Neutral Citation Number: [2017] EWCA Civ 39

Case Nos: C1/2016/0986, C1/2016/1016

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MRS JUSTICE LANG DBE
[2016] EWHC 247 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 January 2017

Before:

Lord Justice McFarlane
and
Lord Justice Lindblom

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Between:

(1) Secretary of State for Communities and Local Government
(2) Knight Developments Ltd. — **Appellants**

- and –

Wealden District Council — **Respondent**

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Mr Richard Kimblin Q.C. (instructed by **the Government Legal Department**) for the **First Appellant**
Mr James Maurici Q.C. (instructed by **Richard Max & Co. Solicitors**) for the **Second Appellant**
Mr Rhodri Price Lewis Q.C. and Mr Scott Lyness (instructed by **Sharpe Pritchard LLP**) for the **Respondent**

Hearing dates: 18 and 19 October 2016

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Judgment Approved by the court for handing down

Lord Justice Lindblom:

Introduction

1. These two appeals concern an inspector's decision to grant planning permission for a development of housing on a site near Crowborough in East Sussex. Two distinct questions arise. Did the inspector fall into error in considering the possible effects of the proposed development on the Ashdown Forest Special Area of Conservation ("the SAC") and the Ashdown Forest Special Protection Area ("the SPA")? And did he misdirect himself when considering alternative sites for the development in the light of government policy for "major development in an Area of Outstanding Natural Beauty" in paragraph 116 of the National Planning Policy Framework ("the NPPF")? Neither question raises any novel issue of law.

2. The two appellants are the Secretary of State for Communities and Local Government, whose inspector, Mr David Nicholson, made the decision, and Knight Developments Ltd., the applicant for planning permission. The respondent in both appeals is Wealden District Council, the local planning authority. The proposed development was the construction of 103 dwellings, 42 of them to be provided as affordable housing, and the provision of 10 hectares of "suitable alternative natural green space" ("SANG") and public open space, on land at Steel Cross, a small settlement to the north of Crowborough. The site is in the countryside, beside the A26 trunk road, in the High Weald Area of Outstanding Natural Beauty ("the AONB"), and about 2.4 kilometres from the edge of Ashdown Forest. The council refused planning permission on 13 February 2014. Knight Developments appealed to the Secretary of State. The inspector held an inquiry into that appeal over 11 days in March and April 2015. In a decision letter dated 16 July 2015 he allowed the appeal. The council challenged his decision by an application under section 288 of the Town and Country Planning Act 1990. The challenge succeeded before Lang J.. In an order dated 17 February 2016 she quashed the inspector's decision. I granted permission to appeal on 11 May 2016.

The issues in the appeal

3. On the first question, relating to the inspector's consideration of the possible effects of the development on the SPA and the SAC, we have four issues to decide. First, did he adopt too strict an approach in concluding that there was no need for an "appropriate assessment" under article 6(3) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") and regulation 61 of the Conservation of Habitats and Species Regulations 2010 ("the Habitats regulations") (ground 2 of the Secretary of State's appeal)? Secondly, was he wrong, as the judge concluded he was, to assume that heathland management to mitigate the effects of nitrogen deposition would be carried out under a strategic access management and monitoring strategy ("SAMMS") (ground 3 of the Secretary of State's appeal, and ground 1 of Knight Developments')? Thirdly, did he fail to take into account evidence given for the council on the efficacy of heathland management (ground 2 of Knight Developments' appeal)? And fourthly, was the judge wrong not to exercise her discretion to withhold relief (ground 3 of Knight Developments' appeal, supported by the Secretary of State), and, in particular, did she fail to give appropriate weight to the views of

Natural England as "relevant nature conservation body" (ground 1 of the Secretary of State's appeal)?

4. On the second question, concerning the inspector's consideration of the effect the development would have on the AONB and his approach to alternative sites, there is a single issue: whether he misinterpreted and misapplied the policy in paragraph 116 of the NPPF, wrongly confining the exercise to Crowborough rather than considering the availability of sites throughout the district (grounds 4 and 5 of the Secretary of State's appeal, and grounds 4, 5 and 6 of Knight Developments').

Possible effects on biodiversity in Ashdown Forest – the inspector's conclusions

5. Ashdown Forest contains one of the largest continuous blocks of lowland heath in south-east England. The SAC, which extends to about 2,700 hectares, comprises both Northern Atlantic wet heaths with Erica tetralix and European dry heaths. It is a "European site" under regulation 8 of the Habitats regulations. The SPA was designated mainly for the protection of two species of bird: the Nightjar and the Dartford Warbler, both included in Annex 1 of EU Directive 79/409/EEC on the conservation of wild birds, as amended. Ashdown Forest is also designated a Site of Special Scientific Interest ("SSSI"), for its heaths, birds, invertebrates, reptiles and amphibians, including the Great Crested Newt.

6. In its decision notice refusing planning permission the council contended that "both alone and in combination with other plans and proposals, [the proposed development] would have an adverse effect on the integrity of the SPA and SSSI, including impact through pressures for increased recreational use of the Ashdown Forest and the intensification of nitrogen deposition in the protected area by additional traffic generated". The proposal had "not demonstrated adequate mitigation for the cumulative impacts caused to the biodiversity interests".

