Neutral Citation Number: [2023] EWCA Civ 762

Case No: CA-2022-001665

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
MRS JUSTICE LANG
[2022] EWHC 2044 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 June 2023

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS
SIR KEITH LINDBLOM
(Senior President of Tribunals)
and
LADY JUSTICE ANDREWS

- -

Between:

PERSIMMON HOMES (THAMES VALLEY) LIMITED	**Appellant**
- and -	
WORTHING BOROUGH COUNCIL	**Respondent**
- and -	
SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Interested Party**

- -
- -

Paul Cairnes KC and James Corbet Burcher (instructed by **Shoosmiths LLP**) for the **Appellant**
Isabella Tafur and Daisy Noble (instructed by **Sharpe Pritchard LLP**) for the **Respondent**
The **Interested Party did not attend and was not represented**

Hearing date: 17 May 2023

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Approved Judgment

This judgment was handed down remotely at 4.10pm on 30 June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Keith Lindblom, Senior President of Tribunals:

Introduction

1. The main question in this case is whether an inspector who granted planning permission for a large development of housing and other uses in countryside within the setting of a National Park made errors of law when considering relevant local and national planning policy. The court below held that he did, in two ways: first, in failing to deal with the proposal's conflict with two draft strategic policies in an emerging local plan, and secondly, in misapplying the Government's policy for development that would affect the setting of a National Park.

2. With permission granted by Warby L.J., the appellant, Persimmon Homes (Thames Valley) Ltd. ("Persimmon"), appeals against the order of Lang J. dated 1 August 2022, quashing a decision of an inspector appointed by the second respondent, the Secretary of State for Levelling Up, Housing and Communities. The inspector allowed Persimmon's appeal against the refusal by the first respondent, Worthing Borough Council ("the council"), of outline planning permission for a mixed-use development including 475 dwellings on land to the north-west of the railway station in Goring-by-Sea. The Secretary of State defended the decision in the court below, but has taken no part in the appeal to this court.

3. The site is about 20 hectares of agricultural land, part of Chatsmore Farm, outside the boundary of the built-up area as defined in the Worthing Core Strategy 2011, in an undeveloped swathe of land between the settlements of Goring-on-Sea to the east and Ferring – in the district of Arun – to the west, and within the setting of the National Park. The railway station, which is within the built-up area, lies immediately to the south-east. The South Downs National Park extends down to the A259 Littlehampton Road, which runs east-west on the northern side of the site. Persimmon's application for planning permission was submitted to the council in August 2020. The council refused planning permission on 11 March 2021. Persimmon appealed under section 78 of the Town and Country Planning Act 1990. The inspector held an inquiry into that appeal over eight days in January 2022. His decision letter is dated 25 February 2022. The challenge to it was brought by an application under section 288 of the 1990 Act.

The issues in the appeal

4. There were originally four grounds of challenge. The judge rejected grounds 1 and 3 but upheld grounds 2 and 4. Ground 2 was that the inspector failed to take into account the proposal's conflict with two emerging policies in the Submission Draft Worthing Local Plan, Policy SS1 and Policy SS4, or to provide adequate reasons for his assessment of it against those two policies. Ground 4 was that he had erred in his consideration of the likely effect of the development on the National Park, in particular the acknowledged harm to its setting, failing to perform his duty under section 11A of the National Parks and Access to Countryside Act 1949, to apply the policy in paragraph 176 of the National Planning Policy Framework ("the NPPF"), and to give adequate reasons for his conclusions on these matters. Permission to appeal was granted against the judge's decision on each of those two grounds. Persimmon must succeed on both issues if the appeal is to be allowed.

The council's refusal of planning permission

5. The council refused planning permission for six reasons. Only the first and second reasons are relevant to the issues we have to decide. They stated:

> "01. The proposed development is outside of the built-up area as defined in the Worthing Core Strategy and the emerging Submission Draft Worthing Local Plan and is not allocated for residential development. The proposal is therefore contrary to policy 13 of the Worthing Core Strategy and emerging policies SS4, SS5 and SS6 of the Submission Draft Worthing Local Plan, resulting in the coalescence of settlements and the loss of an important area of green space that contributes to local amenity, sense of place and wildlife. Furthermore, it is considered that the adverse impacts of the development would demonstrably outweigh the benefits as substantial adverse landscape and visual effects would arise from the development affecting the local area and the wider landscape, including the landscape setting to the National Park (therefore adversely affecting its statutory purpose to conserve and enhance its natural beauty and cultural heritage), Highdown Hill scheduled Monument and the Conservation Area.
>
> 02. The application is considered to be premature as the development proposed is so substantial, and its cumulative effect would be so significant, that to grant permission would undermine the plan-making process in particular its overall spatial strategy about the location of new development, its landscape evidence and proposed green space designations that are central to the emerging Submission Draft Worthing Local Plan. The proposal therefore fails to comply with paragraph 49 of [the NPPF]."

Policy 13 of the Worthing Core Strategy

6. The Worthing Core Strategy was adopted in 2011. Together with the saved policies of the previous local plan, it was, at the time of the challenged decision, the statutory development plan. It identified four areas of open countryside as "long established breaks in development between settlements". The site was in one of those areas. It had been a designated gap in the West Sussex Structure Plan (2004) and in the previous local plan.

7. Policy 13 of the core strategy stated, under the heading "The Natural Environment and Landscape Character":

> "Worthing's development strategy is that new development needs can be met within the existing built up area boundary and, with the exception of the West Durrington strategic allocation, and will be delivered on previously developed sites, therefore:
>
> - Residential development outside of the existing built up area boundary will only be considered as part of a borough-wide housing land review if there is a proven under-delivery of housing within the Core Strategy period.

- Other proposals that support countryside based uses, such as agriculture and informal recreation may be considered if they are deemed essential and/or can contribute to the delivery of the wider strategic objectives. If development in these areas is proposed it must take into account and mitigate against any adverse effects on visual and landscape sensitivity.

…".

