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Dear Mr Rowberry

**Application:18/504836/EIAOUT: Binbury Park, Bimbury Lane,**
**Proposal: Outline application for the erection of up to 1,750 dwellings, including affordable housing, 46,000sq.m commercial space, a hotel, a local centre, new primary school, park and ride facility, strategic highway improvements etc.**

Thank you for inviting the Kent Downs AONB Unit to comment on the above application. The following comments are from the Kent Downs AONB Unit and as such are at an officer level and do not necessarily represent the comments of the whole AONB partnership. The legal context of our response and list of AONB guidance is set out as Appendix 1 below.

## National planning policy

The application site lies within the Kent Downs AONB. The application therefore needs to be tested against the purpose of the designation, to conserve and enhance natural beauty and the way that this purpose is represented in national and local policy.

The legal requirements for protecting Areas of Outstanding Natural Beauty, which underpin national planning policy, are set out in the Countryside and Rights of Way Act 2000. This places a statutory duty on relevant authorities, which includes local and central government, to have regard to the purpose of conserving and enhancing the natural beauty of AONBs in exercising their functions.

The recently revised NPPF has strengthened policy on AONBs with a newly twice repeated instruction in paragraph 172 for AONBs to be enhanced, in addition to being conserved, bringing the policy in line with the Countryside and Rights of Way Act 2000. An additional sentence in the revised NPPF then provides that 'the scale and extent of development within these areas should be limited'. In addition, the revised NPPF is clear at paragraph 11 that the presumption in favour of sustainable development remains disengaged where

policies relating to AONBs and other specified designations, provide a clear reason for refusing the development in instances where there are no relevant development plans or policies are out of date.

The scale of the proposals is such that it constitutes major development, as accepted in the planning application submissions. As such the application needs to be assessed against both parts of paragraph 172 of the Revised NPPF. The second part of paragraph172 states that planning permission should be refused for major developments in AONBs, except in exceptional circumstances and where it can be demonstrated that they are in the public interest. Three criterion against which the assessment of major developments should be considered are set out; the need for the development, the impact on the landscape and the scope for developing outside of the designated area or meeting need in another way. It is necessary for both the exceptional circumstances and the public interest case to be satisfied and for all three criterion to be addressed.

The Kent Downs AONB Unit does not consider that any exceptional circumstances nor a public interest case have been demonstrated that would justify the release of this land for the proposed development within the AONB, a nationally important landscape resource. Assessing the proposal against each of the criteria set out in paragraph 172, we offer the following comments:

Need for the development:

The NPPF requires there to be an assessment of the need for the development, including in terms of any national considerations. It is our view that no national need has been identified. The AONB Unit acknowledges that while providing additional housing and employment land and promoting a specified list of 'benefits' in the form of playing pitches, park and ride, highway improvements etc. might be desirable, both individually and cumulatively, it does not provide a sufficient or robust reason to justify the proposed development in view of the resultant significant harm that would occur to a nationally protected landscape. The proposal does not amount to exceptional circumstances and none of the elements either individually cumulatively are of national importance.

Given that Maidstone Borough Council currently has a five year housing supply (6.3 year housing land supply as at April 2018) and a recently adopted Local Plan (October 2017), there is no specific need for this site to be released for housing. It should also be noted that site was considered by the Local Plan Inspector as part of the 2017 Local Plan Examination and found not to be appropriate for development; at paragraph 293 of his Report, the Inspector advises that the site is considered inappropriate and reference is made to the provisions of the NPPF that major proposals should be refused except in exceptional circumstances).

It is understood that an early review of Maidstone's Local Plan is to be carried out, with adoption anticipated by 2021. It would be wholly inappropriate to permit a development of the scale proposed in advance of preparation of a new Local Plan which would properly establish both OAN for employment and housing land requirements and establish the most appropriate locations for development to be directed to. This is particularly important in view of the 'in principle' national policy

presumption against major development within AONBs as set out in the revised NNPF.

Furthermore, if as alleged in the Planning Statement, the application site is the only option that can deliver significant growth in the Borough, then footnote 6 to paragraph 11 of the Revised NPPF would be applicable. This states that strategic policies should provide for OAN **unless** the application of policies in the Revised NPPF that protect specified designated areas including AONBs provide a strong reason for restricting the overall scale, type or distribution of development in the plan area. As development would clearly be contrary to the provisions of paragraph 172 that requires great weight to be given to conserving and enhancing natural and scenic beauty and for development in AONBs to be limited in scale and extent, a case for not meeting the OAN could clearly be made.

Similarly, in respect of employment need, the adopted local plan provides for approximately 76,000 sq. m of employment floor space and meets the identified need for employment land in the Borough. Reference is made in the Planning Statement to the allocated land not being likely to come forward, citing an application at Waterside Park (15/503228/OUT), which forms part of the Borough's employment land supply in the local plan, being refused. We would strongly question this assertion however, given that a subsequent resubmission of this application (17/502331) was granted permission in July 2018.

The proposal incorporates the provision of a new Country Park. While we have no objection in principle to the provision of such a facility, it cannot not be argued to be needed as the local area is already well served by the White Horse Wood Country Park on the opposite side of the A249 which is currently underutilised. Furthermore, there is already public access across the application site including land proposed to be a Country Park, provided by Public Rights of Way KH74, KH60 and KH62.

Scope for Development Elsewhere:

The AONB Unit contends that this element is not properly addressed in the applicant's submission. Only 27.3% of the District lies within the AONB and while there are other local landscape designations, as confirmed in the revised NPPF at paragraph 172, AONBs (along with National Parks) have the highest status of landscape protection and planning decisions should protect and enhance valued landscapes in a manner commensurate with their statutory status (paragraph 170). The 72.7% of the District that does not fall within the AONB designation would clearly be more appropriate to meet any strategic development needs. The AONB Unit is firmly of the view that should the need for a strategic development of the scale proposed be identified it should be properly assessed through the local plan process so that both need and appropriate location can be fully assessed at a District wide level as well as through the Duty to Co-operate and that any identified need should be met by utilising sites which are less environmentally constrained within the Borough, with there being no specific or functional requirement for these facilities to be located either on land at Bimbury Park or on land designated as AONB. Other than generalised statements, no evidence has been put forward as to why the proposed development, either cumulatively or as individual elements, could not be provided on land outside of the designated area.

The importance of consideration of alternative sites in respect of assessment against paragraph 116 of the former NPPF is demonstrated in the High Court Decision of Wealden District Council v Secretary of State for the Communities and Local Government & Anor (2016) EWHC 247 (Admin)(17 February 2016), attached as Appendix 2. This relates to a housing proposal in the High Weald AONB. In quashing the Inspector's decision Mr Justice Lang stated:

*"Unfortunately the Inspector did not adequately investigate or assess whether the Steel Cross development could be located at an alternative site, either in Crowborough or the wider district, and so he did not properly apply NPPF 116, nor did he take into account all relevant considerations, as required in public law decision- making. I consider that this was a significant failure, given the high level of protection afforded to AONBs under national planning policy. In my view, it would not be appropriate for me to exercise my discretion not to quash the decision on this ground since, on the evidence, it is possible that a suitable alternative site might be identified, which could alter the overall judgment made on whether the presumption against development ought properly to be rebutted in respect of this development."*

Detrimental effect on the landscape

The site lies within the Mid Kent Downs Character Area as identified in the Landscape Assessment of the Kent Downs AONB, carried out by the Countryside Commission which classifies the AONB into 13 distinct character areas. The Mid Kent Downs is further broken down into four local character areas and the site lies within the Chatham Outskirts local character area. The most recent Landscape Character Assessment covering the site is the Maidstone Landscape Character Assessment of 2012 (LCA). The majority of the site lies within the Bredhurst and Stockbury Downs Landscape Character Area identified in this LCA.

The site is predominantly rural in nature and largely consists of a mix of woodland, some of which is designated Ancient Woodland and agricultural land, comprising a patchwork of small fields with attractive undulating topography to the north and west including a steep sided narrow valley with a more gently sloping landscape and larger arable fields on the north eastern and southern most parts of the site. This is consistent with the landscape characteristics identified in the various LCAs, including the Kent Downs LCA where key characteristics are identified as including 'large arable fields on the plateaux', 'much surviving original ancient woodland, and series of wide ridges and steep sided dry valleys. The site, in the main, reflects the characteristics of the Kent Downs AONB and contributes to the landscape and scenic beauty of it and we strongly disagree with the contention that the site is of low to moderate quality.

The proposal would result in the creation of a new settlement in the open countryside on what is currently agricultural land. The proposed mixed use development of the scale proposed would be wholly uncharacteristic with the current predominantly rural character of the locality. The proposed development would result in a substantial change to the character of the site, introducing built development where there currently is none. While it is noted that some of the existing trees and hedges within the site would be retained along with some of the field boundaries, the character of the fields would be wholly compromised. Harm

would arise as a result of the urbanisation of the agricultural land leading to a complete alteration of the character of the site. As well as harm arising as a result of the proposed buildings, the introduction of the quantum of development would not be in keeping with settlement pattern in the locality which comprises small scale villages and individual farmsteads/dwellings.

There would also be harm as a result of tree removal, including the removal of 14 groups of trees, partial removal of 11 groups, some of which are protected by TPOs and the removal of 1.6 ha of Ancient Woodland, all of which would have a detrimental impact on landscape character. Paragraph 175 of the revised NPPF advises that development resulting in the loss of ancient woodland should be refused unless there are wholly exceptional reasons, such as infrastructure projects including NSIPs and where the public benefit would clearly outweigh the loss or deterioration of habitat. In our view, no such exceptional reasons have been demonstrated.

The harm would be exacerbated as a result of the density and height of the proposed buildings; parameter plans submitted in support of the application indicate that that the majority of the proposed housing would be a mix of 3 and 4 stories in height and is proposed at moderate density with high density incorporated on the eastern side of the site. This would fail to reflect the local character of surrounding villages where development is generally limited to low density, two storey development. The proposed commercial development would also be particularly harmful, with the proposal including some 18,777sq.m of large scale B8 Storage and Distribution buildings.

The proposed sports facilities while largely retaining the openness of part of the site would result in existing farmed countryside being converted to playing pitches, also wholly out of keeping with landscape character. The introduction of floodlighting to what is currently an essentially unlit area would be highly detrimental to the dark night skies of the AONB, as would the additional light pollution from the road infrastructure (A249 grade separated junction proposals) together with lighting from community facilities, primary school, commercial areas and park and ride facilities, particularly in view of the fact it is advised that these will require security lighting during the night time periods.

Other elements of the proposal would also result in particular harm. A large Park and Ride facility and overflow parking to serve the County Showground would necessitate converting some 8 ha of existing arable land to a hard surfaced car park which would fail to conserve the natural beauty of the AONB as well as introducing further lighting into a currently unlit area.

There would also be significant detrimental impacts as a result of proposed new highways infrastructure. The proposal includes a new junction to allow free flowing traffic along the A249 south bound and a traffic signal control for the A249 northbound. This would comprise a grade separated site access comprising two slip lanes either side of the A249 requiring land take on the east side of the A249 and significant engineering works including the provision of a vehicular underpass beneath the A249 with associated loss of mature trees along the edge of the existing highway as well as the introduction of retaining walls between the main carriageway and slip road. A secondary access is also proposed close to the existing access to the Kent Showground. Such infrastructure would all result in further urbanisation of

the A249, failing to conserve and enhance the special qualities and character of the AONB.

Reference is also made at paragraph 3.8 of the Planning Statement to the creation of a bus priory lane along the A249, however no details are provided and this is not included within the red line site plan. Such a proposal would be likely to involve road widening/loss of existing highway vegetation and would have further major detrimental impacts on the character and quality of the Kent Downs AONB.

Accordingly, the Kent Downs AONB Unit is of the view the development would result in a major adverse impact to landscape character and that the proposal would not conform with the 'Restore and Improve' strategy identified in the LCA which identifies the Bredhurst and Stockbury Downs LCA as having a moderate sensitivity to change.

In terms of visual impacts, longer and middle distance views to the site are limited as a result of the undulating topography of the landscape and the presence of blocks of woodland. Notwithstanding this, there would nevertheless be substantial negative visual impacts in both shorter distance views of the site and views from within the extensive site area itself, which is traversed by a number of public rights of way. The experience of users of these Public Rights of Way would be substantially altered. The LCA notes that the majority of tree and hedgerow species are broadleaved and the arable crops are seasonal, therefore views would appear more open in winter. Much of the tree cover in and within the vicinity of the site comprise Ash which is being severely impacted by Ash die-back disease (Chalara Fraxinea) in the locality, as noted locally on site. Loss of the majority of ash trees in the Kent Downs AONB is anticipated which is likely to result in views of the site being opened up; the potential impacts of Ash dieback disease need to be taken into account.

A notable feature of the site is some extraordinary long distance views northwards across the Isle of Grain, including both narrow and panoramic views, available from the public rights of way that cross through the site including from public footpath KH62 and restricted Byway KH74. These dramatic views are identified as one of the special characteristics and qualities of the Kent Downs AONB, with the Management Plan stating ' Breath taking, long-distance panoramas are offered across open countryside, estuaries, towns and the sea from the scarp, cliffs and plateaux; the dip slope and dry valleys provide more intimate and enclosed vistas' (page 7). These views would be lost as a result of the proposed built development and landscaping proposals.

A sense of tranquillity is a special quality of the AONB and its importance is recognised by its inclusion in the Management Plan (policy SD7). While recognising that tranquillity at the site is affected by the A249, the proposal would further erode tranquillity by virtue of increases in noise, activity and traffic at the site. The Noise and Vibration Assessment does not assess impacts of noise on recreational users of the AONB, focusing on residential receptors only. The site is traversed and surrounded by several Public Rights of Way. The proposal would result in an increase in noise experienced by users of the footpaths.

It is contended in the Planning Statement that as the site only represents 0.72% of the total area of AONB in Maidstone Borough, the proposal would represent a de Minimis effect on overall quantum of AONB in the Borough. The AONB Unit does not consider that this is an appropriate test for acceptability of development within an AONB, nor is the way that major development is dealt with in the NPPF. The Kent Downs AONB is a wide and large expanse of area and development of any scale which detracts from elements which contribute to that wider natural and scenic beauty would not conserve or enhance it.

