Neutral Citation Number: [2015] EWHC 109 (Admin)

Case No: CO/3270/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2015

Before :

Mr Justice Lindblom

- -

Between :

Horsham District Council	**Claimant**
- and -	
Secretary of State for Communities and Local Government	**First Defendant**
- and -	
Barratt Southern Counties Limited	**Second Defendant**

- -

Mr David Lintott (instructed by **the Head of Legal and Democratic Services**) for the **Claimant**
Mr Richard Kimblin (instructed by **the Treasury Solicitor**) for the **First Defendant**
Mr Mark Lowe Q.C. (instructed by **Osborne Clarke**) for the **Second Defendant**

Hearing date: 19 November 2014

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Judgment Approved by the court for handing down

Judgment Approved by the court for handing down

Mr Justice Lindblom:

Introduction

1. It is not a general principle in planning law that an acceptable proposal for development should be turned away because a better one might be put forward instead. This case shows why that is so.

2. The claimant, Horsham District Council, applies under section 288 of the Town and Country Planning Act 1990, for an order to quash the decision of the inspector appointed by the first defendant, the Secretary of State for Communities and Local Government, in a decision letter dated 2 June 2014, allowing the appeal of the second defendant, Barratt Southern Counties Limited ("Barratt"), against its refusal of planning permission for a development of housing on land to the north of West End Lane in Henfield, West Sussex.

The issues for the court

3. The council's application to the court raises two main issues:

   (1) whether, in the light of government policy in paragraph 64 of the National Planning Policy Framework ("the NPPF"), the inspector's approach to the loss of views from the appeal site was unlawful (ground 1 in the council's particulars of claim); and

   (2) whether the inspector's conduct of Barratt's appeal was procedurally unfair (ground 2).

The appeal site and proposal

4. Henfield is a town with a population of about 5,000. Under the Horsham Core Strategy (2007) it is one of the district's Category 1 settlements. These were described in Policy CP5 of the core strategy ("Built-up Areas and Previously Developed Land") as "towns and villages with a good range of services and facilities as well as some access to public transport – capable of sustaining some expansion, infilling and redevelopment". Policy CP4 of the core strategy ("Housing Provision") said that a further development plan document would identify sites for housing development in the district. By the time Barratt's appeal came before the inspector this had not yet happened. In May 2009 the council adopted its "Facilitating Appropriate Development Supplementary Planning Document", which envisaged some new housing development being built outside the defined built-up areas of Category 1 settlements.

5. The appeal site is in the countryside to the west of Henfield – about seven hectares of farmland on the northern side of West End Lane. It lies outside the boundary of the built-up area, as defined under Policy DC1 ("Countryside Protection and Enhancement") of the council's adopted General Development Control Policies (2007). A public footpath runs across it, along the ridge to which the land rises from north and south.

6. Barratt submitted its proposal to the council in an application for full planning permission on 29 April 2013. The proposal was for a development of 160 dwellings of various sizes, with landscaping and open space, accessed from West End Lane. New housing on this scale is not development of a kind identified by Policy CP1 of the core strategy as normally acceptable in

the countryside. On 22 August 2013 the council refused planning permission for seven reasons, including that the proposed development was "an unacceptable form of development in the countryside …" (the first reason for refusal), that it would "[fail] to protect the townscape character of the area …" (the third reason for refusal), and that it "would result in substantial material harm to the landscape character of the site and its rural surroundings" and "would have significant adverse impacts on the visual amenity of the surrounding area" (the fourth reason for refusal). Barratt appealed to the Secretary of State against the council's decision on 11 September 2013. In its pre-inquiry statement (at paragraph 5.18) the council summarized its case on the fourth reason for refusal in this way:

> "Criterion 6 of the [Facilitating Appropriate Development Supplementary Development Document] states that the proposed development must protect, conserve and/or enhance landscape character. The Council will demonstrate that the scale, height and massing of the scheme would lead to substantial harm to the landscape character of the area, and would have a distinctly urbanising impact on the rural landscape character of the countryside."

The NPPF

7. The NPPF was published in March 2012 and was supplemented in March 2014 by the Government's Planning Practice Guidance ("the PPG").

8. Paragraph 14 of the NPPF says that the "presumption in favour of sustainable development" should be seen as a "golden thread running through both plan-making and decision-taking". For decision-taking in cases where the development plan is "absent, silent or relevant policies are out-of date", this is said to mean that planning permission should be granted unless either "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits …" or "specific policies in [the NPPF] indicate development should be restricted".

9. The NPPF reinforces the long-standing requirement in national planning policy that local planning authorities must maintain at all times at least a five-year supply of suitable and deliverable housing land. Paragraph 49 states:

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

10. In the section headed "Requiring good design" (paragraphs 56 to 68) the NPPF lays down a series of policy principles. Paragraph 56 says that the Government "attaches great importance to the design of the built environment", and that "[good] design is a key aspect of sustainable development, and indivisible from good planning, and should contribute positively to making places better for people". Paragraph 64 says this:

> "Permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions."

This succeeded the policy in paragraphs 13 and 34 of Planning Policy Statement 1 ("Delivering Sustainable Development") – one of the statements of government planning policy replaced by the NPPF – which said that such development "should not be accepted".

11. The guidance on "Design" in the PPG amplifies the policy in the NPPF. Paragraph 001 answers the question "Why does good design matter?" It says that "[good] quality design is an integral part of sustainable development", that the NPPF "recognises that design quality matters and that planning should drive up standards across all forms of development", and that "[as] a core planning principle, plan-makers and decision takers should always seek to secure high quality design". Paragraph 007 – "Planning should promote local character (including landscape setting)" – says that "[the] successful integration of all forms of new development with their surrounding context is an important design objective …", and that "[views] into and out of larger sites should also be carefully considered from the start of the design process."

