Neutral Citation Number: [2017] EWCA Civ 58

Case No: C1/2015/3025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE FOSKETT
[2015] EWHC 2311 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 February 2017

Before:

Lord Justice Lewison
and
Lord Justice Lindblom

- -

Between:

R. (on the application of DLA Delivery Ltd.)	**Appellant**
- and -	
Lewes District Council	**Respondent**
- and -	
Newick Parish Council	**Interested Party**

- -

Mr Christopher Young and Mr James Corbet Burcher (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Ms Clare Parry (instructed by **Sharpe Pritchard**) for the **Respondent**
The interested party did not appear and was not represented

Hearing dates: 15 and 16 November 2016

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

Lord Justice Lindblom:

Introduction

1. This appeal concerns the process by which a neighbourhood development plan was prepared for the parish of Newick in East Sussex – the Newick Neighbourhood Plan ("the NNP").

2. In a claim for judicial review the appellant, DLA Delivery Ltd., challenged the decision of the respondent, Lewes District Council, to allow the NNP to proceed to a referendum under paragraph 12 of Schedule 4B to the Town and Country Planning Act 1990, prior to its statutory "making" – effectively its adoption – under section 38A(4) of the Planning and Compulsory Purchase Act 2004. The NNP had been prepared by the interested party, Newick Parish Council. The claim was dismissed by Foskett J. on 31 July 2015. He granted permission to appeal on a single ground. On 5 April 2016 I granted permission on the other four.

The issues in the appeal

3. As now refined, the grounds of appeal raise five issues. First, did the district council misunderstand and misapply the requirement in paragraph 8(2)(e) of Schedule 4B that a neighbourhood development plan be in "general conformity with the strategic policies contained in the development plan for the area of the [local planning] authority (or any part of that area)" (ground 1)? Secondly, did it fail to discharge the requirements of article 6(3) of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") and regulation 102 of the Conservation of Habitats and Species Regulations 2010 ("the Habitats regulations") (ground 2)? Thirdly, did it fail to have regard to relevant national policy and guidance for the delivery of new housing, in the National Planning Policy Framework ("NPPF") and the Planning Practice Guidance ("PPG") (ground 3)? Fourthly, did it proceed in breach of regulations 5(6) and 9 of the Environmental Assessment of Plans and Programmes Regulations 2004 ("the SEA regulations") (ground 4)? And fifthly, did it fail to comply with the requirement in paragraph 7(6) of Schedule 4B that the examiner of a neighbourhood development plan should be "independent", and was the NNP process thus infected by apparent bias (ground 5)?

The statutory scheme for the preparation of neighbourhood development plans

4. Neighbourhood planning was an important part of the coalition Government's "localism" agenda. The provisions for the preparation of a "neighbourhood development plan" – in sections 38A, 38B and 38C of the 2004 Act and Schedule 4B to the 1990 Act – were introduced by the Localism Act 2011 (see the first instance judgment in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin), at paragraphs 1 and 6). Section 38(A)(2) of the 2004 Act defines a neighbourhood development plan as "a plan which sets out policies (however expressed) in relation to the development and use of land in the whole or any part of a particular neighbourhood area specified in the plan". Once made, a neighbourhood development plan becomes part of the

development plan (section 38(3)(c) of the 2004 Act), in accordance with which planning applications must be determined unless material considerations indicate otherwise (section 38(6)).

5. Where a neighbourhood development plan is to be prepared, a "qualifying body" must make an application for the designation of an area as a "neighbourhood area" (Part 2 of the Neighbourhood Planning (General) Regulations 2012 ("the 2012 regulations")). The local planning authority must assist in this process (paragraph 3 of Schedule 4B to the 1990 Act). The neighbourhood development plan, once prepared, must be consulted upon under regulation 14 of the 2012 regulations, submitted to the local planning authority under regulation 15, and publicized by the local planning authority under regulation 16. If the local planning authority considers that the requirements of paragraph 6 of Schedule 4B have been complied with, it must submit the "draft neighbourhood development order" for examination under paragraph 7. The examiner's remit is relatively limited (see the judgment of Holgate J. in *Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin), at paragraphs 61, 62, 132 and 133, and the judgment of Supperstone J. in *BDW Trading Ltd. v Cheshire West and Chester Borough Council* [2014] EWHC 1470 (Admin), at paragraphs 83 and 84). He must consider whether the draft order meets the "basic conditions" – which do not include the question of whether the neighbourhood development plan is "sound" (paragraph 8(1) and (2) of Schedule 4B). He must prepare a report, recommending either that the draft order, with or without modifications, is submitted to a referendum or that the proposal for the order is refused (paragraph 10). He may only recommend that the order is submitted to a referendum if it complies with the "basic conditions" (paragraph 10(4)). If the local planning authority is satisfied that the neighbourhood development plan "meets the basic conditions", is "compatible with the Convention rights", and complies with any provision under section 61E(2), 61J and 61L of the 1990 Act, a referendum on the making of the neighbourhood development order must be held (paragraph 12(4) of Schedule 4B). If more than half of those voting have voted in favour of it, the local planning authority must "make" the neighbourhood development plan unless to do so would breach "any EU obligation or any of the Convention rights" (section 38A(4) and (6) of the 2004 Act).

The NNP process

6. The parish of Newick is described in the NNP (in section 1, "Newick Past and Present") in this way:

> "[It] is a largely rural area of just under eight square kilometres (three square miles) in the North of Lewes District. It lies on the Greenwich Meridian and in the Low Weald of East Sussex. At its centre is the Village of Newick, this being the only settlement of any size in the Parish. The nearest towns are Haywards Heath, seven miles to the west, Uckfield, five miles to the east, Burgess Hill, eight miles to the southwest and Lewes …, eight miles to the south."

The population of the village is about 2,500. It is about 7 kilometres from the Ashdown Forest Special Protection Area ("the SPA") and the Ashdown Forest Special Area of Conservation ("the SAC"), one of the largest continuous blocks of lowland heath in the south-east of England, which provides habitat for two species of ground-nesting birds – the European Nightjar and the Dartford Warbler, both of them European Protected Species.

7. In 2003 the district council adopted the Lewes District Local Plan, whose plan period ran from 1991 to 2011. Some of the policies of that local plan, including Policy RES1, which provided for 4,600 new dwellings in the plan period, were in due course saved and remained effective until the district council and the South Downs National Park Authority adopted the Lewes District Local Plan Part 1: Joint Core Strategy, for a plan period running from 2010 to 2030. The core strategy provides for a minimum of 100 net additional dwellings in Newick, on sites to be identified in the Lewes District Local Plan Part 2: Site Allocations and Development Management Policies Development Plan Document or in neighbourhood development plans. It was published in draft in November 2011. The examination hearings began in January 2015. In his report, published in March 2016, the inspector concluded that it was sound. It was adopted by the district council in May 2016 and by the National Park Authority on 23 June 2016. Its adoption has been challenged by Wealden District Council in proceedings now before the Planning Court. That claim was heard on 8 February 2017, and judgment was reserved.

8. The preparation of the NNP began in 2013. The work was undertaken by a steering group formed by the parish council, with assistance from officers of the district council. In his report, published on 3 December 2014, the examiner, Mr Nigel McGurk, B.Sc. (Hons.), M.C.D., M.B.A., M.R.T.P.I., said that the preparation of the NNP had been a "major, sustained community effort". He concluded that, subject to a number of modifications, the NNP "is in general conformity with the strategic policies of the development plan for the area", and that it "meets the basic conditions" (p.25 of his report), and he recommended that it should proceed to a referendum (p.26). The NNP identified four sites for housing – under Policy HO2, Policy HO3, Policy HO4 and Policy HO5. It was put to a referendum on 26 February 2015. There were 846 votes in favour and 102 against, on a turnout of 49%. It was duly made by the district council on 22 July 2015.

9. DLA had promoted a site at Mitchelswood Farm in Newick for allocation in the NNP, without success. But planning permission for a development of up to 50 dwellings on that site was granted by the Secretary of State for Communities and Local Government on appeal on 23 November 2016. The site is outside the 7 kilometre "zone of influence" for the SPA and the SAC. The sites allocated in the NNP are all within that "zone of influence".

Ground 1 – paragraph 8(2)(e) of Schedule 4B

10. Paragraph 8(2) of Schedule 4B provides:

> "(2) A draft order meets the basic conditions if –
>
> (a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,
> …
> (d) the making of the order contributes to the achievement of sustainable development,
> (e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),

> (f) the making of the order does not breach, and is otherwise compatible with EU obligations, and
> … ."

Under section 38(3)(b) of the 2004 Act, the "development plan" comprises "the development plan documents (taken as a whole) which have been adopted or approved in relation to [the] area". However, paragraph 17(a) of Schedule 4B states that reference to the "development plan" in this schedule "does not include so much of a development plan as consists of a neighbourhood development plan under section 38A of [the 2004 Act]". There is no relevant statutory definition of "strategic policies", or of the concept of "general conformity".

11. Paragraph 183 of the NPPF says that "[neighbourhood] planning gives communities direct power to develop a shared vision for their neighbourhood and deliver the sustainable development they need". It adds that "[parishes] and neighbourhood forums can use neighbourhood planning to … set planning policies through neighbourhood plans to determine decisions on planning applications …". Paragraphs 184 and 185 state:

> "184. Neighbourhood planning provides a powerful set of tools for local people to ensure that they get the right types of development for their community. The ambition of the neighbourhood should be aligned with the strategic needs and priorities of the wider local area. Neighbourhood plans must be in general conformity with the strategic policies of the Local Plan. To facilitate this, local planning authorities should set out clearly their strategic policies for the area and ensure that an up-to-date Local Plan is in place as quickly as possible. Neighbourhood plans should reflect these policies and neighbourhoods should plan positively to support them. Neighbourhood plans and orders should not promote less development than set out in the Local Plan or undermine its strategic policies.
>
> 185. Outside these strategic elements, neighbourhood plans will be able to shape and direct sustainable development in their area. Once a neighbourhood plan has demonstrated its general conformity with the strategic policies of the Local Plan and is brought into force, the policies it contains takes precedence over existing non-strategic policies in the Local Plan for that neighbourhood, where they are in conflict. Local planning authorities should avoid duplicating planning processes for non-strategic policies where a neighbourhood plan is in preparation."