7. In his decision letter the inspector said there were five "main issues" in Knight Developments' appeal. One of them was the effect of the development on "the biodiversity of the Ashdown Forest", having regard, in particular, to "recreational use" and "nitrogen (N) deposits" (paragraph 9).

8. There was no dispute that the proposal engaged regulation 61 of the Habitats regulations. Regulation 61 required the inspector, as the "competent authority" in this case, "before deciding to … give … permission … for … a … project which … is likely to have a significant effect on a European site … (either alone or in combination with other … projects)", to "make an appropriate assessment of the implications for that site in view of the site's conservation objectives". The inspector acknowledged that the Habitats regulations "essentially take a precautionary approach to potential effects on a site's conservation objectives" (paragraph 42 of the decision letter). He referred to regulation 61, reminding himself that "[the] Courts … have found that the threshold for requiring an *appropriate assessment* is very low" (paragraph 43). He mentioned the decision of the Court of Justice of the European Union in *Sweetman and others v An Bord Pleanala (Galway County Council and another intervening)* [2014] P.T.S.R. 1092.

9. He considered first the effects of "recreational use" (in paragraphs 44 to 54 of his decision letter). "SAMMS projects" had been identified, "particularly related to dogs". Mid Sussex District Council was receiving "contributions from developers" for its "SAMM Interim Mitigation Strategy" (paragraph 52). Knight Developments had "offered a contribution towards the SAMMS" with the intention of "reducing recreational and other impacts". The level of funding was yet to be determined, but the contribution "would offset any likely significant adverse effects and more than overcome any shortcoming in the SANG provision" (paragraph 53). The inspector concluded that "on balance the proposals would not result in any harm to [Ashdown Forest] from recreational uses" (paragraph 54).

10. The potential effects of nitrogen deposition were a separate matter. Nitrogen deposits from vehicle exhausts can harm heathland habitat through increased acid deposition and eutrophication. The inspector had to consider whether it was possible to exclude a risk of likely significant effects on the European site as a result of nitrogen deposition from vehicle exhausts on the relevant stretch of the A26 – 255 metres in length. The parties had agreed that the proposed development on its own would not be responsible for harmful effects, and that the issue for the inspector was whether it was likely to do so in combination with other development.

11. The expert witness who gave evidence on ecological matters for Knight Developments, Mr Adrian Meurer of Hankinson Duckett Associates, had produced a "Note on management to counter effects of nitrogen deposition on the Ashdown Forest SAC", dated 30 March 2015, in which he said that heathland management could address any risk of harm to the SAC. He relied on guidance from DEFRA in a pamphlet entitled "The Impacts of Acid and Nitrogen Deposition on Lowland Heath", which referred to the use of habitat management to maintain low nutrient levels. Some management, including the cutting of heathland vegetation and bracken, and grazing by ponies, sheep and cattle, was already taking place (paragraph 4 of the note). Given that the additional nitrogen deposition attributable to the proposed development would be "de minimis", any heathland management brought about through the appeal scheme "should not be regarded as either mitigation or compensation, but … as 'enhancement'" (paragraph 9). The note also confirmed Mr Meurer's oral evidence that "in the future an allowance for heathland management could, and should, be included within the [SAMMS] employed in relation to the Ashdown Forest" (paragraph 13).

12. For the council, expert evidence on ecology was given by Mr Christopher John of Ecus Ltd.. He contended that lowland heath requires management in any event to maintain the eco-system, and that traditional management techniques are unlikely to mitigate nitrogen deposition; that the effects of management and its relationship with retained nitrogen are uncertain and difficult to predict, and vary from site to site; and that management to reduce the effects of nitrogen deposition has been found to have unintended consequences, including damage to plants, and to birds, animals and water quality and the loss of seed bank – for example, as he put it in his speaking note, "repeated cutting may lead to competition from rank species and changes in species composition" (paragraph 4.1.6 of Mr John's speaking note). It was "not possible to propose a suitable mitigation scheme [in this case] without further study to determine both the level of impact of [nitrogen] deposition resulting from the proposal and the level of impact (positive or negative) of any proposed management" (paragraph 4.1.7).

13. Knight Developments relied on a unilateral undertaking, under section 106 of the 1990 Act. This included, in Schedule 9 – "Contributions payable to the District Council", covenants to pay the council "The Strategic Access Management and Monitoring Strategy (SAMMS) Contributions" and the "Heathland Management Contribution". The "Strategic Access Management and Monitoring Strategy (SAMMS) Contributions" were defined as a sum calculated by reference to a tariff published and adopted by the council, or, in default of that, the tariff specified in the obligation. The "Heathland Management Contribution" was defined as "the total payment of £12,500 … (£500 per hectare over a 100 year period cutting on rotation every 25 years) towards heathland management measures on Ashdown Forest to include management of 5 hectares of land associated with a 255m section of the A26 road x 200m into the SAC".