The inquiry

12. The inspector held an inquiry into Barratt's appeal on six days between 25 March and 2 April 2014. He visited the site on 1 April 2014. Both main parties were represented at the inquiry by counsel – Barratt by Mr Mark Lowe Q.C., the council by Mr David Lintott. Expert witnesses on either side were called to give evidence.

13. For the council planning evidence was given by one of its planning officers, Mr James Hutchison. In section 6.3 of his proof of evidence he set out his view on the "Impact of the Development on Landscape Character", though he acknowledged (in paragraph 6.3.5) that the council's Landscape Officer, Mr Matthew Bright, had "provided a detailed assessment of the significance of the impact of the proposed development on the landscape character of the area …". In paragraph 6.3.7 Mr Hutchison referred to the policy in paragraph 64 of the NPPF, remarked that "[design] encompasses a wide range of matters …", and went on to say this:

> "The appeal scheme is considered to represent a poor design that fails to integrate and respond to the sensitivity of the rural landscape character of the area. The proposed development therefore fails to meet the requirements of policy [sic] 64 of the Framework, and permission should therefore be refused."

Mr Hutchison returned to that policy in paragraph 7.1.3 of his proof. There he said that the NPPF "is also clear that irrespective of whether the Council's housing policies, or any others for that matter, are out of date, poor design and design that does not take the opportunities available for improving the character of an area should be refused permission (paragraph 64 of the Framework)".

14. In his proof of evidence, at paragraph 4.3, Mr Bright said that the appeal site "has a very open, rural and largely undeveloped character", and that existing development on this side of Henfield "does not exert an undue visual influence on the character of the appeal site when perceived against the much more extensive backdrop of open countryside to the south west and west and the magnificent backdrop of the chalk escarpment of the South Downs beyond, in which Chanctonbury Ring is prominent". In paragraph 4.4 of his proof Mr Bright referred to the "[very] attractive characteristic panoramic and long distance views" which could be obtained from the site "to the wider undulating Low Weald countryside to the north and north

west, views which in clear weather conditions extend as far as Blackdown[,] the highest hill in Sussex, and to Leith Hill in Surrey, the highest hill in south east England". The "landmark building of St [Hugh's] Charterhouse Monastery" was "prominent in northerly views with Partridge Green Parish Church tower also a feature." When asked by the inspector what "opportunities" there were of the kind referred to in paragraph 64 of the NPPF, Mr Bright said (again according to Mr Lintott's note):

> "There are opportunities to improve structure of the boundaries. The appeal site is fundamentally a sensitive site. It is in my view poor design blocking off views. …".

15. In cross-examination by Mr Lintott, Mr Williams conceded that in the Landscape and Visual Impact Assessment which he had prepared for the proposal ("the LVIA") he had not analysed long views from the site. According to Mr Lintott's note, one of the questions Mr Williams was asked by the inspector was whether, if those long views had been analysed, there was any "other mitigation which could have been adopted". His answer to that question, as recorded by Mr Lintott, was this:

> "I would have been able to take into account and create a corridor of open views to protect them."

16. In his closing submissions at the inquiry (at paragraph 4.14) Mr Lintott referred to that evidence, and said to the inspector that even if he were to find the development of the appeal site acceptable in principle, "any well designed scheme should contain view corridors to retain these important views", and that it was "fundamental to the principles in the NPPF relating to good design and the need to integrate development into the character of the area that a scheme such as this should protect these views".

The inspector's decision letter

17. In paragraph 10 of his decision letter the inspector identified the seven main issues in the appeal, in the light of local and national policy and the council's reasons for refusing planning permission. The first two of those main issues were:

> "
>
> - What effect the development would have on the character and appearance of the landscape, including in the transition from the existing built up area towards the countryside.
>
> - Whether the design of the development would take any opportunities that are available to improve the character and quality of the area and the way it functions".

The next four main issues concerned the effect the development would have on a listed building (the grade II listed Camellia Cottage), its likely effect on the capacity of the local road network and "sustainable travel objectives", and whether sustainable arrangements would be made for drainage and other infrastructure. The last main issue was this:

"

- Whether this would be a sustainable development and whether any significant and demonstrable harm in these regards would be outweighed by the benefits of housing provision to address identified requirements".

18. The inspector considered the first main issue in paragraphs 11 to 42 of his decision letter, dividing this section under three headings: "Character and Appearance" (paragraphs 11 to 19), "Landscape character" (paragraphs 20 to 37), and "Visual Effects" (paragraphs 38 to 42).

19. In dealing with the second of those three topics, "Landscape character", he recorded the fact that the appeal site was "not locally or nationally designated for its landscape value" (paragraph 23). The 2005 West Sussex Landscape Strategy advised that in integrating new development on the edges of settlements into the wider landscape, "on-site and off-site views" should be taken into account (paragraph 25). The Henfield Parish Design Statement drew attention "to views into and out of the parish which it seeks to preserve and respect in the design and positioning of new development", but "[this] reference [was] not specific to the appeal site or any other location". It also said that further development in the West End Lane area should be prevented. However, the inspector gave "[little] weight" to this comment because the design statement was not part of the development plan and "its role [was] not to determine where development should and should not be located" (paragraph 26).

20. The inspector went on to consider the Landscape Character Assessment undertaken by the council in 2003, which had included "specific assessments of the sensitivity of the landscape to accommodate urban extensions". The appeal site was within the Henfield and Small Dole Character Area, on the boundary of Landscape Setting Areas 3 and 4, which had been "assessed respectively as having 'moderate' or 'low' sensitivity to urban extensions". This Landscape Character Assessment had identified "important views towards the Downs but those were from the south of Henfield within Area 5". Neither Area 3 nor Area 4 had then been "identified as having important views" (paragraph 27). In 2013 one of the officers of the council who had been involved in the preparation of the 2003 Landscape Character Assessment undertook a landscape character study. The only explanation the inspector could see for the officer's "markedly different conclusions" was that he now thought "the team in 2003 (of which he was part) made errors of judgement" (paragraph 28).