In conclusion, the Kent Downs AONB Unit considers the proposed development would result in a significant detrimental change to landscape character as well as harming visual amenity, removing the current sense of openness and having a significant detrimental effect on the landscape and scenic beauty of the AONB. Given the change from open countryside to urban development it is contented that the impact on landscape character could not be mitigated. The AONB is sensitive to both landscape and visual effects. Justifying the proposal on the basis that the site is largely hidden in longer distance views does not justify the proposal; this is not just a visual issue but one about landscape impacts as well; the NPPF is clear that it is both landscape and scenic beauty that is required to be conserved in AONBs.

Conclusion on assessment of proposal against paragraph 172 of the NPPF

Taking the above into account, the Kent Downs AONB Unit is of the view that there is no justifiable need for an urban development of this scale in a location within the AONB. The appellant has not demonstrated that the development could not be provided on less sensitive sites, including those outside of the AONB. The development would not represent exceptional circumstances, nor be in the public interest, given the scale of development and significant harm that would arise to a nationally protected landscape. Boosting the supply of houses and employment land does not comprise sufficient justification for allowing major new development in the AONB. While providing the specified shopping list of benefits might be desirable, none provide a sufficient or robust reason to justify the proposed development in view of the resultant significant harm that would occur to a nationally protected landscape. They do not, in our view, amount to exceptional circumstances and are not generally of national importance. The application fails all three tests for major development within AONBs set out at paragraph 172, as well as being contrary to the first part of the paragraph which requires that great weight be given to conserving landscape and scenic beauty and that the scale and extent of development within these areas should be limited.

## Local Planning policy

It is also considered that the proposal would be contrary to several policies in Maidstone's Local Plan, adopted October 2017, in particular policies SS1, DM3 – Natural Environment and SP17 - Countryside.

Policy SS1 sets out the Strategy for the Borough and sates that an expanded Maidstone urban area will be the principle focus for development while the Kent Downs AONB will be conserved and enhanced.

Policy DM3 requires that requires new development to protect and enhance the natural environment by incorporating measures where appropriate to protect positive landscape character, tress with significant amenity value, important hedgerows and the existing Public Rights of Way network from inappropriate development and to avoid significant adverse impacts as a result of development. This policy also requires that account be taken of the Kent Downs AONB Management Plan. As explained above, the AONB Unit is of the view the proposal would result in significant adverse impacts on the nationally protected AONB landscape designation as well as being contrary to several policies in the Kent Downs AONB Management Plan.

Policy SP17, in line with the revised NPPF, requires that great weight be given to the conservation and enhancement of the Kent Downs Area of Outstanding Natural Beauty. The explanatory text to this policy, at paragraph 107 states that 'economic development within the AONB should be located in existing traditional buildings of historic or vernacular merit in smaller settlements, farmsteads or within groups of buildings in sustainable locations'.

As has been demonstrated above, the AONB Unit considers that the proposed development would have a substantial and significant harmful impact on the special characteristics and qualities of the AONB, including tranquillity that would not be offset by the proposed landscape enhancements and taken as a whole the proposal would neither conserve nor enhance the AONB.

As Maidstone has an up to date Local Plan and can demonstrate a five year supply of deliverable housing sites, the application should be determined in accordance with the policies of the Local Plan.

**Kent Downs AONB Management Plan**

In addition to being contrary to policies in the NPPF seeking to protect AONB landscapes and local plan policies seeking to protect the character of the countryside and landscape, the proposal would also be contrary to policies in the Kent Downs AONB Management Plan, Second Revision 2014 to 2019. The Management Plan has been adopted by all local planning authorities in the Kent Downs, including Canterbury City Council. The national Planning Policy Guidance confirms that Management Plans can be a material consideration in planning decisions and this view is confirmed in previous appeal decisions, including APP/U2235/W/15/3131945, Land west of Ham Lane, Lenham, Maidstone, where at paragraph 48 of the Inspector's decision letter it is confirmed that "the Kent Downs AONB Management Plan April 2014 (the Management Plan) is also a further significant material consideration".

The following policies from the Management Plan are considered to be of particular relevance to the application:

**MPP2** Individual local authorities will give high priority to the AONB Management plan vision, policies and actions in Local Plans, development management decisions, planning enforcement cases and in carrying out other relevant functions.

**SD1** The need to conserve and enhance the natural beauty of the Kent Downs AONB is recognised as the primary purpose of the designation and given the highest level of protection within the statutory and other appropriate planning and development strategies and development control decisions.

**SD2** The local character, qualities and distinctiveness of the Kent Downs AONB will be conserved and enhanced in the design, scale, setting and materials of new development, redevelopment and infrastructure and will be pursued through the application of appropriate design guidance and position statements which are adopted as components of the AONB management Plan.

**SD3** New development or changes to land use will be opposed where they disregard or run counter to the primary purpose of the Kent Downs AONB.

**SD7** To retain and improve tranquillity, including the experience of dark skies at night, careful design and the use of new technologies should be used. New developments and highways infrastructure which negatively impact on the local tranquillity of the Kent Downs AONB will be opposed unless they can be satisfactorily mitigated.

**SD8** Proposals which negatively impact on the distinctive landform, landscape character, special characteristics and qualities, the setting and views to and from the AONB will be opposed unless they can be satisfactorily mitigated."

**LLC1** – The protection, conservation and enhancement of special characteristics and qualities, natural beauty and landscape character of the Kent Downs AONB will be supported and pursued.

**FL1** The AONB will retain the principally farmed character for which it is valued.

**FL7** Conversion from agricultural to leisure use and the creation of non-agricultural structures will only be supported where there is not a cumulative loss to the principally farmed landscape of the AONB.

**WT1** Threats to the existing extent of woodland and transitional habitats around woodland will be resisted. Extension of both habitats types will be supported where appropriate to landscape character. The loss of ancient woodland will be opposed.

**AEU2** Diversions and stopping up of PRoWs will be resisted unless it can be demonstrated that they will not have a detrimental impact on opportunities for access and quiet enjoyment of the AONB landscape and historic character.

**AEU14** Proposals which detract from the amenity and enjoyment of users of the Public Rights of Way network will be resisted.

## LANDSCAPE & VISUAL IMPACT ASSESSMENT

The Kent Downs AONB Unit disagrees with the conclusion of the LVIA that the effects of the development on the character and visual appearance of the open countryside and Kent Downs AONB will not be significant or harmful. The introduction of some 76 ha of built form, including 1750 new houses, large scale storage and distribution industrial buildings and 9ha of car park plus floodlit formal playing fields would result

in significant harm to the intrinsic rural character and appearance of the area and detract from the natural appearance and beauty of the AONB that could not be satisfactorily mitigated by landscaping or other methods. Furthermore, much of the proposed mitigation in the form of additional planting within and around the perimeter of the site would result in a loss of existing views both across the site as well as some exceptional long distance views towards and across the Isle of Grain and is not an appropriate design response to the special characteristics and qualities of the AONB. Such views are recognised as one of the AONBs special qualities and characteristics, as identified at page 7 in the AONB Management Plan '…Breath taking, long-distance panoramas are offered across open countryside, estuaries, towns and sea from the scarp, cliffs and plateaux'.

We offer the following specific comments on the LVIA submitted as part of the ES.

**Landscape Impacts:**

The AONB Unit considers that the Magnitude of Change has been significantly under reported in many cases. Example appraisal categories of Magnitude of Change provided within the LVIA methodology at pages 7 & 8 of Appendix 10.2 are:

Very High - Total loss or comprehensive enhancement of the landscape resource.

High - Substantial loss or enhancement of the landscape resource.

Medium - Partial loss/alteration or moderate enhancement of the landscape resource.

Low - Slight loss/alteration or slight enhancement of the landscape resource.

Very Low / Negligible - Minor loss/alteration or minor enhancement of the landscape resource.

Despite the total loss or substantial loss of the landscape resource from open agricultural land to urban built development, corresponding with a Very High or High Magnitude of Change, the LVIA often assesses the Magnitude of Change as being Medium or Low. We are also concerned with the forecast reduction in Magnitude of Change assigned to some of the Landscape Receptors from Construction/Year 1 to Year 15. We strongly disagree that the proposed mitigation would lead to the stated reductions in Magnitude of Change with no amount of landscaping or other measures compensating for the loss in landscape resource that would result due to the substitution of nationally protected, open countryside with an urban development. As the level of effect for landscape is derived from assessing the Sensitivity against the Magnitude of Change, assigning a lower degree of Magnitude of Change value will produce a lower level of effect.

**Landscape elements, pattern and character**

The LVIA assigns a Magnitude of Change of Medium to High during Construction and at year 1, however this is reduced to low to medium at Year 15. The site is provided with a sensitivity of Medium to High, which is justified on the basis that in the 'central southern and eastern parts of the site there are very few landscape elements or patterns of any significance which are important apart from some boundary hedgerows and trees within the site'. However the AONB Unit considers

that the sensitivity should be HIGH. Example Appraisal categories for landscape sensitivity are provided in Table 3.0 of Appendix 10.2):

Very High - Typically internationally or nationally recognised landscape resource of strong landscape structure with many distinct features worthy of conservation with high susceptibility to the proposed change.

High -Typically of national recognition and of recognisable landscape structure with some features worthy of conservation; may contain occasional detracting features with high or medium susceptibility to the proposed change.

Medium -Typically of designated regional or district recognition or undesignated but value expressed through consensus, demonstrable use or non-official publications. Distinguishable landscape structure. Some or few features worthy of conservation, some detracting features with medium susceptibility to the proposed change.

As the site lies within the nationally recognised landscape designation of an AONB, has a recognisable landscape structure that is consistent with the characteristics of the Landscape Character Area within which it sits, we consider it should be assigned a High Sensitivity. The site itself does not include the industrial estate and there are few detractors within it. We consider the landscape condition of the site to be in average repair/quality and to make an average contribution to landscape character.

With regards to the landscape susceptibility, given that is has High value being within a designated AONB and in a landscape that is unlikely to accommodate the specific form of development without undue negative consequences 'i.e. being out of scale or out of character and effective mitigation would be difficult to achieve,' this results in a High susceptibility and a consequent High level of sensitivity.

The AONB Unit does not agree with the LVIA that there would be a Low to Medium Magnitude of Change to the Landscape at year 15. While we recognise that some of existing hedges, trees and woodlands would remain, the overall character of the landscape on the developed part of the site, including sports area, would be wholly compromised, with the loss of arable farmland and its substitution with an urban townscape, contrasting with the predominantly rural surroundings. The loss of ancient woodland and re-profiling of ground levels to create building platforms would also have negative impacts. We therefore consider that there would be a long term High degree of change, and a substantial loss of the landscape resource, representing a High Magnitude of Change, resulting in a Substantial Adverse effect.

**LCA District level Bredhurst and Stockbury Downs** - The LVIA assigns a Magnitude of Change of Medium during Construction and at year 1, however this is reduced to low at Year 15. At Table 10.6.3 the LVIA states that 'Overall, the changes to the landscape character of the locality due to the development will be moderate/slight adverse due to built development to slight beneficial in relation to landscaped areas.' The Magnitude of Change to landscape is assessed as low 'given the size and scale of the character area in relation to the proposed development'. This results in a negligible effect i.e. a minor loss or alteration or minor enhancement of the landscape resource. However we do not agree with the assignment of 'low' i.e. a slight loss of the landscape resource. The application site is considered to be wholly characteristic of this Landscape Character Area. The scale of the proposal

would occupy a significant portion of it, changing the character from open agricultural land to a new urban townscape. As such we consider that the Magnitude of Change should be assessed as 'Medium' i.e. a partial loss of landscape resource which would result in a Moderate/Substantial to Moderate Impact, rather than the Moderate/Slight Adverse predicted effect.

**Protected Trees and Woodland** - The LVIA assigns a Magnitude of Change of Very High to low during Construction, Very High to low/negligible at year 1, reducing to Very Low to Negligible at Year 15. While we note that the proposal retains some trees and woodland within the site, the proposal would nevertheless result in the loss of a number of trees including 1.6 ha of Ancient Woodland. Ancient Woodland is classified as irreplaceable habitat, which takes hundreds of years to establish and is assigned the highest level of protection at national level, with the NPPF advising that development resulting in the loss of such habitats should be refused unless there are wholly exceptional reasons. We therefore do not concur with the assessment that the loss of 1.6 ha of Ancient Woodland would have a Very Low to Negligible effect at year 15 due to proposed mitigation in the form of an increase in 5.6ha of woodland and allowing increased public access into the site. We consider that the Magnitude of Change would be at least Medium resulting in a Substantial to Moderate/Substantial Adverse residual effect as opposed to the 'Neutral/Slight Beneficial' reported in the LVIA.

**SP17** - The LVIA assigns a Magnitude of Change of Medium during construction, Medium to Low at year 1 and Medium to Low at Year 15. The Receptor is assigned a sensitivity of Medium to High. Policy SP17 specifies that development proposals in the countryside will not be permitted unless they accord with other policies in the Local Plan and they would not result in harm to the character and appearance of the area and that great weight is to be given to the conservation and enhancement of the Kent Downs AONB. As the site is located in the open countryside and is wholly within the Kent Downs AONB and the proposal would harm the character and appearance of the area and fail to conserve and enhance the AONB, we consider that this receptor should be assigned a High to Very High sensitivity. In view of the scale of the proposal, there would be a substantial loss of the landscape resource i.e. a High magnitude of change, resulting in a Substantial to Major Substantial effect as opposed to the Moderate/Slight Adverse to Negligible effect reported in the LVIA.

**AONB** – The LVIA assigns a Magnitude of Change of Medium during Construction, Medium at year 1, and Low at Year 15. The proposed development would result in the conversion of some 76ha of land from open farmed countryside to an urban townscape including forms of development such as large scale industrial storage and distribution buildings, and extensive areas of car park that are not compatible with AONB designation and would not be capable of being satisfactorily mitigated; the proposed built development would not be complimentary to the local character and qualities of the AONB.

We cannot agree with the LVIA that the residual effect would be Medium to Low after 15 years i.e. a 'Partial loss or alteration or moderate enhancement of the landscape resource/Slight loss or alteration or slight enhancement of the landscape resource.' No amount of landscaping would compensate for the change of character

from farmed land to urban townscape. Furthermore, as detailed earlier in this response, the proposal would be wholly contrary to numerous policies in the Kent Downs AONB Management Plan. While individual elements of the scheme such as some of the landscaping proposals and increasing public access to the site may be compliant with specific policies of the AONB Management Plan, this would not result in a net benefit to the AONB when balanced against the very substantial amount of development proposed and would not result in a net contribution to achieving the aims or objectives of the Kent Downs AONB Management Plan.

