELP policies and how they were said to relate to the substance of the challenge other than by reference to the Council's planning evidence for the appeal. I raised this with the Council prior to the hearing but received little elucidation until the hearing.

25. It should not be necessary to do, but I observe that a claimant is required to set out the main aspects of its case in the Grounds and Skeleton Argument and the Court should not be left simply to speculate as to how they might be formulated and to work them out from a mass of inquiry material produced in evidence. While criticisms have been made by the Court of unduly lengthy, or over-elaborate, skeleton arguments, the opposite situation is equally to be avoided and the court should not be left in the dark as to the essential elements of the case until the hearing. It does not assist the Court's preparation for the hearing

and, if it took defendants by surprise, might lead to delay or adjournment. Fortunately, Mr Stedman Jones and Miss Osmund-Smith were able to deal with the issues as they were presented in Court.

26. The Council appeared to be under the impression that the only relevant considerations in the case were the alleged failure to give proper weight to the ELP policies, to misapply NPPF para. 216 or to give inadequate reasons in these respects and not to consider how the issues arising under the emerging polices were dealt with the context of the DL as a whole or, indeed, the extent to which they overlapped with ALP policies. Again, it was only in oral submissions that the Council advanced the suggestion that in two respects the Inspector had failed to deal with two matters arising under ELP policies – in respect of the use of "conserve" rather than "respect" under EH1 and the protection of Conservation Target Areas ("**CTAs**") under ELP EH3. The failure to consider those two matters was neither raised in the Grounds nor in the skeleton argument and Mr Mackenzie did not apply to amend to include them in his grounds.

The ELP Policies

27. Since 3 of the 5 policies are no longer in issue, I propose to note with respect to those 3 only that:

    i) OS2 dealt with the spatial strategy for the distribution of development within the district (and which classified Enstone as a "village");

    ii) HS2 dealt with the delivery of housing and required proposals to be "in accordance with other policies in this plan" (in which respect it added little of substance to the other policy requirements); and

iii) EH7 dealt with heritage issues, following the NPPF policies.

28. EH1 as it stood before the Inspector (with the 2016 main modifications) stated:

> "**Policy EH1 - Landscape Character**
>
> The quality, character and distinctiveness of West Oxfordshire's natural environment, including its landscape, cultural and historic value, tranquillity, geology, countryside, soil and biodiversity, will be conserved and enhanced.
>
> New development should respect and, where possible, enhance the intrinsic character, quality and distinctive natural and man-made features of the local landscape, including individual or groups of features and their settings, such as stone walls, trees, hedges, woodlands, rivers, streams and ponds. Conditions may be imposed on development proposals to ensure every opportunity is made to retain such features and ensure their long-term survival through appropriate management and restoration. Proposals which would result in the loss of features, important for their visual, amenity, or historic value will not be permitted unless the loss can be justified by appropriate mitigation and/or compensatory measures which can be secured to the satisfaction of the Council. When determining development proposals within or impacting upon the Cotswolds Area of Outstanding Natural Beauty, great weight will be given to the conservation of the area's landscape and scenic beauty. Special attention and protection will be given to the landscape and biodiversity of the Lower Windrush Valley Project, the Windrush in Witney Project Area and the Wychwood Project Area."

29. This was proposed to be amended by the draft FMMs in several respects but what the Council relies upon is that the phrase "New development should respect and, where possible, enhance" was to be amended so that "respect" became "conserve" as follows:

> "New development should conserve ~~respect~~ and, where possible, enhance the intrinsic character, quality and distinctive natural and man-made features of the local landscape…"

30. The FMMS noted that this was to reflect discussions during the Stage 2 examination hearing sessions.

31. It was also proposed to add to EH1 "to strengthen policy protection in relation to noise and light pollution":

> "Proposed development should avoid causing pollution, especially noise and light, which has an adverse impact upon landscape character and should incorporate measures to maintain or improve the existing level of tranquillity and dark-sky quality, reversing existing pollution where possible."

32. I mention this since it is clear from DL 40 that concerns as to light pollution had arisen but were considered to be capable of being dealt with by the design of new lighting.

33. ELP policy EH3 as proposed to be amended by the draft FMMs provided (new text proposed is underlined):

> "**Policy EH3 – Public Realm and Green Infrastructure**
>
> The existing areas of public space and green infrastructure ~~assets~~ of West Oxfordshire will be protected and enhanced for their multi-functional role, including their biodiversity, recreational, accessibility, health and landscape value and for the contribution they make towards combating climate change. ~~and new multi-functional areas of space will be created to achieve improvements to the network (through extending spaces and connections and/or better management), particularly in areas of new development and/or where stakeholder/partnership projects already exist or are emerging.~~
>
> Public realm and publicly accessible green infrastructure network considerations should be integral to the planning of new development.
>
> New development should:
>
> i. ~~not result in~~ avoid the loss, fragmentation loss of functionality of the existing green infrastructure network, including within the built environment, such as access to waterways, unless it can be demonstrated that replacement provision can be provided which will improve the green infrastructure network in terms of its quantity, quality, accessibility and management arrangements.
>
> ii. ~~Development proposals will be expected~~ opportunities for ~~necessary~~ improvements to the District's multi-functional