Paragraph 198 says that "[where] a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted". In *Woodcock Holdings*, Holgate J. (in paragraph 24 of his judgment) endorsed the submission of counsel for the Secretary of State that the policy in paragraph 198 does not give "enhanced status to neighbourhood plans as compared with other statutory development plans".

12. The PPG, as published by the Government in March 2014 and current at the time when the NNP was made, stated in paragraph ID:41-009-20140306, under the heading "Can a Neighbourhood Plan come forward before an up-to-date Local Plan is in place?":

> "Neighbourhood plans, when brought into force, become part of the development plan for the neighbourhood area. They can be developed before or at the same time as the local planning authority is producing its Local Plan.
>
> A draft neighbourhood plan or Order must be in general conformity with the strategic policies of the development plan in force if it is to meet the basic condition. A draft Neighbourhood Plan or Order is not tested against the policies in an emerging Local Plan although the reasoning and evidence informing the Local Plan process may be relevant to the consideration of the basic conditions against which a neighbourhood plan is tested.
>
> Where a neighbourhood plan is brought forward before an up-to-date Local Plan is in place the qualifying body and the local planning authority should discuss and aim to agree the relationship between policies in:
>
> - the emerging neighbourhood plan
> - the emerging Local Plan
> - the adopted development plan
>
> with appropriate regard to national policy and guidance.
>
> …
>
> The local planning authority should work with the qualifying body to produce complementary neighbourhood and Local Plans. It is important to minimise any conflicts between policies in the neighbourhood plan and those in the emerging Local Plan. This is because section 38(5) of [the 2004 Act] requires that the conflict must be resolved by the decision maker favouring the policy which is contained in the last document to become part of the development plan."

When that guidance was revised in February 2016 a passage was added which said that "… allocating reserve sites [in neighbourhood plans] to ensure that emerging evidence of housing need is addressed … can help minimise potential conflicts and ensure that policies in the neighbourhood plan are not overridden by a new Local Plan".

13. Foskett J. summarized DLA's argument on this ground of the claim in this way (in paragraph 115 of his judgment):

> " … (i) although [the NNP] is required to be in general conformity with the strategic policies of the Local Plan …, this was not possible in this case because the adopted Local Plan (which was adopted in 2003 and addressed development needs for the period 1991 to 2011) does not contain any relevant strategic content as regards the contemporary housing needs for the area; (ii) all of the available evidence demonstrates that [the NNP] was never intended to be in conformity with the adopted Local Plan, but to be in conformity with the emerging Local Plan ((Part 1): Core Strategy); (iii) the housing requirement in the Local Plan has not yet been decided and the emerging Local Plan is still in the process of examination yet [the NNP] (and, it is said, the examiner in particular) relies upon the content of the emerging Local Plan for its strategic content, especially in terms of the delivery of ["Suitable Alternative Natural Greenspace" ("SANG")]; (iv) there is no policy requiring a review of [the NNP] which will henceforth be the local development

> plan for Newick until 2030. It is argued that [the NNP] cannot be in conformity with the emerging Local Plan because the latter is not yet adopted."

14. In preparing the 2003 local plan the district council had planned for a requirement of 4,600 new dwellings between 1991 and 2011 – in accordance with the East Sussex and Brighton & Hove Structure Plan. As the judge said, therefore, the 2003 local plan "[did] not address current housing needs or the needs for the period from 2015 to 2030" (paragraph 116). He referred to the emerging core strategy, the core strategy inspector's "Interim Findings" in February 2015, and the evidence of Mr Edward Sheath, the district council's Head of Strategic Policy, in his first witness statement, dated 3 June 2015, confirming that the settlement target for Newick of approximately 100 dwellings in Spatial Policy 2 "will not be proposed to be increased through the modifications to the Core Strategy, subject to Council approval" (paragraphs 117 to 119 of the judgment).

15. Before the judge, Mr Christopher Young, for DLA, contended that this was mere speculation. At that stage the core strategy process had not yet run its course, its final housing requirement might still change, and the figure of "approximately 100" dwellings for Newick might then become meaningless. There was no relevant local plan with which the NNP could be in "general conformity". The adopted local plan was out of date, and the new core strategy still emerging. The NNP had been drafted to conform with the core strategy (paragraphs 120 and 121 of the judgment). In his report the examiner had said that the Foreword to the NNP "contains an error … – it is not a requirement for neighbourhood plans to conform with emerging District-wide plans" (p.12). He said this of the section on "Housing" (p.17):

> "The introduction, or supporting text, to this section is simply wrong. It states that the Neighbourhood Plan has to accord with the allocation of housing in the emerging Local Plan. This fails to reflect national legislation."

He recommended the deletion of the offending text.

16. The "essential issue" here, said the judge, was "whether in law it is permissible for [a neighbourhood development plan] to be "made" before the appropriate Local Plan has been adopted" (paragraph 129 of the judgment). He referred to Lewis J.'s judgment in *R. (on the application of Gladman Developments Ltd.) v Aylesbury Vale District Council and another* [2014] EWHC 4323 (Admin), and Holgate J.'s in *Woodcock Holdings*. In both of those cases the court had accepted that the absence of strategic policies for housing in an up-to-date local plan did not preclude the making of a neighbourhood development plan. Though not bound by those decisions, Foskett J. saw no reason to think that the essential reasoning in them was wrong (paragraphs 130 to 138).

17. Mr Young submitted to us that the "basic condition" in paragraph 8(2)(e) demonstrates Parliament's intention that a neighbourhood development plan should not undermine the strategy in an up-to-date local plan, including its policies for the provision of new housing in the local planning authority's area. That, said Mr Young, is the true purpose of paragraph 8(2)(e). Government policy in paragraph 184 of the NPPF is consistent with it. The requirement in paragraph 8(2)(e) did not prevent the NNP being made before the core strategy had been adopted, so long as it was, at the time of its making, in "general conformity" with the "strategic policies" of the 2003 local plan which had been saved and therefore remained policies of the development plan. Neither at the time of the examiner's

report – December 2014 – nor when the NNP was made – July 2015 – was the emerging core strategy part of the development plan. There were, in fact, no "strategic policies" for housing in the development plan with which the NNP could properly be said to be in "general conformity". In this respect the NNP was, said Mr Young, "premature".

18. Policy RES1 of the 2003 local plan was a saved policy. It related to the period from 1991 to 2011. It said nothing about the provision of housing after 2011, and, as Mr Young put it in reply, "plainly had no relevance post-March 2011". The NNP's figure of 100 dwellings to be provided in Newick in the period from 2015 to 2030 did not derive from the 2003 local plan. It derived from the emerging core strategy, whose period runs from 2010 to 2030. This is clear from the examination draft of the NNP published in August 2014, which stated in its Foreword that "[as] required by the regulations, [the NNP] conforms with [the district council's] proposed Joint Core Strategy, due for adoption in 2014/15, which sets out the strategic planning policy of the district's Local Plan until 2030 …", and in section 4.2, "HOUSING", that "[to] comply with government legislation, [the NNP] has to accord with the allocation of new housing for Newick proposed in [the district council's] emerging Local Plan", which "requires that construction of a further 100 new homes by 2030 be planned for in the Parish of Newick". It is also clear from the Newick Neighbourhood Plan: Basic Conditions Statement, also published in August 2014, which stated (on p.7) that "[the NNP] is written to be in general conformity with both the strategic and core policies of the Core Strategy, which is at an advanced stage, as well as the saved policies of the Local Plan". In his report the examiner made it clear that an attempt to achieve "general conformity" with the emerging core strategy was inappropriate (see paragraph 15 above). The original reference to "general conformity" with the emerging core strategy had been removed in the draft of the NNP that went to the referendum, but that erroneous intention, Mr Young submitted, is still apparent in section 4.2, which states:

> "To reflect the emerging housing target of [the core strategy], this plan seeks to allocate sites for the construction of 100 new homes by 2030, … ."

So, submitted Mr Young, the NNP failed the "basic condition" in paragraph 8(2)(e). It could not be in "general conformity" both with the housing policies of the 2003 local plan and with the housing policies of the emerging core strategy. Section 38(5) of the 2004 Act does not overcome DLA's concern here, which is that the NNP was found to meet the requirement of "general conformity" in a vacuum, before the core strategy was adopted, and had been relied upon by the district council in refusing planning permission for the Mitchelswood Farm proposal.

19. I do not accept that argument. As Ms Clare Parry, for the district council, pointed out, submissions similar to Mr Young's have several times been rejected at first instance. In *Gladman Developments v Aylesbury Vale District Council* the saved polices of the adopted local plan did not include any polices relating to the identification of the housing needs for the district, or any strategic housing policies. The local planning authority had prepared a draft local plan that identified a housing requirement for the district as a whole and for the settlement, Winslow, for which a neighbourhood development plan was being prepared. But the local plan inspector recommended that the local plan should not be adopted. There was therefore no adopted development plan document containing strategic policies for housing development. Lewis J. said (in paragraph 58 of his judgment):

> "In my judgment, a neighbourhood development plan may include policies dealing with the use and development of land for housing, including policies dealing with the location of a proposed number of new dwellings, even where there is at present no development plan document setting out strategic policies for housing. The examiner was therefore entitled in the present case to conclude that the Neighbourhood Plan satisfied basic condition 8(2)(e) of Schedule 4B to the 1990 Act as it was in conformity with such strategic policies as were contained in development plan documents notwithstanding the fact that the local planning authority had not yet adopted a development plan document containing strategic policies for housing. … ."

and (in paragraph 59):

> "[As] a matter of statutory language, there is nothing in the provisions of either Schedule 4B to the 1990 Act or the provisions of the 2004 Act governing neighbourhood development plans to support the contention that a neighbourhood development plan cannot include policies dealing with the use and development of land for housing in the absence of a development plan document setting out strategic policies on housing issues. … [The condition in paragraph 8(2)(e)] is dealing with a situation where there are in existence strategic policies and they are contained in a development plan document and there is a conflict between those policies and the policies contained in a neighbourhood development plan. The condition is not dealing with a situation where there are no strategic policies dealing with particular issues contained in a development plan document. The condition is not worded in terms that a neighbourhood development plan cannot include policies dealing with particular issues unless and until a development plan document is brought into existence containing strategic policies on such issues."

