Neutral Citation Number: [2024] EWHC 2088 (Admin)

Case No: AC-2024-LON-000765
and AC-2024-LON-000778

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 August 2024

Before :

THE HON. MR JUSTICE HOLGATE

- -

Between :

AC-2024-LON-000765
VISTRY HOMES LIMITED **Claimant**

- and -

(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES
(2) ST ALBANS CITY AND DISTRICT COUNCIL
(3) COLNEY HEATH PARISH COUNCIL

Defendants

AND

AC-2024-LON-000778
FAIRFAX ACQUISITIONS LIMITED **Claimant**

-and-

(1) SECRETARY OF LEVELLING UP, HOUSING AND COMMUNITIES
(2) HERTSMERE BOROUGH COUNCIL
(3) HERTFORDSHIRE COUNTY COUNCIL
(4) ALDENHAM PARISH COUNCIL

Defendants

- -
- -

Mr. Zack Simons (instructed by **Clarke Willmott Solicitors**) for the **First Claimant** in the first claim**.**
Dr. Ashley Bowes and **Mr. Harley Ronan** (instructed by **Pinsent Masons LLP**) for the **Claimant** in the second claim**.**

Mr. Robert Williams (instructed by the **Government Legal Department**) for the **First Defendant** in both claims**.**
Mr. Wayne Beglan and **Ms. Olivia Davies (**instructed by **Hertsmere Borough Council)** for the **Second Defendant** in the **second claim.**

The third defendant in both claims did not appear and was not represented, nor was the fourth defendant in the second claim.

Hearing dates: **9-10 July 2024**

- -

Approved Judgment

This judgment was handed down remotely at 16.00 pm on 07/08/2024 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 for statutory review brought under s.288 of the Town and Country Planning Act 1990 ("the TCPA 1990") concern decisions by Inspectors on planning appeals relating to large residential schemes in the Green Belt. It was common ground that each constituted "inappropriate development" for the purposes of Green Belt policy in the National Planning Policy Framework ("the NPPF").

2. Accordingly, each development was, by definition, harmful to the Green Belt and could not be approved unless "very special circumstances" ("VSC") existed. That is, the harm to the Green Belt by reason of inappropriateness and any other harm resulting from the proposal, had to be "clearly outweighed" by the other material considerations (paras. 152 and 153 of the NPPF):

> "152. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 153. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations."

3. In each case the Inspector found that substantial weight should be given to the harm that would be caused to the Green Belt, that harm would also be caused to the local landscape and, in one appeal, other matters.

4. Each proposed development is located in a district, the City of St. Albans in one case and Hertsmere Borough in the other, which largely falls within the Green Belt and where there have been longstanding issues with the local planning authority ("the LPA") identifying an adequate supply of housing land in accordance with the NPPF. Therefore, the Inspectors in each case treated the contribution which each scheme would make to the provision of general market housing and affordable housing as benefits attracting substantial weight in the "very special circumstances" balance, weighing against the harm in the other side of the balance.

5. Thus far, the claimants do not challenge any part of the respective decision letters.

6. In each case the Inspector went on to assess how much weight to give other benefits, before striking the overall planning balance. Each claimant seeks to challenge the way in which the Inspector dealt with just two of the benefits. In the claim brought by Vistry Homes Limited ("Vistry") the grounds of challenge relate to:

   (i) The development of "previously developed land" ("PDL") as a benefit (para. 123 of the NPPF); and

(ii) The provision of a net gain in biodiversity ("BNG") as a benefit (para. 180(d) of the NPPF).

7. In the claim brought by Fairfax Acquisitions Limited ("Fairfax") the grounds of challenge relate to:

(i) The provision of economic benefits from the construction and occupation of the proposed dwellings (para. 85 of the NPPF); and

(ii) The provision of BNG as a benefit (para. 180(d) of the NPPF).

The BNG issue is common to both cases.

8. Neither claimant alleges that the Inspector in its case failed to take into account the relevant benefits. Instead, each complaint relates to the relative weight given by the Inspector to those benefits.

9. For that reason it is important to recall what was said by Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759 at p.780 F-H:

> "The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all. The fact that the law regards something as a material consideration therefore involves no view about the part, if any, which it should play in the decision-making process.
>
> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State."

10. A challenge to an Inspector's decision on matters of weight would not appear to be promising. Furthermore, in these cases the benefits in question were not the main issues on which the appeals were contested. Indeed, the parties said rather little about the benefits. Accordingly, it would not be surprising to find that the Inspectors' reasoning was correspondingly succinct. In one instance Fairfax even seeks to criticise an approach taken by the Inspector which was common ground between the parties at the public inquiry.

11. We should also not lose sight of two facts. First, the extent of the difference between the weights applied to the benefits was not very great. The weight which the claimants asked the Inspectors to place on each of the benefits the subject of the present claims was no more than "significant". The Inspector gave moderate or neutral weight to the two benefits in the Vistry appeal and limited weight to the two benefits in the Fairfax appeal. Second, the decisions attached much greater weight to other, self-evidently important subjects, such as harm to the Green Belt, or the provision of affordable housing.

12. The general principles upon which a statutory review under s.288 is conducted were summarised in *St. Modwen Developments Limited v Secretary of State for Communities and Local Government* [2018] PTSR 746 at [6] – [7].

13. The claimants seek to challenge the Inspector's conclusions on weight by a number of routes depending upon which finding is being criticised. First, it is said that the finding is flawed because it is based upon a misinterpretation of the NPPF. Here it is necessary to distinguish interpretation from application of policy (see e.g. *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88 [8]-[9]; *Gladman Developments Limited v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1450 at [32]). Normally, a party raising such an argument should at least identify (i) the policy wording said to have been misinterpreted, (ii) the interpretation of that language adopted by the decision-maker and (iii) how that interpretation departs from the correct reading of the policy (*Trustees of Barker Mill Estates v Secretary of State for Communities and Local Government* [2017] PTSR 408 at [83]).

14. Second, it is said that the application of the NPPF by the Inspector was irrational. Here counsel is using the term in the second sense identified by the Divisional Court in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [98], namely a demonstrable flaw in the reasoning leading to a conclusion – significant reliance upon an irrelevant consideration, or absence of evidence to support an important step in the reasoning, or "a serious logical or methodological error" in the reasoning (approved by the Supreme Court in *R (Finch) v Surrey County Council* [2024] UKSC 20 at [56]).

15. Third, it is said that the reasoning on particular conclusions was legally inadequate.

16. In order to provide the context for the grounds of challenge, it is necessary to summarise the contents of each Inspector's decision letter in some detail. This exercise also reveals the care and skill with which each Inspector carried out his task. I will then address the grounds of challenge in the following order:

    (i) Use of PDL (Vistry);

    (ii) Economic benefits (Fairfax);

    (iii) BNG (Vistry and Fairfax)

17. The hearings of the two claims took place one after the other, but the parties agreed that the court may take into account written and oral submissions and materials in both cases when determining each claim. I wish to express my gratitude for the helpful written and

oral submissions from all counsel and for the single set of bundles which the parties agreed to cover both cases.

The planning appeal in Vistry's case

The planning application

18. On 5 August 2022 Vistry made an application to St. Albans and City District Council ("SACDC") for outline planning permission for the demolition of an existing house at 42, Tollgate Road, Colney Heath and stables, and the erection of up to 150 dwellings, 81 as market housing, 60 as affordable homes (40%) and 9 as self-build or custom houses. The means of access was to be approved as part of the application. Matters relating to layout, scale, appearance and landscaping were reserved for subsequent approval. The site also comprised a substantial area of open pasture land to the rear of 42-100, Tollgate Road.

19. SACDC refused the application on 25 May 2023 and Vistry appealed to the Secretary of State. A public inquiry was held in September 2023. The Inspector issued his decision letter on 26 January 2024. The decision took into account the revised version of the NPPF dated 19 December 2023 and the written representations of the main parties on that document.

Colney Heath and the appeal site

20. Colney Heath is a small, nucleated village between St. Albans to the north west, Hatfield to the north east, Welham Green to the south east and London Colney to the south west. The village comprises 3 clusters of development separated and surrounded by open countryside, a mixture of fields and woodlands (DL 6).

21. The appeal site is located adjacent to the southernmost part of the village. The River Colne runs along its south western boundary. It has an area of 7.82ha, nearly all of which comprises open fields. In the north west corner of the site there is a small equestrian facility (manège, stables, stores and hardstandings). That facility, together with the curtilage of 42 Tollgate Road, occupies around 3,000 sqm, just 3.8% of the overall site. The appeal site is almost entirely free of buildings and other development. The fields are used for grazing and exercising horses (DL 6, 7 and 19). The development area of the appeal scheme, including the access, amounts to 4.06ha or about 52% of the overall site area (DL 20).

The development plan

22. The relevant policies are contained in the "Saved Policies" of the old-style (pre-Planning and Compulsory Purchase Act 2004) City and District of St. Albans Local Plan Review ("the Local Plan"). The whole of the district lies in the Green Belt save for some specified towns and settlements. However, Colney Heath is not a specified settlement. It is a "Green Belt Settlement" where the Green Belt is "washed over" the whole village (DL 8).

23. SACDC is preparing a new local plan to cover the period running to 2041. It is at an early stage, having only undergone consultation under reg. 18 of the Town and Country

Planning (Local Planning) (England) Regulations 2012 (SI 2012 No. 767). The document proposes changes to Green Belt boundaries to meet the development needs of the district, but not at Colney Heath. The Inspector gave limited weight to the policies in the emerging local plan, as was common ground between the parties (DL 9).

Main issues in the planning appeal

24. Because of the publication of the reg. 18 version of the emerging local plan, paras. 77 and 226 of the NPPF only required SACDC to demonstrate a 4-year supply of housing land, rather than a 5-year supply (DL 11). But there was still a substantial shortfall. In another case it might have been necessary for the Inspector to apply the tilted balance in para. 11(d)(ii) of the NPPF, but here, in accordance with case law, it was only necessary to apply para. 11(d)(i) of the NPPF and the VSC balance under Green Belt policy. The parties therefore agreed that the appeal turned on whether VSC were shown to exist (DL 12 and 13).

