Case No: 10359/2012

Neutral Citation Number: [2013] EWHC 3058 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2013

Before :

THE HONOURABLE MRS JUSTICE LANG DBE

- -

Between:

(1) William Davis Limited

(2) Jelson Limited **Claimants**

- and -

(1) Secretary of State for Communities and Local Governments

(2) North West Leicestershire District Council **Defendants**

- -

Jeremy Cahill QC & Satnam Choongh (instructed by **Bird, Willford & Sale**) for the **Claimants**
James Maurici QC (instructed by **The Treasury Solicitor**) for the **First Defendant**
The Second Defendant was not represented

Hearing dates: 2nd & 3rd October 2013

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Judgment

Mrs Justice Lang DBE :

1. In this application under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), the Claimants apply to quash the decision of the Secretary of State for Communities and Local Government ("the Secretary of State") dated 20th August 2012.

2. The Claimants appealed, under section 78 TCPA 1990, against the failure of the local planning authority, North West Leicestershire District Council ("the planning authority"), to give notice within the prescribed period on an application for outline planning permission for residential (and associated) development on land north of the A511 Stephenson Way, Coalville, Leicestershire ("the Site"). The appeal was recovered for the Secretary of State's determination, pursuant to section 79 and paragraph 3 of Schedule 6 to the TCPA 1990.

3. An Inspector, Mr P.E. Dobsen, held a public local inquiry between 7th and 29th February 2012. The planning authority opposed the grant of planning permission. After the conclusion of the inquiry, the National Planning Policy Framework ("NPPF") was issued, in March 2012. An opportunity was given to make further written representations, which were taken into account by the Inspector. The Inspector recommended that the appeal be dismissed and planning permission refused, in a report dated 13th June 2012.

4. The Secretary of State agreed with the Inspector's conclusions and recommendations. Accordingly, he dismissed the appeal and refused planning permission in his decision letter ("DL") dated 20th August 2012.

The scope of an application under section 288 TCPA 1990

5. Section 288 of the 1990 Act provides, so far as is material, that:

> "(1) If any person -
>
> …
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds -
>
> (i) that the action is not within the powers of the Act,
>
> or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that action, he may make an application to the High Court under this section. …
>
> (5) On any application under this section the High Court—
>
> …

> (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

6. Section 288(1)(b)(ii) relates to procedural requirements, and is qualified by the requirement that the claimant should show that he has been substantially prejudiced by the failure to comply with the provisions (subs.(5)(b)). There is some degree of overlap between the limbs of the statutory formula.

7. The general principles of judicial review are applicable. As Forbes J. said in *Seddon Properties v Secretary of State for the Environment* (1978) 42 P &CR 26:

> "(1) The Secretary of State must not act perversely. That is, if the court considers that no reasonable person in the position of the Secretary of State, properly directing himself on the relevant material, could have reached the conclusion which he did reach, the decision may be overturned. See, *e.g. Ashbridge Investments Ltd v. Minister of Housing and Local Government* [1965] 1 W.L.R. 1320, *per* Lord Denning M.R. at 1326F and Harman L.J. at 1328H. This is really no more than another example of the principle enshrined in a sentence from the judgment of Lord Greene M.R. in *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223 at 230:"
>
> 'It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere.'
>
> (2) In reaching his conclusion the Secretary of State must not take into account irrelevant material or fail to take into account that which is relevant: see, *e.g.* again the *Ashbridge Investments* case, *per* Lord Denning M.R. *loc. cit.*
>
> (3) The Secretary of State must abide by the statutory procedures, in particular by the Town and Country Planning (Inquiries Procedure) Rules 1974. These Rules require him to give reasons for his decision after a planning inquiry r.18 and those reasons must be proper and adequate reasons which are clear and intelligible, and deal with the substantial points which have been raised: *Re Poyser and Mills Arbitration* [1964] 2 Q.B. 467."

8. In accordance with the requirements of public law, the Secretary of State must ask himself the right question and take reasonable steps to acquaint himself with the relevant information to answer it correctly: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, per Lord Diplock at 1065B. He ought to take into account a matter which might cause him to

reach a different conclusion – the use of the word "might" means that there must be a real possibility that he would reach a different conclusion if he did take that consideration into account: *Bolton MBC v Secretary of State for the Environment* (1990) 61 P & CR 343, per Glidewell LJ at 352-252.

9. The exercise of planning judgment and the weighing of the various issues are entirely matters for that decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28 and *Tesco v Secretary of State for the Environment* [1995] 1 W1.R 759, at 780. In the latter case Lord Hoffmann said "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. In *Newsmith v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 74 (a case concerning a challenge to a planning inspector's decision) Sullivan J. said at [6] – [8]:

> "An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision. An allegation that an Inspector's conclusion on the planning merits is *Wednesbury* perverse is, in principle, within the scope of a challenge under section 288, but the court must be astute to ensure that such challenges are not used as a cloak for what is, in truth, a rerun of the arguments on the planning merits.
>
> In any case, where an expert tribunal is the fact finding body the threshold of *Wednesbury* unreasonableness is a difficult obstacle for an applicant to surmount. That difficulty is greatly increased in most planning cases because the Inspector is not simply deciding questions of fact, he or she is reaching a series of planning judgments. For example: is a building in keeping with its surroundings? Could its impact on the landscape be sufficiently ameliorated by landscaping? Is the site sufficiently accessible by public transport? et cetera. Since a significant element of judgment is involved there will usually be scope for a fairly broad range of possible views, none of which can be categorised as unreasonable.
>
> Moreover, the Inspector's conclusions will invariably be based not merely upon the evidence heard at an inquiry or an informal hearing, or contained in written representations but, and this will often be of crucial importance, upon the impressions received on the site inspection. Against this background an applicant alleging an Inspector has reached a *Wednesbury* unreasonable conclusion on matters of planning judgment, faces a particularly daunting task ..."

11. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well informed reader who understands the principal controversial issues in the

case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

12. Two citations from the authorities listed above are of particular relevance to the disputed issues in this case.

a) *South Somerset District Council*, per Hoffmann LJ at 84:

> "...as Forbes J. said in *City of Westminster v Haymarket Publishing Ltd:*
>
> > "It is no part of the court's duty to subject the decision maker to the kind of scrutiny appropriate to the determination of the meaning of a contract or a statute. Because the letter is addressed to parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument relating to each matter in every paragraph"
>
> The inspector is not writing an examination paper on current and draft development plans. The letter must be read in good faith and references to policies must be taken in the context of the general thrust of the inspector's reasoning ... Sometimes his statement of the policy may be elliptical but this does not necessarily show misunderstanding. One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy or proposed alteration to policy."

b) *Clarke Homes*, per Sir Thomas Bingham MR at 271-2:

> "I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."

Grounds of challenge

Ground 1: Misinterpreting and misapplying the NPFF

13. The Claimants' primary ground was that the Secretary of State and the Inspector misinterpreted and misapplied the NPPF.

1. Legal principles

14. It was common ground that the Secretary of State was obliged to take his decision in accordance with the following legal framework.

15. Section 70(2) TCPA 1990 provides that in dealing with a planning application the planning authority "shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations."

16. Section 70(2) applies to decisions taken by the Secretary of State as it applies in relation to an application for planning permission which falls to be determined by the local planning authority (section 79(4) TCPA).

17. Section 38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004") provides that "if regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

18. Section 38(3) PCPA 2004 defines the development plan to include the regional strategy for the region in which the area is situated, as well as local plans adopted in relation to that area.

19. It is well-established that the statutory term "material consideration" includes statements of national planning policy contained in Government documents such as Circulars, Planning Policy Statements and the NPPF. Paragraphs 2 and 196 of the NPPF confirm the principle that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. It goes on to say that the NPFF is a material consideration in planning decisions.

20. In *Tesco Stores v. Secretary of State for the Environment & Ors* [1995] 1 WLR 759, Lord Hoffmann said, at 780F-H, that the weight to be given to a material consideration was a question of planning judgment for the planning authority.

21. In *Edinburgh City Council* v *Secretary of State for Scotland* [1997] 1 W1.R. 1447, the House of Lords considered the effect of the Scottish equivalent of section 38(6) PCPA 2004. Lord Clyde said, at 1458C:

> "the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the plan should not be followed. If it is thought useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission … if the application accords with the development plan and there are no material considerations indicating that it should be refused, permission should be granted. If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the

> plan can be seen to be outdated and superseded by more recent guidance."

22. Lord Hope said at 1450B-G that a planning decision maker:

> "is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what has been laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant. In such a case the decision where the balance lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.
>
> The presumption which section 18A lays down is a statutory requirement. It has the force of law behind it. But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility thus lies with the decision-taker. The function of the court is … a limited one."

23. I accept the submission made by both counsel that, when considering whether the Inspector and the Secretary of State mis-interpreted the NPPF, I should apply the approach taken to the interpretation of development plans by the Supreme Court in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13. Lord Reed (with whose judgment Lord Brown, Lord Hope, Lord Kerr and Lord Dyson agreed) said, at [18 - 19]:

> "18 …The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained … in this area of public administration as in others … policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
>
> 19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are

> full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v. Secretary of State for the Environment* [1995] 1 WLR 659, 780 per Lord Hoffmann). …"

2. Development Plan

24. In this case, the relevant parts of the development plan were:

a) The East Midlands Regional Plan, approved in 2009. At the time of the DL the Secretary of State had not yet revoked regional strategies, but he had issued a letter stating that he intended to do so. In *R (on the application of Cala Homes (South) Ltd v Secretary of State for Communities and Local Government* [2011] EWCA Civ 639 the Court of Appeal held that this intention was lawfully capable of being a "material consideration".

b) The North-West Leicestershire Local Plan, adopted in 2002. Policy E20, of particular importance in this case, had been saved on terms by direction of the Secretary of State dated 21st September 2007.

25. The Inspector summarised the material parts of these plans as follows:

> "44. The East Midlands Regional Plan: The most relevant EMRP policies are cited in the SCG [CD-ID1]. Whereas the appellants consider that the proposals conform with all of these policies, the Council argues that they conflict in particular with policies 1 (regional core objectives), 26 (protecting and enhancing the region's natural and cultural heritage), 28 (regional priorities for environmental and green infrastructure), and 36 (regional priorities for air quality).
>
> 45. The EMRP provides a broad development strategy for the East Midlands up to 2026. Of relevance to North West Leicestershire and Coalville, its Three Cities Sub Regional Strategy "contains policies and proposals to create more sustainable patterns of development and movement within and between Leicester, Derby and Nottingham and their hinterlands". The regional key diagram, shows Coalville as a sub-regional centre (SRC) within the national forest, subject to policy 3.
>
> 46. Policy 1 includes 11 regional core objectives, including those relating to housing, the economy and the environment. Policy 3 - distribution of new development - states that

appropriate development (of a lesser scale than in the region's 5 principal urban areas) should be located in the sub-regional centres, including Coalville, the only SRC in North West Leicestershire. Para 2.2.9 explains that the SRCs have been selected on the basis of their size, the range of services they provide, and their potential to accommodate further growth.