network of green infrastructure (including Conservation Target Areas) and open space, (through for example extending spaces and connections and/or better management), particularly in areas of new development and/or where stakeholder/partnership projects already exist or are emerging, in accordance with the Council's Green Infrastructure Plan, its Open Spaces Strategy, Playing Pitch Strategy, Living Landscape Schemes, locally identified Nature Improvement Areas and any future relevant plans (such as Neighbourhood Plans) and programmes as appropriate,

iii. ~~providing~~ provide opportunities for walking and cycling within the built-up areas and connecting settlements to the countryside through a network of footpaths, bridleways and cycle routes

iv. maximise opportunities for urban greening such as through appropriate landscaping schemes and the planting of street trees

v. consider the integration of green infrastructure into proposals as an alternative or to complement 'grey infrastructure' (such as manmade ditches and detention ponds and new roads)

vi. demonstrate how lighting will not adversely impact on green infrastructure that functions as nocturnal wildlife movement and foraging corridors.

Contributions towards local green infrastructure projects will be sought where appropriate. If providing green infrastructure as part of development, applicants should demonstrate how it will be maintained in the long term.

~~New development should not result in the loss of open space, sports and recreational buildings and land unless up to date assessment shows the asset is surplus to requirements or the need for and benefits of the alternative land use clearly outweigh the loss and equivalent replacement provision is made. Where appropriate, development will be expected to provide or contribute towards the provision of necessary improvements to open space, sports and recreational buildings and land.~~"

34. These changes were stated -

> "to reflect discussions during the Stage 2 examination hearing sessions".

35. The corresponding ALP policies considered by the Inspector were BE2, BE4, NE1 and NE3. These provided (where relevant):

“**POLICY BE2 -**

General Development Standards

New development should respect and, where possible, improve the character and quality of its surroundings and provide a safe, pleasant, convenient and interesting environment.

Proposals for new buildings and land uses should clearly demonstrate how they will relate satisfactorily to the site and its surroundings, incorporating a landscape scheme and incidental open space as appropriate.

A landscape scheme accompanying detailed proposals for development should show, as appropriate, hard and soft landscaping, existing and proposed underground services, a phasing programme for implementation and subsequent maintenance arrangements.

Proposals will only be permitted if all the following criteria are met:

Quality of Development and Impact upon the Area:

a) the proposal is well-designed and respects the existing scale, pattern and character of the surrounding area;

b) new buildings or extensions to existing buildings are designed to respect or enhance the form, siting, scale, massing and external materials and colours of adjoining buildings, with local building traditions reflected as appropriate;

c) the proposal creates or retains a satisfactory environment for people living in or visiting the area, including people with disabilities;

d) existing features of importance in the local environment are protected and/or enhanced;

e) the landscape surrounding and providing a setting for existing towns and villages is not adversely affected;

f) in the open countryside, any appropriate development will be easily assimilated into the landscape and wherever possible, be sited close to an existing group of buildings.

…”

“**POLICY BE4 -**

Open space within and adjoining settlements

> Proposals for development within or adjoining the built-up area should not result in the loss or erosion of:
>
> a) an open area which makes an important contribution to:
>
> i. the distinctiveness of a settlement; and/or
>
> ii. the visual amenity or character of the locality;
>
> b) a facility of benefit to local residents;
>
> c) an area of nature conservation value;
>
> d) common land or a village green.
>
> When assessing any proposals for development which could affect existing open space, consideration will be given to the opportunity to:
>
> i. remedy deficiencies in provision, and
>
> ii. exchange the use of one site for another to substitute for any loss of open space."
>
> "**POLICY NE1 -**
>
> **Safeguarding the Countryside**
>
> Proposals for development in the countryside should maintain or enhance the value of the countryside for its own sake: its beauty, its local character and distinctiveness, the diversity of its natural resources, and its ecological, agricultural, cultural and outdoor recreational values."
>
> **"POLICY NE3 -**
>
> **Local Landscape Character**
>
> Development will not be permitted if it would harm the local landscape character of the District. Proposals should respect and, where possible, enhance the intrinsic character, quality and distinctive features of the individual landscape types."

36. As can be seen from the extracts from the DL above, the Inspector considered the ALP, which were development plan policies, at DL 10-17 where he considered the degree to which they were consistent with the NPPF. With the exception of NE1, which is only partially consistent with the NPPF and thus attracted "moderate weight" (DL 16) the other 3 policies quoted above were

considered to be consistent with the NPPF and thus afforded "full weight" (DL 12, 14, 17). The heritage policy in the ALP, BE8, was not consistent with the NPPF and carried only limited weight and it is notable that the consideration of the heritage issues was largely by reference to the NPPF policies (which were mirrored in EH7).

