Town and Country Planning Act 1990 - Section 77
Town and Country Planning (Inquiries Procedure) (England) Rules 2000

Site:	Anglia Square including land and buildings to the north and west
Appeal by:	Weston Homes PLC
PINS reference:	APP/G2625/V/19/3225505
LPA reference:	18/00330/F

Norwich Cycling Campaign

Proof of Evidence / APPENDICES

Air Quality

PoE-CYC/102

3rd December 2019

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The Planning Inspectorate

Appeal Decisions

Inquiry held on 1, 2, 3, 8, 9 & 22 November 2016
Site visit made on 4 November 2016

by Roger Clews BA MSc Dip Ed DipTP MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 9 January 2017

Appeal A – Ref: APP/V2255/W/15/3067553
London Road, Newington, Kent ME9 7NL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
- The appeal is made by Gladman Developments Ltd against Swale Borough Council.
- The application Ref 15/500671/OUT is dated 26 January 2015.
- The development proposed is described on the application form as: *Residential development of up to 330 dwellings plus 60 units of Extra Care (including a minimum of 30% Affordable), an allocated ¼-acre of serviced land for potential doctor's surgery, demolition of farm outbuildings, planting and landscaping, informal open space, children's play area, surface water attenuation, a vehicular access point from London Road and associated ancillary works.*

Appeal B – Ref: APP/V2255/W/16/3148140
London Road, Newington, Kent ME9 7NL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a failure to give notice within the prescribed period of a decision on an application for outline planning permission.
- The appeal is made by Gladman Developments Ltd against Swale Borough Council.
- The application Ref 15/510595/OUT is dated 23 December 2015.
- The development proposed is described on the application form as: *Residential development of up to 140 dwellings plus 60 units of Extra Care (including a minimum of 30% Affordable), an allocated ¼-acre of serviced land for potential doctor's surgery, demolition of farm outbuildings, planting and landscaping, informal open space, children's play area, surface water attenuation, a vehicular access point from London Road and associated ancillary works.*

Decisions

Appeal A – Ref: APP/V2255/W/15/3067553

1. The appeal is dismissed and planning permission is refused for the development which is the subject of planning application Ref 15/500671/OUT, dated 26 January 2015.

Appeal B – Ref: APP/V2255/W/16/3148140

2. The appeal is dismissed and planning permission is refused for the development which is the subject of planning application 15/510595/OUT, dated 23 December 2015.

Procedural matters

Rule 6 party

3. The Kent branch of the Campaign to Protect Rural England [CPRE Kent] appeared at the inquiry as a Rule 6 party.

Planning obligations

4. I made arrangements to allow the appellants to submit two executed unilateral undertakings, one for Appeal A and one for Appeal B, after the close of the inquiry. Each is dated 1 December 2016. I consider their contents further below.

Reserved matters

5. The applications which are the subject of Appeal A and Appeal B were both made in outline, with all detailed matters apart from access reserved for future consideration. I shall consider the appeals on the same basis.

The appeal sites

6. The Appeal A site is made up of three adjacent rectangular fields, each over 300m in length and around 125m-135m wide, lying just to the south of the A2 London Road. The fields are separated by shelterbelts running roughly at right-angles to the road. For convenience I shall call the eastern field Field A, the middle one Field B and the western one Field C. Fields B and C are currently used for intensive apple-growing while Field A is planted with blackcurrant bushes. A group of farm outbuildings at the north-western corner of Field A is also part of the Appeal A site. The Appeal B site comprises Fields A and B, but excludes Field C and the farm outbuildings.

Description of the Appeal A proposals

7. During the inquiry the appellants submitted a letter requesting that the access details submitted as part of the Appeal B proposals should also apply to the Appeal A proposals, replacing the original Appeal A access details. Neither the Council nor CPRE Kent objected to this substitution. Since interested persons were able to comment on the Appeal B access details during the appeal process, in my view no-one's interests would be prejudiced by the change. I shall therefore consider Appeal A on that basis.

8. Consequently it is necessary to revise the description of the Appeal A proposals to take account of the replacement access details. It is also necessary to move the words "(including 30% Affordable)" so that they qualify the proposed dwellings as intended, and not the extra care accommodation; and to make three further minor adjustments, which do not materially alter the proposals. These are to add the word "accommodation" after "Extra Care" for clarity; to change "¼ acre" to "0.1ha" to ensure consistency in the use of metric units; and to change "doctor's surgery" to "healthcare facility" to more accurately reflect the terms of the unilateral undertaking (see below). The parties to the inquiry agreed to all these changes.

9. I shall therefore consider the **Appeal A** proposals on the basis of the following description:

Residential development of up to 330 dwellings (including a minimum of 30% Affordable) plus 60 units of Extra Care accommodation, an allocated 0.1ha of serviced land for potential healthcare facility, demolition of farm outbuildings, planting and landscaping, informal open space, children's play area, surface water attenuation, a vehicular access point from London Road including the widening and realignment of the A2, and associated ancillary works.

Description of the Appeal B proposals

10. While the Appeal B application was still before the Council, it was amended to remove the proposed demolition of the farm outbuildings and to reduce the maximum number of dwellings to 126. Those revised proposals were considered by the Council on 26 May 2016, when they resolved against officers' recommendations that they would have refused planning permission if they still had jurisdiction over the application. Interested persons have had the opportunity to make representations on the revised proposals during the appeal process.

11. In my view, therefore, no person's interests would be prejudiced by my considering Appeal B on the basis of the revised proposals. For consistency, it is also necessary to make the same further changes to the description of the Appeal B proposals as are set out in paragraph 8 above for the Appeal A proposals. The parties to the inquiry agreed to these changes.

12. I shall therefore consider the **Appeal B** proposals on the basis of the following description:

Residential development of up to 126 dwellings (including a minimum of 30% Affordable) plus 60 units of Extra Care accommodation, an allocated 0.1ha of serviced land for potential healthcare facility, planting and landscaping, informal open space, children's play area, surface water attenuation, a vehicular access point from London Road including the widening and realignment of the A2, and associated ancillary works.

Withdrawn appeal for listed building consent

13. Originally a third appeal, Ref APP/V2255/Y/15/3067567, was to be considered the inquiry. It was a listed building consent appeal submitted alongside Appeal A. However, it subsequently emerged that the outbuildings at Pond Farm to which the appeal – and the earlier refused listed building consent application – applied are not in fact listed buildings. Hence listed building consent is not required for their demolition. On that basis the appellants withdrew the third appeal by letter dated 31 October 2016.

Main issues

14. At the opening of the inquiry I identified 10 main issues for both appeals and, following representations from CPRE Kent, I agreed to consider an eleventh. In the Reasons section below I consider each main issue in turn before reaching my overall conclusions on each appeal. In some cases I have modified my original definition of the main issue in the light of the evidence I heard at the inquiry.

Reasons

First main issue – Whether or not the Council can demonstrate a current five-year supply of housing land and, if not, what is the extent of the shortfall?

15. The development plan for the area comprises the *Swale Borough Local Plan 2008* [SBLP], adopted in February 2008, and the *Kent Minerals and Waste Local Plan 2013-2030* [KMWLP], adopted in July 2016. It is common ground between the Council and the appellants that the SBLP does not provide a robust and up-to-date objectively-assessed housing need figure, and there is no evidence that leads me to take a different view.

16. The emerging *Swale Borough Local Plan: Bearing Fruits 2031* [ELP] is at examination. Initial hearings were held in November 2015 and the inspector subsequently issued her Interim Findings. In them she supported the Council's proposal that the ELP should be based on a Plan period of 2014-2031 with an objectively-assessed housing need figure of 776 dwellings per annum [dpa]. While there are outstanding representations to the ELP examination that the figure should be different, the Council and the appellants agreed that it represents an appropriate basis against which to measure housing land supply for the purposes of this inquiry.

17. A different objectively-assessed housing need figure may yet be arrived at through the ELP examination. But at this stage 776 dpa represents the most authoritative assessment of that figure, having been discussed at the initial examination hearings and endorsed by the inspector in her Interim Findings. Based on that figure, the Council and the appellants agree that the current housing land supply in Swale borough, based on figures in the latest available Housing Information Audit 2014/15, amounts to some 3.8 years' worth. No substantive evidence supporting any different need or supply figure was put to me and so I shall consider the appeals on that basis.

18. NPPF paragraph 49 advises that housing applications should be considered in the context of the presumption in favour of sustainable development, and that relevant policies for the supply of housing should not be considered up-to-date if a five-year supply of deliverable housing sites cannot be demonstrated. I shall consider the implications of this when dealing below with relevant policies.

19. I conclude on the first main issue that the Council cannot demonstrate a current five-year supply of housing land and that the shortfall amounts to about 1.2 years' supply.

Second main issue – Whether or not granting planning permission for either appeal proposal would undermine the plan-making process to the extent that the appeal should be dismissed on grounds of prematurity

20. Guidance on the circumstances in which refusal of planning permission on grounds of prematurity might be justified is given in the national *Planning Practice Guidance* [PPG] at ref 21b-014-20140306. They are likely, the PPG says, to be limited to situations where the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or phasing of new development that are central to an emerging Local Plan, and where that emerging plan is at an advanced stage. While the PPG is careful to emphasise that those

circumstances are not exclusive, the evidence before me specifically on this issue did not seek to go beyond them.

21. The ELP is at a relatively advanced stage, since initial hearings have been held and Interim Findings issued by the inspector. Newington is identified in ELP policy ST3 as one of the Rural Local Service Centres. These form the third tier of the ELP's settlement hierarchy. Development is to be focussed at a tertiary scale, supporting each settlement's role as the primary focus for the rural area. This contrasts with the settlement hierarchy defined in SBLP policy SH1, in which Newington is identified as a fourth-tier settlement. The examination inspector concluded in her Interim Findings that the ELP settlement hierarchy is soundly based and consistent with national policy, subject to the allocation of additional sites and clarification of the monitoring approach. It is reasonable therefore to consider it unlikely that the settlement hierarchy, and Newington's position in it, will have changed substantially by the time the ELP is adopted.

22. On the other hand, over 400 main modifications to the ELP have been published for consultation in response to the inspector's Interim Findings. The proposed main modifications include an uplift of over 2,000 in the housing requirement, new site allocations and increases in existing allocations. Some 2,220 representations have been made on the main modifications and will need to be considered by the inspector. Further hearings are also to be held before she completes her report and recommendations. As a result, substantial uncertainty remains about exactly which site allocations will appear in the adopted ELP and at what scale.

23. As the larger of the two schemes before me, the Appeal A proposal for 330 dwellings would represent about 2.5% of the total objectively-assessed need figure for Swale over the ELP period. It is true that the proposed main modifications to the policy ST3 reasoned justification envisage only 1.3% of the total housing requirement being provided at Newington. But even with the addition of the Appeal A proposal figure, the proportion assigned to Newington would remain comfortably within the range envisaged for the Rural Local Service Centres as a whole. (The range set out in the proposed main modifications is from less than 1% at three of the settlements to 4% at Teynham and 6% at Iwade.)

24. From the above points I make the following findings. The Appeal A proposal can be seen as substantial in the context of the ELP, representing about 2.5% of its overall housing requirement. But in respect of the overall scale of development at Newington the proposal would conform to the emerging settlement hierarchy, which the examination inspector has endorsed. Therefore granting planning permission for it at this stage would not prejudice the plan-making process, in which final decisions are in any case yet to be made on many site allocations. The same applies to the smaller Appeal B proposal.

25. I am aware that the proposed reasoned justification to policy ST3, at paragraph 4.3.35.3, qualifies the role of Newington and the other Rural Local Service Centres as the primary focus for the rural area by saying that this role must be achieved *without harm to their character and separation with* [sic] *other settlements*. But that qualification is not a reason to conclude that granting permission for either appeal proposal would undermine the plan-making

process. Rather it draws attention to certain other considerations which I will deal with under the third main issue.

26. I conclude on the second main issue that granting planning permission for either appeal proposal would not undermine the plan-making process. Neither appeal should therefore be dismissed on grounds of prematurity.

Third main issue – The effect of the appeal proposals on landscape character and on the form of Newington

27. Of the SBLP policies that are relevant, in whole or part, to this main issue, I regard policies SP5, TG1, SH1, E6, E7 and H2 as policies for the supply of housing in the terms of NPPF paragraph 49. This is because, by promoting development within defined settlement limits and restricting it in the countryside outside those limits, their effect is to confine housing development to a level that broadly equates to the SBLP requirement. That requirement, however, is significantly below what the Council and the appellants agree (for the purposes of this appeal) is the current objectively-assessed need. In the current situation where the Council has a supply of only 3.8 years' worth of housing land, those policies would inevitably prevent the Council from demonstrating a five-year supply of deliverable housing sites and they must therefore be regarded as therefore as out-of-date.

28. That is not to say that setting development boundaries is unsound in principle, and indeed ELP policy ST3 proposes to retain that policy designation. But it is evident from the process of the ELP examination to date that neither its overall housing requirement nor the current five-year housing land requirement could be met if the SBLP's development boundaries and Strategic Gaps were retained in their current form. Consequently, although the appeal sites lie outside a development boundary and within a Strategic Gap defined in the SBLP, the policy conflicts resulting from this carry very limited weight in these appeals. In this context I note that the appeal sites do not lie in any of the Important Local Countryside Gaps defined in ELP policy DM25, which has been endorsed by the examination inspector.

29. Although revised development boundaries are defined in the main modifications to the ELP, they, and the consultation representations on them, are subject to consideration by the examination inspector. Thus it cannot be assumed that they will survive unchanged and so they also carry very limited weight in the appeals.

30. SBLP policies E1, E9(a)-(e) and E19 are not policies for the supply of housing. Instead they set out general development management criteria that apply to development both in the countryside and in rural settlements (in the case of E9(a)-(e)) or to all development in Swale (E1 and E19). The criteria are relevant when considering the effect of the appeal proposals on landscape character and on the form and setting of Newington. These policies generally accord with national policy in the NPPF and therefore carry their full statutory weight. ELP policy DM24, the soundness of which has been endorsed by the examination inspector, has similar objectives to E9. Also specifically relevant are NPPF paragraph 17, bullet point 5, which requires recognition of the intrinsic character and beauty of the countryside, and paragraph 109 which advises that valued landscapes should be protected and enhanced.

31. At a national level, the appeal sites lie in the North Kent Plain landscape character area, as defined by Natural England. Natural England's character area profile, published in 2015, describes its key characteristics as including *an open, low and gently undulating landscape … dominated by agricultural land uses. […] Orchards and horticultural crops characterise central and eastern areas, and are often enclosed by poplar or alder shelter belts and scattered small woodlands. […] Large settlements and urban infrastructure … are often visually dominant in the landscape.*

32. The 2004 *Landscape Assessment of Kent* [LAK], prepared for the County Council [KCC], places the appeal sites in the Fruit Belt Landscape Character Area, which it describes as … *predominantly a rural, agricultural landscape characterised by a complex landscape pattern of orchards, shelterbelts, fields of arable and pasture and horticultural crops, and divided by small blocks of woodland. […] The A2 and A249 route corridors, and associated ribbon development, run through the area and have a localised urbanising effect.*

33. At the local level, the *Swale Landscape Character and Biodiversity Appraisal and Guidelines* [SLCBA&G], produced for the Council in 2011, defines a Newington Fruit Belt extending west and south-west from Newington itself. The appeal sites lie right at the north-eastern edge of this area. The document comments that *It is surprising within the local vicinity to find that this function* [fruit production] *and the integrity of the landscape structure are very much intact and in good condition. It is a small-scale, enclosed landscape with a strong and regular field pattern. Mature and over-mature hedgerows of mixed native species and mature statuesque shelterbelts of poplar and alder emphasise the landscape pattern and intimated* [sic] *nature of this area.* […] *Along the A2 over large commercial buildings are poorly designed and not well screened. These features have a major impact on the quality of the landscape and the A2 corridor.*

34. In making my assessment of the landscape quality of the appeal sites, as well as referring to these character area appraisals, it is helpful also to consider the *Range of factors that can help in the identification of valued landscapes*, set out in Box 5.1 of the Landscape Institute's *Guidelines for Landscape and Visual Impact Appraisal,* 3rd edition (2013). Neither the sites nor their zone of visual influence are subject to any landscape designations, nor do the sites have any known associations with public figures or historical events. Nonetheless, in themselves they are fully representative of key characteristics of the landscape character area in which they lie, whether that is considered at the national, county or borough level. They are a very good example of a small-scale orchard and horticultural landscape, with a strong and regular field pattern enclosed by poplar and alder shelterbelts.

35. The fact that landscape of this type is not rare in the local area does not lessen its potential value, in my view. On the contrary, it derives value from the fact that it is representative of the typical local landscape character. Indeed, a landscape type that is locally rare could hardly be characteristic of an area. The fields are used for commercial fruit-growing, and not managed as traditional orchards like the one next to the village church that I saw during my site visit. But in itself that does not mean they cannot constitute a valued landscape.

36. A more significant consideration is the context in which the appeal sites are set. Along the busy London Road there are urbanising elements, particularly the continuous strip of mostly residential development that runs along the north side of the road, the car sales premises opposite the sites and the continuous street lighting. But rural elements, including the tall, evergreen roadside hedge to Fields B and C with its grass verge to the roadside, the open grassed area in front of the agricultural outbuildings and the adjacent former Pond Farmhouse, are equally prominent. The big glasshouses opposite the north-western corner of Field C are a further rural element, while the industrial estate to the west does not significantly impinge on views from London Road close to the appeal sites due to boundary screening and a difference in levels.

37. There are views over the appeal site fields from the north, along the public footpath which climbs over Mill Hill. While the edge of development in Newington, along the eastern edge of Field A, is clearly seen from the footpath, the buildings on the north side of London Road are almost entirely concealed by the topography and by a belt of trees along the railway line that runs parallel to the road. From this viewpoint the appeal site fields appear as an integral part of the rural landscape to the west and south-west of Newington. There are scattered groups of buildings in this landscape but they are subsidiary features in the predominantly rural scene.

38. Another public footpath runs from London Road across the north-western corner of Field B and Field C. Once one is behind the boundary hedge the traffic noise begins to recede and the fields are experienced as an almost entirely rural landscape, heavily enclosed by the closely-spaced rows of apple trees and the surrounding shelterbelts.

39. During my site visit it was difficult to obtain clear views into the appeal sites from other nearby public viewpoints. However, it is reasonable to suppose that when the leaves are off the surrounding hedges, there are filtered views into the sites from London Road and from the sports field to the south. From both these viewpoints the sites would be seen in the context of neighbouring development.

40. Drawing all these points together, I find that the scenic quality of the appeal site fields is not substantially diminished by the presence of predominantly residential development along London Road to the north and Playstool Road to the east, or by the proximity of London Road itself. Certainly these are urbanising factors in the overall landscape, but they do not significantly detract from the intrinsically attractive rural character of the fields themselves. Indeed, in views from the public footpaths over Mill Hill and across the appeal site the reduced prominence of urbanising factors enables the fields' attractive rural character to be experienced all the more.

41. In itself, this intrinsic attractiveness would not lift the appeal sites out of the category of ordinary countryside. The more important consideration is that, as I have shown, they constitute a very good example of the small-scale orchard and horticultural landscape that is a key characteristic of the area. In combination, I find that these considerations justify regarding the appeal sites as constituting a valued landscape that should be protected and enhanced, in the terms of NPPF paragraph 109.

42. In reaching this view I have taken account of the assessment, in the SLCBA&G, of the landscape sensitivity of the Newington Fruit Belt as "low". That change

from the "moderate" ranking it was given in the corresponding 2005 assessment is explained as being due to urbanisation along the A2 and the expansion of the settlement of Hartlip interrupting the landscape pattern more significantly than previously considered. But I have shown why, in the specific context of the appeal sites, urbanising factors do not significantly detract from their landscape character and value. Indeed the deterioration in the assessed sensitivity of the area underlines the importance of the SLCBA&G's objective of reinforcing the surviving elements of its typical landscape character.

43. I have also taken account of the "moderate" ranking that the SLCBA&G gives to the landscape in the Newington Fruit Belt as a whole. Again, it appears that it is urbanising factors that are seen as the main degrading features. Against that, the assessment records that *the strong network of mature field boundaries provides visual coherence and largely screens any discordant buildings*, a finding which accords with my assessment of the appeal sites. The LAK's description of the landscape condition of the Fruit Belt Landscape Character Area as "very poor", with an incoherent pattern of elements, applies to a very much larger and more diverse area than the Newington Fruit Belt. In my view it is not an accurate description of the character area to the south and south-west of Newington identified in the SLCBA&G.

44. The Appeal A proposals would result in most of the three appeal site fields being taken up with built development. Only the north-western part of Field C is shown as open space on the indicative development framework plan. The trees and hedges along the southern and western boundaries would be retained, as would the shelterbelts separating the three fields, albeit that the latter would need to be broken through in places to create access ways. However, almost all of the tall hedge along the frontage of Fields B and C would be removed, together with its grass verge, to create the new vehicular access and visibility splays. There would also be substantial widening of London Road to create a right-turn lane into the access with ghost islands to east and west.

45. The effects of these changes on the appeal site fields would be clearly seen from the public footpaths over Mill Hill and within the appeal site. They would take away both the locally typical, small-scale orchard and horticultural landscape characteristics of the appeal sites and their intrinsically attractive rural character. In views from London Road, the changes would have the effect of extending and reinforcing urbanisation along the A2, which is identified as having an important negative impact on landscape quality in both the LAK and the SLCBA&G.

46. The Appeal B proposals would directly affect only Fields A and B, leaving Field C undeveloped except for a short length of the vehicular access from London Road. The indicative development framework plan shows a substantial area of open space to the east and west of the farm outbuildings and a wide landscaped strip next to the southern site boundary. Nonetheless, most of Fields A and B would be taken up with development, and the same amount of hedgerow removal and road widening on the London Road frontage would take place as for the Appeal A scheme.

47. These changes, which would be evident from the public footpaths over Mill Hill and across part of Field B, would take away almost all the locally typical, small-scale orchard and horticultural landscape characteristics of Fields A and B

together with their intrinsically attractive rural character. In views from London Road the changes would have a similarly harmful urbanising effect as the Appeal A proposals. The retained areas of landscaping and open space, including a small proposed community orchard, and the replacement frontage hedgerow would not overcome these effects, as they would be experienced in the context of the new housing development rather than as part of a wider rural landscape. Even if Field C were retained in fruit production, it would appear as an isolated remnant of the existing, coherent enclave of fruit fields separated by shelterbelts.

48. A green infrastructure strategy for each appeal proposal could secure the creation of additional landscaping features, including a replacement frontage hedgerow for the Appeal A scheme. But they would not compensate for the loss of a very good surviving example of exactly the local landscape characteristics that the SLCBA&G seeks to reinforce. Both appeal proposals would therefore conflict with SBLP policies E1 and E9, in that they would fail to safeguard landscape elements that contribute to the distinctiveness of the locality and the natural environment more generally. They would also conflict with national policy in NPPF paragraph 109, as they would fail to protect or enhance a valued landscape.

49. Were planning permission to be granted for either of the appeal proposals in spite of these policy conflicts, I am sure that a residential development consistent with the design requirements of SBLP policy E19 could be created. With the Appeal B scheme in particular there is potential to provide a softer and more satisfactory western edge to Newington than the rather stark edge currently provided by rear boundaries along Playstool Road. That would be rather more difficult to achieve with the Appeal A scheme because of the proximity of the industrial estate to the western boundary of Field C.

50. Nonetheless, I conclude on the third main issue that, while there could be some modest benefit in respect of settlement form, both appeal proposals would cause substantial harm to landscape character.

Fourth main issue – The effect of the appeal proposals on the significance of the Grade II listed Pond Farmhouse and on the adjacent farm outbuildings which are non-designated heritage assets

51. The Grade II listed Pond Farmhouse, which probably dates from the late 18th century, stands between London Road and the northern boundary of Field A. The farm outbuildings, most of which were built in the mid-19th century to replace earlier buildings, stand at the north-western corner of Field A, a short distance away from the former farmhouse. Pond Farmhouse used to be part of the same farmstead as the outbuildings and the appeal site fields, but has been in separate ownership since 1963 and now has its own residential curtilage, separated from the fields and outbuildings by a wall, hedge and fence. Neither appeal proposal involves any works to Pond Farmhouse or within its curtilage, but the Appeal A development involves the demolition of the outbuildings. Under the Appeal B proposals they would be retained.

52. SBLP policy E14, which is not a policy for the supply of housing, is specifically relevant to this main issue. It states that proposals affecting a listed building and/or its setting will only be permitted if the building's special architectural or historic interest and its setting are preserved. This is similar to, albeit somewhat more stringent than, the statutory requirement that I should have

special regard to the desirability of preserving the listed building or its setting or any features of special architectural or historic interest which it possesses[1].

53. Also directly relevant are NPPF paragraphs 132 to 135, which set out a structured approach to the consideration of development proposals affecting the significance of heritage assets. This requires an assessment of the scale of any harm that a development may cause to the significance of a designated heritage asset. Different responses are then prescribed, according to whether any harm will be substantial or less than substantial. Because SBLP policy E14 is expressed in absolute terms, and does not allow for this more fine-grained assessment process, the weight I can accord to any conflict with it is reduced. I shall therefore follow the NPPF approach in my consideration of this main issue.