47. Policy 13a sets out the regional housing provision. The total for North West Leicestershire in 2006-2026 is 10200, giving an annual provision (or requirement) of 510.

48. The three cities sub-regional strategy, stated in policy SRS3, provides that in North West Leicestershire the 510 d.p.a. will be "located mainly at Coalville, including sustainable urban extensions as necessary". The EMRP gives no further indication as to an appropriate location or locations for a SUE at Coalville, as this was to be a matter for local plan policies.

49. Para 4.2.18 refers to Green Wedge policies. It notes that "Green Wedges serve useful strategic planning functions in preventing the merging of settlements, guiding development form, and providing a green lung into urban areas, and act as a recreational resource. Although not supported by Government policy in the same way as Green Belts, they can serve to identify smaller areas of separation between settlements." It goes on to note that "A review of existing Green Wedges or the creation of new ones in association with development will be carried out through the local development framework process".

50. Policy 26 - protecting and enhancing the region's natural and cultural heritage – states, inter alia, that "the region's best and most versatile agricultural land should be protected from permanent loss or damage". Policy 36 - regional priorities for air quality - says that local development frameworks etc. should contribute to reducing air pollution in the region, and consider the potential effects of new developments and increased traffic levels on air quality.

51. The North West Leicestershire Local Plan: This was adopted in August 2002 and many of its policies were saved in 2008.

52. Central to this Inquiry is saved policy E20, Green Wedge, which states that "Development will not be permitted which would adversely affect or diminish the present open and undeveloped character of the Coalville-Whitwick-Swannington Green Wedge, identified on the Proposals Map. Appropriate uses in the Green Wedge are agriculture, forestry, minerals extraction and outdoor sport and recreation uses. Any built development permitted within the Green Wedge will be limited

> to minor structures and facilities which are strictly ancillary to the use of the land for these purposes.
>
> 53. The Council and most 3rd party objectors consider this the most directly relevant and important development plan policy in the appeal. The appellants accept that the scheme would conflict with it, but argue that it would nevertheless comply with several other saved local plan policies, and that in any event there are compelling reasons to make an exception to the Green Wedge policy (see section 7).
>
> 54. The local plan's housing provision, including its land allocations, extended only up to 2006, and is agreed to be out of date. It was not much discussed at the Inquiry."

3. The Claimants' submissions

26. Turning to the specific grounds of challenge in this case, the Claimants' case was that the Inspector and the Secretary of State had misinterpreted and/or misapplied NPPF in the following respects:

a) they failed to apply the presumption in favour of sustainable development;

b) they failed to find that Policy E20 was inconsistent with NPPF;

c) they failed to hold that Policy E20 was a relevant policy for the supply of housing and accordingly out of date;

d) the Inspector wrongly determined that Policy E20 was a "specific policy" within the meaning of paragraph 14 NPPF;

27. The material parts of paragraph 14 of the NPPF provide:

> "14. At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan making and decision- taking."
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> …
>
> For decision taking this means [Footnote 10 "unless material considerations indicate otherwise"]: approving development proposals that accord with the development plan without delay; and where the development plan is absent, silent or relevant policies are out of date, granting permission unless:
>
> - any adverse impact on doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> - specific policies in this Framework indicate development should be restricted. [Footnote 9: "For example, those policies

> relating to sites protected under the Birds and Habitats Directive (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Greenbelt, Local Green Space, and Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets: and locations at risk of flooding or coastal erosion."]

28. The Claimants submitted that the Inspector and the Secretary of State should have made their decision in accordance with paragraph 14, by applying the presumption in favour of sustainable development. It was a misinterpretation of the NPFF to address, as a preliminary issue, whether or not the proposed development was sustainable.

29. The Claimants accepted that the first bullet point in paragraph 14 of the NPFF did not apply because the proposed development was not in accordance with the existing development plan, as the site was situated in an area designated as "Green Wedge", which was protected from development by Policy E20.

30. However, the second bullet point in paragraph 14 applied, because Policy E20 should have been treated as out-of-date. First, because the planning authority was not able to demonstrate a five year supply of deliverable housing sites. It was part of NPFF policy to deliver "a wide choice of high quality homes" (section 6). Paragraph 47 directs local planning authorities as follows:

> "47. To boost significantly the supply of housing, local planning authorities should:
>
> use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
>
> identify and update annually a supply of specific deliverable sites sufficient to provide 5 years worth of housing against their housing requirements with an additional buffer...;…"

31. The Claimants submitted that Policy E20 should have been considered to be out-of-date by virtue of paragraph 49 which provides:

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

32. Alternatively, Policy E20 should have been treated as out-of-date because it was no longer relevant and it was inconsistent with the NPFF. Pursuant to the implementation guidance in Annex 1 to the NPFF, the importance of up-to-date plans

is reinforced (paragraph 209) but a local plan should not be considered out-of-date simply because it pre-dates the NPFF (paragraph 211). As this decision was taken within 12 months of the date of publication of the NPFF, decision-takers could give full weight to relevant policies adopted since 2004, despite a degree of conflict with the NPPF (paragraph 214). The Regional Plan fell within the scope of paragraph 214. Plans adopted prior to 2004, such as Policy E20, fell within the scope of paragraph 215 which provides:

> "due weight should be given to relevant policies in existing plans according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)."