To the same effect, though not on precisely parallel facts, is the reasoning of Supperstone J. in *BDW Trading* (in paragraph 82 of his judgment), Holgate J. in *Woodcock Holdings* (in paragraph 131 of his judgment), and since Foskett J.'s judgment was handed down, Holgate J. in *R. (on the application of Crownhall Estates Ltd.) v Chichester District Council* [2016] EWHC 73 (Admin) (in paragraphs 27 to 29 and 60 to 64 of his judgment).

20. In my view Foskett J.'s conclusions on this issue (in paragraphs 135 to 139 of his judgment) are consistent with those first instance decisions, and correct.

21. Mr Young submitted that Lewis J. was wrong in *Gladman Developments v Aylesbury Vale District Council* to construe paragraph 8(2)(e) as permitting "general conformity" with "something which does not exist". But I think the reasoning in the passages I have quoted from Lewis J.'s judgment is perfectly good. It is also consistent with his analysis in *Gladman Developments Ltd. v Wokingham Borough Council* [2014] EWHC 2320 (Admin). There the local planning authority had made allocations in a development plan document to meet a core strategy's housing requirement which derived from a regional plan. It was argued that the plan could not in those circumstances be "sound", because it was not based on the full "objectively assessed needs" for housing in the authority's area, as government policy in paragraph 47 of the NPPF now requires. Lewis J. rejected that argument (in paragraphs 60 to 69 of his judgment). Similar submissions also failed in *Oxted Residential Ltd. v Tandridge District Council*, both before Dove J. at first instance ([2015] EWHC 793 (Admin)), and before this court in the subsequent appeal ([2016] EWCA Civ 414: see, in

particular, paragraphs 29 to 38 of my judgment, with which Jackson and Patten L.JJ. agreed). I recognize, of course, that those two cases were not concerned with a neighbourhood development plan's relationship to a local plan whose period had expired, but with the relationship between a development plan document and a core strategy said to be out of date because it did not conform with government policy in the NPPF.

22. I do not see how Mr Young's argument can be reconciled with the relevant statutory context. The provisions of Part 2 of the 2004 Act envisage a "local development scheme" comprising "development plan documents", which will together form the statutory development plan for the local planning authority's area (section 17(3) of the 2004 Act). A neighbourhood development plan, once made, will be a constituent part of the development plan (section 38A(2) of the 2004 Act). As one would expect, the statutory scheme seeks to ensure an appropriate degree of consistency between a neighbourhood development plan and the strategy of the extant, statutorily adopted development plan. That is the essential purpose of the "basic condition" in paragraph 8(2)(e). Section 13 of the 1990 Act requires local planning authorities to keep their development plan documents under review. If a neighbourhood development plan has been made and the local planning authority later produces a development plan document containing new "strategic policies", that development plan document will, under section 38(5) of the 2004 Act, prevail over any inconsistent policies in the neighbourhood development plan. And if a policy in a neighbourhood development plan is not, or ceases to be, up-to-date, this will be a material consideration in a development control decision, and may justify departing from that policy.

23. Nor, in my view, does the language of paragraph 8(2)(e) bear the interpretation urged upon us by Mr Young. The true sense of the expression "in general conformity with the strategic policies contained in the development plan" is simply that if there are relevant "strategic policies" contained in the adopted development plan for the local planning authority's area, or part of that area, the neighbourhood development plan must not be otherwise than in "general conformity" with those "strategic policies". The degree of conformity required is "general" conformity with "strategic" policies. Whether there is or is not sufficient conformity to satisfy that requirement will be a matter of fact and planning judgment (see the judgment of Laws L.J. in *Persimmon Homes and others v Stevenage Borough Council* [2006] 1 W.L.R. 334, at pp.344D-345D and pp.347F-348F).

24. The short answer to Mr Young's argument is, I think, to be found within the argument itself. Housing allocations made in a neighbourhood development plan for a plan period which does not coincide or even overlap with the period of an adopted local plan cannot logically be said to lack "general conformity" in this respect with the strategic housing policies of that local plan for that local plan period. In those circumstances the two plans will have been planning for the provision of housing in wholly different periods. In this case – as in *Gladman Developments v Aylesbury Vale District Council* (see paragraphs 27 and 31 of the judgment), but in contrast, for example, to the situation in *Crane* (see paragraph 7 of the judgment in that case) – the period for which the 2003 local plan had planned had elapsed before the preparation of the NNP was begun, and some four years before it was made. As Mr Young himself submitted in reply, the NNP does not align itself with the housing requirement in the 2003 local plan, and the NNP could not possibly do that because its period runs from 2015 to 2030, whereas the period of the 2003 local plan ran from 1991 to 2011.

25. Paragraph 8(2)(e) does not require the making of a neighbourhood development plan to await the adoption of any other development plan document. It does not prevent a neighbourhood development plan from addressing housing needs unless or until there is an adopted development plan document in place setting a housing requirement for a period coinciding, wholly or partly, with the period of the neighbourhood development plan. A neighbourhood development plan may include, for example, policies allocating land for particular purposes, including housing development, even when there are no "strategic policies" in the statutorily adopted development plan to which such policies in the neighbourhood development plan can sensibly relate. This may be either because there are no relevant "strategic policies" at all or because the relevant strategy itself is now effectively redundant, its period having expired. The neighbourhood development plan may also conform with the strategy of an emerging local plan. It may, for example, anticipate the strategy for housing development in that emerging plan and still not lack "general conformity" with the "strategic policies" of the existing development plan.

26. This understanding of paragraph 8(2)(e) is consistent with national policy and guidance in the NPPF and the PPG. As Foskett J. recognized (in paragraph 129 of his judgment), such policy and guidance is not an aid to statutory interpretation. However, the policies in paragraphs 184 and 185 of the NPPF reflect the statutory requirement, in paragraph 8(2)(e), for a neighbourhood development plan to be in "general conformity" with the "strategic policies" of the development plan, and the references to the "Local Plan" in those policies of the NPPF are clearly to a statutorily adopted local plan, not an emerging plan. Both NPPF policy and the guidance in the PPG are designed to prevent the mischief of a neighbourhood development plan frustrating the strategy of an up-to-date local plan. But the encouragement in paragraph 184 for local planning authorities to "set out clearly their strategic policies for the area and ensure that an up-to-date Local Plan is in place as quickly as possible" does not imply that only when an up-to-date local plan has already been adopted will it be possible for a neighbourhood development plan to be taken though its own statutory process. The guidance in the PPG explicitly accepts that a neighbourhood development plan can be prepared "before or at the same time" as a local plan, and explains how a local planning authority should proceed if the neighbourhood development plan is brought forward first. Such guidance would have been unnecessary and inappropriate if the statutory scheme required the preparation of the neighbourhood development plan to be held back until an up-to-date local plan is in place.

27. Finally, I see no force in the submission that a statement made in the House of Commons by the then Planning Minister, Mr Greg Clark M.P. at the committee stage of the passage through Parliament of the Localism Bill ought to be admitted in these proceedings to assist in the construction of paragraph 8(2)(e). The Minister said that "one test of the soundness of a neighbourhood plan – … a requirement for it even to go to a referendum – is that it has to be consistent with the local plan, which itself has to be consistent with national policy" (*Hansard*, HC, Public Bill Committee, 1 March 2011, col. 700). I cannot see how that statement of the Minister could conceivably be admissible under the principles identified by the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593 (see the speech of Lord Browne-Wilkinson at p.634F to p.635B). The legislative provision with which we are concerned is neither ambiguous nor obscure, and the statement on which DLA seeks to rely cannot be said to be clear on any contentious question of construction.

28. I would therefore reject this ground of appeal.

Ground 2 – article 6(3) of the Habitats Directive and regulation 102 of the Habitats regulations

29. Article 6(2) of the Habitats Directive requires Member States to "take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated …". Article 6(3) provides that "[any] plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives", and that "[in] the light of the conclusions of the assessment … and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public". Regulation 102(1) of the Habitats regulations provides that where a "land use plan" is "(a) … likely to have a significant effect on a European site … (either alone or in combination with other plans or projects)", and "(b) is not directly connected with or necessary to the management of the site", the plan-making authority "must, before the plan is given effect, make an appropriate assessment of the implications for the site in view of that site's conservation objectives …". Regulation 102(4) provides that "[in] the light of the conclusion of the assessment, and subject to regulation 103 (considerations of overriding public interest), the plan-making authority … must give effect to the land use plan only after having ascertained that it will not adversely affect the integrity of the European site".

30. The relevant principles in European and domestic case law are well established and familiar. Article 6(3) of the Habitats Directive must be applied consistently with the "precautionary principle" (see the judgment of Lord Carnwath in *R. (on the application of Champion) v North Norfolk District Council* [2015] UKSC 52, at paragraph 12). The need for an "appropriate assessment" is triggered by a risk that the plan or project in question will have a significant effect on a European site. Such a risk will exist if, on the basis of objective information, the possibility of a significant effect cannot be excluded (see the judgment of the Grand Chamber of the European Court of Justice in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] 2 C.M.L.R. 31, at paragraph 44, and the Opinion of Advocate General Sharpston in Case C-258/11 *Sweetman v An Bord Peanala* [2013] 3 C.M.L.R. 16, at paragraphs 47 to 50). It is for a third party who asserts that there is a risk which cannot be excluded on the basis of objective information to produce credible evidence to the court that the risk is a real one, and not merely hypothetical (see the judgment of Sullivan L.J. in *Boggis v Natural England* [2009] EWCA Civ 1061, at paragraph 37). Where the need for an "appropriate assessment" is not obvious, the competent authority must decide whether it is necessary (see the judgment of Lord Carnwath in *Champion*, at paragraph 35). The views of Natural England may – though not must – be given considerable weight in this exercise (see, for example, the judgment of Beatson J., as he then was, in *Shadwell Estates Ltd. v Breckland District Council* [2013] EWHC 12 (Admin), at paragraph 72).