The draft policies in the emerging local plan

8. The draft Worthing Local Plan was submitted for examination in June 2021. Examination hearings were held in November 2021. In December 2021 the local plan inspector sent his initial advice letter to the council, indicating the steps required to make the draft local plan sound and legally compliant. The council's schedule of main modifications, approved by him, was published about two months after the decision on Persimmon's appeal, in April 2022. Consultation followed, in April and May 2022. The local plan inspector's report was published in October 2022. He rejected Persimmon's contention that the appeal site ought to be allocated. The local plan was eventually adopted by the council in March 2023. It contains 12 major allocations for housing development, for about 1,750 dwellings.

9. Draft Policy SS1 in the emerging local plan set out the strategy for new development in the borough in the plan period. At the time of the challenged decision it stated:

"SS1 SPATIAL STRATEGY

Up to 2036 delivery of new development in Worthing will be managed as follows:

The Local Plan will:

a) seek to provide for the needs of local communities and balance the impact of growth through the protection and enhancement of local services and (where appropriate) the safeguarding of employment sites, leisure uses, community facilities, valued green/open spaces and natural resources;

b) help to deliver wider regeneration objectives, particularly in the town centre and seafront, through the allocation of key urban sites;

c) seek to increase the rate of housing delivery from small sites.

d) The strategy for different parts of the Borough is as follows:

i) Land within the Built Up Area Boundary – development will be permitted subject to compliance with other policies in the Local Plan. Development should make efficient use of previously developed land but the density of development should be appropriate for its proposed use and also relate well to the surrounding uses and the character of the area. Within the existing urban fabric nine key regeneration sites are allocated for development.

ii) Edge Of Town Sites – six edge of town sites are allocated for development.

iii) Open Spaces/Countryside/Gaps – valued open space and landscapes outside of the Built Up Area Boundary are protected. This includes important gaps between settlements, the undeveloped coastline and the features which provide connectivity between these areas."

10. Draft Policy SS4 related to land outside the boundary of the built-up area. At the time of the challenged decision it stated:

"SS4 COUNTRYSIDE AND UNDEVELOPED COAST

a) Outside of the Built Up Area Boundary land excluding sites designated as Local Green Spaces under SS6 will be defined as 'countryside and undeveloped coast'.

b) Development in the countryside will be permitted, where a countryside location is essential to the proposed use. Applications for the development of entry-level exception sites, suitable for first time buyers will be supported where these:

– comprise of entry-level homes that offer one or more types of affordable housing;

– be adjacent to existing settlements and proportionate in size to them; and

– comply with any local design policies and standards.

c) Development to support recreation uses on the coast will normally be permitted subject to:

i. built facilities being located within the adjacent Built Up Area Boundary;

ii. the need to maintain and improve sea defences.

d) Any development in the countryside and undeveloped coast should not result in a level of activity that has an adverse impact on the character or biodiversity of the area.

e) Improvements to green infrastructure, including (but not restricted to) enhanced pedestrian, cycle, equestrian access, and better access for those with mobility difficulties will be supported.

f) The setting of the South Downs National Park and the Designated International Dark Skies Reserve must be respected and opportunities to improve access to the National Park will be sought through joint working with other

> organisations including the Park Authority, West Sussex County Council, Highways England and landowners."

11. Draft Policy SS5 designated four Green Gaps, including Chatsmore Farm and the Goring-Ferring Gap. At the time of the challenged decision it stated:

> "SS5 LOCAL GREEN GAPS
>
> The four areas listed below are designated as Local Green Gaps between the settlements of Worthing & Ferring and Worthing & Sompting/Lancing, and will be protected in order to retain the separate identities and character of these settlements.
>
> a) Goring-Ferring Gap;
>
> b) Chatsmore Farm;
>
> c) Brooklands Recreation Area and abutting allotments; and
>
> d) Land east of proposed development (site A15) at Upper Brighton Road.
>
> Outside of those areas designated as Local Green Space, all applications for development (including entry level exception sites) within Local Green Gaps must demonstrate that individually or cumulatively:
>
> i) it would not undermine the physical and/or visual separation of settlements;
>
> ii) it would not compromise the integrity of the gap;
>
> iii) it conserves and enhances the benefits and services derived from the area's Natural Capital; and
>
> iv) it conserves and enhances the area as part of a cohesive green infrastructure network."

12. Emerging Policy SS6 had designated Local Green Spaces, including Chatsmore Farm. In view of the local plan inspector's advice in his letter of 9 December 2021 that this policy did not comply with the NPPF, the council did not rely on it at the inquiry into the section 78 appeal.

Paragraphs 48 and 49 of the NPPF

13. Under the heading "Determining applications", paragraphs 48 and 49 of the NPPF state:

> "48. Local planning authorities may give weight to relevant policies in emerging plans according to:

a) the stage of preparation of the emerging plan (the more advanced its preparation, the greater the weight that may be given);

b) the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and

c) the degree of consistency of the relevant policies in the emerging plan to this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given).

49. However, in the context of the Framework – and in particular the presumption in favour of sustainable development – arguments that an application is premature are unlikely to justify a refusal of planning permission other than in the limited circumstances where both:

a) 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 plan; and

b) the emerging plan is at an advanced stage but is not yet formally part of the development plan for the area."

Section 11A of the 1949 Act and paragraph 176 of the NPPF

14. Section 11A(2) of the 1949 Act provides:

> "(2) In exercising or performing any functions in relation to, or so as to affect, land in a National Park, any relevant authority shall have regard to the purposes specified in subsection (1) of section five of this Act and, if it appears that there is a conflict between those purposes, shall attach greater weight to the purpose of conserving and enhancing the natural beauty, wildlife and cultural heritage of the area comprised in the National Park."

The "purposes specified" in section 5(1) are "(a) … conserving and enhancing the natural beauty, wildlife and cultural heritage of the areas specified in the next following subsection" and "(b) … promoting opportunities for the understanding and enjoyment of the special qualities of those areas by the public". The "areas specified" are National Parks (subsection (3)).