33. The Claimants submitted that Policy E20 was neither relevant or up-to-date because the planning authority had agreed, in a review, that the "Green Wedge" designation was no longer appropriate for this area. Instead it was going to be designated as an "Area of Separation", which was designed to serve a different purpose from a "Green Wedge" area. Reference was made to *Tewkesbury Borough Council v Secretary of State for Communities and Local Government & Ors* [2013] EWHC 286 (Admin) in which Males J said, at [13], that a "plan which is based on outdated information … is likely to command relatively little weight".

34. The Claimants also submitted that Policy E20 was inconsistent with the Regional Plan 2009 which required substantial provision of housing at Coalville, which had not yet been built.

35. Moreover, Policy E20 was plainly inconsistent with the NPFF because it comprehensively ruled out any form of development which would "adversely affect or diminish the present open and undeveloped character" of the Green Wedge and, as the Inspector said at paragraph 330 of his report, it was "highly restrictive towards new development and is intended to keep the land predominantly clear and open, and in continued agricultural use." The Claimants invited me to follow the approach of the court in *Colman v Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin) in which Kenneth Parker J. dismissed a challenge to the Inspector's decision, holding that he was entitled to find that the local policies which restricted development in the countryside were inconsistent with the NPFF "cost-benefit" approach, as they did not allow for countervailing economic benefits to be weighed in the scales.

36. Finally, the Claimants submitted that the Inspector mistakenly treated this site as "Local Green Space", which would justify restricting development under the terms of paragraph 14, NPFF. The site had not been designated "Local Green Space" and would not have been eligible for this designation.

4. Conclusions

37. In my judgment, the Inspector and the Secretary of State directed themselves correctly by asking the question whether the proposed development was "sustainable development". At the Inquiry, the Claimants did not dissent from the Inspector's analysis that the fourth main issue was "whether the appeal scheme represents sustainable development, to which the Framework's "presumption in favour" should

apply" (paragraph 317). In their written submissions to the Inspector, the Claimants expressly referred to this question, I accept Mr Maurici's submission that paragraph 14 NPFF only applies to a scheme which has been found to be sustainable development. It would be contrary to the fundamental principles of NPFF if the presumption in favour of development in paragraph 14 applied equally to sustainable and non-sustainable development.

38. The Claimants did not seek to challenge the conclusion of the Inspector and the Secretary of State that the proposed development was not sustainable development. Although Mr Cahill made it clear during the hearing that he disagreed with their conclusion, he had no basis in law for challenging it, since it was quintessentially a planning judgment. Mr Cahill's criticism, namely, that the Inspector and the Secretary of State failed adequately to consider the economic and social aspects of sustainable development, is not tenable when one reads the careful and thorough Report and DL, weighing up all the relevant factors. It is also important to bear in mind that, in addition to the loss of the Green Wedge, other factors such as the scheme's adverse effect on the Coalville Air Quality Management Area and the loss of some 25 hectares of best and most versatile (BMV) land, led to the conclusion that the scheme was not sustainable development.

39. In my judgment, the Inspector and the Secretary of State made a legitimate planning judgment when they concluded that Policy E20 remained relevant and was not out-of-date. The Inspector's reasoning was as follows:

> "322. Issue 1i) – the scheme's effect on the purposes, identity and character of the designated Green Wedge: For the Council and most of the 3rd parties, this is probably the most salient issue in the Inquiry. Andrew Bridgen MP said that, judging from his postbag, the prospective loss of the Green Wedge has been the single most contentious and generally unpopular planning proposal in the district in the last few years, since the Stephenson Green scheme first emerged. This was confirmed by WAG and by several individual local residents, all objecting to it…"
>
> 323. No third parties appeared at the Inquiry in support, and I have seen no evidence of any public support for it in any documents…
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> ...
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> 325. It is very clear that many local people greatly value this green area of open countryside on the edge of Coalville, and want to preserve its status as Green Wedge, which has protected it hitherto from development. They want to see that status maintained in effect, even if under another name, such as an Area of Separation (as mooted in the emerging CS). That is so even though the area in question is not designated in any statutory plan for its landscape or other intrinsic environmental quality.

326. I do not accept the appellants' argument that there is something inherently unsuitable, either in terms of its location and in terms of its characteristics, in a Green Wedge (or similar) planning designation for this particular tract of urban fringe countryside. This part of the Green Wedge is where it is simply because it separates urban areas (Coalville and Whitwick), and up to now has remained open, undeveloped and largely in agricultural use. Nothing in the appellants' evidence persuades me that there is anything illogical, inappropriate or out-dated in maintaining this land as a Green Wedge; rather, their evidence is directed at showing that it would be better put to residential use, as a "sustainable" urban extension…

327. In my view, the appeal site is a fairly unremarkable tract of countryside, largely comprising open fields, but with minor undulations and variations in topography and numerous hedgerows and individual trees. Nevertheless, it is by no means unattractive, and remains intact and unspoilt. It is still productively farmed, mainly for arable crops, and, as I saw during my own site visits, is almost nowhere degraded or abused by dumping, abandoned vehicles, fires, vandalism or other negative but typical manifestations and signs of the urban fringe.

328. It provides a variety of pleasant and unobstructed views, including many of the low wooded hills around Whitwick nearby to the north and east. Despite being subject to some traffic noise from the adjoining A511, much of it also lends an appreciable degree of rural tranquillity, which can be experienced on any of its public footpaths and in Green Lane.