25. The Inspector decided that the main issues in the appeal were:

> "14. In view of the above, and having regard to everything I have read, heard and seen in this case, the main issues in this appeal are:
>
> - The effect of the proposed development on the openness and purposes of the Green Belt;
>
> - The effect of the appeal proposal on the landscape character and appearance of the area;
>
> - The effect of the proposed development on the setting and significance of nearby heritage assets, including the Grade I listed North Mymms Park House, Grade II listed Colney Heath Farmhouse and adjacent Grade II listed barn, and the non-designated heritage assets of North Mymms Park and Tollgate Farm;
>
> - Whether the site's location is or can be made sustainable in transport terms; and
>
> - Whether or not the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations, including the provision of housing and any other benefits which the proposed development may bring, so as to amount to the very special circumstances necessary to justify the proposed development."

Effect on Green Belt openness

26. Paragraph 142 of the NPPF states that the fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open. The essential characteristics of Green Belts are their openness and permanence (para. 142 of the NPPF and DL 17).

27. The change from open fields to development across more than half of the site would have a significant impact on the spatial openness of the Green Belt in this location (DL 20).

28. The Inspector assessed in some detail the impact of the scheme on the visual component of openness at DL 21 to DL 26.

29. The site can be seen from a number of locations on surrounding roads and footpaths (DL 21). From each location the site is seen as part of a corridor of open fields and countryside, running along the River Colne to the south and west of Colney Heath. The views from Tollgate Road have very strong connections to the wider landscape with open fields and woodland blocks. In visual terms the site makes an important contribution to the openness of the Green Belt (DL 22).

30. The appeal proposal would infill around three-quarters of the gap between the houses on Tollgate Road and the woodland along the River Colne (DL 23).

31. In response to Vistry's suggestion that the site is visually contained, the dwellings would be clearly visible above existing and proposed boundary planting filling the open space on the appeal site. Any "containment" or screening provided by proposed landscaping would reduce the visual openness of the site rather than mitigate the effect of the development on the openness of the Green Belt (DL 24). Activity, traffic movement and street lighting in dark hours would also affect openness (DL 25).

32. At DL 26 the Inspector concluded:

> "26. Overall, the loss of openness on the appeal site due to the permanent change from fields used for horses to a housing estate of up to 150 dwellings, which would be built across more than half of the site and be clearly visible from surrounding roads and footpaths, intruding into the corridor of open land between Colney Heath and the River Colne, would be substantial. The resulting harm to the openness of the Green Belt in this location would, therefore, be substantial."

Effect on Green Belt purposes

33. The Inspector dealt with this subject at DL 27 to DL 32.

34. It was common ground that the proposed development would conflict with the purpose of safeguarding the countryside from encroachment (DL 27). The Inspector rejected Vistry's suggestion that the appeal site makes a weak contribution to that purpose. The site is clearly visible from a range of public vantage points within and around Colney Heath and it forms part of a swathe of land alongside the River Colne which is visually connected to the countryside to the southeast and northwest. In its current form, the appeal site makes "a strong contribution to the purpose of the Green Belt in safeguarding the countryside from encroachment" (DL 28).

35. Unlike other Green Belt sites referred to, the appeal site was not contained, rather it forms part of the open countryside (DL 29 to DL 30).

Overall conclusions on Green Belt harm

36. In DL 31 to 32 the Inspector concluded:

> "31. In this case, the appeal proposal would constitute a substantial incursion of urban development into the open countryside to the south of Colney Heath, extending the settlement well beyond the existing ribbon of housing on Tollgate Road. This would cause substantial harm to the key purpose of the Green Belt in this location in safeguarding the countryside from encroachment.
>
> 32. Paragraph 153 of the Framework establishes that substantial weight should be given to any harm to the Green Belt. Accordingly, the harm to the openness and purposes of the Green Belt, in addition to the harm by reason of inappropriateness, carry substantial weight against the appeal proposal."

Effect on landscape character and appearance

37. The Inspector dealt with the effect on landscape character at DL 33 to DL 43 and on appearance or visual impact at DL 44 to DL 50.

38. Although the appeal site has a settlement edge on its north eastern boundary (the back of properties in Tollgate Road), its predominant character is rural. It forms part of a corridor of open countryside along the River Colne, which includes Colney Heath Common to the northwest and the parkland landscape of North Mymms House (a grade I listed building) to the south east (DL 33).

39. The development would result in the loss of much of the rural character of the site. Only the portion within a Local Wildlife Site adjacent to the River Colne would remain undeveloped, but this would mostly be hidden from Tollgate Road by the proposed housing (DL 35). The development would be an urbanising influence projecting into the Colne Valley (DL 36).

40. Although the site is not a "valued landscape" within para. 180(a) of the NPPF it has "the intrinsic character and beauty of the countryside" (para. 180(b)). The development would substantially erode the contribution and value of the site to the rural character of the area and setting of Colney Heath (DL 37).

41. Vistry's assessment underestimated the visual impacts of the proposal; that of SACDC was fairer (DL 38). The landscape of the appeal site had at least a "medium" quality and value (rather than "low to medium"). The impacts would be substantial and visually intrusive and could not be adequately mitigated. This would be a "substantial adverse" effect which would not reduce over time (DL 39 to DL 40).

42. The impact of the development on the "surrounding landscape" would be moderate at year 1 and the urbanising influence would remain at that level (DL 41). Within the "wider landscape" the new development would be clearly visible as a new urban extension into the countryside south of Colney Heath. This would noticeably change

the character, scale and pattern of the landscape and townscape in the area resulting in a moderate adverse impact in year 1 reducing to a slight adverse but not negligible impact over time (DL 42 to DL 43).

43. The Inspector then carried out a similarly detailed and careful analysis of visual impacts on a number of receptors (DL 44 to DL 50). The impacts varied but, for example, the housing would be "very prominent" in a view from Tollgate Road, even at year 15, "extending the settlement towards the river, urbanising, disrupting and foreshortening the view." There would be a "substantial adverse" effect reducing to "moderate adverse" over time (DL 46). Other impacts were less severe.

44. The Inspector set out his overall conclusions on landscape and visual impacts at DL 51 to DL 52:

> "51. Based on the landscape and visual evidence I have seen and heard, I do not share the appellant's view that the appeal site is visually contained or that the impacts of the proposed development on the surrounding landscape would be limited and localised. The site is clearly visible from the surrounding roads, footpaths and dwellings on all sides, in nearby and middle distance views. Its
>
> existing open farmland character would be replaced by urban development, which would have adverse effects on the existing rural setting of Colney Heath and the views of countryside from surrounding receptors. The adverse visual and landscape effects would range from 'substantial' and 'moderate' in the first year following the completion of the development, to 'slight' after 15 years with landscaping mitigation. However, in a number of locations, the impacts would remain at a 'substantial' or 'moderate' adverse level over time.
>
> 52. Overall, I consider that the adverse landscape and visual impacts would cause significant harm to the landscape character and appearance of the appeal site and the surrounding area. In my view the proposed development would fail to recognise the intrinsic character and beauty of the countryside on the site and to the south of Colney Heath. As such it would be contrary to paragraph 180(b) of the Framework. It would also be contrary to Policy 2 of the Local Plan which seeks to safeguard the character and setting of Green Belt settlements, including Colney Heath."

Harm to heritage assets

45. The Inspector dealt with the effect of the scheme on heritage assets at DL 53 to 64. The Inspector found that the proposal would cause "less than substantial" harm to designated heritage assets which made it necessary for that harm to be balanced against public benefits under para. 208 of the NPPF (DL 64). At DL 145 the Inspector found that those benefits outweighed heritage harm, so that that harm, taken by itself, did not

constitute a freestanding reason for refusal. But in the VSC balance, the heritage harm carried "great weight" against the proposal (DL 146).

Sustainability of location in terms of transport

46. The Inspector addressed this subject at DL 65 to DL 89 in relation to all modes of transport. The scheme fared better in some respects than others. He gave his overall conclusions in DL 89:

> "89. That said, I concur with the Council that the limitations on the appeal site's location in terms of access by sustainable modes of transport may not be sufficient to fail the policy tests in paragraphs 109 and 114 of the Framework and, therefore, justify the dismissal of the appeal in their own right. However, the lack of a genuine choice of sustainable modes of travel to access medical facilities, and the incoherent, indirect and unsafe cycling routes from the village, are important material considerations which weigh against the proposed development in the overall planning balance."

Market and affordable housing

47. The Inspector dealt with this subject at DL 90 to DL 95. In summary the Inspector said:

(i) The shortfall against the 4 year requirement of housing land in SACDC's district remains substantial (DL 90);

(ii) There has been a serious under-delivery of housing in the district over a number of years (DL 91);

(iii) Even if the emerging local plan is adopted by December 2025, the housing trajectory in that plan shows that delivery on allocated sites would not begin until 2028/9, in around 5 years' time. In the meantime, the delivery of housing would continue to fall well short of the number of dwellings required each year with the associated problems identified (DL 92);

(iv) The proposed development would be delivered in the next 5 years, making a material contribution to the supply. The provision of 81 units of market housing should carry very substantial weight in favour of the development (DL 93);

(v) There is a shortfall in the supply of affordable dwellings of 2,220 dwellings, which is projected to increase over the next five years. The provision of 60 units on the appeal site would represent a social benefit to which very substantial weight should be given (DL 94 to DL 95).

48. The Inspector also gave substantial weight to the provision of 9 dwellings on self-build and custom plots (DL 96 to DL 98).

49. The Inspector dealt with economic benefits (DL 99 to 101) and ecology including BNG (DL 102 to DL 104). Up to this point there is no challenge to the decision. He then dealt with PDL (DL 105 to DL 117).

50. The Inspector turned to address a range of issues raised by third parties, none of which told against the appeal proposal (DL 118 to DL 141).