21. In paragraph 32 the inspector referred to the LVIA, which, he said "generally concludes that the landscape on and around the appeal site is of medium to low sensitivity, reflecting the conclusions of the 2003 [Landscape Character Assessment]. The LVIA predicted "typically moderate/slight adverse landscape effects in Year 1 but moderate or slight beneficial landscape effects in the long term". At the inquiry Barratt's landscape witness (Mr Williams) had "accepted that outward views from the development were not analysed in the LVIA. However neither had these specific views been previously identified as important in the [Landscape Character Assessment]."

22. The inspector concluded that housing development on the north side of West End Lane "would inevitably change the open and rural character" of the appeal site. Barratt had not disputed that "there would be some harm to the existing landscape character, at least in the short term" (paragraph 34). But this "would apply to almost any built development of open greenfield land on the edge of the settlement, whether it is Henfield or one of the District's other towns and villages". Changes such as this were "inevitable where greenfield sites are needed to meet identified housing needs". In the inspector's view, as he said in paragraph 35, "[the] appeal site has no special landscape designation and its own physical character is

unremarkable". He added that "[any] particular qualities that it does possess relate instead to views of and from the land."

23. In paragraph 36 the inspector said that "[in] close views towards the land from adjoining roads and footpaths the site's openness currently contributes to the generally open and rural quality of the adjoining lanes and the surrounding area". The layout of the proposed development was, he said, intended to mitigate its impact on those views. The proposed layout would, he said, "retain some qualities of openness" and "accord with an objective of the West Sussex Landscape Strategy to use open space and planting to provide a visual link to the countryside and as an attractive backdrop and foil to new development". As the planting matured it would "soften the edge of the built development and help to screen the extended settlement, notwithstanding the location of development on the low ridge" (paragraph 37).

24. Turning to the topic of "Visual Effects", the inspector referred to the "design effort" which had been "devoted to the local views towards the development from nearby roads and footpaths, including from the Downs Link". He accepted that "the viewer will be aware of the presence of the housing, particularly as in some places it will be seen on the skyline" (paragraph 38). The footpath bisecting the site was "a useful link to other paths in the area and … locally unusual in providing long views to both north and south". The views to the south included "views above trees and buildings of the outline of the distant South Downs including the outline of Chanctonbury Ring with its hillfort … typically seen in silhouette against a bright southern sky". To the north there were "more distant and indistinct views across the Low Weald towards other hills, as well as occasional distant views of the towers of St [Hugh's] Charterhouse Monastery and of Partridge Green Church, where not obscured by trees" (paragraph 39).

25. In paragraph 40 the inspector considered the likely effects of the development on views from the site:

> "Some of the outward views from parts of the existing footpath would be obscured by the proposed development. However other views would remain, particularly from the higher ground at the eastern end of the path, where a view of the Downs above the rooftops should survive, and in glimpsed views northwards through occasional gaps between the buildings. Moreover it is proposed that new paths with public access would be created to the north and south of the houses. These would provide some outward views, but because they would be on lower ground and close to the planted site margins, the available views would be more restricted than those currently available from the public footpath. Nevertheless views towards either the north or the south are available from a number of footpaths and other locations around Henfield and some long views would remain from locations on the appeal site."

26. The passage in the inspector's decision letter which is at the heart of the issues in these proceedings is paragraph 41:

> "At the Inquiry the Appellant's landscape witness acknowledged that, had long outwards views been analysed, it may have been possible to reduce the effect on such views. However it was not indicated how this might have been achieved and what effect this may have had on other objectives including the efficient use of the land and the protection of local views. I consider it likely that there would have been conflict between these objectives. To create more panoramic views to the north and south from the centre

> of the site it would have been necessary to either significantly reduce the overall amount of development or to reduce the areas of open space, whether at the edges of the development or alongside the east-west public footpath. A reduction in perimeter planting to keep outward views more open would also be likely to expose more houses in inward views from the countryside. That would also make the development appear more exposed on the skyline and would conflict with an objective of the Local Distinctiveness Guidelines to screen larger settlements."

27. The inspector concluded his assessment of "Visual Effects" in paragraph 42:

> "It is concluded that the site is not of particular landscape value and that, as an urban extension, the development would result in an inevitable change in the present landscape character. The design and layout would however respect the surroundings by retaining an open and green appearance at the edges of the development and adjacent to the footpath across the site. That public footpath does afford simultaneous panoramic long views which some people value and which would be lost. The effect would be partially mitigated in that some long views would remain from part of that path and from other paths in the wider area and because some more limited long views would also be available from other new paths on the site. Nevertheless there would be some adverse visual impact and the visual changes would adversely affect the appreciation of the landscape of neighbouring areas."

28. The inspector considered "Design" in paragraphs 43 to 52. He began in paragraph 43 by considering the relevant policies at local and national level. As to national policy, he referred in particular to paragraphs 58, 60 and 64 of the NPPF. Paragraph 64, he said, "provides that permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions". He went on to consider the existing pattern of development in Henfield (paragraphs 44 to 46), the different approaches which might have been taken to the density and layout of housing development on the appeal site (paragraphs 47 and 48), and the merits of the approach which had been taken to the design of the proposal (paragraphs 49 to 51). His conclusion on the quality of the design is in paragraph 52:

> "It is concluded that if there is a need for an urban extension on this scale to meet housing needs … then this design approach is reasonable for this site and has regard to its context and to local distinctiveness. By taking available opportunities to create areas of open space, protect some of the character of adjoining lanes, provide new rights of way, and use locally distinctive styles and materials, it would broadly accord with the design objectives of the Framework and would not be a poor design in the terms of paragraph 64 of the Framework."