329. And, crucially, it provides very clear separation between Coalville and Whitwick. In short, I consider that in general the appeal site functions well as a Green Wedge. To my mind, there is no obvious reason why it should not continue to do so well into the future.

330. So much for the land itself. In policy terms, post-Framework it remains subject to saved development plan policy E20, which is highly restrictive towards new development and is intended to keep the land predominantly clear and open, and in continued agricultural use. There is no doubt - and the appellants acknowledge this - that the appeal proposals conflict with this policy….

331. I am also in little doubt that, despite the large scale of the scheme, the appellants have gone to some lengths to design its layout with the intention of minimising and mitigating its impact on the Green Wedge. That is apparent from the original design exercises, beginning with the Princes Foundation report, and continuing through other reports and the lengthy, iterative

and consultative design process described by Mr. Williams. [109-114]

…

333. I agree with the appellants that, technically, the scheme would not lead to the complete and unmitigated coalescence (or merging) of Coalville and Whitwick. That is largely owing to the inclusion of a linear series of green areas between the built-up parts of the appeal scheme and the two existing settlements, such that no new development would be juxtaposed with any existing areas of housing. The appellants place much emphasis on these areas of green infrastructure as attractive, usable but separating features which would render the scheme acceptable in the wider landscape.

334. However, to my mind and eye the overall effect of the scheme would still be tantamount to the (undesirable) coalescence of Coalville and Whitwick. The proposed development would be on such a scale that it would erode the Green Wedge to a very large extent. Little of it, in this eastern part, would remain intact and undeveloped.

335. Thus I agree with the thrust of the Council's and WAG's evidence and opinions on this matter. In place of a broad swathe of open land on the edge of Coalville, there would be a very large urban development with green edges….

336. I find, therefore, that the appeal scheme would have a very profound impact on the purposes, identity and character of this part of the designated Green Wedge. It would undermine its purposes, almost nullify its identity, and completely change its character. In short, and in large part it would be permanently lost. How much does this matter? Plainly it matters a lot to the Council, and to local residents and the general public. In my opinion, the Green Wedge here has served and continues to serve a useful and much valued planning purpose, and it should only be lost for very compelling land use planning reasons. I deal with this below, principally in relation to housing land requirements and supply.

337. Finally under this heading, the Framework contains many references to green infrastructure (a term defined in its glossary) and the need to protect it where this is consistent with the imperatives of development. I consider that, given its value as part of the Green Wedge, the appeal site should be seen as part, and a very important part, of the existing green infrastructure of Coalville and its environs. The presumption in favour of sustainable development (NPPF, para. 14 etc.) contains caveats applicable to decision-taking, including (in its footnote 9) a reference to the need to protect and conserve

> "Local Green Space". This is described further in the Framework paras. 76-77, which contain bullet-point criteria. According to these, the appeal site might in principle qualify for a Local Green Space designation, although, as noted elsewhere, the Council proposes to designate it as an Area of Separation in its CS."

40. The Secretary of State agreed with the Inspector, stating:

> "Green Wedge
>
> 12. For the reasons given in IR/322-337, the Secretary of State agrees with the Inspector that the appeal scheme would have a very profound impact on the purposes, identity and character of this part of the designated Green Wedge, and would undermine its purposes, almost nullify its identity, and completely change its character. He agrees with the Inspector that in large part it would be permanently lost (IR/336). He further agrees that the overall effect of the proposed development would, by eroding the Green Wedge to a large extent, be tantamount to the undesirable coalescence of Coalville and Whitwick (IR 333-334).
>
> 13. The Secretary of State notes that the period the NWLLP covers ended in 2006, but he agrees that the Green Wedge here has served and continues to serve a useful and much valued planning purpose, and that it should only be lost for very compelling land use planning reasons (IR/336). He further agrees with the Inspector that, given its value as part of the Green Wedge, the appeal site should be seen as a very important part of the existing green infrastructure of Coalville and its environs (IR/337)."

41. The evidence indicated that Green Wedge policies had been part of local planning policy in Leicestershire since as long ago as 1987. The Regional Plan acknowledged their useful function: Inspector's Report, paragraph 49, quoted at paragraph 25 of my judgment. I do not accept, therefore, that Policy E20 conflicts with the Regional Plan. The housing development proposed for Coalville under the Regional Plan did not signal a decision to develop the Green Wedge for housing purposes. Although it was common ground that some greenfield land would have to be used, there were other sites in the Coalville area in which the additional housing could be provided. Indeed, in its emerging Core Strategy, the local planning authority has earmarked an alternative site for housing development, outside of the Green Wedge, at Bardon Grange.

42. The Claimants' reliance upon the planning authority's decision to remove Green Wedge status from the area on the grounds that the criteria were no longer met did not stand up to close scrutiny. The paper "*Local Development Framework Core Strategy Background Paper: Green Wedge Study*" (November 2008) showed that, in the view of the planning authority, the Green Wedge at Coalville continued to meet criterion D,

namely, "Preventing the coalescence and maintaining the physical identity of settlements adjoining the main urban areas". The planning authority decided to pursue option 1 in the paper namely:

> "Option 1 – Identify all three areas as a Strategic Gap or Area of Separation
>
> This option recognises the role that the undeveloped areas play in restricting the physical merger of Coalville with the areas of Swannington, Thringstone and Whitwick. New development which would result in this physical separation being reduced would be resisted. In effect this would represent a continuation of the existing approach, albeit under a different policy."