Very special circumstances

51. The Inspector summarised the main harm which the scheme would cause at DL 142 to DL 144 and at DL 146 to DL 147:

> "142. The starting point in this case is that the appeal proposal constitutes inappropriate development in the Green Belt, which paragraph 152 of the Framework establishes is, by definition, harmful to the Green Belt, and should not be approved except in very special circumstances. In carrying out the 'very special circumstances' test, it is important to note that under paragraph 153 of the Framework, for 'very special circumstances' to exist, the harm by reason of inappropriateness and any other harm resulting from the proposal must be 'clearly' outweighed by other considerations. So, it is not sufficient for the factors in support of the proposal to merely outweigh the harm. Rather, for the appeal to be allowed, the overall balance of benefits against harms would have to weigh decisively in favour of the appeal scheme, not just marginally.
>
> 143. Beginning with harms, in addition to the harm by reason of inappropriateness, I have found that the proposed development would cause substantial harm to the openness of the Green Belt at Colney Heath and to its purpose in safeguarding the countryside from encroachment. Paragraph 153 of the Framework requires substantial weight to be given to any harm to the Green Belt. Accordingly, the harm to the openness and purpose of the Green Belt, in addition to the harm by reason of inappropriateness, each carry substantial weight against the appeal proposal. In my view these comprise a comprehensive range of Green Belt harm, not merely by reason of inappropriateness, but to the fundamental aim and purposes of the Green Belt.
>
> 144. In terms of other harms, the proposed development would also cause significant harm to the rural landscape character and appearance of the appeal site and the surrounding countryside to the south of Colney Heath, which I have established would be contrary to both national and Local Plan policies. Whilst the Council did not rely on the harm to landscape character as a separate reason for refusal, it is a distinct harm to be considered alongside the Green Belt harm in the overall balance. In my view, for the reasons I have given above, the level of landscape harm which would result, adds further significant weight against the appeal proposal.
>
> …

> 146. However, this does not constitute a finding of 'no heritage harm' and therefore a neutral factor in the overall Green Belt balance. Instead, the harm to the designated heritage assets remains an impact to which paragraph 205 of the Framework indicates great weight should be given, irrespective of the finding of less than substantial harm to their significance. Accordingly, the fact that the proposed development would harm rather than conserve the settings and significance of the Grade I and Grade II listed buildings, carries great weight against the appeal proposal in the Green Belt balance. The very minor harm to the non-designated heritage assets adds a minimal degree of further weight against the proposal.
>
> 147. In respect of access by sustainable modes of transport, notwithstanding the proposed improvements to the 305 bus service, which would be a benefit arising from the appeal scheme, the lack of a genuine choice of sustainable modes of travel to medical facilities, and the inadequacies of the cycling routes from the village to other key facilities, would result in journeys being made by car rather than more sustainable modes. In my view, these factors carry a moderate amount of weight against the proposed development."

52. The Inspector dealt with the main benefits of the proposal at DL 148 to DL 149:

> "148. Turning to the benefits of the proposal, there is a pressing need for additional housing in St Albans District, which the appeal scheme would help to address. The shortfalls against the requirement for a 4-year supply of housing land and the need for affordable housing are substantial. Although there is an emerging Local Plan, which allocates sites to meet housing needs over the next 20 years, this is unlikely to result in the delivery of sufficient new homes to meet the shortfalls within the next 5 years. Therefore, the construction of up to 150 new homes, including 60 affordable units, are key benefits of the appeal proposal, which, given the shortfalls and the Government's objective to significantly boost the supply of homes, should be accorded very substantial weight in the overall Green Belt balance.
>
> 149. In addition, the provision of 9 plots for SB&CB housing within the appeal scheme, although small in number, represents a benefit attracting substantial weight, given the level of unmet demand for this type of housing in the District. The proposed development would also deliver material economic and ecological benefits, in the form of jobs, increased trade for local services, and a 10% BNG, both of which I consider should attract moderate weight in favour of the appeal proposal. I also attach moderate weight to the improvements to the 305 bus service, which would result from"

53. The Inspector decided that all other matters should carry neutral weight, including the use of PDL land to carry out the development (DL 150).

54. The Inspector struck the overall VSC balance in DL 152:

> "152. Accordingly, I have considered the totality of the benefits of the proposed development against the totality of its harms. Even though the provision of market and affordable housing attracts the highest level of weight of any consideration in this case, overall I judge that the housing and other benefits do not clearly outweigh the combination and extent of harms to the Green Belt, landscape character and appearance, and heritage assets, and arising from the limitations in the choice of sustainable transport modes. Therefore, I conclude that the other considerations in this appeal do not clearly outweigh the harm that I have identified."

55. It followed that, applying paras. 11(d)(i) and 152 of the NPPF the proposal should not be approved and the appeal dismissed (DL 153). The application of s.38(6) of the 2004 Act led to the same conclusion (DL 154 to DL 155).

The planning appeal in Fairfax's case

The planning application

56. On 7 September 2022 Fairfax made an application to Hertsmere Borough Council ("HBC") for outline planning permission for the erection of up to 195 new houses, of which 45% would be affordable, safeguarded land for the expansion of a nearby primary school and the provision of a medical centre on land south of Shewley Road, Radlett, Hertfordshire. The application included the means of access, but matters relating to layout, scale, appearance and landscaping were reserved for subsequent approval.

57. HBC refused the application on 2 March 2023 and Fairfax appealed to the Secretary of State. A public inquiry was held over 6 days in August and October 2023. The Inspector issued his decision letter on 26 January 2024. He took into account the revised version of the NPPF dated 19 December 2023 and the written representations of the main parties on that document.

The appeal site

58. Radlett is a settlement with a population in 2021 of 10,060.

59. This greenfield site has an area of 11.45ha. The majority of the site is an agricultural field used as pasture. The western boundary backs on to the rear gardens of housing in "suburban streets" of Radlett and the grounds of Newberries Primary School. Sherley Road forms the site's northern boundary. To the east lies a 40ha block of woodland, Newberries Wood and The Gorse.

60. The whole of the site lies within the Green Belt. About 8ha of the site would be developed for housing, the medical centre and access roads. It was common ground that the proposal was for "inappropriate development" in the Green Belt.

The main issues

61. In DL 4 the Inspector said that the main issues in the appeal were:

> "a) The effect of the proposed development on the openness and purposes of the Green Belt;
>
> b) The effect of the proposed development on the character and appearance of the area, specifically on the landscape; and
>
> c) Whether any harm to the Green Belt, any harm to the landscape and any other harm, is clearly outweighed by other considerations, so as to amount to the very special;"

Green Belt issues

62. In DL 8 the Inspector referred to paras. 152 and 153 of the NPPF. The overriding main issue in the appeal was whether the benefits of the proposed development clearly outweighed its overall harm, so as to establish VSC. It was common ground that there was both a spatial and a visual aspect to the effect of the development on openness. The object of para. 142 of the NPPF is to prevent built or urban development extending on to open Green Belt land, including land next to or surrounding the existing built-up area of settlements not in the Green Belt (DL 10).

Effect on openness

63. The majority of the site would be permanently developed with new buildings and access roads and there would be the activity associated with the housing and the new GP surgery. The proposal was in direct conflict with the spatial policy to keep the land open. Substantial weight had to be given to that harm (DL 11).

64. The Inspector dealt with visual effects on the openness of the Green Belt in DL 12 to DL 15.

65. The woodland block to the east of the site and in the southern part of the site would generally shield it from wider views in the surrounding Green Belt countryside. In that context he described a number of "glimpsed views" (DL 12). He acknowledged that the suburban housing within Radlett along the whole of the western boundary of the site impacted on its character (DL 13). He said that, as such, the proposed development would not be particularly visible compared to other parts of the Green Belt in the locality or the Borough, which were not enclosed by a thick woodland belt. The site is "relatively visually self-contained" (DL 14). Nevertheless, he decided that the loss of 8ha of Green Belt land to built development would clearly have a "significant adverse effect upon its openness, which would be a physical manifestation of its inappropriateness."

Green Belt purposes

66. The first relevant purpose was "to check the unrestricted sprawl of large built-up areas" (para. 143(a) of the NPPF). There was an issue as to whether Radlett qualified as such an area. The Inspector decided that it did (DL 17). He then went on to find that although the proposal would be visually contained by the woodlands, the new development would still represent the further sprawl of Radlett (DL 18). There is no legal challenge to these conclusions.

67. The second purpose of Green Belt policy is "to prevent neighbouring towns merging in to one another" (para. 143(b) of the NPPF). The site performs "moderately" in relation to this purpose (DL 24). The development would reduce the gap between Radlett and Borehamwood to the south east from 1.7km to 1.4km and between Radlett and Shenley from 1km to 0.9km. But the Inspector considered that the smaller the gaps between the settlements the more important those gaps are for the purposes of para. 143(b). The existing gaps are relatively small, which is characteristic of the Metropolitan Green Belt. It is important to preserve open land spatially between such settlements if Green Belt policy is to remain effective in these areas (DL 19 to DL 21).

68. The third purpose of Green Belt policy is "to assist in safeguarding the countryside from encroachment" (para. 143(c) of the NPPF). The appeal site performs "strongly" in relation to this purpose (DL 24). Development would clearly encroach upon open countryside (DL 22 and DL 24). The Inspector noted that a study carried out by HBC's consultants had suggested allocating the appeal site for housing development but (a) that was in connection with an earlier review of the local plan which had been withdrawn and (b) it is well established in case law that the "exceptional circumstances" test for altering Green Belt boundaries in such a review is less strict than the VSC test for dealing with individual planning applications (DL 25 to DL 29). Again, none of these conclusions is challenged.

Conclusions on Green Belt harm

69. The Inspector set out his conclusions on the Green Belt issue at DL 30 to DL 31:

> "30. The proposed 8 Ha of built development would have a significant adverse effect on the Green Belt's openness, which would be a physical manifestation of its inappropriateness. In terms of the Green Belt purposes, the development would have a moderate adverse effect on purpose 'a) to check the unrestricted sprawl of large built-up areas'. It would have a moderate effect on purpose 'b) to prevent towns merging into one another', and a strong effect or impact on purpose 'c) to assist in safeguarding the countryside from encroachment'.
>
> 31. Whilst this significant effect on openness and adverse impact on Green Belt purposes may well be 'inevitable' (in the appellant's words) as a result of the inappropriate development of up to 195 homes and a new medical centre, such inevitability does not lessen its considerable harm to the Green Belt, to which I must give substantial weight."