31. A decision-maker considering whether a significant effect can be ruled out may take into account mitigation (see the judgment of Sullivan J., as he then was, in *R. (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin), at paragraphs 54 to 76). Where mitigation

measures are relied upon, the question will be whether there was "sufficient information at that stage" to enable the decision-maker to be satisfied "as to the achievability of the mitigation …" (see the judgment of Richards L.J., with which Underhill and Briggs L.JJ. agreed, in *No Adastral New Town Ltd. v Suffolk Coastal District Council* [2015] EWCA Civ 88, at paragraph 72). In some circumstances, for example, the provision of SANGs may be relied upon as mitigation even though their exact location and ultimate deliverability remain for the time being uncertain (see Richards L.J.'s judgment in *No Adastral New Town*, at paragraphs 31, 34, 39 and 70 to 74, and the judgment of Sales L.J., with which Richards and Kitchin L.JJ. agreed, in *Smyth v Secretary of State for Communities and Local Government* [2016] Env. L.R. 7, at paragraphs 77 and 87 to 102).

32. As Foskett J. acknowledged (in paragraph 39 of his judgment), if any of the sites allocated for housing in the NNP were to be developed – except perhaps for the site allocated under Policy HO5 – appropriate SANG would have to be found. The site allocated under Policy HO2 , at Cricketfields, was the subject of a resolution by the district council in May 2015 to grant planning permission for 31 houses, subject to a condition preventing implementation until a SANG had been provided. As the judge explained (in paragraph 40), it was "agreed that 8 hectares of SANG is required per 1,000 additional population", and "each SANG must be a minimum size which needs to be large enough to accommodate a minimum of a 2.3-2.5 km circular walk (without doubling back) and ideally with a choice of routes extending up to 5km in length". The "purpose is to attract dog walkers". For developments near Ashdown Forest, "the [SANGs] must relate well to the location of the new housing, either on the edge of the new housing proposal or in close proximity to it, because its primary purpose is to be sufficiently attractive to divert people (especially dog walkers) from the housing development away from the forest to the new SANG".

33. In the Habitat Regulations Assessment Report (Stages 1-3) for the emerging core strategy, published in January 2013 ("the HRA"), the district council said that "using the precautionary principle, it was necessary to continue the ["appropriate assessment"] process for the two sites" (paragraph 4.5). The "appropriate assessment", in section 6 of the HRA, acknowledged that "mitigation of new residential development within 7km of the Ashdown Forest was required as there was no evidence to suggest that there would not be significant negative effect alone and in combination, on the protected site by increasing recreational disturbance", and "[given] that the Proposed Submission Core Strategy includes a figure of 100 residential units to be provided in Newick (Spatial Policy 2), it meant that the effect needed to be mitigated or alternative solutions found" (paragraph 6.1). Section 7 described the intended approach to the provision of SANGs for residential development within 7 kilometres of Ashdown Forest. It envisaged that "work on identifying suitable SANG provision is progressed by [the district council] so that a site or sites can be allocated in a Development Management Policies Development Plan Document or a Neighbourhood Development Plan" (paragraph 7.17). The approach to the provision of SANGs was refined in an addendum report produced in March 2014, which amended paragraph 7.17 of the HRA to include this:

> "SANG(s) will be provided at an appropriate scale, design and location in accordance with advice from Natural England. The delivery of a SANG or SANGs is in order to successfully offset the impact of residential development in the 7km zone around the Ashdown Forest. Therefore, until such a time that appropriate SANG provision is delivered or site specific mitigation is provided that is agreed to

> be suitable by the District Council and Natural England, development resulting in a net increase of one or more dwellings within the 7km zone will be resisted."

34. As Foskett J. explained (in paragraphs 66 to 97 of his judgment), the district council found that the NNP did not require "appropriate assessment". In February 2014 it produced the Habitat Regulations Screening Report for the NNP, which had been prepared in July 2013. In section 1, "Introduction", the Habitats Regulations Screening Report explained that it "presents the finding of the screening stage of the [Habitats Regulations Assessment] process, examining whether or not the emerging Newick Neighbourhood Development Plan … is likely to have a likely significant effect [sic] on any protected sites" (paragraph 1.4), and that "[this] screening assessment should be read alongside the Habitat Regulations Assessment of the Lewes District Core Strategy: Proposed Submission Version" (paragraph 1.5). In section 2, "Process", it acknowledged that "[other] plans and strategies that could have an impact on protected sites "in combination" with the plan under production, also have to be taken into account during the screening stage" (paragraph 2.8). It also recognized that "[importantly,] the HRA process is underpinned by the precautionary principle, especially in the assessment of potential impacts and their resolution", and that "[therefore] if it is not possible to rule out a risk of harm, based on the evidence available, to a protected site, it is assumed a risk may exist", and this "would mean that such a site could not be 'screened out' at the initial stage of the process" (paragraph 2.9).

35. Section 4 of the Habitat Regulations Screening Report, "Screening the Protected Site", referred to "the HRA on the Lewes District Core Strategy", which had "assumed that 100 homes would be built in Newick by 2030" (paragraph 4.2). It had noted that "… it has been determined, in consultation with Natural England, that the Core Strategy would not have a significant negative effect on the Ashdown Forest SAC/SPA in terms of nitrogen deposition either alone or in combination with other plans", and therefore that "mitigation or avoidance measures are not required" (paragraph 4.3). It had also "found that development within 7km of the Ashdown [Forest] (within which most of Newick Parish lies) was likely to have a significant negative effect on the Ashdown Forest SAC/SPA in terms of recreational disturbance, unless mitigated against", but that, "as a result [of the mitigation measures], the Core Strategy complies with the Habitats Regulations and does not require further assessment" (paragraph 4.4). It had been "assumed that [the NNP] will plan for the same amount of housing (100 homes) as tested in the HRA on the Core Strategy" (paragraph 4.5). Under the heading "The Screening Assessment", the Habitat Regulations Screening Report said this (in paragraph 4.6):

> "As can be seen in Table 1 below, a screening assessment has been undertaken. From the findings of the screening assessment, it has been determined that [the NNP] would not cause a likely significant effect to the Ashdown Forest SAC/SPA, either alone or in combination with other plans. As such, we have screened out the site from further stages of the HRA process."

Table 1, "Screening Assessment of Ashdown Forest SAC/SPA", under the heading "LIKELY SIGNIFICANT EFFECTS TO SITE (INLCUDING POTENTIAL 'IN-COMBINATION' IMPACTS)?", referred to the conclusions in the HRA that there would be no significant effect on the European site – either from nitrogen deposition caused by traffic generated by the new development, or, with the necessary mitigation for development within 7 kilometres of the European site, from recreational disturbance. It stated:

> "The HRA for the Lewes District Core Strategy considered whether nitrogen deposition on the site, caused by traffic, would be significant. It found that it would not. As [the] will plan for the same amount of development as the Core Strategy, it is assumed that it would also not have a significant effect.
>
> The HRA for the Lewes District Core Strategy considered whether recreational disturbance caused by residents from new development would have a significant effect on the site. It found that development within 7km of the Forest would need to be mitigated against. The Core Strategy introduces the necessary mitigation and therefore the HRA found that development would not have a significant effect on the site. As [the NNP] will plan for the same amount of development as the Core Strategy, it is assumed that it would also not have a significant effect."

36. That conclusion was consistent with the view expressed by Natural England in an e-mail to the district council dated 17 May 2013, in which they stated that "[as] the amount of development proposed in [the NNP] is in accordance with the Lewes DC Local Plan [sic], Natural England agrees with your conclusion of the HRA screening of no likely significant effect".

37. The examination draft of the NNP referred (on p.8) to the SPA and the SAC, to the "protected zone … encompassing all land within 7km of [the] boundary [of Ashdown Forest]", and stated:

> "… Much of Newick lies within that zone and it has been agreed that [SANGs] must be developed before any new housing is permitted within the zone. It is understood that [the district council] is working towards provision of such [SANGs]. …"

38. In its letter to the district council dated 13 October 2014, in response to consultation on the NNP, DLA complained that no relevant and available SANGs had yet been identified, that providing them would be difficult and likely to extend "over many years", that there was no certainty about their provision – or even on the formula for the calculation of payments for the "Suitable Access and Management and Monitoring Strategy" ("SAMMS"), and that this was an obstacle to the delivery of the sites allocated for housing in the NNP. In their consultation response, undated but seemingly submitted to the district council in September or early October 2014, Natural England said that "[although] reference to [SANGs] is made in the final paragraph of page 8 of [the NNP], it is not clear that development within the [7 kilometre] zone of influence will need to contribute to delivering this and other measures such as on-site visitor management …".

39. In his report the examiner said this (on p.18):

> "I note above that [the NNP] recognises the need to provide [SANGs]. As a consequence of the location of the Neighbourhood Area in relation to the Ashdown Forest SPA, relevant development proposals must provide mitigation measures to be delivered prior to occupation and in perpetuity. Any such measures should include the provision of [SANGs].

> It is not the role of a neighbourhood plan to set policy requirements for matters that need to be considered on a more strategic basis. [The NNP] does not, in itself, seek to allocate SANGS but it does highlight the need for them. I consider that, in the interests of clarity, it would be appropriate to set this out within Policy HO1.
>
> - Policy HO1, add "HO1.7 Due to the Neighbourhood Area's location, relevant development proposals must provide mitigation measures to be delivered prior to occupation of the development and in perpetuity. Measures should include the provision of [SANGs]."
>
> I note that there is no substantive evidence to demonstrate that it would not be possible to meet the proposed requirements resulting from the above. I also note in this specific regard that [the district council] is working towards the provision of [SANGs] and that this is recognised within [the NNP]."