43. Thus, the Inspector was entitled to conclude that the proposed Area of Separation policy was intended to prevent coalescence and maintain the physical separation of settlements, just as the Green Wedge policy had previously done.

44. The Claimants drew my attention to the fact that the adoption of the Core Strategy has been subject to delays and its progress is now suspended. However, I have to judge the lawfulness of the Inspector's Report and the DL on the basis of the position as it was at the time the decision was made. The Inspector said in his report:

> "55. *The emerging North West Leicestershire Core Strategy:* At the time of the Inquiry, the Council was in the process of preparing the submission version of the CS. It was anticipated that this would be considered at a special meeting of the full Council in late April 2012, after which it would be subject to a regulation 27 public consultation.
>
> 56. According to [NWLDC7] submission is expected "in the summer of 2012" [Footnote 4: According to the Council's Framework submissions, this duly occurred, and the Council agreed to publish its CS for consultation prior to submitting it to the Secretary of State]. The appeal site, together with other parts of the existing Green Wedge, will be identified as an Area of Separation (using a term from the EMRP), and will not be allocated for any form of development."

45. When considering the extent to which Plan E20 is inconsistent with the NPPF, the Claimants are correct to say that Policy E20 prevents housing development on this site, and so does not, of itself, reflect the countervailing advantages of development. However, on reading the Report and the DL, it is clear that the Inspector and the Secretary of State went beyond the terms of Policy E20 and gave considerable weight to the advantages of a development which would increase the supply of housing in the area, as required by the Regional Plan.

46. The Inspector and the Secretary of State also understood and acknowledged the tension between the NPPF's policy in favour of delivering housing, and its policy in favour of protecting green spaces, in section 11, entitled "Conserving and enhancing

the natural environment". Planning authorities are directed to plan positively for the protection, enhancement and management of networks of biodiversity and green infrastructure (paragraph 114). "Green Infrastructure" is defined in the Glossary as "a network of multi-functional green space, urban and rural, which is capable of delivering a wide range of environmental and quality of life benefits for local communities." The Inspector and the Secretary of State both concluded that the site was a very important part of the existing green infrastructure of Coalville and its environs. As Lord Reed said in *Tesco Stores* at [19] (paragraph 23 above), planning policies often contain broad statements of policy, many of which may be mutually irreconcilable, so in a particular case, one must give way to another. The task of reconciling different strands of planning policy on the facts of a particular case has been entrusted to the planning decision-maker. Such planning judgments will only be subject to review by this court on very limited grounds.

47. The Claimants sought to argue that Policy E20 should have been treated as one of the "[r]elevant policies for the supply of housing" within the meaning of NPPF, paragraph 49 because the restriction on development potentially affects housing development. I do not consider that this is a correct interpretation of paragraph 49. Paragraph 49 is located in the section of the NPPF dedicated to housing and it refers to policies for "the supply of housing", of which there are many in local, regional and national plans. It was agreed that the housing policies in the Development Plan in this case, were out-of-date by virtue of paragraph 49 (see the DL, paragraph 22). However Policy E20 does not relate to the supply of housing, and therefore is not covered by paragraph 49. I was shown numerous Inspector's decisions in which paragraph 49 had been applied but these were distinguishable from this case because the policies related specifically to housing. There were a couple of exceptions, but insofar as Inspectors have applied paragraph 49 to policies which did not relate to housing, I respectfully suggest that they did so in error. In my view the implementation provisions in Annex 1 govern policies which are not specifically related to housing, not paragraph 49.

48. On a fair reading of the Inspector's Report at paragraph 337, applying the legal principles set out in paragraphs 11 and 12 of my judgment, I have no hesitation in rejecting the Claimants' submission that the Inspector mistakenly believed the site was designated a "Local Green Space". The Inspector only said that it "might in principle qualify". When considering paragraph 14 NPPF (Report, paragraphs 306-7) he did not suggest that any of the specific policies restricting development applied in this case. If he had believed that to be the case, it would have been identified as a main issue in the appeal. Finally, the Secretary of Space makes no mention of "Local Green Space" in his DL, confirming that it was not considered to be material in the determination of the appeal.

Ground 2: Failure of consistency in decision-making

49. The Claimants provided the Court with a large number of decisions and reports in other planning applications, in support of their submission that the Secretary of State had acted inconsistently with previous decisions, in breach of the principles in *North Wiltshire DC v SSE* [1992] 65 P & CR 137. By the time of the hearing, the Claimants accepted that almost all of the other decisions either post-dated the report and DL or had not been drawn to the attention of the Inspector and the Secretary of State at the time. Mr Cahill did not pursue the ground of inconsistency. Instead he invited me to

look at the other decisions as illustrations of appropriate decision-making under the NPPF. I found the other decisions of little value since they turned upon the local plans and planning judgments specific to the particular case.

Ground 3: Prematurity

50. The Claimants submitted that the Secretary of State erred in law in holding that the scheme was of such a size and scale as to prejudice the outcome of the planning authority's emerging Core Strategy and that this was a consideration that counted against the proposed development. They argued that the Secretary of State failed to have regard to material considerations; his reasoning was inconsistent and irrational; and he failed to apply properly the guidance on prematurity.