Landscape issues

70. The Inspector addressed this subject at DL 32 to DL 44. He accepted that the site has no landscape designation and is not a "valued landscape" for the purposes of para. 180(a) of the NPPF.

71. A principal issue between the parties was the sensitivity of the site and its characteristics to residential development (DL 33). Landscape sensitivity is a combination of its value and the susceptibility of those characteristics to change (DL 36 to DL 38). The Inspector explained why he preferred the approach of HBC's consultant to that of Fairfax. The latter focused on the site's relative containment by woodland blocks and existing housing, rather than the effects of the proposed development on the site's intrinsic characteristics as an open, pastoral field. The Inspector disagreed with Fairfax's contention that the site has a stronger relationship to the residential area of Radlett than the wider countryside. The settlement edge did not affect the intrinsic, pastoral open character of the site as an agricultural field, which would be "substantially adversely affected" by the scheme (DL 39 to DL 43).

72. The Inspector concluded that there would be substantial adverse landscape effects on the site as the result of the permanent residential development of 8ha of countryside (DL 44).

Benefits of the scheme

73. The Inspector then went on to explain why the appeal proposal would not cause any other harm (DL 45 to DL 48) before addressing the benefits of the scheme (DL 49 to 99).

74. The Inspector stated that as a matter of general principle "mitigation of the effects of the development and measures that do no more than ensure compliance with development plan policies cannot be benefits" (DL 49).

75. He adopted a scale of weighting for the benefits in the case in descending order of importance: very substantial, substantial, significant, moderate, limited and very limited (DL 52).

76. On the contribution of new market housing, the Inspector recorded that HBC could only demonstrate a 2.25 years supply of housing land as against a requirement of 5 years supply. This was a shortfall of 2,088 homes based on the requirements of HBC's Core Strategy (2012 to 2027). Given that 80% of HBC's area is in the Green Belt, the new local plan will have to allocate at least some Green Belt land for greenfield housing development. But the Inspector had little confidence that the LPA is moving forward effectively to meet local housing needs through the plan-led system (DL 54 to DL 55). The Inspector said that where there is a chronic failure to deliver housing, as in Hertsmere Borough, and there is no short or medium term solution for remedying a persistent shortfall, the delivery of new housing must be encouraged and treated as an important priority, reflecting the objective in para. 60 of the NPPF of significantly boosting the supply of housing (DL 57). The Inspector gave substantial weight to the provision of 195 new homes (DL 60).

77. He then gave very substantial weight to the provision of 45% of these homes as affordable. The delivery of affordable housing in Hertsmere Borough had been "woefully inadequate" because it is mainly provided on the back of schemes for new market housing and there had been a "general chronic failure" to deliver such schemes. There was a need for 503 affordable housing dwellings between 2020 and 2036, or 8,048 dwellings over the 16 year period (DL 61 to DL 65).

78. The Inspector then assessed the weight to be given to a series of other benefits:

- Land for the expansion of Newberries Primary School (DL 66 to 70) – limited weight.
- The shell and core of a new medical centre (DL 71 to 83) – moderate weight.
- Works to improve a Puddingstone geological sequence (DL 84 to DL 86) – limited weight.
- BNG (DL 87 to 91) – limited weight.
- Accessibility and transport initiatives (DL 92 to DL 93) – very limited weight.
- Economic benefits (DL 94 to DL 98) – limited weight.

79. The inspector struck the VSC balance at DL 100 to DL 104:

> "100. Regarding harm, the development would have a significant adverse effect on Green Belt openness, which would be a physical manifestation of its inappropriateness, a moderate adverse effect on Green Belt purposes a) and b), and a strong effect on purpose c). I must give this Green Belt harm substantial weight, as mandated by the NPPF.
>
> 101. Added to this harm to the Green Belt there would be substantial adverse landscape effects on the character and appearance of the area as a result of the permanent residential development on approximately 8 Ha of the site.
>
> 102. Regarding the other considerations, the benefits of the proposal to be balanced against such harm, these are weighted as follows: substantial weight to housing supply, very substantial weight to the AH, moderate weight to the new surgery facility, limited weight to the school expansion land, the RIGS Plantation enhancement, BNG and the economic benefits, and very limited weight to the transport initiatives.
>
> 103. Having regard to these benefits, they do not clearly outweigh the overall significant harm to the Green Belt and the substantial adverse landscape effects on the character and appearance of the area. I have explained above my conclusions on the benefits with regard to my weighting scale set out above.

> Whilst these are of course a matter of judgement, I would add that, even if greater weight was to be attributed to some of these benefits – for instance if I had given significant weight to the new health facility and to the economic benefits – the totality of these other considerations would still not clearly outweigh the overall harm that the development would cause.
>
> 104. Consequently, the VSCs necessary to justify the proposed development do not exist. In making this judgement I am aware that the benefits, either individually or in total do not need to be 'very special' or even 'special'. But they do in total need to clearly outweigh the overall harm, which they do not in this case."

80. Essentially for the same reasons the Inspector found that the proposal would conflict with the statutory development plan (DL 105). He also explained that the conflict with Green Belt policy was sufficient to disapply under para. 11(d)(i) of the NPPF the presumption in favour of sustainable development (which arose because of the inadequate housing land supply). Consequently, there was no need for the Inspector to go on to consider para. 11(d)(ii) of the NPPF.

Vistry (Ground 2) – Development of PDL as a benefit

81. Chapter 11 of the NPPF is entitled "Making effective use of land." This can include the use of "previously-developed" or brownfield land. Paragraph 123 of the NPPF states:

> "123. Planning policies and decisions should promote an effective use of land in meeting the need for homes and other uses, while safeguarding and improving the environment and ensuring safe and healthy living conditions. Strategic policies should set out a clear strategy for accommodating objectively assessed needs, in a way that makes as much use as possible of previously-developed or 'brownfield' land.[49]"

82. Importantly, this policy is qualified by footnote 49:

> "Except where this would conflict with other policies in this Framework, including causing harm to designated sites of importance for biodiversity."

83. Paragraph 124 states:

> "124. Planning policies and decisions should:
>
> (a) …
>
> (b) …
>
> (c) give substantial weight to the value of using suitable brownfield land within settlements for homes and other identified needs, and support appropriate opportunities to

> remediate despoiled, degraded, derelict, contaminated or unstable land;
>
> (d) …"

Vistry accepts that it could not rely upon the encouragement given by para. 124(c) to the use of brownfield land because the appeal site lay outside the settlement of Colney Heath.

84. The Glossary in Annex 2 to the NPPF contains the following definition of "PDL":

> "**Previously developed land**: Land which is or was occupied by a permanent structure, including the curtilage of the developed land (although it should not be assumed that the whole of the curtilage should be developed) and any associated fixed surface infrastructure. This excludes: land that is or was last occupied by agricultural or forestry buildings; land that has been developed for minerals extraction or waste disposal by landfill, where provision for restoration has been made through development management procedures; land in built-up areas such as residential gardens, parks, recreation grounds and allotments; and land that was previously developed but where the remains of the permanent structure or fixed surface structure have blended into the landscape."

85. The basic definition of PDL refers to land which is or was "occupied by a permanent structure, including the curtilage of the developed land." Plainly, "the developed land" refers to the land which has been developed by the erection of a structure, for example, a building. So in that case the curtilage would refer to the curtilage *of that building*. Even then, Annex 2 of the NPPF makes it clear that not all of the curtilage may be developed. Finally, PDL may include "any fixed surface infrastructure."

86. The word curtilage is used in a number of different legal and policy contexts in planning, for example permitted development rights. Here, the Secretary of State has chosen to use this term as part of the definition of PDL. The word "curtilage" in the NPPF must be interpreted according to relevant legal authority. The leading decision on what is the curtilage of a building remains *R (Hampshire County Council) v Secretary of State for Environment, Food and Rural Affairs* [2022] QB 103.

87. It is important to emphasise that when the term "curtilage" falls to be applied in the definition of PDL, or in planning cases more generally, close attention must be paid to all the reasoning in *Hampshire* on the meaning of curtilage.

88. The core principle is that the land must be so *intimately connected* with the building as to lead to the conclusion that the land forms part and parcel *of the building*. Practitioners and decision-makers need to be clear about what that principle means, by a careful study of all relevant parts of the Court's reasoning.

89. The present case does not raise the issue whether there was a legal error in the finding on "curtilage". But it is appropriate for the court to highlight a few points. Curtilage

refers to land which *belongs* to a building. It is sometimes treated as synonymous with an appurtenance. If the extent of a curtilage is properly assessed, it should be sufficiently proximate to the building that a reference to "the building" could be treated, without artifice, as including the land as well ([48] to [51] and [68]). As Nugee LJ stated, curtilage refers to "bits of land that go with a building, of 'relatively limited' extent" ([135]), whilst recognising that the extent of a curtilage may vary with the nature and size of the building [55].

90. It is irrelevant to ask whether the building and land together form part of some residential or other unit. Functional equivalence is irrelevant. Likewise, it is irrelevant to ask whether the enjoyment of an area of land is advantageous or convenient or necessary for the full enjoyment of the other. The criteria for determining the extent of a planning unit, and indeed the very concept and purpose of planning unit, are all irrelevant to identifying a curtilage ([47], [61] and [115]). If the Secretary of State had meant to use, for example, the notion of a planning unit as the basis for defining and associated with a building he would have needed to use language to that effect, instead of opting for "curtilage".

91. Vistry contended that the whole of the appeal site other than the equestrian buildings along the north western boundary of the site constituted the curtilage of those buildings and therefore was part of the PDL. In other words, green open pasture land representing about 96% of the appeal site was thought to represent the curtilage of buildings and hardstanding at one end of the site occupying the remaining 4% of the overall area (assuming that 42, Tollgate Road is included in that 4% figure).