29. The issue of "Housing Need" is dealt with in paragraphs 73 to 75 of the decision letter. The council accepted that there was "a significant shortfall" against the requirement for a minimum five-year supply of sites for housing, "when set against the need that was objectively assessed in the former South East Plan" (paragraph 74). Whether the five-year supply now stood at 59% of the requirement, as Barratt argued, or 64%, as the council maintained, was, in the inspector's view, "of little consequence for this appeal". The council agreed.

30. Striking the "Planning Balance" in paragraphs 76 to 83 of his decision letter, the inspector referred to government policy in paragraphs 14 and 49 of the NPPF (paragraphs 76 and 77),

and concluded that "[as] there is not here a 5-year supply of housing [the] relevant development plan policies should not be considered up to date" (paragraph 78). Whether the presumption in favour of sustainable development should apply here depended on whether other policies in the NPPF indicated that development should be restricted (paragraph 79). The appeal proposal could "make a significant contribution to the current shortage of market and affordable homes" (paragraph 81). In paragraph 82 the inspector said this:

> "It is concluded above that there would be some adverse environmental impacts and associated conflict with some objectives of the development plan and the Framework. In particular there would be a loss of open countryside, changes to local views and to the character of rural lanes, a loss of some long views from parts of the footpath across the site, and a failure to fully preserve the present open setting of a listed building or buildings resulting in a (less than substantial) effect on heritage significance. … But the early provision of new homes in circumstances of a local shortfall also merits considerable weight and importance, particularly as the recent regional and national shortfall in housebuilding has been widely reported, as has the current high level of demand. Some of these environmental effects would be experienced in any expansion of a built-up area and the proposed design provides substantial mitigation. It is not a poor design as some have suggested."

The inspector's conclusion in this part of his report was that the likely "adverse environmental effects" of the proposed development were "limited" and did not outweigh "the considerable social and economic benefits". Policy in the NPPF did not indicate that the development should be restricted. The development would therefore be "sustainable", and "the presumption in favour of such development should be applied". This was, said the inspector, "a material consideration which here outweighs a literal conflict with some development plan policies and especially those policies that are out of date in respect of housing supply".

Was the inspector's approach to the loss of views from the appeal site unlawful?

31. In his submissions on behalf of the council Mr Lintott says it is clear from the second of the inspector's main issues that he saw the quality of the design of the proposed development as a matter of central importance in his decision. That issue reflects the language in paragraph 64 of the NPPF. The inspector recognized the importance of views both to and from the site (paragraph 35 of the decision letter), evidently understood that relevant local policies, including the 2005 West Sussex Landscape Strategy and the Henfield Parish Design Statement, required such views to be protected in the design of new development (paragraphs 25 and 26), recorded the fact that Mr Williams had not analysed "long outward views" from the appeal site (paragraphs 32 and 41), found that the loss of "simultaneous panoramic long views" from the footpath across the site would be harmful (paragraph 42), noted the concession that if long outward views had been analysed it might have been possible to reduce the effect of development on those views, but concluded nonetheless that to have done this would have resulted in a "significantly" less efficient use of the appeal site for housing or a reduction in open space, and would have been likely to display more of the development to inward views, and make it appear more exposed on the skyline (paragraph 41). Thus, Mr Lintott argues, in the part of his decision letter in which he was considering "Visual Effects", the inspector identified an opportunity "for improving the character and quality" of the area, which the design of the proposed development had not taken. This was a point he should also have added to his consideration of the "Design" and his conclusions on the "Planning

Balance". But he did not do that because he had misled himself into thinking that the opportunity to protect outward views could be disregarded.

32. Mr Lintott submits that the inspector plainly failed to take into account a material consideration, which at least might have made a difference to his decision. Mr Williams' concession was not merely that it "may have been possible" to reduce the effect of development on long outward views, but that it "would" have been possible to take those views into account in the design and "create a corridor of open views to protect them". But in any event there was no proper basis for the inspector's conclusion that this would have resulted in the harm he thought was likely. This was not a conclusion he could reasonably make on the evidence before him. He did not explore the ways in which "a corridor of open views" might have been created, and what the consequences of doing that would really have been. Indeed, says Mr Lintott, the inspector's conclusion is disproved by the evidence before the court in the witness statement of Mr Bright, which shows how one could have achieved "possible view corridors" to the north and south without compromising the efficient use of the site, reducing open space within the development, or spoiling local views more than was absolutely necessary. And if it had turned out to be necessary to reduce the amount of housing proposed on the site, one cannot know whether the inspector would have regarded it as significant. There was no absolute need to build as many as 160 dwellings on the site.

33. Mr Lintott goes on to submit, therefore, that the inspector misunderstood and misapplied government policy in paragraph 64 of the NPPF – a specific policy which indicates that development should be restricted, and is capable therefore of overriding the presumption in favour of sustainable development. The inspector ought to have seen the conflict here with paragraph 64. In the light of this policy, he was not entitled to grant planning permission for Barratt's proposal while it was still possible for a scheme to come forward in which long views from the site would be better protected. Mr Lintott acknowledges (in paragraph 43 of his skeleton argument) that "[land] may be developed in any way that is acceptable, and the presence of a better alternative design is not a lawful reason for refusal of itself". But, he says, this was patently one of those "opportunities" which paragraph 64 requires developers to take if they are to gain planning permission for their proposals. Barratt's scheme should have been rejected because it was poor design. It was, Mr Lintott submits (in paragraph 39 of his skeleton argument), "wrong in principle to grant permission where this key issue has not been addressed, rather than dismissing the appeal and allowing [Barratt] to design a scheme which does address this issue or demonstrates that it is simply not possible to do so and that the opportunity is therefore not available".

34. Mr Lintott's final submission is that in any event the inspector failed to give proper, adequate and intelligible reasons for concluding that the policy in paragraph 64 of the NPPF had been complied with in this case, and, in particular, for discounting the opportunity to preserve views from the site.