We are therefore of the view that the Magnitude of Change should remain High at Year 15. The High to Very High Sensitivity assigned to the AONB assessed against a Medium to High Magnitude of Change results in a Substantial to Major Substantial residual adverse effect as opposed to the 'Moderate/Slight Adverse to negligible effect' reported in the LVIA.

**Visual Impacts:**

The AONB Unit does not agree with many of the conclusions of the assessment of visual effects set out in the LVIA. We also consider that for a development of this scale, the LVIA should have included photomontages of the proposed development to help better assess visual impacts.

Generally, as with the landscape impacts, we consider that the Magnitude of Change is significantly underestimated, particularly in respect of residual impacts; in many cases the LVIA concludes that the introduction of significant urban built form would result in a residual low to negligible impact despite the introduction of significant built urban form, which does not correspond with the LVIA methodology. We also have concerns that the all the views are assessed in the LVIA as being 'Indirect', in the majority of the close-up views, we consider the views to be 'Direct'.

The LVIA assesses that that the initial visual effects of the development, both during construction and on completion at Year 1 would include many 'Major Substantial to Substantial' and 'Substantial to Moderate Substantial' adverse visual effects from viewpoints within and close to the boundaries of the site. This, as set out at Table 7 of the Methodology and page 14/15 of ES Vol. 2 Appendix 10 Landscape & Visual Amenity P1/5, represents a significant effect. The LVIA contends however that in all views, the visual effects would be reduced by appropriate architectural treatment, setting buildings back from the site boundaries and through the introduction of landscaping. It is also reported that the effects would be reduced as a result of viewers becoming accustomed to seeing the development and as a result of increased habitat diversity. It is concluded that such measures would reduce the visual adverse level of effect to 'Moderate to Slight or Slight/Negligible adverse' in the longer term, depending on the view point.

While landscaping may result in a degree of reduction in visual impact, it is considered wholly inappropriate to justify lower values in respect of Magnitude of Change on the basis that 'development closest to the view point will screen development/dwellings within the remaining parts of the site'. It is also considered inappropriate to justify the lower values as a result of 'new residents and regular users of the footpath becoming accustomed to seeing the new development'.

Reference to increased habitat diversity is also inappropriate, as this is not relevant to assessing visual impacts.

Furthermore, the AONB Unit does not consider that the proposed mitigation would result in the reported reduction of Magnitude of Change from the closer range viewpoints and that a mix of Moderate/Substantial adverse, Substantial adverse and Major substantial adverse effects would remain, representing a significant effect.

In addition to our concerns regarding the stated reduction in Magnitude of Change from most of the closer viewpoints, we have additional concerns in respect of the following viewpoints:

**VP1** provides views across open countryside sloping gently upwards in a southerly direction, with longer distance views to woodland beyond. This would change to views of a large scale urban development at close range. We therefore consider that there would be a Very High Magnitude of Change at Construction and Year 1 reducing to Very High to High at Year 15 because the development would remain the dominant feature that would change the overall landscape character. This would result in a minimum Moderate/Substantial Adverse to Major Substantial adverse residual effect at Year 15, not Moderate to Slight as predicted.

**VP 2** provides views of open countryside looking northwards, with long distance views over the site to the Isle of Grain. Although the entrance to the Industrial Estate is just visible, the bulk of the Estate is screened behind trees. This would change to close up views of a large scale urban development, with the long distance views lost. We therefore consider that there would be a Very High Magnitude of Change at Construction and Year 1 reducing to Very High to High at Year 15 because the development would remain the dominant feature that would change the overall landscape character. This would result in a minimum Moderate/Substantial Adverse up to a Major Substantial adverse residual effect at Year 15, not Moderate to Slight as predicted.

**VP 4** provides views over arable fields with little urban form or other detractors apparent. The views extend well beyond the application site to wider views over the countryside beyond. From this viewpoint, the proposed landscaping would filter views of the proposed housing estate, however the change in character of the site and built development would still be apparent at Year 15, especially in winter months. The introduction of the landscaping would also remove the open nature of the existing views. This VP is taken from the start of a Public Right of Way that then passes centrally through both new housing and the sports pitch provision where there would be a substantial change to the view; we are of the opinion that there should be a View Point further east on the Public Right of Way which would be assigned 'High' sensitivity and a Very High Magnitude of Change at Year 15, which would result in a residual Major Substantial adverse effect.

**VP 5** This viewpoint is taken from a Public Right of Way through farmland where there are extensive views of open countryside for a length of approximately 750 metres. The LVIA concludes that the development would result in a recognisable change to the view however assigns this Viewpoint a Magnitude of Change of High to Low at Construction and Year 1 reducing to Low to Negligible at Year 15. The

example appraisals provided in the Methodology for a Low Magnitude of Change provide that 'typically the proposals constitute only a minor component of the wider view, which might be missed by the casual observer or receptor. Awareness of the proposals would not have a marked effect on the overall quality of views', while Negligible advises that 'typically only a very small part of the proposals is discernible and/or they are at such a distance that they are scarcely appreciated. The proposals would have very little effect on views that would typically be long range and/or oblique in nature.' The view from the footpath would clearly change beyond recognition from an open country view with few visual detractors to a large housing estate, albeit landscaped. We do not agree with the assertion 'the proposed development will also provide the opportunity to enhance the character of this section of footpath no 62 albeit in a more urban context'. As such, we consider that there would be a Very High Magnitude of Change at both Construction and Year 1, reducing to High at Year 15 as the landscaping matures. This would result in a Residual effect of Substantial Adverse rather than the reported Moderate to Slight Adverse in the LVIA.

**VP 6** This is taken from the same public FP62 as VP5 but at its western end. From this VP, views are more contained and the character of the landscape is much more undulating in nature. The LVIA concludes that the development would result in a recognisable change to the view however assigns this Viewpoint a Magnitude of Change of High to Low at Construction and Year 1 reducing to Low to negligible at Year 15. The example appraisals provided for low to negligible are 'Low - typically the proposals constitute only a minor component of the wider view, which might be missed by the casual observer or receptor. Awareness of the proposals would not have a marked effect on the overall quality of views. Negligible - typically only a very small part of the proposals is discernible and/or they are at such a distance that they are scarcely appreciated. The proposals would have very little effect on views that would typically be long range and/or oblique in nature.' The view from the footpath would clearly change beyond recognition from an undulating view of open countryside with few visual detractors to a large housing estate, albeit landscaped. As such, we consider that there would be a Very High Magnitude of Change at both Construction and Year 1, reducing to High at Year 15 as the landscaping matures. This would result in a Residual effect of Substantial Adverse rather than the predicted Moderate to Slight Adverse in the LVIA.

**VP 8** This viewpoint provides expansive views across wide open countryside including groups of trees in both the foreground, middle distance and distance with little in the way of visual detractors. The proposal would result in the loss of the foreground (left hand side of photo) and middle distance groups of trees and the existing rural view would be replaced by a large scale housing development. The LVIA suggests that at Year 1 'the magnitude of change will diminish with distance as the houses nearest the viewer will partially or completely screen development within the remainder of the site'. The report concludes that the Magnitude of Change would be High to Low at Construction and Year 1 but will have reduced to Low to Negligible at year 15. As views here will have changed from open countryside to a large urban housing estate, we consider the Magnitude of Change would be Very High at Construction and Year 1 and remain Very High to High at Year 15 as

landscaping matures and softens the development. This would result in a residual effect of Major Substantial to Substantial adverse.

**VP 9** The existing low key, informal entrance to the Showground with views over maintained grass and informal gravel access tracks with glimpsed views to the countryside beyond will be replaced with a hotel, associated car parking and landscaping. In our view there would be a very high magnitude of change at Construction and Year 1 that would reduce to High at Year 15, as the proposal would form a visible and recognisable new element within the view that would change overall landscape character, rather than the medium to low Magnitude of Change assessment in the LVIA. This would result in a Moderate/Substantial residual effect.

**VP 10** This viewpoint provides views across wide open countryside including woodland in the distance. The LVIA concludes that the Magnitude of Change would be Very High to High at Construction and Very High to Low at Year 1 but will have reduced to Low to Negligible at year 15. As views here will have changed from open countryside to a large urban housing estate, we consider the Magnitude of Change would be Very High at both Construction and Year 1, reducing to High at Year 15 as landscaping matures, resulting in a residual effect of Substantial Adverse effect.

**VP 13** – Built development associated with the proposal would largely be hidden from this View Point, especially by year 15, but the proposed new footbridge across the A249 would be visible and form a distinct feature in the view, although it would not change overall character. This, along with the entrance from the A249 and new highway lighting would, in our view, represent a Magnitude of Change of Medium, resulting in a residual impact at Year 15 of Moderate/Substantial Adverse to Moderate Adverse impact.

**VP 16** Views from this location are currently of undeveloped countryside to woodland beyond. This would change to views over a large housing estate, substantially altering the open nature of the view. While landscaping may soften the visual impact by year 15, the development would still be visible and recognisable i.e. represent a High Magnitude of Change, resulting in a Substantial adverse residual effect at year 15.

**VP 19** The view will become more urbanised and engineered with the provision of a new junction, including underpass and slip roads with retaining walls which would constitute new distinct features in the view. Existing vegetation will also need to be removed to facilitate the highways works. We therefore do not agree that the Magnitude of Change would be Low to Negligible at year 15, we consider the works would represent a Medium Magnitude of Change, resulting in a residual impact of Moderate/Substantial adverse.

In conclusion, the AONB Unit considers that the LVIA significantly underestimates the residual effects of the development on completion at year 15 in terms of both landscape and visual effects, as a result of Receptor Sensitivities and Magnitude of Change being assigned too low. We note that in respect of an appeal on Land to the north of Sandwich Road, Ash, Kent, CT3 2AH APP/X2220/W/17/3174842 the Inspector similarly considered David Williams Landscape Consultancy Ltd to assign too lower values to these elements, stating '*I fail to understand how the construction*

*of an estate of 104 houses can be judged to be a partial loss or alteration of the site. The site is currently an open field…..*'(Paragraph 32).

The AONB Unit considers that in respect of the landscape character of the site, (elements and patterns/character), the local character area – Bredhurst and Stockbury Downs), Policy SP17 of Maidstone's Local Plan and the Kent Downs AONB and Management Plan, the development would result in either Moderate/ Substantial, Substantial or Major Substantial residual effects, all of which (apart from the moderate assigned to the Bredhurst and Stockbury Downs LCA) are classified as Significant effects. With regards to Visual impacts, we conclude that there would be Significant effects at 11 of the Viewpoints, including Substantial Adverse effects at View Points 5, 6, 10 and 16 and Major Substantial effects at View Points 1,2,4 and 8.

**DISCREPANCIES/OTHER MATTERS:**

The AONB Unit has identified a number of mistakes and discrepancies in various reports submitted in support of the application, bringing to question the accuracy of the submissions:

At paragraph 5.18 of the ES, a description of the proposal states that there would be a predominance of two storey housing with the scale of the buildings limited to 2 storeys at the perimeter of the site, rising to 2.5 and 3 storeys in the central zone. However, this contrasts substantially with the parameter plan: development heights (October 2018 and superseded version), where the majority of housing is proposed at 4 storey, with 3 storeys proposed around the perimeter of the site.

In respect of parking, the ES advises that a car park of 300 parking spaces will be provided, however Table 3.1 - Schedule of Accommodation in the Planning Statement identifies that 1ha of the site is identified for a Park and Ride facility that would provide between 200 and 300 parking spaces, while an additional 7.86 ha will be given over to provide an overflow showground car park area.

Both the Planning Statement (paragraph 5.52) and the LVIA incorrectly describe the site as including an industrial estate; the industrial estate is in fact excluded from the application site area red line boundary.

The Arboricultural Report makes several references to an existing country park, located to the west and north-west boundary of the application site. There is no Country Park in this location.

At paragraph 5.63 of the Planning Statement, it is advised that the proposals include the provision of a new Country Park of over 50 ha, which it is claimed would be the largest in Kent. The AONB Unit is aware of four other Country Parks in the Kent that are significantly larger however; Trosley - 65 ha, Shorne - 116 ha, Lullingstone 205 ha and the Warren Country Park - 81 ha.

Conclusion

The application site lies within the Kent Downs AONB, a nationally protected landscape. The site is rural in nature comprising predominantly open countryside

made up of arable fields and woodland that lies outside of any recognised settlement. The scale of the development together with its inappropriate location, and the poor relationship to existing settlement pattern would result in a significant detrimental change to landscape character as well as harming visual amenity, removing the current sense of openness and failing to conserve and enhance the landscape and scenic beauty of the AONB. We are of the view that the impact to the AONB could not be satisfactorily mitigated by landscaping or other methods.

As such, the proposal would weaken and disregard the primary purpose of the AONB designation, namely the conservation and enhancement of its natural beauty. Accordingly the proposal is considered to be in conflict with the revised NPPF, in particular paragraph 172 which provides that great weight should be given to conserving and enhancing landscape and scenic beauty in AONBs and that major development should not be permitted except in exceptional circumstances and where public interest can be demonstrated; it is the view of the Kent Downs AONB Unit that the stringent tests set out at paragraph 172 of the NPPF have not been met.

The appellant has not demonstrated that the development could not be provided on less sensitive sites, including those outside of the AONB. The development does not represent exceptional circumstances, nor would it be in the public interest, given the scale of development and significant harm that would arise to a nationally protected landscape. Boosting the supply of housing and employment land does not comprise sufficient justification for allowing major new development in the AONB. While providing the specified shopping list of benefits might be desirable, none provide a sufficient or robust reason to justify the proposed development in view of the resultant significant harm that would occur to a nationally protected landscape. They do not, in our view, amount to exceptional circumstances and are not of national importance. The application fails all three tests for major development within AONBs set out at paragraph 172, as well as being contrary to the first part of the paragraph which requires that great weight be given to conserving landscape and scenic beauty and that the scale and extent of development within these areas should be limited.

The application is also considered to be contrary to policies SP17 and DM3 of Maidstone's recently adopted Local Plan as well as policies MPP2, SD1, SD2, SD3, SD7, SD8, LLC1, FL1, FL7, WT1, AEU2 and AEU14 of the Kent Downs AONB Management Plan.

**The Kent Downs AONB Unit therefore objects to the application.**

I hope you find these comments useful. I would be happy to discuss this further if this would be helpful.