92. In the statement of common ground for the inquiry, Vistry and HBC agreed that the pasture land "is in lawful equestrian use" (para. 6.12). In the proof of evidence of Vistry's planning consultant it was said that from a description of the use of the site for equestrian purposes it was clear that the fields formed "an essential part" of the use of the stables and manège. It was simply for that reason that the witness thought that "the paddocks have a clear intimate association with the stable buildings and manège such that they form part and parcel of the same curtilage."

93. With respect, that superficial line of reasoning conflicted with the decision in *Hampshire*. It failed to apply the reasoning in that case. The test is whether the land in question forms part and parcel *of the building*. The test is *not* whether the fields and buildings form one messuage or parcel of land. That is simply the consequence of applying the correct legal test properly (see *Hampshire* at [61] to [65]). The statement by the planning consultant that the pasture land, stable buildings and manège form part and parcel of the same curtilage involves the same error of law as the Court of Appeal identified in [63] of *Hampshire*.

94. Unfortunately in cross-examination HBC's planning witness was asked to agree with that erroneous legal analysis and did so. The closing submissions for HBC and Vistry did not address the proper test and the reasoning in *Hampshire*.

95. In this way the Inspector was led to accept that the whole of the appeal site constituted PDL, either as developed land or curtilage land (see DL 106 to DL 108).

96. Given that Vistry's appeal was dismissed by the Inspector and there is no procedure in a challenge under s.288 of the TCPA 1990 for the service of a Respondent's Notice akin to a cross-appeal, there is no issue in this case about the legal correctness of DL 106 to DL 108. However, if Vistry were to succeed in having the decision quashed, it would be necessary for the new decision-maker to approach the issue of the extent of the PDL land on the correct legal basis, applying *Hampshire*.

97. The challenge brought by Vistry relates to the second part of the Inspector's handling of the PDL issue in which he arrived at the conclusion at DL 117 that the status of the appeal site as PDL did not carry any weight in favour of the proposed development in the VSC balance or was a neutral factor (see DL 150). This must be approached on the basis that the Inspector's finding on the extent of PDL is not impugned.

98. The Inspector summarised para. 123 of the NPPF and the qualification of that policy by footnote 49 (DL 109). In DL 110 he correctly stated that para. 154(g) of the NPPF defines the circumstances in which the redevelopment of PDL would be treated as "appropriate" and therefore not subject to the presumption against new buildings in the Green Belt:

> "154. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:
>
> a) …
>
> g) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:
>
> – not have a greater impact on the openness of the Green Belt than the existing development; or
>
> – not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority.
>
> …"

99. In DL 111 the Inspector referred to the decision of the Court of Appeal in *Dartford Borough Council v Secretary of State for Communities and Local Government* [2017] PTSR 737 for the uncontroversial proposition that the proviso in para. 154(g) on the circumstances in which PDL may be developed or re-used in the Green Belt means that the NPPF's encouragement of development on brownfield land is not unqualified where that land is located in the Green Belt (see [13]). However, the decision does not assist on the issues which arise in Vistry's challenge.

100. At DL 122 the Inspector said:

> "112. I have concluded above that the proposed development would cause substantial harm to the openness and purposes of the Green Belt. As such it would not qualify as an exception under paragraph 154(g) and would, therefore, constitute inappropriate development in the Green Belt. Accordingly, the appeal proposal would conflict with the Framework's policy on the approach to the re-use and redevelopment of PDL in the Green Belt."

There is no challenge to that conclusion.

101. Vistry's challenge relates to the reasoning which follows:

> "113. Whether or not this policy conflict and the resulting Green Belt harm would be outweighed by other considerations is the subject of the 'very special circumstances' test, which I deal with below. However, in circumstances where the appeal proposal does not comply with the Framework's policy on the re-use of PDL in the Green Belt, it would undermine that policy to then attach weight to the development and use of PDL in favour of the appeal proposal, when carrying out the 'very special circumstances' Green Belt balancing exercise.
>
> 114. I have been referred to the Maitland Lodge appeal decision, in which the Inspector attached positive weight to the use of PDL within the Green Belt, in the light of the Framework's policy on making effective use of PDL. However, this was in a context where the Inspector had already concluded the proposal would not cause substantial harm to the openness of the Green Belt, and was, therefore, an acceptable use of PDL in the Green Belt that did not constitute inappropriate development in the Green Belt. Accordingly, he did not need to determine 'very special circumstances' and the use of PDL was capable of being weighed as a free-standing material consideration as part of the overall planning balance. The circumstances in this appeal are very different, and accordingly, the Maitland Lodge decision does not offer a comparable precedent for me in determining this issue.
>
> 115. The appellant also suggests that the appeal site is a sequentially preferable location for development over other non-PDL Green Belt sites, in the context of the need for housing in the District. This is based on the expectation in paragraph 147 of the Framework that plans should give first consideration to land which has been previously-developed, in circumstances where it has been concluded it is necessary to release Green Belt land for development. However, paragraph 147 of the Framework clearly applies to the preparation of development plans. Therefore, whether or not the appeal site should be considered a sequentially preferable site over non-PDL sites within the Green

> Belt, is a matter to be determined through the preparation and examination of the emerging Local Plan rather than this appeal.
>
> 116. I note that in the Maitland Lodge decision, the Inspector regarded the sequential preference of that site as PDL in the Green Belt as a positive benefit. However, again, that was in a context where the appeal proposal was not inappropriate development in the Green Belt or harmful to the Green Belt. In this appeal, notwithstanding the PDL status of the site, the proposal would constitute inappropriate development in the Green Belt, due to the substantial harm it would cause to the openness of the Green Belt."

102. Mr. Simons criticises DL 113 as having misinterpreted the NPPF. He points to the Inspector's language "it would undermine that policy to then attach weight to the development and use of PDL in favour of the appeal proposal" in the VSC balance. He makes 2 submissions. First, in a case where the use of PDL falls outside para. 154(g), the Inspector read the NPPF as precluding the inclusion of that use of the PDL as a free-standing planning benefit in the VSC balance. Second, the issue of whether the proposal would conflict with Green Belt policy for the purposes of footnote 49 (so as to disapply the policy encouragement in para. 123 of the NPPF for the use of PDL) depends upon the application of the VSC test. That test requires all forms of harm to be weighed against all other planning considerations which must include the benefit of using PDL in the Green Belt. Mr. Simons seeks to rely upon my judgment in *Monkhill Limited v Secretary of State for Housing, Communities and Local Government* [2021] PTSR 1432 at [39(12)] (and see also the Court of Appeal [2021] PTSR 1432 at [18]).

103. I should say straight away that *Monkhill* was not concerned with the relationship between PDL and Green Belt policies in the NPPF. Nothing that was said in that case can be taken as supporting Vistry's submissions or providing any assistance on the issues raised here.

104. I am unable to accept Mr. Simons' first submission. The second sentence of DL 113 involves the application, not interpretation, of policy in the NPPF. As he himself said, the Inspector was simply dealing with an issue of weight, in particular, whether to attach any weight to the use of PDL when carrying out the VSC balance. He did not use any language to suggest that he read the NPPF as precluding the inclusion of the use of PDL as a benefit in that balance.

105. The words "would undermine that policy" indicate that the Inspector was expressing a planning judgment. Plainly, he would have had well in mind his findings on the serious harm that the proposal would cause to the openness and purposes of this particular part of the Green Belt and the fact that the proposal involved the erection of buildings across largely open, green pasture land. He was entitled to say as a matter of judgment that no weight should be given to the use of land of that nature for built development, given the harm to this part of the Green Belt it would cause. That was a perfectly rational judgment. The Inspector did not conflate para. 154(g) with para. 153. The conclusion that the Inspector's reasoning in DL 113 was no more than a perfectly straightforward application of policy is sufficient to dispose of Vistry's first complaint.

106. There is an air of unreality about the alternative approach for which Vistry contends: namely, that some positive weight had to be given to the development of green, open pasture land in view of its description as PDL, notwithstanding the harm those buildings would cause. That begs the question what would that benefit be? How would its weight be assessed?

107. Mr. Simons accepted that in the circumstances of the present case (and the Inspector's findings), the only benefit which could be claimed for the use of PDL would be what he described as a general, sequential preference for choosing PDL sites in the Green Belt over non-PDL sites in the Green Belt. This was based upon para. 147 of the NPPF.

108. LPAs may review and alter Green Belt boundaries in exceptional circumstances but only through the plan-making process (para. 145). It is in that context that para. 147 says that:-

> "Where it has been concluded that it is necessary to release Green Belt land for development, plans should give first consideration to land which has been previously-developed and/or is well-served by public transport."

109. It will be noted that para. 147 of the NPPF gives "first consideration" to the use of certain types of Green Belt land, not limited to PDL but also including land well-served by public transport. It does not suggest that PDL should be released from the Green Belt, irrespective of the nature and/or level of harm to the Green Belt that the release of any specific site would cause. These are obviously material considerations to be taken into account, particularly where PDL which comprises green, open pasture land is able to serve important Green Belt functions. Plainly the necessary judgments may involve comparative assessments between different Green Belt sites, both PDL and non-PDL. Paragraphs 145 and 147 of the NPPF allow for that to happen through the local plan process. Ordinarily, *ad hoc* decision-making on individual planning applications and appeals does not provide a suitable, adequate process for the comparative exercise across a district which is likely to be needed.

110. Once para. 147 of the NPPF is read properly in context it is impossible to see how the Inspector's treatment in DL 114 to DL 116 of the "sequential preference" issue and of the decision by an Inspector in the Maitland Lodge planning appeal could possibly be faulted.

111. I reject Mr. Simons' submission that the Inspector in the present case failed to deal sufficiently or properly with the Maitland Lodge appeal decision. The Inspector found that the use of PDL land in that case fell within the category of appropriate development, so that the VSC test did not have to be applied. His observations on a "general" sequential preference for PDL land in the Green Belt did not address para. 145 of the NPPF. But then, he did not need to do so because he proceeded on the basis that the site had already been found to be suitable for development and to be removed from the Green Belt: "*therefore*, the appeal site in general is sequentially preferable to non-PDL sites in the Green Belt …' (DL 38 to DL 39 of the Maitland Lodge decision).