35. I cannot accept that argument.

36. There are cases in which the court has to remind claimants of the limits to its jurisdiction in challenges to planning decisions under section 288 of the 1990 Act (see, for example, *Newsmith Stainless Ltd. v Secretary of State for the Environment* [2001] EWHC Admin 74 and *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin)). This is one of those cases. The classic description of the grounds on which such a challenge may be made is that given by the Court of Appeal in *Ashbridge Investments Ltd. v Minister of Housing and Local Government* [1965] 1 W.L.R.

1320, in the judgment of Lord Denning M.R. at p.1326F and the judgment of Harman L.J. at p.1328H to p.1329A). This jurisdiction, now exercised by the Planning Court, is well established. It rests on a number of basic principles. Three of those basic principles bear on the issue I am considering here:

(1) An application under section 288 of the 1990 Act does not afford "an opportunity for a review of the planning merits" of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith Stainless*, at paragraph 6). The weight to be attached to any material consideration and all matters of planning judgment are for the decision-maker, who is free, so long as he does not "lapse into *Wednesbury* irrationality", to give material considerations "whatever weight [he] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H).

(2) The interpretation of planning policy is ultimately a matter of law for the court, but the application of relevant policy is for the decision-maker. Planning policies are not to be construed with the rigour appropriate to the interpretation of a statute or a contract. Statements of policy will be interpreted objectively by the court in accordance with the language used, read in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgement of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2102] P.T.S.R. 983, at paragraphs 17 to 22). When it is suggested that an inspector has failed to understand a relevant policy the court must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, in *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83).

(3) Decision letters of the Secretary of the State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. They are written principally for parties who know what the issues between them are. An inspector does not have to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28). The reasons for a decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No.2)* [2004] 1 W.L.R. 1953, at p.1964B-G).

37. Tested against the relevant principles of public law, including those to which I have just referred, the inspector's decision in this case does not seem to me to be defective in any way.

38. I do not accept that he misunderstood or misapplied government policy in paragraph 64 of the NPPF.

39. Paragraph 64 is one of 13 paragraphs in the NPPF which explain what the Government wants the design of new development to achieve. Properly understood, that paragraph of the NPPF

does not seek to define "poor design" simply as design which "fails to take the opportunities available for improving the character and quality of an area and the way it functions". It means that design which, in the decision-maker's judgment, fails in this particular respect is one kind of "poor design" and, in principle, should not be accepted. But it does not say, and in my view it does not mean, that a proposal which does not take every conceivable opportunity to improve the character and quality of an area, or which does not do as well in this respect as some alternative proposal might have done, must therefore automatically be rejected. To read that concept into the policy would be to misconstrue it.

40. There is a further point. The policy in paragraph 64 must not be read in isolation from the broader context of policy on design in which it is set, or the still broader context of national policy for delivering "sustainable development". The policies in paragraphs 56 to 64 of the NPPF refer to some of the many considerations involved in the design of development. Assessing the merits of a particular proposal will require the decision-maker to consider the design as a whole in judging whether it is "good design" or not. As Mr Richard Kimblin submits on behalf of the Secretary of State (in paragraph 20(iv) of his skeleton argument), "the decision maker has to make an assessment of the design in the round, giving such weight as is appropriate to the various factors and constraints which properly come into play".

41. When the design of a development is being considered, aesthetic judgments have to be made. Such judgments are squarely within the responsibility of local planning authorities when determining applications for planning permission, and, on appeal, the Secretary of State and his inspectors. They are among the most difficult to upset in proceedings such as these**,** because widely differing views on the quality of a particular design can fall within the range of reasonable judgment. The same may be said of the conclusion reached by a decision-maker when judging whether a developer has failed "to take the opportunities available for improving the character and quality of an area and the way it functions", and whether, for this reason, his proposal should be regarded as "poor design".

42. In this case the inspector referred to the policy in paragraph 64 of the NPPF, as one would have expected, in the section of his decision letter where he considered "Design", in paragraphs 43 to 52 (see paragraph 28 above). This was the part of his decision letter in which he addressed the second of the seven main issues he had set for himself in paragraph 10. It cannot be said that he was unaware of the need to tackle the question effectively posed by paragraph 64 of the NPPF. He deliberately framed his second main issue using the words of that paragraph (see paragraph 17 above). And when he began his consideration of the issue of "Design", in paragraph 43 of his decision letter, he again spelt out the policy in paragraph 64.

43. In paragraph 52 the inspector expressed a clear conclusion on the quality of the design of Barratt's proposed development. If an "urban extension on this scale" was required to meet housing needs – and he went on to find that it was – the approach taken to the design of this extension to the settlement of Henfield was, he concluded, "reasonable for this site and has regard to its context and to local distinctiveness". He applied the policy on good design in paragraphs 56 to 68 of the NPPF generally, and the policy in paragraph 64 specifically. He found that the design approach adopted in the scheme "would broadly accord with the design objectives of [the NPPF]". But his conclusions on the design of the development went further than that. He concluded that the design would take "available opportunities" in each of the four respects he identified: first, by creating areas of open space; secondly, by protecting some of the character of adjoining lanes; thirdly, by providing new rights of way; and fourthly, by using locally distinctive styles and materials. His judgment, therefore, was that

this "would not be a poor design in the terms of paragraph 64 of [the NPPF]". That judgment seems to me to be entirely reasonable, clearly explained, and based on a secure planning assessment with which the court could not properly interfere.

44. The inspector brought his conclusions on the design of the proposal into his consideration of the "Planning Balance" in paragraphs 76 to 83 of his decision letter, where he weighed the benefits of the proposed development against its disadvantages, including its "adverse environmental impacts", one of which was "a loss of some long views from parts of the footpath across the site" (see paragraph 30 above). In the final sentence of paragraph 82, he repeated his conclusion that the design of the development was "not a poor design". On this question he was absolutely unequivocal. And again, I cannot see any basis on which his judgment upon it, or the careful analysis on which that judgment was founded, could conceivably be said to be bad in law.