14. In dealing with the potential effects of nitrogen deposition from vehicle exhausts (in paragraphs 55 to 74 of his decision letter), the inspector said that "in adopting the precautionary principle, restricting any increase in housing would limit any increase in harm to [Ashdown Forest]" caused by additional car journeys (paragraph 55). He referred to the core strategy inspector's conclusions that the council's estimate of an increase of 950 in the annual average daily traffic flow ("AADT") on one section of the A26 "did not leave much headroom" below the figure of 1,000 AADT in the Design Manual for Roads and Bridges, which the council had taken as the threshold for appropriate assessment, and that "further development should be restricted on a precautionary basis" at least until the results of the core strategy review were released in 2015. This approach had been upheld by the court in *Ashdown Forest Economic Development LLP v Secretary of State for Communities and Local Government and others* [2014] EWHC 406 (Admin) (paragraph 58). Knight Developments had argued that since "screening" was not required for the 9,500 homes proposed in the core strategy, "the same should apply" to their proposal for 103 dwellings (paragraph 60). But the council said that "even one new dwelling, cumulatively with developments in Wealden and other districts" could not be "screened out" and that "an *appropriate assessment* should be required" (paragraph 61). The inspector acknowledged that the figures may be inaccurate, but concluded that "further developments likely to affect the AADT … should not be automatically screened out" (paragraph 62).

15. In his conclusions on air quality, the inspector said the council had argued that "the assessment of the in-combination effects" required further information (paragraph 63). The council said that the results of their air quality and traffic monitoring were expected in 2017; Knight Developments had suggested they would take "much longer". The council "therefore relied very heavily on the precautionary conclusions in the [core strategy] Inspector's report". Natural England was "satisfied" that the issue of air quality was being "adequately addressed" and, therefore, had "no need to comment" (paragraph 64). Although Knight Developments' study concluded that "the effects of the proposed development would be insignificant at the receptors in [Ashdown Forest]", it did not exclude "any impact" (paragraph 66).

16. Under the heading "Conclusions on N deposits" the inspector said:

> "67. Notwithstanding my conclusion on air quality, there is little evidence of a direct link between AADT along the A26 and eutrophication in the AF. It is common ground that the proposals alone would not generate additional AADT above the threshold regarded as likely to result in a significant effect and the only issue was from in-

combination effects. Nevertheless, I accept that a precautionary approach should be taken and that, given the importance of the SAC, and the requirements of the Habitats Regulations, this is a high bar. In the form the application was submitted, there would therefore be some risk, however low, of a significant in-combination effect.

68. The appellant has subsequently offered contributions to SAMMS in accordance with its evidence of habitat management practice elsewhere and using the best information on tariffs available (see under s106 below). As well as addressing the problems caused to the SPA by dogs, the contributions would also be used to take measures such as cutting and grazing to reduce nutrient levels. While not accepting that the contributions were acceptable, the Council did not offer any contrary evidence to indicate that the projects which would be funded by SAMMS would not be effective in reducing what would in any event be a very low risk of additional eutrophication. I therefore accept from the evidence before me that, as well as supplementing the SANG, the SAMMS contribution would have a significant beneficial effect on biodiversity in the AF and so also offset any small chance of harm as a result of N deposition.

69. I acknowledge that the evidence on habitat management … was produced late on. However, this follows on from discussions which the Council has been having with [Natural England] for a number of years even prior to 2013 [Here there is a footnote referring to a letter dated 15 April 2013 from Natural England to the council and Mid Sussex District Council.]. At that time [Natural England] anticipated that a scheme of contributions for wardening and monitoring could come forward within a very small number of months. To date, nothing has been finalised.

70. In a recent response from another application [Here there is a footnote to an e-mail from Natural England dated 24 March 2015 relating to a proposal for development at "Benchmark Barn, Groombridge Lane.] [Natural England] commented that its approach to air quality issues differs from the Council's in that its specialists advise that an in-combination assessment is not required unless a proposal is considered significant alone (i.e. an increase of greater than 1,000 AADT or more than 1% of the critical load). As that proposal would not breach these thresholds it had no objection. While I note that this response concerned a development on quite a different scale, and I have taken a more precautionary approach, this reinforces my conclusion that, with mitigation, there would be no LSE.

71. I note that [Natural England] had no objection to the scheme with regard to air quality issues and so, while it may not have considered the SAMMS mitigation, this would not affect its response on this point. Overall, even if there were clear and specific evidence that there would be an increase in N deposition on the AF which would measurably reduce plant diversity and harm habitat conservation, which there is not, contributions to SAMMS would make positive and demonstrable improvements to the habitat on the AF. These would have a beneficial effect on biodiversity which would clearly outweigh any unproven and, at worst, almost negligible harm from N deposits.

72. In [*R. (on the application of Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P. & C.R. 16], the claimant argued, inter alia, that *'... the Secretary of State had erred in considering mitigation proposed as part of the package at the screening stage to determine the significance of effects on the SPA and consequent need for an [appropriate assessment].'* However, it was held that: *'There was no legal requirement under reg.48(1) that an SPA screening assessment had to be carried out disregarding ... any mitigation measures that formed part of a plan or project.'* I am therefore convinced that, even taking account of the low threshold required by *Sweetman*, with mitigation, there would be no LSE on the heaths. It follows that an *appropriate assessment* is not required, and that concerns with regard to N deposition should not prevent the development.

73. Given the informative nature of the wording on air quality added to biodiversity policy in WCS12, which notes further investigation but does not prohibit development in the meantime, there would be no breach of development plan policy. Having regard to the representations made by [Natural England], I find that the implications of the scheme on air quality would accord with policy in [the] NPPF chapter 11 regarding biodiversity, SSSIs, SPAs, SACs and air pollution."