37. Mr Mackenzie for the Council submitted that:

i) The Inspector failed to consider the ELP policies and the weight to be accorded to them by reference to the three elements set out in para. 216 of the NPPF, contrary to the judgment of Holgate J. in ***Woodcock Holdings Ltd. v Secretary of State*** [2015] JPL 1151, especially at paras. 51-52 and 138-146;

ii) The approach of the Inspector in DL 18-20 and his summary treatment of the ELP policies is to be contrasted with the detailed consideration of the ALP saved policies at DL 9-17 where he considered the degree to which they were consistent with the NPPF and afforded weight to them accordingly;

iii) The Inspector failed to explain adequately why he had reached his conclusions on the ELP both by reference to the para. 216 criteria and generally;

iv) The Inspector failed to consider any of the ELP policies when considering the substantive planning issues;

v) In particular the Inspector failed to consider and apply the requirement to “conserve” in EH1 (as proposed to be modified) and the effect of the proposals on the CTA in which the Site was located;

vi) The failure to give due weight to the ELP was itself of substance since it should have added weight to the objections raised by the Council;

vii) There was a failure to give adequate reasons.

38. Mr Stedman Jones for the Secretary of State and Miss Osmund-Smith, for Rosconn, both submitted that:

i) The Council ran a different case at inquiry, which placed far less emphasis on the ELP policies than it now does;

ii) The issue of the significance and weight of the ELP policies was simply not a principal important controversial issue for the purposes of the appeal until the Court proceedings sought to make them so; and

iii) In any event, the approach of the Inspector was sufficient in the context and the ELP policies added little to the consideration of the substantive issues.

General approach

39. The principles applicable to the exercise of the Court’s power to review planning decisions under s. 288 are well-known and do not require repeating here. See Lindblom LJ in ***St Modwen Developments Ltd v Secretary of State for Communities and Local Government*** [2018] PTSR 746 at paras. 6 and 7 and in ***East Staffordshire Borough Council v Secretary of State for***

Communities and Local Government [2018] PTSR 88 at para. 50. In ***St Modwen***, at para. 47 Lindblom LJ issued a cautionary note which bears on the issues here:

> "In these proceedings before the court the importance of the housing trajectory has been elevated to a significance it simply did not have in evidence and submissions at the inquiry. This was not conceded, but it seems quite plain. And I agree with the judge's comment that one must "be cautious lest a point on a [section] 288 challenge takes a very different shape and emphasis from that which it had before the inspector". That is what has happened here."

40. In terms of alleged failures to take into account material considerations, see Glidewell LJ's summary of the principles in ***Bolton MBC v Secretary of State*** [2017] PTSR 1063 at 1072-3. These include:

> "(2) The decision-maker ought to take into account a matter which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. Such a matter is relevant to his decision-making process. By the verb "might", I mean where there is a real possibility that he would reach a different conclusion if he did take that consideration into account.
>
> (3) If a matter is trivial or of small importance in relation to the particular decision, then it follows that if it were taken into account there would be a real possibility that it would make no difference to the decision and thus it is not a matter which the decision-maker ought to take into account.
>
> (4) As Hodgson J said, there is clearly a distinction between matters which a decision-maker is obliged by statute to take into account and those where the obligation to take into account is to be implied from the nature of the decision and of the matter in question. I refer back to the *CREEDNZ Inc* case [1981] 1 NZLR 172.
>
> (5) If the validity of the decision is challenged on the ground that the decision-maker failed to take into account a matter in the second category, it is for the judge to decide whether it was a matter which the decision-maker should have taken into account.
>
> (6) If the judge concludes that the matter was "fundamental to the decision", or that it is clear that there is a real possibility that

> the consideration of the matter would have made a difference to the decision, he is thus enabled to hold that the decision was not validly made. But if the judge is uncertain whether the matter would have had this effect or was of such importance in the decision-making process, then he does not have before him"

41. Principles (2) and (3) are closely related to the issue of whether a consideration was a principal important controversial issue before the Inspector. Bearing in mind Lindblom LJ's warning at para. 47 of ***St Modwen***, it is important to determine whether an issue which forms centre stage in a challenge before this court was in fact that controversial and important before the Inspector.

The ELP and para. 216 NPPF

42. I accept the submissions of Mr Stedman Jones and Miss Osmund-Smith that the status of the ELP policies and their significance was of marginal significance to the issues before the inquiry and the focus was on the substantive planning issues themselves.

43. In considering the ELP policies, and their role in the appeal, the following facts are relevant:

    i) They are referred to in the first two reasons for refusal together with the ALP policies and the NPPF as providing a basis for the reasons for refusal on the substantive issues;

    ii) The Council's Pre-Inquiry Statement lists the relevant ELP policies together with the ALP and NPPF and simply notes at para. 2.7 that "the weight to be attached to the saved and emerging local plan policies will be assessed as regards consistency with the NPPF";