54. In the absence of any direct effect on the physical fabric of Pond Farmhouse, it is the appeal proposals' effect on the house's setting, and any resulting harm to its significance, that fall to be assessed. The house's symmetrical two-storey façade, built in a classical idiom typical of the late 18th and early 19th centuries, faces London Road. It stands out from the rest of the houses along this stretch of London Road, virtually all of which date from the 20th century, because of its age, its size and its fine proportions. Its prominence is enhanced by the wide gaps that separate it from the neighbouring houses to either side.

55. To the west of the former farmhouse, separated from it by a hedge and fence, is a flat grassed area with a post-and-wire boundary fence to the road. Behind that grassed area, and also clearly visible from the footway on the northern side of the road, is the front range of the farm outbuildings. It is built in a simple vernacular style with brick walls, timber doors and window frames, and weatherboarding to the upper parts of the taller western end. Immediately behind that taller section, but not clearly visible from the road, is the circular brick wall of a former oast building, but the distinctive cowl which would have stood on top of the wall is missing.

56. The building range is poorly maintained, with shabby paint on the woodwork, patchy whitewash on the walls and corrugated metal and asbestos sheeting on the roofs, presumably in place of the original tiles. All this considerably reduces any intrinsic attractiveness it might possess. Nonetheless, I regard it as an important element in the setting of Pond Farmhouse. Even though there is no longer any functional relationship between them, its proximity to the listed building enables one to appreciate the historical function of the former farmhouse, and indeed the reason why the farmhouse was built in this location at all. Without the presence of these functional outbuildings to complement the more elegant farmhouse, such an appreciation would be much more difficult, if not impossible.

57. In taking this view I acknowledge that the list entry for Pond Farmhouse, made in 1967, refers only to its external architectural details and makes no mention of the outbuildings or of any historical significance it may have. Indeed, by the time of the listing the outbuildings and the former farmhouse were already in separate ownership. But those facts do not relieve me of the responsibility of assessing its historical significance and the role its setting plays in establishing that. Without doing so I would be unable to meet the statutory duty of "special regard" or to carry out the assessment process set out in the NPPF.

[1] *Planning (Listed Buildings and Conservation Areas) Act 1990, s.66(1)*

58. Clearly the 20th-century development along London Road also contributes to the setting of Pond Farmhouse. But the ensemble created by the former farmhouse, the front range of the outbuildings and the grassed area in front of them has a historic agricultural character quite distinct from that surrounding development. The section of gravel track in front of the outbuildings does not create any significant sense of separation between them and the farmhouse. Without the outbuildings the listed building might well appear as just an unusually attractive older residence among all the other dwellinghouses. With them, its historical *raison d'être* is plain to see.

59. There is a stand of tall trees behind the group of outbuildings that, in combination with the shelterbelts, cuts off views of them and Pond Farmhouse from most parts of the appeal site fields. Views of the rear of the farmhouse can be obtained from the eastern edge of Field A, but the backs of the houses in Playstool Road are a far more prominent visual influence in this location. Moreover, this part of the field is not publicly accessible. From the public footpath that crosses the north-western corner of Fields B and C only the roof of the farmhouse can be seen, and from the Mill Hill footpath the farmhouse is almost completely hidden by the topography and foreground vegetation.

60. Because of the very limited intervisibility between them, I find that the appeal site fields are not a significant element in the setting of Pond Farmhouse. From the point of view of assessing the contribution its setting makes to the listed building's significance, therefore, its setting is confined to the surrounding development and other features along this part of London Road. While the surrounding 20th-century development, including the prominent car sales outlet opposite, has a negative impact on Pond Farmhouse's special historic interest and significance, this is far outweighed by the positive contribution made by the adjacent front range of outbuildings and the grassed area in front of them.

61. Because they would involve the demolition of all the farm outbuildings, I consider that the Appeal A proposals would result in substantial harm to the historic significance of Pond Farmhouse. In reaching this view I have taken into account the possibility that a condition could require new buildings very similar in form and design to the outbuildings to be built in their place, as part of the new residential development. But even if it were possible to replicate the historic appearance of the existing buildings, it is difficult to see how their functional character – which is an essential part of their contribution to the historic significance of the former farmhouse – could realistically be preserved in view of the likely desire of future residents to domesticate both the buildings themselves and the area around them.

62. However, Pond Farmhouse's historic significance is only part of its overall significance as a designated heritage asset. Its equally, if not more, important architectural qualities would be unaffected by the proposals and so I find that the demolition of the outbuildings would cause less than substantial harm to its significance overall.

63. Turning to the effect of the Appeal A proposals on the farm outbuildings as non-designated heritage assets, as I have already made clear the front range is in a fairly poor condition overall. If anything the rear range is in a worse condition: while its brickwork and roof retain more of their original appearance and materials, it has suffered fairly extensive fire damage. Neither building range appears to contain evidence of any noteworthy building techniques or

historic agricultural innovations. The other, smaller outbuildings are more modern blockwork structures of no obvious architectural or historic value.

64. In my view, therefore, the farm outbuildings have very limited significance as non-designated heritage assets in their own right. Considered purely in this context, therefore, their demolition as part of the Appeal A proposals would not lead to any material harm. However, because their demolition would cause less than substantial harm to the significance of Pond Farmhouse, the proposals would conflict with SBLP policy E14 and with the more general requirement in policy E1 to protect the built environment.

65. Because the farm outbuildings are retained under the Appeal B proposals, those proposals would not affect the significance of the listed former farmhouse or the outbuildings themselves and so no policy conflicts would arise.

66. I conclude on the fourth main issue that the Appeal A proposals only would cause less than substantial harm to the significance of the Grade II listed Pond Farmhouse. There would be no other harm to any heritage asset.

Fifth main issue – The effect of the appeal proposals on the availability of best and most versatile agricultural land

67. The appeal sites (apart from buildings and tracks) are made up entirely of Grade 1 and Grade 2 agricultural land –amounting to around 12.9ha in all three fields and around 8ha in Fields A and B. These are the top two grades and they put the sites into the category of best and most versatile (BMV) land.

68. NPPF paragraph 112 advises that local planning authorities should take into account the economic and other benefits of BMV land. Where significant development of agricultural land is demonstrated to be necessary, they should seek to use areas of poorer quality land in preference to that of a higher quality.

69. The NPPF does not define what is "significant" development of agricultural land. Natural England must be notified of any developments leading to the loss of more than 20ha of BMV land[2], but although that threshold has been accepted in some appeal decisions as a yardstick to measure significance, in others it has not. Natural England themselves advise that *The [BMV] land protection policy is relevant to all planning applications, including those on smaller areas, but is for the planning authority to decide how significant the agricultural land issues are.* That is the approach I shall follow.

70. While BMV land is ultimately a national if not an international resource, in assessing the significance of any loss it is relevant, in my view, to consider how prevalent BMV land is in the local area. Indeed, to some extent this is implicit in the NPPF's advice, since it effectively requires local planning authorities to assess the relative availability of poorer and higher quality land when significant development is necessary.

71. In this context, there is persuasive evidence that the appeal sites are typical of a belt of predominantly high-quality agricultural land stretching all the way from Gillingham to Faversham. Overall, the ELP indicates that some 70% of the 23,000ha of agricultural land in Swale borough is BMV land. While there are of course variations in this general picture, it means that it would probably

[2] By the *Town and Country Planning (Development Management) (England) Order 2015*

be difficult to find large developable sites of lower-quality land not only around Newington but around Sittingbourne as well. This is borne out by the fact that greenfield development sites around both settlements that are proposed for allocation in the ELP contain substantial areas of BMV land.

72. Drawing these points together, it is self-evident that in absolute terms both appeal proposals would lead to a loss of BMV land. However, the respective site areas of 12.9ha and 8ha of BMV land would represent a very small proportion of the extensive resources of BMV land in this part of Kent. Moreover, it seems likely that finding alternative sites of lower-quality land in the local area for developments of the scale required to meet the objectively-assessed need for housing would be difficult. Against this background, I find in these particular cases that the loss of BMV land could not be said to be significant.

73. I conclude on the fifth main issue that, although the proposals would lead to the loss of BMV land, that loss would not be significant when assessed against national planning policy.

Sixth main issue – The effect of the appeal proposals on the supply of brickearth

74. The appeal sites lie in a Mineral Safeguarding Area [MSA] defined in the KMWLP under policy CSM 4 because of its resources of brickearth. KMWLP policy DM 7 states that in MSAs, planning permission for non-minerals development that is incompatible with minerals safeguarding will only be granted in certain circumstances. These include where the mineral is not of economic value or its extraction would not be viable or practicable. Unsurprisingly, given their recent adoption date, these policies are consistent with national policy in NPPF section 13 and so carry their full statutory weight.

75. KCC are considering a planning application for extraction of brickearth on an extensive area of land at Paradise Farm, to the west and south of the appeal sites. The applicants are Wienerberger, who own the only remaining brick manufacturing plant in the county, Smeed Dean at Sittingbourne.

76. From the land levels on the appeal sites, it seems clear that brickearth has been extracted from Fields A and B in the past. In April 2016 the appellants invited Wienerberger to assess the likely quality of the remaining brickearth on the sites. Wienerberger reported that *we have carried out sample boreholes and confirm there are very little brickearth deposits remaining … [and] there is a lot of chalk present which is not suitable for our process.* They added that *the material was cross contaminated with flint so not only was the seam very thin it is also unusable in our process due to the presence of flint.*

77. At the inquiry Cllr Wright argued that Wienerberger had failed to investigate the parts of the sites, including Field C, where most brickearth is likely to be present, and that other brickmakers could use the material despite it containing chalk and/or flint. Cllr Wright's family owned the Sittingbourne brickworks prior to its purchase by Wienerberger and he has substantial knowledge of brick-making. However, he did not suggest any particular alternative brickmaker that might make use of the brickearth.

78. As Wienerberger are the only brickmakers in the area I consider it most unlikely that any other firm would come forward to extract the material. They were invited to assess all three appeal site fields and although they did not dig

any boreholes in Field C, it is clear from their responses that they do not consider the brickearth here to be suitable for their process. On the evidence before me I therefore find that it is unlikely to be of economic value and that its extraction is unlikely to be viable. The appeal proposals would not conflict with KMWLP policies CSM 4 or DM 7.

79. I conclude on the sixth main issue that the appeal proposals would have no materially harmful effect on the supply of brickearth.

Seventh main issue – The effect of the appeal proposals, including any proposed mitigation measures, on the use of sustainable forms of transport and on the safe and efficient operation of the road network

80. The appeal sites are within walking distance of the shops and other amenities in the centre of Newington. Newington Primary School is further away, at the northern end of the village, but it would still be feasible for parents and children to walk there – though of course parents might choose to drive instead. The access proposals for both appeal schemes include a new footway along the site frontage and widening of the footway on the northern side of London Road, with pedestrian crossing facilities (a refuge and a puffin crossing) on each side of the site access. The appellants also propose to provide tactile paving at the junction of London Road and Wykeham Close, and localised carriageway narrowing at the junction of Church Lane and High Oak Hill to control vehicle speeds near the school. The existing public right of way across parts of Fields B and C would be retained.

81. Newington has good public transport links to Sittingbourne, the Medway towns, eastern Kent and London. It is possible to travel by bus or train to all those places for work, shopping, leisure and other purposes. Existing bus stops and the railway station are within walking distance of the appeal sites, and the appellants propose to provide new bus stops and shelters closer to the site access and additional cycle parking spaces at the station.

82. Either appeal scheme, if permitted, would also be subject to a Travel Plan. This would involve the appointment of a co-ordinator to promote and monitor the use of sustainable modes of transport by residents, with the aim of reducing peak hour vehicle use below a prescribed target level.

83. All these measures, which could be secured by means of conditions and the unilateral undertakings, would benefit those residents of the new developments reliant on sustainable modes of transport and would encourage the use of those modes by other residents. Some of the measures would also benefit existing residents of Newington. The proposals would therefore comply with the guidance in section 4 of the NPPF on maximising sustainable transport solutions and giving people a real choice about how they travel.

84. The vehicular access arrangements for both appeal schemes would provide visibility splays appropriate to the existing 40mph speed limit along this section of London Road. A new eastbound right-turn lane, protected by ghost islands, would be provided for vehicles waiting to enter the site access. The access design has been subject to safety audit and has been approved by KCC, the local highway authority.

85. The impact of traffic generated by the new developments on key junctions in the surrounding area has been assessed using a methodology approved by KCC

and Highways England (HE). It found that there would be adequate spare capacity at all junctions where the development traffic would have a significant impact, apart from the junction between the A2 and A249 at the eastern end of Keycol Hill. Here the modelling showed that the junction would operate significantly over capacity in the assessment year, even without the addition of traffic from the proposed developments. The addition of that traffic would lead to further deterioration in performance.

86. Accordingly the appellants have agreed with KCC and HE that no more than half the dwellings proposed under Appeal A may be occupied until a defined scheme of improvements to the junction has been completed. For Appeal B, a financial contribution to the same junction improvement scheme has been agreed. These measures, which could be secured by condition and unilateral undertaking respectively, are proportionate to, and would provide the necessary mitigation of, the impact of traffic from each appeal proposal on the A2/A249 junction. They would thereby accord with SBLP policy T2.

87. During the inquiry I was made aware of the high degree of local concern about highway safety and congestion on local roads, and especially on the A2 through Newington. Tragically, the father of one person who spoke had been killed in an accident on London Road near the appeal sites some years ago. I do not underestimate the scale of these concerns, and indeed I saw for myself that London Road is very busy at most times of day. I have no doubt that when exceptional events occur, such as the closure of the M2 or the implementation of Operation Stack on the M20, congestion along it becomes very severe. Moreover, where the A2 passes through the centre of Newington there are choke points that can cause temporary delays to the passage of vehicles.

88. However, I am satisfied from the evidence before me that, with the implementation of the measures I have described, neither proposed development would materially worsen any existing congestion on the highway network or lead to a material deterioration in highway safety. Both appeal proposals would therefore comply with the safe access requirements of SBLP policy T1 and with relevant guidance in section 4 of the NPPF.

89. I conclude on the seventh main issue that the appeal proposals, including any proposed mitigation measures, would have a positive impact on the use of sustainable forms of transport and would not materially detract from the safe and efficient operation of the road network.

Eighth main issue – The effect of the appeal proposals, including any proposed mitigation measures, on air quality, particularly in the Newington and Rainham Air Quality Management Areas

90. SBLP policy SP2, which is not a policy for the supply of housing, is relevant to this issue. Among other things, it states that adverse environmental impact of development will be avoided, but where there remains an incompatibility between development and environmental protection, and development needs are judged to be greater, the Council will require adverse impacts to be minimised and mitigated. NPPF paragraph 120 requires the effects of pollution and the potential sensitivity of the area to its effects to be taken into account in planning decisions. Paragraph 124 advises that any new development in Air Quality Management Areas (AQMAs) should be consistent with the local air quality management plan.

91. National air quality standards, based on a 2008 European directive, are set out in the *Air Quality Standards and Objectives Regulations 2010.* They include a limit value of 40 micrograms per cubic metre (µg/m^3) for the annual mean concentration of nitrogen dioxide (NO_2). Limit values are also set for particulate matter and other pollutants. The Government is responsible for ensuring that these limit values are met. In practice, most of the actions necessary to achieve this are devolved to local authorities. They are required to carry out regular reviews and assessments of air quality to identify areas where the limit values are, or are likely to be, exceeded. They must declare AQMAs and prepare action plans to improve air quality in such areas.

92. Added emphasis to the urgency of meeting the limit values for air pollutants was given by the decision of the High Court in November 2015[3] quashing the Government's 2015 Air Quality Plan. The court found that the plan should have sought to achieve compliance by the earliest possible date rather than selecting 2020 as its target date. It also found that the Government had adopted too optimistic a model for future vehicle emissions.

93. An AQMA was declared along a section of London Road and High St in Newington in 2009 because the annual mean NO_2 objective was exceeded. Another AQMA has been declared in High St, Rainham, some 3km west of Newington in the adjacent Medway Council area, for the same reason. The latest available monitoring data, from 2015, shows that the annual mean objective of 40µg/m^3 for NO_2 was exceeded at two monitoring sites on the High St in the centre of Newington and at one site in Rainham High St.

94. The appellants' evidence to the inquiry includes an assessment of the air quality impacts of each appeal proposal, carried out in September 2016. These assessments supersede earlier work done by the same consultants. Each assessment models five main scenarios for the Newington and Rainham AQMAs: "without development" scenarios for the base year (2015) (Scenario 1) and for an assumed opening year for the development (2020) (Scenario 2) and a "with development" scenario for the opening year modelling the impact of the development traffic (Scenario 3). The impact of the development traffic taking into account the cumulative effect of other nearby proposed developments is then assessed using the same methodology (Scenarios 4 & 5).

95. For both appeal schemes, both Scenarios 3 & 5 find "moderate adverse" impacts at only one of the 16 receptor sites that were assessed – this is located in the centre of Newington a short distance from the monitoring site at which the highest annual mean NO_2 concentrations were recorded in 2015. Two other receptor sites, also in Newington High St, receive "slight adverse" impacts while the other 13 show "negligible" change.

96. However, it is noteworthy that the "without development" scenario for the opening year (Scenario 2) forecasts a substantial reduction in annual mean NO_2 concentrations compared with the 2015 base year. For example, NO_2 concentrations at receptor site ES4 are shown as falling from 48.85µg/m^3 in 2015 to 37.43µg/m^3 in 2020. Reductions almost as great are predicted at many of the other receptor sites in Newington.

97. It is true that annual mean NO_2 concentrations in Newington reduced significantly between 2010 and 2014 – by around 6µg/m^3 across all monitoring

[3] [2016] EWHC 2740 (Admin)

sites combined. But most of that reduction occurred between 2010 and 2012: from 2012 to 2014 the reduction was only around 1µg/m^3. Against that background, it seems optimistic on the face of it to expect that NO_2 concentrations will fall by the substantial amounts predicted in Scenario 2.

98. In the light of this, sensitivity versions of scenarios 2 to 5, in which the "without development" and "with development" scenarios are based on emission factors that remain unchanged between 2015 and 2020, were modelled for both the stand-alone and cumulative effects of the proposals. These show that for both appeal schemes in both "with development" scenarios there would be "substantial adverse" effects at three receptor sites in Newington. There are also "moderate adverse" and "slight adverse" effects at between three and five other receptor sites in each of these scenarios. In each case the limit value for annual mean NO_2 concentrations would be exceeded at five receptor sites, in some cases by a considerable amount.

99. The sensitivity scenarios are probably too pessimistic: as the appellants' witness pointed out, tightening of emission standards for new vehicles should, over time, bring about substantial further reductions in NO_2 emissions from traffic. But I was given no firm data on the rate at which this is likely to occur. In the absence of any conclusive evidence on this point, I consider it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent that informed the modelling of original Scenarios 2 to 5. My view is reinforced by the High Court's finding on the excessive optimism of future emissions modelling. This means that original Scenarios 3 and 5 cannot be taken as reliable projections of the likely impacts of the appeal proposals on air quality.

100. In my view the likelihood is that the impacts of the appeal proposals will fall somewhere between the best case original Scenarios 3 and 5 and the worst case sensitivity versions of those scenarios. Without further modelling it would be unwise to try to assess those impacts too precisely, but it seems safe to say that the possibility of "substantial adverse" impacts on receptors in Newington cannot be ruled out, and that "moderate adverse" impacts and exceedence of the limit value at a number of receptors in both Newington and Rainham are almost certain. This would be the case whether or not the cumulative impacts of other developments are factored in.

101. It might well be that, on this analysis, the limit values for NO_2 concentration levels would be exceeded in Newington and Rainham in 2020 even without the proposed developments. But this would not justify the further worsening of air quality that the modelling indicates would arise were either development to go ahead.

102. Both "moderate adverse" and "substantial adverse" impacts are considered likely to have a significant effect on human health, according to the 2015 publication *Land-Use Planning & Development Control: Planning for Air Quality*[4]. In accordance with guidance in that publication, the appellants propose to fund measures to mitigate the adverse impacts of the developments on both the Newington and Rainham AQMAs. Contributions to fund those measures are calculated using the DEFRA Emission Factors Toolkit and secured by the unilateral undertakings.

[4] Produced by Environmental Protection UK and the Institute of Air Quality Management

103. However, the level of contribution for each appeal scheme is based on 2020 emission factors. As I have found, on the evidence before me it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent assumed in the modelling of original Scenarios 2 to 5. Consequently the contributions may well not reflect the true impacts of the developments.

104. Proposed mitigation measures are outlined in the unilateral undertakings and the final mitigation scheme is subject to the approval of the Council. The proposed measures include electric vehicle charging points for each dwelling, green travel measures and incentives to encourage the use of walking, cycling, public transport and electric or low emission vehicles. No specific evidence has been provided, however, to show how effective those measures are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast NO_2 emissions.

105. Drawing all this together, I find that it is more probable than not that both appeal proposals would have at least a moderately adverse impact on air quality in the Newington and Rainham AQMAs, and thus a significant effect on human health. While measures are proposed to mitigate those adverse impacts, there is no clear evidence to demonstrate their likely effectiveness, and it may well be that the contributions to fund the measures fail to reflect the full scale of the impacts.

106. I therefore conclude on the eighth main issue that, even after taking into account the proposed mitigation measures, the appeal proposals are likely to have an adverse effect on air quality, particularly in the Newington and Rainham AQMAs. I reach this conclusion for the reasons set out above, notwithstanding that the Council raise no objection to the proposals on air quality grounds. Both proposals would thereby conflict with the guidance in NPPF paragraphs 120 and 124.

Ninth main issue – Whether or not the appeal proposals make adequate provision to mitigate the effects of the proposed developments on the Thames Estuary & Marshes, Medway Estuary & Marshes and The Swale Special Protection Areas and RAMSAR sites

107. The unilateral undertaking submitted for each appeal provides for a contribution to be made, if planning permission is granted, towards the implementation of the *Thames, Medway and Swale Estuaries Strategic Access and Monitoring Strategy*. In each case the contribution would be proportionate to the scale of the proposed development and would provide adequate mitigation for the effects of each proposed development on the Thames Estuary & Marshes, Medway Estuary & Marshes and The Swale Special Protection Areas and RAMSAR sites. Neither appeal proposal therefore conflicts with SBLP policy E12, which seeks to protect sites designated for their importance to biodiversity.

Tenth main issue – Whether or not the appeal proposals make adequate provision for the infrastructure necessary to support the developments proposed

108. I have considered transport infrastructure provision under the seventh main issue. For each appeal proposal, the unilateral undertakings also make provision for contributions towards education, youth services, library services, social care, healthcare, and provision of recycling and waste containers. I am satisfied that these contributions are necessary to make each development

acceptable in planning terms, and that they are directly related and fairly and reasonably related in scale and kind to each development. The Council have confirmed that none would breach the "pooling" limit contained in the *Community Infrastructure Levy Regulations 2010* (as amended).

109. The unilateral undertakings provide for the laying out, management and maintenance of the public open space within each appeal scheme. The provision of adequate sustainable drainage, estate roads and parking spaces, foot- and cycle-paths and other on-site infrastructure could be secured by conditions if planning permission were granted for either scheme. Accordingly there is no substantial evidence of any unmet infrastructure requirements that would arise as a result of the proposals.

110. I conclude on the tenth main issue that the appeal proposals would make adequate provision for the infrastructure necessary to support the developments proposed.

Eleventh main issue – What benefits would arise from the appeal proposals?

111. The appeal proposals would provide up to 330 and 126 dwellings respectively, of which at least 30% would be affordable housing. These represent very substantial benefit in a situation where the Council can demonstrate a housing land supply of only 3.8 years' worth and where there is a pressing local need for affordable housing. Newington is a strong housing market area without the risk factors that apply to some of the sites proposed for allocation in the ELP. On the evidence I heard there is no reason to doubt that the appeal sites could begin to deliver housing within two years of a grant of outline permission, thereby making a valuable contribution to the five-year housing supply.

112. The provision of 60 units of extra-care housing would also be a valuable benefit in the context of an acute and growing shortage of such accommodation in Swale and forecast growth of 46% in the number of residents over 65 years of age in the borough during the ELP period. On the other hand, I see only limited benefit in the proposed allocation of land for the provision of an on-site healthcare facility, as there is no clear evidence that any healthcare provider would actually come forward to develop the facility.

113. Both schemes would generate substantial economic benefits in terms of construction jobs (at least 300 full-time equivalent (FTE) for six years for Appeal A or at least 150 FTE for five years for Appeal B); additional spending by the new residents which would benefit the borough's economy (£8.7 million for Appeal A or £3.3 million for Appeal B); employment opportunities at the extra-care housing; a substantial increase in the local labour force; additional Council tax revenue of some £4.8 million over 10 years (Appeal A) or £1.8 million over 10 years (Appeal B); and New Homes Bonus payments of about £3.1 million over six years (Appeal A) or £1.2 million over six years (Appeal B). The full implementation of improvements to the A2/A249 junction in connection with the Appeal A scheme would have positive economic benefits over a wider area.

114. As noted under the seventh main issue above, some of the transport measures to be provided in connection with the appeal schemes would also benefit existing residents of Newington and encourage the wider use of sustainable forms of transport. Those measures include new and improved

pedestrian footpaths, bus stops and shelters and crossing facilities on London Road, additional cycle parking at the railway station, and proposed traffic-calming measures near Newington Primary School.