Yours sincerely

Katie Miller
Planning Manager, Kent Downs AONB Unit

**APPENDIX 1**

**Planning consultations with the Kent Downs AONB Unit**

**Background and context:**
The Kent Downs Area of Outstanding Natural Beauty partnership (which includes all the local authorities within the AONB) has agreed to have a limited land use planning role. In summary this is to:

- Provide design guidance in partnership with the Local Authorities represented in the AONB.
- Comment on forward/strategic planning issues-for instance Local Development Frameworks.
- Be involved in development management (planning applications) in exceptional circumstances only, for example in terms of scale and precedence.
- Provide informal planning advice/comments on development control (planning applications) at the request of a Kent Downs AONB Joint Advisory member and /or Local Authority Planning Officer.

**The Countryside and Rights of Way Act 2000**

The primary legislation relating to AONBs is set out in the Countryside and Rights of Way Act 2000. Section 85 of this Act requires that in exercising any functions in relation to land in an AONB, or so as to affect land in an AONB, relevant authorities, which includes local authorities, shall have regard to the purpose of conserving and enhancing the natural beauty of the AONB. This is known as the 'Duty of Regard'. The Duty of Regard can be demonstrated by testing proposals against the policies set out in the Kent Downs AONB Management Plan and its supporting guidance (see below).

**Relationship of the AONB Management Plan and Development Management**

The CRoW Act requires that a management plan is produced for each AONB, and accordingly the first Kent Downs AONB Management Plan was published in April 2004. The second revision Management Plan (20014-2019) has been formally adopted by all the local authorities of the Kent Downs. The Management Plan may be viewed on the Kent Downs web site. Please let us know if you would like any hard copies.
https://s3-eu-west-1.amazonaws.com/explore-kent-bucket/uploads/sites/7/2018/04/18113849/KDAONB-Management-Plan.pdf
Under the CRoW Act, the Management Plan is required to 'formulate the (Local Authority) policies for the management of the AONB and for carrying out their functions in relation to it'. The policies of the Kent Downs AONB Management Plan are therefore the adopted policies of all the Local Authorities in the Kent Downs.

The national Planning Policy Guidance confirms that AONB Management Plans can be a material consideration in planning decisions and this view is confirmed in previous appeal decisions, including APP/U2235/W/15/3131945, Land west of Ham Lane, Lenham, Maidstone, where at para 48 of the Inspectorate's decision letter, it is confirmed that "the Kent Downs AONB Management Plan April 2014 (the Management Plan) is also a further significant material consideration". The decision can be downloaded at:

https://acp.planninginspectorate.gov.uk/ViewCase.aspx?caseid=3131945

Any Kent Downs AONB Unit response to consultations on planning applications will reflect the policies of the Management Plan along with other Kent Downs AONB produced guidance which help support the delivery of the policies of the Management Plan, as set out below.

**Other Kent Downs AONB Guidance**

Kent Downs Landscape Design Handbook
Design guidance based on the 13 landscape character areas in the Kent Downs. Guidance is provided on fencing, hedges, planting, gateways etc. to help the conservation and enhancement of the AONB.

Kent Downs Renewable Energy Position Statement
Provides a clearly articulated position for the Kent Downs AONB partnership with regards to renewable energy technologies. It recognises that each Local Planning Authority must balance the impact of proposals for renewables on the AONB with all the other material planning considerations.

Kent Rural Advice Service Farm Diversification Toolkit
Guidance on taking an integrated whole farm approach to farm developments leading to sound diversification projects that benefit the Kent Downs.

Kent Downs Land Manager's Pack
Detailed guidance on practical land management from how to plant a hedge to creating ponds and enhancing chalk grassland.

Rural Streets and Lanes - A Design Handbook
Guidance on the management and design of rural lanes and streets that takes the unique character of the Kent Downs into account. This document discusses the principle of shared space and uses examples from around the UK and Europe. The Handbook has been adopted by Kent County Council as policy.

Managing Land for Horses
A guide to good practice on equine development in the Kent Downs, including grassland management, fencing, trees and hedges, waste management and basic planning information.

Kent Farmstead Guidance and Kent Downs Farmstead Guidance
Guidance on the conservation, enhancement and development change of heritage farmsteads in the Kent Downs based on English Heritage's Kent and National Character Area Farmstead Statements. Includes an Assessment method and Design Guidance.

The above documents are available to download at:

https://www.kentdowns.org.uk/planning/planning-publications/

**The NPPF and AONBs**

National planning policies are very clear that the highest priority should be given to the conservation and enhancement of Areas of Outstanding Natural Beauty. The NPPF confirms that AONBs are equivalent to National Parks in terms of their landscape quality, scenic beauty and their planning status.

Paragraph 172 of the revised NPPF specifies that 'great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues.' It is advised that the scale and extent of development within AONBs should be limited and that major developments should be refused in AONBs except in exceptional circumstances and where it can be demonstrated that they are in the public interest. No definition is given as to what constitutes major development within an AONB, however a footnote to this paragraph states that this is 'a matter for the relevant decision taker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined'.

The thrust of the NPPF as set out in paragraph 11 is that there is a presumption in favour of sustainable development. It specifies that in respect of decision taking, proposals that are in accordance with an up to date development plan should be granted, however where there are no relevant development plan policies, or policies are out of date, permission should be granted unless the application of specific policies in the Framework that protect areas of particular importance provide a clear reason for refusing the development. Footnote 6 to this paragraph specifies that such policies include those relating to AONBs. A Court of Appeal case in June 2017[1] clarified that identification of policies indicated in Footnote 6 (previously footnote 9 to paragraph 14 of the 2012 NPPF), does not shut out the presumption in favour, rather the specific policy or policies have to be applied and planning judgment exercised. In the case of AONBs, this would mean an assessment of the acceptability of the proposal against paragraph 172 of the NPPF.

[1] Barwood Strategic Land II LLP (Appellant) and (1) East Staffordshire Borough Council and (2) Secretary of State for Communities and Local Government (Respondents), on appeal from the Administrative Court Planning Court, [2017] EWCA Civ 893 Case No: C1/2016/4569 [2016] EWHC 2973 (Admin), before: Lord Justice Gross, Lord Justice Underhill and Lord Justice Lindblom, on 25th May 2017.

**APPENDIX 2**

Case No: CO/4024/2015

Neutral Citation Number: [2016] EWHC 247 (Admin)
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 February 2016

**Before** :

**MRS JUSTICE LANG DBE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

**WEALDEN DISTRICT COUNCIL**

**Claimant**

**- and -**

**(1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT**
**(2) KNIGHT DEVELOPMENTS LIMITED**

**Defendants**

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Rhodri Price Lewis QC and Scott Lyness** (instructed by **Sharpe Pritchard LLP**) for the **Claimant**
**Richard Kimblin** (instructed by **The Government Legal Department**) for the **First Defendant**
**James Maurici QC** (instructed by **Richard Max & Co**) for the **Second Defendant**

Hearing dates: 26, 27 & 28 January 2016

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# Judgment

**Mrs Justice Lang :**

## Introduction

The Claimant ("the Council") applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash a decision of the First Defendant, made by his appointed Inspector on 16 July 2015, allowing the Second Defendant's appeal against the refusal of planning permission for housing and associated development at Steel Cross, north of Crowborough, East Sussex ("the Site").

Outline planning permission was granted to the Second Defendant ("Knight") for the construction of 103 dwellings (including 42 affordable dwellings), provision of 10 ha of land for a SANG ("Suitable Alternative Natural Green Space") and multi-functional public open space with associated car parks and accesses, footpaths, play space, Sustainable Urban Drainage Systems, access via a new junction, landscaping (including tree planting and enhancement to wildlife habitats) and footpaths.

### Refusal of planning permission by the Council

The Council, which is the local planning authority, refused planning permission on 13 February 2014. Among other reasons, it concluded that the proposal represented an unacceptable and unjustified form of development in open countryside, within the High Weald Area of Outstanding Natural Beauty ("AONB") and outside the development boundary for Crowborough. Such development was contrary to the Local Plan and provisions of the National Planning Policy Framework ("NPPF").

The Claimant also concluded that the proposed development, both alone and in-combination with other plans and proposals, would have an adverse effect on the integrity of protected areas in Ashdown Forest, the edge of which is about 2.4 km from the site. The Claimant's decision stated:

> "The application site lies within 7km of the Ashdown Forest Special Protection Area ("SPA"), Special Area of Conservation ("SAC") and Site of Special Scientific Interest ("SSSI"). …Ashdown Forest forms part of a complex of heathlands in southern England that support breeding bird populations of European importance. It was classified in 1996 under EU Directive 79/409, known as the Birds Directive. As such, the SPA is a European site to which Part IV of the Conservation (Natural Habitats etc) Regulations 1994 ("the Regulations") apply. The designation is primarily concerned with the protection of two rare and vulnerable bird species, the Nightjar and Dartford Warbler; these are identified in Annex 1 of the Directive.
>
> The SAC has two qualifying features: Northern Atlantic wet heaths with Erica tetralix and European dry heaths (this is considered to be one of the best areas in the United Kingdom). Ashdown Forest contains one of the largest single continuous blocks of lowland heath in south-east England, with both 4030 European dry heaths and, in a larger proportion, wet heath.…

> The development proposal, both alone and in-combination with other plans and proposals, would have an adverse effect on the integrity of the SPA and SSSI, including impact through increased recreational use of the Ashdown Forest and the intensification of nitrogen deposition in the protected area by additional traffic generated. There are no suitable proposals to mitigate this adverse effect…The proposal would also conflict with policy WCDS12 of Wealden District Council's Core Strategy, as the development has not demonstrated adequate mitigation for the cumulative effects caused to the biodiversity interests.
>
> As a result, there are concerns with regard to the adverse effect on the integrity of the SPA, including the deterioration of the quality of the habitats and an increased disturbance to birds.
>
> The proposed development would therefore be contrary to saved policies EN7 and EN15(1) of the adopted Wealden Local Plan 1998, coupled with advice within National Planning Policy Statement 2012 paragraphs 109, 117, 118 and 119…Circular 06/05 "Biodiversity and Geological Conservation – Statutory Obligations and their Impact within the Planning System" and "Planning for Biodiversity and Geological Conservation: A Guide to Good Practice (March 2006) and policies WCS12 and WCS14 of the Wealden Core Strategy 2013."

**The Inspector's decision**

Knight appealed under section 78 TCPA 1990. The appointed Inspector (Mr David Nicholson) held an Inquiry and conducted site visits. The Inspector identified the main issues in the appeal, in paragraph 9 of the Decision Letter ["DL 9"], as the effect of the proposals on:

- The character and appearance of the area with reference to the adopted development boundary of Crowborough and the High Weald AONB;
- The biodiversity of Ashdown Forest, with particular regard to pressures from recreational use and nitrogen deposits;
- Sustainability, including accessibility and the availability of non-car modes of transport;
- Whether any benefits would outweigh any harm which might be caused;
- Whether the proposal amounted to sustainable development.

In summary, the Inspector concluded:

- The proposal would only harm the character and appearance of the central part of the site; the remainder would be enhanced by the proposed SANG. For these reasons he gave limited weight to the conflict with Core Strategy landscape policies [DL 26, 27].
- The location outside the development boundary of Crowborough conflicted with Local Plan policies on the countryside, but this should be given only moderate weight in the overall balance, and should not outweigh the need for more housing [DL 32, 33].
- The Site did not exhibit the particular characteristics of the AONB which had given rise to its designation and so the proposal would not harm important characteristics of the

AONB. The proposal would have a neutral effect on the contribution made to the landscape and scenic beauty of the AONB, and so would comply with Core Strategy and Local Plan policies and NPPF 115 [DL 39, 40].

Ashdown Forest SAC and SPA were European sites covered by the Conservation of Habitats and Species Regulations (Amendment) 2010 ("the Habitats Regulations") [DL 42].

Recreational use of Ashdown Forest by residents could have an adverse effect on habitat and disturb the birds, and ought to be mitigated, in accordance with the Local Plan and Core Strategy policies [DL 44 – 47]. The on-site SANG would be used by residents instead, to some extent, thus fulfilling the objective of Policy WCS12 [DL 50]. The Strategic Access Management and Monitoring Strategy ("SAMMS") projects would address problems arising from recreational use and the financial contributions to SAMMS from Knight Developments would offset any likely significant adverse effects [DL 53].

Nitrogen emissions from vehicle exhausts could have an adverse effect on the protected heaths in Ashdown Forest [DL 55]. The Core Strategy Inspector found that further development should be restricted on a precautionary basis at least until further reviewed [DL 58]. In light of the conclusions in the Core Strategy report, further housing development which was likely to increase traffic flows beyond that anticipated in the Core Strategy ought not to be automatically screened out under the Habitats Regulations [DL 62].

The impact of the proposal on its own would be insignificant, but adopting the precautionary approach required under the Habitats Regulations, there was a low risk of a significant in-combination effect [DL 67]. However, the contributions by Knight towards SAMMS for habitat management would outweigh the harm, if any, from nitrogen deposits [DL 71]. With this mitigation, the proposal would not be likely to have a significant effect on the heaths and so no "appropriate assessment" under the Habitats Regulations was required [DL 72].

Overall the Site was reasonably well located with regard to accessibility [DL 78].

The scheme would provide housing and economic benefits and the environmental effects would be neutral overall. The scheme would amount to sustainable development as defined by the NPPF – a material consideration upon which he placed considerable weight [DL 85 – 87].

Applying NPPF 116, there were "exceptional circumstances" "in the public interest" why planning permission should be granted for a major development within an AONB. There was "a lack of harm" to the landscape and scenic beauty. The alternative sites proposed by the Council were not realisable alternatives. But even if there were appropriate alternative sites within Crowborough or the wider district, there would still be insufficient housing land overall to meet the full objectively assessed need for housing ("OAN"), and the need for affordable housing. Some development within the AONB had already been granted permission [DL 88 – 91].

The proposal would accord with the development plan as a whole and the NPPF [DL 107].

## Grounds of challenge

By the date of the hearing, the Claimant's grounds of challenge had been reduced to the following three grounds:

**Nitrogen deposition**. The Inspector erred in law when concluding that the proposals would have no significant effect on the Ashdown Forest SAC, pursuant to section 61 of the Habitats Regulations, in particular:

in finding that contributions to SAMMS would mitigate any such effect; or

by failing to have regard to evidence that proposed contributions to heathland management could not effectively mitigate any such effect.

**NPPF 116 & alternative sites**. The Inspector erred in his consideration of NPPF 116 when concluding that there were no alternative sites to meet the need for the proposed development, by failing to take into account relevant evidence or acting unreasonably.

**Inadequate reasons**. The Inspector's reasons for his findings on Grounds (i) and (ii) above fell below the required standard.

