One Earth Solar Farm

Volume 9.0: Other Post-Submission Documents [EN010159]

Applicant's Response to ExA Written Questions 2

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Contents

1. Introduction

1.1 Purpose of the Report

1.1.1 This report provides the Applicant's responses to the Examining Authority's Written Questions and requests for information (ExQ2) [PD-014] issued 30 September 2025 in response of the proposed One Earth Solar Farm (the 'Proposed Development').

1.2 Structure

1.2.1 Section 1 of this report sets out the purpose and structure of this report and explains the approach taken by the Applicant in preparing responses. Section 2 of this report provides the Applicants responses to the questions raised of the Applicant by the Examining Authority (ExA), including signposting to other responses and documents were appropriate. Where questions have been raised of other parties, the Applicant has not provided a response to those questions except where it considers that it would be helpful for the ExA for it to do so.

1.2.2 To minimise duplication, the Applicant has sought to cross-refer where appropriate to responses provided in other relevant submissions that have been entered into the Examination.

2. Applicant Response Table

App Ref	ExQ2 Ref	Question Summary	Applicant Response
General			
	Q1.01	**Consultation** Throughout the examination concern has been expressed with regard to the suitability and extent of the consultation undertaken. The ExA have previously sought confirmation that a complete and comprehensive suite of documents is provided to ensure we have a full understanding of the consultation undertaken and the responses received. The inference from the submissions made indicates that a full suite has still not been provided to the examination. 1. Can the applicant reexamine their submissions in this respect, and to aid both the ExA and concerned IPs identify where within the documentation a full suite of consultation documentation can be found. The ExA wonder if a table with index may provide a simple way of identifying for all parties the full information with corresponding EL references. 2. In undertaking the review if documents are identified to be absent, please ensure any missing elements are provided.	The Applicant confirms that it has met the statutory consultation requirements under sections 42, 46, 47 and 48 of the Planning Act 2008. In addition to these legal obligations, the Applicant has followed relevant guidance and best practice to ensure that stakeholders were able to engage meaningfully and at appropriate stages throughout the development of the Proposed Development. The Applicant consulted on the Statement of Community Consultation (SOCC) with host local authorities, whose feedback informed revisions to the consultation approach. These changes are detailed in the Consultation Report [APP-151]. The Applicant subsequently published the required notices to publicise both the SOCC and the statutory consultation, including in local newspapers (on two consecutive weeks), a national paper, and the London Gazette. Following the announcement of a general election, the Applicant consulted with local authorities and extended the consultation period. Updated notices were published to reflect the revised deadlines. During the statutory consultation, the Applicant provided a range of engagement mechanisms, including: • public information events; • meetings with parish councils

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			• meetings with residents • a suite of consultation materials; • multiple feedback channels. All responses received were reviewed and considered, and presented in Appendix J of the Consultation Report [AS-011]. Following the close of the consultation period, all five host local authorities confirmed the Adequacy of Consultation Milestone, confirming that the Applicant had met its statutory obligations. In addition to community engagement, the Applicant consulted all prescribed statutory consultees under section 42 of the Planning Act 2008. Their responses are also included in Appendix J of the Consultation Report [AS-011]. Ongoing engagement with these bodies has continued throughout the pre-application and examination stages, and further correspondence is available in the Examination Library. The full original suit of documentation relating to consultation can be found at references APP-151 to APP-164. Subsequently Appendices J-1 and J-2 have been updated with the revised version at reference REP1-017
Air quality and emissions			
	Q6.0.1	**Air Quality – Planning Guidance**	The guidance is still interim guidance. There has been no update on the likely publication of the full guidance.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		The applicant's response to ExQ1 6.0.1, stated that the guidance published by DEFRA remained interim. 1. Can the applicant please confirm this still to be the case? 2. If it has been updated, please advise what changes have occurred and if this leads to any change to the AQ Chapter or the conclusions reached.	
Compulsory acquisition, temporary possession and other land or rights considerations			
	Q9.0.1	**Connection point** 1. In light of the position stated at CAH1 – and the information available for the proposed substation location, please provide clarity over why the whole High Marnham site remains identified as necessary for CA. Please consider providing a plan showing the areas of existing infrastructure and the area of land that National Grid have identified as required for the new substation to demonstrate with greater clarity those areas which potentially could be excluded, or provide further justification for including the whole area, when access for the corridor can only be achieved from the west/ north west and the cable corridor is indicated to be 20m. 2. While the ExA understand that the draft of the DCO would only allow land that is required to be subject to CA, please explain how this resolves the apparent discrepancy with the CA Guidance, where the justification for the land take is needed at the outset.	As noted in the Written Summary of Applicant's Oral Submissions at Compulsory Acquisition Hearing 1 [REP3-064], the extent of land included in the Order Limits around the existing High Marnham substation is required to account for the currently unknown location of National Grid Electricity Transmissions (NGET) new 400kV substation. It is acknowledged that NGET has published a proposed 400kV site location as part of consultation for the North Humber to High Marnham DCO project. This location remains subject to change until such a time as NGET's Town and Country Planning Act application for the substation is submitted. Even at this stage, confidence in the location of the substation increases but may still be subject to change through the planning application process. The Applicant is engaging directly with NGET to establish the level of certainty that exists over the location of the proposed 400kV substation and any contingency areas which they may consider in the event that there are any unforeseen issues with the planning application. It is envisaged that the planning application is going to be submitted by NGET prior to the end of the examination and as such the Applicant expects to be

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			able to make an informed decision as to any reduction in the area of land subject to compulsory acquisition powers in this area at that point in time. As noted previously, the Applicant will continue to engage directly with NGET to discuss this matter and will look to expedite any possible reduction whilst ensuring the project's ability to connect to the grid is not fettered in any way. With regards to the ExA's request for a plan showing the areas of existing and proposed infrastructure, the Applicant would note that these areas, namely the existing 275kV substation and the proposed 400kV substation, would remain subject to compulsory acquisition powers in order to ensure that the project is able to connect into the allotted electrical bay. For this reason, the Applicant does not believe that producing a plan showing existing infrastructure will provide any further clarity to the ExA on the areas of land where the request to acquire compulsory acquisition powers may in the future be refined. In terms of justification for the land take at the outset, the Applicant has provided the justification in this respect and has been clear as to what the rights in this land are required for. The draft DCO is clear that rights are sought in this area for the cable connection to High Marnham substation.
Articles			
	Q10.1.1	**Disapplication and modification of statutory provisions** In their D3 response NCC (LIR Addendum [REP3-086]) express concern that the FRA indicates that flood risk	The disapplications referenced by the Applicant in its **FRA [REP2–043]** are the same as those sought in Article 6 of the draft DCO.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		activity permits and ordinary water course consents would be disapplied (paragraph 7 (a)). The dDCO seeks to disapply regulation 12 (requirement for an environmental permit) in respect of flood risk activity. (1) Can the applicant clarify that these 2 matters are one and the same or explain the distinction (2) Do the EA have any concerns in this respect	With respect firstly to flood risk activity permits, the **FRA [REP2–043]** states (page 16): *"… a Flood Risk Activity Permit (FRAP) from the EA would ordinarily be required. However, it is proposed that the need for FRAPs under the Environmental Permitting (England and Wales) Regulations 2016 would be disapplied in Article 6 of the draft DCO [EN010159/APP/3.1] subject to agreement by the EA pursuant to s150 of the Planning Act 2008, provided that satisfactory forms of protective provisions are agreed."* This accords with Article 6(1)(f) of the **draft DCO [REP2-009]**. The Applicant's discussions with the EA in respect of this disapplication are ongoing as part of the parties' negotiation of protective provisions. With respect secondly to ordinary water course consents, the **FRA [REP2–043]** states (page 16): "*Furthermore, for any works to any ordinary watercourse, Ordinary Watercourse / Land Drainage Consent would ordinarily be sought from Trent Valley Internal Drainage Board (IDB). Instead, it is proposed that the requirement for Land Drainage Consent, in particular Sections 23, 32 and bylaws made under Section 66, would be disapplied, provided that satisfactory forms of protective provisions are agreed with the IDB.*" This accords with Article 6(1)(a), (b) and (c) of the **draft DCO [REP2-009]**. The Applicant's discussions with the IDB in

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			respect of this disapplication are ongoing as part of the parties' negotiation of protective provisions.
Schedule 15 – Procedure for discharge of requirements			
	Q10.2.1	**Discharge of Requirements and the payment of fees** It is not clear from the comments made by NCC in item LIR 172 at D3 in respect of the payment of a fee for requirement 15 being aligned with requirement 11, whether there is a detailed justification for the fee to be increased. Please can both parties set out their reasoning in the event this remains outstanding.	The Applicant has drafted this provision in relation to fees having regard to the likely complexity of the documents in question and how onerous discharge of the requirement is expected to be. Taking on board the comments from NCC, the Applicant has amended paragraph 5(2)(a) of Schedule 15 in the draft DCO submitted at Deadline 4 to include requirement 11.
Historic environment			
	Q11.0.1	**Archaeology** Can the applicant NCC, and LCC please provide an update on their respective positions with regard to the investigations for archaeology, the written scheme of investigation, and if there are any matters which remain outstanding?	An advanced draft of the Outline Written Scheme of Investigation (OWSI) has been prepared in consultation and in agreement with the relevant local authorities and archaeological advisors. The OWSI details the overarching strategy for: • additional trial trenching to be carried out as pre-commencement condition; • the potential mitigation strategies to be implemented, and • the control system to be implemented during Construction, Maintenance and Decommissioning phases. The Applicant continues to engage with the Archaeology Advisory Teams to the LPAs and Historic England to finalise the OWSI. The relevant Statement of Common Grounds presents the current agreed and outstanding items.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
Hydrology and Hydrogeology and the Water Environment			
	Q12.0.1	**Flood Risk Assessment** Please provide an update on the progress of updating the FRA to address the issues raised by the EA at ISH2 and discussed in a meeting on 11 September 2025, on the following: (1) Use of voided structures for inverters/pcs; (2) Impact of, and agreement of flood flows due to partially submerged solar panels and other equipment; (3) Interaction between the proposed development and existing flood defences; and (4) The draft requirement for the dDCO for the re-running of the FRA at the detailed design stage – is this approach compliant with policy?	A number of discussions have been held with the EA since Deadline 3, and agreement has been reached on some key points. A draft SOCG was shared with the EA ahead of Deadline 4, however, a response has not yet been received. 1) As per EA discussions, the approach to voided structures has been agreed, other than the exact wording of the Flood Risk Mitigation Requirement 22. Refer to responses to D3 submissions [9.31 (rev 01)] D3R27 and D3R28. 2) Following discussions with the EA, it is now proposed that no solar panels will be submerged within the Order Limits during the design flood event. This will be achieved by adjusting the panel angle (within the 10 – 25 degree as set out within the outline design parameters) or by removing the bottom row of panels. The maximum top of panel heights (as secured by the outline design parameters) will not be exceeded in taking this approach. This is proposed to be secured through a new flood risk mitigation requirement (requirement 22) to the dDCO and an amendment to the relevant outline design parameter for the PV panels. The requirement provides that the FRA would need to be re-run to confirm the outcomes of the current FRA in terms of flood risk and flood plain storage (the current FRA is being updated to reflect no

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			submerged panels) - therefore the detailed design would need to ensure it can deliver the same results as currently shown. It is anticipated that this would require panels with their lowest part to be higher than provided for in the outline design parameter (to avoid being submerged in the designed flood event), and the outline design parameter has been amended to allow for that. In short, the requirements of the re-run FRA and details approved under that requirement, overrule the outline design parameter in relation to the height of the lowest part of the panels. Conservative assessments of the impact of the panel mounting structures on flood volumes in the design flood event have been undertaken and confirm that the potential increase in flood depth is below the 5mm tolerance agreed with the EA. This has been agreed in principle with the EA . Despite this agreement, the EA requested in a meeting held on the 26th September 2025 that they now require hydraulic modelling to consider the impact the supports of the panel mounting structures would have on flood flows and this is being considered ahead of Deadline 5. With the above in mind, an updated FRA is not being submitted at Deadline 4, until this is resolved. However, a draft version of the FRA was submitted to the EA on the 26th September 2025 for their review and a follow up meeting was held with them

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			on the 8th October 2025. This version of the FRA included updated discussions regarding the Flood Risk DCO Requirement wording, further commentary on the inverter voided structures, submerged panels and flood volume assessments. 3) With regards to the interaction between the existing flood defences and the proposed cable crossings, this has been discussed and agreed with the EA in meetings since Deadline 3. The EA's response to the draft SOCG is awaited. . An updated FRA will be submitted at Deadline 5. In discussions with the EA, held on the 8th October 2025, it was requested that all documents be updated to set out that minimum buffers of 16m will be provided between the Proposed Development and the toe of existing flood defences. The EA requested this change to manage the risk of contamination in the event of a drilling fluid breakout. 4) Refer to Applicant response to Q12.0.3 below.
	Q12.0.2	**Location of solar panels and equipment** (1) Please explain why is it necessary for the inverters/pcs to be located in the areas of flood risk? (2) What is the reasoning for the inverters/pcs being located in the proposed locations? (3) How many inverters/pcs will be located in the areas that are subject to flooding – in answering please	1) Due to voltage drop increasing over distance, inverters must be placed nearby to the panels that feed into them. Typically voltage drop is limited to a maximum of 3% for DC strings. Higher Voltage drop impacts the overall efficiency of the system. The indicative locations shown have been selected to balance the requirements of reducing the voltage

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		explain with reference to Flood Zone 2, Flood Zone 3 and areas of flood extent? (The ExA understand that the detailed design has not yet been undertaken, and the final figure may yet not be known, however please in answering the above questions specify the maximum number and the range the final design may include).	drop whist moving the PCS further from the deepest areas of flood water where possible. 2) Inverters are located near access tracks to allow for ease of maintenance activities. This, in conjunction with voltage drop requirements dictate that some inverters must be located in flood zones. 3) Based on indicative locations of inverters: 61 inverters are located within the design flood extent, 16 are located within Flood Zone 2; and 76 are located in Flood Zone 3. The number will be confirmed at detailed design, including pursuant to the proposed DCO requirement 22, which would require re-confirmation of the FRA outcomes based on the detailed design for the scheme.
	Q12.0.3	**Flood Risk Assessment requirement** Within the Written Summary of applicant's Oral Submissions at the Issue Specific Hearing 2, page 27 states: "*The Applicant plans to share the updated FRA with the EA in advance of Deadline 4 (to hopefully allow sufficient review time) and to submit it to the Examination at Deadline 4 (hopefully having had time to address any outstanding comments from the EA and/or to confirm the agreed position). At the same time the Applicant will submit a draft requirement for the dDCO. The draft requirement will essentially require that at detailed design the Applicant will re-run the FRA in order to demonstrate to the relevant planning authority and the EA that based on the detailed design, the impact on flood risk and flood plain storage is no worse than the outcomes included in the FRA. The Applicant wants to closely align the content of the FRA to the*	The requirement being proposed by the Applicant would operate so that the outcomes of the FRA would be secured, including the impact of the Proposed Development on flood risk. The proposed approach would require the Applicant to re-run the FRA based on the detailed design, in order to give confirmation and certainty that with the detailed design, the same outcomes in terms of flood risk are achieved. This approach provides certainty now that based on the assumptions for the Proposed Development that the impact on flood risk is negligible and within the EA's tolerances, and then it also secures re-confirmation of that conclusion ahead of commencement. In this way the SoS has certainty as to the impact on flood risk. It is noted that the Applicant's proposed requirement is included in the draft DCO submitted at this Deadline 4, however, this is the subject of ongoing discussion with the EA

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		proposed requirement so that the FRA makes clear what the updated FRA at the time of detailed design is focussed on and what outcomes it needs to achieve. For this reason they will be provided side by side at Deadline 4. The Applicant will share the draft requirement with the EA alongside the FRA." Can the applicant please provide details of how this approach is policy compliant, does the SoS not need to know at this stage that the scheme would not result in flooding elsewhere?	and the Applicant understands that the EA will shortly share its comments on the form of requirement with the Applicant.
	Q12.0.6	**PPG on flood risk was updated 17/09/25 including changes to the Sequential Test, see para 27a** Paragraph 27a states. "*For infrastructure proposals of regional or national importance the area of search may reasonably extend beyond the local planning authority boundary. It may also, in some cases, be relevant to consider whether large scale development could be split across a number of alternative sites at lower risk of flooding, but only where those alternative sites would be capable of accommodating the development in a way which would still serve its intended market(s) as effectively.*" (1) Does this new guidance have any effect on the application for the proposed development or what the applicant has undertaken in the assessments provided? (2) Does the new guidance mean that any further work is required in respect of the Sequential Test?	National planning policy guidance (NPPG) was updated on 17th September 2025 in relation to the application of the sequential test for flood risk. The most important changes relevant to the Order Limits include paragraph 027a as highlighted by the ExA. The Applicant's consideration of these changes is set out below: • Paragraph: 027a Reference ID: 7-027a-20220825 has been updated to further emphasise that the sequential test should be applied proportionately, focusing on realistic alternatives in areas of lower flood risk that could meet the same development need. For infrastructure proposals of regional or national importance, the PPG continues to recognise that this could be split across a number of alternative sites at lower risk of flooding, but has been updated to include clarification that this is only where those alternative sites would be capable of accommodating the development in a way which would still serve its intended market(s) as effectively.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		(3) If so what additional work do you consider would be required as a result of the changes? (4) Has the position of any party changed due to the amendments made to the PPG?	As such, the Applicant provides the following answers to the specific questions raised: 1) This endorses the approach already taken by the Applicant in applying the sequential test to the Order Limits as follows: • A proportionate approach should be taken in applying the sequential test which should only focus on realistic alternatives that could meet the same development need, and which would be capable of serving its intended markets as effectively. In this case, the intended market is the electricity consumer, with the route to market being through the National Grid High Marnham Substation. Alternatives which did not connect into this substation would not meet this same market need. • The sequential test carried out by the Applicant identified that there were no reasonably available sites at a lower risk of flooding, as all sites would either need to include areas of Flood Zones 2&3 in order to connect into the National Grid High Marnham Substation and therefore would not be sequentially preferable, or benefit from other planning or environmental considerations that would result in development being refused, or would not be capable of accommodating the development in a way which would still serve its intended market as effectively.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			2) No, as the approach taken is in accordance with and supported by amendments made. 3) N/A 4) No, the Applicant still considers that the sequential test has been passed and there are no reasonably available alternative sites. The Applicant has previously set out in the Sequential Test and Exceptions Test Assessment [REP2-080] how its approach to the search area and the criteria for what would constitute an appropriate site for solar has been reasonable, realistic, flexible and proportionate, and the added references in the PPG to the appropriateness of the catchment area and the proportionality of the approach are supportive of those previous submissions. The Applicant's position is that submissions from other parties have not necessarily taken the same approach in terms of their criticism of the Applicant's application of the sequential test.
	Q12.0.7	**NCC Addendum to Local Impact Report (Flooding)** Can the applicant please provide a full response to the points raised in the NCC Deadline 3 submission Addendum to Local Impact Report (Flooding) [REP3-086], in particular, paragraph 7?	The Applicant has provided responses to the points raised in Paragraph 7 of Rep3-086 as part of the 'Applicant Response to Comments on Responses to D3 Submissions [9.31 (rev 01)]. The FRA and Drainage Strategy will be updated in line with the comments for Deadline 5. This will be shared in advance of D5 as soon as available.
	Q12.0.8	**Water Resources Assessment (WRA)** Please provide an update of progress made on the WRA, including a timescale for its completion and submission to the examination.	A Water Resource Assessment has been prepared and submitted to Anglian Water for review. Anglian Water have confirmed receipt, however, a technical response is not expected until early November.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
	Q12.0.12	**Water environment** In her D3 submission [REP3-098], Mrs Heather Fox raises a number of issues relating to the water environment. Please provide a full and detailed response to all issues raised. It was indicated at ISH2 that issues raised previously had not been fully addressed, please review previous submissions and confirm that full responses have been received where necessary cross refencing to previous submissions.	The Applicant has developed a detailed response to questions arising around the water environment in response to representation made by Mr Fox and Mrs Fox. This can be found the Applicant Response to D3 Submissions [EN010159/APP/ 9.31 (rev 01)].
	Q12.0.13	**Sequential Test Addendum [REP3- 069]** Can the applicant please provide the full legal cases referenced.	Please see appended to this document at Appendix A, a copy of the decision in R (Mead and Redrow) v SoS LUHC [2024] EWHC 279 (Admin). The Court of Appeal decision is also provided, however, the key decision is the High Court decision.
	Q12.0.14	**D3 representations from Mr Fox** At D3, Mr Fox made a number of submissions [REP3-100, REP3-101, REP3-102, REP3-103, REP3-104, REP3-105, REP3-106, REP3-107, REP3-108, REP3-109, REP3-110,] regarding potential issues relating to the water environment as a whole. Can the applicant please provide a detailed response to all the points, including, stating if any changes are necessary as a result, or if any further assessments are needed.	The Applicant has developed a detailed response to questions arising around the water environment in response to representation made by Mr Fox and Mrs Fox. This can be found the Applicant Response to D3 Submissions [EN010159/APP/ 9.31 (rev 01)].