17. The inspector then brought together his conclusions on the effects on Ashdown Forest:

"74. The [core strategy] Inspector adhered to the precautionary approach to the European sites. [Here there is a footnote referring to the decision of the European Court of Justice in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] Env. L.R. 14.] However, given the contributions to SAMMS through the s106 obligation, the LSE, if any, can be minimised or avoided altogether and there is little doubt that the necessary mitigation can be put in place. For the reasons set out above, I find that the contributions satisfy the tests in the NPPF and would improve biodiversity to a degree that would safely exceed the theoretical harm on account of increased traffic and consequential N deposition.

75. Mitigation should be in place before harm occurs. Conditions would require the proposed on-site SANG. The SAMMS contributions would also be paid in accordance with a timetable. There would be a delay between payment and occupation which would enable measures to be put in place.

76. For the reasons given above, and subject to conditions and the s106 obligation discussed below, I conclude that the proposed mitigation would sufficiently overcome any possible LSE on biodiversity to the SPA or SAC and that an *appropriate assessment* is not required. The proposals would accord with saved [local plan] policy EN7 which, with reference to [Ashdown Forest], only permits development if it would conserve the landscape and historic character, and with [core strategy] Policy WCS12, as above. In the event of an *appropriate assessment*,

> which does to [sic] apply, I note that there is a statutory requirement to consult the appropriate nature conservation body. As [Natural England] has commented on the application, made its views very clear, and delegated any decision to the Council, I consider that this requirement has already been met anyway."

He confirmed those conclusions in paragraph 94, where he said that "subject to mitigation, there would be no overall harm to biodiversity on account of recreational impacts or [nitrogen] deposits". And in paragraph 105, when dealing with the section 106 planning obligation, he said this:

> "105. SAMMS contributions would be paid to the Council either at the rate adopted at that time or, failing that, based on the current tariff adopted by MSDC. The reason for this is that MSDC has an interim SAMMs strategy in place, with costed projects, and the intention that contributions would be channelled to the Conservators of AF who have agreed on a range of heathland management projects. These could be used to offset impacts from the appeal on either recreational use or N deposits, or both. For the reasons I set out above, these contributions are needed, directly related to the development and, given the joint working by MSDC and [Natural England], are of an appropriate scale."

Was the inspector's approach to the need for "appropriate assessment" too strict?

18. Mr Richard Kimblin Q.C., for the Secretary of State, submitted that the inspector's approach in considering whether appropriate assessment was required in this case was more rigorous than it needed to be under regulation 61 of the Habitats regulations. He was dealing with a very short section of the A26 and a proposed development of only about 100 dwellings, the core strategy inspector having concluded that no significant effect on the SAC was likely with 9,500 dwellings. He went well beyond the precautionary approach expounded in the European and domestic case law. The threshold he set was too low – at the level of any increase in nitrogen deposition rather than any real, as opposed to hypothetical, risk of a significant effect arising from such an increase (see the judgment of Sullivan L.J. in *Boggis v Natural England* [2009] EWCA Civ 1061, at paragraph 37). It follows, submitted Mr Kimblin, that his conclusions on the effectiveness of heathland management as mitigation were "ultimately irrelevant".

19. I cannot accept those submissions. In my view, as Mr Rhodri Price Lewis Q.C. submitted on behalf of the council, the inspector's approach cannot be criticized as too stringent. Mr Kimblin's argument here, in effect, was that the inspector took not merely a precautionary approach but a super-precautionary or ultra-precautionary approach, not warranted under regulation 61 or endorsed anywhere in the authorities. I disagree. It seems to me that the inspector, conscious of the relevant case law, adopted what he regarded as a suitably precautionary approach in this case, no more and no less.

20. The inspector was entitled to conclude that, in considering whether an "appropriate assessment" was required for this particular proposal, it was necessary to take into account the mitigation to which he referred, including heathland management. And he was entitled to find that mitigation essential in reaching his conclusion that an "appropriate assessment" was not required. He

referred (in paragraph 72 of his decision letter) to the decision of Sullivan J., as he then was, in *Hart District Council*, in particular Sullivan J.'s observation that there was "no legal requirement that a screening assessment under [regulation 48(1)] must be carried out in the absence of any mitigation measures that form part of a plan or project" (paragraph 76 of the judgment). In this case, he clearly did find it both appropriate and necessary to take mitigation into account. He referred to the precautionary approach as setting "a high bar" because of "the importance of the SAC" (paragraph 67 of the decision letter). He concluded (in the same paragraph) that, in the absence of mitigation – "[in] the form the application was submitted" – there would be "some risk, however low, of a significant in-combination effect". That conclusion, in my view, demonstrates a sound understanding of the precautionary approach. And it also reflects a perfectly valid judgment as to how the precautionary approach should be applied in this case. The inspector deliberately took "a more precautionary approach" than Natural England (paragraph 70). He was entitled to do that. His reference to "the low threshold required by *Sweetman* …" (paragraph 72), and to "the precautionary approach to … European sites", in accordance with the decision of the European Court of Justice in *Waddenzee* (paragraph 74), show that he was well aware of the relevant jurisprudence.

21. The significance of the decisions in *Waddenzee* and *Sweetman* has recently been considered in the domestic courts: in this court in *Smyth v Secretary of State for Communities and Local Government* [2015] EWCA Civ 174 and more recently still by the Supreme Court in *R. (on the application of Champion) v North Norfolk District Council* [2015] UKSC 52.