In response, both Defendants submitted that the Inspector's decision did not disclose any error of law. Alternatively, if the Inspector did err as alleged under Grounds (i) or (ii) above, the court ought nonetheless to uphold the decision in the exercise of its discretion because, even absent any error, the decision on these issues would properly be the same.

## Legal framework

### A. Applications under section 288 TCPA 1990

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

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

The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1978) 42 P &CR 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74, at [6] – [8]:

> "… An allegation that an Inspector's conclusion on the planning merits is *Wednesbury* perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.

> In any case, where an expert tribunal is the fact finding body the threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.
>
> Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task ..."

Despite the general principle that questions of fact are primarily for the decision-maker, not the courts, to resolve, a mistake of fact may amount to an error of law in certain circumstances.

Following the seminal case of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14, it has been established that, where a public body makes a finding of fact which is unsupported by any evidence, or which is based upon a view of the evidence which could not reasonably be held, it will have erred in law. Generally such an error is categorised as irrationality or a failure to take into account relevant considerations. The application of this principle in challenges to planning decisions was confirmed by Lord Nolan in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

An Inspector determining an appeal is under a duty to properly inform himself of the information relevant to his decision. As Lord Diplock said in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064H - 1065A:

> "It was for the Secretary of State to decide that. It is not for any court of law to substitute its own opinion for his; but it is for a court of law to determine whether it has been established that in reaching his decision ….. he had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 … Or, put more compendiously, the question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

The doctrine of mistake of fact giving rise to unfairness is conceptually distinct from these cases because the legal flaw is the unfairness that results from the mistake. In *E v Secretary of State for the Home Department* [2004] QB 1044, the Court of Appeal held that mistake of fact

giving rise to unfairness is a separate head of challenge in an appeal on a point of law "at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result" (per Carnwath LJ at [66]). This includes planning cases since "the planning authority has a public interest, shared with the Secretary of State through his Inspector, in ensuring that development control is carried out on the correct factual basis" (per Carnwath LJ at [64]).

In *E* the Court set out four requirements which will generally have to be met before a mistake of fact can give rise to the necessary unfairness:

A mistake as to an existing fact.

The fact must be uncontentious and objectively verifiable.

The party relying upon the mistake must not have been responsible for it.

The mistake must have played a material (but not necessarily decisive) part in the public body's reasoning.

An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment (1993) 66 P & CR 83.*

An Inspector is required to give adequate reasons for his decision, pursuant to Rule 18 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000.

The standard of reasons required was described by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 W.L.R. 1953:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only

> succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

## B. The determination of an application for planning permission

The determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. Section 70(2) TCPA 1990 provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides:

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

The NPPF is a material consideration for these purposes, but it is policy not statute, and does not displace the statutory presumption in favour of the development plan: see NPPF 11 to 13.

In *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13, Lord Reed (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed) said, at [17]:

> "It has long been established that a planning authority must proceed upon a proper understanding of the development plan: see, for example, *Gransden & Co Ltd v Secretary of State for the Environment* (1985) 54 P & CR 86, 94 per Woolf J, affd (1986) 54 P & CR 361; *Horsham DC v Secretary of State for the Environment* (1991) 63 P & CR 2319, 225-226 per Nolan LJ. The need for a proper understanding follows, in the first place, from the fact that the planning authority is required by statute to have regard to the provisions of the development plan: it cannot have regard to the provisions of the plan if it fails to understand them. It also follows from the legal status given to the development plan by section 25 of the 1997 Act. The effect of the predecessor of section 25, namely section 18A of the Town and Country (Planning) Scotland Act 1972 (as inserted by section 58 of the Planning and Compensation Act 1991), was considered by the House of Lords in the case of *City of Edinburgh Council v Secretary of State for Scotland* 1998 SC (HL) 33, [1997] 1 WLR 1447. It is sufficient for present purposes to cite a passage from the speech of Lord Clyde, with whom the other members of the House expressed their agreement. At p.44, 1459, his lordship observed:
>
> > "In the practical application of sec. 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it." "

Lord Reed rejected the proposition that each planning authority was entitled to determine the meaning of development plans from time to time as it pleased, within the limits of rationality. He said:

> "18. … The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained…..these considerations suggest that, in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context. They are intended to guide the decisions of planning authorities, who should only depart from them for good reason.
>
> 19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."

These general principles also apply to other planning decision-makers, including an Inspector determining an appeal on behalf of the Secretary of State.

**C. Protection of Habitats**

Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") is currently transposed into UK domestic law by the Habitat Regulations 2010. By Article 2 of the Directive, measures taken pursuant to the Directive "shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest".

Article 1 provides:

> "(e) conservation status of a natural habitat means the sum of the influences acting on a natural habitat and its typical species that may

affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species…"

"The conservation status of a natural habitat will be taken as 'favourable' when:

- its natural range and areas it covers within that range are stable or increasing, and

- the specific structures and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

- the conservation status of its typical species is favourable as defined in (i)."

By regulation 61(1), which transposes Article 6(3) of the Habitats Directive:

"A competent authority, before deciding to undertake, or to give any consent, permission or other authorisation for a plan or project which –

(a) is likely to have a significant effect on a European site…(either alone or in-combination with other plans and projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications for that site in view of the site's conservation objectives."

Regulation 61(5) provides:

"In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site…"

The CJEU in *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw Natuubehher en Visserik* ("Waddenzee") CJEU Case C-127/02, [2004] ECR 1-7405, explained at [43-44]:

"43. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of art 174(2) EC …. and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned …. Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure

> effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised and thereby contributes to achieving, in accordance with ….. the Habitats Directive …..its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora."

The Supreme Court has recently held in *R (Champion) v North Norfolk DC* [2015] 1 WLR 3710, per Lord Carnwarth at [37], that there is no formal screening stage under Regulation 61/Article 6(3). The consideration of whether there are likely significant effects is a "trigger" for an appropriate assessment (at [41]).

"Appropriate" is not a technical term. It indicates no more than that the assessment should be appropriate to satisfy the responsible authority that the project "will not adversely affect the integrity of the site concerned", to a high standard of investigation: *Champion* at [41]. The authority must be convinced that the plan or project in question will not adversely affect the integrity of their site concerned: *Waddenzee* at [56]. There should be "no reasonable scientific doubt" remaining as to the absence of such effects [59]. Where an appropriate assessment is carried out, it "cannot have lacunae and must contain complete, precise and definitive work findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned: *Sweetman and others v An Bord Pleanála (Galway County Council and another intervening)* (Case C-258/11) [2014] P.T.S.R. 1092 at [44]. However, absolute certainty is not possible and the assessment has a "subjective" nature and "no special procedure is prescribed, and, while a high standard of investigation is demanded, the issue ultimately rests on the judgment of the authority": *Champion* at [41].

A project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site, in accordance with the Habitats Directive. The precautionary principle should be applied for the purposes of that appraisal: *Sweetman* at [48].

In order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of article 6(3) of the Habitats Directive, the site needs to be preserved at a "favourable conservation status", as defined in Habitats Directive (see above). This entails the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the Directive: *Sweetman* at [39].

It is appropriate to take into account proposed mitigation measures in considering whether there are likely to be significant effects and hence whether an appropriate assessment is triggered. However if the competent authority does not agree with the proponent's view as to the likely efficacy of the proposed mitigation measures, or is left in some doubt as to their efficacy the competent authority will not have been able to exclude the risk of a significant effect on the basis of objective information: *R (Hart District Council) v. Secretary of State for Communities and Local Government* [2008] 2 P&CR 3012 at [76]. The approach in *Hart* was followed in *Smyth v. Secretary of State for Communities and Local Government* [2015] EWCA Civ 174, per Sales LJ at [74], provided that the competent authority "can be sure" that there will be no significant harmful effects: at [76].

In *Champion*, at [54], Lord Carnwath held that, following the decision in *Walton v Scottish Ministers* [2013] PTSR 51, even where an error of EU law has been established, the court retains a

discretion to refuse relief if the claimant has in practice been able to enjoy the rights conferred by European legislation and there had been no substantial prejudice (per Lord Carnwath at [139]; per Lord Hope at [155]). However, the court's discretion has to be exercised having regard to the judgment of the CJEU in *Gemeinde Altrip v Land Rheinland-Pfalz* Case C-72/12 [2014] PTSR 311, which held, where a procedural defect under the EIA Directive was established, the national court could decide that there had been no impairment of rights if it was able to take the view that the decision would not have been different even if the procedural error had not occurred. However, the claimant should not have to prove that the decision would have been different; it was a decision to be made by the Court having regard to the evidence provided. In making its assessment, the court should take into account the seriousness of the defect and to ascertain whether it had deprived the public of the guarantees provided (in that case) under the EIA Directive.

NPPF Section 11 contains national planning policy on "conserving and enhancing the natural environment". NPPF 119 provides that the presumption in favour of sustainable development does not apply where development requiring appropriate assessment under the Birds or Habitats Directives is being considered, planned or determined.

**Ground 1: nitrogen depositions**

**A. Evidence and issues on appeal**

It was common ground at the appeal that the Ashdown Forest SAC was designated pursuant to the Habitats Directive and Regulations due to the presence of, inter alia, extensive areas of lowland heath, in particular its European dry heath and Northern Atlantic wet heath communities. The Ashdown Forest covers an area of 3,207 hectares; the SAC designation covers 2,729 ha.

There was no dispute that the proposals necessitated consideration of regulation 61 of the Habitats Regulations, which required the Inspector, as a "competent authority" to determine whether it was a "project which is likely to have a significant effect on a European site… (either alone or in-combination with other plans or projects)" and if so to "make an appropriate assessment of the implications for that site in view of the site's conservation objectives." The SAC is a "European Site" for the purposes of the Regulations.

The main issue was whether it was possible to exclude a risk of likely significant effects on the SAC as a result of nitrogen deposition on the heathland, caused by vehicle emissions from the development and, on the case of the Council, in-combination with other development in the area, along an identified 255 metre section of the A26. It was agreed that the deposition of nitrogen can have harmful effects on heathland habitat, in particular through nitrogen eutrophication (enrichment).

The case for the Council proceeded on the basis that when preparing its Core Strategy (2013), the Inspector appointed to hold an examination into the Strategy had accepted that the housing development anticipated by the Strategy would not breach a threshold of 1000 AADT (Annual Average Daily Traffic) on any particular road in the area, at which level it was possible to "screen out" any likely significant effect on the SAC as a result of vehicle emissions, albeit that the relevant section of the A26 would reach 950 AADT. At the Inquiry Knight challenged the evidence on which this figure of 950 AADT was reached, contending that it ought to have been lower.

The 1000 AADT threshold was derived from methodology in the Design Manual for Roads and Bridges ("DMRB") which had been agreed with Natural England and the East Sussex County Council during the Core Strategy process. The Core Strategy Inspector found that the figure of 950 "did not leave much headroom" for development beyond that proposed and that there was sufficient evidence on a precautionary basis to restrict further development in north Wealden beyond that in the Core Strategy until a review of the Strategy. The review was anticipated at the time to take place by 2015, in order to revisit another constraint on development in a different part of the district relating to waste water treatment capacity. Policy WCS12 of the Core Strategy was therefore drafted to state that "the Council will also undertake further investigation of the impacts of deposition on the Ashdown Forest so that its effects on development can be more fully understood and mitigated if appropriate".

In the light of the Core Strategy, and the findings of the Core Strategy Inspector, the Council argued that the proposed development, when taken cumulatively with other development, including that envisaged by the Core Strategy, could not be screened out, and that an appropriate assessment should be required. It also argued that further development should not be allowed until any review of the Strategy, as anticipated by the Core Strategy Inspector, could take into account extensive detailed monitoring work, the first results of which were expected in 2017. That monitoring work, it was contended, would be linked with ecological monitoring to examine the extent of any link between nitrogen deposition and ecological conditions within the SAC and therefore the potential for new development to come forward. It was argued that the monitoring work undertaken by Knight did not provide information which linked nitrogen deposition to site conditions or effects which might occur to habitats, such that it was not possible to exclude a risk of harm to the SAC on any appropriate assessment of the project. Evidence on air quality and related planning policy was respectively provided by Professor Duncan Laxen and Mr Chris Bending, a planning officer at the Council.

Knight contended that, applying the DMRB methodology (and following the approach generally adopted by Natural England), the threshold should only be applied to the traffic generated by its scheme alone (which would be much less than 1000 AADT); that the same approach was taken by the Council in the Core Strategy process; that in any event the cumulative traffic generation would fall below the threshold; and that in reliance on monitoring and modelling that it had carried out in a study to support its proposals, they could be "screened out" on the basis of other guidance issued by the Environment Agency. Evidence on air quality and related planning policy was provided by Dr Claire Holman and Mr Andy Stevens. The Council disputed any reliance on the Environment Agency methodology.

In response to a question from the Inspector relating to the potential for mitigation to address any likely significant effect on the SAC arising from nitrogen deposition, Knight adduced evidence in support of heathland management techniques as a means of mitigating any risk of harm to the SAC from nitrogen depositions.

At the Inquiry, Knight offered a draft unilateral undertaking which included a covenant to pay SAMMS contributions. The undertaking also included a covenant to pay a Heathland Management Contribution. Both payments were to be made prior to the commencement of development.

**B. Inspector's decision**

The Inspector's main conclusions on this issue were as follows:

"*Ashdown Forest (AF) – Nitrogen (N) deposition*

**Annual Average Daily Traffic Flow (AADT)**

"55. The A26 is a major route from Crowborough to the larger town of Tunbridge Wells and passes close to the AF. Traffic flows on this section of road vary …. From just over 16,000 to nearly 18,000 vehicles per day. Additional houses are likely to lead to additional car journeys. Nitrogen (N) deposits from vehicle exhausts can affect vegetation through increased acid deposition (from exhaust and other gases dissolved in rainwater) and from eutrophication, that is the over-enrichment by nutrients leading to greater proliferation of other forms of vegetation other than the heaths. With regard to traffic, the concerns are the likely level of increase in annual average daily traffic (AADT) along roads adjacent to the AF and the resultant effect of this on N deposits. It follows that, in adopting the precautionary principle, restricting any increase in housing would limit any increase in harm to the AF."

"57. The Council then undertook a Habitats Regulations Assessment (HRA) screening exercise for the CS, including the AF SAC, using the method in DMRB and 1,000 AADT as the threshold for an appropriate assessment. It identified the heaths there as one of the most sensitive habitats in the district and that the baseline N deposition exceeds critical loads with in the AF…."