15. The Government's Planning Practice Guidance, as published in July 2019, states in paragraph ID 8-039-20190721 that the duty in section 11A "is relevant in considering development proposals that are situated outside National Parks … but which might have an impact on their setting or protection".

16. In a section of the NPPF headed "Conserving and enhancing the natural environment", paragraph 176 sets out government policy for areas with the highest status of protection, which include National Parks. It states:

> "176. Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of development within all these designated areas should be limited, while development within their setting should be sensitively located and designed to avoid or minimise adverse impacts on the designated areas."

The inspector's decision letter

17. In his decision letter the inspector identified three main issues. Two are relevant in these proceedings: first, "whether the appeal site offers an acceptable location for development having regard to local and national planning policy, the need for housing, the Council's emerging local plan and the effect of the proposed development on local green space"; and second, "the effect of the proposed development on the landscape, including the setting of the South Downs National Park (SDNP)" (paragraph 8).

18. In a section headed "Location and Local Green Space", when considering "Existing development plan policy", the inspector concentrated on Policy 13 of the core strategy. It was, he said, "common ground that the appeal site falls outside the BUAB, is not a previously developed site and would conflict with WCS Policy 13". Persimmon had argued that Policy 13 was "out of date and should be afforded limited weight" (paragraph 11). But the inspector disagreed. In his view this policy "remains one of the cornerstones of the adopted development plan and … continues to serve a useful planning purpose". And this was "despite it being intended to meet a significantly lower housing requirement, having been prepared under a different policy background and being primarily protective in nature" (paragraph 15).

19. On "Housing need" the inspector said that "while the parties disagree on the extent of the shortfall, the Council accepts that it is unable to demonstrate a 5-year housing land supply and will continue to be unable to do so post adoption of the emerging Worthing Local Plan (eLP)" (paragraph 20).

20. Under the heading "The emerging local plan and prematurity", he noted that the site was "not designated as a local green space, local or strategic gap and does not currently benefit from any formal protection in planning terms", and that there was no "policy support for its strategic retention in planning terms as part of the current development plan" (paragraph 22). He then turned to the emerging local plan (in paragraphs 23 to 27):

> "23. However, emerging Policy SS5 of the eLP identifies the appeal site as part of one of four Local Green Gaps. It restricts development within these areas in order to retain the separate identities and character of Goring-by-Sea and

> neighbouring settlements. Likewise, emerging Policy SS6 seeks to designate Chatsmore Farm, including the appeal site, as Local Green Space (LGS).
>
> 24. The Framework advises that weight may be given to relevant policies in emerging plans according to their stage of preparation, the extent to which there are unresolved objections and their degree of consistency to the Framework.
>
> 25. I note that the eLP is currently at a relatively advanced stage – with hearings having been held and the eLP inspector having issued an initial advice letter. However, in his initial advice, the eLP inspector has made a number of comments on the relationship between emerging Policies SS4, SS5 and SS6, their internal consistency and in some cases their compliance with the Framework and the planning practice guidance.
>
> 26. While I agree that the site may be demonstrably special to the local community and of particular local significance, the Council accepts that, in view of the conclusions of the eLP inspector, Chatsmore Farm constitutes an extensive tract of land and is unsuitable, as currently proposed, for LGS designation under emerging Policy SS6. I concur with the Council's conclusions on this and as such, afford that policy no weight in the determination of this appeal.
>
> 27. Turning then to emerging Policy SS5, I acknowledge there would be some potential conflict with that emerging policy in so far as the proposal would develop a significant portion of the proposed gap and reduce the visual separation of the settlements. However, a number of main modifications are also proposed to that emerging policy to ensure its effectiveness and provide internal consistency with policies SS4 and SS6. While I accept that these do not affect the overall policy aims, they are nevertheless subject to further consultation and it is, at present, unclear what form the final policy will take. This, in my judgment, considerably limits the weight which it should be afforded."

21. As for the council's case on "prematurity", he said this (in paragraphs 28 to 30):

> "28. Furthermore, while I note the Council's arguments in respect of prematurity and its concerns with the effect that the proposal would have on the strategic balance it is seeking to achieve in the eLP, the Framework makes clear that arguments that an application is premature are unlikely to justify a refusal of planning permission other than in limited circumstances. This is particularly the case where the presumption in favour of sustainable development applies.
>
> 29. In the present case, while I acknowledge the eLP is at a reasonably advanced stage, it is nevertheless still some way off from adoption. Furthermore, even though the proposed scheme would develop one of the 4 remaining gaps which emerging Policy SS5 of the eLP seeks to protect, I do not consider its effect would be is [sic] so substantial, or its cumulative effect so significant, that granting permission would undermine a fundamental aspect of the eLP's strategic balance as a whole.

> 30. Overall, I am not persuaded by the Council's arguments on prematurity and do not consider the eLP is at a sufficiently advanced stage to justify a refusal of planning permission on those grounds. Likewise, I do not consider the emerging policy SS5, in so far as it relates to the appeal site, is so central to the eLP that granting permission would have a materially undermining effect, particular [sic] when viewed in light of the exceptional need for housing in the borough.
>
> 31. Indeed, the fact remains that, at present, the appeal site does not form part of a designated strategic gap for planning purposes, nor does it benefit from any other specific form of protection in planning policy terms over and above that set out in Policy 13 of the WCS."

22. In his "Summary on location and local green space" he concluded (in paragraphs 32 to 34):

> "32. I have found above that while the site may be demonstrably special to the local community and of particular local significance, I concur with the views of the eLP inspector and the Council that the site does not meet the criteria for designation as LGS. Likewise, I have found that the proposal would not materially undermine the strategic balance that the Council is seeking to achieve as part of the eLP.
>
> 33. However, I have also found the proposal would be in conflict with WCS Policy 13 due to its location on a greenfield site outside the BUAB. I consider this policy forms one of the cornerstones of the adopted development plan and, as such, I consider it should be afforded full weight.
>
> 34. Nevertheless, it is clear that the identified conflict with this policy needs to be considered in light of the area's exceptionally high levels of unmet housing need - which I accept will have significant, real-life consequences for residents of the borough. I consider these matters further in the planning balance below."