iii) The Statement of Common Ground between the Council and Rosconn noted at Section 3 the status of the ALP and ELP and referred to the current state of the ELP which is reflected in DL8 to DL10. There are only a few references to the ELP policies (e.g. OS2 at para. 4.4, housing supply at para. 4.6). There is no indication that the ELP policies are contentious in the context of the appeal and the list of "matters in dispute" in section 5 mentions ELP policies as the context for the specific substantive planning issues to which they are relevant e.g. OS2, H2, EH1 and EH3 are referred to (together with the ALP and NPPF policies) as the context for "the level of harm to the character and appearance of the area". The weight to be attached to the ELP and the significance of the policies themselves is not listed as one of the "key areas of dispute between the parties" (para. 5.1). The matters in dispute broadly reflect the issues considered by the Inspector in the DL (with some that were resolved such as drainage and a planning obligation). It was agreed that the Site did not fall within any designated landscape area and was not a "valued landscape" within para. 109 of the NPPF;

iv) Catherine Tetlow's proof of evidence (Principal Planning Officer in the Development Management section of the Council) to the inquiry, in addition to a discussion of the housing land supply position at the ELP examination, which is not relevant for present purposes, refers to the policies in more detail in Section 11 -

a) Paras. 11.16 and 11.17 consider EH1 and EH3 and pointed out that -

i) The use of "conserve or enhance" in EH1, contending that the proposals did not do so;

ii) There would be a loss of a significant part of the CTA since the Site "lies entirely within the Glyme and Dorn Valleys Conservation Target Area" and that "CTAs identify some of the most important areas for wildlife conservation in Oxfordshire where target conservation action will have the greatest benefit. They provide a focus for coordinated delivery of biodiversity work…"

b) Section 12 sets out the "planning balance' primarily by reference to the NPPF and the balancing of less than substantial harm under para 134 of the NPPF with public benefits. There is no reference to the ELP;

c) Section 13 sets out the conclusions by reference to the substantive planning issues. The only policies referred to there are those in the NPPF and there is no mentioned of the ELP;

v) Peter Frampton's evidence for Rosconn summarised the key ELP policies at paras. 2.9-2.21. He disputed the relevance of EH3 on the basis the Site was not in an area of public space or green infrastructure asset. Again, there appears to be little controversy with regard to the policies themselves as opposed to the substantive issues identified by the Inspector and in the Statement of Common Ground;

vi) Whilst too much weight should not be placed on the closing speeches of the parties at inquiry, they can as here provide a pointer to what were regarded as the principal controversial issues. Mr Mackenzie addressed the issue of emerging policy in the Council's Closing Submissions in terms which did not treat the ELP issues as controversial or of key significance -

> "48. **OS2 and H2**. In terms of the criteria in OS2 the Appeal Scheme would:
>
> a. (bullet 2) [of Policy OS2] – not form a logical complement to the existing scale and pattern of development, which is nicely balanced with the valley in visual terms at the moment and is not prominent in its views, or the character of the area a characteristic of which is the almost wholesale lack of development in the low valley slopes;
>
> b. (bullet 5) – not protect the landscape and setting of the landscape for the same reasons; and
>
> c. (bullet 6) – involve the loss of an area of open space that makes an important contribution to the character and appearance of Enstone (for the same reasons as above)
>
> 49. **EH7**. As is invariably the case nowadays, all heritage policies in Local Plans simply mimic the NPPF's heritage policies and there is no differential between them."

There is also reference at 43-44 to EH1 though not EH3, though EH1 is referred to as carrying forward the policies in NE1 and NE3, emphasis is placed on "conserve or enhance" landscape which was said to be "directly analogous with NPPF para. 109" and that EHI should carry "significant weight at this stage" in the plan process. The policy considerations are dealt with in the last six pages of the submissions coming after some 15 pages dealing with the substantive issues and evidence. The majority of the policy consideration dealt with the ALP

policies and the NPPF heritage policies other than those few references to the ELP I have set out above;

vii) Miss Osmund-Smith's written closing submissions to the inquiry on behalf of Rosconn dealt with the ELP at paras. 88-98 and referred to the fact that the "outcome of the process cannot be pre-judged" and that "the emerging local policies are not yet in a position to attract full, or nearly full, weight". She then dealt with the specific ELP policies and submitted there were no conflicts, for example, with H2 or OS2, and that EH3 was not relevant because the Site was not green infrastructure. She referred to Miss Tetlow's evidence on EH3 as "entirely new, and not articulated in the rfr" (which so far as I can tell, is correct) and then submitted that Miss Tetlow was not an ecologist and that the Council ecologist had supported the proposals. At para 98 Miss Osmund-Smith noted that "[Miss Tetlow] confirmed she did not disagree with the consultation response – indeed, she had no basis on which to disagree" (apparently this was given during cross-examination) and that, even if relevant, the policy was satisfied and "significant ecological benefits flow from the scheme in accordance with 109 of the NPPF". Mr Mackenzie did not suggest that Miss Osmund-Smith had incorrectly recorded Miss Tetlow's agreement given in cross-examination.

44. Having regard to the inquiry documentation as a whole, I reject the assertion in the Council's skeleton argument at para. 15 that "the Scheme's compliance with the ELP was a major issue at the inquiry". I agree with the Defendants that the Council has sought to elevate a relatively minor issue at the inquiry into a major

issue before this Court. This is relevant to the approach to be taken to how the Inspector dealt with the ELP and to his reasons having regard to Lord Brown in ***South Bucks DC v Porter (No. 2)*** [2004] 1 W.L.R. 1953 at para. 36 –

> "They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved."