22. In *Smyth*, Sales L.J., with whom Stephen Richards and Kitchin L.JJ. agreed, referred (in paragraph 61 of his judgment) to the "strict precautionary approach" in *Waddenzee*, which had been followed and emphasized in *Sweetman*, where Advocate-General Sharpston had (in paragraph 49 of her Opinion) described the threshold under the first limb of article 6(3) of the Habitats Directive as "very low". Sales L.J. went on to say (in the same paragraph):

> "… "In case of doubt" whether there may be significant effects on a protected site, an appropriate assessment is required ([paragraph 47 of the Advocate-General's Opinion in *Sweetman*]). The CJEU (Third Chamber) in its judgment did not indicate any doubt as to the correctness of this approach. Like the Advocate-General, it emphasised that Article 6 should be construed as a coherent whole (para. 32 of the judgment); that the competent national authorities should only authorise a plan or project pursuant to Article 6(3) where – "once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field" – they are "certain" that the plan or project will not have lasting adverse effects on the protected site, i.e. "where no reasonable scientific doubt remains as to the absence of such effects" (para. 40 of the judgment); and that the assessment under Article 6(3) "cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned" (para. 44 of the judgment). See also, among a number of other authorities to similar effect, Case C-43/10, *Nomarchiaki Aftodioikisi Aitoloakarnanias* [2013] Env LR 21, paras [109]-[117]."

23. The Supreme Court's decision in *Champion* was handed down on 22 July 2015, shortly after Knight Developments' appeal had been determined. Lord Carnwath (in paragraph 12 of his judgment, with which Lord Neuberger, Lord Mance, Lord Clarke and Lord Toulson agreed) referred to the "[authoritative] guidance on the interpretation of article 6(3) [of the Habitats Directive] … given by the Court of Justice of the European Union … in [*Waddenzee*]", where the court made it clear (in paragraph 41 of its judgment) that article 6(3) "set a low threshold for likely significant effects". Having observed (in paragraph 35) that the Habitats Directive and Habitats regulations "contain no equivalent to "screening" under the EIA Regulations", Lord Carnwath acknowledged (at paragraph 38) "the low threshold required to "trigger" the safeguards in article 6(3) and (4)", to which the European Commission's guidance "Managing Natura 2000 Sites: The Provisions of Article 6 of the 'Habitats' Directive 92/43/EEC" refers.

24. I see nothing in the Supreme Court's decision in *Champion* or this court's in *Smyth* to support the argument that the inspector's approach under regulation 61 of the Habitats regulations was excessively cautious. Having directed himself appropriately on the precautionary approach, as in my view he did, he had then to exercise his own judgment in deciding whether or not the low threshold for likely significant effects in article 6(3) was surmounted in this case. He concluded that it was not, but only on the basis that the mitigation measures to which he referred, including "habitat management", were taken into account. Implicit in his conclusion that "with mitigation, there would be no LSE on the heaths" (paragraph 72 of the decision letter) and that an "appropriate assessment" was therefore not required, was that in the absence of mitigation there would be, or at least could be, a likely significant effect and an "appropriate assessment" would be required. In short, the mitigation, including heathland management, was necessary to his conclusion on the need for "appropriate assessment". This was a matter of judgment for him, as "competent authority". In my view, he exercised that particular judgment lawfully.

The inspector's reliance on the financial contribution for heathland management

25. Before Lang J., the council argued that the inspector was wrong to rely on Knight Developments' "SAMMS contributions" as an appropriate means of funding mitigation of the harmful effects of nitrogen deposition. Those contributions – whether based on the tariff the council intended to adopt or on the tariff in Mid Sussex District Council's SAMMS strategy – were intended for a quite different purpose, which was to mitigate harm to the SPA arising from recreational activity, including, in particular, dog walking. Lang J. accepted those submissions. She concluded that the inspector had made a "factual mistake" in assuming that heathland management would be funded by the "SAMMS contributions" (paragraph 47 of the judgment). There was "no defined scheme for mitigation" to address the risk of nitrogen deposition (paragraph 56), and "no evidence of any … agreement" of the kind referred to paragraph 105 of the decision letter; none of the projects to be funded by SAMMS related to heathland management (paragraph 58); "no formal agreement had actually been reached with the Conservators on this issue" (paragraph 59); and the discussions between the council and Natural England referred to in Natural England's letter of 15 April 2013 "had nothing to do with habitat management" (paragraph 76). The inspector "mistakenly believed that heathland management to reduce nitrogen deposition was part of the SAMMS, and had been agreed with the Conservators", whereas, "[in] fact, there was no agreed heathland management scheme in evidence, which was a highly relevant consideration which he failed to consider". His

conclusion that the proposed development was "not likely to have significant effects on the SAC" was therefore "unlawful" and "flawed" (paragraph 77).

26. Mr Kimblin submitted that those conclusions of the judge are inconsistent. She clearly thought that the heathland management intended as mitigation for the effects of nitrogen deposition was uncertain, and that the inspector should have appreciated this. But she was apparently untroubled by the fact that the council had not yet settled its SAMMS strategy, and that this too was uncertain.

27. I do not think that submission is well founded. The scope of the relevant SAMMS projects appears to have been reasonably clearly established by the time of the inquiry. But there was, it seems, no tangible scheme of heathland management relevant to Knight Developments' proposal. And in any event, if the SAMMS projects were no more certain to be delivered than an effective and relevant scheme of heathland management, I cannot see how the Secretary of State's appeal could gain any strength from that.