45. Those conclusions of the inspector show that he understood paragraph 64 of the NPPF correctly and applied it lawfully when considering the design of the proposed development. The inspector focused on the policy in paragraph 64, as well as the broader policies on the design of development within which that paragraph is set. Conscious of those policies, as he clearly was, he exercised his own judgment on the issues relating to "good design" and "poor design", concluded firmly that the proposal was not of "poor design", and brought that conclusion into the comprehensive assessment of the planning merits on which he based his decision. That is what he had to do. The judgments involved, including the judgment required under the policy in paragraph 64 of the NPPF, were for him to make, not the court. And in my view the judgments he made are unassailable on *Wednesbury* grounds.

46. Mr Lintott's submission that the inspector failed to have regard to a material consideration is, I believe, untenable for the following reasons**.**

47. It cannot be suggested that the inspector failed to consider the evidence and submissions put before him on views to, within, and from the site. On the contrary, he did so with conspicuous care: in his consideration of "Landscape character" (see paragraphs 19 to 23 above); in his assessment of "Visual Effects" (see paragraphs 24 to 27 above); and in his conclusions on the "Planning Balance" (see paragraph 30 above). His treatment of views was a recurrent theme in his discussion of the planning merits. But it was far from being the only one, and its significance in his decision should not be exaggerated.

48. The passage of the decision letter on which Mr Lintott concentrated in particular – paragraph 41 – was not the crucial part of the inspector's decision. It was one step in one stage in his consideration of his first main issue – the effect the development would have on the character and appearance of the landscape. That is its context (see paragraphs 25 to 27 above).

49. In paragraph 40 the inspector concentrated on the effect the proposed development would be likely to have on views from the site. Certain views would be lost, others gained. The development would obstruct some views from the public footpath. But other views from that path would remain. New paths would be created, which the public would be able to use. These would allow views out of the site, albeit more restricted views than those available from the existing path. From other footpaths and other places in Henfield there were views to the north and south. Some long views from the site itself would remain. None of those findings is attacked in these proceedings. It is not suggested that the inspector failed to take into account any view he ought to have considered, or that his findings were factually wrong. He did not conclude, either here or anywhere else in his decision letter, that the effect the

development would have on views from the site was symptomatic of "poor design" or would justify the refusal of planning permission.

50. It was in the light of his findings in paragraph 40 that the inspector went on to consider whether the impact of the development on views out of the site might have been reduced had the scheme been designed in a different way.

51. In the first sentence of paragraph 41 he acknowledged, as he had in paragraph 32, Mr Williams' confirmation that long outward views had not been analysed in the LVIA. He also noted Mr Williams' concession that the effect of development on such views might have been reduced in a different design. I do not regard his use of the word "may" rather than the word "would" – as recorded by Mr Lintott – as being of anything more than semantic significance. On a sensible reading of paragraph 41 he plainly did accept that it would be possible for a scheme to be devised in which the effect of development on views from the site would be less than it would be with the development actually proposed, even though no such scheme had been produced in evidence at the inquiry.

52. The inspector went on to say, rightly, that it had not been indicated at the inquiry how the effect on long views from the appeal site might have been reduced, or what implications this would have had on "other objectives" – my paraphrase. The two particular objectives he mentioned were "the efficient use of land" and "the protection of local views". As Mr Lowe for Barratt submits, these two considerations were clearly relevant to the matter the inspector was considering here. In the absence of any evidence to demonstrate the contrary, he was entitled to take the view that a scheme in which the effect of development on outward views was reduced would be "likely" to generate some "conflict" between relevant planning objectives. This is the proposition in the third sentence of paragraph 41. In the light of the parties' evidence and submissions at the inquiry it seems not only reasonable but wholly unsurprising. It cannot conceivably be said to be unsound as a matter of law. On its own it would have supported the conclusion that to reject Barratt's proposal on the grounds of a failure to reduce the effect of development on outward views would be wrong.

53. However, the inspector did not leave it at that. In the last three sentences of paragraph 41 he referred to the problems he foresaw with a scheme that attempted to create wider views to the north and south from the centre of the site – in summary, either a significant reduction in the amount of development or a reduction in the open space provided within it, the likelihood of more of the development being revealed to inward views from the countryside beyond, and the development as a whole being more exposed on the skyline, which would go against an objective in relevant guidance. In paragraph 42 he accepted that there would be an "inevitable change in the present landscape character of the appeal site itself". He also accepted that "simultaneous panoramic long views" from the public footpath across the site would be lost, but found that this loss would be "partially mitigated". His conclusion, at the end of that paragraph, was that there would be "some adverse visual impact", and that "the visual changes would adversely affect the appreciation of the landscape of neighbouring areas". These conclusions he carried into his consideration of the "Planning Balance" in paragraphs 82 and 83, where he said the "adverse environmental effects" would be "limited" and did not outweigh the proposal's "considerable" benefits (see paragraph 30 above). In my view, it cannot be said that any of his conclusions in paragraph 42, or the corresponding elements of his later discussion of the "Planning Balance", is legally flawed.

54. No criticism can fairly be made of the inspector for what he said about those likely consequences of designing the proposal in a different way. Mr Lowe points out that the

possibility of doing this to accommodate panoramic views from the appeal site was not, as he put it, a "principal important controversial issue" that one could have discerned in the council's reasons for refusal, or in its statement of case, or in the summary of its case provided by Mr Hutchison in his proof of evidence, or even in the proof of Mr Bright.