115. Finally, the public open space in each appeal scheme would be available for use by the general public, not just the scheme's residents.

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116. Section 38(6) of the *Planning and Compulsory Purchase Act 2004* requires that I determine the appeal in accordance with the development plan unless material considerations indicate otherwise. The Appeal A proposals would conflict with SBLP policies SP5, TG1, SH1, E6, E7 and H2 because they involve residential development outside a development boundary and within a Strategic Gap, both defined in the SBLP, and none of the policy exceptions that would permit such development apply. The proposals would also conflict with SBLP policies E1 and E9 because of the substantial harm they would cause to landscape character, and with SBLP policies E1 and E14 because they would fail to preserve the special historic interest and the setting of the listed Pond Farmhouse.

117. I have found no conflict with SBLP policies E12, E19, T1 or T2 or with KMWLP policies CSM 4 or DM 7. Although SBLP policy E15, dealing with Conservation Areas, is mentioned in the Council's putative reasons for refusal it is not relevant to this appeal. SBLP policies SP1 and SP2 also feature among the Council's putative reasons for refusal. Neither is a policy for the supply of housing: instead they deal with the broad issues of sustainable development and the impact of development on the environment.

118. SBLP policy SP2 requires a judgment to be made as to whether development needs are greater than the interests of environmental protection. The shortfall of 1.2 years' worth of housing land in the Council's current five-year supply undoubtedly creates a pressing need for additional housing development, including affordable housing, and the rapidly growing number of older people in the borough means there is also a strong need for housing for that age group in particular. The development proposals would make a substantial contribution to meeting each of those categories of need. But I consider that this contribution would be outweighed by the harm that the proposals would cause to the visual, historical and atmospheric environments of the borough, through their effects on landscape character, on the significance of Pond Farmhouse and on air quality. That harm could not be adequately minimised or mitigated and so there would be conflict with policy SP2.

119. Policy SP1 requires a broader balance to be drawn between positive and negative aspects of the proposals. In the terms of this policy the proposed development would provide for physical, social and community infrastructure, provide a very substantial number of new dwellings in a mix and range of housing types, including affordable housing, support existing local services and provide opportunities to reduce the need to travel by car. But in my judgment those benefits would be outweighed by the detrimental impact that the proposals would have on areas of environmental importance and on human health and well-being. Therefore, while the proposals would increase local self-sufficiency and satisfy human needs for housing, their greater weight that I give to their adverse environmental impact means that they would conflict with policy SP1.

120. Thus the Appeal A proposals would conflict with the development plan as a whole. That said, their conflicts with SBLP policies SP5, TG1, SH1, E6, E7 and H2 carry very limited weight in my decision because those policies are out of date for the reasons given under the third main issue above. Their conflict with policy E14 also carries limited weight because that policy is not consistent with guidance in the NPPF.

121. Where relevant development plan policies are out of date, NPPF paragraph 14 advises that permission should be granted unless **either** any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the NPPF's policies as a whole (Limb 1); **or** specific NPPF policies indicate that development should be restricted (Limb 2). Having reached a conclusion on those tests, it is also necessary to consider whether there are other material considerations that would lead to a different conclusion (footnote 10 to NPPF paragraph 14).

122. That whole process, to which I now turn, leads to an outcome which reflects the presumption in favour of sustainable development that lies at the heart of the NPPF. Although not all the relevant development plan policies in this case are out of date, I shall conduct the paragraph 14 process as if they were in order to ensure that the presumption is robustly applied.

123. Policies relating to designated heritage assets are specifically listed in the NPPF's footnote 10 as indicating that development should be restricted, and so Limb 2 of paragraph 14 applies to the Appeal A proposals. I have found that the proposals would lead to less than substantial harm to the significance of the listed Pond Farmhouse. NPPF paragraph 134 requires that harm to be weighed against the proposals' public benefits. There would be substantial benefits from the supply of a large amount of new housing, including affordable housing and housing for older people for which there is a high level of need, in the context of a significant shortfall in the Council's five-year housing land supply. There would also be substantial benefits to the borough's economy, and some benefits to non-residents from transport infrastructure and open space provision.

124. I find that, in combination, these benefits of the proposals would outweigh the harm the proposals would cause to the significance of the designated heritage asset. Thus the Limb 2 test does not indicate that permission should be refused.

125. I shall structure the broader Limb 1 assessment by assessing the benefits and adverse impacts of the Appeal A proposals in terms of the three dimensions of sustainable development. Substantial **social** benefits would arise from the delivery of 330 new dwellings and 60 extra-case housing units, beginning in about two years from the grant of planning permission. This would make a significant contribution to meeting demonstrated needs for market, affordable and older persons' housing and to addressing the shortfall of 1.2 years in the housing land supply for the borough. It would provide support for local businesses and services in the village and help to rebalance its ageing demographic profile. Housing development at the scale proposed would accord with the settlement hierarchy in the ELP, which is unlikely to be altered. All this would accord with NPPF paragraphs 28, 47 and 50.

126. The proposed development would be well served by means of transport other than the car and residents would have a genuine choice when deciding

how to travel to a wide range of destinations. Additional benefits would accrue to non-residents from the transport infrastructure provided in association with the development – most notably including the full implementation of improvement works to the A2/A249 junction. In these ways the proposals are consistent with section 4 of the NPPF.

127. The public open space and retained public right of way within the development would be available to non-residents and so would contribute to their health and well-being in accordance with NPPF paragraph 73. Provision of land for an on-site healthcare facility would be consistent with the objectives of NPPF paragraphs 69 and 70, but because there is considerable uncertainty over whether the facility would actually be delivered, this benefit carries only limited weight.

128. Against all these social benefits, however, must be set the strong likelihood that, notwithstanding the proposed mitigation measures, the appeal proposals would contribute to at least "moderate adverse" impacts on air quality in both the Newington and Rainham AQMAs. Thus they would be likely to have a significant adverse effect on human health. These effects of the proposals would conflict with the guidance in NPPF paragraph 124.

129. I have set out the substantial **economic** benefits of the Appeal A proposals under the eleventh main issue. While there would also be some loss of BMV land, that loss would not be significant when assessed against national planning policy, and the proposals would have no materially harmful effect on the supply of brickearth. Thus the economic impacts of the proposals are strongly positive and carry significant weight in accordance with NPPF paragraphs 18 and 19.

130. Turning to the **environmental** dimension, the Appeal A proposals would have no harmful consequences for ecology or flood risk. Indeed there is the potential for some on-site biodiversity enhancement in accordance with NPPF paragraph 118.

131. For the reasons I have given under the third main issue, however, and notwithstanding any potential benefit they might have in respect of settlement form, the proposals would cause substantial harm to landscape character. By failing to protect or enhance what I have found to be a valued landscape they conflict with NPPF paragraph 109.

132. The proposals would also cause less than substantial harm to the significance of the listed Pond Farmhouse. Although I found in applying the Limb 2 test that, in itself, that harm is outweighed by the benefits of the appeal proposal, it is nonetheless a negative factor to be considered in the overall Limb 1 balance.

133. Drawing all this together, I conclude on the Limb 1 assessment that, even after considerable weight is given to the social, economic and environmental benefits that I have set out above, the substantial harm that the appeal proposals would cause to the character of a valued landscape and their likely significant adverse effect on human health would significantly and demonstrably outweigh those benefits. The less than substantial harm the proposals would cause to the significance of the listed Pond Farmhouse adds a small amount of additional weight to the negative side of the balance but does not affect the overall outcome of the assessment.

134. No other material considerations that would lead me to a different conclusion in respect of the NPPF paragraph 14 assessment or in any other respect have been drawn to my attention. I find therefore that there are no material considerations which indicate that Appeal A should be determined other than in accordance with the development plan. Accordingly, I conclude that Appeal A should be dismissed.

Overall conclusions on Appeal B – Ref: APP/V2255/W/16/3148140

135. I shall follow the same assessment process for the Appeal B proposals as for Appeal A. The Appeal B proposals would conflict with SBLP policies SP5, TG1, SH1, E6, E7 and H2 because they involve residential development outside a development boundary and within a Strategic Gap, both defined in the SBLP, and none of the policy exceptions that would permit such development apply. The proposals would also conflict with SBLP policies E1 and E9 because of the substantial harm they would cause to landscape character. There would be no conflict with SBLP policies E12, E19, T1 or T2 or with KMWLP policies CSM 4 or DM 7.

136. The shortfall of 1.2 years' worth of housing land in the Council's current five-year supply creates a pressing need for additional housing development, including affordable housing, and the rapidly growing number of older people in the borough means there is also a strong need for housing for that age group in particular. The development proposals would make a significant contribution to meeting each of those categories of need. But I consider that this contribution would be outweighed by the harm that the proposals would cause to the visual and atmospheric environments of the borough, through their effects on landscape character and on air quality. That harm could not be adequately minimised or mitigated and so there would be conflict with SBLP policy SP2.

137. In the terms of SBLP policy SP1 the proposed development would provide for physical, social and community infrastructure, provide a significant number of new dwellings in a mix and range of housing types, including affordable housing, support existing local services and provide opportunities to reduce the need to travel by car. But in my judgment these benefits would be outweighed by the detrimental impact that the proposals would have on an area of environmental importance and on human health and well-being. Therefore, while the proposals would increase local self-sufficiency and satisfy human needs for housing, the greater weight that I give to their adverse environmental impact means that they would conflict with policy SP1.

138. Thus the Appeal B proposals would conflict with the development plan as a whole. That said, their conflicts with SBLP policies SP5, TG1, SH1, E6, E7 and H2 carry very limited weight in my decision because those policies are out of date for the reasons given under the third main issue above.

139. Although the other relevant development plan policies in this case are not out of date, I will conduct the NPPF paragraph 14 process as if they were in order to ensure that the presumption in favour of sustainable development is robustly applied.

140. The Limb 2 test does not apply to the Appeal B proposals. I shall structure the Limb 1 assessment by assessing the benefits and adverse impacts of the Appeal B proposals in terms of the three dimensions of sustainable

development. Significant **social** benefits would arise from the delivery of 126 new dwellings and 60 extra-case housing units, beginning in about two years from the grant of planning permission. This would make a valuable contribution to meeting demonstrated needs for market, affordable and older persons' housing and to addressing the shortfall of 1.2 years in the housing land supply for the borough. It would provide support for local businesses and services in the village and help to rebalance its ageing demographic profile. Housing development at the scale proposed would accord with the settlement hierarchy in the ELP, which is unlikely to be altered. All this would accord with NPPF paragraphs 28, 47 and 50.

141. The proposed development would be well served by means of transport other than the car and residents would have a genuine choice when deciding how to travel to a wide range of destinations. Some additional benefits would accrue to non-residents from the transport infrastructure provided in association with the development. In these ways the proposals are consistent with section 4 of the NPPF.

142. The public open space and retained public right of way within the development would be available to non-residents and so would contribute to their health and well-being in accordance with NPPF paragraph 73. Provision of land for an on-site healthcare facility would be consistent with the objectives of NPPF paragraphs 69 and 70, but because there is considerable uncertainty over whether the facility would actually be delivered, this benefit carries only limited weight.

143. Against all these social benefits, however, must be set the strong likelihood that, notwithstanding the proposed mitigation measures, the appeal proposals would contribute to at least "moderate adverse" impacts on air quality in both the Newington and Rainham AQMAs. Thus they would be likely to have a significant adverse effect on human health. These effects of the proposals would conflict with the guidance in NPPF paragraph 124.

144. I have set out the substantial **economic** benefits of the Appeal B proposals under the eleventh main issue. While there would also be some loss of BMV land, that loss would not be significant when assessed against national planning policy, and the proposals would have no materially harmful effect on the supply of brickearth. Thus the economic impacts of the proposals are strongly positive and carry significant weight in accordance with NPPF paragraphs 18 and 19.

145. Turning to the **environmental** dimension, the Appeal A proposals would have no harmful consequences for ecology or flood risk. Indeed there is the potential for some on-site biodiversity enhancement in accordance with NPPF paragraph 118.

146. For the reasons I have given under the third main issue, however, and despite the benefit they could provide in respect of settlement form, the proposals would cause substantial harm to landscape character. By failing to protect or enhance what I have found to be a valued landscape they conflict with NPPF paragraph 109.

147. Drawing all this together, I conclude on NPPF paragraph 14 assessment that, even after considerable weight is given to the social, economic and environmental benefits that I have set out above, the substantial harm that the

appeal proposals would cause to the character of a valued landscape and their likely significant adverse effect on human health would significantly and demonstrably outweigh those benefits.

148. No other material considerations that would lead me to a different conclusion in respect of the NPPF paragraph 14 assessment or in any other respect have been drawn to my attention. I find therefore that that there are no material considerations which indicate that Appeal B should be determined other than in accordance with the development plan. Accordingly, I conclude that Appeal B should be dismissed.

Roger Clews

Inspector

APPEARANCES

FOR THE LOCAL PLANNING AUTHORITY:

Mr W Upton, of Counsel	instructed by Mid-Kent Legal Services
He called	
Mr D Huskisson DipLA CMLI	Principal, Huskisson Brown Associates
Mr S Algar BA MSc MRTPI	Design & Conservation Manager, Swale Borough Council
Mr R Lloyd-Hughes BScEstMan MRICS	Director, Rural Planning Ltd
Mr M Goddard BA DipTP DMS MRTPI	Director, Goddard Hester Planning Practice
Mr K Bown BSc MPhil MRTPI	Spatial Planning Manager, Highways England

FOR KENT CPRE:

Mr R Knox-Johnston	instructed by CPRE Kent
He called	
Ms J Barr BSc LLM PGCert MA MRTPI	Planner, CPRE Kent
Cllr J Wright	Swale Borough Councillor
Ms E Rouse MCIfA MA BA	Principal, Wyvern Heritage and Landscape
Mrs M Milsted-Williamson	Swale Local Footpaths Officer, Ramblers' Association
Cllr S Harvey	Chair of Planning Committee, Newington Parish Council
Cllr M Baldock	Kent County and Swale Borough Councillor
Prof S Peckham	Director, University of Kent Centre for Health Service Studies

FOR THE APPELLANTS:

Mr P Cairnes, QC	instructed by Gladman Developments Ltd
He called	
Mr P Rech BA BPhilLD CMLI	Director, FPCR Environment & Design Ltd
Mr J Clemons BA MA MSc MRTPI IHBC	Director and Head of Built Heritage, WYG
Mr S Helme BEng MSc CIHT	Director, Ashley Helme Associates Ltd
Mr A Walton BSc DipAc&NC MCIEH AMIOA	Technical Director & Principal Environmental Scientist, Wardell Armstrong LLP
Mr J Mackenzie BSc DipTP MRTPI	Planning & Development Manager, Gladman Developments Ltd

INTERESTED PERSONS:

Mr M Buttle	Resident of London Road, Newington
Mr R Palmer	Resident of Station Road, Newington
Mr Harrington	Resident of Playstool Road, Newington
Mrs C Buttle	Resident of London Road, Newington
Mrs A Fagg	Resident of London Road, Newington
Mr N Hudson	Resident of Bull Lane, Newington

DOCUMENTS SUBMITTED DURING AND AFTER THE INQUIRY

1 Letter from Mr Mackenzie to PINS case officer, withdrawing the listed building consent appeal
2 Draft Unilateral Undertaking for Appeal A
3 Draft Unilateral Undertaking for Appeal B
4 Signed Statement of Common Ground on heritage issues between the Council and the appellants
5 Opening Statement for Gladman Developments Ltd (Mr Cairnes)
6 Swale Borough Council Core documents:
- CDS1 Adopted Swale Borough Local Plan
- CDS2 Emerging Swale Local Plan, Bearing Fruits, Main Modifications June 2016
- CDS3 Inspector's Interim Findings on Swale Local Plan, Parts 1, 2 & 3
- CDS4 SBC/PS/115: Summary of main issues arising from consultation on main modifications, October 2016

7 Peter Brett Associates October 2016 OAN Advice Note
8 Supplementary Statement on Best & Most Versatile Agricultural Land (Mr Lloyd-Hughes)
9 Rebuttal of Evidence – Planning (Ms Barr) with two attached appeal decisions
10 Appeal decision Ref APP/G2435/W/15/3005052
11 Secretary of State appeal decision Ref APP/R0660/W/15/3136524
12 CPRE Kent Opening Statement (Mr Knox-Johnston)
13 Appendices A-E to Councillor Wright's evidence
14 Anonymous response written on reverse of A4 leaflet entitled "Wake Up Newington"
15 1976 Soil Survey Land Use Capability classification table and plan of Newington and surrounding area
16 Agricultural Land Classification and Soil Resources report for Persimmon Homes site at Land north of High St, Newington (April 2015)
17 Signed Statement of Common Ground on highways matters between Kent County Council & Ashley Helme Associates Ltd
18 Design & Access Statement and site layout plan for Persimmon Homes site at Land north of High St, Newington
19 Kent Minerals & Waste Local Plan, policies CSM 4 & DM 7
20 Page of additional information on air quality monitoring 2015-16 and plan of air quality monitoring points in Newington
21 Signed Statement of Common Ground on planning issues between the Council and the appellants
22 Signed Statement of Common Ground Supplementary No 1 on highways matters between Highways England, Kent County Council & Ashley Helme

Associates Ltd

23 School roll figures for Newington CE Primary School, 7 November 2016

24 Judgment in Client Earth (No 2) v SoS for Environment, Food & Rural Affairs and others [2016] EWHC 2740 (Admin)

25 Extract from *Guidelines for Landscape and Visual Impact Assessment*, including Box 5.1

26 DCMS, *Principles of Selection for Listing Buildings*

27 *Kent Farmsteads Guidance, Part 1 – Farmsteads Assessment Framework*

28 *Further observations on air quality following the High Court judgement 2nd November 2016* (Prof Peckham)

29 Lists of draft conditions for Appeal A & Appeal B

30 Letter from Mr S Barker of Gladman to PINS requesting that the Appeal B access arrangements should also apply to Appeal A

31 Table and plan showing Correlation of Swale Borough Council monitoring locations with Existing Sensitive Receptors modelled by Mr Walton

32 Highways England, *Information regarding the Government's Road Investment Strategy as it relates to M2 junction 5*

33 Extract from Ricardo Energy & Environment. *Kent & Medway Air Quality Monitoring Network,* p60, Figures 49 & 50

34 Track-changed version of draft Unilateral Undertaking for Appeal A showing comments from the Council

35 Track-changed lists of draft conditions for Appeal A & Appeal B showing comments from the Council and the appellants

36 SBLP Implementation and Delivery Schedule 2016/17

37 Council's note and tables regarding proposed developer contributions

38 Email correspondence between the appellants and Kent County Council regarding education contributions, with attached tables

39 Closing Statement for CPRE Kent (Mr Knox-Johnston)

40 Closing Submissions for the Council (Mr Upton)

41 Closing Statement for Gladman Developments Ltd (Mr Cairnes)

42 Email exchange between Mr Mackenzie and the Council, dated 30 November and 1 December 2016, setting out agreed wording for a proposed affordable housing condition

43 Certified copy of executed Unilateral Undertaking for Appeal A

44 Certified copy of executed Unilateral Undertaking for Appeal B

45 Email from Kent County Council dated 6 December 2016 concerning the executed Unilateral Undertaking for Appeal A

46 Email from Kent County Council dated 6 December 2016 concerning the executed Unilateral Undertaking for Appeal B

PLANS SUBMITTED DURING THE INQUIRY

A Drawing No 6363-SK-01 rev A: *Proposed Redevelopment of Pond Farm Outbuildings – Indicative Sketch*

B Kent Minerals & Waste Local Plan, plan showing Mineral Safeguarding Areas in Swale

C Plan showing suggested accompanied site visit itinerary

2 High Court judgement, Gladman Pond Farm case, 6th November 2017

Neutral Citation Number: [2017] EWHC 2768 (Admin)

Case No: CO/873/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
IN THE MATTER OF AN APPLICATION UNDER SECTION 288 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 November 2017

Before :

THE HONOURABLE MR JUSTICE SUPPERSTONE

Between :

GLADMAN DEVELOPMENTS LIMITED	**Claimant**
- and -	
1) SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendants**
2) SWALE BOROUGH COUNCIL	
- and –	
CAMPAIGN TO PROTECT RURAL ENGLAND (KENT BRANCH)	**Interested Party**

Richard Kimblin QC (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Richard Moules (instructed by **Government Legal Department**) for the **First Defendant**
Second Defendant did not appear and was not represented at the hearing
Ashley Bowes (instructed by **Richard Buxton Environmental and Public Law**) for the **Interested Party**

Hearing dates: 18-19 October 2017

Approved Judgment

Mr Justice Supperstone :

Introduction

1. The Claimant applies pursuant to section 288 of the Town & Country Planning Act 1990 to quash the Decision dated 9 January 2017 of Roger Clews, an Inspector appointed by the First Defendant, who determined two appeals (Appeal A and Appeal B) on a conjoined basis at an Inquiry during November 2016 against refusals of planning permission for residential development for 330 (Appeal A) and 140 (Appeal B) dwellings plus 60 extra care units ("the Decision"). Lang J granted permission on all grounds.

2. The Claimant's planning application relates to land at London Road, Newington, Kent ("the Site").

3. The Second Defendant is the local planning authority for the area in which the Site is situated ("the Council"). It has filed summary grounds of defence maintaining that the Decision was lawful, but it was not separately represented at the hearing.

4. The Interested Party ("CPRE") was a "Rule 6" party at the inquiry.

5. Eleven main issues were considered at the inquiry. The Claimant succeeded on nine of those issues. The Claimant's arguments were not accepted on two issues:

   i) Landscape character (the third issue); and

   ii) Air quality (the eighth issue).

   This claim is only concerned with air quality.

The legislative framework on air quality

6. In *Client Earth (No.2) v Secretary of State for the Environment, Food & Rural Affairs* [2016] EWHC 2740 (Admin), Garnham J sets out at paras 6-15 the relevant provisions of the Air Quality Directive (2008/50/EC) ("the Directive") and the Air Quality Standards Regulations 2010 ("the Regulations").

7. The Judge stated, so far as is material:

> "9. The articles of the Directive ... include Article 2, which adopts definitions from earlier Directives, including the following:
>
> "*'ambient air' shall mean outdoor air in the troposphere excluding workplaces...*
>
> *'limit value' shall mean a level fixed on the basis of scientific knowledge, and with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained;*

'air quality plans' shall mean plans that set out measures in order to attain the limit values or target values;

'margin of tolerance' shall mean the percentage of the limit value by which that value may be exceeded subject to the conditions laid down in this Directive;

'target value' shall mean a level fixed with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole to be attained where possible over a given period;

'zone' shall mean part of the territory of a Member State, as delimited by that Member State for the purposes of air quality assessment and management;

'agglomeration' shall mean a zone that is a conurbation with a population concentration in excess of 250,000 inhabitants or, where the population concentration is 250,000 inhabitants or less, with a given population density per km to be established by the Member State..."

10. Article 13 imposes limit values and alert thresholds for the protection of human health. It provides:

"*1. Member States should ensure that throughout their zones and agglomerations, levels of sulphur dioxide, PM10, lead and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.*

In respect of nitrogen dioxide and benzene the limit values specified in Annex XI may not be exceeded from the date specified therein".

11. Article 22 provided for postponement of attainment deadlines and exemption from the obligation to apply certain limit values.

"*1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of 5 years for that particular zone or agglomeration on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan should be supplemented by the information listed in Section B of Annex XV related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline*".

12. Article 23 ... provides for AQPs:

> "*1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.*
>
> *In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.*"
>
> 13. Annex XI sets out limit values for the protection of human health. For nitrogen dioxide the limit value in any given hour is 200ug/m^3, which is not to be exceeded more than 18 times in a calendar year, and 40ug/m^3 which applies to each calendar year.
>
> ...
>
> 15. The Directive was brought into domestic law in the UK by means of four sets of Regulations, one for each of the home nations. … Regulation 26 of the Air Quality Standards Regulations (2010/1001) requires the drawing up of AQPs [for England]. It provides, as is material:
>
> "*(1) Where the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM10 in ambient air exceed any of the limit values in Schedule 2 or the level of PM2.5 exceeds the target value in Schedule 3, the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value.*
>
> *(2) The air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time...*
>
> *(4) Air quality plans must include the information listed in Schedule 8...* " "

The background

8. Garnham J noted in *Client Earth (No.2)* that: (1) in previous proceedings between the parties, in which the Claimant, Client Earth, challenged previous AQPs, produced by the UK Government, the Supreme Court made a declaration that the UK was in breach of Article 13 of the Directive (para 3). (2) On 17 December 2015, in purported compliance with the order of the Supreme Court and the provisions of the Directive, DEFRA published the Government's 2015 Air Quality Plan which addressed the need to reduce nitrogen dioxide emissions (para 4). (3) Client Earth challenges the

lawfulness of that plan (para 5). The judge concluded that it would be appropriate to make a declaration that the 2015 AQP fails to comply with Article 23(1) of the Directive and Regulation 26(2) of the Regulations, and an order quashing the plan (para 95(iv)).

9. His reasons for so concluding are set out at para 95(i)-(iii):

> "(i) that the proper construction of Article 23 means that the Secretary of State must aim to achieve compliance by the soonest date possible, that she must choose a route to that objective which reduces exposure as quickly as possible, and that she must take steps which mean meeting the value limits is not just possible, but likely;
>
> (ii) that the Secretary of State fell into error in fixing on a projected compliance date of 2020 (and 2025 for London);
>
> (iii) that the Secretary of State fell into error by adopting too optimistic a model for future emissions."