"58. The CS Inspector looked at the issue of N deposition. In considering the appropriate housing provision he noted the Council's concern that, in north Wealden, levels of development beyond those proposed would have a significant effect on the AF SAC in terms of N deposition. In finding the CS to be sound, the Inspector noted that the estimate of 950 AADT did not leave much headroom. On the basis of the evidence before him, he found that further development should be restricted on a precautionary basis at least until an early review of N deposits, anticipated to be in 2015. This approach was upheld in the High Court."

"62. I acknowledge the arguments that the figure of 950 AADT may be inaccurate … and that the scheme might well not generate levels in excess of 1,000 AADT in any event. Nevertheless, given the conclusions in the CS, I find that further development likely to affect the AADT along the A26, beyond that anticipated in the CS, should not automatically be screened out."

**Air Quality**

"66. …while the appellant's study concludes that the effects of the proposed development would be insignificant at the receptors in the AF, it does not exclude any impact."

**Conclusions on N deposits**

"67. Notwithstanding my conclusion on air quality, there is little evidence of a direct link between AADT along the A26 and eutrophication in the AF. It is common ground that the proposals alone

would not generate sufficient AADT above the threshold required to result in a significant effect and the only issue was from in-combination effects. Nevertheless, I accept that a precautionary approach should be taken that, given the importance of the SAC, and the requirements of the Habitats Regulations, this is a high bar. In the form the application was submitted, there would be some risk, however low, of a significant in-combination impact."

"68. The appellant has subsequently offered contributions to SAMMS in accordance with its evidence of habitat management practice elsewhere and using the best information on tariffs available (see under s.106 below). As well as addressing the problems caused to the SPA by dogs, the contributions would also be used to take measures such as cutting and grazing to reduce nutrient levels. While not accepting that the contributions were acceptable, the Council did not offer any contrary evidence to indicate that the projects which could be funded by SAMMS would not be effective in reducing what would in any event be a very low risk of additional eutrophication. I therefore accept from the evidence before me that, as well as supplementing the SANG, the SAMMS contribution would have a significant beneficial effect on biodiversity in the AF and so also offset any small chance of harm as a result of N deposition.

"69. I acknowledge that the evidence of habitat management …. was produced late on. However, this follows on from discussions which the Council has been having with NE for a number of years even prior to 2013. At that time NE anticipated that a scheme of contributions for wardening and monitoring could come forward within a very small number of months. To date, nothing has been finalised."

"70. In a recent response to another application, NE commented that its approach to air quality issues differs from the Council's in that its specialists advise that an in-combination assessment is not required unless a proposal is considered significant alone … As that proposal would not breach these thresholds it had no objection. While I note that this response concerned a development on quite a different scale and I have taken a more precautionary approach, this reinforces my conclusion that, with mitigation, there would be no LSE. "

"71. I note that NE had no objection to the scheme with regard to air quality issues and so, while it may not have considered the SAMMS mitigation, this would not affect its response on this point. Overall, even if there were clear and specific evidence that there would be an increase in N deposition on the AF which would measurably reduce plant diversity and harm habitat conservation, which there is not, contributions to SAMMS would make positive and demonstrable improvements to the habitat on the AF. These would have a beneficial effect on biodiversity which would clearly outweigh any unproven and, at worst, almost negligible harm from N deposits."

"72….. even taking account of the low threshold required by *Sweetman*, with mitigation, there would be no LSE on the heaths. It

follows that an appropriate assessment is not required, and that concerns with regard to N deposition should not prevent the development."

*Conclusions on the AF*

"74. The CS Inspector adhered to the precautionary approach to the European sites. However, given the contributions to SAMMS through the s106 obligation, the LSE, if any, can be minimised or avoided altogether and there is little doubt that the necessary mitigation can be put in place. For the reasons set out above, I find that the contributions satisfy the tests in the NPPF and would improve diversity to a degree that would safely exceed the theoretical harm on account of increased traffic and consequential deposition."

"75. Mitigation should be in place before harm occurs. Conditions would require the proposed on-site SANG. The SAMMS contributions would also be paid in accordance with a timetable. There would be a delay between payment and occupation which would enable measures to be put in place."

"76. … subject to conditions and the section 106 obligation … I concluded that the proposed mitigation would sufficiently overcome any possible LSE on biodiversity to the SPA or SAC and that an appropriate assessment is not required. … In the event of an appropriate assessment, which does not apply, I note that there is a statutory requirement to consult the appropriate nature conservation body. As NE has commented on the application, made its views very clear, and delegated any decision to the Council, I consider that this requirement has already been met anyway."

*Planning obligation*

"105. SAMMS contributions would be paid to the Council either at the rate adopted at that time, of failing that, based on the current tariff adopted by MSDC. The reason for this is that MSDC has an interim SAMM strategy in place, with costed projects, and the intention that contributions would be channelled to the Conservators of AF who have agreed on a range of heathland management projects. These could be used to offset impacts from the appeal on either recreational use or N deposits, or both. For the reasons I set out above, these contributions are needed, directly related to the development and given the joint working by MSDC and NE, are of an appropriate scale." "

**C. Conclusions on alleged errors of law**

Having considered the evidence and the submissions of the parties, I have concluded that the Inspector made a factual mistake in assuming that heathland management to mitigate nitrogen deposits was part of the agreed SAMMS projects, funded in part by Knight's contributions under the section 106 agreement.

There was clear evidence that the SAMMS projects would be directed at mitigating the potential harm to the SPA and the protected bird species as a result of increased recreational use of Ashdown

Forest by residents of the proposed housing development and their dogs. There was no suggestion that it would be directed at heathland management to reduce nitrogen deposits.

The section 106 agreement provided for payment of "Strategic Access Management and Monitoring Strategy Contributions", which was defined as "the sum calculated in accordance with a tariff published or adopted by the Council when payment is due, or if no tariff had been adopted at that date then a sum calculated in accordance with the … tariff published and adopted by MSDC [Mid Sussex District Council]".

Because of a difference between the parties as to the appropriate basis of the SAMMS contribution, evidence was adduced at the Inquiry about the projects which would be funded under SAMMS.

The Council had opposed the use of the Mid Sussex tariff, on the grounds that it was based on circumstances which could not simply be transferred to those in Wealden generally, or related to this development in particular. It was clear, through that debate, that the tariff in the SAMMS contributions reflected the tariff included in the Mid Sussex Interim SAMMS Strategy; and that that tariff was predicated upon a list of projects which were costed for the purposes of calculating contributions on a per dwelling basis. These measures were stated to focus on "protecting the SPA from new recreational pressures through managing access (visitor) behaviour and monitoring both birds and visitors". The projects identified in the Mid Sussex Strategy to achieve this were "responsible dog ownership publicity", "development of a community activities and events programme involving the 'dog world'", "dog training courses on Ashdown Forest", "recruitment, training and support of Dog Rangers", the "recruitment of a p/t Education Co-ordinator and teachers", and "surveillance of 'churring' nightjars and Dartford warbler territories during the breeding season".

Knight put forward the Council's own emerging tariff as an alternative basis for the SAMMS contribution. The evidence for this included a "CIL Background Paper 2: SANGS and SAMMS" which had been published to explain the work being carried out to prepare a joint SAMMS Framework with other local authorities. The purpose of this work was explained as follows:

> "Ashdown Forest is an attractive and compelling recreational resource. Whilst SANGS are considered to be an essential and effective mitigation measure to help ensure that visit rates do not increase it has been identified that local residents enjoy using a variety of green spaces for their recreational activity including Ashdown Forest. It is likely therefore that residents living in new development will still visit and use the SPA from time to time even with the provision of SANGS. The aim of strategic access management measures and associated monitoring is to therefore reduce the likelihood of any adverse impact on the protected bird species during the breeding season should residents from new development choose to visit the forest."

The background paper went on to identify the measures that would be required:

> "To provide confidence that…there will be no increase in harm caused as a result of recreational pressure on the SPA. The projects considered necessary to effectively deliver this mitigation include the following:
>
> The production and promotion of a Code of Conduct for dog walkers;

The provision of signage/interpretation boards at car parks;

The employment of a Volunteer Dog Ranger Manager;

The employment of Dog Ranger Volunteers;

Responsible dog ownership training;

The employment of an Education, Community Events and Activities Co-ordination;

The employment of two Countryside Workers;

Visitor monitoring; and

Bird monitoring."

It can be seen therefore that on either basis, the SAMMS contributions as defined in the section 106 obligations and as taken into account by the Inspector were based on measures designed to address recreational impacts on the SPA, as evidenced by the Mid Sussex SAMMS strategy and the evidence of work that the Council was carrying out to prepare its own. None of this evidence had anything to do with mitigating the potential effects of nitrogen deposition on the SAC arising from vehicular emissions.

The Inspector recognised in his decision that SAMMS projects "particularly relate to dogs" [DL 52], but went on to find that "as well as addressing the problems caused to the SPA by dogs, the contributions would also be used to take measures such as cutting and grazing to reduce nutrient levels" [DL 68].

The difficulty with this conclusion is that there was no evidence that the contributions would actually be used to take measures such as cutting and grazing in a manner that would reduce nitrogen deposition. This is clear from the projects referred to above. There was no defined scheme of mitigation which could be identified as the means by which any risk of nitrogen deposition would actually be addressed.

The Inspector went on to conclude, at DL 105, that "SAMMS contributions would be paid to the Council either at the rate adopted at that time or, failing that, based on the current tariff adopted by MSDC. The reason for this is that MSDC has an interim strategy in place, with costed projects, and the intention that contributions would be channelled to the Conservators of AF who have agreed on a range of heathland management projects. These could be used to offset impacts from the appeal on either recreational use or N deposits, or both."

However there was no evidence of any such agreement. Before the Inquiry was a copy of minutes from a meeting of the Board of Conservators on Monday 10th November 2014 which referred to an agreement with the Council for a "range of continuing projects to be funded by SAMMS…grants to the value of £1 million…These funds, together with an initial two-year funding from WDC through SAMMS of £25,000 per annum (yet to be confirmed) will contribute to the Every Dog Matters Programme. Other potential SAMMS projects to be phased in as contributions are made include: volunteer co-ordinator; development of a Dog Walkers Code of Conduct; Dog Training programme; Education and Information Service…; Community Events; Additional operational staff."

None of this related to heathland management and did not provide any basis for concluding that the SAMMS contributions would be used either partly or entirely for mitigating nitrogen

deposition… as suggested by the Inspector. The Council informed the Inspector that no formal agreement had actually been reached with the Conservators on this issue. It also explained, in its closing submissions to the Inquiry:

> "110c. there is no evidence of any discussions, let alone agreement, with the relevant stakeholders, including the Ashdown Forest Trust or East Sussex County Council or Natural England, who would have to be involved in the implementation of any management plan and any consideration of whether it would be appropriate having regard to other factors…"

Both Defendants relied upon the Heathland Management Contribution set out in the section 106 agreement. Both Defendants submitted that, even if the Inspector had incorrectly identified this contribution as part of SAMMS, his reasoning remained sound, because the contribution to heathland management would be made in any event, albeit on a different basis.

I am unable to accept the Defendants' submissions, for two reasons.

First, as I have already explained, unlike the SAMMS projects, there was no scheme for the reduction of nitrogen deposits by heathland management. Obviously heathland management (cutting, removal etc) already took place in Ashdown Forest as a matter of routine, as Mr Meurer acknowledged, but this had not prevented the build-up of nitrogen depositions to date. The existence of a financial contribution towards heathland management, on its own, in the absence of a scheme, was not a sound basis upon which to proceed, particularly since the Inspector found that, absent mitigation, there would be a risk of significant effects [DL 67 & DL 70] and that mitigation was "necessary" [DL 74] and "needed" [DL 105]. The Inspector failed to give any consideration to these difficulties, presumably because of his mistaken view that heathland management was part of the SAMMS.

Second, the Inspector reached his conclusion that heathland management would mitigate the adverse effects of nitrogen deposition without giving any or any proper consideration to the evidence adduced on behalf of the Council by Mr John, in which he raised a number of concerns about heathland management as a means of mitigation.

Not only did the Inspector not address the concerns raised by Mr John, but he expressly relied on the absence of any contrary evidence from the Council in justifying the overall conclusion which he reached. At DL 68 he said "the Council did not offer any contrary evidence to indicate that the projects which would be funded by SAMMS would not be effective in reducing what would in any event be a very low risk of additional eutrophication. I therefore accept from the evidence before me that … the SAMMS contribution have a significant beneficial effect on biodiversity … and so also offset any small chance of harm as a result of N deposition" [DL 68]. If one gives the Inspector the benefit of the doubt by substituting "Heathland Management Contribution" for "SAMMS", it is apparent that the Inspector concluded that Knight's evidence that heathland management would be effective mitigation was uncontradicted.

The Inspector's failure to give proper consideration to Mr John's evidence was of particular concern given the fact that the heathland management proposal had been introduced only mid-way through the Inquiry and Knight's evidence in support of it was very limited.

At the opening of the Inquiry, neither the Council nor Knight Developments were relying upon mitigation by way of heathland management as part of their case. Knight's case was that, properly assessed on its own and not in-combination with other development, the increase in

nitrogen deposits generated by the proposed scheme would only have a negligible effect on the overall level of nitrogen deposition. Thus, no mitigation was required.

Knight presented detailed expert evidence on air quality and nitrogen depositions from Dr Holman. It is significant that, in a lengthy report, Dr Holman made no mention of heathland management as mitigation. In a lengthy proof of evidence, Mr Meurer gave expert evidence on nitrogen deposition. He too made no mention of heathland management as mitigation, even though he expressly considered mitigation in respect of other matters.

The Inspector raised the possibility of heathland management as mitigation on his own initiative during the course of the Inquiry, perhaps because of references to it in the evidence e.g. paragraph 28 of the report of the Core Strategy Inspector, which I set out below.

In response, Knight then put forward an alternative case, arguing that heathland management would mitigate the adverse effects of the additional nitrogen deposits generated by the proposed development.