55. But I do not have to go that far. I need only conclude that the inspector could reasonably deal with the matter in the way he did. In my view, he could. The council was not positively contending for a smaller or different scheme. It was not, at least at that stage, prepared to support any residential development on the site. Without knowing whether the inspector was going to accept the principle of the site being developed for housing or the scale of development proposed by Barratt, it had to decide how its case at the inquiry should be put. It did not want to risk undermining its opposition to the appeal by putting some alternative scheme before the inspector for him to compare with Barratt's proposal. I can understand that. But in the circumstances the inspector did not have to speculate about the precise form an alternative scheme might take, or anticipate such a scheme being proposed if Barratt's appeal were dismissed. Without any tangible alternative scheme in front of him, he could only consider the matter hypothetically, applying his judgment to the evidence presented on either side. And that is what he did.

56. In my view the inspector exercised his judgment entirely lawfully on the evidence before him. In the light of the evidence the conclusions to which he came were undoubtedly open to him. He did not fail to have regard to any material consideration, nor did he have regard to any immaterial consideration, nor were any of his conclusions unreasonable in the *Wednesbury* sense.

57. I should add this. I do not read the inspector's conclusions in paragraphs 41 and 42 of his letter, or his later conclusions on "Design" and the "Planning Balance", as reflecting an assumption that, regardless of the principles of good design and sustainable development, the appeal site must be developed with a scheme of not less than 160 dwellings. He did not assume that. He saw the provision of 160 new homes as a benefit of the proposed development because of the contribution it could make to reducing the significant shortage of housing in the district of Horsham (paragraphs 74 and 81 of the decision letter). He concluded that Barratt's scheme for that number of dwellings was not "poor design", either in the sense of paragraph 64 of the NPPF or in any other respect (paragraphs 52 and 82), and also that the development would be sustainable (paragraph 83). Given those conclusions, it would have been absurd for him to set about comparing Barratt's proposal with imaginary schemes for a smaller number of dwellings.

58. The suggestion that the inspector could not approve Barratt's scheme if he thought a better one might have been proposed is misconceived. That idea is not implicit in paragraph 64 of the NPPF (see paragraph 39 above). Nor, as I said at the outset, does it find support in planning law (see paragraph 1 above). In *First Secretary of State and West End Green (Properties) Ltd. v Sainsbury's Supermarkets Ltd.* [2007] EWCA Civ 1083 Keene L.J. said (in paragraph 38 of his judgment, with which Mummery L.J. and Richards J. agreed):

> "There is certainly no legal principle of which I am aware that permission *must* be refused if a different scheme could achieve similar benefits with a lesser degree of harmful effects. In such a situation, permission *may* be refused but it does not have to be refused. The decision-maker is entitled to weigh the benefits and the disbenefits of the proposal before him and to decide (if that is his planning judgment) that the proposal is

> acceptable, even if an improved balance of benefits and disbenefits could be achieved by a different scheme. …".

59. In this case, as Mr Lowe submits, the fact that a different approach could have been taken to the design of the scheme, and that this could have preserved some views from the site which would not be preserved by Barratt's development, does not mean that the design of the proposal the inspector was actually considering was itself contrary to government policy in the NPPF. In his judgment, clearly, the design was not contrary to that policy and there was no need to reject the proposal, leaving Barratt to come back, if they chose to, with a different one. The reality here, which Mr Lintott's submissions do not seem to confront**,** is surely this. If the inspector had found some conflict with the NPPF because the proposal before him betrayed "poor design" he would have said so. But he did not. If he had thought Barratt's scheme failed to take a worthwhile opportunity to improve "the character and quality" of the area and "the way it functions" by reducing the effect of development on long outward views, he would have said that. Again, he did not. Plainly, in his judgment, this did not count as an opportunity missed. That is why, in his conclusions on "Design" in paragraph 52 of the decision letter, when he gauged the success of the proposal in meeting the requirements of the policy in paragraph 64 of the NPPF and its benefits in taking relevant "opportunities", he did not have to set against those benefits a failure to do more than it did to protect views from the site.

60. The inspector was entitled, indeed required, to exercise his own judgment on those matters. He did so, as I have said, in an entirely lawful way, applying policy in the NPPF impeccably. It may be that the council disagrees with him, but such disagreement is not ammunition for a legal challenge.

61. Neither is the evidence given by Mr Hutchison in his second witness statement, dated 5 August 2014, where he introduced the council's "Alternative Scheme", which it had by then prepared "to demonstrate [that] the residential development of the appeal site can be brought forward whilst taking the opportunity to improve the character of an area and the way in which it functions" (in paragraphs 7 to 21) – to which Mr Williams responded in his witness statement of 13 August 2014, rebutting Mr Hutchison's comments on the "Alternative Scheme" (in paragraphs 25 and 35 to 47), and producing a new drawing "showing viewing corridors from the eastern part of the footpath on the [appeal site]" (exhibit "DHW1"). And neither is the evidence given by Mr Bright in his witness statement of 28 October 2014, responding to Mr Williams' comments on the council's "Alternative Scheme" (in paragraphs 18 to 22), and producing a new drawing showing corridors of view from the appeal site towards the South Downs and the Low Weald (exhibit MPJBi) and freshly taken photographs to illustrate those views (exhibit MPJBii).

62. The court has always deprecated attempts to re-open discussion of the planning merits by introducing such material in affidavits and witness statements. Doing this in an effort to bolster a legal challenge, or to strengthen resistance to it, is both inappropriate and futile – a point forcefully made by Sullivan J. in *Newsmith Stainless* (at paragraphs 10 and 11), which users of the Planning Court should heed. In an application under section 288 of the 1990 Act challenging an inspector's decision the documentary evidence provided to the court should generally be confined to the decision letter itself and material which was available to the inspector. A similar approach should apply in a claim for judicial review of a local planning authority's decision to grant planning permission (see, for example, the judgment of Jackson L.J. in *R. (on the application of Lanner Parish Council v Cornwall Council* [2013] EWCA 1290, with which Rimer and Lewison L.JJ. agreed, at paragraphs 57 to 64). It is not

acceptable for any party in proceedings such as these to burden the court with contentious illustrative material which was not before the decision-maker when the challenged decision was made. Nor should the parties think that such evidence will persuade the court to look more sympathetically upon an advocate's submissions on alleged errors of law. It will not.