10. The Government published its new draft National Air Quality Plan on 5 May 2017, with public consultation running until 15 June 2017.

The Decision Letter ("DL")

11. The Inspector dealt with issue 8 at DL90-106.

12. At DL90 he referred to Local Plan policy SP2 which requires adverse environmental impacts of development to be avoided or minimised and mitigated where development needs are greater. He also referred to NPPF paragraph 120 which requires the effects of pollution and the potential sensitivity of the area to its effects to be taken into account in planning decisions, and to NPPF paragraph 124 which advises that any new development in Air Quality Management Areas ("AQMAs") should be consistent with the local air quality management plan.

13. At DL91 he identified the relevant pollution limit values, based on the Directive, which as set out in the Air Quality Standards Objectives Regulations 2010, include a limit value of 40 micrograms per cubic metre for the annual mean concentration of nitrogen dioxide ("NO_2"). He noted that while the Government is responsible for ensuring that these limit values are met, in practice most of the actions necessary to achieve this are devolved to local authorities.

14. At DL92 he noted the added emphasis to the urgency of meeting the limit values for air pollutants given by the decision in *Client Earth (No.2)* where the court found that:

> "the plan should have sought to achieve compliance by the earliest possible date rather than selecting 2020 as its target date. It also found that the Government had adopted too optimistic a model for future vehicle emissions".

15. At DL93 he noted that the Council had declared two AQMAs, and that the latest available monitoring data from 2015 shows that one of the limit values for nitrogen dioxide was exceeded at monitoring sites for both AQMAs.

16. At DL94-95 he explained that the Claimant's air quality assessments predicted, of the sixteen receptors sites that were assessed, "moderate adverse" impacts at one receptors site, and two other receptors sites received "slight adverse" impacts.

17. At DL96-97 he said that it seemed optimistic on the face of it to expect that NO_2 concentrations will fall by the substantial amounts predicted because they assumed substantial reductions in the background concentration of nitrogen dioxide.

18. At DL98 he said that in the light of this the Claimant had undertaken sensitivity tests based on emission factors that remain unchanged between 2015 and 2020. They showed there would be "substantial adverse" impacts at three receptor sites, and "moderate adverse" and "slight adverse" impacts of between three and five further receptor sites. That being so "in each case the limit value for annual mean NO_2 concentrations will be exceeded at five receptor sites, in some cases by a considerable amount".

19. At DL99 he said that "the sensitivity scenarios are probably too pessimistic".

    He said:

> "as the appellant's witness pointed out, tightening of emission standards for new vehicles should over time, bring about substantial further reductions in NO_2 emissions from traffic. But I was given no firm data on the rate at which this is likely to occur. In the absence of any conclusive evidence on this point, I consider it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent that informed the modelling of original Scenarios 2 to 5. My view is reinforced by the High Court's finding on the excessive optimism of further emissions modelling. This means that original Scenarios 3 and 5 cannot be taken as reliable projections of the likely impacts of the appeal proposals on air quality".

20. He continued:

> "100. In my view the likelihood is that the impacts of the appeal proposals will fall somewhere between the best case original Scenarios 3 and 5 and the worst case sensitivity versions of those scenarios. Without further modelling it would be unwise to try to assess those impacts too precisely, but it seems safe to say that the possibility of 'substantial adverse' impacts on receptors in Newington cannot be ruled out, and that 'moderate adverse' impacts and exceedance of the limit value at a number of receptors in both Newington and Rainham are almost certain. This would be the case whether or not the cumulative impacts of other developments are factored in.

101. It might well be that, on this analysis, the limit values for NO_2 concentration levels would be exceeded in Newington and Rainham in 2020 even without the proposed developments. But this would not justify the further worsening of air quality that the modelling indicates would arise were either development to go ahead.

102. Both 'moderate adverse' and 'substantial adverse' impacts are considered likely to have a significant effect on human health, according to the 2015 publication *Land-Use Planning and Development Control: Planning for Air Quality*. In accordance with guidance in that publication, the appellants propose to fund measures to mitigate the adverse impacts of the developments on both Newington and Rainham AQMAs. Contributions to fund those measures are calculated using DEFRA Emission Factors Toolkit and secured by the unilateral undertakings.

103. However the level of contribution for each appeal scheme is based on 2020 emission factors. As I have found, on the evidence before me it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent assumed in the modelling of original Scenarios 2 to 5. Consequently the contributions may well not reflect the true impacts of the developments.

104. Proposed mitigation measures are outlined in the unilateral undertakings and the final mitigation scheme is subject to the approval of the Council. The proposed measures include electric vehicle charging points for each dwelling, green travel measures and incentives to encourage the use of walking, cycling, public transport and electric or low emission vehicles. No specific evidence has been provided, however, to show how effective those measures are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast NO_2 emissions.

105. Drawing all this together, I find that it is more probable than not that both appeal procedures would have at least a moderately adverse impact on air quality in the Newington and Rainham AQMAs and thus a significant effect on human health. While measures are proposed to mitigate those adverse impacts, there is no clear evidence to demonstrate their likely effectiveness and it may well be that the contributions to fund the measures fail to reflect the full scale of the impacts".

21. At DL106 the Inspector concludes on this issue that:

"even after taking into account the proposed mitigation measures, the appeal proposals are likely to have an adverse effect on air quality particularly in the Newington and Rainham

> AQMAs. I reach this conclusion for the reasons set out above, notwithstanding that the Council raise no objection to the proposals on air quality grounds. Both proposals would thereby conflict with the guidance in NPPF paragraphs 120 and 124".

22. In his overall conclusions on Appeal A at DL116-134, the Inspector said at DL128:

> "Against all these social benefits, however, must be set the strong likelihood that, notwithstanding the proposed mitigation measures, the appeal proposals would contribute to at least 'moderate adverse' impacts on air quality in both the Newington and Rainham AQMAs. Thus they would be likely to have a significant adverse effect on human health. These effects of the proposals would conflict with the guidance in NPPF paragraph 124".

In relation to his overall conclusions on Appeal B set out at DL135-148 the Inspector reached the same conclusion at DL143.

Grounds of Claim

23. The Claimant contends that in respect of the air quality issues, the Inspector erred as follows:

i) In respect of future changes in air quality and in respect of the mitigation—

a) a failure to apply the outcome of *Client Earth (No.2)* in his understanding of the effectiveness of air quality action plans;

b) a failure to give effect to the principle that the planning system presumes that other schemes of regulatory control are legally effective;

c) a failure to explain why application of the DEFRA damage cost analysis and associated contribution was not likely to be effective;

d) a failure to consider the imposition of a *Grampian* condition requiring a higher contribution to the mitigation fund, and;

e) a failure to give an opportunity to the Claimant to address the above, the Inquiry or prior to issuing the appeal decision.

ii) The air quality action plan – a failure to explain how the proposal is in conflict with the action plan, read as a whole; and

iii) The emerging Development Plan – a failure to consider a material consideration, namely the allocation of residential development within the AQMA.

I shall consider each ground of claim in turn.

Ground 1(a)

24. The Claimant contends that the Inspector failed to apply the outcome of *Client Earth (No.2)* in his understanding of the effectiveness of air quality action plans.

25. Mr Richard Kimblin QC, for the Claimant, accepts that the Inspector accurately summarises the *ratio* of the judgment in *Client Earth (No.2)* that "the plan should have sought to achieve compliance by the earliest possible date rather than selecting 2020 as its target date" (DL92).

26. However, Mr Kimblin submits that the Inspector did not engage with the judgment, the true import of which is that the Government must change its plan, make progress and hit the target. The essence of what should have been addressed is that the Government has undertaken to put in place measures to ensure that the limit values are met within a short timeframe, and there were measures that could have been put in place. The Inspector should, Mr Kimblin submits, have proceeded on the basis that the Government would comply with the law, but he did not, rather he proceeded on the basis that the breaches of the Directive would continue.

27. I do not accept the submission that the Inspector proceeded as Mr Kimblin suggests. The Inspector's reference to the added emphasis to the urgency of meeting the limit values for air pollutants given by the decision of the High Court (DL92) makes clear that he understood that the Government had to achieve compliance by the earliest possible date.

28. That in itself though does not meet Mr Kimblin's point that what is required by the judgment is that in order to achieve compliance by the soonest date possible the Secretary of State must choose a route to that objective which reduces exposure as quickly as possible, and she must take steps which mean meeting the value limits is not just possible, but likely (para 95(i)). As to how compliance can be achieved Mr Kimblin refers, in particular, to para 65 of the judgment where the Judge noted that "[t]he evidence demonstrates clearly that Clean Air Zones, the measure identified in the plan as the primary means of reducing nitrogen dioxide emissions, could be introduced more quickly than 2020".

29. However, as Mr Richard Moules, for the Secretary of State, and Mr Ashley Bowes, for CPRE, submit, the Inspector was not required to assume that local air quality would improve by any particular amount within any particular timeframe.

30. In the recent decision in *R (Shirley) v Secretary of State for Communities and Local Government* [2017] EWHC 2306 (Admin) Dove J said at para. 63:

> "… the question of air quality and exceedance of any limit values or thresholds is clearly and obviously a material consideration in the decision as to whether or not to grant planning permission. It is also material to the determination of whether mitigation measures are required and the affect of any mitigation measures that are proposed."

As Mr Moules observes, there is no suggestion in *Shirley* that the duty to produce and implement an air quality plan means local planning authorities should presume that the UK will become complaint with the Directive in the near future.

31. The key question, Mr Moules submits, is what the decision in *Client Earth (No.2)* actually meant for the decision maker given that the latest available monitoring data from 2015 showed that the annual mean objective of 40ug/m^3 for NO_2 was exceeded in Newington and Rainham AQMAs (DL93). The Claimant's proposals would indirectly result in additional NO_2 through vehicle emissions. It was not known what measures the new draft National Air Quality Plan would contain, let alone what the final version would contain following public consultation. It follows that the Inspector did not know how any new national measures would relate to local measures; nor did he know what would be "the soonest date possible" that the new National Air Quality Plan would aim to achieve compliance by. In those circumstances I agree with Mr Moules that the Inspector could not reach any view as to whether the measures in the new National Air Quality Plan would be likely to be effective in securing compliance by any particular date.

32. I consider that the Inspector properly engaged with the *Client Earth (No.2)* decision. He understood what the judgment required, and carefully analysed the evidence that was presented before him (DL99-106). He formed a judgment as to what the air quality is likely to be in the future on the basis of that evidence. He was entitled to consider the evidence and not simply assume that the UK will soon become compliant with the Directive.

Ground 1(b)

33. Mr Kimblin submits that the Inspector failed to give effect to the principle that the planning system presumes that other schemes of regulatory control are legally effective.

34. He contends that the regime of measures to meet the requirements of the Directive as soon as possible is partially in place and is being further developed.

35. In support of this submission Mr Kimblin relies on para 122 of the NPPF which states that:

> "In doing so, local planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities."

36. Mr Kimblin acknowledges that paragraph 122 is concerned with pollution control regimes as now found in environmental permits. However he submits it is not confined to such regimes. The Inspector should, he submits, have directed himself to

the principle which paragraph 122 contains and he should have read NPPF paragraphs 122-124 as a whole.

37. Mr Kimblin referred to the decision of the Court of Appeal in *Gateshead MBC v Secretary of State for the Environment* [1995] Env LR 37. That case concerned a decision in which the regimes of control under the Town and Country Planning Act and the Environmental Protection Act overlapped. The Court of Appeal approved the judgment of Mr Jeremy Sullivan QC, then sitting as a deputy judge, who held that emissions to atmosphere were material to a planning decision. Glidewell LJ said at page 44:

> "Mr Mole submits, and I agree, that the extent to which discharges from a proposed plan will necessarily or probably pollute the atmosphere and/or create an unacceptable risk of harm to human beings, animals or other organisms, is a material consideration to be taken into account when deciding to grant planning permission. The Deputy Judge accepted that submission also. But the Deputy Judge said at page 17 of his judgment, and in this respect I also agree with him,
>
> > 'Just as the environmental impact of such emissions is a material planning consideration, so also is the existence of a stringent regime under the EPA for preventing or mitigating that impact for rendering any emissions harmless. It is too simplistic to say, "The Secretary of State cannot leave the question of pollution to the EPA"."

38. Mr Kimblin accepts that paragraph 122 is concerned with pollution control regimes, as now found in environmental permits. However he contends it is not confined to such regimes. He submits that the principle contained in paragraph 122 is even stronger in the present case than in cases on pollution control. This is so for a number of reasons, most significantly, Mr Kimblin suggests, because we are concerned with a regime in which the Government is legally bound to achieve a particular outcome, quickly. That is only achievable by the use of non-planning measures.

39. I reject this submission. Paragraph 122 is clear. I agree with Mr Moules that the principle referred to in paragraph 122 concerns situations where a polluting process is subject to regulatory control under another regulatory scheme in addition to the planning system. It is directed at a situation where there is a parallel system of control, such as HM's Inspectorate of Pollution in *Gateshead MBC*, or the licensing or permitting regime for nuclear power stations in *R (An Taisce) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin). The point being that the planning system should not duplicate those other regulatory controls, but should instead generally assume that they will operate effectively. The Directive is not a parallel consenting regime to which paragraph 122 is directed. There is no separate licensing or permitting decision that will address the specific air quality impacts of the Claimant's proposed development.

Ground 1(c)

40. The Claimant contends that the Inspector failed to explain why application of the DEFRA damage cost analysis and associated contribution was not likely to be effective.

41. Mr Walton, in his first witness statement at paras 9-13, explains how he undertook calculations of the sum required to mitigate the effects of the proposed developments, using the standard DEFRA Cost Damage Calculation which was accepted by the two local planning authorities affected.

42. Mr Kimblin submits that the Inspector erred in discounting the result of the Cost Damage Calculation on the basis that he did not have specific evidence of effectiveness (DL104) because the principles which underlie the calculation have been determined by the relevant Secretary of State. CPRE contended that the mitigation was unclear, which Mr Kimblin observes of course was true. The Claimant does not contend that the mitigation is automatically presumed to be effective. The problem here, Mr Kimblin submits, is first, that the Inspector presumed that the appropriately calculated funding was not robust without specific evidence of effectiveness, and without dealing adequately or at all with the range of calculations in the Claimant's September 2016 Air Quality Addendum Assessment. The Inspector seems to have required something definite. Second, he did not explain what was wrong with the mitigation. Given that the undertakings provided precisely what the Government's own method required, much more explanation was required before it could be set aside. It was not the role of the Inspector to question the agreed methodology, and none of the parties had invited him to do so. In the alternative, Mr Kimblin contends the Inspector misunderstood the mitigation and its basis, which was not in dispute.

43. In considering this ground of challenge it is necessary to look at the evidence and how the parties presented their cases.

44. Paragraph 9.2.7 of the Claimant's Addendum Assessment under the heading "Recommendations for Mitigation" states: "The impact of the proposed development is predicted to be significant for human receptors within the Newington and Rainham AQMAs. Therefore, mitigation measures will be required and an air pollution damage cost assessment has been carried out to determine the impact of the proposed development in both the SBC and MC administrative areas". What follows is two sets of calculations using 2020 and then 2015 emission factors. At paragraph 9.2.4(1) it is said under the heading "Potential Mitigation Strategies":

> "Determination of appropriate mitigation measures associated with the proposed development site is ongoing but cannot be specified at this time. However, Gladman Developments Ltd are agreeable to entering into a planning agreement in the form of a mitigation statement which commits them to contributing towards mitigation measures which will equal or exceed the value determined by the damage cost calculation using the 2020 Emission Factors (£311,018.80 – based on a value of £197,267.70 for the Newington AQMA and £113,751.10 for the Rainham AQMA), and will focus on mitigating pollutant

> concentrations, particularly within the Newington and Rainham AQMA's, as a result of development generated traffic."

45. The Addendum Assessment continues:

> "9.2.4(2) The 2020 Emission Factors calculation cost is the appropriate figure on which to base the cost of mitigation…
>
> …
>
> 9.2.4(3) Based on the above evidence, we believe it would be unreasonable for our client to be required to commit to mitigation based on emission factors which are six years prior to the development's opening year, as it is highly unlikely that there would not be a significant improvement in vehicle emissions over this period."

46. It was on that basis the Claimant offered the undertakings that they did.

47. In his evidence-in-chief, Mr Walton, on behalf of the Claimant, said:

> "Difficulty with air quality mitigation is identifying measures that aren't measurable; very difficult to say if we do 'x' this will take off 'x' micrograms – quantification of effect very difficult. Number of guidance documents; refer to planning for air quality guidance which refers to good practice measures developers can put in place, for example charging points, travel plan… Difficult to specify in detail at this stage and may not come to fruition if not bus operator."

Mr Walton gave further evidence on mitigation measures in cross-examination and he was then asked questions by the Inspector. Referring to paragraph 6.17 in the addendum to Mr Walton's proof of evidence where there is a list of potential mitigation measures, the Inspector noted that the first is contribution to highway measures. The Inspector asked whether there were any "specific improvements?" Mr Walton replied:

> "No, this very much follows the traffic assessment and TA already indentified steps somewhat more remote from the site but these are general suggested mitigation measures to be put forward to local authority and highways authority for their consideration."

The Inspector then asked:

> "Would it be fair to say that if highway improvements were to have an impact in improving air quality would need to be local…?"

Mr Walton answered:

> "Would have to be very focused. But if you were able to identify improvements which improved congestion which caused change in traffic movement patterns… can have knock on effect of relocating traffic i.e. reducing traffic in AQMA…"

It seems clear that in asking these questions the Inspector was going beyond the generic list to see if Mr Walton had anything specific in mind by way of mitigating improvements.

48. The Claimant's contentions also disregard the evidence of Professor Peckham, called by CPRE, who gave evidence on air quality. He said:

> "It is not clear how the effects of increased pollution levels are to be mitigated. Proposals for mitigation have been calculated as a financial contribution in line with DEFRA's national guidelines but there is no indication how such financial mitigation is to be used to reduce pollution levels." (Proof of evidence, para 15)

Professor Peckham's evidence, in-chief and during cross-examination, challenged the Claimant's air quality modelling and the adequacy of the mitigation it proposed.

49. In its closing statement CPRE said;

> "The air pollution mitigation 'contribution', however large, does nothing for the adults and children being affected by air pollution now together with the greater harm that would result if the development(s) were granted permission."

50. It is, in my view, plain from the evidence of Mr Walton and from the questions asked by the Inspector, and from the evidence of Professor Peckham and the closing submissions of CPRE that the likely effectiveness of the mitigation measures was a live issue at the inquiry. That being so, the Inspector was required to reach his own judgment on the matter. I agree with Mr Moules that the Inspector was entitled to consider "the effect of any mitigation measures that are proposed" (see *Shirley* at para 14; and also by analogy *Secretary of State for Communities and Local Government v Wealden District Council* [2017] EWCA Civ 39, per Lindblom LJ at para 30, where "the Inspector did not explain how he thought the financial contributions in the Section 106 obligation were in fact going to be translated into practical measures to prevent or overcome the possible effects of Nitrogen deposition to which he had referred…").

51. I consider that at DL104-106 the Inspector reached a conclusion that on the evidence he was entitled to reach and that he explained what was wrong with the mitigation. The contributions had not been shown to translate into actual measures likely to reduce the use of private petrol and diesel vehicles and hence reduce the forecast NO_2 emissions (DL104).

Ground 1(d) and Ground 1(e)

52. The Claimant contends that the Inspector was obliged to consider whether the issue which concerned him in relation to mitigation could be overcome by the imposition of a *Grampian* condition (Ground 1(d)); and that he failed to give the Claimant an opportunity to address the matter at the Inquiry or prior to issuing the appeal decision (Ground 1(e)).

53. The Claimant never suggested it would agree to be bound by a *Grampian* or any such condition. Nevertheless Mr Kimblin submits that a condition which required the submission of a scheme of mitigation measures could have been drafted and imposed in a manner which precluded development until the planning authority accepted that the scheme would address the air quality impacts. That, he submits, would have been a reasonable condition (see *British Railways Board v Secretary of State for the Environment* [1993] 3 PLR 125, per Lord Keith at 128 & 132; NPPG on *Grampian* Conditions; and witness statement dated 22 February 2017 of Mr John McKenzie, the Claimant's planning director, at para 5). It is irrelevant, Mr Kimblin submits, that such a condition was not canvassed by any party before the Inspector.

54. I reject these submissions. An Inspector does not have an obligation to cast about for conditions that are not suggested to him. It was not suggested by the Claimant that if the Inspector were unpersuaded by its evidence he should consider imposing a *Grampian* condition. I agree with Mr Moules that the Claimant having presented the Inspector with two unilateral undertakings, he was entitled to take them as the Claimant's settled position in respect of mitigation. Further, in the light of the Inspector's finding as to the lack of evidence as to the effectiveness of the proposed mitigation measures, I agree with Mr Bowes that the reasonableness of the condition that the Claimant now suggests it would have accepted is questionable.

55. In *Top Deck Holdings v Secretary of State for the Environment* [1991] JPL 961 at 964-965 Mann LJ, when considering the question as to what the Inspector was to do in regard to a condition that was neither requested nor, more significantly, offered, referred to the decision of Forbes J in *Marie Finlay v Secretary of State for the Environment and London Borough of Islington* [1983] JPL 802. The issue before the court, was described by Forbes J as follows:

> "The notice of motion took two broad points. The first was that the Secretary of State failed to take into account a material consideration being, in effect, the possibility of attaching conditions to any planning permission which might get rid of some or all of the objections raised to this particular change of use."

Upon that point Forbes J said this:

> "It was one thing to say that where the question of conditions was being canvassed it might be sensible for the Secretary of State to consider making a slight alteration to the condition if that would deal with the problems that might arise … It was a wholly different thing to suggest that where there had been no canvassing of any possible condition, the Secretary of State was

> bound to look around and consider whether there was or was not some possible condition which might be attached which might save this planning application.
>
> …
>
> If a party to an appeal wanted the appeal to be considered on the basis that some condition could cure the planning objection put forward, then it was incumbent on the appellant to deal with that condition at the inquiry. Unless such a condition has been canvassed the Secretary of State was not at fault in not imposing such a condition. For those reasons … the attack on this decision on the grounds of failure to consider the application of conditions failed."

Mann LJ agreed with the view expressed by Forbes J. He said that:

> "Such an approach had to work sensibly in practice. An Inspector should not have imposed on him an obligation to cast about for conditions not suggested before him."

56. I do not accept Mr Kimblin's submission that the decision in *Top Deck Holdings* is confined to its own facts, being concerned with offering a condition involving the demolition of buildings, which, he suggests, is certainly something which an applicant would need to offer. I consider that in *Top Deck Holdings* the Court of Appeal was stating a general principle. In *National Anti-Vivisection Society v First Secretary of State* [2004] EWHC 2074 (Admin) Collins J commented at para 32:

> "As a general proposition, it is not for an Inspector or for the Secretary of State to identify conditions which neither the local planning authority or the appellants consider to be appropriate. Authority for that proposition is to be found in the decision of the Court of Appeal in *Top Deck Holdings*… The details of the condition that it was suggested the Inspector should have indentified in that case are perhaps of no real importance. The principle is what matters."

57. Mr Kimblin has further suggested support for the Claimant's case can be drawn from the NPPG Costs Guidance: refusing planning permission or a planning ground capable of being dealt with by conditions risks an award of costs. However that guidance is directed to a planning authority determining planning applications and its conduct in determining such applications. Different considerations apply when considering the obligations of an Inspector seized of an appeal.

58. I also reject the contention that the Claimant did not know what case it had to meet.

59. In *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] PTSR 1145 at para 62, Jackson LJ summarised the relevant principles of fairness. They are, so far as material:

> "(1) Any party to a planning inquiry is entitled to (i) to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case… (4) a rule 7 statement or a rule 16 statement identities what the inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties but it does not bind the inspector to disregard evidence on other issues. Nor does it oblige him to give the parties regular updates about his thinking as the Inquiry proceeds. (5) The Inspector will consider any significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the Inspector expressly states that they need not do so…"

Beatson LJ added at para 90:

> "The authorities on planning inquiries considered by my Lord show that in this context what is needed is knowledge of the issues in fact before the decision maker, the inspector, and an opportunity to adduce evidence and make submissions on those issues…"

60. It was Professor Peckham's evidence that it was not clear how the financial mitigation proposal (in line with the agreed methodology) is to be used to reduce pollution levels (see para 48 above). He was saying that the contributions had not been shown to translate into actual measures likely to reduce NO_2 emissions. In his evidence Mr Walton accepted that it was difficult to quantify the effects of mitigation measures (see para 47 above). I consider it sufficiently clear that the effectiveness of mitigation measures was an issue as far as emission factors were concerned. The Claimant in its evidence, through Mr Walton, attempted to answer the points that were raised on this issue.

61. I am satisfied from the evidence to which I have referred that the Claimant knew the case which it had to meet and had an opportunity to adduce evidence and make submissions in relation to mitigation measures (which included suggesting a *Grampian* condition if he had wished to do so). I consider that the principle of fairness was satisfied in this case.