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Landscape and visual			
	Q15.0.1	**Proposed Screening fence along A1133** The ExA note that further information providing greater clarity for this mitigation is due to be provided at D4. (1) It would be helpful to understand further in designing this mitigation, what other forms of redress to resolve the problem that arises were considered and why they were excluded. For example siting the fence further away from the road, planting greater screening at the outset, earlier in the process to reduce the time the fence would be required for, providing a larger proportion of larger plants as part of the mix to achieve a shorter period of needing a fence, or removing panels which the glint and glare assessment identifies as causing the problem? (2) Are there further options that could further alleviate the potential harm that may arise? Which in worst case scenario would result in a 4m high solid fence, being present for 15 years along several km? (3) Please confirm that there are no other boundaries where this mitigation has been identified as necessary, or point out where they might be and the extent, location and likely length of screening required. (4) In providing mitigation, can it be mitigation if it creates a harm in itself? In responding to the above please address the advice within NPS EN-1 paragraph 5.10.26 in particular the final sentence which states *"In these circumstances, the Secretary of State may decide that the benefits of the mitigation to reduce the*	**In response to point 1:** The mitigation proposed in response to glint and glare impacts that may be experienced by people travelling on A1133, A57 and users of the training railway has been reconsidered following discussion at Issue Specific Hearing 2. In response to each of the examples referenced in Q15.0.1: - Set back from the road: A new parameter has been added to the Outline Design Parameters for Work No. 5 which states that "*Fences installed to mitigate glint and/or glare impacts will not be located within 10m of a highway boundary*". Securing this minimum distance ensures that a degree of openness would be retained along the edge of the highway. - Planting greater screening at the outset, earlier in the process: The updated Outline Landscape and Ecology Management Plan (submitted at Deadline 4) now states that "*wherever practicable, planting proposed to mitigate glint and glare will be planted at the beginning of the construction phase to minimise the duration before SC1-SC3 can be removed*". - Providing a larger proportion of larger plants: Planting of taller stock was considered but is not proposed since younger stock is typically quicker to establish, has a lower chance of failure, and often results in a fuller and healthier hedgerow. - Removing panels that result in problematic glint and glare: The Glint and Glare Assessment has been re-

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		landscape and/or visual effects outweigh the marginal loss of function."	run and the extent of fencing proposed has reduced substantially. This is detailed under point 2 below, but in summary the extent of proposed screening has reduced from 5,585m to 1,037m, of which 555m is proposed parallel to the public highway with one section proposed along the A1133 and a second proposed along the A57. Given the reduced extent of mitigation screening identified in the updated assessment, people driving on the A1133 and A57 would pass only one length of screening on each road. Given that the speed limit of both roads is 60mph, it is reasonable to assume that drivers' attention is focussed on the road, rather than the view. This indicates a lower sensitivity to change. The visual impact associated with the proposed fencing would be experienced for a very short duration, limited to a glimpse, as people drive past. A combination of the lower sensitivity of drivers and the limited impact would result in a very low level of effect resulting from the proposed fences/screens. Irrespective of the screens proposed, it is inevitable that people travelling on these A roads would experience a degree of change as a result of the solar panels proposed. As such, removal of panels and associated generating capacity is considered a disproportionate mitigation strategy that would result in only a negligible benefit, rather than a 'very significant benefit' (as referenced in EN-1 5.10.26) to people travelling on the roads in question. **In response to point 2:**

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			The initial Glint and Glare Assessment was prepared on the basis of several assumptions which are listed on page 5 and 6 of the initial Glint and Glare Assessment [APP-188]. The list of assumptions includes: - "*No obstructions are considered between the reflection and the receptor*"; and - "*Any existing screening (bushes, trees, buildings etc.) that may obstruct the Sun from view of the solar panels is not included in the modelling unless stated otherwise*". These assumptions were made to inform an assessment of a 'worst case' scenario and resulted in the identification of eight lengths of screens being proposed to provide mitigation. These screens were referred to as 'OB1 – OB8' and were to be secured through the Outline Landscape and Ecology Management Plan (OLEMP) [REP3-047]. OB1 – OB8 comprised screens up to 4m in height and extending for 5,585m parallel to parts of the highway and rail network in proximity to the proposed solar panels. As detailed in the OLEMP, the Applicant had already acknowledged that the original Glint and Glare Assessment was precautionary. It was anticipated that the extent of screening would reduce through detailed design, and a commitment was put in place to re-run the Glint and Glare Assessment as part of detailed design. Following discussion of the design and extent of OB1 – OB8 through Issue Specific Hearing 2, the Applicant has re-run the Glint and Glare Assessment, on a more realistic worst case

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			basis, and provided the updated assessment into the Examination Library at Deadline 4. The updated assessment represents a more realistic worst case because it provides a finer level of detail than the initial Glint and Glare Assessment. With reference to section 6.3 of the updated assessment, it "*has considered obstruction elements from a detailed topographical survey… The survey includes information on the terrain, vegetation and buildings*." The updated assessment concludes that the existing features, such as hedgerows, topography and buildings, will serve to screen most of the potential glint and glare effects resulting from the Proposed Development on the road and rail network. As a result, the following mitigation measures are proposed: - Along A1133: SC1 measuring 240m and shown on page 19 of the updated assessment. This is a reduction of 1,271m from 1,511m along A1133 identified in the initial Glint and Glare Assessment. - Along A57: SC2 measuring 315m and shown on page 18 of the updated assessment. This is a reduction of 1,892m from 2,207m along A57 identified in the initial Glint and Glare Assessment. - Along the training railway: SC3 measuring 482m and shown on page 18 of the updated assessment. This is a reduction of 921m from 1,403 along the training

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			railway identified in the initial Glint and Glare Assessment. Therefore, whilst the need for the proposed screening remains, its extent is substantially reduced from that discussed previously. **In response to point 3:** The Applicant confirms that only SC1, SC2 and SC3 (please see associated lengths under point 2, above) are required and therefore only these three screens are secured in the OLEMP. **In response to point 4:** It is acknowledged that the screening proposed would result in a change to the visual experience of travelling along the A1133 and A57. However, in the context of the wider Proposed Development, the associated impact arising from the screening would be minimal, as set out under point 1. Furthermore, the screening is proposed to mitigate a specific impact associated with glint and glare as experienced by road users. The Applicant continues to take a precautionary approach to this assessment, and therefore the associated mitigation, to ensure that the DCO affords flexibility to provide screening necessary to ensure the safety of people travelling on the road network. Following further design work that would occur post consent, a further iteration of the Glint and Glare Assessment will be undertaken based on the final layout proposed through detailed design and will form part of the information provided to host authorities under Requirement 5 of the Draft DCO [APP-007]. Therefore, the Applicant is of the

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			view that, despite the minimal visual impact that would result from the proposed fences, SC1-SC3 do provide effective and proportionate mitigation of glint and glare impacts.
	Q15.0.2	**Proposed Screening fence along A1133** (1) Could the need for the fence be avoided if the panels were set a minimum distance back from the road? (2) If so, what would the distance be, and what would the consequence be of removing the affected panels from the scheme?	Please see response to Q15.0.1 above.
	Q15.0.3	**Site compound locations** In her D3 submission [REP3-087], Mrs Walker raises issues relating to the proposed locations of site compounds. Can the applicant please provide a full reasoning and evidence, for why the site compound in question must be at the location indicated?	The provision of temporary construction compound (site compounds) are secured by Works No. 6, with Work No.6a relating to primary compounds and Work No. 6b relating to secondary compounds. In respect of Work No. 6b, up to 10 such compounds may be located within the area shown on the Works Plan [REP2-007] labelled "Works Area 6b". Referring to Mrs Walker's D3 Submission, the compound referenced, as shown on drawing 'OE-ACM-R0-GE-DR-02004 Typical Construction Compound and Hardstand Overview' within the Site Layout Plans [APP-016] is a secondary compound, and therefore falls within Work Area 6b. The location shown on 'OE-ACM-R0-GE-DR-02004 Typical Construction Compound and Hardstand Overview' is illustrative. The final location of these compounds will be subject to approval through Requirement 13 (construction environmental management plan) as set out in the Draft DCO [APP-007]. The illustrative locations have been used to inform the Environmental Impact Assessment and have been selected

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			to reflect a reasonable layout taking into account factors such as the spacing between primary and secondary compounds, proximity to sensitive receptors (including residential dwellings), and efficient construction processes.
	Q15.0.4	**Residential Properties** (1) In order to aid the ExA understand fully the approach that has been taken to the assessment of effect on visual amenity for residential receptors can the applicant provide clarification on how the approach taken addresses the following sections of the NPS. NPS EN-1 paragraph 5.7.4 states *"For energy NSIPs of the type covered by this NPS, some impact on amenity for local communities is likely to be unavoidable.* ***The aim should be to keep impacts to a minimum, and at a level that is acceptable***." Paragraph 5.10.6 states *"Projects need to be designed carefully, taking account of the potential impact on the landscape. Having regard to siting, operational and other relevant constraints* ***the aim should be to minimise harm to the landscape, providing reasonable mitigation where possible and appropriate."*** Paragraph 5.10.21 states "*The assessment should include the visibility and conspicuousness of the project during construction and of the presence and operation of the project* ***and potential impacts on views and visual amenity***." (Our highlighting) (2) To date a full list of properties within the Order Limits appears to be outstanding, with a corresponding map identifying the properties. If it has been provided, please provide the appropriate	Response to Point 1: The Applicant notes that NPS EN-1 paragraph 5.7.4 relates to dust, odour etc. rather than visual amenity. Overall given the paragraphs quoted, the Applicant understands the ExA wishes to understand how visual amenity for residential receptors has been mitigated. Minimising the landscape effects and visual amenity impact of the Proposed Development on the environment and local communities has been one of the key influences throughout design development. This has been evidenced in the Design Approach Document [REP2-021], particularly pages 36 – 57. This section of the Design Approach Document first details how each iteration of the masterplan has been developed in line with the project specific design principles. The second part deals specifically with the design evolution around local villages and residential dwellings. Key points of relevance to NPS EN-1 paragraph 5.7.4 include: - Removal of all proposed solar panels between North Clifton and South Clifton between non-statutory consultation and statutory consultation to minimise the Proposed Development's impact on the setting of the villages, and the visual impact of residents. - The removal of all proposed elements west of Thorney to remove potential impacts to resident's visual amenity.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		EL reference. In the event it remains outstanding please ensure it is provided. The response provided in [REP1-077] and [REP1-078] explains the approach taken in respect of a number of the properties affected, the ExA are currently not confident this includes all properties. Within these documents separation distances for residential properties to solar panels appears to vary considerably for example: o Sheet 1 Farhill Farm 413m, Grey Oak and the Grove 259-290m, Whimpton House 314m, o Sheet 2 Properties east of Main Street Ragnall 235-252m, Hall Farm Cottage 226-242m, o Sheet 3 Farhill Farm 155m, Vicarage Farm 180m – 363m, farm west of Main Street 273m o Sheet 4 properties west of Main Street 195-198m, north of George Street 173m o Sheet 7 Skegby House 38-58m o Sheet 10 1 Collingham Road 206-208m o Sheet 14 The Hall 245m, The Station 80m o Sheet 15 Moor Farm 195m-289m o Sheet 16 The Chase 132m Can the applicant please explain further the justification for the significant variance in distance between residential properties and the proposed arrays. If in some circumstances it is recognised a separation distance of 413m is an appropriate separation distance, how can 38m or 132m be appropriate?	- The removal of c. 40 acres of proposed solar panels in the field south of the 'Access Road to Fledborough' between statutory consultation and DCO submission to retain uninterrupted views of Fledborough Viaduct in response to feedback provided through consultation regarding the importance of the visual connection between the viaduct and the access road. - Siting the proposed panels west of Ragnall behind intervening landform to minimise their visual impact from the first iteration of the masterplan and extending the offset to the west to c. 200m from Main Street, between statutory consultation and DCO submission, along with the introduction of mitigation planting, to minimise the Proposed Development's impact on the setting of the village. - Commitment to minimum offsets of 15m from public rights of way to the closest proposed solar panel, although this is regularly exceeded as detailed on page 65 of the Design Approach Document, in recognition that the local public right of way network is a key way for the local community to experience the wider landscape. This approach accords with NPS EN-1 paragraph 5.10.19. Ultimately policy must be read as a whole, and the NPS are clear that landscape, and specifically visual, impacts are to be expected from nationally significant infrastructure projects (see e.g. paragraph 5.10.13). Policy therefore encourages adequate assessment and adoption of appropriate mitigation. This approach has been adopted by the Applicant. For example, and to demonstrate compliance with NPS EN-1 paragraph 5.10.6, the Applicant set out how the Proposed

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			Development responds to this in the Landscape and Visual Impact Assessment [REP3-015] in section 11.5 titled 'Environmental Measures'. This section is structured to reflect the considerations established in NPS EN-1 paragraph 5.10.6 covering: - Siting and design; - Landscape enhancement; - Design response to dwellings; - Design response to public rights of way; - Order Limits design and appearance; and - Protection of existing vegetation. Regarding paragraph NPS EN-1 paragraph 5.10.21, in accordance with this paragraph the Landscape and Visual Impact Assessment [REP3-015] provides a description and assessment of the visibility of the project during construction and operation (at year 1 and year 15) and provides a description of the associated impacts on views and visual amenity. This assessment of visual effects has been subject to discussion with the host authorities. The visual assessment covers several different categories of visual receptor (people) including residents, road users and recreational users. As agreed with host authorities and discussed through the Issue Specific Hearings and summarised in the subsequent written summary [REP1-077] and [REP1-078], a threshold for triggering individual residential visual amenity assessments was agreed as being major adverse visual impacts at year 15. This threshold was agreed with host authorities. As set out in the relevant Statement of Common Ground documents, Lincolnshire County Council, Nottinghamshire County Council, Newark and Sherwood District Council and Bassetlaw District Council each agree with the level of visual effect for each visual receptor and also agree that a

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			Residential Visual Amenity Assessment is not required. Conversation is ongoing with West Lindsey District Council but no discrepancy has been identified to date. Response to point 2: The Landscape and Visual Impact Assessment provided at Deadline 3 [REP3-015] included Table 11.10. This table lists each of the individual residential properties that are included within each visual receptor group. The table also signposts the reader to the relevant sheet of the Land Plans [REP2-006], allowing the reader to identify the precise location of each dwelling. For clarity, the Land Plans themselves comprise the corresponding map that should be used to identify the properties listed in Table 11.10. The final column in Table 11.10 identifies the viewpoint used to assess the visual impact on the dwelling. This table, and the associated documents, has been reviewed by Nottinghamshire County Council, Lincolnshire County Council, Newark and Sherwood District Council and Bassetlaw District Council, each of whom has confirmed the approach to be acceptable and agrees with the level of visual impact identified. Conversation is ongoing with West Lindsey District Council, but no disagreement has been raised to date. This is confirmed via the Statement of Common Ground submitted at Deadline 4. Regarding the difference in distances between residential dwellings and above ground infrastructure: The project recognised early in the design process that a ‘one size fits all’ approach to residential offsets, for instance a standard offset distance, would not be appropriate. Different houses and the way they are used by residents varies. Instead, the project design response should respond to the

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			current view, for instance the orientation, height, character of the view, foreground vegetation, and surrounding topography. As discussed through the Issue Specific Hearings and summarised in the subsequent written summary [REP1-077] and [REP1-078] the design in proximity to dwellings has been informed by field work and visits to individual properties. To provide an example of the reasoning behind the difference in approach, as highlighted in the examples given in the question, The Chase includes offsets of 132m to the north, and 44m to the south east. The 132m north of the property is closer than that proposed around other dwellings; however, The Chase is enclosed by existing trees and vegetation that limits views to the north and east. In recognition that, particularly during winter months, views are afforded through the trees of the wider landscape, the offset was increased to 132m to maintain a sense of openness beyond the intervening vegetation. The fence line would be 44m south east of the dwelling. This is behind existing vegetation within the curtilage boundary and a field boundary hedge (outside domestic ownership). The panels proposed in this location would therefore not be visible from the dwelling. A ground floor window and gate to the garden face due south, and therefore no panels or associated infrastructure are proposed on any land due south of the dwelling to minimise visual impact experienced by the residents. The principal view from the dwelling is orientated westwards, across the A1133 and extends across fields north of Moor Lane towards South Clifton. A view corridor was carved out of this view in the non-statutory masterplan (see page 56 of the Design Approach Document [REP2-021]). However, through further survey and consultation, the entire field was removed from the potential Order limits in the statutory consultation masterplan, thereby

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			removing all potential infrastructure in the primary view from the dwelling. Taking an example from the list in the question that appears to have a longer distance offset, there are no panels proposed to be closer than 414m north of Farhill Farm. It was recognised that, unlike The Chase, Farhill Farm had potential to have solar panels on all four sides of the property in the statutory consultation masterplan. The team visited the dwelling and met with the resident who explained that the northern view is the principal view from the dwelling and therefore the priority for consideration in the final design. This is balanced by the fact that the proposed panels to the south and the west remain closer to the property, but by maintaining the field to the north of the dwelling as open, this would minimise the visual impact experienced by residents. The description above is intended to provide an example of how the iterative design process has responded to field work and consultation feedback, and how this has resulted in the design approach to individual dwellings. A similar 'individual' approach has been taken to each dwelling located in proximity to the Order limits.
Noise and vibration			
	Q16.0.1	**North Clifton Hall** (1) Can the applicant direct the ExA to where in the noise and vibrations assessments, potential impacts from construction, operation and decommissioning on North Clifton Halll are provided?	Response to Question 1: <u>Construction Noise and Vibration</u> Appendix 15.3 of the ES [APP-141] contains tables (Table 8 to Table 10) summarising the results of the various elements of the construction noise assessment for all noisy stages of

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		(2) Given the proximity of a proposed access road to North Clifton Hall, can the applicant please provide details of the mitigation measures that will be secured in the DCO, to provide mitigation from potential noise and vibrations effects at North Hall Farm during construction, operation and decommissioning?	construction and which include all receptors for which the predicted noise impacts prior to mitigation are greater than negligible. North Clifton Hall is, however, not included in these tables as predicted construction noise levels prior to mitigation are negligible at this property during all stages of construction. For reference, the predicted unmitigated construction noise levels for each of the various construction stages at North Clifton Hall are: Trenching: 56 dB(A) (Negligible impact) Piling: 64 dB(A) (Negligible impact) Access track construction: 57 dB(A) (Negligible impact) BESS and substation compound construction: 37 dB(A) (Negligible impact) Similarly, the construction vibration assessment is summarised in Table 11 of Appendix 15.3 of the ES [APP-141] for receptors where greater than negligible vibration impacts are predicted prior to mitigation. North Clifton Hall is not included in this table, as the vibration impacts at North Clifton Hall are predicted to be negligible prior to any mitigation measures. Predicted worst case unmitigated construction vibration levels at North Clifton Hall are 0.1 mm/s PPV (Negligible impact). <u>Operational Noise and Vibration</u>

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			With regard to operational noise, predicted noise levels prior to mitigation are presented in Tables 4 to 7 of Appendix 15.4 of the ES [APP-142]. As for the construction noise assessment, these tables only include results for receptors where predicted noise impacts prior to mitigation are greater than negligible during either the day or night. Predicted unmitigated operational noise levels from the BESS units at North Clifton Hall are negligible during both day and night, therefore results for North Clifton Hall are not included in Table 4, however predicted operational noise levels from the MVPT skids, PCSs and combined overall operational noise levels from all operational plant and equipment prior to mitigation are minor at North Clifton Hall. Results for North Clifton Hall are therefore included in Tables 5, 6 and 7 of Appendix 15.4 [APP-142]. For ease of reference, operational noise predictions prior to mitigation at North Clifton Hall are reproduced below, including predicted noise levels during operation of the BESS units. BESS: Day: 29 dB(A) (Negligible impact) Night: 27 dB(A) (Negligible impact) MVPT Skids: Day: 30 dB(A) (Negligible impact) Night: 31 dB(A) (Minor impact) PCSs: Day: 34 dB(A) (Minor impact) Night: N/A (Negligible impact) All Operational Noise Sources Combined: Day: 34 dB(A) (Minor impact)

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			Night: 33 dB(A) (Minor impact) <u>Decommissioning Noise and Vibration</u> As discussed in Section 15.6.12 of Chapter 15 of the ES [APP-044], details of works that will be required during decommissioning are not available, therefore a detailed assessment of noise and vibration impacts at North Clifton Hall during decommissioning cannot be provided. As per Chapter 15 of the ES, however, decommissioning activities are likely to be similar in nature to construction activities. As such, and given that construction activities are predicted to results in no higher than negligible impacts at North Clifton Hall during any stage of construction prior to mitigation, potential noise and vibration impacts during decommissioning will be not significant in EIA terms. Response to Question 2: Within the question the Examining Authority have referred to North Hall Farm. Given the context of this question the Applicant has assumed this is a typographical error and answered in respect to North Clifton Hall. Since no significant noise or vibration effects are predicted at North Clifton Hall during any stage of construction or operations, with the absolute worst-case impact at this property during any stage of the life of the project predicted to be minor prior to mitigation, no specific noise and vibration mitigation measures will be required to limit noise or vibration at this receptor. The noise control measures that apply to the Proposed Development as a whole, however, also apply at

App Ref	ExQ2 Ref	Question Summary	Applicant Response
			North Clifton Hall. These include Requirement 13 of the draft DCO [REP3-003] which requires a CEMP / CEMPs to be submitted and approved by the relevant planning authorities, which will include noise and vibration control measures, and which must be followed during construction works. In addition, Requirement 16 of the draft DCO [REP3-003] requires a noise assessment to be submitted and approved by the relevant planning authorities which demonstrates that operational noise from the Proposed Development will be mitigated to the operational noise limit defined in Requirement 16, which is a cumulative noise limit that must be achieved by all installed plant and equipment associated with the final design of the Proposed Development. The noise control measures that apply to the Proposed Development as a whole, however, also apply at North Clifton Hall. These include Requirement 13 of the draft DCO [REP3-003] which requires a CEMP / CEMPs to be submitted and approved by the relevant planning authorities, which will include noise and vibration control measures, and which must be followed during construction works. In addition, Requirement 16 of the draft DCO [REP3-003] requires a noise assessment to be submitted and approved by the relevant planning authorities which demonstrates that operational noise from the Proposed Development will be mitigated to the operational noise limit defined in Requirement 16, which is a cumulative noise limit that must be achieved by all installed plant and equipment associated with the final design of the Proposed Development.
	Q16.0.2	**Location of Power Conversion Systems (PCS)** In her D3 submission [REP3-073], Mrs Walker raises the issue of inconsistencies in information provided by the	As has been stated in previous responses any locations of PCS units shown during the pre-application stage were illustrative. Exact positioning of PCS units will be determined

<table>
<tr><th>App Ref</th><th>ExQ2 Ref</th><th>Question Summary</th><th>Applicant Response</th></tr>
<tr><td></td><td></td><td>applicant in responses to questions regarding the proposed locations of PCS. Can the applicant please clarify which response is correct, and provide a full and detailed response to all issues raised?</td><td>at the detailed design stage. There are secured parameters that restrict the position of PCS to minimise impact (both noise and visual). These parameters are detailed in the Outline Design Parameters under Work No. 1 in Table 2.1 [REP2-022].