Policy HO1.7 was duly added to the NNP. It stated:

> "HO1.7 Due to the Neighbourhood Area's location, relevant development proposals must provide mitigation measures to be delivered prior to occupation of the development and in perpetuity. These measures should include the provision of [SANGs], or similar as agreed by [the district council] and Natural England, as well as contributions to a monitoring and management strategy at Ashdown Forest."

40. On 21 September 2016 – after the hearing before the judge – the district council's Planning Applications Committee resolved to grant planning permission for the provision of a SANG on a site of 11.8 hectares to the south of Jackies Lane in Newick, owned by a developer, Thakeham Homes Ltd.. The officer's report to the committee, recommending that planning permission be granted, stated (in paragraph 6.14):

> "Natural England, [the district council's] expert advisers in this instance, has been consulted in relation to the submitted scheme. They have confirmed that they consider that the proposals fulfil the criteria for SANG. Furthermore they have confirmed that the size of the SANG being 11.8 hectares, is sufficient in size to meet the full policy criteria of 8ha per 1000 population i.e. it will mitigate against the effect of up to 1,375 people or approximately 572 new dwellings."

and (in paragraph 6.43):

> "Long term financing of the maintenance and management of the SANG is likely to be secured through Section 106 contributions sought from future housing developments coming forward in the 7km zone. As set out above the sites already allocated in [the NNP] will provide at least 100 additional dwellings. Discounting the site that already has planning permission (Cricketfield) this leave a minimum of 67 units. Whilst details of the expected management costs are still awaited from the applicants it is not expected that these are likely to be high and are therefore unlikely to result in unreasonable or unviable costs for future housing proposals coming forward in the 7km zone of influence."

On 16 November 2016, as we were told after the hearing of the appeal, the district council granted planning permission for the SANGs at Jackies Lane, subject to a section 106

agreement committing the developer to transfer it to the parish council, the district council or a management company for its upkeep.

41. Before the judge, and again before us, Mr Young argued that the making of the NNP was vitiated by the lack of evidence to demonstrate that the requisite SANGs would actually be provided, and the allocations dependent on them brought forward. He submitted that there was here a breach of article 6(3) of the Habitats Directive and regulation 102 of the Habitats regulations. He relied on Richards L.J.'s observation in his judgment in *No Adastral New Town* (at paragraph 72) that a local planning authority in a situation of this kind must have "sufficient information … to be duly satisfied that the proposed mitigation could be achieved in practice". In this case, he submitted, the necessary degree of certainty was absent. The examiner should have seen this, but failed to do so.

42. Mr Young also argued that the district council had omitted to consider the possibility of the NNP having significant effects on the European site in combination with other plans. That submission is not right. The Habitat Regulations Screening Report expressly concluded, in paragraph 4.6, that the NNP "would not cause a likely significant effect to the Ashdown Forest SAC/SPA, either alone or in combination with other plans", and the analysis in Table 1 included "POTENTIAL 'IN-COMBINATION' IMPACTS". The HRA had also considered (in paragraph 6.1) the potential effects on the European site "alone and in combination …" (see paragraphs 33 to 35 above).

43. The judge rejected Mr Young's argument on the deliverability of SANGs. In his view the examiner's conclusions were sound. DLA's letter of 13 October 2014 had, in fact, provided no "substantive evidence" to support the conclusion that SANGs could not be delivered. The examiner was "perfectly entitled to express the view that he did based upon the assertion of [the district council] that work was continuing to identify SANG(s) for the purposes of ensuring that the contemplated housing development could proceed" (paragraphs 87 and 88 of the judgment). Ms Parry had submitted, as she did to us, that both the district council and the examiner had been properly satisfied that the required SANGs and payments for SAMMS would come forward. The judge saw support for that submission in the judgment of Sales L.J. in *Smyth*. Sales L.J. had referred (in paragraph 29 of his judgment) to the present "uncertainty about how and when both the substantial residential developments contemplated by the draft LDFs and the setting up of the SANGs will take place", acknowledging that the land for SANGs might have to be acquired by means of compulsory purchase orders, and that the funding for its acquisition had still to be found. But as he had gone on to say (in paragraph 77), the inspector had been "lawfully entitled to take into account the proposed preventive safeguarding measures in respect of the SPA and SAC under the first limb of art.6(3), for the purposes of giving a screening opinion to the effect that no "appropriate assessment" would be required under the second limb … , in the course of his consideration whether to grant planning permission". In Foskett J.'s view that analysis "offers support for the proposition that plans for the provision of SANG in the future (even those with uncertainties attached) may be sufficient to comply with the [Habitats] Directive and the [Habitats regulations]" (paragraphs 89 to 92 of his judgment).

44. Foskett J. accepted that the court could find a local planning authority's conclusion on this question "unsustainable on the usual public law grounds", but rightly acknowledged that "the threshold for sustaining such a challenge is high even where the principle being applied is the strict precautionary principle …" (paragraph 93). The issue for the court, he

said, was "not … whether SANG will be deliverable as required, but whether [the district council] was entitled to rely upon its belief that it will be delivered within the plan period and whether the examiner was justified in accepting that as a sufficient basis for [the NNP] to meet the "basic conditions"…". In the light of Richards L.J.'s judgment in *No Adastral New Town*, and Sales L.J.'s in *Smyth*, "the resolution of the issue must inevitably be fact and context specific". Here, the court could place reliance on the district council's confidence in "the deliverability of SANG" (paragraph 94). And "if the anticipated SANG does not materialise in a way that permits the necessary housing development, [the district council] will see itself as obliged to consider alternative sites" (paragraph 95).

45. Mr Young submitted that in *No Adastral New Town* and *Smyth* there had been considerably more detail before the decision-maker than was before the examiner and the district council in this case. In both of those cases an area or site had been identified for SANG (see paragraph 39 of Richards L.J.'s judgment in *No Adastral New Town*, and paragraph 28 of Sales L.J.'s in *Smyth*). That degree of certainty was missing in this case. The requisite "precautionary" approach cannot be discerned either in the assessment in the district council's Habitat Regulations Screening Report or in the examiner's relevant conclusions. The examiner seems to have imposed an evidential burden on objectors to the NNP to demonstrate that SANGs would not or could not be provided, and to have assumed the required SANGs would emerge without any evidence on which to base that assumption – whereas he should have assumed they would not emerge unless there was sufficient evidence that they would.

46. I cannot fully accept that argument, for these reasons.

47. First, as the judge found, both the district council and the examiner clearly understood that SANGs would in due course have to be identified and brought forward in a reasonable time to enable the allocated sites to be developed for housing within the period of the NNP (see paragraphs 32 to 44 above). This is not a case of a failure by a local planning authority or an inspector to recognize the need for mitigation of a particular kind to be in place before planned development may proceed, or to address the deliverability of that mitigation and thus the deliverability of the development itself. These questions were faced in the course of the preparation of the NNP, and in the light of DLA's objection (see, in particular, paragraphs 32 to 39 above). In the end, however, they were matters of planning judgment for the examiner and the district council.

48. Secondly, I do not accept that, in the context of the strict "precautionary" approach consistently emphasized in European and domestic authority, the relevant planning judgments formed by the district council and the examiner were, on their face, irrational or otherwise unlawful. Those judgments, it should be remembered, fell to be made in a plan-making process, not in the making of a decision on an application for planning permission. In considering whether "appropriate assessment" for the NNP was necessary under article 6(3) of the Habitats Directive and regulation 102 of the Habitats regulations, the district council and the examiner clearly understood that mitigation in the form of suitable SANGs would be required to be in place before development on the allocated sites could go ahead, or at least before the new dwellings could be occupied. It was on this understanding that the examiner had to exercise his planning judgment. In principle, in my view, it was open to him to conclude, as a matter of planning judgment, that the requisite SANGs would be provided, and that, throughout the period of the NNP, the SPA and the SAC would therefore be safeguarded against any significant effects (see paragraphs 43 and 44 above).

49. Thirdly, I do not accept that, in substance, the planning judgment on which the examiner's conclusion rested was in any way inconsistent with the "precautionary" approach, or otherwise legally flawed. As he said, although the NNP acknowledged the need for SANGs, it was not allocating land for their provision. It was therefore unnecessary to resolve in this plan-making process which particular site or sites would be suitable for SANGs. The efficacy of SANGs as mitigation seems not to have been in dispute. At any rate, the district council and the examiner were evidently in no doubt about that, and it is not argued that they ought to have been (see paragraphs 32 to 37 above). At this stage it was perhaps inevitable, and anyway not surprising, that the location of the SANGs and the timing of their provision should still be uncertain. Such uncertainty might well have been an obstacle to a grant of planning permission for a proposed development of housing. But it was not an obstacle to allocations for housing development in Newick being made in the NNP. The examiner noted that, as the NNP stated, the district council was "working towards the provision of SANGs". In the circumstances I think he was entitled to take into account the absence of "substantive evidence to demonstrate that it would not be possible to meet the proposed requirements …" (see paragraphs 39, 43 and 44 above). The absence of such evidence was a relevant factor here, to which he could reasonably give weight, and did. In doing so, he was not, in my view, intending to reverse an evidential burden, or to depart from the "precautionary" approach. He was, in effect, asking himself the critical question to which Richards L.J. referred in his judgment in *No Adastral New Town* (at paragraph 72): whether, on all the material before him, he was satisfied that the proposed mitigation "could be achieved in practice". On a fair reading of his conclusions, the answer he gave to that question was plainly "Yes".