Ground 2

62. The Claimant contends that the Inspector erred in failing to explain how the proposal is in conflict with the air quality action plan, read as a whole. It is the Claimant's case that its proposed mitigation measures were consistent with the local action plan, and that the Inspector ought to have explained where the inconsistency with the plan arose.

63. The Newington Air Quality Action Plan deals generally with a wide range of matters. On page 4 it states that:

> **"The most realistic/financially achievable and environmentally sound options to reduce air pollutants in the High Street at Newington AQMA are:**
>
> 1. Continuous Monitoring, Modelling, Further Assessments.
> 2. Continued liaison between Planning and Environmental Health colleagues regarding the LDF process and on application for planning permission, resulting in development which should not materially affect air quality in the AQMA.
> 3. Supporting reduction in traffic impact projects and campaigns e.g. tyre inflation, fuel efficiency, smart driving courses, etc.
> 4. Promotional work with industry to encourage consideration of alternative fuels and vehicles, routes/times for traffic.
> 5. Work with local rail, green taxi and bus companies, car share schemes.
> 6. Work with schools re School Travel Plan and other projects.
> 7. Investigate NOx absorbing materials.
> 8. Work with the Co-op and shops in the High Street regarding lorry deliveries and emissions and use of parking.
> 9. Community trees and plants project."

(See also item 10 in Medway Action Plan where the focus is on avoiding worsening air quality).

64. Mr Kimblin submits that the Claimant does not know how or why the proposal is said to be inconsistent with the Action Plan, the Inspector having said nothing about consistency or otherwise with the Action Plan.

65. Mr Kimblin refers to the proposed forms of mitigation under the heading "Potential Mitigation Strategies" in the Claimant's September 2016 Air Quality Addendum Assessment. At paragraph 9.2.40 it states:

> "Mitigation measures which could be implemented include:
>
> - Contributions to highway improvements in order to reduce local traffic congestion;
> - Provision of electric vehicle charging points on the proposed development site;

- Contributions to low emission vehicle refuelling infrastructure;
- Provision of enhanced public transport serving the site;
- Provision of incentives for the uptake of low emission vehicles;
- Financial support to low emission public transport options; and
- Improvements to cycling and walking infrastructure."

66. The Inspector properly directed himself as to NPPF paragraph 124. He referred to the Newington and Rainham Air Quality Action Plans. The Newington plan notes at section 7.1 on proposed Borough-wide Measures to improve air quality that:

> "The Local Planning Authority will continue to liaise closely with Environmental Health on applications for planning permission, and will carefully consider whether mitigation measures are required relating to development which could affect the air quality within the Newington AQMA. Where these can be secured either through planning conditions or obligations, in accordance with government guidance, legislation and planning policy, the Local Planning Authority will seek to ensure they are provided. Where such measures cannot be secured, and harm to the air quality in the AQMA is significant, planning permission may be refused."

67. The Inspector found that the proposed development would be likely to have an adverse effect on air quality, particularly in the AQMAs. That being so, I agree with Mr Moules that it is obvious why the Inspector concluded that the proposed development was inconsistent with the local air quality action plans that sought to ensure development did not harm air quality. The decision letter read as a whole makes it clear to the parties (*Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at paragraph 19, per Lindblom J (as he then was)) that the inspector followed national policy, found there to be a breach of the air quality action plans, and accordingly concluded at that both proposals would conflict with the guidance in NPPF paragraph 124.

Ground 3

68. The Claimant contends that the Inspector failed to have regard to the fact that the emerging development plan contained an allocation for 115 dwellings in Newington within the AQMA.

69. Mr Kimblin submits that the Inspector failed to address that the planning authority has accepted the balance of considerations, including air quality impacts, which results in this allocation. He submits that if the Inspector did seek to grapple with this material consideration, and applied the same reasoning as he applied to the appeal proposals, he would have had to conclude that the allocation within the Newington AQMA was

contrary to NPPF paragraph 124. He would have had to, and should have, addressed the fact that his finding was contrary to relevant policy/allocation in the emerging local plan.

70. I reject these submissions. First, it is clear that the Inspector did deal with the emerging plan (DL21-22) and he considered that little weight should be given to it. He noted that over 400 main modifications to the emerging local plan ("ELP") had been published for consultation in response to the Inspector's Interim Findings, and that some 2,220 representations had been made on the main modifications that will need to be considered by the Inspector (DL22). Further hearings were held before the Inspector completed her report and recommendations. In those circumstances the Inspector was entitled to conclude, as he did, that "substantial uncertainty remains about exactly which site allocations will appear in the adopted ELP and at what scale" (DL22).

71. Second, whilst emerging Policy AX6 proposes an allocation of 115 dwellings in Newington, it provides that the development must "Address air quality impacts arising in the Newington AQMA, including the implementation of innovative mitigation measures" (Main Modification 161, para 5). New development must thus be judged on its merits according to its air quality impacts. I consider that is what the Inspector did in relation to the Claimant's proposal.

Conclusion

72. For the reasons I have given none of these grounds of claim succeed. Accordingly, this claim is dismissed.

3 Appeal Court judgement, Gladman Pond Farm case, 12th September 2019

Neutral Citation Number: [2019] EWCA Civ 1543

Case No: C1/2017/3476

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE SUPPERSTONE
[2017] EWHC 2768 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2019

Before:

Lord Justice McCombe
Lord Justice Lindblom
and
Lord Justice Peter Jackson

- -

Between:

Gladman Developments Ltd.	**Appellant**
- and -	
Secretary of State for Communities and Local Government	**First Respondent**
- and -	
Swale Borough Council	**Second Respondent**
- and -	
CPRE Kent	**Third Respondent**

- -
- -

Mr Richard Kimblin Q.C. and Mr Oliver Lawrence (instructed by **Addleshaw Goddard LLP**) for the **Appellant**
Mr Richard Moules (instructed by **the Government Legal Department**) for the **First Respondent**
The Second Respondent did not appear and was not represented.
Dr Ashley Bowes (instructed by **Richard Buxton Solicitors**) for the **Third Respondent**

Hearing date: 8 May 2019

Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Justice Lindblom:

Introduction

1. Did an inspector determining appeals under section 78 of the Town and Country Planning Act 1990 fail to deal lawfully with the likely effects of the proposed housing development on air quality? That is the main question in this appeal.

2. The appellant, Gladman Developments Ltd., appeals against the order of Supperstone J., dated 6 November 2017, dismissing its application under section 288 of the 1990 Act, by which it had challenged the decision of an inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, in a decision letter dated 9 January 2017. The inspector dismissed two appeals under section 78. Each was against a failure by the second respondent, Swale Borough Council, to determine an application for outline planning permission for housing development on land at London Road, Newington: the first ("Appeal A"), for a development of up to 330 dwellings and 60 units of "Extra Care accommodation"; the second ("Appeal B"), for a development of up to 140 dwellings and 60 units of "Extra Care accommodation". The council has taken no part in the proceedings, either in this court or below. The third respondent, Campaign to Protect Rural England (Kent Branch) ("CPRE Kent"), is an objector to the proposed development and a rule 6 party. It has actively opposed the challenge to the inspector's decision.

3. The appeal sites are farmland to the south of London Road. They are not allocated for development in the Swale Borough Local Plan 2008. The inspector held an inquiry into the appeals on six days between 1 and 22 November 2016. When the inquiry opened, he identified 10 "main issues", and added another in the light of the representations of CPRE Kent (paragraph 14 of the decision letter). Gladman succeeded on nine of those issues, but not on the third – "[the] effect of the appeal proposals on landscape character and on the form of Newington" – or the eighth – "[the] effect of the appeal proposals, including any proposed mitigation measures, on air quality, particularly in the Newington and Rainham Air Quality Management Areas". The challenge attacked the inspector's conclusions on the eighth issue alone.

4. Supperstone J. rejected every ground of the claim. I granted permission to appeal on 3 October 2018.

The issues in the appeal

5. There are six grounds of appeal. They contend that the judge's conclusions are contrary to Directive 2008/50/EC "on ambient air quality and cleaner air for Europe" ("the Air Quality Directive") and irreconcilable with the decision of Garnham J. in *R. (on the application of ClientEarth) (No.2) v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin), [2017] P.T.S.R. 203, and that he was wrong to hold that the inspector could not reach a view on the likely effectiveness of measures to improve air quality in the national air quality plan (ground 1); that the inspector should have seen the relevance to his decision of the proposed measures to bring air quality within limit values, and the "presumption" in paragraph 122 of the National Planning Policy Framework, as published in March 2012 ("the NPPF") (ground 2); that his approach to the mitigation measures proposed by Gladman was wrong (ground 3); that he erred in failing to consider the imposition of a

suitable "Grampian" – or negative – condition (see *Grampian Regional Council v City of Aberdeen District Council* (1983) 47 P. & C.R. 633) (ground 4); that it was unfair of him not to give Gladman an opportunity to overcome the shortcomings he saw in the proposed mitigation (ground 5); and that he failed to provide adequate reasons for concluding that the proposals were inconsistent with the air quality action plans for Newington and Rainham, and contrary to the policy in paragraph 124 of the NPPF (ground 6).

6. Those six grounds produce three broad issues: first, whether the inspector erred in failing to grasp the significance of Garnham J.'s decision in the ClientEarth proceedings, and the policy in paragraph 122 of the NPPF (grounds 1 and 2); second, whether he failed to deal properly with the proposed mitigation, whether he should have considered a condition preventing the development going ahead until effective mitigation had been secured, and whether his decision is vitiated by procedural unfairness (grounds 3, 4 and 5); and third, whether he failed properly to explain how Gladman's approach to mitigation departed from the air quality action plans (ground 6).

The Air Quality Directive

7. Recital (2) to the Air Quality Directive states that "[in] order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level". Recital (9) says that "[where] the objectives for ambient air quality laid down in this Directive are not met, Member States should take action in order to comply with the limit values and critical levels, and where possible, to attain the target values and long-term objectives". Recital (18) says that "[air] quality plans should be developed for zones and agglomerations within which concentrations of pollutants in ambient air exceed the relevant air quality target values or limit values … where applicable".

8. Article 2, "Definitions", defines a "limit value" as "a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained". Article 13, "Limit values and alert thresholds for the protection of human health", requires Member States to "ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM_{10}, lead and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI". It also states that "[in] respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein", and that "[the] alert thresholds for concentrations of sulphur dioxide and nitrogen dioxide in ambient air shall be those laid down in Section A of Annex XII".

9. Article 23, "Air quality plans", states:

> "1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.

> In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. …".

Annex XI, "Limit values for the protection of human health", states that the limit value for nitrogen dioxide over a calendar year is 40 $\mu g/m^3$.

10. In England the Air Quality Directive was transposed into domestic law by the Air Quality Standards Regulations 2010 ("the 2010 regulations"). Regulation 26, "Air quality plans", which requires the drawing-up of air quality plans in England, provides that "[where] the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM_{10} in ambient air exceed any of the limit values in Schedule 2 or the level of $PM_{2.5}$ exceeds the target value in Schedule 3, the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value" (regulation 26(1)); and that "[the] air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time" (regulation 26(2)).

The ClientEarth proceedings

11. In a series of proceedings, and with conspicuous success, ClientEarth has sought the intervention of the court in the process by which the Government has attempted to comply with the requirements of articles 13 and 23 of the Air Quality Directive (see *R. (on the application of Shirley) v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22, at paragraphs 29 to 32).

12. By the time the inspector made his decision on Gladman's appeals, ClientEarth's second claim for judicial review had been heard and decided by Garnham J. Judgment was handed down on 2 November 2016 – the second day of the inquiry into Gladman's appeals. This was followed on 21 November 2016 – the penultimate day of the inquiry – by a further judgment on relief. In his order, sealed on 22 November 2016, Garnham J. made a declaration that the United Kingdom's 2015 air quality plan did not comply with article 23(1) of the Air Quality Directive and regulation 26(2) of the 2010 regulations. He also made a mandatory order requiring the Secretary of State to publish a draft modified air quality plan complying with the legislation by 24 April 2017 – a deadline he later extended to 9 May 2017, to accommodate the "purdah" period for the 2017 General Election – and to publish a final modified air quality plan by 31 July 2017. On 5 May 2017, some four months after the inspector's decision letter was issued, the Government published the modified air quality plan in draft for public consultation. The 2017 air quality plan was published in final form on 26 July 2017. It is not necessary to relate the subsequent history.

13. In his judgment on the claim in *ClientEarth (No.2)*, Garnham J. rejected "any suggestion that the state can have regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved where one route produces results quicker than another", stating that "[in] those respects the determining consideration has to be the efficacy of the measures in question and not their cost" – which "flows inevitably from the requirements in [article 23] to keep the exceedance period as short as possible" (paragraph 50 of the judgment). In his view "the measures a member state may adopt should indeed be "proportionate", but they must be proportionate in the sense of being no more than is required to meet the target" (paragraph 51).

14. He therefore accepted the submission made on behalf of ClientEarth "that the Secretary of State must aim to achieve compliance by the soonest date possible", and the submission made on behalf of the Mayor of London that "she must choose a route to that objective which reduces exposure as quickly as possible" (paragraph 52). He also "substantially" agreed with the further submission that "the Secretary of State must choose measures which maximise the prospect of achieving the target …". There is, he said, "no obligation in [article 23], express or implied, that a member state must take all imaginable steps aimed at reducing exposure". That "would be disproportionate …". But "implicit in the obligation "to ensure" is an obligation to take steps which mean meeting the value limits is not just possible, but likely" (paragraph 53). The 2010 regulations "require that the plan must include measures "intended to ensure" compliance within the shortest possible time", and "[the] identified measures cannot intend to ensure an outcome that is anything less than likely" (paragraph 54). And "[the] evidence demonstrates clearly that [Clean Air Zones], the measure identified in the plan as the primary means of reducing nitrogen dioxide emissions, could be introduced more quickly than 2020" (paragraph 65).

15. He concluded (in paragraph 95):

> "95. … (i) … [The] proper construction of article 23 means that the Secretary of State must aim to achieve compliance by the soonest date possible, that she must choose a route to that objective which reduces exposure as quickly as possible, and that she must take steps which mean meeting the value limits is not just possible but likely; (ii) … the Secretary of State fell into error in fixing on a projected compliance date of 2020 …; (iii) … the Secretary of State fell into error by adopting too optimistic a model for future emissions; and (iv) … it would be appropriate to make a declaration that the 2015 [air quality plan] fails to comply with article 23(1) of the [Air Quality Directive] and regulation 26(2) of [the 2010 regulations] …".

The NPPF

16. Paragraphs 120, 122 and 124 of the NPPF stated:

> "120. To prevent unacceptable risks from pollution …, planning policies and decisions should ensure that new development is appropriate for its location. The effects (including cumulative effects) of pollution on health, the natural environment or general amenity, and the potential sensitivity of the area or proposed development to adverse effects from pollution, should be taken into account. …
>
> …
>
> 122. … [Local] planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.

...

124. Planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and the cumulative impacts on air quality from individual sites in local areas. Planning decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan."

17. The policies in those three paragraphs were replicated with minor changes in paragraphs 180, 181 and 183 of the revised NPPF, published in July 2018, and no further change was made in the February 2019 version.

The air quality action plans

18. The Newington Air Quality Management Area Action Plan, published by the council in December 2010, sets out, in section 7.1, borough-wide measures to improve air quality, including a discussion of the use of planning conditions and obligations in development:

> "Decisions on applications for planning permission which may affect the Newington AQMA will be determined in the light of … relevant policy, guidance and legislation regarding air pollution, in conjunction with the Council's Environmental Health Department.
>
> Planning conditions will be imposed on planning applications, where appropriate, to address adverse impacts within the application site arising from the development; (conditions can be used to require, for example, the provision of secure cycle storage, landscaping, and dust suppression.)
>
> Where adverse impacts arise off-site or where they cannot otherwise be controlled via planning conditions, the Council, as Local Planning Authority, will, where possible, seek to address them through the use of planning obligations …
>
> Planning obligations may make acceptable a development which would otherwise be considered unacceptable in planning terms. … They can potentially prescribe the nature of development, secure a contribution from a developer to compensate for loss from development or else mitigate impacts from a development. Contributions may be either in cash or in kind; for example, by providing funds for traffic calming measures, enhancements to public transport provision, new recreation facilities etc.
>
> The Local Planning Authority will continue to liaise closely with Environmental Health on applications for planning permission, and will carefully consider whether mitigation measures are required relating to development which could affect the air quality within Newington AQMA. Where these can be secured either through planning conditions or obligations, in accordance with government guidance, legislation and planning policy, the Local Planning Authority will seek to ensure they are provided. Where such measures cannot be secured, and harm to the air quality in the AQMA is significant, planning permission may be refused."

19. Another air quality action plan, published by Medway Council in December 2015, covers the Air Quality Management Area in Rainham.

The inquiry and the inspector's decision

20. At the inquiry Gladman was represented by leading counsel, who called five expert witnesses, one of whom, Mr Malcolm Walton, a Technical Director and Principal Environmental Scientist at Wardell Armstrong LLP, gave evidence on air quality. CPRE Kent also called a witness on air quality, Professor Stephen Peckham, the Director of the Centre for Health Services Studies at the University of Kent and Professor of Health Policy at the London School of Hygiene and Tropical Medicine. Gladman produced two section 106 planning obligations in the form of unilateral undertakings, which provided for financial contributions and practical measures to mitigate the effect of the development on air quality.

21. In their evidence both Professor Peckham and Mr Walton stated their views on the likely adequacy of the proposed contributions and mitigation measures. Professor Peckham said (in paragraph 15 of his proof of evidence) that there was "no indication how such financial mitigation is to be used to reduce pollution levels". After judgment had been handed down in *ClientEarth (No.2)* on 2 November 2016, he presented further observations in writing. In his evidence-in-chief Mr Walton acknowledged that it was difficult to quantify the effects of the mitigation measures. None of the parties raised the possibility of a "Grampian" condition being imposed on a grant of planning permission, to prevent the development going ahead until the council was satisfied that an effective scheme for mitigating harm to air quality was in place. Nor did the inspector do so.

22. The inspector dealt with the likely effects of the proposed development on air quality – his eighth main issue – in paragraphs 90 to 106 of his decision letter. He referred to the requirement in Policy SP2 of the local plan, that "adverse impacts [of development] be minimised and mitigated". He noted that paragraph 120 of the NPPF required "the effects of pollution and potential sensitivity of the area to its effects to be taken into account in planning decisions", and that paragraph 124 said "any new development in Air Quality Management Areas … should be consistent with the local air quality management plan" (paragraph 90).

23. He referred to the national air quality standards set out in the 2010 regulations, including "a limit value of 40 micrograms per cubic metre ($\mu g/m^3$) for the annual mean concentration of nitrogen dioxide (NO_2)", and the fact that "[limit] values are also set for particulate matter and other pollutants". He acknowledged that "[the] Government is responsible for ensuring that these limit values are met", but that "[in] practice, most of the actions necessary to achieve [compliance with limit values] are devolved to local authorities", which are "required to carry out regular reviews and assessments of air quality", so they can "identify areas where limit values are, or are likely to be, exceeded" (paragraph 91).

24. He then came (in paragraph 92) to Garnham J.'s decision in *ClientEarth (No.2)*:

> "92. Added emphasis to the urgency of meeting the limit values for air pollutants was given by the decision of the High Court in November 2015 quashing the Government's 2015 Air Quality Plan. The court found that the plan should have sought to achieve compliance by the earliest possible date rather than selecting 2020

as its target date. It also found that the Government had adopted too optimistic a model for future vehicle emissions."

25. He referred to the two Air Quality Management Areas: one along a section of London Road and High Street, Newington, the other in High Street, Rainham, and the fact that in 2015 the "annual mean objective of 40μg/m^3" for nitrogen dioxide had been "exceeded" at monitoring sites in both (paragraph 93).

26. He then turned to Gladman's evidence on air quality at the inquiry, which included air quality assessments for each appeal proposal, carried out in September 2016 (paragraph 94). For both schemes, in two of the scenarios considered, "moderate adverse" impacts had been found at the receptor site in the centre of Newington "a short distance from the monitoring site at which the highest annual mean NO_2 concentrations were recorded in 2015", and "slight adverse" impacts at two others (paragraph 95).

27. Having considered the evidence of reductions in annual mean NO_2 concentrations in Newington between 2010 and 2014 and in particular between 2012 and 2014, the inspector thought it was "optimistic … to expect that NO_2 concentrations will fall by the substantial amounts predicted in Scenario 2" – the "without development" scenario for the opening year (paragraph 97). Sensitivity tests had therefore been undertaken, on the basis of emission factors that remained unchanged between 2015 and 2020. These showed, for both appeal schemes, in the "with development" scenarios, "substantial adverse" effects at three receptor sites in Newington, as well as "moderate adverse" and "slight adverse" effects at between three and five other receptor sites in each of these scenarios. And "[in] each case the limit value for annual mean NO_2 concentrations would be exceeded at five receptor sites, in some cases by a considerable amount" (paragraph 98).

28. He continued (in paragraphs 99 to 104):

> "99. The sensitivity scenarios are probably too pessimistic: as the appellants' witness pointed out, tightening of emission standards for new vehicles should, over time, bring about substantial further reductions in NO_2 emissions from traffic. But I was given no firm data on the rate at which this is likely to occur. In the absence of any conclusive evidence on this point, I consider it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent that informed the modelling of original Scenarios 2 to 5. My view is reinforced by the High Court's finding on the excessive optimism of future emissions modelling. This means that original Scenarios 3 and 5 cannot be taken as reliable projections of the likely impacts of the appeal proposals on air quality.
>
> 100. In my view the likelihood is that the impacts of the appeal proposals will fall somewhere between the best case original Scenarios 3 and 5 and the worst case sensitivity versions of those scenarios. Without further modelling it would be unwise to try to assess those impacts too precisely, but it seems safe to say that the possibility of "substantial adverse" impacts on receptors in Newington cannot be ruled out, and that "moderate adverse" impacts and exceedance of the limit value at a number of receptors in both Newington and Rainham are almost certain. This would be the case whether or not the cumulative impacts of other developments are factored in.

101. It might well be that, on this analysis, the limit values for NO_2 concentration levels would be exceeded in Newington and Rainham in 2020 even without the proposed developments. But this would not justify the further worsening of air quality that the modelling indicates would arise were either development to go ahead.

102. Both "moderate adverse" and "substantial adverse" impacts are considered likely to have a significant effect on human health, according to the 2015 publication *Land-Use Planning & Development Control: Planning for Air Quality* [produced by Environmental Protection UK and the Institute of Air Quality Management]. In accordance with guidance in that publication, the appellants propose to fund measures to mitigate the adverse impacts of the developments on both the Newington and Rainham AQMAs. Contributions to fund those measures are calculated using the DEFRA Emission Factors Toolkit and secured by the unilateral undertakings.

103. However, the level of contribution for each appeal scheme is based on 2020 emission factors. As I have found, on the evidence before me it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent assumed in the modelling of original Scenarios 2 to 5. Consequently the contributions may well not reflect the true impacts of the developments.

104. Proposed mitigation measures are outlined in the unilateral undertakings and the final mitigation scheme is subject to the approval of the Council. The proposed measures include electric vehicle charging points for each dwelling, green travel measures and incentives to encourage the use of walking, cycling, public transport and electric or low emission vehicles. No specific evidence has been provided, however, to show how effective those measures are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast NO_2 emissions."

29. He therefore concluded (in paragraphs 105 and 106):

"105. Drawing all this together, I find that it is more probable than not that both appeal proposals would have at least a moderately adverse impact on air quality in the Newington and Rainham AQMAs, and thus a significant effect on human health. While measures are proposed to mitigate those adverse impacts, there is no clear evidence to demonstrate their likely effectiveness, and it may well be that the contributions to fund the measures fail to reflect the full scale of the impacts.

106. I therefore conclude on the eighth main issue that, even after taking into account the proposed mitigation measures, the appeal proposals are likely to have an adverse effect on air quality, particularly in Newington and Rainham AQMAs. I reach this conclusion for the reasons set out above, notwithstanding that the Council raise no objection to the proposals on air quality grounds. Both proposals would thereby conflict with the guidance in NPPF paragraphs 120 and 124."

30. In his "Overall conclusions on Appeal A …", the inspector found conflict with several policies of the local plan, including Policy SP2 (paragraph 118). He set against the "social benefits" of the proposed development "the strong likelihood that, notwithstanding the proposed mitigation measures, [it] would contribute to at least "moderate adverse" impacts on air quality in both the Newington and Rainham AQMAs", and thus "would be likely to have a significant adverse effect on human health". In his view "[these] effects … would

conflict with the guidance in NPPF paragraph 124" (paragraph 128). He concluded that "even after considerable weight is given to the social, economic and environmental benefits …, the substantial harm that [the developments] would cause to the character of a valued landscape and their likely significant adverse effect on human health would significantly and demonstrably outweigh those benefits" (paragraph 133). No material considerations indicated that the proposal in Appeal A should be determined otherwise than in accordance with the development plan, and that appeal therefore had to be dismissed (paragraph 134). The conclusions on Appeal B were in similar terms (in paragraphs 143, 147 and 148).

Did the inspector misunderstand the decision in the ClientEarth proceedings, and the policy in paragraph 122 of the NPPF?

31. For Gladman, Mr Richard Kimblin Q.C. – who did not appear at the inquiry – submitted that the inspector did not see the significance, and likely effect, of Garnham J.'s decision in *ClientEarth (No.2)*, and thus failed to approach his assessment of the likely effect of the proposed development on air quality in a lawful way.