<table>
<tr><th>Type</th><th>Parameter</th></tr>
<tr><td>Location</td><td>Where practicable PCS units will not be located within 100m of residential dwellings and 50m of existing public rights of way and in all cases will be designed to ensure a night time noise rating level at residential receptors of no greater than 35dB(A).</td></tr>
<tr><td>Design</td><td>PCS enclosures will measure up to 13m long x 3m width.</td></tr>
<tr><td>Design</td><td>PCS located outside the extent of the designed flood event (as set out in ES Chapter 7 [EN010159/APP/6.7]) will not exceed height 4.5m AGL.</td></tr>
<tr><td>Design</td><td>PCS located within the extent of the designed flood event (as set out in ES Chapter 7 [EN010159/APP/6.7]) will be mounted on stilts and will not exceed height 6m AGL.</td></tr>
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App Ref	ExQ2 Ref	Question Summary	Applicant Response
			Further restrictions on noise levels from PCSs are secured in Requirement 16 of the draft DCO [REP3-003].
	Q16.0.3	**Noise at property** In his D3 response [REP-084], Mr Walker provides details of a noise phenomenon that occurs at his property. Can the applicant please provide a detailed response to this matter.	The Applicant is not able to comment in detail on sources of noise other than those associated with the Proposed Development. In order to do so, detailed information would be needed such as the level of noise produced by the noise sources referred to, the distance of those sources from residential properties, the height of the sources and receivers above the ground, the frequency content of the source noise, details of the intervening topography, etc. It is understood, however, that the concern primarily relates to ground-borne noise during operation of the development. The Applicant can confirm that plant and equipment associated with the operation of the Proposed Development will not generate any perceptible levels of ground-borne noise / vibration at noise sensitive receptor locations (see 3.10.4 in section 3.10 of the Scoping Opinion [APP-150]). In addition, airborne noise from the proposed operational plant and equipment is controlled by Requirement 16 of the draft DCO [REP3-003], which requires that the operational airborne noise levels from the Proposed Development achieve the levels set out in Chapter 15 of the ES [APP-044].
Transportation and traffic			
	Q18.0.1	**Safety audits for new access points** At ISH2, NCC confirmed an RSA1 being undertaken on the proposed access points on classified roads within Nottinghamshire would be an acceptable fall-back position. Can both parties confirm whether they consider this to be an	The Stage 1 RSA has been undertaken and is attached in the A57 Access Briefing note which the Applicant will look to submit on or before Deadline 5

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		acceptable position? If so, can the applicant please provide an RSA1 for the proposed access points in Nottinghamshire on classified roads? If the applicant does not agree, please explain why not.	
	Q18.0.2	**Gate A access point** The submission at Deadline 3 from NCC [REP3-085] includes comments on the applicant's previous response to the LIR. These comments include the following: "*Access 1 (Gate A) – The need for a ghost island in accordance with DMRB is queried as the construction peak period daily traffic flow shown in Table 4 of the TA exceeds that indicated as acceptable for a simple priority junction in Figure 2.3.1 of DMRB CD123. The swept paths should identify corresponding opposing movements on the same viewport. There appear to be conflicts between opposing movements*." (1) Is a ghost island an appropriate junction type for the operational and decommissioning phases of the proposed development? (2) Are there any potential risks to road safety of a ghost island junction with the likely number of vehicle movements that will occur during the operational and decommissioning phases of the proposed development? (3) If the applicant does not provide a ghost island, would NCC consider the access point to be safe? (4) Can the applicant confirm the duration that vehicle movements at this access point would be above the	The A57 access junction review report has been prepared and provides further information on the design and operation of the junction. A ghost island junction is not considered necessary for the proposed access junction as the average traffic flows fall below the thresholds for this type of junction as detailed in the A57 Access Review. Point 1: A ghost island is not required for the construction, operational or decommissioning phases of the proposed development. Point 2: The Road Safety Audit found no road safety concerns with the proposed simple junction layout. Point 3: The Road Safety Audit was undertaken in line with the requirements of GG119 and was independent of the design team. The RSA did not identify a requirement for a ghost island. Point 4: The peak month lasts for one month only. The traffic thresholds are detailed in the A57 Access Junction review report. Points 5 & 6: The Applicant does not believe that a ghost island is required or justified.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		threshold for a simple priority junction? Alternatively provide evidence why the threshold would not be met (5) Would the provision of a ghost island in this location lead to any additional land take, over and above what is currently proposed in the dDCO? (6) What other issues, aside from highways-related issues, would be caused by the use of a ghost island? For example, would there be landscape or visual impacts that need to be assessed?	
	Q18.0.3	**Swept path analysis** The submission at Deadline 3 from NCC [REP3-085] includes comments on the applicant's previous response to the LIR. These comments include the following: "*A common theme throughout the drawings appears to be an issue with the swept paths. Right turning exiting vehicles commence the turn prior to reaching the give way which means that this manoeuvre is being started prior to visibility being available. At the point that visibility is available, the cab of the vehicle would be at an oblique angle to the major road meaning that the driver may not be able to see vehicles approaching from the left. If the vehicle was at 90° to the give way at the point where visibility would be available, it would be in the path of an entering vehicle. It also appears that a right turning exiting vehicle would not be able to make the turn from the give way at a number of the accesses due to the narrowness of the road on to which it is turning. This suggests that the proposed accesses are not wide enough to accommodate all turning manoeuvres and/or that the*	The detailed design stage of the junctions is secured in the Outline Construction Traffic Management Plan [ref], with the designs being undertaken to the satisfaction of the relevant local authority highway departments. The detailed design stage will review the swept paths following detailed consultation with the selected contractors to refine the junction requirements. Any alterations to the junctions would be identified at this stage and will be located within the works areas highlighted in the DCO.

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		roads onto which they turn do not accommodate the required manoeuvres and may need localised widening." Can the applicant please provide a response to the issue raised above, and what work is required to overcome it?	
	Q18.0.5	**NCR 647** The submission at Deadline 3 from NCC [REP3-085] includes comments on the applicant's previous response to the LIR. These comments included the following: "*Our only request is that at the western end of the NCR, where it leaves the disused railway line and joins the public highway, temporary signage should be installed by the developer to warn cyclists of the presence of construction traffic. This is the location annotated 07/22 and 07/23 on Sheet 7 of 16 of the Streets, rights of way and access plans. We would suggest that para. 3.1.3 of the oPROWMP is amended to include this specific provision.*" Can the applicant please provide their response to the ExA, on the need for temporary signage in this location or confirm amendment to the oPROWMP?	In the update to the Outline Public Rights of Way Management Plan issued at Deadline 3 **[REP3-057]**, an updated paragraph 3.1.3 was included as requested by Nottinghamshire County Council and makes provision for temporary signage at this location.
	Q18.0.6	**Barred routes** The submission at Deadline 3 from NCC [REP3-085] includes comments on the applicant's previous response to the LIR. These comments include the following: "*Paragraph A.12.4.27 of the Transport Assessment (TA) states that the data has been independently crosschecked*	Point 1: The extents of the Wear & Tear Agreement would be agreed with each highway authority prior to works commencing and would be secured in the finalised Construction Traffic Management Plan, secured under the DCO (see section 4.7 of the Outline CTMP [REP3-049). Point 2a: The comment relates to an earlier version of the oCTMP report. The latest version of the oCTMP provides

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		against DfT traffic data and maintains that there are 792 HGVs south of South Clifton. This is contrary to DfT information, which identifies there are 320 (annual average) HGVs to the south of South Clifton. As per our previous responses, the increase in HGVs is therefore over 60% and the applicant should review the need for assessment on the route between Besthorpe Quarry and Sand Lane, Spalford on this basis. It is thought that addressing this is unlikely to require amendments to highway, but its exclusion means that this length of road would not be included in the Wear and Tear agreement (see response to LIR 150 and 151." "*As per response to LIR131, whilst HGVs will not impact the settlement of Collingham, the additional HGVs may impact the smaller settlements along this route. It is not thought likely that addressing this omission would result in any amendments to highway being necessary, but the route will need to be considered in terms of Wear and Tear.*" (1) Can the applicant please confirm whether the roads should be included in a wear and tear agreement and if not provide a justification? "*With regards to the additional barred routes, please note that the diagram of the barred routes is referred to in both the TA and oCTMP as being in Figure 2 but are in Figure 4.1. The figure is helpful to identify potential routes missing and it would be beneficial to include routes leading to South Scarle in these.*" (2) Can the applicant please confirm:	clarification and references Figures 4.1. An insert of the area near North Clifton and South Clifton is also provided in Figure 4.2 of [EN010159/APP/7.9.3]. Point 2b: The routes from South Scarle are included and can be seen in Figures 4.1 of [EN010159/APP/ 7.9.3 (rev 04)]. Point 3: The oCTMP is updated and is [EN010159/APP/ 7.9.3 (rev 04)]. Point 4: Figures 4.1 and 4.2 provide further clarity within [EN010159/APP/ 7.9.3 (rev 04)].

App Ref	ExQ2 Ref	Question Summary	Applicant Response
		○ Which is the correct figure reference? ○ Whether routes to South Scarle should be included on the diagram of barred routes? (3) Can the applicant please ensure that when the next iteration of the TA and oCTMP are submitted at Deadline 4, the errors highlighted by NCC and those raised by Mrs Walker [REP3-088] are corrected. (4) Can the applicant ensure a clear plan is included that is sufficiently clear and precise it can be used for enforcement purposes.	
	Q18.0.7	**Visibility splays** In their D3 submission Comments on responses to LIRs 1[REP3-085], NCC raise a number of issues in response to LIR141. Can the applicant please provide a full and detailed response to all issues raised under LIR141, including the query regarding land outside of the red line boundary for visibility splay.	The Applicant has responded to the points raised by NCC in the Applicant Response to D3 Submissions [9.31 (rev 01)]

Appendix A Legal Cases

Neutral Citation Number: [2024] EWHC 279 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/02/2024

Before :

THE HON. MR. JUSTICE HOLGATE

- -

Case No: AC-2023-LON-002327

BETWEEN:

MEAD REALISATIONS LIMITED

Claimant

- and –

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) NORTH SOMERSET COUNCIL

Defendants

AC-2023-LON-002481

BETWEEN:

REDROW HOMES LIMITED

Claimant

- and –

(1) THE SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) HERTSMERE BOROUGH COUNCIL

Defendants

- -
- -

Charles Banner KC and **Isabella Buono** (instructed by **Clarke Willmott Solicitors**) for the **Claimant** in AC-2023-LON-002327

Zack Simons and **Isabella Buono (**instructed by **Osborne Clarke LLP)** for the **Claimant** in AC-2023-LON-002481

Hugh Flanagan and **Piers Riley-Smith** (instructed by the **Government Legal Department)** for the **First Defendant** in both claims

Emmaline Lambert (instructed by **Hertsmere Borough Council)** for the **Second Defendant** in AC-2023-LON-002481

North Somerset Council did not appear and were not represented.

Hearing dates: 17 and 18 January 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 12 February by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr. Justice Holgate:

Introduction

1. These two claims raise issues about the interpretation and application of the sequential test in national policy on flood risk.

2. In AC-2023-LON-002327 Mead Realisations Limited ("Mead") brings a challenge under s.288 of the Town and Country Planning Act 1990 ("TCPA 1990") to the decision of the Inspector on behalf of the first defendant, the Secretary of State for Levelling Up, Housing and Communities, dated 20 June 2023 dismissing its appeal against the refusal by the second defendant, North Somerset Council ("NSC"), of an application for planning permission for residential development of up to 75 dwellings at Lynchmead Farm, Ebdon Road, Wick Street, Lawrence, Weston-Super-Mare ("the Lynchmead decision").

3. In AC-2023-LON-002481 Redrow Homes Limited ("Redrow") brings a challenge under s.288 to the decision of the Inspector on behalf of the same defendant dated 19 July 2023 dismissing its appeal against a deemed refusal by the second defendant, Hertsmere Borough Council ("HBC"), of an application for planning permission for residential developments of up to 310 units and land reserved for a primary school, community facilities and a mobility hub on land at Little Bushey Lane, Bushey ("the Bushey decision").

Relevant Policies

4. The National Planning Policy Framework ("NPPF") was first published by the Secretary of State on 27 March 2012. These claims relate to the NPPF published on 20 July 2021, the version in force at the dates of the respective public inquiries and decision letters.

5. Chapter 2 of the NPPF deals with "achieving sustainable development". Paragraph 11c-d sets out the presumption in favour of sustainable development (as analysed in *Monkhill Limited v Secretary of State for Housing, Communities and Local Government* [2020] PTSR 416; [2021] PTSR 1432 and *Gladman Developments Limited v Secretary of State for Communities, Housing and Local Government* [2021] PTSR 1450). In the present cases the local planning authorities were unable to demonstrate a 5-year supply of deliverable housing sites within their respective areas and so the presumption in favour of sustainable development, otherwise known as the "tilted balance", was engaged, unless disapplied by limb (i) or limb (ii) of paragraph 11d.

6. Under limb (i) the presumption is disapplied where *inter alia* the application of the NPPF policies "that protect areas or assets of particular importance provides a clear reason for refusing the development proposed". Those policies include the policies relating to "areas at risk of flooding or coastal change" (see footnote 7). Where flood risk policy does not provide a clear reason for refusing permission, the tilted balance applies unless any adverse impacts of granting permission would "significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole" (limb (ii)).

7. Chapter 14 of the NPPF deals with the challenges posed by climate change, flooding and coastal change. Paragraphs 159 to 169 deal with flooding. The overall objectives are set out in para. 159:

> "Inappropriate development in areas at risk of flooding should be avoided by directing development away from areas at highest risk (whether existing or future). Where development is necessary in such areas, the development should be made safe for its lifetime without increasing flood risk elsewhere."

8. Paragraphs 160 to 161 address the preparation of strategic policies and development plans. Paragraph 161 provides:

> "All plans should apply a sequential, risk-based approach to the location of development – taking into account all sources of flood risk and the current and future impacts of climate change – so as to avoid, where possible, flood risk to people and property. They should do this, and manage any residual risk, by:
>
> a) Applying the sequential test and then, if necessary, the exception test as set out below;
>
> b) …"

9. The submissions in these cases have focused on para. 162, which sets out the sequential test:

> "The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide the basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding."

The sequential test applies not only to plan-making but also to development control decisions. The words "from any form of flooding" refer not only to flooding from rivers or the sea, but also surface water flooding.

10. If the sequential test is passed, that is there are no reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding, then it may be necessary to apply the "exception test" in accordance with paras. 163 to 165:

> "163. If it is not possible for development to be located in areas with a lower risk of flooding (taking into account wider sustainable development objectives), the exception test may have to be applied. The need for the exception test will depend on the potential vulnerability of the site and of the development proposed, in line with the Flood Risk Vulnerability Classification set out in Annex 3.

> 164. The application of the exception test should be informed by a strategic or site-specific flood risk assessment, depending on whether it is being applied during plan production or at the application stage. To pass the exception test it should be demonstrated that:
>
> a) the development would provide wider sustainability benefits to the community that outweigh the flood risk; and
>
> b) the development will be safe for its lifetime taking account of the vulnerability of its users, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.
>
> 165. Both elements of the exception test should be satisfied for development to be allocated or permitted."

11. Annex 3 (referred to in para.163) classifies different types of land use, namely "essential infrastructure" (e.g. infrastructure which has to be located in a flood risk area), highly vulnerable (e.g. caravans and installations requiring hazardous substances consent), more vulnerable (e.g. hospitals, care homes, residential development), less vulnerable (shops, services, offices and industry) and water-compatible development.

12. Paragraph 164(a) allows the need for the development plus any sustainability benefits to be balanced against flood risk.

13. Paragraph 167 requires that a development proposal should not increase flood risk elsewhere. Applications should be supported by a site-specific flood risk assessment. The Environment Agency is responsible for classifying land by reference to the annual probability of flooding from a river or the sea. For zone 1 the probability is less than 0.1%, for zone 2 below 1% from rivers or below 0.5% from the sea, and for zone 3 1% or above from rivers or 0.5% or above from the sea. A flood risk assessment is required for all development in zones 2 or 3 and certain development in zone 1.

14. On 6 March 2014 the Secretary of State introduced a website containing Planning Practice Guidance ("PPG") which may be amended from time to time. The section on flood risk was amended on 25 August 2022.

15. Development plans are prepared to determine the need for different types of development and their distribution across the area of the plan. It is plain from para. 026 of the PPG that the need for development is a relevant consideration in plan-making. That need should be reviewed where the sequential test is not satisfied.

16. The PPG describes how the sequential test should be applied in determining planning applications. The test is applied to an area "defined by local circumstances relating to the catchment area for the type of development proposed", for example the catchment area of a school. The need for a certain type of development (e.g. to sustain an existing community) may limit the area of search for alternative sites to an area in flood zones 2 and 3 and so sites further afield may not be reasonable alternatives (PPG para. 027). Nationally or regionally important infrastructure may involve an area of search beyond the area of the local authority.

17. The submissions in this case have largely focused on para. 028 of the PPG:

> "**What is a "reasonably available" site?**
>
> 'Reasonably available sites' are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
>
> These could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. Such lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'.
>
> The absence of a 5-year land supply is not a relevant consideration for the sequential test for individual applications."

18. Ground 1 in Mead's claim is concerned with the Inspector's treatment of the relationship between para. 162 of the NPPF, para. 028 of the PPG and policy "CS3: Environmental impacts and flood risk assessment" of the North Somerset Core Strategy 2017.

19. What the Inspector referred to as the "first part" of CS3 reads as follows:

> "…
>
> Development in zones 2 and 3 of the Environment Agency Flood Map will only be permitted where it is demonstrated that it complies with the sequential test set out in the National Planning Policy Framework and associated technical guidance and, where applicable, the Exception Test, unless it is:
>
> - development of a category for which National Planning Policy Framework and associated technical guidance makes specific alternative provision; or
>
> - development of the same or a similar character and scale as that for which the site is allocated, subject to demonstrating that it will be safe from flooding, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall."

20. So the first part of Policy CS3 requires development in zones 2 or 3 to comply with the sequential test in the NPPF and, where appropriate, the exception test. In DL 10 the Inspector noted that the "technical guidance" had been withdrawn and so he did not place any weight upon that document.[1]

[1] This was identified in 3.46 of the Core Strategy as the "Technical Guidance to the National Planning Policy Framework" issued in March 2012 alongside the 2012 version of the NPPF. Para.1 of the Guidance states that it retained key elements of earlier national planning policy documents "as an interim measure pending a wider

21. The remaining part of CS3 states:

> "For the purposes of the Sequential Test:
>
> 1. The area of search for alternative sites will be North Somerset-wide unless:
>
> - It can be demonstrated with evidence that there is a specific need within a specific area;
>
> or
>
> - The site is located within the settlement boundaries of Weston (including the new development areas), Clevedon, Nailsea and Portishead, where the area of search will be limited to the town within which the site is located.
>
> Other Local Development Documents may define more specific requirements.
>
> 2. A site is considered to be 'reasonably available' if all of the following criteria are met:
>
> - The site is within the agreed area of search.
>
> - The site can accommodate the requirements of the proposed development.
>
> - The site is either:
>
> a) owned by the applicant;
>
> b) for sale at a fair market value; or
>
> c) is publicly-owned land that has been formally declared to be surplus and available for purchase by private treaty.
>
> Sites are excluded where they have a valid planning permission for development of a similar character and scale and which is likely to be implemented."

22. The Inspector referred to these paragraphs as the "first and second sections". They are said to be "for the purposes of the sequential test." The first section states that generally the area of search will be the whole of North Somerset's area. That was common ground in the Mead case (see DL 12). However, the policy also states that the area of search may be based upon a different area in which there is shown to be a specific need. The second section of CS3 states that a site is considered to be "reasonably available" if all

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review of guidance to support planning policy." The Government's website states that this Guidance was withdrawn on 7 March 2014, having been replaced by the PPG issued on the previous day.

of the criteria set out are met. The argument in ground 1 of the Mead case focused on this second section of CS3.

23. The claimant's argument in the Redrow case does not rely upon any part of the statutory development plan for Hertsmere. It appears that policy SADM14 of the Site Allocations and Development Management Policies Plan (adopted in November 2016) essentially replicates policy in the NPPF. In the subsequent draft Hertsmere Local Plan, policy H10 allocated an area which included the Bushey appeal site, for up to 350 homes, community facilities, local retail, flexible workspace, a primary school and public open space. However, on 27 April 2022 HBC decided to withdraw that draft plan.

A summary of the decision letters

The Lynchmead decision

24. Mead's application was for an outline planning permission with all matters reserved except access (DL 2).

25. The Inspector defined the main issue in the appeal as the effect on the development of flood risk, in particular the sequential test (DL 6). The benefits of the scheme and housing land supply were considered as part of the overall planning balance (DL 7).

26. The site lies within flood zone 3 with a "high probability" of flooding from the sea (DL 8).

27. The Inspector found at DL 12 to DL 22 that the proposal met the sequential test in the second part of policy CS3 of the Core Strategy because (a) the area of search had been borough-wide and (b) there were no alternative sites meeting the criteria for "reasonable availability" set out in the "second section" of CS3.The Inspector decided that two other sites owned by Mead were not reasonable alternatives because they could only accommodate 70 or 74 dwellings rather than the 75 dwellings proposed for the appeal site (DL 16), indicating his strict application of the criterion in CS3 that a site should accommodate "the requirements of the proposed development."

28. The Inspector dealt with national flood risk policy at DL 23 to 40. Here he concluded that the sequential test in national policy was not met because there were reasonably available sites for residential development appropriate for the proposal with a lower flood risk than the appeal site. In reaching this conclusion he applied the NPPF read together with the PPG.

29. The Inspector addressed the overall planning balance at DL 50 to 60. He treated the provision of 75 dwellings as the most important benefit, given that the Council could only demonstrate a supply of housing land of 3.5 years. The provision of 30% of the housing as affordable dwellings was a significant benefit. There were also some economic, bio-diversity and community benefits.

30. The Inspector said that set against the benefits of the proposal there was the harm that would arise if the development were to be flooded. He dealt with flood risk at DL 55 to 56:

> "55. Set against those benefits is the harm that would arise if the development were to flood. Evidence provided by the Council indicates that tidal flood waters could be deep. Such flooding would enter dwellings and surcharge drains. Standing water would be likely to be present for some time before water levels returned to normal. Such flooding would cause extensive damage both to buildings and their contents, requiring significant repair or replacement. There may also be adverse health and environmental impacts. The risk of this harm occurring weighs significantly against the proposal.
>
> 56. Irrespective of the degree of risk of flooding occurring or measures that could be taken to make the development resilient to flooding during its lifetime, the Framework is clear that development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. I have found that there are such sequentially preferable sites available. This weighs heavily against the proposal."

31. At DL 58 the Inspector found that national policy on flood risk provided a clear reason for refusal and therefore disapplied the presumption in favour of sustainable development (para. 11d(i) of the NPPF).