23. In a section headed "Landscape", the inspector came to the "Setting of the [National Park] and views from within it", and said this (in paragraphs 44 to 49):

> "44. As noted above, the appeal site is visible from within the SDNP, with clear views of the appeal site possible from the Scheduled Monument at Highdown Hill as well as from parts of Highdown Rise and the car park at Highdown Gardens. It forms part of the middle distance, framed to either side by the settlements of Goring-by-Sea and Ferring, with longer range, extensive views towards the sea.
>
> 45. The SDNP Authority has not raised any specific concerns in relation to views from within the SDNP or with the impact of the proposed development on the setting of the National Park. Nevertheless, the Council consider that the overall effect of the proposal on views from Highdown Hill would be substantial adverse.
>
> 46. I do not agree. While I note that views are breath-taking from this vantage point, I observed that the appeal site itself is not prominent in those views and

> the focus is clearly on the sea. This accords with the Viewpoint Characterisation and Analysis Study (2015) which identifies Highdown Hill as a good vantage point from which to view the surrounding landscape and recognises that, notwithstanding the densely populated areas of Worthing and Ferring, extensive sea views are the main focus. Even though the proposed development would be visible in the mid-ground view, it would nevertheless be seen in the context of existing development – much of which already extends further north and in closer proximity to the SDNP than would the proposed development.
>
> 47. I accept that the addition of built form on the appeal site would result in a clearly perceptible and noticeable change to the existing view. However, these views already include intrusive development which affect [sic] the tranquillity from within the SDNP. The appeal site would be seen within this context. Extensive views towards the sea and the sense of tranquillity within this part of the SDNP would not materially alter and while I accept there would be change to the view, I concur with the appellant that the level of harm would be moderate adverse and not significant.
>
> 48. Turning then to the views from Highdown Rise and the public car park at Highdown Gardens, from these locations within the SDNP I acknowledge the proposed development would, from certain viewpoints, be more noticeable. However, as with views from Highdown Hill, it would be seen within the context of the existing development south of the A259 and would appear neither overly prominent, visually intrusive or materially affect views towards the sea.
>
> 49. Paragraph 176 of the Framework does not seek to restrict development within the setting of a national park but instead advises that it should be sensitively located and designed to avoid or minimise adverse impacts. In view of its location towards the southern end of the site, and the limited impact on views from within the SDNP, I consider that would be the case with the development proposed and do not therefore consider that the setting of the SDNP or views from within it would be materially affected."

24. Under the heading "Localised impacts" he considered the likely effects on local views (paragraphs 50 to 56). He agreed with Persimmon's assessment of "moderate adverse" effects on views from many of the viewpoints assessed, including Goring Street, but concluded that "the impact on receptors travelling along Littlehampton Road, users of the public footpaths 2121 and 2121-1 … and those using the nearby railway bridge would be substantial adverse" (paragraph 56).

25. His "Overall conclusions on landscape" were these (in paragraph 57):

> "57. Drawing the above threads together, I do not consider the proposed development would materially affect the setting of the SDNP, the wider landscape or undermine the existing physical or visual separation between the settlements of Goring-by-Sea and Ferring. However, I acknowledge the appeal site is valued by the local community and that its loss would result in some harm in this respect. I have also found that the proposal would adversely impact on a number of visual receptors which would result in some further harm. I consider these further as part of the overall planning balance below."

26. In a section headed "Overall Planning Balance" he stated these conclusions on the proposal's relationship to development plan and emerging local plan policy (in paragraphs 82 and 83):

> "82. I have found above that the proposed development would be in conflict with WCS Policy 13. As I have made clear, I consider this policy remains one of the cornerstones of the adopted development plan and should be afforded full weight. As such, I consider the proposal would be in conflict with the development plan as a whole, which I consider should be afforded significant weight.
>
> 83. I have also found that there would be some potential conflict with emerging Policy SS5. However, as I have noted above, this emerging policy is subject to a number of modifications, further consultation and it is unclear what form the final policy will take. As such, in accordance with paragraph 48 of the Framework, I afford it only limited weight."

27. His conclusion on the likely effect of the proposed development on "visual receptors" was this (in paragraph 84):

> "84. The proposal … would have an adverse impact on a number of visual receptors. However, in view of the limited nature of these impacts I afford them only moderate weight. It would also result in the loss of a site that is greatly valued by the local community. While I acknowledge it is not a valued landscape in planning terms, in view of the considerable amount of local opposition, I afford this significant weight."

28. He accepted that "Worthing has an exceptional unmet need for housing and that position is unlikely to change in the medium term", that "the appeal site is well located to the existing built-up area and would make a meaningful contribution to meeting this unmet need", and "that this should be afforded very significant weight at the uppermost end of the spectrum" (paragraph 87). He also accepted that "the appeal scheme would make a significant contribution to meeting the area's substantial unmet need for affordable housing", and that the 190 affordable dwellings proposed "would make a significant contribution to meeting the unmet affordable housing need", which he gave "very significant weight" (paragraph 88).

29. Finally on the planning balance, he concluded (in paragraphs 91 and 92):

> "91. On balance, while I consider the proposal would result in a number of adverse impacts, I do not consider they would significantly and demonstrably outweigh the clear and substantial benefits that would arise from the proposed development when assessed against the policies of the Framework taken as a whole.
>
> 92. Consequently, notwithstanding the overall conflict with the development plan identified above, I consider there are material considerations which indicate that a departure is justified in the present circumstances."

Did the inspector err in his treatment of the draft policies in the emerging local plan?