32. Supperstone J. was unimpressed by this argument – in my view rightly so. He did not accept that the inspector misunderstood Garnham J.'s conclusions and the effect of the relief he granted. His reference in paragraph 92 of the decision letter to Garnham J.'s emphasis on the urgency of meeting the limit values for air pollutants made it clear that he understood the need for the Government to achieve compliance by the "earliest possible date" (paragraph 27 of Supperstone J.'s judgment). This was not a complete answer to the contention that Garnham J.'s decision required the Secretary of State to "choose a route to that objective which reduces exposure as quickly as possible, and … must take steps which mean meeting the value limits [sic] is not just possible, but likely (para 95(i))" (paragraph 28), but the inspector was "not required to assume that local air quality would improve by any particular amount within any particular timeframe" (paragraph 29). I agree.

33. The judge referred (in paragraph 30 of his judgment) to observations made by Dove J. at first instance in *Shirley* ([2017] EWHC 2306 (Admin)) (at paragraph 63): that "the question of air quality and exceedance of any limit values or thresholds is clearly and obviously a material consideration in the decision as to whether or not to grant planning permission", and "is also material to the determination of whether mitigation measures are required and the effect of any mitigation measures that are proposed". But as he went on to say, there was "no suggestion in *Shirley* that the duty to produce and implement an air quality plan means local planning authorities should presume that the UK will become [compliant] with [the Air Quality Directive] in the near future" (ibid.). Nor was there any such suggestion in the judgments in this court on the appeal in that case.

34. As the judge said, the inspector concentrated – as he had to – on the significance of the decision in *ClientEarth (No.2)* for Gladman's appeals, given that the latest available monitoring data, from 2015, showed the annual mean objective of 40ug/m^3 for NO_2 was exceeded in the Newington and Rainham Air Quality Management Areas. It was not known what measures the new draft national air quality plan would contain, let alone what the final version would contain following public consultation. The inspector did not know how any new national measures would relate to local measures, nor what would be "the soonest date possible" by which the new national air quality plan would aim to achieve compliance. He could not reach any view on whether the measures in the new national air quality plan were

likely to be effective in securing compliance by any particular date (paragraph 31 of the judgment). In the judge's view, the inspector had "properly engaged with the *ClientEarth (No.2)* decision"; had "understood what the judgment required"; had "carefully analysed the evidence that was presented before him (DL 99-106)"; had "formed a judgment as to what the air quality is likely to be in the future on the basis of that evidence"; and was "entitled to consider the evidence and not simply assume that the UK will soon become compliant with [the Air Quality Directive]" (paragraph 32).

35. I can see no error in any of those conclusions of the judge. In my view, as was submitted to us by Mr Richard Moules on behalf of the Secretary of State and Dr Ashley Bowes for CPRE Kent, the inspector did see the true significance and effect of Garnham J.'s judgment in *ClientEarth (No.2)*. In deciding Gladman's appeals, he had to consider the evidence before him, in the particular circumstances of the local area, including local air quality. That is plainly what he did. He was not obliged to embark on predictive judgments about the timing and likely effectiveness of the Government's response to the decision in *ClientEarth (No.2)*, and the requirement to produce a national air quality plan compliant with the Air Quality Directive.

36. There is nothing in the decision letter to suggest that the inspector failed to understand Garnham J.'s reasoning, or the effect of the relief he ordered. As is clear from paragraph 91 of the decision letter, he recognized that, in practice, compliance with the limit values for air pollutants in the Air Quality Directive and the 2010 regulations, though ultimately the responsibility of the Government, lay in the hands of local authorities. In paragraph 92 he acknowledged that "[added] emphasis" had been given to the "urgency of meeting limit values for air pollutants" by Garnham J.'s decision, and the finding that the Government's 2015 Air Quality Plan was defective because it had failed to seek compliance by the earliest possible date, rather than selecting 2020 as a target date. This shows that he did understand Garnham J.'s reasoning, and the practical consequences of his decision. He recognized that that decision was intended to require the Government to act to achieve compliance with limit values by the earliest possible date.

37. It was with this recognition of the Government's and local authorities' responsibilities for securing compliance with limit values, and the urgent need for the Government to take the action required, that the inspector considered the evidence the parties put before him on local air quality. In my opinion his consideration of the evidence in that context, and the conclusions he reached, cannot be criticized.

38. The salient features of the evidence were that local monitoring showed exceedances of the annual mean objective for NO_2 in both the Newington and Rainham Air Quality Management Areas, as the inspector recognized in paragraph 93, and that the proposed development would be likely to bring about a worsening of those exceedances through increased vehicle emissions, though the extent of that worsening was a matter for debate – as he explained in paragraphs 94 to 104. As he said in paragraph 102, "moderate adverse" and "substantial adverse" impacts could be expected to have "a significant effect on human health …". He therefore took a cautious approach, concluding that the financial contributions put forward "may well not reflect the true impacts of the developments" (paragraph 103), and that the adequacy of the proposed mitigation had not been satisfactorily demonstrated (paragraph 104). His ultimate conclusion, in paragraph 105, was that it was "more probable than not" that each of these developments would have "at least a moderate adverse impact on air quality in the Newington and Rainham AQMAs, and thus a

significant effect on human health", and that the proposed mitigation had not been shown to be effective by "clear evidence".

39. He had to form his own judgment on these questions without knowing what measures the Government's new national air quality plan would contain – where, for example, clean air zones would be introduced – or when compliance with limit values would be secured. Nor did he know how measures taken at the national level would translate into local measures. There was no sensitivity evidence before him to reflect the possible consequences of the decision in *ClientEarth (No.2)* in annual mean NO_2 concentrations at the local level.

40. In the circumstances he cannot be criticized for not speculating about unknown measures to improve air quality, at either national or local level, or for not venturing an opinion on any improvement in local air quality. He was entitled to rely, as he did, on the evidence before him, rather than evidence that might have been produced but was not. There is, in my view, nothing unreasonable in his conclusion, in paragraph 99, that "it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent that informed the modelling of original Scenarios 2 to 5"; or in his conclusions, in paragraph 100, that "[without] further modelling" it would be "unwise" to try to assess the impacts of the proposed developments "too precisely", but that the possibility of "substantial adverse" impacts on receptors at Newington could not be ruled out, and that "moderate adverse" impacts in both Newington and Rainham were "almost certain". These conclusions were well within the range of reasonable planning judgment, and they are not flawed by a failure to heed the possible consequences of the decision in *ClientEarth (No.2)*.

41. It was not within the inspector's duty as decision-maker to resolve the "tension", as Mr Kimblin put it, between the Government's responsibility to comply swiftly with the limit values for air pollutants and the remaining uncertainty over the means by which, and when, the relevant targets would be met. In different circumstances, and on different evidence, an inspector might be able to assess the impact of a particular development on local air quality by taking into account the content of a national air quality plan, compliant with the Air Quality Directive, which puts specific measures in place and thus enables a clear conclusion to be reached on the effect of those measures. But that was not so here. This was a submission made by Mr Moules, and in my view it is right.

42. In my view, therefore, Mr Moules was right to submit that in this case, on the evidence as it was at the time of the inspector's decision, he drew reasonable and lawful conclusions on the future "air quality baseline".

43. Supperstone J. also rejected the submission, which Mr Kimblin sought to base on government policy in paragraph 122 of the NPPF, that the inspector failed to apply the principle that the planning system assumes other schemes of regulatory control will operate effectively. This policy, in his view, was directed at a situation where there is a parallel system of control, such as that operated by H.M.'s Inspectorate of Pollution (see *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1995] Env. L.R. 37), or the "licensing or permitting regime for nuclear power stations" (see *R. (on the application of An Taisce) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin)), the essential principle being that the planning system should not duplicate those other regulatory controls, but should generally assume they will operate effectively. As the judge saw it, the Air Quality Directive was "not a parallel consenting regime to which paragraph 122 is directed". There was "no separate licensing or permitting

decision that will address the specific air quality impacts of [Gladman's] proposed development" (paragraph 39 of the judgment).

44. Again, I agree with the judge. If it were right to regard the regime for the protection of human health and the environment against the adverse effects of air pollutants, under the Air Quality Directive and the 2010 regulations, as a regime to which the policy in paragraph 122 of the NPPF related, I do not think the inspector failed to assume it would "operate effectively". He manifestly had regard to it. And he did not doubt that, with the added urgency imparted by Garnham J.'s decision in *ClientEarth (No.2)*, the United Kingdom would discharge its responsibility under the Air Quality Directive to comply with the relevant limit values. But this broad assumption did not negate the conclusions he reached, in the light of the evidence before him, on the likely effects of the proposed development on local air quality in Newington and Rainham.

45. In my view, however, Supperstone J. was right to conclude that the policy in paragraph 122 was not engaged here. The policy was directed to situations where some proposed process or operation liable to cause pollution is subject to control under another regulatory regime. As the judge recognized, its purpose was to avoid needless duplication between two schemes of statutory control. It was concerned with "the control of processes or emissions … where these are subject to approval under pollution control regimes" and with "permitting regimes operated by pollution control authorities" (my emphasis). Such regulatory regimes would include those to which the judge referred, and also, for example, the regime for the issuing of environmental permits under the Environmental Protection Act 1990, which operates in parallel to the land use planning system.

46. As Mr Moules and Dr Bowes submitted, the Air Quality Directive and the 2010 regulations are not a licensing or permitting regime of that kind. The Air Quality Directive is "programmatic in nature". It imposes obligations on the state to comply with the relevant limit values within the shortest possible time, and by the means chosen to achieve compliance. In the United Kingdom the approach adopted by the Government is to promulgate an air quality plan for the relevant zones or agglomerations. Paragraph 122 of the NPPF, properly understood, did not contemplate any assumption being made about that process. It does not require a planning decision-maker to assume that the Government will have acted expeditiously to take the action required to discharge its own responsibilities under the legislative scheme for air quality.

47. Government planning policy did engage with air quality, explicitly, in paragraph 124 of the NPPF. The policy in that paragraph was not qualified or expanded by the policy in paragraph 122. It was directed both to planning policies – which were expected to "sustain compliance with and contribute towards EU limit values or national objectives for pollutants …" – and to individual planning decisions – which were expected to "ensure that any new development in Air Quality Management Areas is consistent with the local Air Quality Action Plan". But there was no requirement to assume the Government would have complied with the Air Quality Directive by the time the development was carried out.

48. It follows in my view that the NPPF did not compel the inspector to assume that the requirements of the Air Quality Directive would have been complied with soon enough, and in such a way, as to make the effects of the proposed development on air quality acceptable. He was not obliged by any such policy to disregard the Government's failure to comply with the Air Quality Directive, as found by the court in *ClientEarth (No.2)*, or to assume that it

would comply within any given time. In submissions both before us and in the court below, effectively on behalf of the Government, this was accepted by Mr Moules.

Did the inspector fail to deal properly with the proposed mitigation and to consider a "Grampian" condition, and was his decision flawed by procedural unfairness?

49. Mr Kimblin submitted that the inspector, in finding Gladman's financial contribution to mitigation was unlikely to be effective, failed to grapple properly with its approach to mitigation, which was based on DEFRA's "damage cost analysis".

50. Supperstone J. rejected this submission, and again I think he was right. He referred to the evidence of Mr Walton for Gladman in his first witness statement (at paragraphs 9 to 13), explaining how he had calculated the sum required to mitigate the effects of the proposed development on air quality using the DEFRA "Cost Damage Calculation", which the local planning authorities had accepted as a suitable approach (paragraph 41 of the judgment). Gladman's complaint was that the inspector found the calculation was not robust in the absence of supporting evidence, without getting to grips with the calculations in Gladman's "Air Quality Addendum Assessment" of September 2016. This was unacceptable, Mr Kimblin had submitted, given that the financial contributions were based on the methodology favoured by the Government (paragraph 42).

51. The judge went on to consider the content of the "Air Quality Addendum Assessment", the evidence given to the inspector by Mr Walton and Professor Peckham, and the relevant submissions made on behalf of CPRE Kent in closing (paragraphs 43 to 49). He referred to answers given by Mr Walton in his evidence-in-chief, and in response to the inspector's own questions, in which he acknowledged the difficulty in predicting the effectiveness of the mitigation. The likely effectiveness of that mitigation was a "live issue" at the inquiry. The inspector had to reach his own conclusion on the matter, exercising his planning judgment – as did the Secretary of State in *Shirley* and the inspector in *Secretary of State for Communities and Local Government v Wealden District Council* [2017] EWCA Civ 39 (paragraph 50 of the judgment). In paragraphs 104 to 106 of his decision letter he had reached a conclusion on the evidence that he was entitled to reach, and he had explained what was wrong with the proposed mitigation. As the judge put it, the "contributions had not been shown to translate into actual measures likely to reduce the use of private petrol and diesel vehicles and hence reduce the forecast NO_2 emissions …" (paragraph 51).

52. I agree. This was not a case of the inspector doubting the soundness of the methodology adopted by Mr Walton in the cost damage calculation. It was not the methodology that was in contention. It was the likely effectiveness of the financial contributions themselves when translated into practical measures. The thrust of the objection by CPRE Kent, which the inspector accepted, was that it could not be demonstrated that the financial contributions would produce practical mitigation sufficient to overcome the likely effects of the development on local air quality.

53. This was a classic matter of planning judgment. The inspector did not have to accept that because an appropriate arithmetical method had been used in calculating the level of financial contributions, the mitigation measures themselves would be effective. It was for him to consider, in the exercise of his planning judgment, whether the mitigation would be effective. He was not confident that it would. Disagreement with this conclusion is not a

proper basis for complaint in proceedings such as these. The conclusion was not irrational. It was not the outcome of an unduly stringent test of certainty being applied. It was not inadequately explained. It was, as the inspector said in paragraph 104, a conclusion reached in the absence of "specific evidence … to show how effective [the proposed mitigation measures] are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast NO_2 emissions".

54. Mr Kimblin's alternative argument was this. First, it was incumbent on the inspector – exercising the Secretary of State's power under section 79(1) of the 1990 Act to deal with the application before him on appeal "as if it had been made to him in the first instance" – to consider whether his concerns could be overcome by a suitably worded "Grampian" condition. And secondly, the perceived shortcomings of the measures in the section 106 obligations were not squarely raised by any party in evidence at the inquiry, the possibility of their being overcome by a condition was not ventilated, and it was unfair of the inspector not to raise this point with the parties before he made his decision.

55. Supperstone J. did not accept that the inspector had to consider the appropriateness of a "Grampian" condition, or give Gladman an opportunity to tackle this question. Gladman had never suggested it would agree to be bound by any such condition (paragraph 53). The inspector was not under a duty to ask himself whether he should impose a condition precluding development until a scheme to overcome the impact on air quality had been approved – a reasonable condition, it was said, in the light of the House of Lords' decision in *British Railways Board v Secretary of State for the Environment* [1993] 3 P.L.R. 125 (see the speech of Lord Keith of Kinkel, at pp.128 and 132). He was under no obligation to "cast about for conditions … not suggested to him" – as was emphasized by Mann L.J. in his judgment in *Top Deck Holdings v Secretary of State for the Environment* [1991] J.P.L. 961 (at pp.964 and 965). He was entitled to take the two unilateral undertakings as Gladman's "settled position" on mitigation. And given his finding that the effectiveness of the proposed mitigation had not been demonstrated by evidence, the reasonableness of the condition now suggested was in any case "questionable" (paragraph 54). What the Court of Appeal had said in *Top Deck Holdings* was not confined to the particular facts of that case; it was a statement of general principle (paragraph 56).

56. In the light of the decision of this court in *Hopkins Developments Ltd. v Secretary of State for Communities and Local Government* [2014] P.T.S.R. 1145 (in particular, the judgment of Jackson L.J. at paragraph 62, and that of Beatson L.J. at paragraph 90), the judge also rejected the contention that the principles of procedural fairness had been offended. Gladman knew the case it had to meet and had an opportunity to adduce evidence and make submissions on the mitigation measures, which included suggesting a "Grampian" condition if it had wished to do so (paragraph 61).

57. I think the judge's analysis here is cogent. When the inquiry began, the likely effect of the proposed development on air quality in the Newington and Rainham Air Quality Management Areas, "including any proposed mitigation measures", was identified by the inspector as one of the main issues in the appeals. None of the parties could have been in any doubt that this was a matter on which he was expecting to hear such evidence and submissions as they chose to put before him. Though the council did not oppose the development on the grounds that it would likely bring about a worsening in air quality, CPRE Kent firmly did. As one might expect, the effectiveness of the proposed mitigation was explicitly part of the issue. Both Gladman and CPRE Kent sought to confront this

question. Gladman saw the need to call its own expert witness, Mr Walton. In his evidence he accepted that the effect of the proposed mitigation measures was difficult to quantify. And the efficacy of Gladman's approach to mitigation, including the utility of the proposed financial contributions was also doubted by Professor Peckham in his evidence for CPRE Kent. Whether this was so was ultimately a matter of planning judgment for the inspector. But there can be no dispute that the adequacy of the proposed mitigation was a contentious issue between Gladman and CPRE Kent.

58. I cannot see how it could be said that in this case the inspector acted in any way contrary to the principles of procedural fairness.

59. The basic principles are not complicated or surprising (see *Hopkins Developments Ltd.*, at paragraphs 47 to 50 in the judgment of Jackson L.J., and paragraphs 87 to 92 in the judgment of Beatson L.J.; *Secretary of State for Communities and Local Government v Engbers* [2016] EWCA Civ 1183, at paragraphs 5 to 9 in the judgment of Lewison L.J.; and *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9, at paragraph 47 of my judgment). In *Hopkins Developments Ltd.* Beatson L.J. (in paragraph 87 of his judgment) referred to the "right to be heard" as a principle of "natural justice" or "procedural fairness", which required "an opportunity to be heard, an opportunity to participate in the procedure in which the decision is made". As he recognized (at paragraph 88), the court must consider whether the party complaining of procedural unfairness had "a reasonable opportunity" to put its case on the matters in issue. The emphasis is on the "opportunity to be heard". As Beatson L.J. went on to say (at paragraph 90), and illustrate (in paragraphs 91 and 92), "[the] authorities on planning inquiries … show that in this context what is needed is knowledge of the issues in fact before the decision-maker, the Inspector, and an opportunity to adduce evidence and make submissions on those issues …".

60. There was no lack of such opportunity in this case. Gladman cannot justly complain that it was unaware of the issue in dispute – the likely effect of the development on air quality, and the effectiveness of its proposed mitigation; or that the issue arose late or unheralded, or only as a minor point referred to in passing in the course of the inquiry, or as a concern of the inspector that occurred to him only after the inquiry was over. Nor can it say that this was merely a matter on which the inspector was seeking the parties' help, as opposed to a squarely contested issue between itself and a rule 6 party, though not an issue between itself and the council. Nor can it complain that the case it had to meet was obscure; or that it did not have a reasonable opportunity to meet that case with evidence and submissions, and in the light of the decision of the court in *ClientEarth (No.2)*. It had the opportunity to counter Professor Peckham's evidence with evidence of its own, and in cross-examination, and, at the end of the inquiry, in closing submissions. It cannot now raise, as if it were a complaint of procedural unfairness, the fact that it did not call different or further evidence to convince the inspector that its proposed mitigation could be relied on to reduce emissions of NO_2 sufficiently. Nor, therefore, can it complain that it suffered any material prejudice. In short, there was no procedural unfairness at all.

61. The likely effect of the development on air quality was an issue to which the inspector ultimately had to apply his own planning judgment in the light of all the relevant evidence and submissions before him. That is what he did. But it is no part of the principles of procedural fairness that he was necessarily obliged to share with the parties his own

thinking, or provisional views, on any of the contentious issues while the inquiry was still in progress, and give them the opportunity to address any concerns he had.

62. I also reject the contention, as did the judge, that the inspector should have considered the possibility of his concerns about the proposed mitigation being overcome by the imposition of a "Grampian" condition, or should have given the parties the opportunity to address him on that question.

63. There is no statutory requirement, or principle of law, to the effect that in determining an appeal under section 78 of the 1990 Act, the Secretary of State, or his inspector, must always – and even if entirely unprompted by any of the parties – seek to make an unacceptable proposal acceptable by imposing a planning condition in "Grampian" form to prevent the development going ahead until a particular objection to it is overcome.

64. Nor is there any statement of national planning policy creating such a requirement. Paragraph 203 of the NPPF – now paragraph 54 of the replacement version published in February 2019 – said that "[local] planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations", and that "[planning] obligations should only be used where it is not possible to address unacceptable impacts through a planning condition". And in the Planning Practice Guidance, issued by the Government in March 2014, paragraph 16-049-20140306, headed "What type of behaviour may give rise to a substantive award [of costs] against a local planning authority?", giving examples of unreasonable behaviour by a local planning authority, says that "refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead". But neither government policy nor government guidance requires an inspector always to undertake his own quest for conditions that might render an unacceptable proposal acceptable, so that he can allow an appeal he would otherwise have dismissed.

65. There may of course be cases where an inspector finds it appropriate to consider imposing such a condition even if none of the parties has suggested it. And when this happens he may think it sensible, or it may be necessary, to seek their comments or submissions. To do this is not contrary to any provision of the statutory scheme or any principle of law, nor is it discouraged in government policy or guidance. There is, however, no statutory requirement or principle of law that, generally, he must take that course.

66. The relevant principle is apparent in the judgment of Mann L.J. in *Top Deck Holdings*. The facts in that case were somewhat different from this. The applicant for planning permission proposed the erection of two buildings with a total floorspace of 652 square metres, which would necessarily require the demolition of buildings with a floorspace of 568 square metres. It was common ground that the removal of other buildings on the site, to eliminate the difference of 84 square metres, could only have been achieved by a planning condition, and it was argued that the inspector should have considered imposing such a condition. Had he done so, it was submitted, his view on the planning balance might have been different. But neither side had put forward such a condition. And in his judgment (at p.964) Mann L.J. posed the question: "What was the Inspector to do in regard to a condition which was neither requested nor, more significantly, offered?". He referred, with approval, to the reasoning of Forbes J. in *Marie Finlay v Secretary of State for the Environment* [1983] J.P.L. 802, including this passage:

> "If a party to an appeal wanted the appeal to be considered on the basis that some condition could cure the planning objection put forward, then it was incumbent on the appellant to deal with that condition at the inquiry. Unless such a condition has been canvassed the Secretary of State was not at fault in not imposing such a condition. …".

67. Mann L.J. is reported to have endorsed that view (at p.965):

> "He (Mann L.J.) respectfully agreed with the view expressed by Forbes J. Such an approach had to work sensibly in practice. An Inspector should not have imposed on him an obligation to cast about for conditions not suggested before him. He emphasised "obligation." If, of his own motion, he wished to impose a condition, then, as Forbes J. suggested, different considerations would arise, including perhaps the reopening of the appeal. He (Mann L.J.) expressed no view upon such a situation. In his judgment, in this case the Inspector was under no obligation, such as [counsel] had suggested he was … ."

68. I think Mann L.J. was there stating a basic proposition, not merely the view he had reached in the circumstances of that particular case. The basic proposition is not that there will never be a case in which an inspector, on his own initiative, may properly raise with the parties the possibility of imposing a particular condition, which the parties themselves have not thought of or suggested. It is that, as a general rule, there is no legal onus on an inspector to formulate conditions that might make the proposed development acceptable, but which none of the parties has suggested to him.

69. Sometimes, I would accept, it might be unreasonable, in the "Wednesbury" sense, for an inspector not to impose a condition even though none of the parties has suggested it, because the need for that condition and the appropriateness of imposing it are perfectly obvious. Such a possibility was recognized, for example, by Collins J. in *National Anti-Vivisection Society v First Secretary of State* [2004] EWHC 2074 (Admin) (at paragraphs 32 to 35) – though in the particular circumstances of that case the judge was "wholly satisfied" that the condition in question, which would have limited the use of the proposed medical research building to animal research, "could not conceivably be regarded as a condition which was obviously needed …" (paragraph 35).

70. In this case too I cannot accept that the inspector was obliged to frame a "Grampian" condition to overcome the inadequacy, as he saw it, of Gladman's proposed mitigation. Nor was it irrational or otherwise unlawful for him not to do that. Recognizing the need to address the effects of the proposed development on air quality as an important issue on which evidence and submissions would be required, the need to counter CPRE Kent's case that the financial contributions would not translate into effective mitigation, and the need to put forward measures that were legally enforceable, Gladman presented the inspector with the expert evidence of Mr Walton, took the opportunity to test Professor Peckham's evidence by cross-examination, relied on the submissions of its leading counsel, and proffered its section 106 obligations. At no stage, however, did it mention the possibility of a "Grampian" condition being imposed if its case on air quality was rejected, or its mitigation measures found wanting.

71. In these circumstances the inspector was, in my view, reasonably entitled to assume that Gladman had advanced the best case it could on air quality, and had not left anything out – indeed, that this was its only case on that issue, and, in particular, on mitigation (see the judgment of Richards J. in *West v First Secretary of State* [2005] EWHC 729 (Admin), at paragraphs 42 to 54). It was not unreasonable to think that the section 106 obligations represented the basis on which he was being invited to conclude that the financial contributions and proposed mitigation measures were adequate and would be effective. His conclusions show very clearly that he was unconvinced by both parts of the mitigation strategy – the financial contributions and the mitigation measures themselves. There was nothing to suggest that Gladman was willing to increase those contributions or strengthen the mitigation or to advance some alternative mitigation strategy, and no evidence of what such an alternative mitigation strategy might involve. Having rejected Gladman's case on air quality, as he did, the inspector could not be expected to grant planning permission with a "Grampian" condition making the development depend on materially different – and unknown – mitigation measures coming forward at some later stage.