32. Accordingly, the Inspector struck a "non-tilted" balance. He decided that the benefits of the proposal were outweighed by the failure to meet the sequential test and the significant harm that would occur if the development were to be flooded (DL 59). In those circumstances, the Inspector said that there was no need for the exception test to be applied and he dismissed Mead's appeal.

The Bushey decision

33. Redrow's application was for an outline planning permission for up to 310 residential units and land for a primary school, community facilities and mobility hub, with all matters reserved other than access. The site comprised 18ha of fields used for grazing by horses (DL 13).

34. The site lies in the Green Belt and therefore in policy terms the proposal was for "inappropriate development". The main issues were the effect of the proposed development on the openness and purposes of the Green Belt and on the character and appearance of the area, whether the location was suitable with regard to policies on flood risk and whether any harm to the Green Belt and other harm was clearly outweighed by very special circumstances. The only area of disagreement on flood risk related to the application of the sequential test (DL 9 and DL 12).

35. It was common ground between Redrow and HBC that the site does not make an important strategic contribution to the Green Belt (DL 33).

36. The Inspector assessed the effects of the proposal on the openness of the Green Belt at DL 38 to DL 44. The proposal would significantly reduce spatial openness (DL 39 to DL 40). There would be a significant and long-term localised effect on visual openness

(DL 41). There would be a significant reduction in visual openness for viewpoints outside and within the site (DL 42 to DL 43). Overall there would be significant harm to both the visual and spatial openness of the Green Belt (DL 44). There would be respectively modest, very limited and no harm to the three purposes of this part of the Green Belt (DL 45 to DL 52).

37. The proposed development would have a significant, harmful effect on the character and appearance of the area (DL 53 to DL 66).

38. A "main river" and some other watercourses run through the site. There are two reservoirs within respectively 350m and 1.5km of the site. Although much of the site lies within flood zone 1, the course of the main river falls within zones 2 and 3 and 10% of the overall site is affected by reservoir flood risk (DL 67 to DL 68). Parts of the site are subject to varying degrees of surface water risk (DL 69). Although Redrow had sought to locate built development within zone 1 for fluvial flood risk, the Inspector said that it was necessary to consider all the development proposed and all sources of flood risk affecting the site. Consequently, the sequential test had to be applied to the whole site (DL 75).

39. The Inspector found that Redrow had taken a reasonable and pragmatic approach by defining the area of search as the whole borough (DL 78 to DL 84).

40. The Inspector found that, on the evidence, there were 13 sites which potentially would be reasonably available and it had not been shown that the proposed development could not be located elsewhere on land at a lower risk of flooding. Accordingly, the proposal did not satisfy the sequential test and conflicted with para. 162 of the NPPF. The inspector gave very substantial weight to this factor (DL 85 to DL 100).

41. At DL 103 to DL 124 the Inspector assessed all the matters upon which Redrow relied as very special circumstances for the purposes of Green Belt policy. HBC has a housing supply of only 1.23 to 2.25 years and the shortfall in meeting the requirement for a 5-year supply of housing land is between 2,104 and 2,875 dwellings. The Inspector described this supply as "woeful" and symptomatic of a chronic failure by HBC to deliver housing. The council is amongst the worst performing authorities on housing land supply in the country (DL 109). The Inspector gave "very substantial weight" to Redrow's proposal to develop up to 310 residential units and the provision of 40% affordable housing (DL 110 to DL 113).

42. But the Inspector concluded that the benefits of the proposal did not amount to very special circumstances clearly outweighing the harm it would cause, including harm to policy on flood risk (DL 126 to DL 130).

43. The presumption in favour of sustainable development was disapplied by the clear reasons for refusal based on Green Belt and flood risk policies (para. 11d(i) of the NPPF) (DL 131 to DL 132).

The issues

44. There are a number of points of principle which are common to both claims, as well as specific points in relation to the decision letters in each case. The parties helpfully

agreed a list of issues. I summarise that list so as to reflect the way in which the oral argument proceeded.

45. In relation to both claims:

(i) The claimants submit that on a true interpretation of para. 162 of the NPPF the Inspector was required to consider whether there were alternative sites which could accommodate the development in fact proposed in its various particulars, including form, quantum and intended timescales for delivery, and not some other hypothetical development. The claimants submit that in each decision letter the Inspector failed to adhere to that interpretation;

(ii) The claimants submit that the PPG is incapable of imposing a more stringent set of requirements than the NPPF. They say that in each case the Inspector wrongly treated para. 028 as requiring a different approach to that required by para. 162 of the NPPF.

(iii) The claimants submit that, properly interpreted, para. 028 of the PPG provides that to be sequentially preferable to the proposal, alternative sites must be capable of accommodating identified needs for the type of development at issue. They say that in each decision letter the Inspector failed to adhere to that interpretation;

(iv) The claimants submit that need for the proposed development is relevant to the application of the sequential test. They submit that the Inspector in each case either wrongly excluded or disregarded that need.

46. In summary, Mr. Charles Banner KC submitted on behalf of Mead that:

(i) PPG must be subservient to policy in the NPPF. It cannot alter or override the NPPF;

(ii) PPG cannot be treated as a mandatory requirement, either in relation to the application of tests or the identification of considerations which are or are not material;

(iii) PPG may be an aid to the interpretation of the NPPF, but only where it corresponds to a NPPF policy or falls within the four corners of that policy;

(iv) Considerable caution is required in interpreting PPG;

(v) PPG is not a binding code.

47. In his reply Mr. Banner accepted that if either Inspector had treated the PPG as elucidating the NPPF in "a non-binding manner," that would not in itself be legally objectionable. I did not understand Mr. Zack Simons (appearing for Redrow) to disagree. But they submit that both Inspectors had erred by treating para. 028 of the PPG as a binding code.

48. Mr. Simons adopted Mr. Banner's overall analysis.

49. It should be noted that there has been no challenge to the lawfulness of para. 028 of the PPG.

50. Counsel treated the remarks of Dove J in *R (Menston Action Group) v City of Bradford Metropolitan District Council* [2016] PTSR 466 at [41] as laying down a general principle that PPG is subservient to the policy in the NPPF for which it provides practice guidance. It cannot override the NPPF.

51. They submitted that PPG is not policy but guidance, relying on the following passage from the judgment of Lieven J in *Solo Retail Limited v Torridge District Council* [2019] EWHC 489 at [33]:

> "In my view the NPPG has to be treated with considerable caution when the Court is asked to find that there has been a misinterpretation of planning policy set out therein, under para 18 of *Tesco v Dundee*. As is well known the NPPG is not consulted upon, unlike the NPPF and Development Plan policies. It is subject to no external scrutiny, again unlike the NPPF, let alone a Development Plan. It can, and sometimes does, change without any forewarning. The NPPG is not drafted for or by lawyers, and there is no public system for checking for inconsistencies or tensions between paragraphs. It is intended, as its name suggests, to be guidance not policy and it must therefore be considered by the Courts in that light. It will thus, in my view, rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in *Tesco v Dundee* applied to the Development Policy there in issue."

52. Mr. Banner and Mr. Simons also said that the PPG must not be elevated into a binding code which prescribes the steps required to be taken when determining a planning application. The PPG is merely practice guidance which is only intended to support the policies in the NPPF (*R (White Waltham Airfield Limited) v Royal Borough of Windsor and Maidenhead* [2021] EWHC 3408 (Admin) at [78]-[79] and *Bramley Solar Farm Residents Group v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2842 (Admin) at [165] to [166], [174] and [177] to [180]).

53. By contrast, in *R (Kinsey) v London Borough of Lewisham* [2021] EWHC 1286 (Admin), a decision cited by both Mr. Banner and Mr. Hugh Flanagan (for the first defendant), Lang J took a different approach to part of the PPG dealing with harm to heritage assets. The judge quashed the decision to grant planning permission because of a failure to identify the degree of harm to heritage assets within the "less than substantial harm" category in accordance with the PPG. She decided that that part of the PPG should not be treated with the "considerable caution" indicated in *Solo Retail* at [53] and that if a decision-maker was going to depart from such national guidance, he should give reasons for doing so (see [66], [73]-[74] and [88]-[89]). In effect, the court treated that part of the PPG as policy.

54. The decisions cited in argument raise the question whether there is a sharp legal divide between the NPPF and the PPG which treats the former as policy and the latter as not?

The legal status of national planning policy

55. It is necessary to go back to first principles. In *R (Alconbury Developments Limited) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at [69] and [74], Lord Hoffman explained that development control does not involve deciding between the rights or interests of particular persons. "It is the exercise of a power delegated by the people as whole to decide what the public interest requires." That is a "policy decision."

56. Lord Clyde added at [139] that "planning is a matter of the formation and application of policy". Planning and the development of land concerns the community as a whole, not just the locality where the particular case arises, but wider social and economic considerations which are properly subject to central supervision. By means of a central authority, the Secretary of State, some degree of coherence and consistency in the development of land can be achieved. National policy is part of the framework for consistent, predictable and prompt decision-making [140]. Consistent with the democratic principle, responsibility for that national policy lies with the Secretary of State accountable to Parliament [141]. The formulation of national policy is an essential element of securing coherent and consistent decision-making, but is subject to the principle that the exercise of discretion must not be fettered [143].

57. In *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] 1 WLR 3923 the Court of Appeal reiterated the importance of the Secretary of State's democratic accountability for national policy. That applies not only to the NPPF but also to written ministerial statements ("WMS") and PPG [25].

58. In *Hopkins Homes Limited v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865 Lord Carnwath JSC clarified the legal source of the Secretary of State's power to make national policy at [19] to [21]. It is not a prerogative power. Instead, it derives expressly or by implication from the planning legislation which gives him overall responsibility for the oversight of the planning system. Inspectors determining statutory appeals on behalf of the Secretary of State are required to exercise their own judgment within the framework of national policy set by government.

59. However, Lord Carnwath added at [24] to [26] that the scope of the NPPF should not be overstated. In the determination of planning applications it is no more than "guidance" and as such, one of the "other material considerations" to which the decision-maker must have regard (s.70(2) of the TCPA 1990). It does not displace the primacy given by s.38(6) of the Planning and Compulsory Purchase Act 2004 to the statutory development plan. The weight to be given to conflict or compliance with the NPPF is a matter of judgment for the decision-maker, a decision with which the court may only intervene on public law grounds (*Gladman Developments Limited v Secretary of State for Communities and Local Government* [2021] PTSR 1450 at [33(3)]).

60. In my judgment, that analysis applies also to WMS and the PPG. Mr. Banner agreed.

61. In dealing with national policy, it is helpful to recall this general statement by the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] 1 WLR 3931 about the role played by policies at [39]:

> "They constitute guidance issued as a matter of discretion by a public authority to assist in the performance of public duties. They are issued to promote practical objectives thought appropriate by the public authority. They come in many forms and may be more or less detailed and directive depending on what a public authority is seeking to achieve by issuing one. There is often no obligation in public law for an authority to promulgate any policy …"

62. I do not think that it is accurate or helpful to say that PPG is only guidance, as if to suggest that it has a different *legal*, as opposed to *policy*, status from the NPPF, or that fundamental legal principles on policy do not apply to both. In *Hopkins* Lord Carnwath referred to the NPPF as "guidance". Neither the NPPF nor the PPG has the force of statute. Neither has a binding legal effect. The ability of the Secretary of State to adopt either derives from the same legal source of power as the central planning authority. The NPPF does not have some special legal status, the effect of which is to restrict the ability of the Secretary of State to change such national policy (or the role of the courts in interpreting any such change) to an amendment made to the NPPF itself.

63. PPG was introduced in 2014 following the "External Review of Government Planning Practice Guidance" carried out by Lord Taylor of Goss Moor in December 2012, following the introduction of the NPPF. The Review recommended the replacement of the then hotchpotch of circulars, statements, guides and letters from the Department's Chief Planner by "formal Government Planning Practice Guidance" to support the NPPF. "Formal planning guidance should be recognised as such through being clearly identified, referenced, dated and accessible in one place as a coherent and understandable suite" (p.7). A few examples help to illustrate how the NPPF and PPG relate to each other in practice.

64. For many years the three legal tests for the validity of conditions attached to a planning permission (*Newbury District Council v Secretary of State for the Environment* [1981] AC 578) were elaborated by six policy tests contained in DoE circular 1/85 and then 11/95. As Lindblom LJ stated at [16] in *R (Menston Action Group) v City of Bradford Metropolitan District Council* [2016] EWCA Civ 796 (a separate claim for judicial review from that considered by Dove J), the policy in the now revoked Circular 11/95 is contained in both the NPPF and the PPG. Paragraph 57 of the current NPPF simply lays down the six policy tests. The PPG explains the application of those tests. I do not see why the PPG should not be treated as a statement of planning policy.

65. Where a proposed development would have an impact upon a heritage asset, paras. 201 to 202 of the current NPPF require a decision-maker to decide whether that development would cause "substantial" or "less than substantial" harm to the significance of that asset. The answer to that question determines which policy test is to be applied. "Substantial" is not defined in the NPPF. Paragraph 018 of the section of the PPG dealing with the historic environment states:

> "In general terms, substantial harm is a high test, so it may not arise in many cases. For example, in determining whether works to a listed building constitute substantial harm, an important consideration would be whether the adverse impact seriously affects a key element of its special architectural or historic

> interest. It is the degree of harm to the asset's significance rather than the scale of the development that is to be assessed. The harm may arise from works to the asset or from development within its setting."

This passage sets out a general test or approach for applying the NPPF. The PPG is planning policy which provides more specific guidance.

66. In *City & Country Bramshill Limited v Secretary of State for Housing, Communities and Local Government* [2021] 1 WLR 5761 the Court of Appeal considered "public benefits" which in paras. 201 to 202 of the NPPF are to be weighed against harm to a heritage asset. Although the NPPF does not define the term, the PPG explains what may qualify as a public benefit (para. 020) (see [75] to [77]). Again the PPG is operating here as a policy.

67. The policies in the NPPF vary in style. Some, like Green Belt policy, are relatively detailed and prescriptive (as policies). Other parts of the NPPF set a framework and the PPG provides more specific or detailed policy guidance on, for example, conditions in planning permissions, development affecting heritage assets and, as we shall see, the sequential test for flood risk cases.

68. In *Bushell v Secretary of State for the Environment* [1981] AC 75 Lord Diplock stated at p.98 that "policy" is a protean word covering a wide spectrum. At a national level it may relate to matters of strategy or high policy, typically the subject of debate in Parliament. But it can also cover technical matters, such as a decision to adopt a uniform method for assessing the need for different road schemes in different parts of the country competing for finite public resources. A statement that a particular technical method or guidance should normally be followed in decision-making can properly be described as policy. Indeed, such statements may be found in the policies of development plans.

69. I do not accept that guidance for decision-making should or should not be treated as policy according to whether it is the subject of prior consultation. Generally, the NPPF and amendments to that document have been consulted upon. But that has not always been the case. In *R (Richborough Estates Limited) v Secretary of State* [2018] PTSR 1168 Dove J referred to evidence of several substantial changes being made to the NPPF without consultation. He rejected the contention that there is a legitimate expectation that the making of changes to the NPPF must be subject to consultation [67] to [75]. On the other hand, there are examples of public consultation being carried out before national policy (including NPPF) has been changed by WMS and PPG. *West Berkshire* dealt with a major change to the policy requirement for housing development to provide affordable housing by the introduction of an exemption for small sites through a WMS and PPG. In March 2018 the Secretary of State consulted on draft amendments to the NPPF alongside more detailed guidance set out in draft changes to the PPG.

70. As a matter of *policy*, PPG is intended to support the NPPF. Ordinarily, therefore, it is to be expected that the interpretation and application of PPG will be compatible with the NPPF. However, I see no legal justification for the suggestion that the Secretary of State cannot adopt PPG which amends, or is inconsistent with, the NPPF. Mr. Banner was unable to point to any legal principle by which the court could treat such a PPG as unlawful. *West Berkshire* is one example of the Secretary of State introducing a new

national policy through WMS and PPG which amended, and was inconsistent with, the pre-existing national policy as set out in the NPPF. In addition, Annex A to the Department's consultation in March 2018 on draft amendments to the 2012 NPPF identified amendments to that document which had already been made through WMSs (see also *R (Stephenson) v Secretary of State for Housing, Communities and Local Government* [2019] PTSR 2209 at [18]).

71. Similarly, I am unimpressed by the claimants' argument that PPG cannot be adopted which is "restrictive" of policy in the NPPF. Where a policy in the NPPF is expressed in very broad or open terms, more detailed guidance in the underlying PPG may be rather more focused as to the approach to be taken. To describe that PPG as restrictive, and therefore inappropriate, is likely to be one-sided and unhelpful. Additions to, or changes in, policy may produce winners and losers. Parties affected by policy will have different points of view. In *West Berkshire* the change of affordable housing policy was favourable to the developers of small housing sites. For them it was not restrictive. But many local planning authorities criticised the change as making it more difficult for them to meet their local requirements for affordable housing. For them the change was restrictive. This simply reflects the fact that planning policy has to address competing interests and views in the overall public interest.

Legal principles on the interpretation and application of planning policy

72. The interpretation of a planning policy is an objective question of law for the court to determine, read in accordance with the language used and its proper context. But the application of policy, properly interpreted, is a matter for the decision-maker, subject only to review by the courts on *Wednesbury* principles. Many policies are framed in language the application of which requires the exercise of judgment, which may only be challenged if irrational or perverse (see *Tesco Stores Limited v Dundee City Council* [2012] PTSR 983 at [18] to [20]). But a genuine issue about the interpretation of a policy is logically a prior question to the application of that policy [21].

73. In *Hopkins* Lord Carnwath stated that the same principles apply both to national and development plan policy [23]. He emphasised a point made by Lord Reed in *Tesco* at [19], that some policies may be expressed in broader terms, so as not to require, or lend themselves to, the same level of legal analysis as a more specific policy. It is necessary for the courts to guard against over-legalisation of the planning process. Practitioners must not elide the important distinction between issues of interpretation appropriate for judicial analysis and issues of judgment in the application of policy [23] to [26].

74. *R (Samuel Smith Old Brewery (Tadcaster) v North Yorkshire County Council* [2020] PTSR 221 illustrates the distinction. Lord Carnwath, giving the judgment of the Supreme Court, referred to the warning given in *Hopkins* against the danger of "over-legalisation" of the planning process. He noted the contrast between the "relatively specific" policy considered in *Tesco* and policies expressed in much broader terms not susceptible to the same level of legal analysis [21]. He held that "openness" in national Green Belt policy is an example of the latter. The court interpreted the policy as far it was necessary and possible to go. Openness is the counterpart of urban sprawl and linked to the purposes of Green Belt policy. It is open-textured and a number of factors are capable of being relevant when it is applied to the particular facts of a specific case. Visual considerations *may*, not *must*, be taken into account. But whether they are taken into account and, if so, how that is done, are matters of planning judgment for the

decision-maker. Openness is not limited to visual matters. It may include how built up the Green Belt is at the time of the decision and how built up it would become if a proposed development were to go ahead [22] to [26].

75. The decision of the Court of Appeal in *Bramshill* provides a further example of the distinction drawn by the Supreme Court. The NPPF states that, in general, the development of "isolated homes in the countryside" is to be avoided. This is a concept of planning policy, not law. It is not defined in the NPPF and does not lend itself to rigorous judicial analysis. As a broadly framed policy, its application depends upon the facts of each case and requires the application of planning judgment in a wide variety of circumstances. The court's function, both in interpreting the policy and in reviewing its application, is therefore limited [30]. The court decided that the policy refers to remoteness from a settlement but not remoteness from other dwellings [31] to [33]. That was the reach of the court's interpretive role for that policy. In that instance we soon arrive at the decision-maker's role to apply the policy using judgment.

76. In *R (Asda Stores Limited) v Leeds City Council* [2021] PTSR 1382 Sir Keith Lindblom SPT stated at [35]:

> "National planning policy is not the work of those who draft statutes or contracts, and does not always attain perfection. The language of policy is usually less precise, and interpretation relies less on linguistic rigour. When called upon – as often it is nowadays – to interpret a policy of the NPPF, the court should not have to engage in a painstaking construction of the relevant text. It will seek to draw from the words used the true, practical meaning and effect of the policy in its context. Bearing in mind that the purpose of planning policy is to achieve "reasonably predictable decision-making, consistent with the aims of the policy-maker", it will look for an interpretation that is "straightforward, without undue or elaborate exposition" (see *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at para. 41). Often it will be entitled to say that the policy simply means what it says, and that it is the job of the decision-maker to apply it with realism and good sense in the circumstances as they arise – which is what local planning authorities are well used to doing when making the decisions entrusted to them (see *R (on the application of Corbett) v Cornwall Council* [2020] JPL 1277, paras. 65 and 66)."

77. I also bear in mind the following additional points made by Sir Keith Lindblom SPT in *R (Corbett) v Cornwall Council* [2023] JPL 126:

> "(2) In seeking to establish the meaning of a development plan policy, the court must not allow itself to be drawn into the exercise of construing and parsing the policy exhaustively. Unduly complex or strict interpretations should be avoided. One must remember that development plan policy is not an end in itself but a means to the end of coherent and reasonably predictable decision-making in the public interest, and the product of the local planning authority's own work as author of

> the plan. Policies are often not rigid, but flexible enough to allow for, and require, the exercise of planning judgment in the various circumstances to which the policy in question applies. The court should have in mind the underlying aims of the policy. Context, as ever, is important (see *Gladman Developments Ltd. v Canterbury City Council* [2019] EWCA Civ 699, at [22], and *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610, at [16], [17] and [39]).
>
> (3) The words of a policy should be understood as they are stated, rather than through gloss or substitution. The court must consider the language of the policy itself, and avoid the seduction of paraphrase. Often it will be entitled to say that the policy means what it says and needs little exposition. As Lord Justice Laws said in *Persimmon Homes (Thames Valley) Ltd. v Stevenage Borough Council* [2005] EWCA Civ 1365 at [24], albeit in the context of statutory interpretation, attempts to elicit the exact meaning of a term can 'founder on what may be called the rock of substitution – that is, one would simply be offering an alternative form of words which in its turn would call for further elucidation'."

78. As the courts have often said, some policies simply mean what they say. The words used may be incapable of, or not susceptible to, further elaboration. But where a court is engaged in interpreting the words of a policy, it may have to decide whether a particular consideration is or is not relevant to the application of that policy (see e.g. *Bramshill* at [75] above). According to the language used and context, a policy may *require* a decision-maker to take a consideration into account, not as a matter of law, but as a matter of policy which, of course, is not binding.