51. "*The Planning System: General Principles*" (2005) provides national guidance on, inter alia, prematurity, at paragraphs 17 to 19. Paragraph 17 states that it may be justifiable to refuse planning permission on grounds of prematurity where a Development Plan Document (DPD) is being prepared or under review but has not yet been adopted, where a proposed development is so substantial, or where the cumulative effect would be so significant, that planning permission could prejudice the DPD by predetermining decisions about the scale, location or phasing of new development which are being addressed in the policy in the DPD.

52. Paragraph 18 provides that, in other cases, refusal on grounds of prematurity will not usually be justified and planning applications should be taken in the light of current policies. However, account can be taken of policies in emerging DPDs. The weight to be attached to such policies depends upon the stage of preparation of review, increasing as successive stages are reached. For example, where a DPD is at the consultation stage, with no early prospect of submission for examination, then refusal on prematurity grounds would seldom be justified. Where a DPD has been submitted for examination but no representations made, then considerable weight may be attached to those policies because of the strong possibility that they will be adopted. The converse may apply if there are opposing representations.

53. Paragraph 19 states that where planning permission is refused on grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development would prejudice the outcome of the DPD process.

54. This guidance now has to be read in the light of further guidance in Annex 1 to the NPPF, which provides, at paragraph 16:

> "216. From the day of publication, decision-takers may give weight to relevant policies in emerging plans according to:
>
> the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
>
> the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and

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

55. In *Murphy v Secretary of State for Communities and Local Government* [2012] EWHC 1198 (Admin), Foskett J. agreed with counsel's submission that that "prematurity is not a legal concept, but a matter of planning judgment and planning policy which is essentially a matter for the decision maker … which allows a decision maker in effect to postpone a decision relating to the grant of permission .. until what is otherwise a relevant emerging local planning policy has been settled" (at paragraph 90). The decision was upheld on appeal; this ruling was not the subject of appeal.

56. At the Inquiry, the planning authority submitted that the proposal for 1400 dwellings, part of a larger potential strategic allocation of around 2000 dwellings, was of such scale that it would prejudice the outcome of the Core Strategy. The proposed site was unsuitable. The development of the appeal site would prejudice the identification of the planning authority's one and only preferred strategic development site at Bardon Grange.

57. At the date of the Inspector's Report, the planning authority's Core Strategy had been considered at a special meeting of the Council and was to be subject to consultation before submission to the Secretary of State (paragraphs 55 & 56).

58. The Inspector referred to, and considered, the relevant guidance. He concluded that the scheme was "substantial and significant in scale, and that approving it now would predetermine the content of the [Core Strategy] as it would have a profound impact on the housing location strategy, and on various other strategic matters as well" (paragraph 355). He said that, owing to its size and scale, it would prejudice the Core Strategy (paragraph 357). He reiterated that its scale would prejudice the outcome of the emerging Core Strategy, in his overall conclusions at paragraph 378.

59. He considered that the Core Strategy would be submitted soon, probably in the summer of 2012 (paragraph 355). Although it had not yet been published, it would contain only one strategic housing site, which would definitely not be the appeal site, which would be designated an Area of Separation, which would limit development and control the form of settlements in much the same way as the Green Wedge policy (paragraph 356).

60. The decision of the Secretary of State on the issue of prematurity was set out in paragraph 16, DL:

> "16. The Secretary of State has had regard to paragraph 216 of the Framework, which indicates the weight that decision-takers may give to relevant policies in emerging plans, as well as to the guidance in The Planning System: General Principles referred to by the Inspector. The Secretary of State notes the Inspector's reasoning at IR/351-356 and his conclusion that the appeal scheme would be of such a size and scale as to prejudice the outcome of the council's emerging Core Strategy and should therefore be considered premature (IR/357 and 378). In

> reaching his conclusion the Secretary of State notes that a pre-submission Core Strategy was published for consultation in May 2012 after the close of the inquiry. However, the Secretary of State agrees with the Inspector that the emerging Core Strategy should be given only limited weight (IR/312). As such he considers that this is a consideration which counts against the proposed development, but is not on its own determinative of the appeal."

61. I am unable to accept the Claimants' criticisms of the Secretary of State's decision, and the recommendations of the Inspector. The Secretary of State referred to, and had proper regard to, the relevant guidance. It was apparent that the emerging Core Strategy would propose a major housing development site in a location other than the appeal site, and that the appeal site would be designated an "Area of Separation" with restricted development. At the time of the Secretary of State's decision, the emerging Core Strategy had been published for consultation purposes and submission to the Secretary of State was expected to follow soon after. In the event, this did not happen. There were unforeseen difficulties and as at September 2013, the Core Strategy process has been suspended, as result of concerns raised by the Inspector during his examination. However, the lawfulness of the decision made by the Secretary of State in August 2012 has to be assessed on the basis of the position which he knew or ought to have known at the relevant time.

62. Applying the test set out by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WL.R. 1953 (set out at paragraph 78 below), the reasons given by the Inspector and the Secretary of State for concluding that the appeal scheme would prejudice the emerging Core Strategy were intelligible and adequate.

63. The decision to give the emerging Core Strategy only limited weight was a lawful one. Since the Secretary of State gave the emerging Core Strategy only limited weight, it was both consistent and rational for him to conclude that the consideration of prematurity, whilst counting against the proposed development, could not be determinative of the appeal.

64. The decision on prematurity was a planning judgment, which can only be challenged on the basis of an error of law, not because the Claimants disagree with it on its merits. I cannot accept that the Inspector and the Secretary of State failed to have regard to the pressing need for housing, and the planning authority's past and future proposals for addressing such need. These issues were at the heart of the appeal. In my view, the Claimants have failed to establish any error of law in the decision on prematurity.