50. However, I do accept that the examiner did not explicitly address the lack of positive evidence to demonstrate that the necessary SANGs would in fact be brought forward in a timely way to ensure that the allocations in the NNP were delivered. And I also accept that he should have done that. In this respect his report, in my view, falls short of the standard of reasons the law requires of an examiner in a neighbourhood development plan process, limited as his role may be (see paragraph 5 above). He was, of course, making a predictive planning judgment, looking at a plan period for the NNP which was to run until 2030, some 15 years in the future. Even so, I think he needed to do more than merely express the conclusion that there was "no substantive evidence" to demonstrate the impossibility of SANGs being provided in the right place at the right time in the course of the plan period – accurate though this statement was as a matter of fact. Nor was it a sufficient explanation for his planning judgment here simply to observe – true as this was too – that the district council was "working towards the provision of [SANGs] and … this is recognised within [the NNP]". I think he needed to go further than that, and to articulate more fully than he did why he was able to conclude that SANGs would be provided, even though, for the moment, particular sites for them had not been identified. This he did not do. The criticism that has some sting, in my view, is that his conclusions, terse as they are, might be taken to suggest that he was placing more trust than he should in the belief of the parish council and the district council that the SANGs would indeed come forward. In short, he needed to say why he was able to share their confidence without hard evidence to support it at this stage.

51. I think that analysis sits perfectly well with the relevant reasoning in the decisions of this court in *No Adastral New Town* and *Smyth*. I have in mind here, in particular, the observations of Richards L.J. in paragraph 74 of his judgment in *No Adastral New Town*, where he endorsed the conclusion of Patterson J. at first instance that the inspector in that

case had been "quite justified in coming to a decision that the mitigation was sufficiently certain for Development Plan purposes" (my emphasis), and went on to say that the policy in question contained "a sensible precautionary measure in a [core strategy] that sets the framework for development until 2027, and … serves to underline the obligation to have continuing regard to the avoidance of harm to the SPA at all subsequent stages of the planning process". Such an approach, said Richards L.J., "is in accordance with Article 6 of the Habitats Directive, not in breach of it". I agree with those observations, and they seem pertinent in this case too.

52. As I have said, however, I do see some force in DLA's argument on this issue. If I am right about that, the question would then be whether the limited success of Mr Young's submissions here should prove fatal to the NNP. I do not think it should. The relevant principles on which the court will act in exercising its discretion to withhold relief are settled and familiar (see the decisions of the Supreme Court in *Walton v Scottish Ministers* [2012] UKSC 44, in particular the judgment of Lord Carnwath at paragraphs 102 to 140, and *Champion*, in particular Lord Carnwath's judgment at paragraphs 54 to 66). In this case I am in no doubt that the application of those principles should lead to relief being withheld. The rights conferred by the European legislation have, in practice, been enjoyed. And no substantial prejudice, either to DLA or to any other participant in the NNP process, has been demonstrated. As I have said, the examiner's basic conclusion on SANGs cannot be stigmatized as irrational. Fuller reasons, if given now, might amplify that conclusion. But it seems to me unreal to imagine that they might change it. That is enough, in my view, to sustain this court's conclusion that it would be inappropriate to grant any relief here. But in any event there is already objective evidence to support what the examiner said. As was rightly brought to our attention after the hearing, the district council has now, on 16 November 2016, granted planning permission for a SANG on a site of 11.8 hectares at Jackies Lane, subject to a section 106 agreement committing the developer to transfer the land (see paragraph 40 above). As Mr Young has quite properly pointed out, the section 106 agreement does not secure funding for the maintenance of the SANG. Nevertheless, the fact that planning permission has now been granted for a SANG only strengthens my conclusion that it would not be right for us, in the exercise of our discretion, to grant any remedy for the defect, such as it is, in the examiner's report.

Ground 3 – deliverability

53. DLA's argument on this ground is the corollary of its argument on the previous issue, and in my view the same essential conclusions apply to it.

54. It is submitted that the examiner and the district council failed to have regard to government policy and guidance for the delivery of new housing. The first of the "basic conditions", in paragraph 8(2)(a) of Schedule 4B, required the examiner to test the NNP against "national policies and advice contained in guidance issued by the Secretary of State". He therefore had to consider whether the NNP gave effect to one of the fundamental themes in the NPPF, amplified in the PPG: that the planning system should "boost significantly the supply of housing" (paragraph 47 of the NPPF). Mr Young submitted that the examiner failed to grapple with this question, and, in particular, to consider whether the NNP complied with the guidance on the deliverability of sites and on the need to take into account constraints on delivery – for example, in paragraphs 3-022-20140306, 3-030-20140306, and 3-032-20140306 of the PPG. The obvious constraint on delivery here, said

Mr Young, was the lack of SANGs for the allocations within the 7 kilometre "zone of influence" for the European site.

55. Foskett J. saw no force in this argument. As it seemed to him, "the deliverability of housing was addressed in the context of the deliverability of SANG: the two go hand-in-hand", and he was, he said, "unable to see any flaw in the process by which [the NNP] was formulated or in the approach of the examiner when he gave his approval to that approach" (paragraph 96 of his judgment). He also rejected – as "nothing more than a repetition of matters already dealt with" – grounds contending that the exercise of site selection had been irrational because the 7 kilometre "zone of influence" was not used as a criterion for the choice of sites, and that the allocation of "undeliverable" sites offended government policy in the NPPF (paragraphs 113 and 114).

56. In my view the judge was clearly right to reject that argument. The main complaint here is that the delivery of the allocated sites might be impeded by the lack of suitable SANGs, and that the examiner failed to confront this possible problem. As I have said, I think that, in substance, this complaint is mistaken (see paragraphs 32 to 52 above). And the argument on this ground adds nothing to the criticism of the examiner's reasons for concluding that the necessary SANGs would be brought forward.

57. More generally, I also agree with the judge that the deliverability of the sites allocated for housing development in the NNP was not neglected in the course of its preparation. The Newick Neighbourhood Plan: Basic Conditions Statement said (in section 3, "MEETING THE CONDITIONS") that "deliverability has been a key consideration when producing the plan". The Newick Neighbourhood Plan Consultation Statement, produced in August 2014, confirmed that "meetings were arranged with the relevant landowners and developers to check that their land would be available when required …". And the examiner, for his part, was plainly conscious of the need for the allocations to be deliverable, in accordance with the NPPF. He referred to the NPPF throughout his report, including the several comments he made about "delivery". For example, when considering the sites allocated for housing, he recommended the removal of a provision for the phasing of development on the allocated sites, concluding that "such an approach fails to have regard to [the NPPF], which is clear in its requirement for sustainable development to go ahead, without delay (Ministerial foreword)" (p.18); that "… setting specific time slots, as [the NNP] seeks to do, would severely limit its ability to be flexible", and that "[the NPPF] requires affordable housing policies to be sufficiently flexible to take account of changing market conditions over time (para 50)"; that, subject to his recommended modifications, "… Policies HO2 to HO5 provide for the delivery of a wide choice of high quality homes, having regard to [the NPPF]"; that the "specific allocations for housing… [provide] for a high degree of certainty with regards the delivery of 100 houses", that "[nowhere] does [the NNP] seek to place a cap, or a maximum limit on the number of dwellings to be built in the Neighbourhood Area during the plan period", and that "[this] approach has regard to [the NPPF's] presumption in favour of sustainable development" (p.19).

Ground 4 – regulations 5 and 9 of the SEA regulations

58. Regulation 5(1) and (2)(b) of the SEA regulations, implementing article 3 of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment ("the SEA Directive"), imposes on the "responsible authority", subject to

paragraphs (5) and (6) and regulation 7, a requirement to carry out an environmental assessment ("SEA") for a "plan or programme" which "sets the framework for future development consent of projects listed in Annex I or II to [Directive 2011/92/EU ("the EIA Directive")]". The NNP came within that description (see the judgment of Richards L.J., with which Moore-Bick and Sharp L.JJ. agreed, in *R. (on the application of Larkfleet Homes Ltd.) v Rutland County Council* [2015] EWCA Civ 597, at paragraph 24). Regulation 5(6), however, provides that an SEA "need not be carried out … (a) for a plan … of the description set out in paragraph (2) or (3) which determines the use of a small area at local level … unless it has been determined under regulation 9(1) that the plan … is likely to have significant environmental effects".

59. Regulation 9(1) provides that "[the] responsible authority shall determine whether or not a plan … of a description referred to in … (b) paragraph (6)(a) [of regulation 5] … is likely to have significant environmental effects". Regulation 9(2) provides that "[before] making a determination under paragraph (1) the responsible body shall … (a) take into account the criteria specified in Schedule 1 …", and "(b) consult the consultation bodies". Regulation 9(3) provides that "[where] the responsible authority determines that the plan … is unlikely to have significant environmental effects (and, accordingly, does not require [an SEA]), it shall prepare a statement of its reasons for the determination". Regulation 15(1)(e) of the 2012 regulations requires, for a neighbourhood development plan, the provision of "(i) an environmental report prepared in accordance with paragraphs (2) and (3) of regulation 12 of [the SEA regulations]" or "(ii) where it has been determined under regulation 9(1) of [the SEA regulations] that the plan proposal is unlikely to have significant environmental effects (and, accordingly, does not require an environmental assessment), a statement of reasons for the determination".

60. No SEA was undertaken for the NNP. Mr Young submitted that an SEA was unlawfully "screened out" by the district council.

61. This argument requires us to consider the Sustainability Appraisal Scoping Report Post-Consultation Issue, prepared by the steering group and dated 9 November 2013, and the previous version of the scoping report, dated 8 May 2013, on which consultation took place between 9 May and 20 June 2013.

62. In section 1, "Introduction", of the May 2013 scoping report (p.2), paragraph 1.2 stated that "[as] required by both European and National Law, consideration is given in this report to the requirements of [the SEA Directive]". In section 2, "Background" (p.3), paragraph 2.5 said:

> "For their Joint Core Strategy, [the district council] and the South Downs National Park Authority carried out a full sustainability appraisal on the contents of their plan. That sustainability appraisal incorporated the requirements of [the SEA Directive]."