79. In other cases a policy may be expressed so as to *allow* a decision-maker to take a consideration into account. So a court may say that a factor is capable of being taken into account by a planning authority. Whether the authority does so, and if so to what extent, will involve its use of judgment, particularly where the policy is set out in broad terms.

80. The interpretation of a policy is generally based upon the express language used, its context and purpose. But when the court is looking at those matters it may decide that a particular meaning is *necessarily* implicit in a policy (see e.g. the analysis by the Supreme Court in the *Tesco* case of the sequential approach in retail policy generally, set out in [94] below). But the court will be cautious about entertaining an argument of this kind. Its role is to interpret, not make, policy. An implicit meaning would at least have to be necessary, clear and consistent with the language used in the policy and appropriate, having regard to the range of circumstances in which the policy may fall to be applied.

81. Often, where a policy is silent on a subject, the court will not be able to arrive at an implicit meaning. In *Tewkesbury Borough Council v Secretary of State for Housing, Communities and Local Government* [2022] PTSR Dove J rejected the authority's argument that national policy required an oversupply of housing land in previous years

in a district to be taken into account as part of a current assessment of that area's land supply for the next 5 years. At [43] he said:

> "In the absence of any specific provision within the Framework there is no text falling for interpretation, and it is not the task of the court to seek to fill in gaps in the policy of the Framework. It is far from uncommon for there to be gaps in the coverage of relevant planning policies: they will seldom be able to be designed to cover every conceivable situation which may arise for consideration. Again, that is perhaps unsurprising given the breadth of the potential scenarios which may arise in the context of a planning application on any particular topic, especially where it is a high level policy with a broad scope like the Framework which is being considered. When it arises that there is no policy covering the situation under consideration then it calls for the exercise of planning judgment by the decision-maker to make the necessary assessment of the issue to determine the weight to be placed within the planning balance in respect of it. In the absence of policy within the Framework on the question of whether or not to take account of oversupply of housing prior to the five-year period being assessed in the calculation of the five-year housing land supply the question of whether or not to do so will be a matter of planning judgment for the decision-maker, bearing in mind the particular circumstances of the case being considered."

82. Dove J considered whether PPG filled the "gap", or silence, in the NPPF, but concluded that the PPG did not assist in that instance [44]. It followed that it was a matter of judgment for the decision-maker as to whether to take a previous oversupply of housing into account when dealing with the 5 year land supply issue and, if so, how ([44]-[47]).

83. In *Braintree District Council v Secretary of State for Communities and Local Government* [2018] 2 P & CR 9 Lindblom LJ said *obiter* at [36] that he doubted that it would be right to exclude guidance in PPG as a possible aid to understanding the policy to which it corresponds in the NPPF. But it was held that in that case the relevant policy in the NPPF was clear and there was no need to refer to other statements of policy, whether in the NPPF or elsewhere.

84. In *R (Bent) v Cambridgeshire County Council* [2018] PTSR 70 Mr. David Elvin QC sitting as a Deputy High Court judge stated that the general principles on the interpretation and application of planning policy apply also to PPG (see [36] to [37]). I agree. But I would add that parts of the PPG contain practical guidance or statements of good practice which depend upon the application of judgment by the decision-maker and may not be not susceptible to judicial interpretation.

85. In *Hopkins* Lord Carnwath said that the courts should respect the expertise of planning inspectors and start with the presumption that they will have understood the policy framework correctly. Their position is analogous to that of expert tribunals and so the courts should avoid undue intervention in policy judgments within their areas of specialist competence [26].

86. Similarly, Sir Geoffrey Vos C (as he then was) stated in *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 that the courts should give local authority planning committees advised by their officers the space to exercise their own planning judgment (see [62]-[64]).

87. I should mention that the passages cited by the parties from *Solo Retail*, *White Waltham*, *Bramley* and *Menston* do not help to resolve the grounds of challenge in this case. It is necessary to read those passages in the context of what the issues were in those cases and what was really decided by the court, as well as wider legal principles on planning policy, its interpretation and application summarised above.

88. In *Solo Retail* the claimant unsuccessfully relied upon guidance in PPG on retail impact analysis to argue that full impact analysis should have been carried out for a small amount of convenience floorspace in a proposal for a comparison goods store. As Lieven J said at [30] that was really an argument about the *application* of policy, not its *interpretation*. The PPG did not set out mandatory requirements [12], [30] and [34] to [35].

89. In *White Waltham* Lang J rejected the challenge under ground 1 to the adequacy of the noise assessment which had been carried out, including the impact on occupants of the proposed dwellings of the existing airfield and its permitted use [56] and [60] to [66]. In those circumstances, the claimant's reliance under ground 2 upon PPG guidance added nothing of substance [77].

90. In *Bramley* Lang J decided that the relevant part of the PPG on the use of agricultural land for solar farms did not mandate that a sequential search be made for alternative sites with a poorer land quality. The PPG did not create a binding code [177] to [180].

91. In *Menston* the claimant relied upon a passage in the PPG to argue that national policy required an authority determining a planning application to assess not only whether the development would be in an area at risk of flooding, or whether existing flood risk would be exacerbated, but also whether the proposal took the opportunity to *reduce existing flood risk* [36]. Dove J decided that the 2012 NPPF laid down that requirement for plan-making but not for development control [40]. I agree with the second reason given by Dove J in [41] for rejecting the claimant's complaint that the local authority had failed to address opportunities for improvement of flood risk. On a fair reading, the passage in the PPG (cited at [22]) did not seek to contradict the difference in approach set out by the NPPF for plan-making and development control [41].

92. The PPG referred *inter alia* to the designing of off-site works "to protect and support development in ways that benefit the area more generally". In my judgment, works of that nature would generally not have a sufficient connection with a proposed development to be a material consideration in deciding whether it should receive planning permission (*R (Wright) v Forest of Dean District Council* [2019] 1 WLR 6562; *DB Symmetry Limited v Swindon Borough Council* [2023] 1 WLR 198). Given that planning policy should if possible be read compatibly with principles of planning law, the PPG did not purport to give guidance on development control, contrary to the submission of the claimant in *Menston.* Accordingly, this was an example of PPG which was not an aid to the interpretation of NPPF policy for dealing with planning applications. It illustrates the need for care and caution in the use of such material.

The interpretation of the sequential test in the NPPF and the PPG.

93. I return to the *Tesco* case. The Supreme Court had to resolve an issue about the meaning of the sequential approach to the location of new retail development and other town centre uses. The policy preference was for new development to be located on "suitable sites" first in town centres, followed by edge of centre locations and, only then, in out of centre locations accessible by a choice of means of transport. The issue before the House of Lords was whether "suitable" meant suitable for meeting identified deficiencies in retail provision in the area, or suitable for the development proposed by the party applying for planning permission [13]. The court decided that the latter was the correct meaning. But that was based not only on the sequence of preferences, but also additional text which referred to meeting the requirements of developers and retailers and the scope for accommodating the proposed development. There was nothing in the policy to support the alternative construction that suitability for the purposes of the sequential test was limited to meeting deficiencies in the retail provision of an area [27].

94. However, the Supreme Court added that suitability for the proposed development was qualified by a specific policy requirement for "flexibility and realism" from retailers, developers and planning authorities [28]:

> "…. The need for flexibility and realism reflects an inbuilt difficulty about the sequential approach. On the one hand, the policy could be defeated by developers' and retailers' taking an inflexible approach to their requirements. On the other hand, as Sedley J remarked in *R v Teesside Development Corporation, Ex p William Morrison Supermarket plc* [1998] JPL 23, 43, to refuse an out-of-centre planning consent on the ground that an admittedly smaller site is available within the town centre may be to take an entirely inappropriate business decision on behalf of the developer. The guidance seeks to address this problem. It advises that developers and retailers should have regard to the circumstances of the particular town centre when preparing their proposals, as regards the format, design and scale of the development. As part of such an approach, they are expected to consider the scope for accommodating the proposed development in a different built form, and where appropriate adjusting or sub-dividing large proposals, in order that their scale may fit better with existing development in the town centre. The guidance also advises that planning authorities should be responsive to the needs of retailers. Where development proposals in out-of-centre locations fall outside the development plan framework, developers are expected to demonstrate that town centre and edge-of-centre options have been thoroughly assessed. *That advice is not repeated in the structure plan or the local plan, but the same approach must be implicit: otherwise, the policies would in practice be inoperable*." (emphasis added)

The need for flexibility and realism was necessarily implicit in those policies which did not refer expressly to those requirements.

95. Turning to retail policy in the NPPF, in *R (Aldergate Properties Limited) v Mansfield District Council* [2016] EWHC 1670 (Admin) Ouseley J decided that "suitable" and "available" referred to the broad type of development proposed in a planning application by approximate size, type of retailing and range of goods, incorporating flexibility, but excluding the corporate attributes of an individual retailer [35] to [38].

96. Where flood risk is in issue, para.162 of the NPPF sets out the sequential preference as follows:

> "… reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding."

97. This is a broad, open-textured policy. There is no additional language indicating how the issue of "appropriateness" should be approached or assessed. There is nothing to suggest that the object is *restricted* to meeting the requirements of the developer or applicant for planning permission, or of his particular proposal on the application site he has selected. On the face of it, the question of appropriateness is left open as a matter of judgment for the decision-maker.

98. This takes us back to the "inbuilt difficulty" of a sequential approach referred to in *Tesco* at [28]. The policy to steer new development to areas with the lowest risk of flooding would be defeated if any examination of alternative sites is restricted by inflexible requirements set by developers. But a broad, non-specific approach by planning authorities to sequential assessments which generally disregards development requirements could lead to inappropriate business decisions being imposed on developers or the market. There is a need for realism and flexibility on all sides.

99. It is not difficult to see why para. 162 of the NPPF has been expressed so broadly as compared, for example, with the retail policies considered in the *Tesco* case. Paragraph 162 applies to all types of development. Some development may be of a specialised or highly specific nature with particular or intrinsic requirements as to the site, form and scale of development, access, and catchment. Examples could include a power station, transport infrastructure, a school or waste disposal facilities. Other forms of development, such as residential, may have no, or fewer, specific requirements for the purposes of a sequential assessment.

100. There is nothing in the language of the NPPF which could justify the court adopting the highly specific interpretation contended for by the claimants, namely alternative sites which could accommodate the development in fact proposed in its various particulars, including form, quantum (both as to site area and amount of development) and intended timescales for delivery. That interpretation would tend to exclude any consideration of other planning considerations which could be considered to affect appropriateness. It would render the sequential test ineffective.

101. It is common ground that when a development plan is being prepared, the sequential test is applied in the context of policies aimed at meeting the housing, employment and other development needs of the local authority's area, or other relevant "catchment" (see also para. 026 of the PPG). Paragraph 166 of the NPPF states that where an application is made for development on a site allocated in a development plan which satisfied the sequential test, that test does not have to be applied again. Where in other cases a sequential test is being carried out for the first time in relation to an application

site, I see no logical reason why the issue of need should be treated as wholly irrelevant to that assessment as Mr. Flanagan suggested. In addition, para. 027 of the PPG suggests that the relevant catchment area or area of search for some types of development will be affected by need considerations. On that basis, I do not see why *all* considerations of need must be excluded when considering the "appropriateness" of alternatives.

102. A developer may put forward a case that the specific type of development he proposes is necessary in planning terms and/or meets a market demand. It then becomes a matter of judgment for the decision-maker to assess the merits of that case and to decide whether it justifies carrying out the sequential assessment for that specific type or for some other, perhaps broader, description of development. Paragraph 162 of the NPPF does not exclude either approach, but leaves to the decision-maker the selection of the approach to be taken. For example, a decision-maker may consider in the circumstances of a particular case that more weight should be given to the objective of steering development towards areas with a lower flood risk.

103. A need and/or market demand case could be based on a range of factors, such as location, the mix of land uses proposed and any interdependence between them, the size of the site needed, the scale of the development, density and so on. But the decision-maker may also assess whether flexibility has been appropriately considered by the developer and by the local planning authority.

104. So far, I have been dealing with an applicant's case on a *specific* need for the type of development proposed. Depending on the merits of the case put forward, this may be relevant to deciding the appropriate area of search and whether other sites in lower flood risk zones have characteristics making them "appropriate" alternatives.

105. By contrast, I do not consider that a *general* need for a type of land use across the local authority's area, e.g. for housing or employment, or a shortfall in a 5 year supply of housing land, is relevant when deciding whether other sites are sequentially preferable and reasonably available alternatives. That general need or shortfall does not help a decision-maker to determine whether a particular site (with its relevant characteristics) qualifies as an "appropriate" alternative to the site selected by the applicant for his proposed development. General need may influence the scope of an area of search, but that is a different issue in a sequential assessment.

106. Paragraph 162 of the NPPF also stipulates that an alternative site be "reasonably available" for the proposed development. That raises issues of judgment for the decision-maker as regards ownership, or the ability to become an owner, so that the site may be developed. "Reasonably available" also has a temporal dimension. The start date and duration of the proposed development may be relevant considerations. But para. 162 of the NPPF does not require the that the availability of an alternative site should always align closely with the trajectory for the developer's proposal. Here again, flexibility on all sides is a relevant consideration, together with any material aspects of need and/or market demand.

107. To summarise, I have rejected the claimants' highly prescriptive interpretation of para. 162 of the NPPF. Instead, applying the approach in *Tesco* at [28] and on a straightforward reading of the NPPF, I have identified factors which are capable of being relevant considerations which a decision-maker may assess as a matter of judgment.

108. It follows that para. 028 of the PPG does not conflict with para. 162 of the NPPF. The PPG performs the legitimate role of elucidating the open-textured policy in the NPPF. The PPG describes "reasonably available sites" as sites "in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development." The PPG provides for issues as to suitability of location, development type, and temporal availability to be assessed by the decision-maker as a matter of judgment in accordance with the principles set out above. In this context, the PPG correctly states that "lower-risk sites" do not need to be owned by the applicant to be considered "reasonably available." That is consistent with the need for flexibility on all sides.

109. The PPG also states that reasonably available sites *may* include "a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development." Whether such an arrangement is so capable depends on the judgments to be made by the decision-maker on such matters as the type and size of development, location, ownership issues, timing and flexibility. Taking into account his assessment of any case advanced by the developer on need and/or market demand, the decision-maker may consider smaller sites (or disaggregation) if appropriate for accommodating the proposed development.

110. I note that the PPG refers to a "series of smaller sites." The word "series" connotes a relationship between sites appropriate for accommodating the type of development which the decision-maker judges should form the basis for the sequential assessment. This addresses the concern that a proposal should not automatically fail the sequential test because of the availability of multiple, disconnected sites across a local authority's area. The issue is whether they have a relationship which makes them suitable in combination to accommodate any need or demand to which the decision-maker decides to attach weight.

111. Lastly, para. 028 of the PPG states that the absence of a 5-year supply of housing land is not relevant to the application of the sequential test to individual proposals. That is consistent with the analysis in [105] above on how general need sits in relation to para. 162 of the NPPF. Such broader issues of need fall to be considered as part of the overall planning balance, in which flood risk considerations will be one component, rather than the sequential test.

112. I have addressed the interpretation of both para. 162 of the NPPF and para. 028 of the PPG, in so far as that falls within the court's remit, matters of judgment which are for the decision-maker and the broad division between those two areas. The interpretation I have adopted does not involve treating either the NPPF or the PPG as a "binding code." That would be impermissible. For the reasons I have given, the NPPF and the PPG can and should be read together harmoniously.

113. Paragraph 028 of the PPG is a proper aid to clarifying and understanding the meaning of the NPPF. Mr. Banner accepts that the PPG may perform that role so long as it is not treated as a binding code. However, that submission is a potential source of confusion which needs to be avoided.

114. In *West Berkshire* the Court of Appeal held that a policy-maker is entitled to express his policy in unqualified terms. In order for a policy to be lawful, there is no requirement for it to use the word "normally", or to allow explicitly for the making of exceptions,

or to prevent the fettering of discretion in some other way. This principle holds good even where a policy is expressed in mandatory terms (see [21] and [25]). The principle applies to both the NPPF and the PPG.

115. The interpretation of para. 162 of the NPPF, read together with para. 028 of the PPG, is an objective question of law for the court, not for the judgment of a decision-maker. Although the process of interpretation does not need to allow for exceptionality or discretion, that does not involve treating either policy as binding. Once the court has reached its conclusions on interpretation, it is the application of those policies which must not involve a fettering of discretion by treating them as binding. We are back to the fundamental distinction between interpretation and application of policy. The two must not be elided or confused.

116. Having dealt with these points of principle I turn to deal with the remaining criticisms of the two decision letters.

The challenge to the Lynchmead Farm decision

Ground 2

117. It is convenient to begin with ground 2. This relates to three aspects of appropriateness: timing, type of development, and size of sites and disaggregation.

118. With regard to timing, the appellant's expert gave evidence that, subject to the grant of permission, it was anticipated that development could begin on the appeal site in early 2025 and be completed within about 2 years. In his closing submissions to the Inspector, Mr. Banner said the uncontested evidence was that the two sites already in the ownership of the appellant (ST17 and ST34) were not "available to be developed at the point in time envisaged for the development" because existing infrastructure on site belonging to either National Grid or Western Power needed to be moved. But the court was not shown anything in Mead's submissions or evidence indicating what would have to be done to that infrastructure or the timescale involved (including why that could not be achieved in the period of about 2 years before the anticipated start of development).

119. At DL 30 the Inspector accepted that the start date of early 2025 was "not unreasonable" although a possibly "optimistic estimate." Nonetheless he proceeded on the basis that an alternative would need to be "available" by that time.

120. Mr. Banner criticises the paragraph which follows:

> "31. However, 'available to be developed' means just that. It does not mean that development of an alternative site would have to follow the same timescale envisaged for the appeal scheme. It is sufficient that there is a positive indication that the land is available to be developed. The start date for development and the rate of build out may be affected by many site-specific factors, such as the need to relocate infrastructure or undertake hydraulic testing, but that does not alter the fact that the land would be available to be developed."

121. Allowing for flexibility, the Inspector was entitled to say that development of an alternative site did not have to follow the *same* timescale as was envisaged for the appeal proposal. He recognised that the start date and build-out rates can be affected by many site-specific factors, including the need to relocate infrastructure, but that does not mean that an alternative is not "available to be developed." Comparison of availability between two sites involves matters of degree. It does not require precise alignment. This is a matter of judgment for the Inspector. On the material shown to the court it is impossible to say that his judgment was irrational.

122. With regard to the type of development proposed on the appeal site, the Inspector said this at DL 29:

> "29. The first relates to the meaning of the phrase 'type of development'. I consider that this means any site that is capable of accommodating residential development, the 'type' of development being 'residential'. Although the appellant may anticipate the appeal proposal to consist of lower density suburban houses, the application has been made in outline with all matters other than access reserved. The only constraint on the type of development proposed is that contained in the description, which is for '…a residential development of up to 75 dwellings…'. I have also had regard to the general approach to planning for residential development in the district, where spatial policies do not constrain the types of dwellings within allocated or windfall sites. Even where some sites require developments to be of a higher density, they would still have the effect of providing residential dwellings on sites with a lower risk of flooding than the appeal site and would therefore achieve the purpose of the sequential test."

123. Mr. Banner criticises the Inspector's decision to treat the proposal as being for residential development in general rather than lower density suburban housing. But this is an issue going to the application of policy, not interpretation and therefore a matter for the Inspector's judgment. On the material before the court, the claimant has come nowhere near demonstrating irrationality and so the criticism must be rejected.

124. I would add that at DL 38 the Inspector did consider in the alternative the claimant's approach to describing the type of development:

> "38. Even if a more restrictive definition of the type of development were to be used, taken to mean residential development of a suburban nature, and the availability of sites for development was taken to be now, in the sense that they either have extant planning permission (or a resolution to grant) for residential development or are allocated for residential development in the current development plan with delivery expected at least in part by 2025, then there are still many alternative sites that would meet the Framework definition of reasonably available[11]."

125. Mr. Banner criticised this paragraph because one of the sites relied upon by the Inspector in the final sentence was site ST17 (see footnote 11) where infrastructure would need to be relocated. But I have already rejected the criticism made of the Inspector's handling of timing, which included this infrastructure issue ([118] to [121] above).

126. The complaint about the Inspector's treatment of type of development is also linked to the size of site or disaggregation point. Under ground 2 the claimant argued that the PPG was inconsistent with the NPPF on this subject. I have rejected that argument.

Ground 5

127. Under ground 5 the claimant criticised the Inspector's construction of para. 028 of the PPG because in DL 33 he decided that need was not a relevant factor in the application of the sequential test:

> "The appellant also suggests that housing need is a relevant consideration in the sequential test. I disagree. I can see no reason for interpreting the Framework in that way. I consider that for individual applications 'the proposed development' means that sought, not the housing needs of the district. …"

128. I do not see any legal error in DL 33 as far as that paragraph goes. For the reasons set out in [105] above, neither the general housing needs of a district or a shortfall in meeting those needs, addresses the issue posed by the sequential test, namely whether an alternative site has qualities making it appropriate and available for the proposed development. But that leaves the question whether Mead advanced any specific case on need for a type of development described as 75 lower density, suburban houses over the timescale envisaged for the appeal site? If so, did the Inspector fail to address that case? Did he consider how smaller sites could form a "series" addressing that need?

129. In his closing submissions to the Inspector, Mr. Banner made a number of points on the interpretation of policy and then said this at para. 34:

> "These considerations … lead to the conclusion that the key question for the sequential test is whether sequentially preferable alternative sites can accommodate the area's needs for this type of development by the point in time envisaged for the development."

130. Mr. Banner asserted that Mead's evidence before the Inspector covered quantitative and qualitative aspects of that need. But no such material has been shown to the court to establish that the subject of need was addressed beyond the passage quoted in [129] above. The court gave the claimant an opportunity to produce any such material to Mr. Flanagan for discussion and hopefully agreement. Mr. Flanagan informed the court after the hearing was concluded that the material he had been shown did not take the matter any further. There was no specific case put quantitatively, or even qualitatively, on a need for low density suburban family housing. That has not been contradicted.

131. In these circumstances, Mead cannot possibly criticise the Inspector for the way in which he dealt with the type of development proposed and his conclusion that need was

irrelevant to the application of the sequential test, at least on the evidence placed before him. The Inspector correctly dealt with the proposal's contribution to meeting general housing need in DL 51 as part of the overall planning balance.