112. The Inspector's reasoning in the present case amply satisfied the requirements laid down in *North Wiltshire District Council v Secretary of State for the Environment*

(1993) 65 P&CR 137, 145. Indeed, for the reasons I have given, I do not see why the Maitland Lodge decision had any "precedent value" for the purposes for which Vistry sought to use it in its appeal. Consequently, I do not consider that the Inspector in the present case was obliged to deal with it, although no doubt he thought it prudent to do so.

113. For completeness, I will address the submissions about the relationship between paras. 123, 153 and 154 of the NPPF together with footnote 49, as a matter of interpretation. That footnote makes it necessary for a decision-maker to determine whether a proposal for the development of PDL in the Green Belt conflicts with Green Belt policy. The first two situations are straightforward.

114. First, if it is decided that the development falls within para. 154(g) of the NPPF, and so is "appropriate", there is no conflict with Green Belt policy and, of course, there is no need to apply the VSC test.

115. Second, if the development falls outside paras. 154(g) of the NPPF, there is no conflict with Green Belt policy if it is demonstrated that the benefits of the proposal and any other material circumstances clearly outweigh all harm, even if the PDL status of the land is not taken into account as a benefit.

116. The third situation is where the development is inappropriate and the VSC balance does not demonstrate that the overall harm from the proposal is clearly outweighed by all other considerations other than the use of PDL for development. In those circumstances, should any benefit from using PDL be added to the balance? Of course, that adjustment would make no difference if, as in the present case, the decision-maker decides that no weight should be given to the PDL factor. But I will put that type of case to one side.

117. It was suggested that there is circularity in the relationship between para. 123 of the NPPF and Green Belt policy where the issue of whether there is conflict with that latter policy depends on applying the VSC test. But is there circularity? If there is circularity in the policy, it would be necessary to break into the circle at some point, so that the policy could be properly applied. But the starting point should be that policies, particularly those like the NPPF which are designed to be used as a practical tool for everyday decision-making, are not drafted so as to create circular arguments, or to be question-begging.

118. The key here is footnote 49. The policy support in para. 123 of the NPPF for the development of PDL is contingent or conditional upon there being no conflict with other policies in the Framework. In this context, footnote 49 does not indicate that that policy support in para. 123 should be weighed against any conflict with another policy of the Framework. Instead, it plainly states that that policy support does not apply if there would be a conflict with another NPPF policy. In effect, footnote 49 simply raises the question whether the proposal would *otherwise* accord with, or conflict with, another NPPF policy. Accordingly, there is no requirement in the Framework for the policy support in para. 123, or the benefit of using PDL in any particular case, to be weighed in the VSC balance in order to determine whether there would be a conflict with Green Belt policy.

119. Put simply, if the VSC balance would otherwise weigh against the proposal, I do not see why that outcome should change simply because of the inclusion of the PDL factor as a benefit, when footnote 49 says that the policy support or the use of PDL does not apply if the scheme conflicts with another NPPF policy.

120. In his reply Mr. Simons pointed to para. 154(f) of the NPPF, which treats limited affordable housing for local community needs as "appropriate development" and submitted that there is no reason in principle why a larger scale "inappropriate" scheme should not be considered as beneficial in a VSC balance. No doubt that is correct. But whether it would be treated as beneficial would be a matter of judgment in each case. There is no policy requirement that it should be so treated. But in any event, this is not a true analogy because, there is no equivalent to Footnote 49.

121. For all of these reasons, this ground of challenge in Vistry's claim must be rejected.

Fairfax (Grounds 6 and 7) – Economic benefits

122. As in many other cases, Fairfax put forward as economic benefits of their proposed housing, the creation of employment for the workers involved in the construction of the development, expenditure in the local area by residents of the new homes and increased tax receipts for HBC.

123. The challenge relates to DL 95 to DL 97 which resulted in the Inspector attaching only limited weight to these benefits:

> "95. I acknowledge NPPF paragraph 85, which states that significant weight should be placed on the need to support economic growth and productivity. But that does not mean that such economic benefits should always be afforded significant weight in any particular case, despite the Inspectors in the Little Bushey Lane, Clappers Lane and Yatton 22 appeals deciding that they did in those cases.
>
> 96. Rather, that very much depends on all the circumstances of the case. To my mind, lesser weight should attach to such benefits where the location of new development is fundamentally contrary to national and local policy, as it is here, because the aim of the plan-led system is to deliver sustainable development.
>
> 97. The fact that the spatial strategy in the CS is out-of-date due to the lack of a 5YHLS does not negate its soundness and compliance with the NPPF as a whole. Economic growth and productivity, the economic objective of sustainable development, does not necessarily trump environmental objectives. Whilst 80% of Hertsmere is Green Belt and housing development on some of it may well be inevitable, exactly where such development should occur, and the economic benefits that would attach to it are a matter for the new local plan."

124. Initially, Fairfax sought to challenge DL 95 as involving (a) a misinterpretation by the Inspector of the statement in para. 85 of the NPPF that "significant weight" should be placed on supporting economic growth and (b) a failure to address the reasoning in other appeal decisions on the same policy (grounds 4 and 5). However, in the light of the decision in *Bewley Homes plc v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 1166 (Admin) Fairfax decided not to pursue those grounds of challenge.

125. Dr. Ashley Bowes submitted on behalf of Fairfax that it was irrational for the Inspector to reduce the weight to be given to the scheme's economic benefits on the grounds that the location of the proposed development was contrary to national and local planning policy, in the absence of evidence, or a finding, that such benefits could be delivered in a way which would not be contrary to those policies (i.e. on other sites). Secondly, he submitted that by reducing the weight to be given to those benefits by reference to a factor which was also included in the harm scale of the VSC balance, the Inspector double-counted the same consideration (ground 6). In the alternative, Dr. Bowes submits that the Inspector's reasoning on this subject was legally inadequate because there is a substantial doubt as to whether his decision was based on relevant and rational grounds (ground 7).

126. Dr. Bowes accepts, rightly in my judgment, that grounds 6 and 7 cannot succeed as grounds of challenge. This is because in DL 103 the Inspector made it clear in the alternative that if he had accepted that significant weight be given to the economic benefits, as Fairfax had contended, the benefits of the scheme would still not have clearly outweighed the overall harm so as to satisfy the VSC test. Accordingly, it is inevitable that the appeal would still have been dismissed. It therefore follows that any error of law that Fairfax might be able to establish under grounds 6 or 7 could not be a material error of law. Alternatively, if Fairfax were to succeed on grounds 6 or 7 alone, the court would refuse to quash the Inspector's decision because it is inevitable that, even if a putative legal error had not been committed, he would still have dismissed the appeal (*Simplex GE (Holdings) Limited v Secretary of State for the Environment* [2017] PTSR 1041).

127. I therefore deal briefly with Fairfax's grounds of challenge under this heading.

128. It is well-established that benefits or other material considerations do not have to be unique to qualify as very special circumstances. But I accept the submission of Mr. Robert Williams for the Secretary of State that when deciding how much weight to give to a benefit, a decision-maker *may* take into account the fact that the type of economic benefit relied upon would arise in any housing development or, in a similar way, any employment development. HBC made that very point in para. 108 of their closing submissions, which was not contested in Fairfax's closing submissions.

129. Against that background, there is no legal reason why the Inspector was not entitled to take into account as a factor reducing the weight to be given to the economic benefits, the fact that the scheme was fundamentally contrary to local and national policy and the aim of the plan-led system to deliver sustainable development (DL 96). There is no legal requirement for the decision-maker to be satisfied that (or to consider whether) those benefits could be achieved elsewhere in compliance with those policies before he can take into account conflict with those policies on the issue of weight. For example,

an Inspector does not have to be able to identify likely alternative policy-compliant scenarios or sites (see by analogy *Trusthouse Forte Limited v Secretary of State for the Environment* (1987) 63 P & CR 293). We are dealing in this case with benefits of a type which can be delivered by development in general.

130. The Inspector was also entitled to judge that where a local plan is out-of-date, and even where some development will inevitably need to take place on Green Belt land, issues of where such development should take place, and concomitant economic benefits realised, are matters for the local plan. It is not necessary for a decision-maker to be able to invoke the policy on prematurity in paras. 49 to 50 of the NPPF in order to be able to make a planning judgment of that kind (DL 96 and DL 97) lawfully.

131. I also accept the submissions of Mr. Wayne Beglan for HBC. He referred to the emphasis in the NPPF upon the plan-led system for the delivery of *inter alia* economic priorities as well as meeting housing needs (paras. 11, 15 and 47). There is no reason why an Inspector cannot give greater weight to benefits achieved in accordance with the plan-led system and lesser weight to those which are not. That does not involve impermissible double-counting with the weighing of harm resulting from the development, such as harm to the Green Belt or to the landscape.

132. There is no merit in the complaint that the Inspector's reasoning was legally inadequate. It does not give rise to any doubt, let alone a substantial doubt, as to whether the Inspector erred in law.

133. For all these reasons, grounds 6 and 7 in the challenge by Fairfax must be rejected.

The provision of BNG as a benefit (Vistry ground 1 and Fairfax grounds 1, 2 and 3)

134. At the time of both decisions the relevant national policy on BNG was set out in para. 180 of the NPPF which, in so far as is relevant, states:

> "180. Planning policies and decisions should contribute to and enhance the natural and local environment by:
>
> a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan);
>
> b) …
>
> c) …
>
> d) minimising impacts on and providing net gains for biodiversity, including by establishing coherent ecological networks that are more resilient to current and future pressures;
>
> …"

135. Paragraph 186 of the NPPF states:

> "186. When determining planning applications, local planning authorities should apply the following principles:
>
> a) if significant harm to biodiversity resulting from a development cannot be avoided (through locating on an alternative site with less harmful impacts), adequately mitigated, or, as a last resort, compensated for, then planning permission should be refused;
>
> b) …
>
> c) …
>
> d) development whose primary objective is to conserve or enhance biodiversity should be supported; while opportunities to improve biodiversity in and around developments should be integrated as part of their design, especially where this can secure measurable net gains for biodiversity or enhance public access to nature where this is appropriate."