30. The judge concluded that the inspector should have taken a similar approach to draft Policy SS1 and draft Policy SS4 as he did to draft Policy SS5, "by assessing the proposal against the emerging development plan, and weighing the conflict in the overall planning balance" (paragraph 94 of the judgment), that "the omission of any proper consideration of Policies SS1 and SS4 was an error on the part of the Inspector", and "[a]lternatively, … the Inspector failed to provide any, or any adequate, reasons in regard to the assessment of the development against [those two policies], and the weight that he attributed to any conflict" (paragraph 95). These were "the product of a new balancing exercise, carried out in the context of the [NPPF], which balanced current housing needs and environmental considerations in the Borough, and had been the subject of examination by another Inspector". It was therefore "irrational not to treat them as material considerations, which ought to be considered in reaching a decision" (paragraph 105).

31. Mr Paul Cairnes K.C., for Persimmon, criticised those conclusions. The inspector had not failed to take account of the two draft policies. The relevant parts of draft Policy SS4 incorporated the strategy in draft Policy SS1, and effectively repeated the existing strategy in Policy 13 of the core strategy. The inspector was obviously well aware of those two draft policies. He mentioned draft Policy SS4 in paragraphs 25 and 27 of his decision letter. And when he referred to Policy 13 and the proposal's conflict with that policy, he was clearly referring to its conflict with draft Policy SS1 as well. His reasons for concluding as he did in paragraphs 32 to 34 are sufficient and clear.

32. For the council, Ms Isabella Tafur submitted that the judge's analysis here was correct.

33. The principles on which the court will act in a challenge to an inspector's decision are well established (see, for example, the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26, and the leading judgment in this court in *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at paragraphs 6 and 7). Caution is essential. Only if the decision is plainly bad in law will the court intervene. As with planning officers' reports to committee, it will read an inspector's decision letter in a straightforward way, with common sense and a tolerance of errors that are not material (see the leading judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraphs 41 and 42). It will not second-guess the inspector's exercise of planning judgment. Nor will it look for perfection in his reasons (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] 1 W.L.R. 1953, at paragraph 36, the speech of Lord Bridge of Harwich in *Save Britain's Heritage v Number 1 Poultry Ltd.* [1991] 1 W.L.R. 153, and the leading judgment in this court in *East Quayside 12 LLP v The Council of the City of Newcastle Upon Tyne* [2023] EWCA Civ 359, at paragraphs 36, 37, 51 and 52).

34. With those principles in mind, I do not think we can conclude that the inspector fell into error in his handling of the draft policies in the emerging local plan, including Policy SS1 and Policy SS4.

35. It is clear that the council's case against Persimmon's section 78 appeal depended, in part, on the contention that the proposal was in conflict with the spatial strategy of the

emerging local plan as well as with the strategy in the development plan itself. The council saw that conflict with the emerging local plan as being, in itself, a substantial factor bearing on the planning merits of the proposed development. This was apparent in the first reason for refusal in its decision notice, in its statement of case, in its evidence at the inquiry and in its closing submissions.

36. Under section 38(6) of the Planning and Compulsory Purchase Act 2004 decision-makers must determine planning applications and appeals in accordance with the development plan unless material considerations indicate otherwise. As the site of the proposed development lay outside the extant built-up area boundary and the proposal was therefore in conflict with Policy 13 of the core strategy, the statutory presumption here was a decision to refuse planning permission. In the council's view, the proposal's conflict with the emerging local plan was a material consideration reinforcing that presumption. But as Ms Tafur submitted, the significance of the proposal's conflict with the emerging plan as a material consideration was that the draft strategic policies represented a fresh statutory process of development plan-making, and the council had now planned in the light of the present level of housing need, which far exceeded the capacity to meet it.

37. However, the proposal's conflict with the strategy embodied in draft Policy SS1 and draft Policy SS4 of the emerging local plan was, in substance, the same allegation as its conflict with Policy 13 of the adopted core strategy. Under both the extant development plan and the corresponding provisions of its emerging successor, the site was protected because it was undeveloped land in the countryside, outside the built-up area boundary. The protection was continuous and equivalent. One can therefore readily infer from the inspector's conclusions on both the adopted and the draft strategic policies that he saw the strategy in draft Policy SS1 and draft Policy SS4 as being, at least for development proposed outside the built-up area boundary, a replication of the current strategy in Policy 13. On this, they were one and the same strategy. In giving Policy 13 "full weight", the inspector was, in effect, recognising that continuity. To give it even greater weight because it was now duplicated in the emerging local plan was, in his view, unnecessary and unjustified.

38. This understanding of the inspector's assessment is reflected in his observation in paragraph 31 of the decision letter that "the appeal site does not form any part of a designated strategic gap for planning purposes, nor does it benefit from any other specific form of protection in planning policy terms over and above that set out in Policy 13 of the WCS", and also in his conclusions, in paragraphs 32 and 33, that "the proposal would not materially undermine the strategic balance that the Council is seeking to achieve as part of the eLP", but also that it "would be in conflict with WCS Policy 13 due to its location on a greenfield site outside the BUAB", and that Policy 13 "forms one of the cornerstones of the adopted development plan and … should be afforded full weight". On a fair reading of those conclusions and the relevant parts of the decision letter taken as a whole, I think the inspector did confront the council's contention that the proposal was contrary not only to the spatial strategy in the adopted core strategy but also to the corresponding strategic policies of the emerging local plan, including both Policy SS1 and Policy SS4 as well as Policy SS5.

39. I do not see how it can be said that he ignored any part of the strategy set out in these draft policies. There is nothing in the decision letter to suggest he did. It is true that he did not refer expressly to Policy SS1. But that omission does not in itself show any legal

error. Policy SS4 was mentioned in the council's first reason for refusal, but Policy SS1 was not. That is not surprising. Policy SS1 had to be read together with the other strategic policies of the emerging local plan, including Policy SS4 and Policy SS5. The broad strategy described in Policy SS1 was elaborated and amplified in those other policies. And the council's reliance on Policy SS1 was necessarily implicit in its reference to Policy SS4. These policies went together. They expressed a single and coherent strategy. And that was how the inspector regarded them. In my view, on a fair reading of his decision letter, he did not ignore Policy SS1.