45. The focus of the inquiry was on the planning issues identified by the Inspector (character and appearance, heritage etc) and his focus more on the ALP than the ELP is perfectly understandable given the ALP saved policies comprised the development plan (most of which were consistent with the NPPF and of full weight) and thus the primary consideration under s. 38(6). Whilst the lack of a five year housing land supply triggered the tilted balance under para. 14 of the NPPF (see para. 49 of the NPPF) nonetheless the ALP was the development plan and the NPPF only another material consideration (however important).

46. Turning to the specifics of the challenge, the first issue is the Inspector's consideration of para. 216 of the NPPF. This provides:

> "From the day of publication, decision-takers may also give weight[40] to relevant policies in emerging plans according to:
>
> - the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
> - the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
> - the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

47. Footnote 40 states "Unless other material considerations indicate otherwise".

48. Mr Mackenzie places great reliance on Holgate J's judgment in ***Woodcock Holdings Ltd. v Secretary of State*** [2015] JPL 1151. That was a case where the Secretary of State had accepted all of the Inspector's reasoning as to why the location for the proposed development was "unsustainable in all relevant respects" (paras. 51 and 52) and –

> "The sole reason given for the Secretary of State's disagreement with his Inspector's recommendation to grant planning permission was that the proposal conflicted with the emerging neighbourhood plan and was premature in relation to that plan."

49. Holgate J agreed at para. 73 that –

> "the Secretary of State dismissed the claimant's appeal because of a combination of conflict with the policies of the emerging Neighbourhood Plan and prematurity in relation to the examination of that plan. The appeal was not dismissed simply because of prematurity. Although the second sentence of DL19 relied upon prematurity to dismiss the appeal, it is plain that DL16 and the first sentence of DL19 also rejected the proposal because it had not been "identified" in the draft plan for release, in other words, because of a conflict with the draft neighbourhood plan."

50. He then added:

> "74. Moreover, there is a second aspect of DL16 which makes it plain that the Secretary of State did not treat prematurity as the sole reason for dismissing the appeal. He decided that it was appropriate "to tip the planning balance in favour of the emerging neighbourhood plan proposals" "in the light of these [considerations]". The matters to which he was referring included not only the identification of "housing allocations elsewhere" (i.e. at Hurstpierpoint) but also "the [District] Council has yet to complete an up-to-date objectively assessed housing needs analysis against which to measure the overall neighbourhood plan proposals". It could not be suggested … that this second factor had anything to do with a prematurity objection. Instead, it was a matter relied upon by the Secretary of State, like the non-identification of the appeal site, in order to

> give greater weight to his conclusion that the appeal proposals conflicted with the emerging neighbourhood plan."

51. In respect of Ground 1 in that case (see paras. 138-140), it was alleged that the Secretary of State had failed to take into account and apply his own policy in relation to the weight to be given to an emerging plan contained in para. 216 and that the reasoning in the decision letter only applied the first criterion in para. 216, and did not deal with the second and third criteria, namely the extent to which there were unresolved objections to relevant policies in the draft plan (and the significance of those objections) and the degree of consistency of the policies with the NPPF. It was there submitted that the Secretary of State had therefore failed to have regard to the second and third criteria, alternatively that he failed to give any reasons in relation to them (these criticisms are also echoed by Mr Mackenzie) whilst the Secretary of State contended that –

> "it was not necessary for a decision-maker to recite and apply each of the three criteria in the NPPF para. 216 because they were simply factors to be taken into account in judging the weight to be attached to a draft plan rather than free-standing tests. The three criteria were not "principal important controversial issues" in their own right attracting an obligation to give reasons."

52. Holgate J. held:

> "141. In my judgment, the policy in the NPPF para. 216 should be read as a whole. It is not a policy which simply makes the trite point that decision-makers may give weight to relevant policies in emerging plans. Rather it is a policy that they may do so "according to" the three criteria or factors which follow. The policy clearly stipulates that the three criteria are relevant in each case. Of course, when dealing with a particular planning proposal it may be the case that the relevant policies in a draft plan have not attracted any objections and so it would not be necessary to consider the second criterion beyond that initial stage. But plainly the second criterion is material in each case in order to ascertain whether a relevant draft policy has attracted any objections and, if so, their nature, before going on to make an assessment of the significance of any such objections.