Did the inspector fail to explain how Gladman's approach to mitigation departed from the air quality action plans?

72. The contention here is that the decision letter contains no proper reasons to explain a finding of conflict with the air quality action plans for Newington and Rainham, which, contrary to the inspector's approach, did not require the effects of the development on air quality to be fully mitigated. Indeed, it was "entirely silent" on this point.

73. The judge rejected this complaint. The inspector had found the proposed development would be likely to have an adverse effect on air quality in the Air Quality Management Areas in those two settlements. It was "obvious", therefore, why he had concluded it was inconsistent with the local air quality action plans, which sought to ensure development did not harm air quality. From the decision letter it was "clear to the parties … that the inspector followed national policy, found there to be a breach of the air quality action plans, and accordingly concluded that both proposals would conflict with the guidance in NPPF paragraph 124" (paragraph 67 of the judgment).

74. Once again, I think the judge was right. As he knew, to establish whether the reasons given by an inspector are clear, adequate and intelligible – in accordance with the principles stated by Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33, [2004] 1 W.L.R. 1953 (at paragraph 36) – one must read the decision letter fairly as a whole, bearing in mind that it is written, principally, for the parties to the appeal, who will be familiar with the contentious issues and the evidence and submissions directed to those issues. When that is done here, there can, I think, be no doubt that the inspector's relevant reasons were sufficient, and lawful.

75. The inspector's conclusions, amply explained in paragraphs 99 to 106 of his decision letter, were that the effectiveness of the mitigation measures put forward by Gladman had not been satisfactorily demonstrated (paragraphs 104 and 105), that the proposed development would have "at least a moderately adverse impact on air quality in the Newington and Rainham AQMAs, and thus a significant effect on human health" (paragraph 105), and that it would "thereby conflict" with the policy in paragraphs 120 and 124 of the NPPF (paragraph 106). He had earlier (in paragraph 90) directed himself accurately on the policies in those two

paragraphs of the NPPF, including, specifically, the policy in paragraph 124 that "[planning] decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan".

76. Having gone on to find that, despite the proposed mitigation, the development would harm air quality in the two relevant Air Quality Management Areas for which air quality action plans had been published, and having expressly connected that conclusion to a finding of conflict with national planning policy in paragraphs 120 and 124 of the NPPF, the inspector was not, in my view, obliged to spell out and elaborate the conclusion that the proposals were in conflict with the air quality action plans. This conclusion was inherent in the conclusion that the proposals were in conflict with the policy in paragraph 124 of the NPPF. It was, as the judge said, obvious.

77. Since the inspector's conclusion on the likely harmful effects on air quality in the Air Quality Management Areas and on human health, and his finding of conflict with government policy in paragraph 124 of the NPPF, rested on his conclusion that the effectiveness of the proposed mitigation was unproven, which plainly it did, there was no need for him to spell out the conclusion that Gladman's approach to mitigation was inconsistent with the air quality action plans. As Dr Bowes submitted, an essential purpose of the air quality action plans was to improve air quality in the Air Quality Management Areas, which, as the air quality action plan for Newington made quite clear, might require planning permission to be refused where effective mitigation could not be secured. Proposed development such as this, judged likely to worsen air quality in a material way because the proposed mitigation had not been shown to be effective, was inevitably inconsistent with the air quality action plans. This too was obvious. The inspector's reasons were not deficient for his not having said it. There was no need for him to do so.

Conclusion

78. For the reasons I have given, I would dismiss the appeal.

Lord Justice Peter Jackson

79. I agree.

Lord Justice McCombe

80. I also agree.

4 ClientEarth2 judgement – November 2016

2 In paragraphs 6 to 15, Mr Justice Garnham gives a good overview of the "legislative scheme" of the EU Directive.

Neutral Citation Number: [2016] EWHC 2740 (Admin)

Case No: CO/1508/2016

IN THE HIGH COURT OF JUSTICE

QUEENS BENCH DIVISION

ADMINISTRATIVE COURT

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 02/11/2016

Before :

MR JUSTICE GARNHAM

- -

Between :

ClientEarth (No.2)	**Claimant**
- and -	
Secretary of State for the Environment, Food and Rural Affairs	**Defendant**
- and-	
Mayor of London	
Scottish Ministers	**Interested**
Welsh Ministers	**Parties**
Secretary of State for Transport	

Nathalie Lieven QC, Ben Jaffey and Ravi Mehta (instructed by **ClientEarth**) for the **Claimant**

Stephen Tromans QC and Rose Grogan (instructed by **Transport For London In-House Solicitors)** for the **Mayor of London**

Kassie Smith QC and Julianne Kerr Morrison (instructed by Government Legal Department) for the **Defendant**

Hearing dates: 18th & 19th October 2016

Approved Judgment

Mr. Justice Garnham:

Introduction

1. Nitrogen dioxide is a gas produced by the combustion of fuel at high temperature in the presence of oxygen. Exposure to nitrogen dioxide in the air carries with it significant risks to human health. A recent analysis from Department for the Environment, Food and Rural Affairs ("DEFRA") estimates that the effects of exposure to nitrogen dioxide has "*an effect on mortality equivalent to 23,500 deaths annually in the UK…*"

2. Recognising those risks, EU law seeks to control that exposure by imposing limits on ambient nitrogen dioxide in the territories of Member States and, when limits are exceeded, requiring the publication of Air Quality Plans ("AQPs") aimed at reducing that exposure.

3. In previous proceedings between the parties, in which the claimant, ClientEarth, challenged previous AQPs produced by the United Kingdom Government, the Supreme Court made a declaration that the UK was in breach of Article 13 of the Air Quality Directive (2008/50/EC). In his judgment of April 2015 granting that declaration, Lord Carnwath, with whom the other members of the Court agreed, said (at paragraph 31), "*The new government, whatever its political complexion, should be left in no doubt as to the need for immediate action to address this issue.*"

4. On 17 December 2015, in purported compliance with the order of the Supreme Court and the provisions of the Directive, DEFRA published the Government's 2015 Air Quality Plan which addressed the need to reduce nitrogen dioxide emissions.

5. Relying on EU law, and the domestic regulations which give effect to it, ClientEarth challenges the lawfulness of that plan. It seeks a declaration that this plan, like its predecessor, fails to comply with Article 23(1) of the Directive and Regulation 26(2) of the Air Quality Standards Regulations 2010, and an order quashing the plan. The defendant, the Secretary of State for Environment, Food and Rural Affairs, opposes the claim. The Mayor of London, an interested party, supports the position of ClientEarth.

The Legislative Scheme

6. The origin of the current EU legislation framework governing air quality was Council Directive 96/62/EC. The aim of that Directive was to define and establish objectives for ambient air quality, to facilitate the assessment of ambient air quality in Member States, to obtain information on ambient air quality and to maintain or improve ambient air quality. It introduced concepts, such as "*air quality plans*", "*limit value*, and "*target value*", devised for the measurement and management of air quality, which concepts were adopted in subsequent Directives.

7. In 1999 a second Council Directive, Directive 1999/30/EC, was introduced with the aim of imposing limit values for particular pollutants, including nitrogen dioxide (NO_2). In 2008 a third directive, Directive 2008/50/EC, repealed the two previous

directives, but reproduced some of the central features of those provisions. It is that Directive which is at the heart of the present challenge.

8. The preamble to the 2008 Directive included the following:

> *"Whereas:*
>
> .....
>
> *(2) In order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level. Therefore, emissions of harmful air pollutants should be avoided, prevented or reduced and appropriate objectives set for ambient air quality taking into account the relevant World Health Organisation standards, guidelines and programmes...*
>
> *(3)[Previous Directives]...need to be substantially revised to incorporate the latest health and scientific developments and the experience of the Member States...*
>
> *(30) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to promote the integration into the policies of the Union of a high level of environmental protection and the improvement of the quality of the environment in accordance with the principle of sustainable development as laid down in Article 37 of the Charter of Fundamental Rights of the European Union."*

9. The articles of the Directive relevant to the present proceedings include Article 2, which adopts definitions from earlier Directives, including the following:

> *"ambient air" shall mean outdoor air in the troposphere, excluding workplaces...*
>
> *"limit value" shall mean a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and /or the environment as a whole, to be attained within a given period and not to be exceeded once attained;*
>
> *"air quality plans" shall mean plans that set out measures in order to attain the limit values or target values;*

> *"margin of tolerance" shall mean the percentage of the limit value by which that value may be exceeded subject to the conditions laid down in this Directive;*
>
> *"target value" shall mean a level fixed with the aim of avoiding preventing or reducing harmful effects on human health and/or the environment as a whole to be attained where possible over a given period;*
>
> *"zone" shall mean part of the territory of a member state, as delimited by that member states for the purposes of air quality assessment and management;*
>
> *"agglomeration" shall mean a zone that is a conurbation with a population concentration in excess of 250,00 inhabitants or, where the population concentration is 250,000 inhabitants or less, with a given population density per km^2 to be established by the Member States .*

10. Article 13 imposes limit values and alert thresholds for the protection of human health. It provides:

> *"1. Member States shall ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, PM_{10}, lead and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI.*
>
> *In respect of nitrogen dioxide and benzene the limit values, specified in Annex XI may not be exceeded from the date specified therein."*

11. Article 22 provided for postponement of attainment deadlines and exemption from the obligation to apply certain limit values.

> *"1. Where, in a given zone or agglomeration, conformity with the limit values for nitrogen dioxide or benzene cannot be achieved by the deadlines specified in Annex XI, a Member State may postpone those deadlines by a maximum of five years for that particular zone or agglomeration, on condition that an air quality plan is established in accordance with Article 23 for the zone or agglomeration to which the postponement would apply; such air quality plan shall be supplemented by the information listed in Section B of Annex XV related to the pollutants concerned and shall demonstrate how conformity will be achieved with the limit values before the new deadline."*

12. Article 23, on which much of the present claim turns, provides for AQPs:

> *1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.*
>
> *In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. The air quality plans may additionally include specific measures aiming at the protection of sensitive population groups, including children.*
>
> *..."*

13. Annex XI sets out limit values for the protection of human health. For nitrogen dioxide the limit value in any given hour is 200ug/m^3, which is not to be exceeded more than 18 times in a calendar year, and 40ug/m3 which applies to each calendar year.

14. Annex XV sets out information to be included in the local, regional or national air quality plans for improvement in ambient air quality. Amongst that information there is required to be detail of those measures or projects adopted with the view to reducing pollution which list and describe all the measures set out in the project, set out a timetable for implementation and provide an estimate of the improvement of air quality planned and the expected time required to obtain that objective.

15. The Directive was brought into domestic law in the UK by means of four sets of Regulations, one for each of the home nations. Those for England are the most pertinent for this case. Regulation 26 of the Air Quality Standards Regulations (2010/1001) requires the drawing up of AQPs. It provides, as is material:

> *"(1) Where the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and PM_{10} in ambient air exceed any of the limit values in Schedule 2 or the level of $PM_{2.5}$ exceeds the target value in Schedule 3, the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value.*
>
> *(2) The air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time...*
>
> *(4) Air quality plans must include the information listed in Schedule 8..."*

The Background

16. The United Kingdom is divided, for the purposes of the 2008 Directive and AQPs, into 43 zones and agglomerations. It is common ground that in 2010 40 of those zones and agglomerations were in breach of one or more of the limit values for nitrogen dioxide.

17. On 20 December 2010 the Secretary of State indicated that AQPs were being drawn up for all non-compliant zones. Plans were submitted to the European Commission in September 2011 including applications for time extensions under Article 22 in respect of 24 zones. The European Commission approved 9 of those applications unconditionally and 3 subject to conditions being fulfilled.

18. In July 2011, ClientEarth commenced judicial review proceedings seeking a declaration that the United Kingdom was in breach of its obligations to comply with the nitrogen dioxide limits provided for in Article 13 of the 2008 Directive. That application failed before this court and the Court of Appeal. As noted above, however, the Supreme Court was satisfied, "*the relevant breach of Article 13 having been clearly established*", that it ought to grant the declarations sought. On the other issues in the case, however, the Supreme Court decided to seek the guidance of the Court of Justice of the European Union ("CJEU") and questions were submitted to that Court.

19. The CJEU, in providing its answer to the Supreme Court, reformulated the four questions into three and answered them as follows:

> *"1. Article 22(1) of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe must be interpreted as meaning that, in order to be able to postpone by a maximum of five years the deadline specified by the Directive for achieving conformity with the limit values for nitrogen dioxide specified in annex XI thereto, a Member State is required to make an application for postponement and to establish an air quality plan when it is objectively apparent, having regard to existing data, and notwithstanding the implementation by that Member State of appropriate pollution abatement measures, that conformity with those values cannot be achieved in a given zone or agglomeration by the specified deadline. Directive 2008/50 does not contain any exception to the obligation flowing from article 22(1)."*
>
> *2. Where it is apparent that conformity with the limit values for nitrogen dioxide established in annex XI to Directive 2008/50 cannot be achieved in a given zone or agglomeration of a*

> *member state by 1 January 2010, the date specified in that annex, and that Member State has not applied for postponement of that deadline under article 22(1) of Directive 2008/50 ,the fact that an air quality plan which complies with the second subparagraph of article 23(1) of the Directive has been drawn up, does not, in itself, permit the view to be taken that that Member State has nevertheless met its obligations under article 13 of the Directive.*
>
> *3. Where a Member State has failed to comply with the requirements of the second subparagraph of article 13(1) of Directive 2008/50 and has not applied for a postponement of the deadline as provided for by article 22 of the Directive, it is for the national court having jurisdiction, should a case be brought before it, to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the Directive in accordance with the conditions laid down by the latter."*

20. The Supreme Court considered that answer in its judgment of April 2015, [2015] UKSC 28. I have already quoted from Lord Carnwath's judgment in that case. It is convenient to note at this stage the following additional passages:

> *"27. Before this court, both counsel have bravely attempted their own linguistic analysis of the reasoning [of the CJEU] to persuade us that the answer is clearer than it seems at first sight. I am unpersuaded by either. Understandably neither party wanted us to make a new reference, although that might be difficult to avoid if it were really necessary for us to reach a determination of the issues before us. If I were required to decide the issue for myself, I would see considerable force in the reasoning of the Commission, which treats article 22 as an optional derogation, but makes clear that failure to apply, far from strengthening the position of the state, rather reinforces its essential obligation to act urgently under article 23(1), in order to remedy a real and continuing danger to public health as soon as possible. For the reasons I have given I find it unnecessary to reach a concluded view.*
>
> *28. The remaining issue, which follows from the answers to the third and fourth questions, is what if any orders the court should now make in order to compel compliance. In the High Court, Mitting J considered that compliance was a matter for the Commission:*
>
> *"If a state would otherwise be in breach of its obligations under article 13 and wishes to postpone the time for*

compliance with that obligation, then the machinery provided by article 22(1) is available to it, but it is not obliged to use that machinery. It can, as the United Kingdom Government has done, simply admit its breach and leave it to the Commission to take whatever action the Commission thinks right by way of enforcement under article 258 of the Treaty on the Functioning of the European Union ." (para 12)

The Court of Appeal adopted the same view. That position is clearly untenable in the light of the CJEU's answer to the fourth question. That makes clear that, regardless of any action taken by the Commission, enforcement is the responsibility of the national courts.

29. Notwithstanding that clear statement, Miss Smith initially submitted that, in the absence of any allegation or finding that the 2011 plans were as such affected by error of law (apart from the interpretation of article 22), there is no basis for an order to quash them, nor in consequence for a mandatory order to replace them. I have no hesitation in rejecting this submission. The critical breach is of article 13, not of article 22 or 23, which are supplementary in nature. The CJEU judgment, supported by the Commission's observations, leaves no doubt as to the seriousness of the breach, which has been continuing for more than five years, nor as to the responsibility of the national court for securing compliance. As the CJEU commented at para 31:

"Member states must take all the measures necessary to secure compliance with that requirement [in article 13(1)] and cannot consider that the power to postpone the deadline, which they are afforded by article 22(1) of Directive 2008/50 , allows them to defer, as they wish, implementation of those measures."

30. Furthermore, during the five years of breach the prospects of early compliance have become worse, not better. It is rightly accepted by the Secretary of State that new measures have to be considered and a new plan prepared. In those circumstances, we clearly have jurisdiction to make an order. Further, without doubting the good faith of the Secretary of State's intentions, we would in my view be failing in our duty if we simply accepted her assurances without any legal underpinning. It may be said that such additional relief was not spelled out in the original application for judicial review. But the delay and the consequent change of circumstances are not the fault of the claimant. That is at most a pleading point which cannot debar the claimant from seeking the appropriate remedy

in the circumstances as they now are, nor relieve the court of its own responsibility in the public interest to provide it."

21. The Supreme Court decision established, as had been accepted by the Secretary of State, that the Government had failed to meet the obligations set out in Article 13 in relation to non-compliant zones. The Government accepted that it was obliged to devise a new AQP in accordance with Article 23 and that that plan should be published by December 2015. The Government did indeed publish its plan, which was entitled "*Improving Air Quality in the UK-Tackling Nitrogen Dioxide in our Towns and Cities*", on 17 December 2015.

22. That AQP comprised a UK overview document, a technical report, a list of UK and national measures and individual zone plans for the 38 air quality zones which were still to meet the nitrogen dioxide limits. It may be helpful to say something here about the process by which the plan was drawn up.

Production of the AQP

23. The plan was produced as a result of a detailed piece of work across Whitehall involving, in particular, DEFRA, the Department for Transport ("DfT") and Her Majesty's Treasury. In response to the present challenge, the Secretary of State has disclosed a substantial quantity of documentation in relation to the development of that plan which includes minutes of many inter-departmental meetings addressing the issues, the resolution of which shaped the plan ultimately produced.

24. The process adopted by DEFRA, in association with other government departments, is well described in the witness statement of Ms Natasha Smith, an experienced policy advisor at DEFRA.[1] What follows is a brief summary of the detailed account provided in her first witness statement.

25. There was first an initial evidence gathering exercise. This began in 2014. Air quality projections were revised using the data for 2013 as the baseline with updated projections becoming available in April 2013. Those projections indicated that 34 out of the 43 zones were expected to meet the limit values by 2020. Nine zones were not expected to meet the limit value by that date without additional measures. Future projections of emissions were modelled at five-yearly intervals and therefore, as Ms Smith puts it, "*it is not possible to demonstrate in the projections when within that 5 year period a measure would take effect.*"

26. The next step in the process of preparing the AQP was the identification of potential measures and an initial analysis. An external research project entitled "*Exploring and Appraising Proposed Measures to Tackle Air Quality*" (known as the "*Levers Project*") was commissioned to investigate possible policy levers or measures to reduce nitrogen dioxide concentrations. That project was carried out by a firm of

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1 I will include reference to Ms Natasha Smith's first name on each occasion I refer to her, in order to distinguish her from Ms Kassie Smith, counsel for the Defendant, to whom I shall refer as "Ms Smith"

consultants called "Ricardo Energy and Environment" ("Ricardo"). Numerous academic papers were reviewed and the potential impact of potential policy measures considered.

27. In modelling future air quality, DEFRA relied on a model called the Pollution Climate Mapping model which had been developed by Ricardo. That model, in turn, relied upon estimates generated by the "computer programme to calculate emissions from road transport" or "COPERT", a software tool used to calculate air pollutant emissions from road transport.

28. Next, an exercise was carried out to prioritise what appeared to be the most appropriate potential measures for further analysis. Those measures included mandatory low emissions zones ("LEZs") and ultra-low emission zones (ULEZs), nationally targeted retro-fit schemes for buses, scrappage schemes for diesel cars, retro-fit schemes for HGVs, voluntary LEZs and ULEZs and nationally targeted scrappage schemes for HGVs. Further analysis was carried out in respect of those prioritised measures.

29. Of particular note, is the fact that mandatory low emission zones were ranked first amongst the priority measures. The use of the word "mandatory", as opposed to "voluntary", indicates whether or not local authorities are to be required by statutory instrument to introduce the relevant zone. Ms Natasha Smith said in her statement that the policy was "*technically feasible to implement and effects will be significant from the start of the policy, meaning that it will reduce emissions quickly in those areas*…." Voluntary LEZ schemes were included on the priority list but were ranked lower because it was recognised that a voluntary scheme

> *"could have much less impact than a mandatory one and on its own could not give the same degree of certainty of achieving compliance because there was no guarantee that the local authority with an exceedance would implement a voluntary LEZ".*

30. Ms Natasha Smith explains that this analysis indicated that to meet the requirements of the Directive *"LEZs would be needed in a minimum of 5 new zones in England*", namely Leeds, Southampton, Derby, Birmingham and Nottingham. It also demonstrated that "*additional action would be required to tighten the requirements in the existing LEZ operating in London, as well as the ultra-low emissions zone in 2020.*"

31. Low emission or clean air zones of different classes were considered. Class A included buses, coaches and taxis only. Class B included those vehicles together with heavy goods vehicles. Class C added light goods vehicles. Class D included all the classes mentioned above and cars. The zones would operate by charging all vehicles in the identified classes, which do not meet specified emissions standards a fee to enter the zone. As Ms Smith explained in argument, charges were to be set at such a level as would discourage use of the zones by a sufficient number of vehicles of the relevant classes as to ensure the ambient nitrogen dioxides levels were below the target level.

32. There was also analysis of the effectiveness of non-targeted national scrappage schemes, targeted scrappage schemes for incentivizing the purchase of cleaner second-hand cars, locally targeted scrappage schemes and retro-fit schemes, amongst other proposals.

33. Immediately following the general election in May 2015, DEFRA began the preparation of the draft AQP, a process that involved much inter-departmental consultation. A formal public consultation exercise was commenced on 12 September 2015 and ran until 6 November 2015. The draft AQP put out for consultation proposed that voluntary CAZs would be set up in the five cities referred to above. It also identified the measures to be taken in London. The consultation received a total of 729 responses, including one from the claimant.

34. In parallel to the development of the plan, the Treasury was carrying out its annual spending review, a process designed to determine departmental budgets for the period from 2016-17 to 2020-21. On 22 September 2015 DEFRA had submitted evidence to HM Treasury on the proposed AQP and both DEFRA and DfT were bidding for elements of the funding necessary for the plan. Of particular relevance, in this context, was a submission to HM Treasury ministers from Treasury officials dated 16 October 2015. This submission sought ministers' "*steer on your preferred package of measures for the UK's Air Quality Plan to feed into Defra and DfT's* (spending review) *bilaterals*". The summary to that submission includes the following:

> *"we have pushed Defra and DfT to provide the least cost pathway to compliance. This involves first defining the minimum set of actions required to meet compliance (and so the overall cost envelope), and then establishing how the costs are most effectively distributed across governments and wider society."*

35. In March 2016 the DfT issued the Mayor of London with a spending review funding agreement which recorded specific measures which the Mayor was expected to take forward, from within Transport for London's own resources. The settlement letter was said by Ms Natasha Smith to reflect "*the commitment by Government to ensure the London Air Quality Plan, as part of the national plan, would be delivered*". That plan set out that an ultra-low emission zone would be implemented in London in 2020 and that national modelling had shown that the current London-wide low emission zone would need to be tightened to a Class C CAZ by 2025 to deliver compliance. Ms Smith goes on to assert that "*with the previous mayor's proposed measures alongside the ULEZ and the London-wide LEZ being tightened to a Class B CAZ in 2020, the AQP acknowledges the same outcome could be delivered within the same timescale.*"

36. The final decisions on the plans were made in November 2015. It was decided that the plan would mandate the implementation of CAZ's in the five cities, together with the arrangements discussed above for London.

The Competing Arguments

37. This case came on for hearing before me on 18 October 2016. The hearing occupied two full days. I was provided with a very substantial volume of documentation. I also had the benefit of thorough and detailed skeleton arguments from the claimant, the Mayor of London and the defendant. The claimant's skeleton, with its associated annexes, ran to some 59 pages, the Mayor's skeleton, with its annex, ran to 32 pages and the defendant's skeleton, with its annex, ran to 49 pages. No short summary of the arguments advanced, orally and in writing, by the three parties who took part in these proceedings would do them justice. I set out here only the barest outline of their respective positions and I address the detailed points they made in the discussion section of this judgment which follows. I record my thanks for the high quality of the arguments I heard.

38. Ms Nathalie Lieven QC, who appeared for the claimant, argued that the AQP was flawed by two errors of law. First, she said that the Secretary of State erred in law in her approach to the requirement of Article 23 that periods of exceedance should be kept "*as short as possible*". Second, she said that the Secretary of State gave disproportionate weight to considerations of cost, political sensitivity and administrative difficulties which were "*of secondary importance to the Directive's primary purpose of protecting human health through the achievement of limit values*". She also argued that the Secretary of State failed to carry out a proper assessment of measures other than mandatory CAZs which were likely to be effective in ensuring compliance with the directive in "*as short as possible*" a time. She referred, in particular, to locally targeted scrappage schemes, a targeted vehicle retrofit scheme, fiscal incentives and measures specifically targeting diesel cars.