28. The argument of Mr James Maurici Q.C. for Knight Developments was somewhat different. He submitted that the inspector was not at fault in assuming that heathland management was within the scope of the relevant SAMMS projects. In his first witness statement, dated 24 October 2015, Mr Meurer had expanded on the evidence he had given at the inquiry. Although the council's emerging SAMMS strategy did not include habitat management, there was, said Mr Meurer, no reason why "habitat management works" should not be included in that strategy (paragraphs 63 and 64 of the witness statement). Mr Maurici submitted that the funding put forward by Knight Developments in the section 106 obligation could have been used to pay for such work. A contribution specifically for "heathland management measures" had been included, on the understanding that the council would be able to add heathland management to its own SAMMS strategy in due course. This is what the inspector must have had in mind in his conclusions in paragraphs 68, 71 and 105 of the decision letter. He was, said Mr Maurici, simply considering the "Heathland Management Contribution" in the context of a SAMMS "package" still under consideration by the council. The judge should have seen that.

29. I cannot accept those submissions. In my view, there are shortcomings in the inspector's conclusions on heathland management, sufficient to invalidate his decision.

30. As Mr Price Lewis submitted, the inspector did not explain how he thought the financial contributions in the section 106 obligation were in fact going to be translated into practical measures to prevent or overcome the possible effects of nitrogen deposition to which he had referred, as well as funding the SAMMS projects which would tackle the potential effects of recreational use. He did not say what he thought was actually going to be done, by whom, and when, in implementing the "habitat management" upon which his conclusion on the need for "appropriate assessment" was predicated. That conclusion depended on his judgment that, with mitigation, including heathland management to mitigate the effects of nitrogen deposition, the proposed development, together with other proposals, was not likely to have significant effects on the European site. Such mitigation, as he made clear, was essential to his "precautionary approach". So if there was any real doubt about the requisite heathland management coming forward, his conclusion that an "appropriate assessment" was not required would, to that extent, be undermined. It was necessary for him to establish with reasonable certainty that the relevant mitigation, including heathland management, would actually be delivered. But he did not do that. He did not identify a solid proposal for heathland management, relevant to this proposed

development, to which there was a firm commitment on the part of those who were going to carry it out. His conclusions in paragraphs 68 and 71 of his decision letter, and in paragraph 105, clearly depended on the concept that the "contributions to SAMMS" in the section 106 obligation "would" – as he put it – actually be used, in part, to fund "projects" of "habitat management". These projects would involve measures, such as cutting and grazing to reduce, "offset" or "outweigh" the effects of nitrogen deposition attributable to this development in combination with other proposals, including "additional eutrophication". But which "projects" he had in mind is obscure.

31. Measures designed to address recreational impacts on the SPA had been identified in Mid Sussex District Council's SAMMS strategy, and the council had been preparing a SAMMS strategy of its own. The tariff in Mid Sussex District Council's SAMMS strategy was based on projects designed to protect the SPA from the pressures created by "new recreational visitors". These included various initiatives for managing recreational activity in Ashdown Forest, and, in particular, the exercising of dogs. The council's position was similar. As its CIL Background Paper stated, its emerging tariff for SAMMS was based on projects including the "production and promotion of a Code of Conduct for dog walkers; the provision of signage/interpretation boards at car parks; the employment of a volunteer Dog Ranger Manager; the employment of Dog Ranger Volunteers; responsible dog ownership training; employment of an Education Community Events and Activities Co-ordinator; the employment of two Countryside Workers; visitor monitoring; and bird monitoring". Such measures were not directed to the mitigation of the potential effects of nitrogen deposition from vehicular emissions.

32. The inspector referred in paragraph 105 of the decision letter to Mid Sussex District Council's "interim strategy … with costed projects", and to "the intention that contributions would be channelled to the Conservators of [Ashdown Forest] who have agreed on a range of heathland management projects", which, he said, "could be used to offset impacts from the appeal on either recreational use or N deposits, or both". But there was, it seems, no basis in evidence for a conclusion that any of that money was going to be spent by the conservators on heathland management. The conservators had not committed themselves to any relevant project of habitat management, whether funded by contributions under the section 106 obligation or otherwise. The inspector was given the minutes of a meeting of the conservators' Finance and General Purposes Committee on 10 November 2014, which referred (at item 38.2/14) to "HLS/Grazing project finances", recording the committee's "concern over the lack of information and the increased costs of and the decisions taken in the grazing project" (item 38.2.2/14), and the fact that "much of the grazing project had been by trial and error and a clearer picture was now emerging which highlighted the need for a five year projection of costs" (item 38.2.3/14). Item 38.4/14 concerned the "Revision to Income Streams …". The minutes went on to state that "[the director] had … reached an agreement with [the council] for a range of continuing projects to be funded by SAMMS … grants to the value of £1 million". Any funding to the board "would be dependent on contributions from the developers and therefore timescales are difficult to estimate". Mid Sussex District Council had also indicated that "funding from developers will be available in the New Year (estimated at around £3,000)". These funds, "together with an initial two year funding from [the council] through SAMMS of £25,000 per annum (yet to be confirmed)" would "contribute to the Every Dog Matters programme". Other "potential SAMMS projects to be phased in as contributions are made" included a "Volunteer Co-ordinator", the "Development of a Dog Walkers['] Code of Conduct", a "Dog Training programme", "Education and Information Service including an Education Co-ordinator",

"Community events" and "Additional operational staff" (item 38.4.2/14). The "current HLS" was due to end in September 2016, and "informal discussions with Natural England … had indicated that the new scheme would be for five years and that the payment per hectare would remain the same". The "start date [remained] undecided" (Item 38.4.3/14).