Paragraph 2.6 stated:

> "As reported in Appendix 1, we have considered whether or not there is a need for our sustainability appraisal also to incorporate the requirements of [the SEA Directive]. We have concluded that [the NNP] would not have any significant environmental effect that has not been considered already in [the district council's]

> sustainability appraisal. As a result, we propose that our sustainability appraisal be simple and appropriate for a local-level plan."

Consultees were then asked whether they "[agreed] with the findings of the analysis presented in Appendix 1", and whether they "[believed] that a simple sustainability appraisal is appropriate for [the NNP]". In section 3, "Parish Portrait" (pp.4 to14), sub-section 3.4, "Environmental", described the relevant environmental constraints and designations, including "European Protected Sites" (paragraph 3.4.2), "Sites of Special Scientific Interest" (paragraph 3.4.3), "Conservation Areas" (paragraph 3.4.5), "Listed Buildings" (paragraph 3.4.6), "Flooding" (paragraph 3.4.7), "Tree Preservation Orders" (paragraph 3.4.9) and "Ancient Woodland" (paragraph 3.4.10). Paragraph 3.4.2 said that "Newick has no European Protected Sites within it, but … is close to Ashdown Forest", referred to the SPA and the SAC and the "protected zone …, encompassing all land within 7 km. of [the] boundary [of Ashdown Forest", and continued:

> "… Much of Newick lies within that zone and it has been agreed that [SANGs] must be developed before any new housing is permitted in the zone. It is understood that [the district council] is working towards provision of such [SANGs] and will recoup their cost by charging the developers of all new housing.".

Section 4, "Sustainability Issues" (pp.15 and 16), identified the "main sustainability issues" – environmental, social and economic. Section 5, "Sustainability Appraisal" (pp.17 to 20), described the "Sustainability Framework" for the NNP, by reference to 12 "sustainability objectives" and their "corresponding indicators". In section 6, "Next Steps" (p.21), paragraph 6.2 explained that the "sustainability framework … will be used to appraise development and policy options for [the NNP], identifying options that would deliver sustainable outcomes", and paragraph 6.3 that the "final sustainability report will accompany the proposed Neighbourhood Development Plan that will be submitted to [the district council]" and "…will be the document that demonstrates, as required by the Neighbourhood Planning Regulations, that the making of the plan contributes to the achievement of sustainable development".

63. In Appendix 1 (pp.22 and 23), paragraphs A1 and A2 stated:

> "A1. The SEA regulations transpose [the SEA Directive] into law. It requires that those making plans that could impact on the environment to consider whether they are likely to have a significant effect or not.
>
> A.2. In order to assess the likely significance of the plan on the environment, the purpose of the plan has been appraised against the criteria detailed in [the SEA regulations] and [the SEA Directive]. This is seen in the table below."

64. The table under those two paragraphs set out, in columns headed "Criteria", "Notes" and "Likely Significant Effect?", an analysis corresponding to the criteria in Schedule 1 to the SEA regulations – "Criteria for determining the likely significance of effects on the environment". The first part of the table is headed "The characteristics of plans and programmes …". For criterion 1(a) – whether a plan or programme sets the framework for other projects or activities – the "Notes" stated that, as "Neighbourhood Development Plans are the lowest-level statutory planning documents in the UK", the NNP "does not set a framework for other projects or plans", but then said that the NNP "will be used for guiding

development in the Parish until 2030". For criterion 1(b) – "the degree to which the plan or programme influences other plans or programmes – they said that "Neighbourhood Development Plans are influenced by other plans, such as [the core strategy] and national planning policy", and that the NNP is "at the bottom of the hierarchy and is not intended to influence other plans and programmes". For criterion 1(c) – "the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development" – they said that the NNP "… will help promote sustainable development and will consider the environment". For criterion 1(d) – "environmental problems relevant to the plan or programme" – they said that "[the] state of the environment will be considered by those making the plan and, where appropriate, they will introduce policy to help overcome any problems", and that "[the] sustainability appraisal and Habitats Regulations Assessment for [the core strategy], which [the NNP] supplements, identified issues relating to the Ashdown Forest and has addressed them in [the core strategy]". And for criterion 1(e) – "the relevance of the plan or programme for the implementation of Community legislation on the environment (for example, plans and programmes linked to waste management or water protection)" – they simply stated "Not applicable for [the NNP]". For each of the criteria, the answer given to the question "Likely Significant Effect" was "No".

65. The second part of the table is under the heading "Characteristics of the effects and of the area likely to be affected …". For criterion 2(a) – "the probability, duration, frequency and reversibility of the effects" of the NNP, the "Notes" stated that the NNP "will guide development in the parish until 2030, with the aim of having a positive impact on the parish and by promoting sustainable development". For criteria 2(b) and 2(c) – respectively, "the cumulative nature" and "the trans-boundary nature" of the effects – they said that "[the] sustainability appraisal of [the core strategy] considered the impact of development in the Parish alongside development in other settlements and parishes", and that "[the] Habitats Regulations Assessment also considered the effects of development in neighbouring districts on protected sites". For criterion 2(d) – "the risks to human health or the environment (for example, due to accidents)" – they stated "[it] is not thought that anything in [the NNP] will increase risks to human health". For criterion 2(e) – "the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected") – they stated that "[the NNP], unlike most plans, is to be written for a very small area and population". For criterion 2(f) – "the value and vulnerability of the area likely to be affected due to – (i) special natural characteristics or cultural heritage; (ii) exceeded environmental quality standards or limit values; or (iii) intensive land-use" – they stated that "[in] collecting information for [the NNP], information has been gained on the characteristics of the area – including information on land use, listed buildings, TPOs and SSSIs", and "[this] information gathering will inform the contents of [the NNP]". For criterion 2(g) – "the effects on areas or landscapes which have a recognised national, European Community or international protection status" – they stated that "[the] Habitats Regulations Assessment for [the core strategy] considered the impact of development on [the SPA and SAC]"; and that "[the core strategy] has put in place policies which mitigate against the effects on the Forest of development in the Parish", and "[thus the NNP] will not have a significant negative effect on the Forest". Again, for each of the criteria, the answer to the question "Likely Significant Effect?" was "No".

66. Under the table, paragraph A3 stated:

> "A3. The above analysis was undertaken by [the district council] on behalf of [the parish council]. In the light of the analysis, it is not thought that [the NNP] would have a significant environmental effect."

67. In an e-mail dated 18 June 2013, responding to consultation on the May 2013 scoping report, Natural England answered the question in paragraph 2.6 in this way:

> "… Provided your analysis fits within the context and assumptions of the district's SA/SEA of the local plan [sic], your appraisal is appropriate."

68. The November 2013 scoping report was in largely the same terms as that of May 2013. It noted, in paragraph 1.4, that Natural England, the Environment Agency and English Heritage had been included in the consultation on the May 2013 scoping report. Paragraph 2.6 repeated the conclusion stated in paragraph 2.6 of the May 2013 scoping report, that the NNP "would not have any significant environmental effect that has not been considered already in [the district council's] sustainability appraisal", and added that none of the statutory consultees had objected to the sustainability appraisal being "simple and appropriate for a local-level plan". Appendix 1 was in the same form as in the May 2013 scoping report.

69. Mr Young submitted that the requirements for "screening" in the SEA regulations were not properly discharged in the scoping reports. Reliance on the sustainability appraisal for the still emerging core strategy, and on the HRA, was misplaced. The core strategy had yet to be tested at its examination. Even when adopted, it was not going to secure the necessary mitigation for the effects of development in Newick within the 7 kilometre "zone of influence" for the European site. And in any event, said Mr Young, the "screening" decision embodied in the scoping reports was incomplete, opaque and, in certain respects, plainly wrong. The notion that the NNP was not setting the framework for the determination of applications for planning permission showed a basic misunderstanding of the legislative regime for SEA. The analysis in Appendix 1 to the scoping reports fell short of the minimum required of a "screening" decision under the SEA regulations. Potential "risks" to the environment were ignored. Had an SEA been undertaken for the NNP, it would have been necessary to consider reasonable alternatives to the allocated sites, including locations outside the 7 kilometre zone.

70. Ms Parry defended the "screening" decision for the NNP as adequate and lawful. It was, she submitted, entirely appropriate for the district council and the parish council to rely on the sustainability appraisal undertaken in the core strategy process, and the HRA. None of the statutory consultees, including Natural England, had disagreed with the conclusion that an SEA was not required for the NNP. Appendix 1 to the scoping reports should not be read in an unduly legalistic way (see, for example, the judgment of Wyn Williams J. in *Aston v Secretary of State for Communities and Local Government* [2013] EWHC 1936 (Admin), at paragraph 23). The criteria in Schedule 1 to the SEA regulations had all been dealt with. Any apparent shortcomings in the "Notes" for criteria 1(a) and 2(d) in Table 1 in the scoping reports were of no real significance. The NNP's role and its place in the development plan hierarchy had not been misunderstood. The "Notes" for criteria 1(d), 2(b), (c), (f) and (g) covered any possible effects on the environment, including any effects on the European site.

71. Foskett J. rejected Mr Young's argument on this ground (in paragraphs 103 to 107 of his judgment). In his view the scoping reports made it sufficiently clear why the conclusion had been reached, in the light of the sustainability appraisal for the core strategy and the HRA, that an SEA was not required for the NNP (paragraphs 104 to 106). He referred to paragraph 3.4.2 of the scoping reports, which acknowledged that much of the parish of Newick lies within the 7 kilometre "protected zone" for the European site; that the district council was committed to SANGs being in place before planning permission was granted for any new housing in the protected zone; and that it was working to secure the provision of SANGs (paragraph 105). He also rejected Mr Young's submission that it was *Wednesbury* unreasonable to discount likely significant effects on the environment because the housing sites allocated in the NNP were all in the protected zone and the mitigation was still uncertain (paragraph 107).