40. It is understandable that the inspector should concentrate mainly on the proposal's relationship to draft Policy SS5. That policy had a particular significance to Persimmon's proposal, because it proposed, as a new provision, the formal designation of an area including the appeal site as a gap between settlements. It therefore called for an assessment of a different kind from the broad strategic objectives in Policy SS1 and Policy SS4, which maintained the strategy in Policy 13 of the core strategy.

41. Nor did the inspector fail to consider the question of weight. Paragraphs 25 and 27 of the decision letter appear in a passage where he was clearly thinking of government policy in paragraph 48 of the NPPF on the factors governing the weight to be given to "relevant policies in emerging plans". In paragraph 24 he referred to those factors: the stage of preparation of the emerging plan in question, the extent to which there are unresolved objections and the degree of consistency with the NPPF.

42. He considered "[t]he emerging local plan and prematurity" together as one sub-issue under a single sub-heading. In my view it made good sense to do so. I recognise that the council's allegation of conflict with the emerging local plan was not the same point as its contention that the proposal was also objectionable on the grounds of prematurity, which was the subject of a separate reason for refusal in the decision notice. The allegation of prematurity went to the integrity of the council's plan-making itself. The argument was that the development would be so much in conflict with the strategy of the emerging plan that to grant planning permission for it would undermine that strategy and prejudge the local plan process. The distinction between the question of the weight to be given to conflict with policy in an emerging plan and the question of prematurity is reflected in paragraphs 48 and 49 of the NPPF. The connection, however, lies in the relationship of the proposal to the emerging policies themselves. And that consideration was at the heart of the inspector's assessment in this part of the decision letter. His conclusions in paragraphs 32 to 34 are not concerned only with the issue of the proposal's prematurity, but also the alleged conflict with the strategic policies of the emerging local plan, as well as with Policy 13 of the core strategy. And in my view he made no legal error in taking that approach.

43. I therefore disagree with the judge on this issue. I do not think there is any real doubt about the lawfulness of the inspector's approach to the draft strategic policies of the emerging local plan on which the council relied. In my view he clearly did take those policies into account, gave weight to the proposal's conflict with them, and provided proper reasons for his relevant conclusions. Those conclusions show a reasonable and lawful exercise of planning judgment on the evidence and submissions he heard.

Did the inspector err in considering the development's effect on the setting of the National Park?

44. In the judge's view the inspector could not rationally conclude both that there would be "moderate adverse and not significant" harm to views from the National Park, as he did in paragraph 47 of his decision letter, and that there would, however, be no adverse effects at all – if this was what he meant in paragraph 49 (paragraph 153 of the judgment). Given the requirement in paragraph 176 of the NPPF that "great weight should be given to conserving and enhancing landscape and scenic beauty" of the National Park, "any assessed harm should be weighed against the benefits of the proposed development in the overall planning balance". The inspector had "missed out this step, despite the fact that it was flagged to him" in the council's evidence and submissions (paragraph 154). He had "failed to give any weight to the moderate adverse effects he found, which was in breach of the policy requirement in paragraph 176 of [the NPPF] to give them "great weight"" (paragraph 155). He had also "failed properly to discharge his duty under section 11A of the 1949 Act … by omitting any consideration of the statutory purpose when conducting the overall planning balance" (paragraph 156). Applying the test in *Simplex (GE) Holdings Ltd. v Secretary of State for the Environment* (1989) 57 P. & C.R. 306, the judge could not conclude that, if the correct approach had been adopted, the outcome would necessarily have been the same (paragraph 157).

45. Mr Cairnes submitted that those conclusions were mistaken. In paragraph 47 of his decision letter the inspector had identified harm to certain views but had concluded, as he was entitled to do, that the proposal did not conflict with the policy in paragraph 176 of the NPPF as it applies to the setting of a National Park – because the development was "sensitively located" and would "minimise adverse impacts" on the National Park. The references to harm to "visual receptors" in later paragraphs of the decision letter – in particular, paragraphs 57 and 84 – include the harm the inspector had identified in paragraph 47 and show it was brought into the planning balance. This confirms that the inspector gave "great weight" to the conservation and enhancement of landscape and scenic beauty in the National Park, as the first sentence of paragraph 176 of the NPPF requires. He did not have to use the words "great weight" to demonstrate this, as if they were an incantation. In paragraph 49 of the decision letter, he referred expressly to the policy in paragraph 176 of the NPPF, and it was clear he was well aware of what that paragraph said. As the Court of Appeal had accepted in *Bayliss v Secretary of State for Communities and Local Government* [2014] EWCA Civ 347, giving "great weight" to harm to a National Park under that policy does not compel a decision-maker to give it any specific level of weight in a particular case. There was a range of weight that could be attributed to the harm, as a matter of planning judgment. Here, the inspector obviously concluded that the weight was of no significance.

46. Again, Ms Tafur argued that the judge was right to conclude that this ground of challenge was well founded, essentially for the reasons she gave.

47. I agree. I think the judge was right on this ground. At least, in my view, the inspector's reasons fell short of what was required in law. They leave a substantial doubt about the lawfulness of his approach to one of the principal issues he had to resolve. And that is enough to require his decision to be set aside.

48. As is common ground, the effect of the proposed development on the setting of the South Downs National Park was not a peripheral matter in the section 78 appeal. It was a prominent aspect of the council's first reason for refusal. It was part of the second main issue identified by the inspector. And it was extensively considered in the evidence on either side at the inquiry.

49. To approach the issue lawfully the inspector had to understand the policy in paragraph 176 of the current version of the NPPF correctly. To misunderstand the policy would be an error of law (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, at paragraphs 17 to 19). While the court will not interfere with an inspector's application of a planning policy, which is a matter of planning judgment, it will require the inspector to undertake that exercise on the basis of a legally correct understanding of what the policy means and requires (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Secretary of State for Communities and Local Government* [2017] UKSC 37, at paragraphs 22 to 36).

50. How then should the policy in paragraph 176 be understood? This question has already, in effect, been considered by this court, both in *Bayliss* and in *Monkhill Ltd. v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 74; [2021] PTSR 1432 – neither of which was cited to the inspector.