33. I can see no basis there for a conclusion that any of the financial contributions under the section 106 obligation would in fact be devoted to mitigating the effects of nitrogen deposition associated with this proposed development. No agreement had been reached, formal or informal, either between the council and the conservators or between Knight Developments and the conservators, on a scheme of heathland management that could be funded in whole or in part with those contributions. The obligation was a unilateral undertaking. It committed Knight Developments to the specified contributions, but it did not secure the delivery of heathland management through those contributions, or stipulate any particular heathland management project that might be funded by them. As was submitted on behalf of the council at the inquiry, there was "no evidence of any discussions, let alone agreement, with the relevant stakeholders, including the Ashdown Forest Trust or East Sussex County Council (or Natural England), who would have to be involved in the implementation of any management plan …" (paragraph 110c of Mr Scott Lyness's closing submissions). I therefore agree with the judge that the inspector's conclusions in paragraph 105 of the decision letter reveal a misunderstanding of the true position.

34. Exactly what the inspector meant when he referred in paragraphs 68 and 71 of the decision letter to "contributions to SAMMS" and in paragraph 105 to "SAMMS contributions" is not entirely clear. What is clear, however, is that, as he said in paragraph 105, "these contributions are needed". From the context one can infer that he had in mind there, and in paragraphs 68 and 71, to both of the contributions in Schedule 9 to the section 106 obligation – "The Strategic Access Management and Monitoring Strategy (SAMMS) Contributions" and the "Heathland Management Contribution". But the crucial question here, as the judge recognized, was not whether the financial contributions were adequate, or what they were called in the section 106 obligation, or how the inspector referred to them in the decision letter, but whether any of the money really would be spent on a relevant, timely and effective scheme of heathland management. That question, in my view, is not satisfactorily addressed in the decision letter. It is true that Mr Meurer in his evidence, and Mr Maurici in the submissions he made at the inquiry, sought to reassure the inspector that, in the future, SAMMS strategies for Ashdown Forest could and should embrace heathland management. But there was, it seems, no guarantee that either the financial contribution for SAMMS or the contribution specifically for heathland management measures would in fact be used to bring about heathland management to mitigate the effects of nitrogen deposition associated with this proposed development in combination with others.

The inspector's treatment of the evidence on heathland management

35. Lang J. found that the inspector had not given "any or any proper consideration" to the evidence of Mr John when reaching his conclusions on the mitigation of nitrogen deposition (paragraph 63 of the judgment). She said the inspector had not merely failed to "address the concerns raised by Mr John" but had also justified his conclusions by relying on "the absence of any contrary evidence" from the council (paragraph 64). This, she said, was a "particular

concern", because the heathland management proposal was introduced "only mid-way through the Inquiry" and the evidence in support of it was "very limited" (paragraph 65). The inspector had "failed to grapple with the concerns raised by Mr John at all", and the passage in paragraph 68 of the decision letter where he stated that the council had not offered any contrary evidence, "indicates that he overlooked it" (paragraph 75). In omitting to consider that evidence, which raised concerns about the efficacy of heathland management as mitigation, the inspector had "failed to meet the requirements of lawful decision-making" (paragraph 77).

36. Mr Maurici submitted that those conclusions of the judge were wrong. In his evidence at the inquiry Mr Meurer had said that in his view the effects of nitrogen deposition attributable to traffic generated by the proposed development would be minimal. But he had suggested a range of heathland management measures to "reduce nitrogen levels". DEFRA's pamphlet, on which he had relied, endorses habitat management as a "tool to maintain low nutrient levels in lowland heaths". If the development brought about any further heathland management, this, in his view, would be not merely mitigation but an "enhancement". He had not been cross-examined on any of this evidence. In his evidence for the council Mr John had raised some "concerns" about heathland management, but in cross-examination he did not deny that it could reduce the effects of nitrogen deposition and also accepted that measures such as cutting and grazing were established heathland management measures in Ashdown Forest. Mr Maurici submitted that the inspector was therefore entitled to say that the council "did not offer any contrary evidence" to indicate that the projects which would be funded by SAMMS would be ineffective in reducing the "very low risk of additional eutrophication" (paragraph 68 of the decision letter). He obviously did not mean that the council had offered no evidence at all on heathland management.

37. Mr Price Lewis pointed out that Knight Developments' expert witness on air quality, Dr Claire Holman of Brook Cottage Consultants Ltd., had not relied on any mitigation for the effects of nitrogen deposition, and that the council had had no notice of Mr Meurer's oral evidence on heathland management, which had apparently been prompted by questions the inspector himself had raised. With the inspector's permission, it chose to address this new evidence not by cross-examination, but through the evidence of Mr John. This did not mean that it was accepting Mr Meurer's evidence; it was not. Several of the points Mr John had made about the efficacy of heathland management were not disturbed by cross-examination, and these were very firmly emphasized in Mr Lyness's closing submissions for the council at the inquiry (in paragraph 109). Yet none of them are mentioned in the decision letter. The inspector must either have misunderstood or simply ignored them.