First, Knight produced a short pamphlet by Defra on "The impacts of acid and nitrogen deposition on lowland heath" which stated, inter alia:

> "More recently, elevated deposition of nitrogen is thought to have contributed to widespread heathland decline throughout NW Europe."
>
> "Current and future legislation will reduce emissions of nitrogenous pollutants, but little is known about the ability of semi-natural ecosystems to recover from the effects of eutrophication. Ongoing work at Thursley Common, a lowland heath in Surrey indicates that recovery will be a slow process, with the effects of earlier N inputs persisting for many years after additions cease."
>
> "Air pollution is not the only driver of ecosystem change; climate change is likely to have detrimental effects on heathland vegetation and alter nutrient cycling. Research has shown that N addition increases the sensitivity of heather to drought; climate change may result in even greater levels of drought injury, particularly in-combination with elevated N deposition…."
>
> "Habitat management in the form of controlled burning, turf cutting, mowing or grazing is used as a tool to maintain low nutrient levels in lowland heaths. Recent results from both experiments and modelling studies indicate that frequent, intensive management (for example turf cutting or mowing with litter removal) is needed to retain nutrient-limited conditions at many heathland sites under current levels of N deposition."

Then, Mr Meurer gave oral evidence about heathland management as mitigation, and he subsequently submitted a note summarising his evidence. He advised that cutting of heathland vegetation and bracken and removal of arisings, together with grazing by ponies, sheep and cattle, were measures which would be effective in reducing nutrient levels, as well as maintaining the heath. At paragraph 10, he gave a guidance cost of £500 per ha for cutting and removal of vegetation, adding that this was "a management practice already being used on the Ashdown Forest". He advised that a contribution towards the cost of such management could be made by Knight Developments to the Ashdown Forest Trust. Finally, he said at paragraph 13 that

in future an allowance for heathland management could and should be included in the SAMMS, although he did not say that such an allowance was currently included in the SAMMS.

It was only during the course of the Inquiry, after the Inspector raised the issue of heathland management, that Knight gave the unilateral undertaking to make a Heathland Management Contribution, which was defined as:

> "The total payment of £12,500 (£500 per hectare over a 100 year period cutting on rotation every 25 years), towards heathland management measures on Ashdown Forest to include management of 5 hectares of land associated with a 255m section of the A26 road x 200m into the SAC."

Mr Lyness, counsel for the Council, was understandably not in a position to cross-examine Mr Meurer on this issue, as he was taken by surprise and did not have instructions.

Mr John, Technical Director of Ecus Ltd, gave oral evidence on ecological issues, including the effect of nitrogen depositions, on behalf of the Council. He commented on the supplementary evidence adduced by Knight and the proposed contribution, stating that in his view it would not constitute acceptable mitigation, having regard to the precautionary approach required under the Habitats Regulations. In summary, his evidence was:

Lowland heath required management in any event to prevent succession and maintain the ecosystem and the application of traditional management techniques was required to maintain the existing habitats and therefore was unlikely to mitigate the effects of nitrogen deposition.

The effects of heathland management and its relationship with retained nitrogen were uncertain and difficult to predict due to variations between sites in respect of their physical and environmental conditions and the species present. There was therefore a need for site specific ecological investigations and modelling of the form that the Council would be undertaking in order to determine the likely effect of mitigations proposed.

The Defra document was a research pamphlet which referred only in very general terms to the fact that intensive heathland management was required to maintain nutrient conditions at many heathland sites under current levels of deposition. This did not of itself avoid the need to investigate the site in question to determine what management techniques were in place and what the potential effects of other techniques might be.

Management techniques to reduce the effects of nitrogen deposition have been found to have unintended adverse ecological consequences including damage to other plants, animals, birds, carbon storage, impacts upon water quality and the loss of the seed bank. These potential consequences had not been addressed by Knight.

No evidence was provided in relation to the nature of current activity or management regime on the relevant land and it was not possible to determine whether Knight's proposal was practical.

Knight had not provided evidence of the nature and scale of potential impacts upon the heathland habitats and was therefore unable to provide evidence that the proposed mitigation would be sufficient.

Due to the high level of uncertainty, it was not possible to propose suitable mitigation without further study to determine the potential impact of the proposed mitigation techniques.

There was no certainty that the mitigation techniques would be accepted by those who might implement them.

On my reading of the decision, the Inspector failed to grapple with the concerns raised by Mr John at all. The passage at DL 68, where he states that the Council did not offer any contrary evidence, indicates that he overlooked it.

The Inspector acknowledged, in DL 69, that the evidence on habitat management had been produced late but went on to say "However, this follows on from discussions which the Council has been having with NE for a number of years….". The implication is that there had been longstanding discussions between the Council and Natural England concerning habitat management as mitigation for nitrogen deposition. But the evidence relied upon by the Inspector in support of this assertion, which was the letter of 15 April 2013, referred to in the Inspector's footnote 19, concerned work to "identify suitable measures to avoid impacts on Ashdown Forest from increases in recreational disturbance" as part of the Council's emerging SAMMS strategy. It had nothing to do with habitat management as mitigation for nitrogen deposition

In the light of the mistakes and failures which I have described above, I have concluded that the Inspector's decision under regulation 61 of the Habitats Regulations that the proposed development was not likely to have significant effects on the SAC was unlawful by reason of his flawed decision-making process. As I have set out in my summary of the law in paragraphs 27 to 34 above, he could only properly exclude the risk of significant effects, in reliance upon mitigating proposals, if he was sure, on the basis of objective information, that there would be no significant harmful effects. A precautionary approach ought to have been adopted. Here the Inspector mistakenly believed that heathland management to reduce nitrogen deposition was part of the SAMMS, and had been agreed with the Conservators. In fact there was no agreed heathland management scheme in existence, which was a highly relevant consideration which he failed to consider. Moreover, in reaching his conclusion, he failed to consider and take into account the evidence of the Council (Mr John), raising concerns about the efficacy of the proposed mitigation. The Inspector thus failed to meet the requirements of lawful decision-making: see *Tameside* and the other cases cited at paragraphs 13 and 14 above.

**D. Conclusions on the exercise of discretion to refuse relief**

Despite the errors of law in the Inspector's approach, the Defendants urged me to exercise my discretion not to quash the decision, applying *Champion*, on the basis that an Inspector properly directing himself on the evidence before him would have reached the same decision. They also submitted that, even if an appropriate assessment had been conducted, an Inspector would have found no adverse effect on the integrity of the site.

However, in my judgment, the evidence is too uncertain for me to reach such a conclusion, and bearing in mind the importance of the SAC and the legal requirements of the Habitats Directive and Regulations, including application of the precautionary principle, I consider it would be unsafe for me to do so. I am ill-equipped to reach conclusions on the technical evidence as I have not had the opportunity to conduct a detailed examination of it, including hearing from expert witnesses. This is an appeal on a point of law only.

In my view, it is significant that the Core Strategy Inspector concluded that nitrogen deposition levels in the Forest were potentially damaging to the habitat. The Inspector in this appeal accepted that finding. In consequence, the Core Strategy Inspector decided that further development in north Wealden ought to be restricted, applying the precautionary approach. In his view, a review of the extent and impact of nitrogen deposition, and the possibility of mitigation, was required.

In his report dated 30 October 2012, the Core Strategy Inspector considered the potential effect of the proposed housing allocation on traffic, and therefore nitrogen deposition. At paragraph 28 he considered the position at the location close to this proposed development:

> "28. Based on the DMRB [Design Manual for Road and Bridges] results, one section of the A26 would have an additional AADR of 950, indicating very little headroom for development beyond that proposed without further assessment to determine whether there would be a likely significant effect on the Ashdown Forest SAC. This work has not been done. However, the best available evidence on the existing nitrogen deposition load toward the centre of the SAC is that it significantly exceeds the ability of habitats to withstand deleterious effects. Deposition is likely to be more severe close to road corridors. Furthermore, I am mindful that the traffic modelling does not take account of possible traffic impacts of growth in neighbouring authorities. Although heathland management may have some part to play in mitigating the effects of nitrogen deposition, in the context of these other facts there is sufficient evidence at this point on a precautionary basis to restrict further development in north Wealden beyond that in the CS….."

> "29. It has been concluded that in relation to the WWTWs issue an early review of the plan is required. Air pollution relating to Ashdown Forest SAC could in the future restrict further planned development which might otherwise be acceptable. To ensure that the housing and other needs of the area are being addressed in the context of the Framework, for the review it would be important to establish more accurately the current extent and impact of nitrogen deposition at Ashdown Forest, the potential effects of additional development on the SAC and the possibility of mitigation if required, working collaboratively with the other affected authorities. I therefore include an appropriate modification to this effect…"

In response to the Inspector's Report, Policy 'WCS12 Biodiversity' in the Core Strategy included the following undertaking:

> "The Council will also undertake further investigation of the impacts of nitrogen deposition on the Ashdown Forest Special Area of Conservation so that its effects on development in the longer term can be more fully understood and mitigated if appropriate."

I place weight on the fact that the Core Strategy was the subject of a judicial review, and so was subjected to close judicial scrutiny. In *Ashdown Forest Economic Development LLP v. SSCLG* [2014] EWHC 406 (Admin), Sales J. upheld the lawfulness of the approach adopted by the Inspector and the Council in relation to the risk of nitrogen deposition, at [80] to [81]:

> "80 In my view, the Inspector's reasoning on this part of the case is rational and compelling. He was entitled to conclude that WDC had produced sufficient evidence in relation to the risk of environmental harm to Ashdown Forest to justify the use of the smaller 9,600 housing figure in the Core Strategy, that the possibility that further work on the issue of nitrogen deposition would show that a higher housing figure could be accommodated was so speculative and likely to be so delayed as not to warrant holding up the approval of the Core Strategy, and that this possibility would be more appropriately accommodated by requiring further investigatory work to be carried out after the adoption of the Core Strategy and when other neighbouring authorities were more advanced in producing their own development plans.
>
> 81 Similarly, I consider that WDC acted in a rational and lawful way in making the examination of the nitrogen deposition issue which it did and in not seeking to undertake any further or more detailed investigation before deciding to submit and then to adopt the Core Strategy. WDC had taken reasonable steps to inform itself about relevant matters in respect of that issue and it was not irrational for it to choose not to pursue further investigations before proceeding to decide that it was appropriate to select Scenario C for assessment under the SEA Directive and to adopt a Core Strategy based on a figure for new homes derived from Scenario C: cf *Secretary of State for Education and Science v Tameside MBC [1977] AC 1014* , 1065B; Cotswold DC v Secretary of State for Communities and Local Government [2013] EWHC 3719 (Admin), [57]-[61]; and *R (Khatun) v Newham LBC [2004] EWCA Civ 55; [2005] QB 37* , [34]-[35]. WDC's assessment was that any housing development above that in the Core Strategy would exceed the 1,000 AADT flows threshold and require a detailed "appropriate assessment" (which, given the low headroom below that figure even for the number of new homes in the Core Strategy, was plainly a rational view); and it was informed by environmental consultants and Natural England that a full detailed "appropriate assessment" of the impact of proposals for development above the 1,000 AADT flows threshold would require traffic modelling on a co-ordinated approach between planning authorities (see, in particular, paragraphs 32, 92 and 124 of Marina Brigginshaw's first witness statement for WDC). The Inspector did not err in concluding that WDC had properly made out its case for deciding to proceed with Scenario C without further examination at the plan making stage of the nitrogen deposition issue."

This part of his decision was not appealed to the Court of Appeal.

By the time of this Inquiry, the Council's review was still ongoing: it is expected to be completed in 2017. The work is extensive, involving monitoring of nitrogen dioxide concentrations at 102 sites; vegetation sampling at 15 transects, including the recording of vegetation composition and structure, recreation pressure, grazing and the effect of tree line buffers. It is conducting aerial imagery analysis and taking soil samples. The data will be used to identify trends in vegetation habitats and species composition with the objective of determining whether these are attributable to air quality influences, including nitrogen deposition.

In my view it would be foolhardy for me to conclude that the Inspector's conclusions were correct, on the basis of the limited evidence before me, when a much more comprehensive review is underway and will report next year.

Knight was critical of the Council's delay in concluding its review. However, I consider that Mr Price Lewis QC was correct to point out that unreasonable delay (if any) on the part of the Council is not a factor which can properly be taken into account when applying the tests under the Habitats Directive and Regulations. It has to be remembered that the purpose of the legislation is to protect habitats. That protection cannot be diminished because of failures on the part of local authorities.

Although Knight adduced expert evidence in this appeal which was not before the Core Strategy Inspector, there remain areas of dispute and uncertainty. Having heard the evidence, the Inspector in this appeal did not accept Knight's main submission that the risk was so negligible that no mitigation was required. Nor did the Inspector accept Knight's submission that an in-combination assessment was inappropriate. I consider it would be wrong for me to accept Knight's evidence and submissions on these complex issues, when the Inspector did not.

I was also concerned by Dr Holman's finding, at paragraphs 205 & 207 of her report, that, on the basis of the traffic modelling conducted by Knight which took into account economic and population growth, the in-combination figure was 1815 AADT, considerably higher than the Council's figures, and in excess of the DMRB limit. Whilst I appreciate that Dr Holman's expert view was that in-combination assessment was incorrect, it does indicate a nitrogen load which is potentially damaging to the SAC, if accurate.

The Inspector stated [DL 71] that Natural England had no objection to the scheme with regard to air quality issues and so, while it may not have considered the SAMMS (i.e. heathland management) mitigation, it would not have affected its response on that point. He referred at DL 70 to Natural England's email in connection with a different planning application (Benchmark Barn) which stated that "our approach to air quality issues surrounding Ashdown Forest differs to Wealden DC's in that our …. specialists advise that an "in combination" assessment is not required unless the process contribution is considered significant alone (i.e. an increase of > 1,000 or more than 1% of the critical load). As the process contribution from this proposal does not breach these thresholds we would have no objection to these proposals."

In the light of this evidence, the Defendants submitted that, on any redetermination, Natural England's position would be that even without <u>any</u> mitigation, the development was not likely to have a significant effect on the SAC, nor would it adversely affect the integrity of the SAC. Regulation 61(3) of the Habitat Regulations provides that, in carrying out an appropriate assessment, the competent authority must consult the appropriate nature conservation body, which is Natural England. Domestic case law has established that the views of Natural England on nature conservation issues deserve great weight, and although an authority is not bound to agree with them, it needs cogent reasons for departing from them: see *R (Prideaux) v Buckinghamshire CC* [2013] Env LR 32 (Admin), at [116] and *R (Morge) v Hampshire County* [2011] 1 W.L.R. 268, at [45].