136. Thus, although the NPPF states that planning decisions should contribute to and enhance the natural environment by providing net gains for biodiversity, it does not set any numerical targets.

137. In neither of these two cases did the development plan contain policies setting a numerical target for BNG.

138. Section 98 and sched.14 to the Environment Act 2021 ("the 2021 Act") introduced a requirement for a condition to be included in the grant of certain planning permissions for the provision of BNG. The 2021 Act achieved this by inserting s.90A and sched. 7A into the TCPA 1990.

139. Global decline in biodiversity is described in the literature as a matter of great concern. It was discussed at the UN COP 26 meeting in November 2021. The nations involved adopted the Glasgow Climate Pact. Paragraph 38 emphasises the importance of protecting, conserving and restoring nature and ecosystems including the protection of biodiversity.

140. A report by the House of Commons Environment Audit Committee in June 2021 ("Biodiversity in the UK: Bloom or bust?" HC 136) referred to the UK as being one of the most nature-depleted countries in the world. In December 2018 DEFRA had published consultation proposals on whether the delivery of BNG through planning permissions should become mandatory for new developments. In its response to consultation the Government (July 2019) decided to promote legislation requiring development to provide 10% BNG and so the 2021 Act was enacted.

141. Section 90A simply gives effect to sched. 7A. The schedule provides for certain grants of planning permission to be subject to a condition to secure that the biodiversity gain objective is met (para. 1(1)). Paragraph 2(1) provides that the objective is met if "the biodiversity value attributable to the development" (as defined) exceeds the pre-

development biodiversity value of the onsite habitat by at least "the relevant percentage", namely 10% (para. 2(3)).

142. The biodiversity value of any habitat refers to "its value as calculated in accordance with the biodiversity metric" (para. 3). That metric is a document published by the Secretary of State and laid before Parliament, "for measuring, for the purposes of this Schedule, the biodiversity value … of habitat …" (para. 4).

143. Paragraphs 13 to 21 of sched. 7A contain provisions requiring the grant of planning permission to be subject to a deemed condition preventing the commencement of development until a biodiversity gain plan has been submitted to and approved by the planning authority.

144. The requirement to provide 10% BNG secured by condition on the grant of planning permission was brought into force on 12 February 2024. But it does not apply to a planning permission granted in relation to an application made before that date (regs. 2 and 3 of The Environment Act 2021 (Commencement No.8 and Transitional Provisions) Regulations 2024 (SI 2024 No.44). Accordingly, the new legislative requirement could not have applied if planning permission had been granted on either Vistry's appeal or Fairfax's appeal.

145. An issue has arisen in a number of planning appeals as to whether the introduction of the BNG 10% requirement is relevant, and if so how, to the weight which may be given in the determination of a planning application or appeal in which the developer commits to increasing the BNG related to the development site, whether an increase of 10% or some other figure.

146. For example, in *NRS Saredon Aggregates Limited v Secretary of State for Levelling Up, Housing and Communities* [2024] Env. L.R. 18; [2024] JPL 616 Eyre J held that in a case where the developer had proposed BNG in excess of 10% but the new statutory requirement was not yet applicable, the decision-maker was not entitled to reduce the weight that would otherwise be given to the first 10% of the BNG because of the impending legislative requirement to provide 10% BNG ([55] to [56]).

147. In *R (Cala Homes (South) Limited) v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639 the Court of Appeal accepted that future legislative provisions could be relevant, where the point was conceded by the developer's counsel ([20] and [33]). Here there is no suggestion by defence counsel that *NRS Saredon* was wrongly decided. For my part, I agree with the essential reasoning of Eyre J. The soundness of that decision is underscored by reg. 3 of SI 2024 No. 44. The statutory BNG condition is only imposed where an application for planning permission is made on or after the date on which the relevant provisions in sched. 7A of the TCPA 1990 came into force (see *R (Weston Homes plc) v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 2089 Admin).

148. It is clear from the decision letters in *Weston Homes*, the present cases, and the other appeal decisions to which they refer, that the assessment of the weight to give to BNG improvements, in the context of the new legislation, has proved to be problematic. With the benefit of helpful submissions from counsel, I will set out some brief, non-

exhaustive guidance to assist decision-makers. This also forms part of the context in which to consider the criticisms made of the decision letters in these two claims.

149. I begin with the position on and after 14 February 2024, the date from which the new provisions have been in force.

150. It is sometimes suggested that where a development makes provision for something which is required by a policy or by legislation, that cannot be regarded as a benefit at all. So, for example, DL 49 of the Fairfax decision states: "…measures that do no more than ensure compliance with development plan policies cannot be benefits." There is no legal principle which supports statements of that kind.

151. The assessment of how much weight to give to a benefit is a matter of judgment. In principle, the same is true of a decision as to whether a measure constitutes a benefit (or a disbenefit or a neutral factor). But all such judgments are subject to the application of public law principles by judicial review (or statutory review under s.288 of the TCPA 1990). Those principles include the obligations on decision-makers (i) to take into account considerations which are mandated by legislation or which are "obviously material", (ii) to disregard legally irrelevant considerations and (iii) to avoid irrationality in reaching findings and conclusions. One type of irrationality is a conclusion which is so unreasonable that no reasonable authority could ever have come to it, or a decision which is outside the range of reasonable decisions open to a decision-maker. Another type of irrationality involves a demonstrable flaw in the reasoning of the decision-maker, including a serious logical or methodological error (see the *Law Society* case and [14] above).

152. Where a development is required to provide a measure in order to overcome or mitigate, or compensate for, a harm caused by that project, ordinarily that measure could not rationally be described as a benefit. So, for example, where a development would result in a loss of biodiversity, the provision of additional biodiversity on the same site or on other land nearby in order to completely offset that loss, so that in overall terms there is no net reduction in biodiversity attributable to the development, is not a benefit. It is simply the development "consuming its own smoke."

153. But as the name and definition of BNG indicates, that term refers to an improvement in biodiversity. That goes beyond offsetting the adverse impacts of a development scheme. It increases biodiversity in order to help redress a general national problem, which is not caused by the development proposed. On any view, that would be a benefit of the proposed scheme. It is difficult to see how rationally anyone could say otherwise. However, the scale of that benefit and the weight to be attached to it are separate considerations.

154. I do not see why the identification of what is, and what is not, a benefit should be altered, because what would otherwise be recognised as an improvement or benefit is the subject of a requirement imposed by planning policy or by legislation. Whether a measure should be treated as a benefit, depends upon *inter alia* its nature and purpose, including whether it would help to meet a need which is, or is not, related to the development proposed. For example, we often find in decision letters that substantial weight is given to the provision of general housing where there has been a shortfall in the delivery of dwellings to meet local policy requirements. Sometimes very substantial

weight is given to the benefit of providing affordable housing in a scheme, although that level of provision is meeting a policy requirement in a development plan.

155. It is difficult to see how logically a decision-maker could give no weight at all to, for example, the provision of 10% BNG because that equated to the 10% requirement in sched. 7A. The fact that such a requirement is imposed by legislation is simply a mechanism for ensuring that a wide range of developments contribute to the collective effort of improving biodiversity in England. It does not alter the nature or purpose of the improvement in biodiversity which is provided, or the underlying justification for the requirement to reverse a national decline in biodiversity over many years.

156. It also follows that where a development would provide BNG of 20%, a decision-maker is not entitled to say that only that part of the BNG which exceeds 10% can qualify as a benefit in deciding whether to grant planning permission.

157. I turn to consider questions of weight. If a decision-maker were to reduce the weight which he *would otherwise give* to a 40% provision of affordable housing because the development will provide the level of housing required by the development plan, that would also be objectionable, certainly in the absence of any logical explanation. The decision-maker should be assessing how the developer's contribution of affordable housing stands in relation to *inter alia* the justification in the development plan for the level of affordable housing required by the policy. Key considerations could include the level and nature of the need for affordable housing in the district and any shortfall in delivery.

158. Similarly in relation to BNG, a decision-maker should consider the nature and purposes of the requirement and of the contribution being made. Schedule 7A of TCPA 1990 imposes a blanket requirement for the provision of 10% BNG for a broad range of development to alleviate a national problem. This benefit is of a generalised nature. It may be contrasted with the benefit of providing affordable housing which is related to (a) the highly specific needs identified by a LPA for its area and (b) ensuring that the release of housing land meets the need for affordable housing as well as general housing. Such considerations may affect the weight to be given to benefits. This is a matter for the decision-maker.

159. Similarly, it is for the decision-maker to decide how much weight to give to generalised economic benefits which would arise from the carrying out of development within a wide range of types throughout a district (see [128] above).

160. During the hearing we saw how little help can be gained from looking at the decisions of Inspectors on other planning appeals. Usually there is insufficient information to help determine true comparability. Understandably weights are not expressed in numerical terms. Inspectors will vary as to the term used and their scale of values may differ. Moreover, as the Fairfax Inspector pointed out, decisions letters often do not explain why a particular weighting was adopted. It can be meaningless simply to compare percentages of BNG without also being told the absolute size of the increase in biodiversity units. For example, DL 90 of the Fairfax decision refers to another site where the development provided an increase of over 7,600% for hedgerows. Whilst that might seem impressive at first sight, I was told that this percentage increase was so

large because the provision of hedgerows in the existing or baseline situation was so low.

161. Having said all this, I do accept Mr Williams' submission that the statutory requirement for BNG of 10% can properly be used as a simple *benchmark* for comparing the BNG to be provided for a proposed development. This was recognised in *NRS Saredon* at [51]. But, where relevant, the limitations of using percentages as a comparator should be appreciated (see [160 above]) and the decision-maker must not commit any of the potential errors identified above.