> 142. When applying para. 216, an Inspector or the Secretary of State determining a planning appeal is largely dependent upon the information provided by the parties on the application of the three criteria. By contrast, where a decision is being taken by a local planning authority which is also responsible for the draft plan in question, that authority is unlikely to be dependent upon others to provide the information needed to apply the three criteria. It has ready access to that information itself.
>
> 143. In my judgment, it is plain that in this case substantial information was placed before the Secretary of State which resulted in the application of the second and third criteria becoming "principal important controversial issues" for the Secretary of State to grapple with and determine (see at [45], [47] and [48] above). For example, the Parish Council submitted to the defendant that the appeal should be dismissed because it proposed substantially more than the 30–40 houses and therefore conflicted with policies C1, H1 and H4 of the draft plan. But the claimant submitted that H4 was in conflict with the NPPF because it imposed a cap on the scale of new housing in Sayers Common and did not provide the "flexibility" required by national policy.
>
> 144. It follows that if the Secretary of State had applied the second and third criteria in the NPPF para. 216, he was obliged to give reasons explaining how he had done so and resolved important planning issues raised by the parties. He did not give any such reasoning in the decision letter. That is a sufficient basis upon which to uphold ground 1.
>
> 145. However, in my judgment the legal error goes further. The decision letter reveals that the Secretary of State did not apply the second and third criteria at all. In DL19 he stated that the issue of whether more land needed to be "allocated" at Sayers Common should not be "prejudged", but should instead be left to the examination of the draft plan. The clear implication was that the defendant considered that the appeal site should not be released for housing development unless and until the figures setting the cap for Sayers Common in policy H4 are increased. Thus, the Secretary of State did not assess whether the inclusion of any cap in draft policy H4 accorded with the NPPF, nor the strength of the objections made to the plan, particularly that policy, (taking into account [33] and [81] of BDW and Reports into the Examination of Neighbourhood Plans cited by the claimant). The criticism at [83] above also applies under ground 1."

53. I reject the contention by Mr Mackenzie that Holgate J. was laying down a mechanical rule for the application of para. 216 but was rather, in my judgment,

considering the application of that policy in the context of the specific issues in that case where the emerging neighbourhood plan was a, if not the, critical factor in the Secretary of State's decision to reject his Inspector's recommendation to grant permission. As the learned Judge noted at para. 143:

> "it is plain that in this case substantial information was placed before the Secretary of State which resulted in the application of the second and third criteria becoming "principal important controversial issues" for the Secretary of State to grapple with and determine."

54. Further, as appears from para. 144, above, Holgate J was also critical of the Secretary of State's failure to assess whether the housing cap in draft policy H4 was consistent with the NPPF and whether there were objections to that plan, particularly that policy. These issues were plainly of central importance to the decision in that case and therefore the failure to grapple with them was a failure to deal with, and give reasons in respect of, principal important controversial issues.

55. However, in the present case, the consistency of the ELP policies with the NPPF was not in issue (though the relevance of EH3 was) and no party suggested that any of them were in conflict with the NPPF. Moreover, the Inspector's discussion at DL 20 took account of the Plan Inspector's letter of 16 January which at least by implication proceeded on the basis that the policies were "likely to be capable of being found legally compliant and sound", which would not be the case had there been any likely significant conflicts with the NPPF.

56. The key point regarding the weight of the ELP was therefore the stage at which the plan had reached and, in my judgment, the Inspector was entitled to take the view that, because there were FMMs still to be finalised, published and

consulted upon, he should attach limited weight to the ELP. However, what amendments the Inspector might suggest should be made to the draft FMMs, the results of public consultation and the extent of any objections were at that stage unknown. As pointed out at para. 142 of ***Woodcock*** the appeal decision-maker is "largely dependent upon the information provided by the parties on the application of the three criteria" and there is no basis for suggesting that the Inspector failed to take that information into account given the terms of DL 18 to 20.

57. Mr Mackenzie faintly argued that the Inspector was not entitled to treat the ELP as of limited weight, but he has not pleaded irrationality and I consider the Inspector's assessment of weight to be a matter for his own judgment and reject any suggestion that it might be irrational. Although the reasons are not set out at great length, I regard DL 20 as sufficient to deal with para. 216 in the circumstances of this appeal. The reasons were adequate to explain the Inspector's conclusion on the ELP given, first, that they were not a principal important controversial issue and, secondly, they are addressed to informed parties who had not raised significant issues with regard to the ELP policies.

58. Moreover, I do not consider that having referenced the policies at DL 18 it is credible to suggest that the Inspector then ignored them. He set out both ALP and ELP policies at the outset as the policy context for the substantive issues, then proceeded to consider those issues. Applying familiar principles regarding the interpretation of planning decisions, it was not necessary for the Inspector to make further express references to those policies since he was plainly aware of them as part of the context of the substantive issues. As I pointed out during

argument, there was little mention in those sections of the DL of any policies but this does not justify a conclusion that they were not in the Inspector's mind as he was considering the issues. Apart from the NPPF policies in the context of heritage, the only policies specifically mentioned are NE1 and NE3 at DL31. That reference was appropriate because the Inspector found "some conflict" with them which, given they formed part of the development plan, plainly require to be considered in the s. 38(6) context even with the application of the tilted balance.