I do not share the Defendants' confidence on this issue. In my view Natural England's position was more nuanced, and in any event would not be binding on a decision-maker. In its letter of 16 January 2014 to the Council's planning officer, Natural England formally objected to this development on the ground that it would have a significant impact on the High Weald Area of Outstanding Natural Beauty (which, incidentally, the Inspector did not accept). Under the heading "Ashdown Forest SPA Objection", which covered a range of issues, Natural England stated:

> "Natural England notes that the proposal is accompanied by an air quality assessment. The text of the environmental statement states that this will consider air quality impacts of existing strategic sites, air quality impacts of the proposed site (in the absence of the strategic sites) and air quality impacts of the proposed sites in combination with the strategic sites. This does not appear to be the case and it is unclear from the assessment what has been assessed. We note that the Council have asked their own air quality consultants to comment on this aspect on the application so we are satisfied that air quality impacts will be considered by the Council prior to determination."

After Natural England was sent a revised version of Knight's air quality assessment, and asked if it wished to comment further, one of its officers replied, in an email dated 10 February 2014:

> "Regarding Air Quality, as discussed with the Council I am satisfied that as you have air quality consultants assessing and commenting on this aspect, I am satisfied that it is being adequately addressed and therefore Natural England have no need to comment on this aspect."

The Inspector observed, at DL 76, that Natural England had "delegated any decision to the Council". In the absence of any evidence from Natural England, I do not know why, in relation to this planning application, they were content to leave it to the Council's air quality consultants on the basis that they were "adequately" addressing this issue, bearing in mind that in the Benchmark Barn application they stated that their approach differed from that of the Council's consultants. Mr Price Lewis suggested it might be because Benchmark Barn concerned the development of a single property whereas the current proposal was for a large housing estate, so the impacts were potentially greater. Whatever the reason, it is clear that Natural England did not present a positive case to either the local planning authority or the Inspector that the proposed development should only be assessed on its own, and not in combination with other proposed development.

At the Inquiry, the Council put forward cogent arguments in favour of an in-combination approach (see its Closing Submissions, paragraphs 40 to 69). Despite his observations about Natural England's views, the Inspector in this appeal proceeded on the basis of an in-combination approach. The Core Strategy Inspector considered the combined effect of the housing proposed, and it appears that Natural England agreed with the methodology used by the Council in its Habitats Assessment for the Core Strategy. The Habitats Directive and regulation 61(1) of the Habitat Regulations require consideration of the likely significant effects of the plan or project "either alone or in combination with other plans and projects". Taking all these factors together, I cannot be satisfied that an Inspector would decide to disregard the in-combination effects of the proposed development.

For these reasons, in the exercise of my discretion, I consider that the decision ought to be quashed. In the light of my conclusion, it is unnecessary for me to address the reasons challenge (ground 3) on the nitrogen deposition issue.

**Ground 2: NPPF 116 & alternative sites**

**A. The NPPF**

The Site is situated in an AONB and so is accorded special protection under national and local planning policies.

NPPF 115 and 116 provide, so far as is material:

> "115. Great weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty…"
>
> "116. Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of:
>
> - the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;
>
> - the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and
>
> - any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which it could be moderated."

**B. Evidence and issues on appeal**

The Core Strategy adopted in February 2013 made provision for 9,440 new homes. It was examined and adopted following the publication of the NPPF and it was found to be sound. The Core Strategy Inspector acknowledged that the housing provision in the Core Strategy would not meet the full housing needs of the area but he found that was justified because of restrictions in the use of land designated as SAC or AONB.

In the High Court, Sales J. upheld the Inspector's conclusions, holding:

> "82 There is nothing in the guidance in the NPPF which indicates that the Inspector proceeded in an illogical or irrational way, or in a way which conflicted with that guidance. In particular, he was entitled to conclude, in conformity with paragraph 158 of the NPPF, that WDC had produced sufficient objective evidence to justify its adoption of the figure of 9,600 (later reduced to 9,440), rather than 11,000, for new homes."

It was accepted at the Inquiry that, when measured against the housing requirement in the Core Strategy, the Council had a five year supply of housing land as required by NPPF 47.

However, the Second Defendant contended that the current full, objectively assessed housing needs across the district were higher than identified in the Core Strategy, based on evidence from Roland Bolton. It also argued that there was substantial affordable housing need in the district generally and in Crowborough in particular. Through the evidence of Andy Stevens, it also relied upon an "AONB Assessment", submitted with the application, to demonstrate that there were no alternative sites in Crowborough outside the AONB which could more suitably accommodate up to 103 dwellings.

The Council accepted that full, objectively assessed housing needs were higher than the Core Strategy housing requirement. However it argued that significant weight should not be given to the existing failure to meet those needs, as this was due to constraints within the district, including the AONB and Ashdown Forest. These had been properly considered as part of the Core Strategy process and reflected in the housing provision on strategic sites in the Core Strategy (from which the site had been excluded). Until the proposed review of the Core Strategy had taken place, there was no justification for attaching substantial weight to another figure of full, objectively assessed housing needs.

The Council also accepted that there was a need for affordable housing, generally, and within Crowborough in particular, but contended that the need for affordable housing did not amount to exceptional circumstances in the terms of NPPF 116, on grounds including the following: that the Second Defendant had overestimated the extent of need by relying on annual figures that were out of date and were not borne out by the extent of the waiting list on the current housing register; that the Core Strategy had provided for other sites to meet affordable housing needs in so far as they were capable of being met in the light of legitimate planning constraints; and that those sites would substantially address needs.

The Council also argued that, even in so far as there was a need for the proposed level of housing, it could be accommodated on other land outside the AONB, either in Crowborough itself (including land at Pine Grove and South East Crowborough which were adopted strategic sites in the Core Strategy and on other sites identified as "suitable" in the Council's SHLAA), or in other land elsewhere in the district. It contended that previous decisions where local affordable housing need had been regarded as amounting to exceptional circumstances were distinguishable from the present case.

The Pine Grove and South East Crowborough sites were included as allocations in the draft Wealden Strategic Sites Local Plan ("SSLP"), which brought forward Strategic Development Areas identified in the adopted Core Strategy. The Inspector appointed to examine the SSLP recommended shortly before the close of the inquiry that housing provision in North Hailsham, elsewhere in the district, should be increased, that there should be a reduction in the developable area at Pine Grove in Crowborough with the removal of 30 proposed dwellings from the allocation. The Council decided to withdraw the SSLP as it considered that these changes would require assessment under the Environmental Assessment of Plans and Programmes Regulations 2004 and that the strategic development areas from the Core Strategy could be brought forward instead through the upcoming Wealden Local Plan.

The Second Defendant argued that the Council had accepted on other applications that local affordable housing need could amount to exceptional circumstances justifying the grant of permission in the AONB and that where this was the case it justified limiting the consideration of alternatives to the town where the proposal was located; that all the evidence pointed to there being a significant local need for affordable housing; that even if (which was disputed) all the housing proposed within SDAs in Crowborough in the Core Strategy were delivered thus would not meet the current level of affordable housing need on the register never mind the future annual needs.

The Second Defendant also argued that it had from the outset given detailed consideration to alternatives (including the AONB Assessment); the methodology used was that employed in the Council's own SHLAA methodology; and that the suggestion in Mr Bending's evidence that there was the potential for circa 1400 new dwellings in Crowborough beyond those identified in SDAs and outside the AONB lacked any credibility having regard to the planning history which included the fact that twice in recent years the Council had done its own

comprehensive searches for sites in Crowborough and was unable to identify any such sites outside the AONB.

**C. Inspector's decision**

In his conclusions on NPPF 116, the Inspector found as follows:

> "89. While housing, and AH, could theoretically be developed elsewhere, most of the district is within the AONB and so there are few alternatives that are not equally constrained. The Council put forward the Pine Grove and South East Crowborough (SEC) emerging allocations. However…the Pine Grove allocation was not endorsed by the SSLP [Strategic Sites Local Plan] Inspector and SEC has potential highways problems. Even if the latter can be resolved, and it appeared to me that they could, this does not alter the fact that there is a need for more housing as well as at SEC. Even if the search for alternative sites is taken wider than Crowborough, there is a lack of housing land to meet the full OAN and one alternative being considered when preparing the draft SSLP would itself be in the AONB. The existence of other sites, which collectively still fall short of the full OAN, does not amount to an alternative and there are no plans, through the duty to co-operate or otherwise, for neighbouring districts to provide for the shortfall.
>
> 90. Moreover, the withdrawal of the SSLP makes it less likely that more sites will come forward and strengthens the case that housing can amount to exceptional circumstances. This applies particularly to the AH which would amount to 40% of the proposed dwellings. In the absence of adequate housing land to meet the full OAN, let alone the AH requirements, I find that there is a need for the development. Moreover, taken with the lack of harm that would be caused to its landscape and scenic beauty, I find that this need amounts to exceptional circumstances to justify development in the AONB.
>
> 91. As set out above, mitigation would be put in place to deal with the detrimental effects. For all these reasons, I find that exceptional circumstances do exist and that the proposals would accord with NPPF 116. I note that at Heathfield and Wadhurst the Council also found that the need for housing, and AH, amounted to the exceptional circumstances with regard to NPPF 116. I find that this analysis should also apply to the appeal proposals and that no precedent would be set by allowing the appeal."

The Inspector had earlier found, at DL 40, that on balance "the proposals would have a neutral effect on the contribution that the appeal site makes to the landscape and scenic beauty of the AONB. The scheme would not harm the important characteristics of the AONB… It would accord with the requirement in NPPF 115 to give great weight to conserving landscape and scenic beauty in AONBs". These findings were taken into account in his assessment under NPPF 116.

**D. Conclusions**

The Council submitted that the Inspector erred in his consideration of NPPF 116 when concluding that there were no alternative sites to meet the need for the proposed development, by failing to take into account relevant evidence or acting unreasonably. In particular, the Council argued that the Inspector:

did not adequately address and resolve the conflicting evidence on the extent of the objectively assessed need for housing, including affordable housing.

did not adequately assess the alternative sites which were available, either within Crowborough or the wider district.

On the issue of need, in my judgment, the Defendants were correct to submit that the Council was, in effect, challenging the Inspector's findings on the evidence, and his planning judgments. This is, of course, impermissible. There was sufficient evidence before the Inspector to support the findings he made. I also accept their submission that the Inspector was not required to specify the objectively assessed housing need, or the affordable housing need, in precise figures, either to fulfil his task under NPPF 116 or to meet the standard of reasons required, applying the principles in *Porter*. He was not conducting an assessment of full objectively assessed need for plan-making purposes under NPPF 47 nor deciding whether the policies for the supply of housing were not up to date under NPPF 49. For the purposes of NPPF 116, it was sufficient for him to assess and record the need in the broad terms in which he did.

The Council presented evidence of alternative sites within Crowborough for consideration by the Inspector, and invited him to visit them. Most of these sites fell within the category of "suitable" sites identified in the Council's Strategic Housing Land Availability Assessment, and were outside the AONB. On the Council's evidence, these sites were capable of accommodating in excess of 1400 dwellings.

At DL 89, the Inspector dismissed one of these sites, Pine Grove, on the ground that it had not been endorsed by the SSLP Inspector. This was a mistake of fact on the part of the Inspector. In his proposed modifications, the SSLP Inspector recommended reducing the number of units at Pine Grove from 91 to 41, and making up the shortfall by increasing the allocation at the Roughetts site in Crowborough to 20 and adding 33 to the strategic allocation in Uckfield (see the SSLP Update Note for the Inquiry, paragraph 4.4). The Update Note annexed a report to the full Council on this issue, dated 27 May 2015, which listed the strategic sites in the Core Strategy. "SD8 Land at Pine Grove" was listed together with "SD9 Land at Jarvis Brook" with a combined provision of "around 140 dwellings". Exhibit CB1 to Mr Bending's third witness statement for this hearing exhibited some of the material provided to the Inspector about these sites; a plan at p.1580 shows Pine Grove and Jarvis Brook near to each other, but not adjacent.

At DL 89, the Inspector also referred to the South East Crowborough (SEC) site, another emerging allocation. He said it had "potential highways problems" but he appears to have accepted the Council's case that these could be resolved.

The Inspector made no findings as to the suitability of the other alternative sites in Crowborough put forward by the Council.

At DL 89, the Inspector accepted the Council's argument that the search for sites could extend beyond Crowborough, into the surrounding district. However, he did not assess sites outside Crowborough as an alternative to the Steel Cross site. Knight did not challenge the availability or suitability of such sites, as its evidence only related to Crowborough.

The Inspector appears to have rejected all these sites as alternatives, not because they were unsuitable, but because taken cumulatively they fell short of meeting the full objective assessed need for housing in the area. In respect of the SEC, he said: "Even if the latter can be resolved, and it appeared to me that they could, this does not alter the fact that there is a need for more housing as well as at SEC". In respect of the wider district, he said: "Even if the search for alternative sites is taken wider than Crowborough, there is a lack of housing land to meet the full OAN". He then concluded: "The existence of other sites, which collectively still fall short of the full OAN, does not amount to an alternative" (emphasis added).

The Inspector was required to consider the need for housing development under bullet point one of NPPF 116. Under bullet two, the question which the Inspector had to address was whether the proposed development at Steel Cross could be located at an alternative site outside the AONB. Its purpose is to ascertain whether an alternative site may be available, so as to avoid development in the AONB. It requires other available sites in the area to be assessed, on their merits, as possible alternative locations for the proposed development. NPPF 116 is not a plan-making provision, like NPPF 47, which requires housing needs and supply to be assessed generally across an area. It is clear from the wording of NPPF 116 that it is intended to apply in the consideration and determination of applications for planning permission for specific developments, as in this case.

Of course, possible alternative sites are only one of a number of factors to be considered under NPPF, but the use of the word "should" indicates that it is a mandatory consideration. No one factor is decisive. Once the Inspector has investigated and assessed the matters identified in the three bullet points, as well as any other relevant considerations, he must then decide whether "exceptional circumstances" and the "public interest" mean that the presumption against major development in AONB is rebutted in the particular case.

Unfortunately the Inspector did not adequately investigate or assess whether the Steel Cross development could be located at an alternative site, either in Crowborough or the wider district, and so he did not properly apply NPPF 116, nor did he take into account all relevant considerations, as required in public law decision- making. I consider that this was a significant failure, given the high level of protection afforded to AONBs under national planning policy. In my view, it would not be appropriate for me to exercise my discretion not to quash the decision on this ground since, on the evidence, it is possible that a suitable alternative site might be identified, which could alter the overall judgment made on whether the presumption against development ought properly to be rebutted in respect of this development.

In view of my conclusions on this issue, in particular at paragraph 112 above, it is unnecessary for me to address the reasons challenge (ground 3) in respect of the NPPF 116 & alternative sites issue.

For the reasons I have given, the Inspector's decision should be quashed.