132. I have already addressed the other aspects of ground 5 relating to the interpretation of the PPG.

Ground 1

133. Ground 1 is concerned with the relationship between para. 162 of the NPPF, para. 028 of the PPG and policy CS3 of the Core Strategy. In DL 23 the Inspector said that the second section of policy CS3 (setting out criteria for determining whether a site is reasonably available) was now inconsistent with the NPPF because of the clarification of para. 162 of that policy by para. 028 of the PPG. He noted that there had been no material change to the text of the NPPF itself from the version current when the Core Strategy was examined and adopted.

134. In DL 24 to DL 26 the Inspector identified the respects in which policy CS3 differed from the clarification of national policy by the PPG:

> "24. In the PPG, reasonably available sites are defined as those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
>
> 25. The PPG says that these could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. There is nothing in the PPG that requires smaller sites to be adjacent to one another, as suggested by the appellant. A series of separate small residential sites would still provide suitable alternative land for equivalent development at a lower risk of flooding.
>
> 26. The PPG also says that such lower-risk sites do not need to be owned by the applicant to be considered reasonably available. Reasonably available sites can include ones that have been identified by the planning authority in site allocations or land availability assessments. There are no exclusions in the PPG relating to sites with planning permission or that publicly owned land must be formally declared to be surplus."

135. In DL 27 the Inspector said:

> "Paragraph 219 of the Framework states that due weight should be given to development plan policies, according to their degree of consistency with the Framework. In this case, because of the inconsistency between the documents as to what is meant by reasonably available, I give lesser weight to the second section of Policy CS3 than I do to the newer and more up to date Framework as interpreted by the PPG."

136. In DL 41 the Inspector set out his overall assessment of the appeal proposal against policy CS3:

> "41. The first part of Policy CS3 requires that development will only be permitted where it is demonstrated that it complies with the sequential test set out in the Framework. As I have concluded that the Framework's sequential test would not be complied with, it follows that the proposed development is in conflict with the first part of Policy CS3. Other than for the definition of the area of search being North Somerset-wide, I consider the remainder of the second part of Policy CS3 to be out-of-date because it is inconsistent with the Framework. I therefore conclude that the proposed development conflicts with Policy CS3 overall. As Policy CS3 was agreed as being the most important policy in determining this appeal, I conclude that the proposal also conflicts with the development plan when taken as a whole."

137. In summary, Mr. Banner submitted in his skeleton that:

(i) The Inspector accepted that the appeal proposal accorded with policy CS3 of the Core Strategy;

(ii) Policy CS3 must have been found "sound" by the independent Inspector who conducted the examination of the Core Strategy, which would have necessitated a conclusion that CS3 (specifically the criteria in the second section of CS3) was consistent with national policy;

(iii) There is no material difference between the 2012 version of the NPPF current when the Core Strategy was adopted and the relevant parts of the 2021 NPPF, a point accepted by the Inspector in DL 23;

(iv) At DL 41 the Inspector concluded that (a) because the proposal conflicted with the current NPPF, it also conflicted with the first part of policy CS3 (see [19] above) and (b) the second section of CS3 (with which the proposal complied – see [27] above) was out of date because it is inconsistent with the current NPPF. On that basis the Inspector concluded that the proposal conflicted with CS3 overall and, because CS3 was the most important policy in the Core Strategy for determining the appeal, with the development plan taken as whole;

(v) The Inspector's conclusions in (iv) above depended upon his reliance upon para.028 as affecting the interpretation of the current NPPF:

(vi) The Inspector erred in law because his reasoning involved treating para.028 of the PPG as having changed the objective meaning of the NPPF and of the Core Strategy.

138. As to point (i), the key issue resolved by the Inspector was the application of the criteria in the second section of policy CS3. In DL 14 to DL 22 he found that there were no alternative sites available satisfying those criteria (see [21] and [27] above). It was just

those criteria which he found to be inconsistent with the NPPF (in DL 23 to DL 27 and DL 41).

139. As stated point (ii) is incorrect,[2] but it is not essential to Mead's argument. In his oral submissions Mr Banner also relied upon the fact that the first part of policy CS3 requires compliance with the sequential test in the NPPF, implying that the criteria in the second section of CS3 were considered to be consistent with the NPPF when the Core Strategy was adopted in 2017.

140. The main thrust of Mr. Banner's argument lies in points (v) and (vi). Point (v) is not controversial.

141. I see no possible legal error in the Inspector's conclusion that the proposal conflicted with the first part of policy CS3 because it conflicted with the sequential test in the NPPF read together with the PPG. It was not suggested by Mead that policy CS3 should be interpreted as referring solely to the 2012 version of the NPPF and ignoring any alterations to that document. So if the NPPF had been amended by including the text contained in para.028 of the PPG, Mead could have no legal complaint. I have explained that there is no legal principle which prevents national policy in the NPPF being altered by a WMS and/or PPG. In any event, para.028 of the PGG is consistent with the open-textured language of para.162 of the NPPF properly understood. The former has merely clarified the latter. The Inspector correctly treated the PPG as having elucidated the NPPF.

142. For essentially the same reasons, the Inspector did not commit any error of law when he concluded that the criteria in the second section of policy CS3 are out of date because they are inconsistent with the NPPF read together with the PPG (DL 23 to DL 27 and DL 41).

143. Mr. Banner submits that the Inspector erred because in treating the PPG as interpreting the NPPF (or defining "reasonably available" sites) he was applying the PPG as a "binding code." I have already explained why that argument is unsustainable (see [114] to [115] above).

144. For these reasons I reject all of the grounds of challenge to the Lynchmead Farm decision.

The challenge to the Bushey decision

145. Redrow's "Flood Risk Sequential Test and Exception Test" (May 2023) presented a sequential assessment covering the whole of the Borough (4.3).

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[2] Section 20 of the Planning and Compulsory Purchase Act 2004 requires that a development plan taken *as a whole* to be "sound". The Act does not define what is meant by "sound". But para.35 of the 2021 NPPF sets out policy requirements for a *plan* to be considered sound, including consistency with the NPPF "and other statements of national policy". Consequently, it is not unlawful for a development plan not to be consistent with national policy in every respect (per Lindblom J as he then was, in *Grand Union Investments Limited v Dacorum Borough Council* [2014] EWHC 1894 (Admin) at [59]). Local circumstances may justify a departure from national policy (see e.g. *Camden London Borough Council v Secretary of State for the Environment* (1990) 59 P & CR 117 and *West Berkshire* at [19] to [21] and [25] to [26]). Mead has not shown the court any evidence on how policy CS3 was assessed in the examination of the Core Strategy.

146. Redrow sought planning permission for up to 310 dwellings and land reserved for educational and community uses on a site of 18.2ha. They followed the guidance in the PPG by applying a margin of plus or minus 25% to the site area, number of dwellings and density. So the assessment considered sites (or groupings of sites) between 13.6ha and 23.1ha in area, capable of accommodating between 232 and 388 dwellings. However, the assessment said that alternative sites, whether solus or smaller sites grouped together, needed to be capable of accommodating the appeal scheme as a whole: market housing, 40% affordable housing, 5% custom and self-build housing, land for a primary school and community hub and substantial open space (4.7 to 4.8). Redrow contended that the benefits of the proposed development, including the amount of open space, could not be spread across a number of smaller disconnected, disparate sites. A primary school and community hub required sufficient land in one location to enable delivery and be accessible to existing and proposed communities (5.3).

147. Redrow considered that only sites which were "available immediately" could be treated as "reasonably available" for the proposed scheme, given the intended timescales for development. The appellant was both the owner of the appeal site and a housebuilder committed to a reduced timescale for the submission of reserved matters. Sites larger than the appeal site would be likely to require co-ordination with other developers and owners and therefore require more time. They would be unlikely to be reasonably available to Redrow at the point in time envisaged for the development (4.9, 4.12 and 5.15).

148. In a statement of common ground Redrow and HBC agreed that residential development on the appeal site would take about 5 years to complete. Redrow said that work would commence on site in 2024 with first completions in 2025, whereas HBC said that first completions would begin in 2027.

149. Redrow said that it was looking for sites with immediate availability, partly in order to alleviate the severe inadequacy of the housing land supply in Hertsmere. Redrow assessed that HBC had a supply of only 1.23 years of land, rather than the requisite 5 years. As the owner of the appeal site, they would be able to progress development more quickly. The proposal would also contribute to meeting the acute need for affordable housing (4.12 to 4.14, 4.16, 5.13, 5.15 and 5.25).

150. In DL 84 the Inspector accepted Redrow's approach of treating the whole of Hertsmere borough as the area of search. She added that any residential scheme such as the appeal proposal would contribute to meeting housing need wherever located in that area and that the school and community facility could also be appropriate on other sites in the Borough.

151. At DL 85 to DL 100 the Inspector considered the assessment of reasonably available sites. She was not persuaded that Redrow's range of plus or minus 25% for defining site size and capacity had been justified or was consistent with the "advice" in the PPG on a "series" of smaller sites (DL 87).

152. At DL 88 she said:

> "88. With regard to the grouping of smaller sites, the proposed development would comprise around 310 homes, land for a primary school and a mobility hub, as well as green

> infrastructure. Although this represents a large, possibly even strategic scheme with non-residential elements, I see no reason why a number of smaller sites could not accommodate all these elements. As in the North Somerset appeal, smaller sites would not necessarily need to be contiguous. I agree with the Council that a series of sites would potentially indicate three or more sites. Equally, I am not convinced that part of a larger site would not represent a reasonable proposition in some circumstances, though considerably larger sites may take longer to bring forward and would not be reasonably available."

153. The Inspector concluded that completion of dwellings would begin in 2026, somewhere between the estimates provided by Redrow and HBC (DL 89 to DL 90).

154. On timing the Inspector said at DL 91 that in line with the Lynchmead Farm decision the development on an alternative site would not necessarily have to follow the appeal scheme's trajectory for start and build out dates in order to be considered "available." Nevertheless at DL 92 she said that alternative sites should "be available for development at the point in time envisaged for the proposed development," echoing the language of para. 028 of the PPG.

155. The Inspector was asked to address a list of 14 sites which HBC said were reasonably available, appropriate for the proposed development and with a lower flood risk. Redrow contended that none of those sites qualified and so there was no sequentially preferable location to the appeal site (DL 93).

156. The Inspector dealt with 4 sites larger than the appeal site at DL 94:

> "94. HEL181 Compass Park, HEL347 Land to northeast of Cowley Hill, HEL362 South of Potters Bar, and HEL379 Kemprow Farm, Radlett are larger sites with lower flood risk than the site. The appellant's evidence with regard to the reasonable availability of these larger sites is not compelling as it lacks detail on how long it might take for these sites to come forward and whether this would be outside the expected timeframe for delivering the proposed development. Despite having been reliant on timescales from the 2019 HELAA, the appellant has not contacted landowners to understand availability and likely timing of delivery. While I understand the appellant's concerns about time taken for land acquisition, there is simply not sufficient information to demonstrate to me that these sites would not be reasonably available on the basis of timescales."

157. The Inspector said that a fifth site larger than the appeal site was not "reasonably available" because its development timescale for 800 houses was 16 or more years (DL 98).

158. In relation to the 9 other sites which were smaller than the appeal site, the Inspector said at DL 95 that Redrow had ruled them out because they were smaller than the lower

end of its range for site size and dwelling numbers, an approach which she had rejected (DL 87).

159. At DL 96 the Inspector disagreed with additional reasons given by Redrow as to why 4 of the smaller sites did not qualify as reasonable alternatives.

160. At DL 97 the Inspector arrived at the following overall conclusion on the 9 smaller sites:

> "97. For all of the aforementioned smaller sites, I recognise that there are a range of different constraints affecting them, but no site is likely to be without constraints. I consider that it has not been adequately demonstrated that they are not reasonably available and that the proposed development could not be delivered through a series of smaller sites."

161. At DL 99 the Inspector said:

> "99. In summary and having considered all the disputed sites, I find that some 13 sites would potentially fall within the meaning of reasonably available. It has therefore not been demonstrated that the proposed development could not be located elsewhere in an area at lower risk of flooding..."

162. I have dealt with Redrow's contentions on the interpretation of para. 162 of the NPPF and para. 028 of the PPG ([96] to [115] above). I will now deal with the remaining issues which arise under their three grounds of challenge.

163. Mr. Simons accepts that Redrow cannot obtain an order to quash the decision by succeeding on ground 1 alone. They need to succeed on ground 1 in conjunction with ground 2. Alternatively, ground 3 provides a freestanding justification for quashing the decision.

Ground 1

164. Mr. Simons submits under ground 1 that the Inspector's approach to sites smaller than the appeal site was legally flawed. He says that the Inspector has, without explanation, departed from the approach in para. 162 of the NPPF, and even para. 028 of the PPG. Instead of looking at sites of around 18.2ha, or down to 13.6ha, and capable of accommodating 310 dwellings, or down to 232 units, she has considered an alternative based on a number of smaller, unconnected sites. She did not address the case advanced by Redrow that that approach could not deliver the range of interconnected benefits which the appeal scheme would deliver and for which there was a need (see [146] above).

165. There is some force in Mr. Simons submissions. Redrow's case, as summarised above, was relevant to the application of the sequential test. The court was not shown any material from HBC challenging that case. The Inspector does not appear to have addressed the matter, despite its significance for the planning appeal. It was a matter which the Inspector should have considered.

166. At DL 97 the Inspector merely said that it had not been adequately shown that the proposed development could not be delivered through a "series" of smaller sites. There was no indication of any connection or relationship between those sites relevant to the justification for the appeal scheme put forward by Redrow.

167. However, on the issue of size Mr. Simons acknowledges that the claimant has no basis for challenging the way in which the Inspector dealt with the larger sites in DL 94. It is for this reason that he rightly accepts that the decision could not be quashed on ground 1 unless the claimant also succeeds on ground 2.

Ground 2

168. Under ground 2 Mr. Simons criticises the Inspector's approach to availability of alternatives in terms of timing. In particular he challenges the Inspector's statement in DL 91 that the development of an alternative site does not necessarily have to follow the trajectory of start and build-out dates for the appeal scheme. He submits that this did not accord with the NPPF read together with the PPG (see para. 36 of his skeleton). Here Redrow, as both the owner of the appeal site and a house builder was seeking to start and complete the development as soon as possible.

169. However, Mr. Simons was right to accept that the sequential test does not require precise alignment between the timescales for an appeal scheme and alternatives.

170. When the Inspector dealt with the larger sites she criticised Redrow's evidence as lacking in detail on how long it might take for those sites to come forward and "whether this would be outside the expected timeframe for delivering the proposed development." In other words, the Inspector did not reject the timescale put forward by Redrow. The flaw in its case was the lack of evidence to show that alternative sites would take materially longer to come forward. This was because Redrow had relied upon timescales set out in a 2019 document and had not contacted the owners of those sites to obtain *current* information on availability and timescales. The Inspector said that she understood Redrow's concerns about the time that might be needed for land acquisition. But for the reasons she gave in DL 94, there was insufficient information to show that the larger sites would not be "reasonably available" in terms of timescale.

171. Accordingly, the Inspector's error under ground 1 is not material to the lawfulness of her decision and grounds 1 and 2 must be rejected.

Ground 3

172. Under ground 3 Redrow criticises the Inspector for failing in the application of para. 162 of the NPPF to have regard to housing need and the implications of failing to meet that need. The claimant submits:

(i) The aim of the NPPF is to steer a district's development needs to areas with the lowest risk of flooding from any source;

(ii) A district's needs should be accommodated, as far as possible, in areas of lowest risk;

(iii) Accordingly, a decision-maker must take account of the level of current need in a district for the type of development proposed and whether that unmet need is capable of being met in areas of lowest flood risk (see para. 44 of skeleton).

173. I agree with Mr. Flanagan that that approach describes the type of exercise which is undertaken in the preparation and examination of a development plan (see e.g. para. 026 of the PPG). Where there remains unmet need which cannot be allocated to areas satisfying the sequential test, that factor together with any other constraints, *may* lead to a policy decision that not all of the identified need should be met. Alternatively, it *may* be decided that all or some part of that residual need should be met notwithstanding that the sequential test has not been satisfied. Either way, the treatment of unmet need is not an input to the sequential assessment for identifying reasonably available alternative sites. The sequential approach is not modified in those circumstances. Instead, the policy-maker will decide what to do with the outcome of applying the sequential test.

174. A similar analysis applies in the determination of planning applications. Where there is an unmet need, for example a substantial shortfall in demonstrating a 5-year supply of housing land, that shortfall and its implications (including the contribution which the appeal proposal would make to reducing that shortfall) are weighed in the overall planning balance against any factors pointing to refusal of permission (including any failure to satisfy the sequential test). If the total size of sequentially preferable locations is less than the unmet housing need, so that satisfying that need would require the release of land which is not sequentially preferable, that too may be taken into account in the overall planning balance. But these are not matters which affect the carrying out of the sequential test itself. Logically they do not go to the question whether an alternative site is reasonably available and appropriate (i.e. has relevant appropriate characteristics) for the development proposed on the application or appeal site. Instead, they are matters which may, for example, reduce the weight given to a failure to meet the sequential test, or alternatively increase the weight given to factors weighing against such failure.

175. In para. 36 of their statement of facts and grounds Redrow contended that if the Inspector had been entitled to treat the 13 disputed sites as sequentially preferable, they would not come close to meeting the housing needs of the Borough, because in DL 108 to 109 the Inspector had identified a shortfall of between 2,104 and 2,875 dwellings in meeting the requirement for a 5-year supply of housing land. New homes would be required on many more sites than the 13 disputed sites and therefore would necessitate the use of land where flood risk is the same as, or worse than, the risk relating to the appeal site.

176. In para. 43 of their detailed grounds of resistance HBC said that Redrow did not give particulars of this contention, which they disputed. In para. 38 of his detailed grounds of resistance the Secretary of State said that on HBC's evidence to the inquiry the 13 disputed sites had a total capacity of 4,105 dwellings, in excess of the unmet need figures in DL 109.

177. Redrow's Reply and a second witness statement by Ms. Katheryn Ventham, a planning consultant acting for Redrow, responded that the capacity of the 13 disputed sites (4,105 dwellings) could not be compared to the shortfall in the 5-year housing land supply (2,104 to 2,875) because the former represents capacity deliverable over a substantially

longer timeframe. Indeed, HBC's own land supply assessment showed that only 1 of the 13 sites was expected to deliver units during the following 5 years, amounting to only 50 dwellings.

178. I can see that if Redrow had submitted to the Inspector that there was a substantial need for housing which could not be met entirely on sequentially preferable sites (and even more so in the next 5 years), so that additional sites with a similar or worse flood risk would need to be developed, that would be a significant factor to be addressed in the overall planning balance. It could reduce the weight to be given to the failure to satisfy the sequential test. Here the Inspector gave that failure "very substantial weight" (DL 100). It would have been arguable that the flood risk implications of satisfying the unmet need for housing land was an "obviously material consideration," such that it was irrational for the Inspector not to have taken it into account (*R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116] to [120]). Alternatively, it could have been said that there was a failure to comply with the duty to give reasons in relation to a "principal important controversial issue" between the parties.

179. The problem faced by Redrow is that, as Mr. Simons accepted, this argument was not put before the Inspector. Redrow did not consider it to be material, let alone obviously material. It was not raised as a substantial issue between the parties. The Inspector cannot be criticised for acting irrationally, or for failing to give reasons, in relation to an argument of this kind which the claimant did not see fit to rely upon at any stage in its appeal. Ground 3 must therefore be rejected for this reason alone.

180. There is also an objection to the raising of a new point of this kind in a statutory review in the High Court. If Redrow had raised at the public inquiry the point now advanced under ground 3, HBC and any other participant would have had an opportunity to adduce evidence if thought appropriate, or, at the very least, to make submissions. Just as important is the point that the matter could have been addressed in a single appeal process. The Inspector would have been able to make any additional findings of fact, to evaluate the weight to be given to the outcome of the sequential test and to strike the overall planning balance, taking into account Redrow's additional point as part of its entire case.

181. If the court were to quash an Inspector's decision because of a new point of this kind, it would probably be necessary for the appeal process to be repeated in its entirety or in large part. At the very least, the same Inspector, or a new Inspector, would have to receive fresh submissions and prepare a new decision letter and evaluate the various policy and planning considerations all over again. The general principle is that new evidence and/or new submissions should not be entertained as a basis for quashing an Inspector's decision if this would mean an Inspector would have to make further findings of fact and/or reach a new planning judgment (see e.g. *R (Newsmith Stainless Limited) v Secretary of State for the Environment, Transport and the Regions* [2017] PTSR 1126 [15]).

182. As in civil proceedings more generally, resources for planning inquiries and hearings are finite and need to be distributed efficiently between all parties seeking to have planning issues resolved. There is therefore a strong public interest in the finality of such proceedings. Parties are generally expected to bring forward their whole case when a matter is heard and determined. No proper justification has been advanced by Redrow

for the court to exercise its discretion exceptionally to entertain a new point which could have been, but was not, raised before the Inspector.

Conclusion

183. I have rejected all of the grounds of challenge raised by Mead and Redrow. Both claims for judicial review must be dismissed. I express my gratitude to counsel and the parties' legal teams for the presentation of their cases and assistance.

Neutral Citation Number: [2025] EWCA Civ 32

Case No: CA-2024-000466

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mr Justice Holgate
[2024] EWHC 279 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/1/2025

Before:
SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE NEWEY
and
LADY JUSTICE ANDREWS

- -

Between:

MEAD REALISATIONS LIMITED	**Appellant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT	**Respondents**
(2) NORTH SOMERSET COUNCIL	

- -
- -

Lord Banner KC and Isabella Buono (instructed by **Clarke Willmott LLP**) for the **Appellant**

Hugh Flanagan (instructed by **the Treasury Solicitor**) for the **First Respondent**

North Somerset Council did not appear and were not represented

Hearing date: 26 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 4:20pm on 30 January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Senior President of Tribunals:

Introduction

1. Did an inspector, when determining an appeal against a local planning authority's refusal of planning permission for housing development, err in law by misunderstanding or misapplying policy and guidance on the "sequential test" for development proposed in areas at risk of flooding? That is the main question in this case. It concerns the relationship between national planning policy in the National Planning Policy Framework ("NPPF") and the corresponding guidance in the Planning Practice Guidance ("PPG"), both issued by the Government, and also their relationship with the relevant policy in the development plan.