59. Mr Mackenzie submitted that the Inspector's failure to grapple with the ELP policies and para. 216 at DL 18-20 was underlined by contrast with the detailed comparison he undertook with regard to the saved ALP policies at DL 10-17. I disagree:

i) Given s. 38(6) of the 2004 Act, the status of the ALP as statutory development plan, and paras. 14 and 215 of the NPPF, the question of whether the saved policies were consistent with the NPPF was an important issue the Inspector had to resolve in order to apply s. 38(6) and para. 14 correctly; and

ii) This process was not critical in terms of the ELP policies since they did not carry the significance of the development plan in terms of s. 38(6) or para 14. Moreover, he referred to the Plan Inspector's letter of 16 January 2018 at DL20 in terms that did not suggest that there was any inconsistency with the NPPF. The issue referred to by the Inspector was not that of consistency with the NPPF but the remaining plan process and the unresolved FMMs.

60. There is no basis in any event for suggesting that the limited weight accorded to the ELP made any difference to the outcome since, other than in respect of the two matters I deal with below, the issues under the ELP policies were already in play as a result of the application of the ALP and NPPF.

61. The Inspector had in any event found a breach of development plan policies NE1 and NE3 at DL 31 and 51 but, in the light of the lack of a five year housing land supply, and para. 49 of the NPPF, he applied the tilted balance in para. 14 of the NPPF. He therefore concluded in respect of the conflict with policy and harm to character and appearance and to heritage assets that -

> "I am satisfied that none of the reasons put forward for opposing the development establishes that the harm would be significant or would demonstrably outweigh the benefits. Therefore, notwithstanding any conflict with Local Plan policies, it follows that the appeal should succeed, subject to conditions"

62. Subject to the two issues I deal with below, I reject the suggestion that the Inspector failed to apply para. 216 of the NPPF or failed to take the ELP policies into account in reaching his decision.

The two specific aspects of the ELP said to have been ignored

63. In the case of these points, my concern is not only that they involve modifying the focus of the case from that before the Inspector but also that they do not figure in the Grounds or the Council's skeleton argument. I did not prevent Mr Mackenzie from arguing the points but he did not seek to amend his grounds to include them as specific issues.

64. I would therefore be inclined to reject the arguments for that reason alone. However, I have nonetheless considered their substance and reject them also

since I do not consider the criticisms to be made out.

EHI – "conserve or enhance"

65. Mr Mackenzie submits that by not specifically applying EH1, or in failing to give significant weight to it, the Inspector failed to accord significance to the requirement that the landscape be "conserved or enhanced" under EH1 as opposed to a policy to "respect and, where possible, enhance" the landscape under NE3. As I have set out above, in his closing submissions Mr Mackenzie submitted at para. 44 that:

> "EHI which requires proposals to "conserve or enhance" the landscape. This is strong language; Conserve is equivalent to protect which means 'do no harm'. It is directly analogous with NPPF para. 109 and has precisely the same bite and effect."

66. However, para. 109 of the NPPF does not use the verb "conserve" but states:

> "109. The planning system should contribute to and enhance the natural and local environment by:
>
> ● protecting and enhancing valued landscapes, geological conservation interests and soils …"

67. It is plain that para. 109 does not use the term "conserve" though it does, I accept, have equivalent effect without it.

68. I consider Mr Mackenzie's argument to be based on a legalistic approach to the language used without properly considering whether the difference of language has any materially different effect. It is necessary to bear in mind the Court of Appeal's strictures against excessive legalism which applies to the construction of policy as well as to any other planning issue: see e.g. Lord Reed in ***Tesco v Dundee City Council*** [2012] P.T.S.R. 983 at para. 19 and Lindblom LJ in ***St Modwen***, above, at para. 7. Indeed, in ***Mansell v Tonbridge & Malling BC***

[2018] JPL 176 at para. 41 Lindblom LJ stated:

> "They should remember too that the making of planning policy is not an end in itself, but a means to achieving reasonably predictable decision-making, consistent with the aims of the policy-maker. Though the interpretation of planning policy is, ultimately, a matter for the court, planning policies do not normally require intricate discussion of their meaning. A particular policy, or even a particular phrase or word in a policy, will sometimes provide planning lawyers with a "doctrinal controversy". But even when the higher courts disagree as to the meaning of the words in dispute, and even when the policy-maker's own understanding of the policy has not been accepted, the debate in which lawyers have engaged may turn out to have been in vain—because, when a planning decision has to be made, the effect of the relevant policies, taken together, may be exactly the same whichever construction is right (see at [22] of my judgment in ***Barwood v East Staffordshire BC***)."

69. Here, the ALP policies provided that proposals for development should also be considered under the following policies:

    i) NE1 (headed "Safeguarding the Countryside") requires proposals for development in the countryside to "maintain or enhance the value of the countryside for its own sake" citing government policy in former PPS7 to "protect the countryside for the sake of its intrinsic character"; and

    ii) NE3 stated that "[d]evelopment would not be permitted if it would harm the local landscape character of the District. Proposals should respect and, where possible, enhance the intrinsic character, quality and distinctive features of the individual landscape types".