Ground 4: Air Quality

65. The Claimants submitted that the Secretary of State:

    a) wrongly interpreted the policies in NPPF as requiring him to treat any exceedance in NO2 levels as a reason for refusal of planning permission;

b) failed to take into account the mitigation measures offered by the Claimants or explain why the condition offered would not secure conformity with approach set out in paragraph 24 NPPF;

c) failed to have regard to a material consideration, namely that the planning authority had decided to allocate another site in Coalville (Bardon Grange) for substantial housing development when it was clear that this development would also create an exceedance in NO2 levels within the AQMA;

d) alternatively, failed to provide any or any adequate reasons as to why exceedance in NO2 levels was something that counted against the proposal when to his knowledge alternative development designed to meet the five-year housing land supply shortage had been sanctioned by the council despite the fact that it would lead to such exceedance.

66. The appeal site was immediately adjacent to an Air Quality Management Area (AQMA), a designation imposed pursuant to section 83 Environment Act 1995 when there are serious concerns about air quality in the area. The Air Quality Standards Regulations 2010 set out limit values of, inter alia, nitrogen dioxide, giving effect to the Air Quality Directive 2008.

67. The NPPF lists minimising pollution in its core principles of sustainable development, at paragraph 7. Under section 11, on conserving and enhancing the natural environment, it gives guidance on the choice of location of new developments to avoid unacceptable risks from pollution (paragraph 120). Paragraph 124 states:

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

68. In the light of the EU and domestic law obligations, and the NPPF guidance, the Secretary of State and the Inspector were entitled, and indeed obliged, to consider the impact of the proposed scheme on emission levels and on the adjacent AQMA. There is no foundation for the Claimants' allegation that they wrongly interpreted the NPPF as requiring them to rule out this scheme because of the exceedance in NO2 levels, without any consideration of other factors, or that they approached their task so narrowly.

69. The planning authority's objection was that the proposal for 1400 homes would generate significant additional traffic, and therefore emissions, next to the AQMA. Air quality monitoring had already shown many exceedances in permissible NO2 (nitrogen dioxide) levels around the junction of A511 Stephenson Way (paragraph 340 of the Report).

70. As the Second Defendant reiterated in its written representations to this Court, the planning authority's proposed site for housing at Bardon Grange was further away

from the AQMA and therefore the increased traffic generated by that development would not have as great an impact on the AQMA.

71. The Inspector considered air quality in detail at paragraphs 338 to 343 of his Report. He formed the view that the impact on air quality "counts against the appeal scheme in the overall planning balance". At paragraph 343 the Inspector said:

> "…it is common sense that any large new area of housing will generate a significant amount of vehicular traffic, and hence vehicle emissions (and possibly other forms of air pollution). And any potential site near Coalville would give rise to some traffic passing regularly through the Stephenson Way/Broom Leys Road junction. Nevertheless, it is even more obvious that the appeal site is closest to it, and the AQMA, still the only one at Coalville. My conclusion is that, from the point of view of maintaining air quality, it is not a sensible location in which to build a very large and potentially polluting housing development."

72. The Secretary of State found, in paragraph 14 of the DL, that the appeal scheme "would probably, though not certainly, cause a worsening of air quality in the Coalville Air Quality Management Area" and that this "counts against the proposal in the overall planning balance". At paragraph 23, he confirmed a "precautionary approach" to the issue of air quality.

73. The Inspector addressed the Claimants' proposed condition, at paragraph 298 of the Report:

> "298. The appellants' additional (not agreed) conditions would require the submission and subsequent implementation of measures to mitigate the scheme's effect on air quality at the Broom Leys/Stephenson Way junction, consistent with the Council's AQAP. The Council objects to this on the grounds that the deleterious effect of the scheme on air quality could not be mitigated by such a condition, which lacks adequate precision. I agree. It might in principle be possible to draft an appropriate condition for this purpose, but such a condition is not before the Inquiry and I do not suggest any particular form of wording."

74. The Inspector was not required to draft a more effective condition for the Claimants to put forward. In any event, he accepted the Council's submission that the effect on air quality could not be adequately mitigated by a scheme.

75. The Secretary of State agreed with the Inspector's conclusions, at paragraph 20 DL.

76. I accept Mr Maurici's submission that the issue of air quality was quintessentially an exercise of planning judgment and the conclusions of the Inspector and Secretary of State in this regard are unimpeachable. The Claimants have failed to identify any error of law in their approach.

77. Finally, the Claimants submitted that the reasons as to why their proposed condition was unacceptable were not made sufficiently clear.

78. The Secretary of State was required to give adequate reasons for his decision. The relevant principles were set out by Lord Brown in *South Bucks District Council and another v Porter (No 2)* [2004] 1 WL.R. 1953:

> 36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the principal important controversial issues, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

79. Applying these principles, I consider that the Claimants' reasons challenge fails. The Inspector gave a sufficiently clear explanation for the rejection of the condition in paragraph 298 of his Report, which the Secretary of State agreed with. The Claimants were represented at the Inquiry and were aware of the evidence and submissions on the air quality issue, summarised in the Report. They knew why the planning authority considered the condition was not sufficient to allay the deleterious effect on air quality because of the real concerns about increase in nitrogen dioxide emissions in the AQMA. They knew that the Inspector agreed with the planning authority's view. The Claimants had sufficient information to enable them to know why they had failed, and to challenge the decision.

80. For the reasons set out above, the claim is dismissed.