39. The Mayor of London, who was represented by Stephen Tromans QC, supported the submissions of Ms Lieven. He argued that the 2015 AQP was inadequate to achieve compliance with Article 13 in London in as short a timescale as possible. He said that there remained serious questions over the adequacy of funding and suggested that the adopted measures required further support by way of monies from central government and by way of a grant of additional powers to the Mayor.

40. The Secretary of State was represented by Kassie Smith QC and Julianne Kerr Morrison. They argued that the court should dismiss the challenge. Ms Smith said that the Secretary of State did not misconstrue Article 23 and that the AQP contained "*proportionate feasible and effective measures*" to address the anticipated non-compliance in particular zones. She said that the assessment of which measures should be included in the plan had been based on a thorough and comprehensive analysis of the best available evidence and "*extensive internal and external consultation*".

41. It was her case that the plan would achieve compliance in the shortest possible time. She said that all potentially relevant measures were carefully considered in drawing up the plan, that the correct weight was attached to the relevant considerations and that any measure which was not included in the plan was excluded from it for legitimate reasons. "*Those reasons included, in particular*", she said "*that the*

introduction of the potential policy measures would not speed up the timeframe for achieving compliance if introduced alongside other planned measures."

Discussion

42. The first step in addressing this claim has to be determining the proper construction of Article 23.

43. On its face, the first sub-paragraph of that Article requires that Member States "*shall ensure*" that AQPs are established so as to achieve the relevant limit values. The second sub-paragraph requires that the plan identifies measures "*so that the exceedance period can be kept as short as possible*". Paragraphs 1 and 2 of Regulation 26 are no less prescriptive; the Secretary of State "*must*" draw up "*and implement*" an AQP "*so as to achieve*" the relevant value; and the plan "*must*" include measures "*intended to ensure*" compliance "*within the shortest possible time*".

44. Ms Lieven argued that those provisions meant that the Secretary of State must aim to achieve compliance by the soonest date possible and must choose measures which maximise the prospect of achieving that target. Mr Tromans added that implicit in Article 23 is an additional requirement that the Secretary of State must choose a route to the target which reduces exposure as quickly as possible.

45. Ms Smith accepts that the duty in Article 23 was expressed in mandatory language. She says, and I accept, that Article 23 assumes the continuing breach of Article 13. As she says, the AQP does not prevent or negate the breach but is a free-standing obligation on the Member State. Ms Smith emphasizes that what Article 23 requires is "*appropriate*" measures. That, she says, incorporates a discretion in the Member States to select the necessary measures. Article 23, says Ms Smith, reflects reality; even where a Member State is in breach, it only has to do what is possible, and that, she says, involves an element of judgement and discretion.

46. Although I accept Ms Smith's arguments that Article 23 gives some discretion to the Member State, it is plain on the face of the Article, in my judgement, that that discretion is narrow and greatly constrained.

47. In their observations to the CJEU in the first ClientEarth case, the Commission said, citing the second sub-paragraph of Article 23(1), that a "*Member State is therefore bound not only to adopt an air quality plan, but also to foresee in that plan measures appropriate to keep the exceedance period as short as possible. As has been stressed above, this is an obligation of result.*" I respectfully agree. It is plain from the words of the Article that the Member State is obliged to ensure that the plans are devised in such a way as to meet the limit value in the shortest possible time.

48. The Commission went on at paragraph 63 of those observations to say this:

> *"The second sub-paragraph of Article 23(1) requires a Member State, therefore, to foresee in its plans effective, proportionate and scientifically feasible measures to address the specific emissions problems in the relevant zone as swiftly*

> *as possible. In other words, a Member State does not have the full discretion to take into account and balance economic, social and political considerations in its choice of the measures to be foreseen (see mutatis mutandis para 15 and 46 of Janecek), as in so doing it would further prolong the period of non-compliance with Article 13 beyond that which is inevitable. Rather, it may do so only within the limits of the objective prescribed in the Directive, and its margin of discretion is heavily circumscribed."*

49. Again, I agree with that conclusion. In *Dieter Janecek v Freistaat Bayern* [2008] ECR I-6221, the CJEU concluded, when considering Directive 96/62, that "*while the Member States thus have a discretion,* [the] *Directive includes limits on the exercise of that discretion which may be relied upon before the national courts*"(p.194 at [46]). It is to be noted that that case addressed the question of whether an individual could require the competent national authorities to draw up an action plan where there was a risk that the limit values or alert thresholds (in that case, for PM_{10}) might be exceeded, rather than whether an AQP already drawn up met the requirements of a Directive. But in my view the terms of Article 23 require precisely the same limits on the discretion of the Member State. Whilst the Member State can determine the measures it is to adopt it must select measures which will be effective in achieving the object in view. That means, inevitably, that they must be scientifically feasible, but effective.

50. There was some debate in the course of the hearing as to the Commission's use of the word "proportionate" and the relevance of cost. Ms Smith sought to argue that by that expression the Commission was intending to suggest that the Member State was entitled to have regard to the cost effectiveness of any contemplated measure. In my judgement, there can be no objection to a Member State having regard to cost when choosing between two equally effective measures, or when deciding which organ of government (whether a department of central government or a local government authority) should pay. But I reject any suggestion that the state can have any regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved where one route produces results quicker than another. In those respects the determining consideration has to be the efficacy of the measure in question and not their cost. That, it seems to me, flows inevitably from the requirements in the Article to keep the exceedance period as short as possible.

51. In my view, the measures a Member State may adopt should indeed be "proportionate", but they must be proportionate in the sense of being no more than is required to meet the target. To do more than is required, especially in the field of environmental protection, may well impact adversely on other, entirely proper and reasonable interests. So, for example, compliance with the nitrogen dioxide limits might well be achieved by denying access to all vehicles in all city centres forthwith. But such a measure would have wholly undesirable economic consequences for the public in general. And such extreme measures would be unnecessary when better targeted efforts would equally well achieve compliance with the requirements of the Directive. That is the sense in which, I apprehend, the Commission used the word "proportionate" in this context and that is the sense in which, in my judgement, the concept is properly applicable here.

52. It follows that I accept Ms Lieven's first submission that the Secretary of State must aim to achieve compliance by the soonest date possible and Mr Tromans' submission that she must choose a route to that objective which reduces exposure as quickly as possible.

53. As to Mr Lieven's second submission, that the Secretary of State must choose measures which maximise the prospect of achieving the target, I substantially agree. There is no obligation in the Article, express or implied, that a Member State must take all imaginable steps aimed at reducing exposure. In fact, in my judgment, that would be disproportionate in the sense articulated above. But implicit in the obligation "*to ensure*" is an obligation to take steps which mean meeting the value limits is not just possible, but likely.

54. Similarly, the 2010 regulations require that the plan must include measures "*intended to ensure*" compliance within the shortest possible time. The identified measures cannot intend to ensure an outcome that is anything less than likely.

Criticism of the plan

55. Ms Lieven advances three primary criticisms of the air quality plan. First, she says that the adoption of five yearly intervals for the projection of nitrogen dioxide emissions was arbitrary and the date chosen for the compliance of 2020 (and 2025 for London) was too far distant. Second, she says the particular modelling method chosen, and in particular reliance on the COPERT emission factors, was mistaken. Third, she says the decision to rely entirely on Clean Air Zones (and the ULEZ in London) as the means of achieving compliance with the obligations set out in the directive was flawed. Insufficient use, she says, was made of different classes of CAZs and other measures that would have reduced nitrogen dioxide emissions.

56. I deal with each point in turn.

Five year intervals in 2020

57. Mr Roald Dickens, a senior economic adviser at DEFRA, explains in his written statement how future projections of nitrogen dioxide emissions are calculated. He says that DEFRA "*has calculated projections for five year intervals as a matter of routine for a number of years.*" He says that that approach is consistent with the practice adopted when producing previous AQPs. It is also the time intervals used by the European Commission whose emission projections are produced by the International Institute for Applied Systems Analysis.

58. He explains that there are several reasons for adopting the five yearly approach. He says that future predictions are inherently uncertain and the use of five year intervals is a pragmatic response. He says the "*government has to balance the additional cost of producing additional projections and the value of that data.*" In Mr Dickens' view, the cost of moving to fifteen annual projections for the period from 2015 to 2030 would be £50,000 (although he does not explain whether that is £50,000 for total additional projections or £50,000 for each additional annual projection). Mr Dickens says that, in addition, moving to more regular projections would delay production of

the plan. He says that calculating a full set of projections takes about three months and production of the plan would have been delayed in consequence.

59. Ms Smith also points to the evidence to the effect that the approach adopted by the UK to air quality modelling has been reviewed by experts in the field. She points out that the approach was considered by an expert committee called the "Air Quality Expert Group" which provides independent scientific advice to DEFRA. That review concluded that the UK's current approach to assessing air quality was fit for purpose. The technical report refers to a review by Hartley McMaster Ltd which found that the approaches adopted in building the model used by DEFRA "*compared relatively well against three independent sets of best practice guidelines*".

60. In the light of that evidence, I do not doubt that use of five yearly emission forecasts is entirely reasonable for routine air quality monitoring. What is notable by its absence, however, is any evidence supporting the suggestion that five yearly cycles are sufficient when a Member State is faced with the urgent task of bringing its nitrogen dioxide readings back within the limits imposed by the Directive.

61. In such a case, I reject the suggestion that the relatively modest cost of the modelling work can be a relevant factor weighing against the taking of that step. I reject too the suggestion that the delay of three months justifies not performing an additional projection. Proper planning of the work involved in preparing the AQP ought readily to have encompassed the time necessary to carry out the necessary projections.

62. There is evidence that it was the routine practice of using five yearly intervals which was the driving factor in setting the 2020 compliance date, rather than any independent focus on achieving the earliest possible date. Thus there is an email exchange between officials on 20 July 2015 which includes the following observations:

> "*We had to model a fixed point in time (2020) for practical reasons, but if we get too attached aiming for that date, I think there are significant risks around how we are seen to interpret shortest possible time.*"

That email prompted the response:

> "*I would also push back… on the assumption that 2020 has to be the date. The challenge for the courts is for us (government) to set out what the earliest date is. I think we are wiser to do that based on what we think is achievable, having taken into account all the risks, than to argue our case… but that's just me!*"

63. That last email was from a Ms Rosalind Wall Deputy Director of Environmental Strategy (DfT). In my judgement she was entirely correct. In my view, what Mr Dickens calls "*a matter of routine*" and a "*pragmatic approach*" was allowed to become the determinative factor in selecting the date by which the AQP would aim to achieve compliance. That was inconsistent with the need to achieve compliance in the shortest possible time.

64. What the department should have been doing, to meet the demands of the Directive, was not working backwards from what happened to be the next routine date for the modelling exercise. Instead, they should have been identifying what measures most quickly effected the necessary reductions in nitrogen dioxide emissions, calculating when they could first be introduced and then modelling the likely reduction that introducing such measures would have so as to assess what more needed to be done. That would have enabled them to assess whether compliance earlier than 2020 (and 2025 in London) was possible. In my judgement that was a flaw in the department's approach which tainted the whole exercise.

65. The evidence demonstrates clearly that Clean Air Zones, the measure identified in the plan as the primary means of reducing nitrogen dioxide emissions, could be introduced more quickly than 2020. Birmingham and Nottingham are aiming to introduce their clean air zones in 2018 and 2019 respectively. There is no evidence to suggest that other cities could not have been required to match those plans.

66. There is some evidence that 2020 had other attractions for Government. In a submission to the Secretary of State dated 14 May 2015 seeking ministers' views on the type of measures to include in the AQPs, Ms Natasha Smith said this: "*In developing potential measures for the plans we have used projected exceedances in 2020 as the basis for defining the worst areas. This is based on our understanding that 2020 is likely to be the earliest the EU will move to fines. Are you content with this approach on timing?*" It appears the minister was so content. That observation certainly suggests that a principal driving factor in selecting 2020 was not the obligation to remedy the problem as soon as possible but to remedy it in time to avoid EU infraction proceedings.

67. Similarly, it appears it was thought in Government that it would be helpful to spread the costs over five years. In an email dated 24 June 2015 officials recorded a conversation between ministers, during the course of which officials "*explained that there is flexibility over when the financial impacts might fall, but we should look to implement these actions over the next five years*". I have also seen a document setting out questions for DEFRA from HM Treasury dated 18 August 2015; one question asks why the money required "*needs to be spent over two years*?" The answer given is "*spend does not have to be over two years; nine years is more realistic given that London does not need to be in compliance until 2025*".

68. I am acutely conscious of the danger of reviewing individual documents, generated during the process of devising a plan of this scope and scale across Government, and ascribing to them too great an importance; civil servants and ministers have to be able to debate proposals freely and concluded views often evolve which are very different from individual expressions of opinion. But these comments, like those of Ms Natasha Smith and Ms Wall noted above, seem fairly to reflect both the process and the outcome.

69. Whatever the reason for selecting 2020 may have been, however, I am satisfied that the department erred in law in selecting so distant a date. The problem of reducing nitrogen dioxide levels was urgent and the plan to do so should have been aimed at

achieving compliance in the shortest possible time, regardless of administrative inconvenience or the costs of making the necessary investigations.

70. It was argued by Ms Smith on behalf of DEFRA that the current plans accommodated earlier achievement of the necessary reduction in emissions. She emphasised the number of occasions on which the AQP refers to achieving compliance "*by 2020*" and argued that the "*longstop dates of 2020 and 2025...reflected what was considered to be a realistic assessment of what was achievable...*" She said that the department was pressing ahead with all speed at introducing Clean Air Zones, that draft statutory instruments to introduce them had already been produced, and that what matters is not just the end date by which the reductions would have been achieved but whether the measures taken, viewed collectively, achieved the objective of making the reductions as soon as possible. As she put it in a short note on the issue "*the timeframe for taking action in the AQP is not driven by the output of the modelling*". She said that the Secretary of State judged that "*by 2020*" was the earliest point "*at which it could be assumed that all mandated CAZs would be in place*".

71. In my judgement, however, the failure to model concentrations of nitrogen dioxide at a date prior to 2020 had two adverse consequences. First, it deprived the Secretary of State of the evidence she needed in order to identify the measures required to ensure compliance by any earlier date. Had the Secretary of State built her plan around an ambition of introducing CAZs by 2018, and had she run the modelling exercise for 2018, she would have discovered the extent to which the CAZs were likely to be effective and whether other measures, whether in the identified cities or elsewhere, were required to achieve compliance by that date.

72. Second, nitrogen dioxide emissions are expected to decline over time, without any efforts from Government, as less polluting motor cars are introduced. That has the consequence that fixing a more distant target date for compliance with the Directive means that less substantial measures have to be adopted by Government to achieve the objective. But that also means that the Government is in breach of the obligation which I have ruled above is implicit in the Directive, namely that the state must choose a route to the target which reduces exposure as quickly as possible.

73. In other words the Secretary of State fell into error in fixing, for what was little more than administrative convenience, on a projected compliance date of 2020 (and 2025 for London) and thereby deprived herself of the opportunity to discover what was necessary to effect compliance by some earlier date and whether a faster route to lower emissions might be devised.

Choice of modelling method

74. Ms Lieven concentrated her fire, in her criticism of the modelling method adopted by DEFRA, on its use of COPERT as the means of calculating vehicle emissions. The COPERT calculation is based on the assumption that diesel cars subject to Euro 6 standards would emit 2.8 times the emission standard. That, argues Ms Lieven is a highly optimistic assumption.

75. The Claimant's skeleton argument explains the issue concisely:

> *"The main source of health damaging NO_2 in urban areas is diesel vehicles…For the last decade, government policy has been to encourage the purchase, and hence use of, diesel cars as they were traditionally considered to release fewer greenhouse gas emissions…than petrol cars.*
>
> *Transport emissions of air pollutants including NOx are regulated by standards established by EU legislation (so called 'Euro standards')…*
>
> *To date there have been six Euro standards…which have become increasingly strict over time…For cars, the latest Euro 6 standard is being introduced in several phases…*
>
> *To date, Euro standards have failed to have the hoped-for real world effect on reducing pollution from diesel vehicles. The failure of successive Euro standards to deliver expected emissions reductions has been well established for several years…"*

76. The claimants rely on the witness statement of Dr Claire Holman, the current chair of the Institute of Air Quality Management. That statement provides a powerful critique of the 2015 AQP. She explains how EU regulations have set "*progressively more stringent emission limits for NOx*" [2]. But she says that the "*imposition of Euro standards have failed to deliver reductions in NOx emissions from diesel vehicles in real-world driving conditions in the last 20 years.*" She says that the Euro 6 standard for cars "*became mandatory for new models from September 2014 and for all new vehicles for September 2015"*. However, she says, "*the emission limit is currently based purely on laboratory testing. Various real-world tests carried out on Euro 6 cars have shown that they exceed the emission limit by a very large margin*."

77. Ms Lieven's case is that a conformity factor of 2.8 substantially underestimates the rate of emissions, and that, if the correct conformity factor is adopted, the emissions are hugely higher. In June 2015 Ricardo carried out a sensitivity analysis which assumes that Euro 6 diesel cars emit 5 times the legal emissions limit. On that basis the number of zones with exceedances in 2020 would be 30 rather than the 8 estimated on the basis adopted in the plan.

78. Ms Smith argues that the Secretary of State relied on the best available evidence to develop the AQP. She said that COPERT emission factors "*are used by most member states across the EU*". These were, she said in oral submissions, "*industry recognised standards*". Paragraph 43 of the UK overview document says that COPERT is the "*recommended method of calculating vehicle emissions by the European Monitoring and Evaluation Program and the European Environment Agency Emissions Inventory Guidebook*".

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[2] When Nitrogen Oxide is emitted in air it rapidly transforms into Nitrogen Dioxide. "*NOx*" refers to both Nitrogen Dioxide and Nitrogen Oxide.

79. In her statement, Dr Holman suggests that this pessimistic scenario "*corresponds closely with recent on road measurements of emissions from Euro six cars.*" She says that measurements by one UK company, 'Emissions Analytics', of emissions from some 80 Euro 6 diesel cars have shown that the nitrogen dioxide emissions under real urban driving conditions are approximately 4.5 times the emission limit. She refers to a European Commission press release dated 20 October 2015 which says that the average discrepancy revealed in other studies is four times emission limits. As she puts it "*this suggests that the scenario used in the sensitivity analysis in the technical report is likely to be closer to reality than that used for the main analysis.*" None of that is seriously challenged.

80. Ricardo, the department's consultants, appear to have reached a similar view by the end of 2014. In an email to DEFRA officials dated 24 November 2014, Ricardo responded to the following observation: "*there was some concerns highlighted in discussions… As to whether fleet projections from DfT are "real" fleet projections or whether they are in fact somehow adjusted in order to make DFT's model work correctly and therefore not representative of the real world.*" Ricardo replied suggesting that there was "*some emerging real-world testing evidence which shows large conformity factors for Euro 6*".

81. The AQP's technical report acknowledges the significance of the potential deficiencies of the COPERT assumptions. At paragraphs 196-197 the report says:

> *"Whilst emerging data indicates that the real world performance of vehicles is growing closer to European test cycle results, there is still some disparity. The road transport emissions used to inform our analysis are based on the latest data on vehicle NOx emissions (COPERT 4v11). These COPERT emission factors do include an assessment of non-conformity to account for disparity, however, recent evidence from Portable Emissions Measurement System (PEMS) data based on a limited number of Euro 6 diesel passenger cars has indicated that the current COPERT data may underestimate emissions for some vehicles.*
>
> *In order to assess how this disparity may affect our projections, an alternative scenario has been modelled, based assuming emissions to be higher than currently predicted."*

82. That calculation assumed that real-world emissions were five times the estimated test emissions. The results of that modelling, according to the technical report, demonstrate that:

> *"if emissions from Euro 6 vehicles were higher in reality than expected in modelling, it could result in up to 22 additional zones being in exceedance of the NO2 limit values in 2020. This demonstrates the significant impact that performance of emissions standards can have on efforts to reduce NO2 concentrations."*

83. It is apparent that DEFRA recognised that they were adopting an optimistic forecast as the foundation for their modelling. Later in the submission to ministers of 14 May 2015, referred to at paragraph 66 above, Ms Natasha Smith said "*Based on our most optimistic projections we would need to implement LEZs in 6 major cities to deliver compliance outside London by 2020.*" It appears ministers were content to adopt those most optimistic projections. In an email he sent on 8 June 2015, Mr Dickens said:

> *"As we are all acutely aware there are major uncertainties around modelling. We have agreed a central set of assumptions from modelling which results in the need for seven low emission zones. However the vast majority of the uncertainty lies on one side of this suggesting more action will be necessary."*

84. The emerging evidence about emissions from Euro 6 vehicles reached as far as the Cabinet. A Cabinet briefing document on air quality, apparently dated October 2015 includes the following:

> *"emerging findings from real-world testing by independent experts, Emission Analytics…suggest emissions for Euro 6 are significantly higher than previously thought. With a conformity factor of 4 early modelling estimates that 23 zones would be non-compliant in 2020."*

85. Against that background, the observation in the technical report supporting the AQP set out above, is remarkable. It means that the Government is acknowledging that its plan is built around a forecast based on figures which "emerging data" is undermining and that if higher, more realistic, assumptions for emissions are made the number of zones which will not meet the limit value in 2020 increases substantially. In my judgement, it is no answer to that point to say that COPERT is widely used in Europe; the fact that others are ignoring the obvious weaknesses of the data is of no assistance to the department.

86. It seems to me plain that by the time the plan was introduced the assumptions underlying the Secretary of State's assessment of the extent of likely future non-compliance had already been shown to be markedly optimistic. In my judgement, the AQP did not identify measures which would ensure that the exceedance period would be kept as short as possible; instead it identified measures which, if very optimistic forecasts happened to be proved right and emerging data happened to be wrong, might achieve compliance. To adopt a plan based on such assumptions was to breach both the Directive and the Regulations.

Other measures

87. My conclusions on the proper construction of Article 23, on the legitimacy of the adoption of 2020 as the target date and on the adequacy of DEFRA's modelling assumptions, are sufficient to dispose of this application. This application must succeed and the AQP must be quashed.

88. In deference to the quality of the arguments I heard, however, and in case this matter should go further, I will go on briefly to record my conclusions on the other principal matters raised.

89. First, it was argued by Ms Lieven that the defendant was in breach of the Directive by not adopting a sufficient number of CAZs. It will be apparent from what I have said already that it seems to me likely that fixing on a more proximate compliance target date and adopting a less optimistic assumption for likely emissions might well mean that CAZs are required in more cities, but ultimately that will depend on the outcome of further modelling.

90. Second, the need to consider the outcome of fresh modelling is equally applicable in respect of the need for CAZs of greater scope. However, as I have indicated above, in my judgement Ms Smith was right in her submission that the Government did not need to do more than was necessary to meet the compliance targets; in that sense the response had to be proportionate. That may well mean that the scope of the zones both inside and outside London does not need to change. Again however, that is not a matter for me, but a question for the defendant after considering further modelling.

91. Third, Ms Lieven identified further possible steps, such as fiscal measures to disincentivise the use of diesel cars and vans, locally targeted scrappage schemes, targeted vehicle retrofitting schemes and measures specifically targeting diesel cars, which she suggested ought to be adopted so as either to make more certain the achievement of the objectives in the Directive or advance the date of compliance.

92. I fail to see how any of them could achieve either of those objectives if low emission zones of sufficient scope are established in all cities where adequate modelling predicts exceedances. CAZs come into effect promptly on being established. LEZs, CAZs and ULEZs are designed to ensure emissions below the required levels. As noted above, charges are to be fixed for such zones at a level which will ensure compliance with the limits in the Directive.

93. Fourth, Ms Lieven criticises the role of HM Treasury. In my view, that criticism is misplaced. It seems to be wholly unsurprising that in its dealings with DEFRA the Treasury should have been seeking to manage and limit the extent of public expenditure. That is what the Treasury is there for. Unless it were the case that the Government permitted the Treasury to refuse to fund measures necessary to ensure compliance, or the Treasury took over DEFRA's management of the response to the Directive (and I have seen no evidence of either), then I see no grounds for criticism. Whilst I recognise that negotiations with HM Treasury must have been challenging, DEFRA was the Department responsible for ensuring compliance with the Directive. For understandable reasons HM Treasury did not wish more public funds spent than was necessary to achieve compliance. But doing no more than was necessary was sufficient.

94. Finally, Ms Lieven and particularly Mr Tromans, criticise the provision made in the AQP for London. The observations made above about the flaws in the plan nationally apply to London as they do to other cities. Whether further, London–specific measures are necessary will depend on the further analysis and further modelling

which I have found to be required to ensure compliance with the Directive and the Regulations.

Conclusions

95. For the reasons set out above I conclude:

i) that the proper construction of Article 23 means that the Secretary of State must aim to achieve compliance by the soonest date possible, that she must choose a route to that objective which reduces exposure as quickly as possible, and that she must take steps which mean meeting the value limits is not just possible, but likely.

ii) that the Secretary of State fell into error in fixing on a projected compliance date of 2020 (and 2025 for London);

iii) that the Secretary of State fell into error by adopting too optimistic a model for future emissions; and

iv) that it would be appropriate to make a declaration that the 2015 AQP fails to comply with Article 23(1) of the Directive and Regulation 26(2) of the Air Quality Standards Regulations 2010, and an order quashing the plan.

96. I will hear counsel further on the precise details of the relief that is appropriate.