2. With permission granted by Lewison L.J., the appellant, Mead Realisations Ltd., appeals against the order of Holgate J. – as he then was – dated 12 February 2024, by which he dismissed its claim for planning statutory review, under section 288 of the Town and Country Planning Act 1990, of the decision of the inspector appointed by the first respondent, the Secretary of State for Housing, Communities and Local Government, dismissing its appeal against the refusal by the second respondent, North Somerset Council, of planning permission for a development of up to 75 dwellings at Lynchmead Farm, Ebdon Road, Wick St Lawrence, near Weston-Super-Mare.

3. The site lies to the north-west of Weston-Super-Mare, in a "High Probability (3a)" floodplain. The application for planning permission was made in June 2020, and refused by the council in July 2022 for three reasons, which included the contention that the proposal was contrary to government policy for the "sequential test" in paragraph 162 of the NPPF and to the related policy in the development plan. Mead Realisations appealed against that decision, under section 78 of the 1990 Act. The inspector held an inquiry into the appeal in May 2023. At the inquiry the council relied on the guidance relating to the policy in paragraph 162 of the NPPF that had been published in the PPG in August 2022. The inspector's decision letter is dated 20 June 2023. Mead Realisations' claim was filed on 28 July 2023. Permission to proceed was granted by Lang J. on 12 September 2023. On 31 October 2023 Sir Duncan Ouseley directed that the claim be heard together with a claim made by Redrow Homes Ltd. in which similar issues arose. The two claims came before Holgate J. at a hearing in the Planning Court on 17 and 18 January 2024. He dismissed them both. Mead Realisations appealed to this court; Redrow Homes did not.

4. In my view the judge was right to conclude and decide as he did.

The issues in the appeal

5. There are two grounds of appeal. They both relate to the judge's conclusions on the first ground of the claim under section 288, and they present us with two main issues:
    (1) whether the judge wrongly held that the PPG can "amend" the NPPF (ground 1); and
    (2) whether the judge wrongly held that the inspector properly treated the PPG as "elucidating" the NPPF (ground 2).

Paragraph 162 of the NPPF

6. In the first version of the NPPF, published in March 2012, paragraph 101 contained a policy for a "sequential approach" to be taken in assessing proposals for development likely to give rise to, or increase, the risk of flooding:

> "101. The aim of the Sequential Test is to steer new development to areas with the lowest probability of flooding. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower probability of flooding. The Strategic Flood Risk Assessment will provide a basis for applying this test. A sequential approach should be used in areas known to be at risk from any form of flooding."

7. In the July 2021 version of the NPPF, extant when the inspector made his decision on Mead Realisations' section 78 appeal, the "sequential test" for flood risk appeared in paragraph 162, which was in chapter 14, "Meeting the challenge of climate change, flooding and coastal change". That paragraph, in similar terms to paragraph 101 of the version published in March 2012, stated:

> "162. The aim of the sequential test is to steer new development to areas with the lowest risk of flooding from any source. Development should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. The strategic flood risk assessment will provide a basis for applying this test. The sequential approach should be used in areas known to be at risk now or in the future from any form of flooding."

8. There was no definition of "reasonably available sites" either in chapter 14 of the NPPF or in its "Glossary".

9. The 2021 version of the NPPF has since been superseded. In the current version, which was published on 12 December 2024, the policy set out in paragraphs 174 and 175 is not materially different from that in paragraph 162 of the version published in July 2021. Once again, there is no definition of "reasonably available sites" either in the text or in the "Glossary".

Paragraph 7-028 of the PPG

10. When the NPPF was first published in March 2012, the Government also issued a document entitled "Technical Guidance to the National Planning Policy Framework". That document was withdrawn on 7 March 2014.

11. The PPG was first published by the Government on 6 March 2014. It included a section entitled "Planning and Flood Risk", superseding the technical guidance document. That

section was amended on 25 August 2022. The amendment included the insertion of paragraph 7-028, which has since remained in its original form.

12. Paragraph 7-028 contains guidance on the "sequential test". The guidance relates to the policy in paragraph 162 of the NPPF, including the concept of a "reasonably available" site. It states:

> "What is a "reasonably available" site?
>
> 'Reasonably available sites' are those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
>
> These could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. Such lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'.
>
> The absence of a 5-year land supply is not a relevant consideration for the sequential test for individual applications."

13. I should add that the Government's response, dated 12 December 2024, to the consultation undertaken for the July 2024 draft NPPF, on Question 80 – "Are any changes needed to policy for managing flood risk to improve its effectiveness?" – said this:

> "After considering the comments received in relation to reasonably available sites, we will shortly be updating planning practice guidance to clarify the definition of reasonably available sites that should be considered as part of the sequential test."

Policy CS3 of the North Somerset Core Strategy

14. The North Somerset Core Strategy, containing policy CS3, was originally adopted by the council in April 2012. Its adoption was the subject of a successful challenge in the High Court, which did not, however, attack policy CS3. In January 2017 it was replaced by the North Somerset Core Strategy (January 2017).

15. Policy CS3, under the heading "Environmental impacts and flood risk assessments", states:

> "…
> Development in zones 2 and 3 of the Environment Agency Flood Map will only be permitted where it is demonstrated that it complies with the sequential test set out in the National Planning Policy Framework and associated technical guidance and, where applicable, the Exception Test, unless it is:

- development of a category for which National Planning Policy Framework and associated technical guidance makes specific alternative provision; or

- development of the same or a similar character and scale as that for which the site is allocated, subject to demonstrating that it will be safe from flooding, without increasing flood risk elsewhere, and, where possible, will reduce flood risk overall.

For the purposes of the Sequential Test:

…

2. A site is considered to be 'reasonably available' if all of the following criteria are met:

- The site is within the agreed area of search.
- The site can accommodate the requirements of the proposed development.
- The site is either:
    a) owned by the applicant;
    b) for sale at a fair market value; or
    c) is publicly-owned land that has been formally declared to be surplus and available for purchase by private treaty.

Sites are excluded where they have a valid planning permission for development of a similar character and scale and which is likely to be implemented."

16. We were told that the reference to "associated technical guidance" is to the document issued by the Government in March 2012 and withdrawn on 7 March 2014.

The inspector's decision letter

17. In his decision letter, under the sub-heading "*Development plan policy*", the inspector addressed Mead Realisations' argument that none of the 39 alternative sites put forward by the council were "reasonably available" because they all failed one or more of the criteria in the second part of policy CS3 (paragraphs 14 to 22 of the decision letter). This, he said, was an argument that the council's witnesses' evidence "does not seek to challenge … to any great extent, relying instead on the assessment of reasonably available sites as defined in national flood risk policy and guidance rather than the second section of Policy CS3, which it considers to be out of date" (paragraph 14). He concluded (in paragraph 22):

> "22. Taking these factors together, I conclude that there is insufficient evidence to demonstrate that any of the alternative sites proposed as reasonable alternatives by the Council meet all of the bulleted criteria set out in the second section of Policy CS3."

18. However, under the sub-heading "*National flood risk policy*", he said (in paragraphs 23 to 27):

> "23. Moving on to consideration of the proposal against national planning policy, the second section of Policy CS3 is now inconsistent with the Framework. Although the wording of national planning policy on flood risk in the Framework is largely the same as it was when Policy CS3 was adopted, the interpretation of it has been clarified by more recent guidance contained in the PPG.
>
> 24. In the PPG, reasonably available sites are defined as those in a suitable location for the type of development with a reasonable prospect that the site is available to be developed at the point in time envisaged for the development.
>
> 25. The PPG says that these could include a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development. There is nothing in the PPG that requires smaller sites to be adjacent to one another, as suggested by the appellant. A series of separate small residential sites would still provide suitable alternative land for equivalent development at a lower risk of flooding.
>
> 26. The PPG also says that such lower-risk sites do not need to be owned by the applicant to be considered reasonably available. Reasonably available sites can include ones that have been identified by the planning authority in site allocations or land availability assessments. There are no exclusions in the PPG relating to sites with planning permission or that publicly owned land must be formally declared to be surplus.
>
> 27. Paragraph 219 of the Framework states that due weight should be given to development plan policies, according to their degree of consistency with the Framework. In this case, because of the inconsistency between the documents as to what is meant by reasonably available, I give lesser weight to the second section of Policy CS3 than I do to the newer and more up to date Framework as interpreted by the PPG."

19. He acknowledged (in paragraph 35) that "the guidance provided in the PPG [was] a material consideration which [he had] taken into account in [his] decision". And he went on to say (in paragraphs 36 to 41):

> "36. Drawing these matters together, I consider that for the purposes of applying the sequential test in this appeal, a reasonably available alternative site is one whose location lies within the district of North Somerset, can accommodate residential development, and would be available for development at the point in time envisaged for the proposal as interpreted above. The alternative sites could include a series of smaller sites so long as collectively they are capable of accommodating the proposed development. There is no need for such smaller sites to be contiguous. Sites do not need to be owned by the applicant, nor are they excluded because of an extant planning permission or resolution to grant. So long as a site is available to be developed there is no need for further evidence

that they are for sale or, in the case of publicly owned land, declared to be surplus and available for purchase by private treaty.

37. Applying those criteria to the alternative sites put forward by the Council, I find that many fall within the meaning of reasonably available in the Framework, as set out in the PPG.

38. Even if a more restrictive definition of the type of development were to be used, taken to mean residential development of a suburban nature, and the availability of sites for development was taken to be now, in the sense that they either have extant planning permission (or a resolution to grant) for residential development in the current development plan with delivery expected at least in part by 2025, then there are still many alternative sites that would meet the Framework definition of reasonably available.

39. Other than in specific instances, individual sites were not discussed in detail at the inquiry as both main parties accepted that the question of whether a site was deemed to be reasonably available depended largely on my conclusions on the differences in interpretation of the wording of the PPG, and the respective weight given between Policy CS3 on the one hand, and the Framework as informed by the PPG on the other.

40. I conclude that the proposed development fails the sequential test as set out in the Framework because there are reasonably available sites for residential development appropriate to the proposed development on land with a lower risk of flooding than the appeal site.

41. The first part of Policy CS3 requires that development will only be permitted where it is demonstrated that it complies with the sequential test set out in the Framework. As I have concluded that the Framework's sequential test would not be complied with, it follows that the proposed development is in conflict with the first part of Policy CS3. Other than for the definition of the area of search being North Somerset-wide, I consider the remainder of the second part of Policy CS3 to be out-of-date because it is inconsistent with the Framework. I therefore conclude that the proposed development conflicts with Policy CS3 overall. As Policy CS3 was agreed as being the most important policy in determining this appeal, I conclude that the proposal also conflicts with the development plan when taken as a whole."

20. When he came to the "Planning Balance" he acknowledged the benefits of the proposal, but concluded (in paragraphs 55, 56 and 59):

"55. Set against those benefits is the harm that would arise if the development were to flood. Evidence provided by the Council indicates that tidal flood waters could be deep. Such flooding would enter dwellings and surcharge drains. Standing water would be likely to be present for some time before water levels returned to normal. Such flooding would cause extensive damage both to buildings and their contents, requiring significant repair or replacement. There may also be adverse health and environmental impacts. The risk of this harm occurring weighs significantly against the proposal.

> 56. Irrespective of the degree of risk of flooding occurring or measures that could be taken to make the development resilient to flooding during its lifetime, the Framework is clear that development should not be permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding. I have found that there are such sequentially preferable sites available. This weighs heavily against the proposal.
>
> …
>
> 59. Although the benefits of providing housing, including affordable housing, in an area with an acknowledged shortfall of housing land would be significant, I conclude that the failure to meet the sequential test and the significant harm that would arise if the development were to flood outweigh those benefits and the other advantages outlined above."

21. In his "Conclusion", therefore, he said that "the proposal would conflict with the development plan when taken as a whole, and that it would also conflict with national planning policy on minimising flood risk to new development"; and that "[other] material considerations [did] not outweigh the harm so caused" (paragraph 61).

The conclusions of Holgate J. in the court below

22. On the relationship between the policy for the "sequential test" in the NPPF and the corresponding guidance in the PPG, Holgate J. said (in paragraph 62 of his judgment) that he did not think it was accurate to say the PPG was "only guidance, as if to suggest that it has a different *legal*, as opposed to *policy*, status from the NPPF", or that "fundamental legal principles on policy" did not apply to both. The ability of the Secretary of State to adopt either derived from "the same legal source of power as the central planning authority". The NPPF did "not have some special legal status" of its own.

23. The judge went on to say (in paragraph 67):

> "67. The policies in the NPPF vary in style. Some, like Green Belt policy, are relatively detailed and prescriptive (as policies). Other parts of the NPPF set a framework and the PPG provides more specific or detailed policy guidance on, for example, conditions in planning permissions, development affecting heritage assets and … the sequential test for flood risk cases."

and (in paragraphs 70 and 71):

> "70. As a matter of *policy*, PPG is intended to support the NPPF. Ordinarily, therefore, it is to be expected that the interpretation and application of PPG will be compatible with the NPPF. However, I see no legal justification for the suggestion that the Secretary of State cannot adopt PPG which amends, or is inconsistent with, the NPPF. Mr Banner was unable to point to any legal principle by which the court could treat such a PPG as unlawful. [*R. (on the application of West Berkshire District Council) v Secretary of State for*

> *Communities and Local Government* [2016] 1 W.L.R. 3923)] is one example of the Secretary of State introducing a new national policy through WMS and PPG which amended, and was inconsistent with, the pre-existing national policy as set out in the NPPF. …
>
> 71. Similarly, I am unimpressed by the claimants' argument that PPG cannot be adopted which is "restrictive" of policy in the NPPF. Where a policy in the NPPF is expressed in very broad or open terms, more detailed guidance in the underlying PPG may be rather more focused as to the approach to be taken. To describe that PPG as restrictive, and therefore inappropriate, is likely to be one-sided and unhelpful. Additions to, or changes in, policy may produce winners and losers. Parties affected by policy will have different points of view. …".

24. He described the policy in paragraph 162 of the NPPF as "a broad, open-textured policy". There was "no additional language indicating how the issue of "appropriateness" should be approached or assessed". And "[on] the face of it, the question of appropriateness is left open as a matter of judgment for the decision-maker" (paragraph 97). Paragraph 7-028 of the PPG did not conflict with that "open-textured" policy in the NPPF, but performed the "legitimate role of elucidating" it (paragraph 108). This interpretation did not involve treating either the NPPF policy or the PPG guidance as a "binding code", which would be "impermissible". They "can and should be read together harmoniously" (paragraph 112). Paragraph 7-028 of the PPG was "a proper aid to clarifying and understanding the meaning of the NPPF" (paragraph 113).

25. Upholding the inspector's approach as lawful, he said (in paragraphs 141 to 143):

> "141. I see no possible legal error in the Inspector's conclusion that the proposal conflicted with the first part of policy CS3 because it conflicted with the sequential test in the NPPF read together with the PPG. It was not suggested by Mead that policy CS3 should be interpreted as referring solely to the 2012 version of the NPPF and ignoring any alterations to that document. So if the NPPF had been amended by including the text contained in para. [7-028] of the PPG, Mead could have no legal complaint. I have explained that there is no legal principle which prevents national policy in the NPPF being altered by a WMS and/or PPG. In any event, para. [7-028] of the PPG is consistent with the open-textured language of para.162 of the NPPF properly understood. The former has merely clarified the latter. The Inspector correctly treated the PPG as having elucidated the NPPF.
>
> 142. For essentially the same reasons, the Inspector did not commit any error of law when he concluded that the criteria in the second section of policy CS3 are out of date because they are inconsistent with the NPPF read together with the PPG (DL 23 to DL 27 and DL 41).
>
> 143. [Counsel] submits that the Inspector erred because in treating the PPG as interpreting the NPPF (or defining "reasonably available" sites) he was applying the PPG as a "binding code[".] I have already explained why that argument is unsustainable … ".

The first main issue – whether the judge wrongly held that the PPG can "amend" the NPPF

26. For Mead Realisations, Lord Banner K.C. argued that the judge was wrong to hold that the PPG could "amend" the NPPF. The PPG could amplify or elucidate policies in the NPPF – as did the "paradigm example" of its guidance supporting NPPF policy on heritage assets, in paragraph 18a-018 – but it could not rewrite those policies, such as by imposing additional mandatory requirements. The PPG was "subservient" to the NPPF. It could give guidance, or a "steer", on the application of NPPF policies, but not create additional requirements that must be met, or restrictions that must be complied with, if a proposal was to accord with those policies.

27. In making that submission Lord Banner relied on passages in four High Court judgments, which, he argued, show that PPG guidance does not have binding effect, even if it has a "flavour of obligation about it": the judgment of Dove J. in *Menston Action Group v City of Bradford* [2016] EWHC 127 (Admin); [2016] P.T.S.R. 466, where, in the context of flood risk, he referred to paragraph 7-050 of the PPG as being "obviously subservient to the policy [in paragraph 103 of the then extant version of the NPPF] for which it provides practice guidance" (paragraph 41); the judgment of Lieven J. in *Solo Retail Ltd. v Torridge District Council* [2019] EWHC 489 (Admin), in which, when considering the checklist for retail impact assessment set out in paragraph 2b-017 of the PPG, she rejected the suggestion that its content was "mandatory where there is a policy requirement for any form of impact test" (paragraph 34); the judgment of Lang J. in *R. (on the application of White Waltham Airfield Ltd.) v Royal Borough of Windsor and Maidenhead* [2021] EWHC 3408 (Admin), where, in the context of noise impact, she rejected an attempt to "elevate the PPG into a binding code which strictly prescribes the steps that a local planning authority must follow when undertaking its assessment" (paragraph 78); and the judgment of Lang J. in *Bramley Solar Farm Residents Group v Secretary of State for Levelling Up, Housing and Communities* [2023] EWHC 2842 (Admin), where, in the context of energy generation, she rejected the suggestion that the PPG imposed a duty to consider alternative sites (paragraph 171), and stressed that "[the] PPG is merely practice guidance which supports the policies in the [NPPF, and …] is not a binding code which prescribes the steps that must be taken when planning a solar farm" (paragraph 177). Lord Banner maintained that there was "no principled reason" to justify a different view being taken of the PPG's guidance on the sequential test for development proposed in areas of flood risk from that taken to its guidance on retail impact or noise assessment or energy generation.

28. Lord Banner submitted that the PPG could not "override" policy in the NPPF, nor create a "binding code" of that kind. He accepted that paragraph 7-028 of the PPG, properly understood, did not exceed the proper role of such guidance. But, he contended, the updated version of the PPG published in August 2022 could not redefine or constrain the broad concept of "reasonably available sites", which by then had been in NPPF policy for some ten years, by cutting down the range of possibilities under that policy or by providing an exhaustive list of considerations. The PPG could not support the implementation of national policy by changing its requirements. The stability of the policies in the NPPF would be undermined if their meaning and effect could be changed

by mere guidance that had only emerged in the PPG, without prior warning or consultation.

29. I cannot accept Lord Banner's criticism of the judge's approach. In my view Holgate J.'s conclusions on the status and role of the NPPF and of the PPG were correct. I also agree with his interpretation of the policy and guidance in question, and with his view on the synergy between them.

30. Lord Banner's argument on this ground rests on the proposition that, as a matter of law, the guidance for the sequential test in paragraph 7-028 of the PPG could not alter the policy in paragraph 162 of the NPPF by making it more onerous or restrictive than it was in its own terms. Like the judge, however, I think the premise here is wrong. As the inspector recognised, and as the judge concluded in paragraph 141 of his judgment, the policy and the guidance are entirely congruent with each other. The judge made the point well when he said that paragraph 7-028 of the PPG is "consistent with the open-textured language" of paragraph 162 of the NPPF, "properly understood". The guidance does not exceed the ambit of the policy. It does what guidance in the PPG can quite legitimately do, which includes explaining a particular policy in the NPPF and how it is meant to operate.

31. If that is so, there is no need for us to decide whether the proposition itself is incorrect, and whether there is any legal principle that prevents national policy in the NPPF being amended, or altered, by guidance in the PPG. But if the question of principle did arise for our decision, I would agree with Holgate J., again in paragraph 141, for the reasons he gave there and in preceding passages of his judgment, that no such rule exists in law.

32. There is no need to depart from orthodox principle in reaching those conclusions. It is well established that the interpretation of planning policy, whether at national or local level, is ultimately a matter for the court. It is equally well established that the court does not generally approach this task with the same linguistic precision as it does the interpretation of a contract or statute (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 938, at paragraphs 18 and 19). The court will also take care to distinguish between proceedings in which the interpretation of planning policy is truly in issue and those in which the real complaint is about the decision-maker's application of that policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] 1 W.L.R. 1865, at paragraph 26).

33. As the judge recognised (in paragraph 62 of his judgment), the legal status of the Government's planning policies in the NPPF and its guidance in the PPG is basically the same. No legal distinction exists between them. They are not legislation. Their status is equivalent in the sense that both of them are statements of national policy issued by the Secretary of State when exercising his general power to do so as the minister with overall responsibility for the operation of the planning system (see the judgment of Lord Carnwath in *Suffolk Coastal District Council*, at paragraph 19, where he referred to the NPPF as "national policy guidance"; the judgment of Lord Gill in the same case, at paragraph 74, where he referred to "[the] guidance given by the Framework"; and the speech of Lord Clyde in *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295, in which he said, at paragraph 143, that "[the] formulation of policies is a perfectly

proper course for the provision of guidance in the exercise of an administrative discretion"). Both the NPPF and the PPG are national planning policy in this broad sense. So too, for example, is a written ministerial statement (see the judgment of Laws and Treacy L.JJ. in *West Berkshire District Council*, at paragraph 25).

34. More than a decade after they were first published, the NPPF and the PPG form a mature body of planning policy and guidance. They have somewhat different purposes. The NPPF is a comprehensive framework of national planning policy, in which the Government sets out its general policies for planning decision-making and plan preparation. The PPG is national guidance for planning practice, which can reinforce that framework. Policies in the NPPF will generally state the Government's objectives and purposes for various aspects of land use planning and planning decision-making, and the essential principles that apply. And – again generally – guidance published in the PPG explains how those policy objectives and purposes are to be achieved, and the principles put into practice, in the decision on an individual proposal or in the preparation of a plan.