72. The court must avoid an overly stringent approach to a "screening" decision under regulations 5 and 9 of the SEA regulations. The exercise of what is essentially a planning judgment on the likelihood of significant effects on the environment may be attacked only on public law grounds (see, for example, the first instance judgments in *Shadwell Estates Ltd.*, at paragraph 73; *Aston*, at paragraph 29; and *Grand Union Investments Ltd. v Dacorum Borough Council* [2014] EWHC 1894 (Admin), at paragraph 90). Of course, the "screening" analysis will sometimes be so perfunctory or superficial as to be legally flawed. And there will be cases where the court has no choice but to find a "screening" decision unlawful – for example, because the local planning authority has failed to demonstrate a true grasp of the issues involved, or to make plain why it has found there would be no likely significant effects on the environment (see, for example, the decision of this court in *R. (on the application of Friends of Basildon Golf Course) v Basildon District Council* [2010] EWCA Civ 1432, in particular the judgment of Pill L.J., with which Carnwath and Rimer L.JJ. agreed, at paragraph 62). But the court must remember that, as Richards L.J. put it in his judgment in *Larkfleet Homes* (at paragraph 41), "documents of this kind are to be read as a whole and with a degree of benevolence" (see also, for example, the judgment of Moore-Bick L.J. in *R. (on the application of Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157, at paragraph 20).

73. In this case it cannot be said that there was no SEA "screening" decision, or that the "screening" decision was not made at an appropriate stage of the NNP process, or that it was made without the benefit of the input of the bodies whose views needed to be sought through consultation, including Natural England (see paragraphs 60 to 68 above). Nor can it be said that the authors of the scoping reports failed to address the crucial question at the "screening" stage: whether the NNP was "likely to have significant environmental effects" (regulations 5(6) and 9(1) of the SEA regulations). The answer to that question, clearly stated in paragraph A3 of Appendix 1 to the scoping reports in the light of the tabulated analysis of the criteria in Schedule 1 to the SEA regulations, and evidently without dissent from any of the "consultation bodies", was that "it is not thought that [the NNP] would have a significant environmental effect" (see paragraphs 62 to 66 and 68 above). In the table in Appendix 1 each of the 12 criteria in Schedule 1 was addressed, albeit briefly (see paragraphs 64 and 65 above). And the "screening" decision itself was, in the circumstances, well within the bounds of reasonable planning judgment (see paragraphs 71 and 72 above). To this extent, therefore, I conclude that the requirements of regulations 5 and 9 of the SEA regulations were discharged.

74. But there are undoubtedly errors in Appendix 1 to the scoping reports. To state, in dealing with criterion 1(a), that the NNP "does not set a framework for other projects or plans" was obviously incorrect. However, this apparent misconception was contradicted straight away by the acknowledgment in the same sentence that the NNP "will be used for guiding development in the Parish until 2030", and also by the similar comment made in dealing with criterion 2(a). And the "Notes" for criterion 1(b) are accurate in recognizing the position of the NNP at the bottom of the development plan hierarchy, and that the NNP is "not intended to influence other plans and programmes". The "Notes" for criterion 1(e) might suggest that the authors of the scoping reports thought "Community legislation on the environment …", including the Habitats Directive, was irrelevant to the NNP process, but the "Notes" for criterion 2(g) specifically address the possible impact of "development in the Parish" on the SPA and the SAC and conclude that "[the NNP] will not have a significant negative effect on the Forest". The "Notes" for criterion 2(d) omit a response to the question as to "risks to … the environment", but the "Notes" for criteria 1(d), 2(b), (c), (f) and (g) refer to the possibility of effects on the environment, both generally (the "Notes" on criteria 1(d), 2(b) and (c)), and, specifically, on the European site (the "Notes" on criteria 1(d), 2(b), (c) and (g)) and on "land use, listed buildings, TPOs and SSSIs" (the "Notes" on criterion 2(f)). The conclusion for each of these criteria, in the column headed "Likely Significant Effect?", was that the NNP was not likely to have significant environmental effects (see paragraphs 64, 65 and 68 above).

75. The errors in Appendix 1 are certainly unfortunate. But in my view they are not enough to invalidate the conclusion, as a matter of planning judgment, that the NNP was not "likely to have significant environmental effects". Read fairly in the light of the whole content of the scoping reports, Appendix 1 does not, in my view, betray a failure to understand and deal with the issues involved in the exercise required in regulations 5(6) and 9 of the SEA regulations (cf. the judgment of Pill L.J. in *Friends of Basildon Golf Course*, at paragraph 62). That, however, is not all. The summary analysis in Appendix 1 leans heavily on work undertaken in the core strategy process. I do not accept that this in itself is a defect in the "screening" decision (see the judgment of Richards L.J. in *Larkfleet Homes*, at paragraphs 24 to 41). The more powerful point, I think, is that although Appendix 1 expresses the conclusion that the NNP will not have significant environmental effects, and does so quite clearly, the scoping reports contain very little by way of an explicit consideration of the possible effects of the development planned for Newick in the NNP, relying instead on the analysis in the sustainability appraisal for the core strategy and the HRA. In this respect it may be said that the "reasons for the determination" are less than adequate. These flaws in the scoping reports are not, in my view, such as to constitute a breach of regulation 5 of the SEA regulations or of either regulation 9(1) or regulation 9(2). But I am prepared to accept that they amount to a breach of regulation 9(3), and also of the corresponding requirement in regulation 15(1)(e)(ii) of the 2012 regulations, and that to overlook this breach would be to strain the court's benevolence too far (cf. Richards L.J.'s judgment in *Larkfleet Homes*, at paragraphs 29 to 41).

76. Once again, however, this leaves the question of whether, in the exercise of the court's discretion, it would be appropriate to withhold relief. And once again, in my view, it would. I have already referred to the relevant principles in *Walton* and *Champion* in dealing with discretion on ground 2 (see paragraph 52 above). In the particular circumstances of this case, given the nature of the breach that I have identified – a breach only of the requirement for reasons in regulation 9(3) of the SEA regulations and regulation 15(1)(e)(ii) of the 2012 regulations, I cannot see any real prejudice to DLA, or any other party, in withholding a

remedy. By contrast, however, I can see considerable prejudice both to good administration and to the interests of the community in Newick – in terms of needless delay and uncertainty – if a remedy were granted. And in any event it is, in my view, inconceivable that the outcome of the SEA "screening" exercise for the NNP might now be any different if the "reasons for the determination" given in the scoping reports were amended and amplified. The "screening" decision itself was perfectly clear, not opposed by the "consultation bodies", and, as I have said, well within the bounds of reasonable planning judgment (see paragraph 73 above). The focus of Mr Young's argument here, as on ground 2, was on the possible effects of the development planned in the NNP on the SPA and the SAC, in view of DLA's doubts over the delivery of SANGs as mitigation. No other point has been taken on the substance of the SEA "screening" exercise. In the light of the HRA and the Habitats Regulations Screening Report produced for the NNP in February 2014, I have already concluded that Mr Young's argument asserting errors of law under the Habitats Directive and Habitats regulations is not sufficiently well founded to justify our granting relief (see paragraphs 46 to 52 above). That conclusion is also relevant here. It reinforces my view that, if the only errors of law in the process of preparing and making the NNP are those which I have identified under this issue and the issue arising under ground 2, we should exercise our discretion against granting relief.

Ground 5 – apparent bias

77. Paragraph 7(4) of Schedule 4B to the 1990 Act provides that "[the] authority may appoint a person to carry out the examination but only if the qualifying body consents to the appointment". Paragraph 7(6) states:

> "(6) The person appointed must be someone who, in the opinion of the person making the appointment –
> (a) is independent of the qualifying body and the authority,
> (b) does not have an interest in any land that may be affected by the draft order, and
> (c) has appropriate qualifications and experience."

78. Mr Young submitted that the appointment of Mr McGurk as examiner was tainted by the appearance of bias, and that this was fatal to the NNP process. He did not suggest that Mr McGurk had any interest in relevant land, or seek to cast doubt on his professional competence and integrity. DLA's grievance here was that the arrangements by which local planning authorities and parish councils "actively select the examiners they want" are incompatible with the requirement that the examiner should be truly "independent", and that they give rise to apparent bias. In this case the selection was made through the Neighbourhood Planning Independent Examiner Referral Service – which is operated by the R.I.C.S., with the support of the Department for Communities and Local Government. In selecting Mr McGurk as examiner, the district council was selecting an examiner whose "track record", publicly available on the internet at the time, was that he had examined a large number of neighbourhood development plans and had found all of them to comply with the "basic conditions".

79. Even without the aid of the helpful written submissions of Mr Richard Moules on behalf of the Secretary of State, dated 19 October 2016 – which were not before Foskett J. – I would conclude, as did the judge (in paragraphs 140 to 150 of his judgment), that Mr Young's

argument must be rejected. A local planning authority is empowered under primary legislation to select an examiner in a neighbourhood development plan process. That legislation has not been challenged in these proceedings. The statutory provisions are not inherently defective. And the arrangements for the selection of the examiner which were used in this case do not undermine the requirement that an examiner must be "independent". Nor do they generate bias or the appearance of bias. The performance by an examiner of the duties under Schedule 4B is subject to the court's supervision in proceedings for judicial review, and the court may quash a neighbourhood development plan if he or she has failed to discharge those duties lawfully. Foskett J. was "unable to see how a fair-minded observer, applying his or her mind to the issue with that factor in play, would see the fact that the choice of examiner is left to the [local planning authority] (in consultation with the Parish Council) as producing an unfair or non-independent result" (paragraph 148 of his judgment). I entirely agree. The judge saw no relevance – and nothing remarkable – in the fact that a particular examiner has previously found all, or nearly all, of the neighbourhood development plans he has examined compliant with the "basic conditions" (paragraph 149). Again, I agree. As the judge concluded, there was no breach of the statutory requirement, in paragraph 7(6)(a), that an examiner be "independent", and no apparent bias.

Conclusion

80. For the reasons I have given, I would dismiss this appeal.

Lewison L.J.

81. I agree.