51. In *Bayliss* the court was concerned with the predecessor policy in paragraph 115 of the original version of the NPPF, which referred to the concept of "great weight" in very similar terms to the first sentence of paragraph 176 of the present version. The relevant issue concerned the effect of development on an Area of Outstanding Beauty ("AONB"), not a National Park, but the "great weight" concept applied to both – as it does in the present version of the policy. Sir David Keene said (in paragraph 18 of his judgment) that there was no indication in the inspector's decision letter that he had failed to take account of the policy in paragraph 115. He was "not required to use the words "great weight" as if it were some form of incantation". This part of the policy "has to be interpreted in the light of the obvious point that the effect of a proposal on an AONB will itself vary: it will vary from case to case; it may be trivial, it may be substantial, it may be major". Sir David added that "the decision maker is entitled to attach different weights to this factor depending upon the degree of harmful impact anticipated"; that in his view "it would be irrational to do otherwise"; and that "[t]he adjective "great" in the term "great weight" therefore does not take one very far". He did not suggest, however, that there might be a level of harm to an AONB or National Park, or to its setting, which might not even engage the application of the policy at all. Applying the policy in a particular case would require the decision-maker to consider the appropriate degree of weight to give to the level of harm he found, conscious of the Government's policy that "great weight" is to be given to the conservation and enhancement of landscape and scenic beauty in these areas with the highest status of protection.

52. In *Monkhill* the court was not directly concerned with the meaning of the expression "great weight". It was concerned with the question of whether that part of the policy could provide a clear reason for the refusal of planning permission, within the scope of the policy for the presumption in favour of sustainable development in paragraph 11(d) of the NPPF. But the court recognised that, the "real sense" of the policy was "an expectation that the decision will be in favour of the protection of the "landscape and scenic beauty" of an AONB, or against harm to that interest". Thus, "[i]f the effects on

the [Area of Outstanding Natural Beauty] would be slight, so that its highly protected status would not be significantly harmed, the expectation might … be overcome", or "it might be overcome if the effects of the development would be greater, but its benefits substantial". This "will always depend on the exercise of planning judgment in the circumstances of the individual case" (paragraph 30). The court therefore agreed with what Sir David Keene had said in the passage I have quoted from his judgment in *Bayliss* (see paragraph 32 of the leading judgment).

53. It is not in dispute that the requirement to give "great weight" to conserving and enhancing landscape and scenic beauty "in" a National Park extends to proposals for development within the setting of the National Park, and not only to development on sites within it. The policy in paragraph 176 distinguishes between development inside and development outside a National Park. It indicates one approach for the former, another for the latter. But it plainly includes both. And both are to be considered under the "great weight" principle.

54. We do not have to decide the question, debated in the court below, whether the expression "great weight" in paragraph 176 carries a similar meaning to the expression "considerable importance and weight" in the assessment of harm to heritage assets (see the judgment of Sullivan L.J. in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2104 EWCA Civ 137; [2014] I P. & C.R. 22, at paragraphs 10 and 28). Lang J. left this question undecided. She considered herself bound by the Court of Appeal's interpretation of the policy in *Bayliss* (paragraph 138 of her judgment). And I can see no reason to differ from that interpretation. Of course, the context here is not the same as in the legislation that applies to proposals affecting listed buildings or conservation areas. As Cranston J. acknowledged in *Howell v Secretary of State for Communities and Local Government* [2014] EWHC 3627 (Admin) (at paragraph 46 of his judgment), the duty in section 11A(2) of the 1949 Act to "have regard" to the relevant statutory purposes, and parallel duties elsewhere in the planning legislation, do not impose an obligation as demanding as the duty to "have special regard" to the desirability of preserving a listed building or its setting in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990.

55. The crucial question here, however, is not the meaning of the words "great weight" in the first sentence of paragraph 176 of the NPPF, taken in their own context. It is whether, on a fair reading of the relevant parts of the inspector's decision letter, his assessment of the likely effects of this development on the setting of the National Park, in which he appears to have accepted that those effects would indeed be harmful, shows how he gave "great weight" to the conservation and enhancement of the landscape and scenic beauty in the National Park, as the policy in paragraph 176 effectively requires. As was held in *Bayliss*, he was not obliged to use the words "great weight" or even to refer to the paragraph 176 policy by name. But in my view his assessment did have to demonstrate that he had approached the question of harm to the National Park with the "great weight" principle in mind.

56. There is no doubt that he did find some level of harm to the setting of the National Park. He did not accept the council's contention that the effect of the development on views from Highdown Hill would be "substantial adverse" (paragraph 46 of the decision letter). But he agreed with Persimmon's landscape witness, Mr Self, that "the level of harm would be moderate adverse and not significant" (paragraph 47). He evidently did so because, in the "breath-taking" views from that vantage point, the appeal site was

"not prominent", because the "focus is clearly on the sea" – as the South Downs National Park Authority's "Viewpoint Characterisation and Analysis Study" states – and because the proposed development "would … be seen in the context of existing development – much of which already extends further north and in closer proximity to the [National Park] than would the proposed development" (paragraph 46).

57. Two conclusions emerge in paragraph 47 of the decision letter, where the inspector was considering views from Highdown Hill. The first concerns the "Visual magnitude of change" under the "Landscape and Visual Impact Assessment" methodology. Using language drawn from that methodology, he accepted that the development "would result in a clearly perceptible and noticeable change to the existing view". This equates to a "Moderate" magnitude of change according to the methodology. The inspector went on to say that the views "already include intrusive development which affect the tranquillity from within the [National Park]", that the site "would be seen within this context", and that the "[e]xtensive views towards the sea and the sense of tranquillity within this part of the [National Park] would not materially alter". His second conclusion was that "while … there would be change to the view, … the level of harm would be moderate adverse and not significant". In paragraph 48 he turned to views from Highdown Rise and Highdown Gardens, finding that the proposed development, though "more noticeable", would again "be seen within the context of the existing development … and would appear neither overly prominent, visually intrusive or materially affect views towards the sea".