35. I would endorse here the observation made by Mr David Elvin Q.C. in *Bent v Cambridgeshire County Council* [2017] EWHC (Admin) (at paragraph 37) that the PPG "comprises a mixture of policy and guidance produced in a less formal manner than the NPPF and subject to frequent on-line revision". Guidance of the kind one sees in the PPG performs a valuable role in explaining, clarifying or elucidating the policies in the NPPF to which it relates. The PPG is not, as Lord Banner put it, a "rival corpus of policy". Much of the guidance it contains is explicitly connected to NPPF policies. It complements those policies. Reflecting the "Conclusion" and "Recommendations" of the report submitted by Lord Taylor of Goss Moor to the Department for Communities and Local Government in December 2012, its function is to support the NPPF, to the benefit of applicants, authorities, those involved in some other way or interested in the planning process, and practitioners. Its mode of publication, as an online resource, makes it both accessible and adaptable to changing circumstances. It promotes greater predictability and consistency in various aspects of planning decision-making and plan preparation when the Government considers this to be necessary, with amendments or additions made to the guidance from time to time and redundant passages withdrawn. It is conducive to certainty in the planning process, without constraining unduly the exercise of planning judgment by local planning authorities, or, in appeals, the Secretary of State and inspectors.

36. This is not to say – and it would be unreal to suggest – that in areas of policy where the Government has provided no guidance in the PPG the conduct of planning decision-making and plan preparation is left as a free-for-all – unpredictable, inconsistent and arbitrary. It is merely to recognise that in these areas the Government has seen no need to use the PPG as a means of assisting the exercise of planning judgment by those to whom Parliament has given the task of making decisions and preparing development plans.

37. These are only generalities. I have not sought to describe, exactly and completely, the different attributes of NPPF policy and PPG guidance, but only to identify some of the features they have. I do not think it is necessary to attempt an exact definition of the role of the PPG. The formulation of national planning policy and guidance involves, for the Secretary of State, a wide discretion, which can be exercised flexibly as

circumstances require. As Holgate J. recognised in paragraph 67 of his judgment, the policies of the NPPF are not uniform in style. Where the NPPF policy is in relatively broad terms, as it is for flood risk, the need for elucidation or explanation in the PPG may be greater. Where the policy is more prescriptive, it may be less. But there are no hard and fast rules on what each must contain, or how each must be expressed.

38. Both the policies in the NPPF and the guidance in the PPG are capable of being material considerations in decision-making on planning applications and appeals. And the weight to be given to such policy or guidance in a planning decision is a matter for the decision-maker, subject to the court's intervention on public law grounds (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 2 All E.R. 636, at p.657e-j).

39. Relevant factors in assessing weight may include the respective terms of the policy and guidance and whether they sit easily together; the timing of their publication, including, for example, whether the policy emerged before the guidance or vice versa, and how recently each was issued; and the nature of the process by which they were produced, including, for example, the fact that the guidance in the PPG is generally not subject to any external consultation before being issued, whereas the policies in the NPPF are.

40. In *Solo Retail* (at paragraph 33) Lieven J. pointed out that the PPG is "not consulted upon, unlike the NPPF and Development Plan policies" and is "subject to no external scrutiny, again unlike the NPPF, let alone a Development Plan". She also noted that "[it] can, and sometimes does, change without any forewarning", that it "is not drafted for or by lawyers", that "there is no public system for checking for inconsistencies or tensions between paragraphs", and that "[it] is intended, as its name suggests to be guidance not policy …". However, to describe the PPG as being, in a legal sense, wholly "subservient" to the NPPF or subordinate to it in a hierarchy of national planning policy would not be right – and Lieven J. did not say that in *Solo Retail*. The exact relationship between a particular policy in the NPPF and corresponding or relevant guidance in the PPG will vary according to the content and terms of the policy and guidance in question.

41. Holgate J. understood the interdependence between NPPF policy and PPG guidance when he said (in paragraph 70 of his judgment) that "[as] a matter of *policy*, PPG is intended to support the NPPF", and "therefore, it is to be expected that the interpretation and application of PPG will be compatible with the NPPF". I agree. Given the function of guidance in the PPG to support policies in the NPPF, one would not expect the Government to publish policies and guidance that are inconsistent with each other. This would not only be counter-intuitive; it would cause needless confusion about the Government's objectives.

42. Policies in the NPPF and guidance in the PPG may, I think, be used as an aid to the interpretation of each other. In *Braintree District Council v Secretary of State for Communities and Local Government* [2018] EWCA Civ 610; [2018] 2 P. & C.R. 9, a case concerning the policy in paragraph 55 of the 2012 version of the NPPF, I said (at paragraph 36) that "I doubt[ed] that it would be right to exclude the guidance in the PPG as a possible aid to understanding the policy or policies to which it corresponds in the NPPF". That comment was "obiter" because the court did not have to resort to the PPG to assist the interpretation of a policy whose meaning was "plain on its face and required[d] no illumination from the PPG or any other statement of national policy or

guidance". In this case too, both the NPPF policy in question and the related guidance in the PPG are clear in their own terms, and when read together they form a coherent whole.

43. Interpreting the policy and guidance with which we are concerned is not difficult. The starting point is the heading given to paragraph 7-028 of the PPG – "What is a "reasonably available" site?". This links precisely to the policy in paragraph 162 of the NPPF, and indicates that the intention of the guidance is to explain the policy as written, not to amend it.

44. In setting up the "sequential test", the first sentence of paragraph 162 of the NPPF expresses the aim of the Government's policy in very simple terms – "to steer new development to areas with the lowest risk of flooding from any source". The general thrust of the policy is to be seen in the second sentence, which describes the sequential approach – that "[development] should not be allocated or permitted if there are reasonably available sites appropriate for the proposed development in areas with a lower risk of flooding", but adds nothing to define or explain the meaning of "reasonably available sites". The third sentence confirms that the strategic flood risk assessment will provide the basis for applying the sequential test; and the fourth that the sequential approach should be used in areas known to be at risk now or in the future from any form of flooding.

45. The policy in paragraph 162 of the NPPF was aptly described by the judge as "broad" and "open-textured". Mr Hugh Flanagan, for the Secretary of State, also referred to it as being "high level". It does not set rigid parameters for the concept of "reasonably available sites". This is an elastic concept, not defined or limited by any other text in the NPPF, nor accompanied by any criteria. It leaves for decision-makers a range of evaluative judgment in ascertaining whether a particular site is or is not "reasonably available".

46. In the absence of a definition of "reasonably available sites" in the NPPF itself, there was obvious scope to clarify that concept in the PPG, and obvious advantage in doing so. Providing a definition in the glossary to the NPPF, or elsewhere in the text, was not the only way in which that could be done. The opportunity to do it was properly taken in the PPG.

47. On the correct interpretation of the policy in paragraph 162 of the NPPF and the guidance in paragraph 7-028 of the PPG, the latter did not amend the former. The PPG did not contradict or override the existing NPPF policy for the sequential test. It did not generate a new or different policy. It did not modify the existing policy by introducing into that policy additional requirements or restrictions. It provided practical guidance on the application of the policy as it stood. It articulated the Government's thinking on the concept of "reasonably available sites". It did so by identifying considerations that would be relevant in applying the pre-existing policy in the NPPF. None of this involved any amendment to the NPPF policy itself. No such amendment was required. The guidance fell within the four corners of the policy.

48. What the PPG guidance did was to clarify – or "elucidate" – the NPPF policy as written. And it did so in flexible language, not in prescriptive terms. It prompts the exercise of

evaluative judgment by the decision-maker. Its first paragraph invites the decision-maker to judge what is a "suitable location for the type of development", and whether or not there is "a reasonable prospect that the site is available to be developed at the point in time envisaged for the development". The second paragraph is notably open-ended. It begins by saying that these locations "could include" sites of various kinds: "a series of smaller sites and/or part of a larger site if these would be capable of accommodating the proposed development". It adds that "[such] lower-risk sites do not need to be owned by the applicant to be considered 'reasonably available'". These are not "mandatory" requirements. They are not a "binding code", or a "straitjacket". They are elucidation, or explanation. Seen in this way, as Mr Flanagan submitted, the guidance in paragraph 7-028 of the PPG is, in fact, "subservient" to the policy in paragraph 162 of the NPPF.

49. Even before the PPG guidance was published it would have been open to a local planning authority, or an inspector, to apply the NPPF policy in the way that the guidance was later to indicate. Equally, once the guidance had been issued it was permissible for decision-makers, when performing their duty under section 38(6) of the Planning and Compulsory Purchase Act 2004, to apply the policy in the light of that guidance in judging whether a decision to grant planning permission would be in accordance with development plan policy drafted to embrace the sequential test in the NPPF. And that is what happened here.

50. The fact that the PPG guidance was only published about ten years after the NPPF policy first appeared does not matter. The publication of practice guidance does not have to be contemporaneous, or near contemporaneous, with the publication of the policy it serves. Nor is the use of the PPG to provide practice guidance limited to explaining the intention of the Government at the time when the related policy in the NPPF was originally promulgated. No such limit on the function of the PPG as practice guidance appears anywhere in the PPG, or in the NPPF. It would artificially curtail the Government's freedom to explain, through such guidance, the intended operation of NPPF policy.

51. The final point here is this. When the decision in this case was made, national policy for the sequential test in paragraph 162 of the NPPF had been incorporated into the development plan in the first part of policy CS3. Also, however, the NPPF policy referred to there had subsequently been clarified by the guidance in paragraph 7-028 of the PPG, which was now in place. And the second part of policy CS3, in stating criteria for assessing whether a site is "reasonably available", not only went beyond what was said in the NPPF policy itself; it was also out of kilter with the clarification of that policy provided in the PPG.

52. In my view therefore, Holgate J. was right to hold that the guidance in paragraph 7-028 of the PPG did not amend the policy in paragraph 162 of the NPPF. As he said (in paragraph 112), the policy and guidance "can and should be read together harmoniously", and (in paragraph 141) "… para.[7-028] of the PPG is consistent with the open-textured language of para.162 of the NPPF properly understood", "[the] former has merely clarified the latter", and "[the] Inspector correctly treated the PPG as having elucidated the NPPF". This was a classic case of guidance in the PPG doing what it can and should do in supporting, by clarifying, the policy in the NPPF to which it relates.

53. But if the question of principle raised in ground 1 of the appeal were not merely hypothetical in the circumstances here and it were right to regard the guidance in paragraph 7-028 of the PPG as not merely having elucidated or explained the policy in paragraph 162 of the NPPF but as having actually amended it, I cannot see any legal obstacle to that. I would accept the judge's view (in paragraph 70 of his judgment) that there is "no legal justification for the suggestion that the Secretary of State cannot adopt PPG which amends, or is inconsistent with, the NPPF", nor "any legal principle by which the court could treat such a PPG as unlawful". As the judge said, *West Berkshire District Council* provides an example of the Secretary of State introducing a new national policy through WMS and PPG that amended, and was inconsistent with, an extant national policy in the NPPF. I also agree with his conclusion (in paragraph 141) that "there is no legal principle which prevents national policy in the NPPF being altered by a [Written Ministerial Statement] and/or PPG". Putting the point at its lowest, for the Government to have used the guidance it gave in paragraph 7-028 of the PPG to modify or qualify its own policy in paragraph 162 of the NPPF in those terms would not have been contrary to any provision of statute, nor would it have it offended any principle of law.

54. None of the four judgments on which Lord Banner relied is at odds with the conclusions of Holgate J. on this part of the challenge, or with my own. They do not suggest a different outcome for ground 1 of the appeal. As Holgate J. said (in paragraph 87 of his judgment), it is necessary to read the passages relied on "in the context of what the issues were in those cases and what was really decided by the court".

55. In *Menston* Dove J. had to consider a passage of guidance in the PPG relating to the effect of development on flood risk and the policy to which it related in the NPPF. He found (in paragraph 41 of his judgment) that the passage in question, in paragraph 7-050 of the PPG, which concerned opportunities to "reduce" the level of flood risk overall, was "obviously subservient" to the policy of the NPPF for which it provided practice guidance, which referred, in paragraph 103, to authorities "ensuring that flood risk is not increased elsewhere". There was, therefore, an evident tension between the policy in the NPPF and the guidance in the PPG. Dove J. said that "the text within the PPG could not override that reading of the primary document", and that the particular passage of guidance he was dealing with was "of generic or overarching application and does not provide an additional gloss on the Framework's separation of policy requirements for plan-making and decision-taking". This was ultimately a question of interpretation for the court. In that case, as Holgate J. said (in paragraph 92), "… the PPG did not purport to give guidance on development control …" and "[accordingly], this was an example of PPG which was not an aid to the interpretation of NPPF policy for dealing with planning applications". And in any event in this case there is no tension between the policy and guidance in question.

56. In *Solo Retail*, when considering the checklist for retail impact assessment in paragraph 2b-017 of the PPG, Lieven J. (in paragraph 33 of her judgment) urged "considerable caution when the Court is asked to find that there has been a misinterpretation of planning policy set out [in the PPG]". She emphasised that the PPG was "intended … to be guidance not policy [,] must therefore be considered by the Courts in that light", and would "rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in [*Tesco v Dundee*] applied to the Development [Plan] Policy there in

issue" (paragraph 33). The paragraph containing the checklist, she said, "cannot and should not be interpreted and applied in an overly legalistic way as if it was setting out mandatory requirements" (paragraph 34). The force of what Lieven J. was saying there was that the PPG was not imposing an additional, compulsory test. Her observations on the relevant passage in the PPG do not go against the conclusions to which Holgate J. came on the issues in this case. The issue in that case, as he said (in paragraph 88) and as Lieven J. herself had said (in paragraph 30 of her judgment), was "really an argument about the application of policy, not its interpretation"; and the PPG "did not set out mandatory requirements …".

57. In *White Waltham* Lang J. was considering the relationship between the policy in paragraph 182 of the NPPF, which sought noise assessments that took into account the effects of development on "[existing] businesses and facilities", and the guidance in paragraph 30-009 of the PPG, which sought consideration of both "existing and future activities". Rejecting the claimant's attempt to "elevate the PPG into a binding code which strictly prescribes the steps that a local planning authority must follow when undertaking its assessment, otherwise it will be found to have acted unlawfully", she described this as "a mistaken approach". The PPG, she said, was "merely practice guidance, which is intended to support the policies in the NPPF" (paragraph 78 of her judgment). Again, those conclusions do not disturb Holgate J.'s analysis in this case. And as he said (in paragraph 89), Lang J. rejected the challenge to the adequacy of the noise assessment that had been carried out, and "[in] those circumstances, the claimant's reliance under ground 2 upon PPG guidance added nothing of substance …".

58. In *Bramley Solar*, a case concerning a proposed solar farm, Lang J. rejected (at paragraphs 117 to 179 of her judgment) the suggestion that the guidance in paragraph 5-013 of the PPG, which stated that applicants "will need to consider" alternative sites, imposed a duty to do so in the absence of any such requirement in the NPPF. She repeated what she had said in *White Waltham*; the PPG was "not a binding code which prescribes the steps that must be taken … " (paragraph 177). The same may be said once again. The issue in that case was different from the one that arises here, but Lang J.'s essential conclusions do not clash with those of Holgate J..

59. If, however, there is any incompatibility between the reasoning in those four judgments and Holgate J.'s in this case, I should make it clear that I regard his as sound, and prefer it.

The second main issue – whether the judge wrongly held that the inspector properly treated the PPG as "elucidating" the NPPF

60. On ground 2 of the appeal Lord Banner submitted the judge was wrong to conclude (in paragraph 141 of his judgment) that the inspector had treated the guidance in paragraph 7-028 of the PPG as merely "elucidating" the policy in paragraph 162 of the NPPF. The inspector had not understood the position of the PPG in the "hierarchy" of policy and guidance. Having found in paragraph 22 of his decision letter that the proposal accorded with policy CS3 of the core strategy read together with paragraph 162 of the NPPF, he had gone on to find in paragraph 23 that this position had been changed by the amendments to the PPG made in August 2022, and that the second part of policy CS3 was "now inconsistent" with the NPPF. He had treated the PPG guidance, in excess of

its proper role, as "rigidly defining" the concept of "reasonably available sites", and setting out "binding criteria" or "requirements" that must be satisfied if a site was to be considered "reasonably available" under national planning policy in the NPPF. The PPG could not "in law" have that effect. The inspector had not used the PPG as an aid to the interpretation of NPPF policy; he had used it to rewrite the policy.

61. This argument is, in my view, ill-founded. The inspector did not find that the guidance in paragraph 7-028 of the PPG had amended, or altered, the policy in paragraph 162 of the NPPF. On the contrary, he concluded, in paragraph 23 of his decision letter, that the guidance had "clarified" the policy. And this, as I have said, is the correct understanding of the guidance.

62. I agree with Holgate J.'s reading of the inspector's decision letter. He was right to hold, in paragraph 141 of his judgment, that it was open to the inspector to find the proposed development in conflict with the first part of policy CS3 because it did not comply with the policy for the "sequential test" in paragraph 162 of the NPPF as now "clarified" – or "elucidated" – by the guidance given in paragraph 7-028 of the PPG. And as the judge held in paragraph 142, the inspector did not commit any error of law when he found that the criteria in the second part of policy CS3 were out of date because they were inconsistent with the NPPF read together with the PPG.

63. I see nothing unlawful in the inspector's conclusions on the proposal's conflict with national and local policy. On a fair reading of his decision letter, it cannot be said that he misunderstood the relationship between the policy in paragraph 162 of the NPPF and the guidance on "reasonably available sites" in paragraph 7-028 of the PPG, or that he regarded the guidance as imposing on him as decision-maker a "binding code", "binding criteria" or "mandatory requirements", or as putting him in a "straitjacket". Nor did he misunderstand the relationship between the Government's policy and guidance and policy CS3 of the core strategy.

64. His assessment is straightforward, and unsurprising. In paragraph 23 of the decision letter he referred, rightly, to the inconsistency between the second part of policy CS3 and the policy for the sequential test in the NPPF, which had not itself changed, but whose "interpretation" had, as he said, been "clarified by more recent guidance contained in the PPG". In paragraphs 24, 25 and 26 he recorded the gist of the guidance accurately. His use of the word "defined" in paragraph 24, when taken in context, does not imply that he misconstrued or misapplied the guidance in paragraph 7-028 of the PPG. In paragraph 27, his reference to "inconsistency between the documents" simply reflected the fact that the PPG had now explained the concept of "reasonably available sites" in a way that was different from policy CS3. Quite properly in the light of the policy in paragraph 219 of the NPPF, he exercised his own planning judgment on the relative weight to be given respectively to the second part of policy CS3 and to the NPPF policy "as interpreted by the PPG". He clearly did not regard the up to date guidance as overriding the NPPF policy itself, but as assisting an understanding of it. And he concluded, crucially, that "lesser weight" was now due to the second part of policy CS3. No issue is taken, or could be, with that exercise of planning judgment. It was, in my view, lawful.

65. In paragraph 35, before carrying out the sequential test, the inspector acknowledged that the PPG guidance was a "material consideration" in his decision – which was

correct. His description of the sequential test, in paragraph 36, is uncontentious. He then, in paragraphs 37 to 40, applied the approach to which he had referred. It was right to say, as he did in paragraph 37, that the meaning of "reasonably available sites" had been "set out" in the PPG. This does not imply that he regarded the guidance as rigidly prescriptive. Nor does his use of the word "definition" in paragraph 38, again taken in context. He referred in paragraph 39 to "differences in interpretation of the PPG", and to the NPPF policy being "informed by the PPG". His use of these phrases, in context, was justified. He concluded in paragraph 40 that "the proposed development fails the sequential test as set out in the [NPPF]". No criticism is, or could be, made of the exercise of planning judgment in those paragraphs, or of the conclusion that flowed from it. In paragraph 41 the inspector focused on the "first part" of policy CS3, recognising that, as he had "concluded that the [NPPF]'s sequential test would not be complied with, it follows that the proposed development is in conflict with the first part of Policy CS3". That conclusion is unimpeachable. So too are the following conclusions in the same paragraph: that leaving aside the definition of the area of search being North-Somerset-wide, "the remainder of the second part of Policy CS3 [is] out-of-date because it is inconsistent with the [NPPF]", that "therefore … the proposed development conflicts with Policy CS3 overall", and that "[as] Policy CS3 was agreed as being the most important policy in determining this appeal, … the proposal also conflicts with the development plan when taken as a whole". And the ultimate weighing of the "Planning Balance" in paragraphs 50 to 59, again in the exercise of planning judgment, was also, in my view, impeccable.

66. Put simply, the inspector's critical conclusions, that the proposal failed the sequential test under current government policy in the NPPF, read – as it now had to be – in the light of the current guidance in the PPG, and that the proposal was not in accordance with the development plan, taken as a whole, are clearly expressed and properly reasoned. His exercise of planning judgment was lawful throughout. And his conclusions reflected a proper understanding and faultless application of the policy in paragraph 162 of the NPPF and the guidance in paragraph 7-028 of the PPG, and of policy CS3 of the core strategy. No public law error occurred.

67. To find, as the inspector did, that the criteria in the second part of policy CS3 did not reflect the policy in paragraph 162 of the NPPF read in the light of the guidance in paragraph 7-028 of the PPG was plainly correct. And in view of his conclusion that there was conflict here with national planning policy for the sequential test in the NPPF as elucidated by the PPG, his conclusion that there was conflict with the first part of policy CS3, which incorporated that policy of the NPPF, was both logical and lawful. That a decision to grant planning permission for the proposal would therefore not be a decision taken in accordance with the development plan was also a lawful conclusion.

68. I do not accept that the inspector's conclusions on the proposal's conflict with policy CS3 are undone by the fact that this policy was adopted when the original, 2012 version of the NPPF was current, that the sequential test for flood risk in paragraph 101 of that version was, in substance, no different from its successor in the 2021 version, and that the PPG guidance only emerged much later. As Mr Flanagan pointed out, although the core strategy, containing policy CS3, was adopted about four weeks after the publication of the NPPF in March 2012, the relevant national policy at the time of the local plan examination would have been Planning Policy Statement 25: Development and Flood Risk, published in March 2010. It is also a matter of fact that policy CS3 was

not in issue in the challenge brought to the adoption of the core strategy, and remained in its original form when the core strategy was re-adopted in October 2017. But that history does not displace the inspector's conclusion that since the meaning and effect of government policy in paragraph 162 of the then current version of the NPPF had now been explained by the Government itself, in paragraph 7-028 of the PPG, it was clear that the proposal before him was in conflict with the NPPF policy and thus with the first part of policy CS3. Nor does it nullify his conclusion that the criteria in the second part of policy CS3 were inconsistent with the NPPF and the PPG. These, as I have said, were conclusions he was entitled to reach. The prior sequence of events in the adoption of development plan policy and the publication of national policy and guidance does not make them unlawful.

Conclusion

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

Lord Justice Newey:

70. I agree.

Lady Justice Andrews:

71. I also agree.

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