England and Wales High Court (Administrative Court) Decisions

Neutral Citation Number: [2016] EWHC 247 (Admin)
Case No: CO/4024/2015

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

Royal Courts of Justice
Strand, London, WC2A 2LL
17 February 2016

B e f o r e :

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

HTML VERSION OF JUDGMENT

Mrs Justice Lang :

Introduction

1. 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").

2. 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

3. 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").

4. 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

5. 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:

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

6. In summary, the Inspector concluded:

> i) 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].
>
> ii) 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].

iii) 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].

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

v) 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].

vi) 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].

vii) 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].

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

ix) 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].

x) 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].

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

Grounds of challenge

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

i) **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:

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

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

ii) **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.

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

8. 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**

9. 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.

10. 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.

11. 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 ..."

12. 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.

13. 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.

14. 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?"

15. 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]).

16. 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:

    i) A mistake as to an existing fact.

    ii) The fact must be uncontentious and objectively verifiable.

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

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

17. 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.*

18. 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.

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

20. 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."

21. 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.

22. 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." "

23. 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."

24. 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**

25. 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".

26. 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)."

27. 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."

28. 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…"

29. 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."

30. 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]).

31. "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] PTSR 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].

32. 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].

33. 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].

34. 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].

35. 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.

36. 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**

37. 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.

38. 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.

39. 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).

40. 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.

41. 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".

42. 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.

43. 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.

44. 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.

45. 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**

46. 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**

47. 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.

48. 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.

49. 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]".

50. 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.

51. 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".

52. 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."

53. 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."

54. 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.

55. 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].

56. 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.

57. 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."

58. 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."

59. 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…"

60. 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.

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

62. 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.

63. 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. 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.

69. 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.

70. 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."

71. 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.

72. 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."

73. 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.

74. 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:

> i) 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.
>
> ii) 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.
>
> iii) 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.

iv) 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.

v) 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.

vi) 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.

vii) 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.

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

75. 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.

76. 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

77. 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**

78. 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.

79. 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.

80. 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.

81. 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…"

82. 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."

83. 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."

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

85. 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.

86. 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.

87. 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.

88. 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.

89. 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.

90. 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."

91. 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 WLR 268, at [45].

92. 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."

93. 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."

94. 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.

95. 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.

96. 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**

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

98. 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**

99. 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.

100. 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."

101. 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.

102. 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.

103. 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.

104. 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.

105. 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.

106. 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.

107. 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.

108. 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**

109. 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."

110. 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

111. 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:

> i) did not adequately address and resolve the conflicting evidence on the extent of the objectively assessed need for housing, including affordable housing.
>
> ii) did not adequately assess the alternative sites which were available, either within Crowborough or the wider district.

112. 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.

113. 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.

114. 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.

115. 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.

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

117. 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.

118. 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).

119. 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.

120. 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.

121. 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.

122. 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.

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