63. Ironically, the production of the council's new material at this stage serves only to highlight the fact that it was not put before the inspector. But even if it had been properly admissible in evidence before the court it would not have altered my conclusions on this ground of the council's application – or, indeed, on the other ground. This is because, as Mr Lowe submits, it really achieves nothing more than to prove the point Mr Williams conceded, which is that a development could have been designed for the appeal site with wider views to the surrounding countryside. It does not prove that such a scheme would qualify in all other respects as "good design" under relevant policy in the NPPF.

64. Finally, I reject the submission that the inspector failed to give clear and adequate reasons for the conclusions he reached on the design of the development under the policy in the NPPF. As will be apparent from the passages of his decision letter which I have quoted or summarized, his reasons are full and completely clear. They leave no room for doubt that he had a true understanding of NPPF policy on good design, including paragraph 64, applied it properly, and exercised a lawful planning judgment on the matters he had to consider.

65. Ground 1 of the council's application therefore fails**.**

Did the inspector act unfairly?

66. It is contrary to the principles of natural justice, Mr Lintott submits, for an inspector to base his conclusions on an opinion of his own, which goes against the case of one of the parties to an appeal, without giving that party the opportunity to address it. Yet that is what happened here. After Mr Williams had conceded that he would have been able to take outward views into account and create a "corridor" to protect them, the inspector did not pursue the matter any further and did not invite the parties to do so. Only when his decision letter was issued did his thoughts about conflict with "other objectives" emerge – in paragraph 41. So the council was denied the opportunity to deal with the matter in evidence or submissions. Whatever alternative layout the inspector might have had in mind, it was unable to comment on that scheme or to produce an alternative layout of its own showing how conflict with "other objectives" could be avoided.

67. I see no force at all in that argument.

68. The Court of Appeal has recently, in *Secretary of State for Communities and Local Government v Hopkins Developments Ltd.* [2014] EWCA Civ 470 and *San Vicente v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1555, revisited the principles relating to procedural fairness at inquiries and hearings into planning appeals, in the light of relevant authority stemming from Lord Russell of Killowen's observations on parties being given "a fair crack of the whip" in his speech in *Fairmount Investments Ltd. v Secretary of State for the Environment* [1976] 1 W.L.R. 1255 (at pp.1265-1266). In his judgment in *Hopkins*, at paragraph 47, Jackson L.J. formulated "the principle of natural justice or procedural fairness" as being that "[any] participant in adversarial proceedings is entitled (1) to know the case which he has to meet and (2) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case". This was the first

of the seven principles which, in paragraph 62, he said he derived from the relevant authorities. Beatson L.J. observed (in paragraph 85 of his judgment) that it was "a commonplace that in the context of administrative decision-making the ascertainment of what procedures are required is acutely sensitive to context and the particular factual situation". The crucial question in that case was whether the developer had had a reasonable opportunity to put its case on "sustainability" and "character and appearance" at the inquiry, both of which were live issues even though neither of them had been identified by the inspector as a "main issue" (paragraphs 88 and 89). Beatson L.J. concluded that "a developer who does not avail himself of the opportunity to test evidence adduced about such an issue (if necessary by seeking an adjournment to adduce further evidence) or to make submissions about it may not complain of procedural unfairness if the inspector's decision is based in whole or in part on that issue" (paragraph 97).

69. Applying the principles identified by the Court of Appeal in *Hopkins* to the circumstances of this case, I see nothing procedurally unfair – or contrary to natural justice – about the way in which the inspector conducted Barratt's appeal. The council was able to present its case against the appeal, and did, through evidence, cross-examination and submissions on all of the main issues, including those relevant to these proceedings.

70. There is, I think, a distinct air of unreality about this ground of the council's application. This is not an instance of a party being unaware of the case it had to meet, or denied a reasonable opportunity to resist the other side's evidence and submissions. It is not an instance of another party, or an inspector, raising some novel point at a late stage, which left the aggrieved party at any real disadvantage. The essence of the council's complaint is that it did not have a fair opportunity to tackle a point which emerged during the inspector's questioning of one of Barratt's witnesses after his cross-examination by its own advocate on the likely effects of the proposed development on views from the site. The council's true grievance is that it was not warned by the inspector that he might exercise his judgment on this matter in the way he eventually did in paragraph 41 of his decision letter.

71. That complaint lacks any substance. It should be remembered that the agenda for the inquiry was largely shaped by the council's own decision to refuse planning permission, against which Barratt appealed. The council had made that decision in the light of its officers' advice, stating its reasons for refusal with care. As Mr Kimblin points out, the inquiry into the appeal was held almost a year after the application was submitted. So the council had ample time in which to prepare its case, including evidence about the design of the proposal, and about effects on "landscape character" and views to and from the site. If, rather than opposing any development on the site, the council had wanted to suggest how the relevant objectives of planning policy, including the policy in paragraph 64 of the NPPF, could be met by some other proposal – whether for 160 dwellings or a smaller number – it could have done so. But at that stage it was not willing to embrace the principle of the site being developed for housing or to volunteer any ideas of its own on the design of a suitable scheme. Nor did it ask the inspector to give it time to prepare an alternative design, even in sketch form, after Mr Williams had conceded that it would have been possible to reduce the effects on outward views. Again, either it chose not to do that or it never thought about doing so. Anyway, it did not. Only now, in its evidence to the court in these proceedings, has it produced its "Alternative Scheme".

72. In these circumstances it is quite impossible, in my view, for the council to complain of any procedural unfairness on the part of the inspector. There was none. If the council now regrets

not having taken the opportunity it had to produce its "Alternative Scheme" in evidence at the inquiry, the inspector is not to be criticized for that.

73. This ground therefore also fails.

Conclusion

74. For the reasons I have given the council's application must be dismissed.