70. It appears clear to me that read fairly, and as a whole, the ALP policies required the countryside and landscape not to be harmed and, if possible, it should be enhanced. Rather than simply focussing attention on the difference between "respect" and "conserve" as Mr Mackenzie did, if the two ALP policies are

considered as a whole, it becomes abundantly clear that his argument is misconceived. I should say, in any event, that I do not even accept Mr Mackenzie's starting point that "respect" in context does not require development not to harm the countryside and landscape.

71. Finally, since the Inspector found the proposals to be in conflict with NE1 and NE3 I find it hard to understand what difference it could have made to take EH3 into account.

EH3 and CTAs

72. I also reject Mr Mackenzie's submission that there was a failure to apply EH3 and to protect the Glyme and Dorn Valleys CTA in which the Site is wholly located. I accept that it was at least tenable that the CTA was to be treated as green infrastructure having regard to the description of green infrastructure in para. 8.27 of the explanatory text of the ELP, which also acknowledges that such infrastructure may not be publicly accessible.

73. The Council's formal statement of the purposes of the designation of the Glyme and Dorn Valleys CTA, Appendix 2 to Miss Tetlow's evidence, shows that the designation of the CTA was predominantly for biodiversity purposes – confirmed by Miss Tetlow herself at para. 11.17 ("CTAs identify some of the most important areas of wildlife conservation in Oxfordshire").

74. In view of the concession of Miss Tetlow and the favourable advice of the Council's ecologist that loss of habitats caused by the proposals were "of low ecological value" and that the proposals -

> "would contribute toward the objective of the Glyme and Dorn Valleys Conservation Target Areas"

it seems to me clear that there had been compliance with EH3, as Miss Osmund-Smith submits. At DL 42 the Inspector understandably accepted there was "no negative effect on nature conservation interests" and an "opportunity for ecological enhancement and habitat creation".

75. Whilst Mr Mackenzie relies on the final sentence in Miss Tetlow's evidence at para. 11.17 as to the loss of CTA area this is far too forensic an approach in a legal challenge in the light of the matters I have set out above and given that in my judgment the CTA here was largely fulfilling an ecological role, which the proposals supported and enhanced. It seems to me that there was good reason for the Council's closing submissions to the inquiry not pressing any objection related to EH3.

76. It follows that in my judgment, this point fails not simply because it was raised late in the day, and was not properly pleaded, but also because it was hopeless.

Failure to take account of the ELP generally

77. Mr Mackenzie also invited me to find that the simple failure by the Inspector to have regard to the ELP policies, or to give substantial weight to them, was itself a material error regardless of the substance of the points raised in connection with the policies, since it would have provided another layer of material considerations that would have added weight to the Council's objections.

78. As a starting point, I reject the proposition that the Inspector did not take into account the ELP policies and consider his assessment of weight to have been lawful, for the reasons I have already set out. This point is therefore academic,

though I will deal with it briefly.

79. A consideration is material if it arises under one policy and, if it has full weight (as was the case with the majority of the ALP policies and the NPPF), it is difficult to see how the presence of another additional policy to similar effect could have affected the planning judgment to be reached. Curiously, Mr Mackenzie in effect supported that proposition in accepting that there was no purpose to considering ELP policy EH7 in the light of the heritage policies in the NPPF (as he had in closing at the inquiry). However, he did not apply the logic of that concession to this broader submission.

80. Since the Inspector (with some adjustment of weight for NE1) found the relevant development plan policies not only to be consistent with the NPPF and of full weight, but found the proposals to conflict to some degree with NE1 and NE3, it is difficult to conceive how the presence of draft policies to similar effect could have made a sensible difference. There was no failure to consider the relevant planning points of substance and, provided there was no issue arising under the ELP which was new and not covered by the ALP or NPPF, I cannot see how repetition of the policy objectives (albeit differently worded) can alter the approach to the planning judgment reached by the Inspector. For example, the harm caused to the character and appearance of the area was no less relevant or significant because it also engaged the ALP and NPPF. I have explained why I have rejected the two points of alleged difference between the ELP and ALP policies.

81. In my judgment, even were this point not academic, it would fail.

Reasons

82. As I have already explained, the DL is a coherent and systematic consideration of the issues in the policy context set out by the Inspector. I consider the Inspector's decision to be clearly structured and well-reasoned and that it is perfectly clear why the Inspector reached his conclusions. I do not consider that his reasons were inadequate specifically with respect to his approach to the ELP having regard to Lord Brown's formulation of the law in ***South Bucks***.

83. As I have already explained, I consider that the Council's approach to ***Woodcock*** failed to take account of both the specific context of that judgment and the particular circumstances of this appeal.

84. I do not consider that the Council has demonstrated substantial prejudice in terms of s. 288(5) of the 1990 Act.

Discretion

85. Finally, in view of my conclusions on the issues, including the specific points raised in connection with EH1 and EH3, I am not satisfied that even if the Inspector had made an error with regard to those matters that it would have made a difference to the outcome. Had it been necessary, I would, exceptionally, have refused to quash the decision for those errors, applying ***Simplex GE (Holdings) Ltd v Secretary of State for the Environment*** [2017] P.T.S.R. 1041 at 1060.

Conclusion

86. For the reasons given above, I dismiss the Council's application.