162. In addition, where substantially more than 10% BNG is offered, it may be necessary for a decision-maker to consider reg. 122 of the Community Infrastructure Levy Regulations 2010 (SI 2010 No. 948) and the principles in, for example, *R (Wright) v Energy Severndale Limited* [2019] 1 WLR 6562. However, I did not receive submissions on this particular point.

163. Where the application for permission was made before 14 February 2024 the statutory 10% requirement should not be treated as having been applicable, nor should that be the effect of the decision-maker's reasoning. However, it was common ground between the parties that the 10% BNG provision in sched.7A to the TCPA 1990 may be used in such cases, but only as a benchmark, in assessing the weight to be given to a BNG contribution. It must not be used to reduce the weight that the decision-maker would otherwise have given to the provision of BNG in a particular case.

The Vistry decision letter

164. The issue between the parties on BNG was of a very narrow compass. It was not presented to the Inspector as an issue on which his decision would turn. The parties agreed that the BNG proposed would be a benefit. SACDC said that it had moderate weight whereas Vistry said it was significant.

165. SACDC's case was that because the BNG was proposed to be off-site that should attract less weight than on-site BNG, which was preferred (see para. 186(a) of the NPPF).

166. Vistry's planning consultant said that the proposal to provide 10% BNG was "a measurable net gain" (see para. 186(d) of the NPPF). Vistry said that national policy did not support giving greater weight to on-site rather than off-site BNG. It is surprising to find such a small dispute ending up as a legal challenge in the High Court.

167. The Inspector dealt with it at DL 103 to DL 104:

> "103. However, the Ecological Impact Assessment submitted with the appeal confirms that there would be an overall net loss in area based habitats, due to the loss of grassland habitats on the north eastern part of the site. This cannot be mitigated on-site, but the appellant proposes to compensate for the loss by delivering a 10% biodiversity net gain (BNG) off-site, through a Biodiversity Offsetting Scheme, secured through the S106 agreement.

> 104. The proposed 10% BNG would be equivalent to the minimum level of BNG mandated in the Environment Act 2021, which is expected to apply to all major development proposals, such as the appeal scheme, during 2024. Given that at the time of writing the statutory requirement for BNG is not yet in force, I consider that the commitment to its provision in advance would be a benefit in favour of the appeal scheme. However, because the gain proposed would be at the minimum of the level set out in the Act, I attach no more than moderate weight to it."

168. The Inspector did not decide in favour of moderate rather than significant weight because the BNG would be provided off-site. Instead, he had regard to the 10% requirement in sched. 7A. Vistry makes no criticism of the fact that the Inspector had regard to that legislation. Instead, the claimant's complaint relates to the way in which he used sched.7A.

169. In summary, Mr. Simons submitted that the Inspector erred in law by treating sched. 7A as if it applied to the proposal when it did not. He relies on the following statements in the decision letter:

(i) The 2021 Act was "expected to apply to all major development proposals, such as the appeal scheme, during 2024."

(ii) The Inspector referred to Vistry's commitment to provide BNG "in advance," i.e. of the requirements of the 2021 Act coming into force. He mistakenly inferred that sched.7A would apply to the appeal proposal eventually.

He also relies upon the Inspector's failure to refer to the transitional arrangement in SI 2024 No. 44, which provided that the BNG statutory requirement would not apply to an application such as that made by Vistry. Mr. Simons criticises the last sentence of DL 104 for treating sched 7A as if it was already in force and as if it prescribed a minimum level of BNG.

170. I agree with Mr. Williams that there is no merit in Vistry's criticisms under this ground of challenge.

171. The Inspector would have been well aware of the material provided to him by Vistry's team. For example, para. 5.95 of the proof of Vistry's planning consultant referred to the 2021 Act and made it plain that it would not apply to the appeal scheme because of transitional measures. Paragraph 16 of his witness statement before this court also states that this was common ground with SACDC. The mere absence of any reference to this agreed point in the decision letter does not indicate that the Inspector treated the 2021 Act as if it did apply to the appeal scheme.

172. Vistry's reading of DL 104 is selective. The passage needs to be read as a whole. The first sentence of DL 104 did not treat the 2021 Act as becoming applicable to the appeal scheme. The words "such as the appeal scheme" did not mean that when the 2021 Act came into force it would apply to that scheme. "Such as" simply referred to future proposals of the same nature as the appeal scheme.

173. The second sentence of DL 104 lends no support to Vistry's case. On the contrary, the Inspector referred to the BNG commitment as being provided in advance of the 2021 Act coming into force, and therefore a benefit. The clear implication is that if the Inspector had thought that the Act would apply to the appeal scheme when it came into force on some future date, then he would not have treated the 10% BNG as a benefit. The fact that he treated the BNG being provided by the proposal as a benefit in the VSC balance demonstrates that he did not labour under the misapprehension that sched.7A of the TCPA 1990 would eventually apply to the appeal scheme.

174. Accordingly, there is no basis for criticising the Inspector as having wrongly treated the 2021 Act as applicable to Vistry's scheme and therefore committing the error identified in *NRS Saredon*.

175. In the last sentence of DL 104 the Inspector assessed the weight to be given to the 10% BNG provided by the appeal scheme, using the requirement in the 2021 Act as a benchmark. That was entirely permissible. There was no legal flaw or inadequacy in the Inspector's reasons.

176. For these reasons, Vistry's ground 1 must be rejected.

The Fairfax decision letter

177. The Inspector dealt with BNG at DL 87 to DL 91:

> "87. The Regulations for introducing a mandatory 10% biodiversity net gain are about to take effect, but the BNG in the proposal would be a minimum of 20%, and so must be a benefit. This would be delivered by sowing an arable field (3.64 Ha) situated 870m to the southeast of the appeal site with a wildflower grass seed mix to create a total of not less than 19 native species, which the appellant would be obliged to do through Schedule 4 of the S106. The appellant says that this should be given significant weight on the basis of the previous appeal decisions at Clappers Lane (moderate weight) and Little Chalfont (substantial weight).
>
> 88. In contrast, the Council says it should be given limited weight, because the Burston Nurseries appeal decision, where the BNG was much greater, only gave it moderate weight.
>
> 89. I accept that the weight afforded to BNG in any particular case should reflect the extent to which it exceeds what will very shortly be a legal requirement to provide, a minimum of 10%.
>
> 90. The Little Chalfont decision, where BNG was also 20%, gave it substantial weight, although there is no explanation why. The Clappers Lane decision, where the BNG was capable of being above 10%, gave it moderate weight. Again, there is no explanation why. In the Burston Nurseries decision, where BNG

> was over 137% for habitats and over 7,600% for hedgerows, it was given moderate weight, again with no explanation.
>
> 91. Given the considerable range of betterment that BNG can and regularly does deliver, as set out in the examples above, I consider that the mere doubling of the BNG percentage in this case above what will very soon be the legal requirement, is a fairly modest BNG. Consequently, I afford it only limited weight."

178. In summary, Dr. Bowes submits :-

Ground 1
The Inspector erred in law by assessing the weight to be given to the proposed BNG on the basis that the 2021 Act required 10% BNG to be provided in any event;

Ground 2
In the alternative, if the Inspector did not err in law as alleged under ground 1, his decision to afford only limited weight to the proposed BNG was irrational, in that it was logically incomprehensible;

Ground 3
In the further alternative to grounds 1 and 2, the Inspector's reasons give rise to a substantial doubt as to whether he took his decision on relevant and rational grounds.

179. Dr. Bowes criticises the first sentence of DL 87 as implying that if the BNG proposed had only been 10% it would not have been a benefit because the 10% BNG requirement of the 2021 Act was "about to take effect." Dr. Bowes then submits that that error explains and infects the reasoning in DL 89 and DL 91. The Inspector gave weight to BNG in excess of 10% because of what he saw as the impending effect of the 2021 Act. He submits that, in the same vein, DL 89 implies that BNG at or below 10% would not be a benefit at all and DL 91 implies that it could carry no weight. He says that the Inspector made an error of law of the same kind as was upheld in *NRS Saredon*.

180. It is necessary to recall the well-established principle that a decision letter is addressed to the parties in the planning appeal who are familiar with the issues in the case (*South Bucks District Council v Porter (No.2)* [2004] 1 WLR 1953 at [26] and [36]) and, I would add, points of common ground.

181. In the closing submissions for Fairfax at the public inquiry, leading counsel asked for the proposed BNG to be assessed in comparison with the 10% requirement in the 2021 Act, while noting that it was not yet in force (paras. 72 and 75). In para. 75 he referred to the assessment in other planning appeal decisions of the weight to be given to "BNG significantly above 10%." In its closing submissions to the inquiry HBC took the same approach (para. 106). The LPA submitted that "the BNG provided is a modest gain over and above the 10% that soon will be the legal minimum."

182. In my judgment the Inspector took the same approach in his decision letter as the parties had urged upon him. He used the 10% requirement in the 2021 Act as a benchmark against which to compare the 20% BNG proposed by Fairfax. It is incontrovertible that

DL 89 and DL 91 took that approach. Indeed, in DL 91 the Inspector had in mind "the considerable range of betterment that BNG can and regularly does deliver". On a fair reading of the decision letter as a whole, DL 87 is to the same effect. The Inspector stated in DL 87 that "the BNG in the proposal would be a minimum of 20%, and so must be a benefit." Given that Fairfax's submission plainly stated that the 2021 Act was not in force, and given also that the Inspector made the same point in DL 87, DL 89 and DL 91, there is no basis for the Court to infer that he treated BNG of 10% and below as not being a benefit, or as having a discounted weight. Instead, he used the impending legislation as a benchmark as he was entitled to do. Ground 1 fails.

183. Once the decision letter is read fairly, and in the light of the closing submissions of the parties at the public inquiry, the allegation under ground 2 of irrationality or illogical or incomprehensible reasoning falls away. There is also no merit in the reasons challenge under ground 3. There is no doubt, let alone a substantial doubt, as to whether the Inspector made a public law error.

184. Accordingly, Fairfax's challenge to the Inspector's decision on the BNG issue must be rejected.

Conclusion

185. For the reasons set out above, the claims brought by Vistry and Fairfax are dismissed.