58. Mr Cairnes did not submit to us that harm of the kind found by the inspector in paragraph 47 of the decision letter – and also, it seems, in paragraph 48 – was simply to be ignored, or that it did not engage the policy in paragraph 176 of the NPPF. I do not think such a submission would have been credible. In the scale of adverse effects prescribed in the methodology for "Landscape and Visual Impact Assessment", effects in the "Moderate" category sit only one level below "Substantial", and above "Slight", "Negligible" and "Neutral". The description of a "Moderate" effect is that "[t]he proposals would impact on a view from a medium sensitive receptor … and would be a readily discernible element in the view".

59. In paragraph 49 of the decision letter the inspector came to the policy in paragraph 176 of the NPPF. He paraphrased the third sentence of paragraph 176, referring to the requirement that development in the setting of a National Park "should be sensitively located and designed to avoid or minimise adverse impacts". He then concluded, it seems, that the proposal was consistent with that part of the policy, because it would be located at the southern end of the site and because of "the limited impact on views from within [the National Park]". He did not say whether the effect of those two considerations was to "avoid" adverse impacts or to "minimise" them. What he said was that he did not "therefore" consider that the setting of the National Park or views within it "would be materially affected".

60. It is only in paragraph 49 that the inspector addressed the question of the proposal's compliance or otherwise with the policy in paragraph 176 of the NPPF. In that paragraph, however, he said nothing about the requirement in the first sentence of paragraph 176 that "[g]reat weight should be given to conserving and enhancing landscape and scenic beauty in National Parks". There are two difficulties here. First, it is not clear how the inspector reconciled his conclusions on harm in paragraphs 47 and 48 with his conclusion at the end of paragraph 49 that neither the setting of the

National Park nor views from within it would be "materially affected". On a straightforward reading of what he did say, these conclusions seem at variance with each other, or at the very least to call for some further words to align them. Secondly, and anyway, it is not clear how he reconciled his conclusions on harm to the setting of the National Park in paragraphs 47 and 48 with the "great weight" principle in the first sentence of paragraph 176 of the NPPF. In what he did say about that harm there is no indication that he gave it such weight as the "great weight" principle required, or indeed what weight, if any, that was. If it really was no weight, he did not explain why this was so.

61. A third difficulty is this. The conclusions in subsequent passages of the decision letter, including the section where the inspector weighed the planning balance, do nothing to overcome the deficiencies in the passage where he was specifically considering the relationship of the proposal to the policy in paragraph 176 of the NPPF. His "Overall conclusions on landscape" in paragraph 57 of the decision letter repeat his earlier conclusion, in paragraph 49, that the proposed development would not "materially affect the setting of the [National Park]", but they do not refer to the policy or expand on what he said in paragraph 49. I do not think one can infer that when he said the appeal site was "valued by the local community and … its loss would result in some harm in this respect" he was referring to the effects it would have on the setting of the National Park or to the paragraph 176 policy. And I do not accept he was doing that when he referred to his conclusion that the development would "adversely impact on a number of visual receptors which would result in some further harm". His references to "visual receptors" in paragraph 57 and again in paragraph 84 seem to relate to his consideration of "localised impacts" in paragraphs 50 to 56, and not to his evaluation of the effects on the setting of the National Park. If this is a misreading of his conclusions, that is, I think, only a consequence of the deficiency in his reasons. And when he came to the "Overall Planning Balance" in paragraphs 82 to 92 he made no mention at all of the National Park and its setting, or of the policy in paragraph 176 of the NPPF. The most one could say is that in acknowledging the development "would result in a number of adverse impacts", in paragraph 91, he might have meant to include the adverse effects he had found it would have on the setting of the National Park. But this too is unclear.

62. We do not have to go as far as the judge and find that the inspector's conclusion in paragraph 49 of the decision letter was, on its face, irrational. It is enough to conclude, as I think we must, that in this part of his decision-making the reasons he gave failed to meet the standard required. Even for an audience familiar with this "principal important controversial [issue]" – as Lord Brown put it in *South Bucks District Council v Porter (No.2)* (at paragraph 36) – and with the parties' evidence and submissions about the effects of the development on the setting of the National Park, it is not clear how, or even if, the inspector has resolved that controversy. It is not clear whether he gave any weight, or conceivably no weight at all, to the harm he identified in paragraph 47 of the decision letter. And it is not clear how that degree of weight can be reconciled with the whole policy in paragraph 176 of the NPPF, including the requirement to give "great weight" to "conserving and enhancing landscape and scenic beauty in National Parks".

63. Clarity on those matters is not too much to expect of the reasons given on one of the main issues in the section 78 appeal. The level of harm identified by the inspector in paragraph 47 of the decision letter – "moderate adverse and not significant" – was not

merely negligible. And it is not obvious how that finding of harm can be squared with the conclusion in the final sentence of paragraph 49 that the setting of the National Park would not be "materially affected". Even if those two conclusions could be regarded as consistent with each other, it would still be unclear whether the harm identified by the inspector carried any weight in his planning balance, or, if it did, how that amount of weight could be seen as compatible with the "great weight" principle in the Government's planning policy for National Parks. That is unclear in paragraph 49 of the decision letter. It remains so in paragraph 57, and in paragraphs 82 to 92. I accept that the inspector did not have to voice the words "great weight", but he did have to show how he had applied that part of the paragraph 176 policy, and how it had influenced the planning balance, if it did.

64. In my view, therefore, the council's complaint on this ground is justified. The inspector's reasons are defective. They leave a substantial doubt that he has lawfully applied relevant national policy to one of the main issues in the section 78 appeal.

65. Like the judge, I am unable to conclude that relief should be withheld on the basis of the principle in *Simplex*. It is, in my view, impossible to say that if the inspector had not erred in the way he did his decision would necessarily have been the same.

Conclusion

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

Lady Justice Andrews:

67. I agree.

The Master of the Rolls:

68. I also agree.