38. I think that submission has force. It seems to me surprising, as it did to the judge, that the inspector should have said nothing about the council's evidence and submissions calling into question the effectiveness, deliverability and consequences of heathland management. That evidence and those submissions went to the possibility of mitigating the effects of nitrogen deposition, and so, on the inspector's own analysis, to the need for "appropriate assessment" in this case. Like the judge, I think he ought to have dealt with them explicitly. It was, of course, open to him to conclude, as a matter of planning judgment, that heathland management, if it could be secured, would be effective in reducing or preventing the harmful effects of nitrogen deposition – in particular, eutrophication – and that, in doing so, it would not itself bring about other ecological harm. But I think this required a reasoned conclusion, showing that he had got

to grips with the council's evidence and explaining why he preferred that given on behalf of Knight Developments. That reasoned conclusion is lacking. It is not the court's task to supply the reasons required. That was for the inspector to do. Here again he went wrong.

39. The judge saw this as a separate and additional ground on which to quash the inspector's decision, sufficient on its own to justify an order to that effect. I agree that it is. It also lends support to my conclusions on the previous issue. Had the inspector explicitly weighed the evidence for and against heathland management as relevant and effective mitigation, he might not also have failed to reach a legally robust conclusion on the question of how such mitigation was in fact going to be achieved in this case.

40. Mr Maurici also submitted that the judge was wrong to say (in paragraph 62 of her judgment) that the heathland management already being undertaken in Ashdown Forest "had not prevented the build-up of nitrogen depositions to date". I see nothing in that submission. I think the judge's comment was justified. As she went on to say (at paragraph 81), the core strategy inspector had concluded in his report (at paragraph 28) that "the best available evidence on the existing nitrogen deposition load toward the centre of the SAC is that it significantly exceeds the ability of habitats to withstand deleterious effects", and that "[although] heathland management may have some part to play in mitigating the effects of nitrogen deposition, in the context of these other facts there is sufficient evidence at this point on a precautionary basis to restrict further development in north Wealden beyond that in the [core strategy]".

41. A further submission made by Mr Maurici was that the judge ought to have acknowledged that the financial contribution for heathland management in the section 106 obligation was "bound to be beneficial". But this submission is also, in my view, mistaken. Whether the contribution towards heathland management was "bound to be beneficial" was a matter for the inspector to consider. The judge found, in effect, that he failed to do that lawfully. And I think she was right.

Discretion

42. Both Mr Kimblin and Mr Maurici urged the judge, if she found that the inspector had erred in his approach to the main issue concerning "the biodiversity of the Ashdown Forest", but in no other respect, to exercise her discretion not to quash his decision. They argued that, in the light of the inspector's conclusions in paragraphs 68 and 71 of the decision letter, it is also clear that if he had undertaken an "appropriate assessment", he would have found no significant effect on the integrity of the SAC – a conclusion consistent with Natural England's decision not to object to the proposal. They relied on the passage in Lord Carnwath's judgment in *Champion* (in paragraph 42), where he said that there was "no reason to think that [the officers'] conclusion would have been any different if they had decided from the outset that appropriate assessment was required, and the investigation had been carried out in that context", and that "[the] mere failure to exercise the article 6(3) "trigger" at an earlier stage [did] not in itself undermine the legality of the final decision".

43. The judge rejected that argument. In her view, given the importance of the SAC and the requirements of the Habitats Directive and Habitats regulations, including the application of the "precautionary principle", and having regard to the Supreme Court's decision in *Champion*, the

evidence was "too uncertain" for her to exercise her discretion not to quash, and it would be "unsafe" not to do so. She said she was "ill-equipped to reach conclusions on the technical evidence" (paragraph 79 of the judgment). The council's review of the core strategy was still in progress (paragraph 85). Areas of "dispute and uncertainty" remained. The inspector had been unable to accept Knight Developments' contention that the risk of adverse effects on the SAC was "so negligible that no mitigation was required", and also the argument that an "in-combination assessment was inappropriate". It would be wrong to accept Knight Developments' evidence and submissions on these "complex issues" when the inspector had not (paragraph 88). The fact that Natural England had not objected on "air quality issues" did not weigh against the granting of relief (paragraphs 90 to 95). The judge therefore concluded that she could not properly exercise her discretion to withhold an order quashing the inspector's decision (paragraph 96).

44. As Mr Maurici and Mr Kimblin acknowledged, this court will not be quick to overturn an exercise of discretion by a judge at first instance deciding whether or not to grant relief (see, for example, the judgment of Sales L.J. in *Smech Properties Ltd. v Runnymede Borough Council* [2016] EWCA Civ 42, at paragraph 28). But in this case, they submitted, the judge's approach was wrong. She had evidently misunderstood the core strategy inspector's conclusions – thinking, incorrectly, that the council's review of the core strategy would be completed in 2017. More significant, however, was that she failed to give Natural England's position as "appropriate nature conservation body" under the Habitats regulations the weight it clearly should have had. As Natural England had explained when responding to consultation on the Benchmark Barn proposal in March 2015, their consistent approach on "air quality issues surrounding Ashdown Forest" – unlike the council's – had been that there was no need to consider a project in combination with others unless the "process contribution" of that particular proposal was "considered significant alone …". On any re-determination of Knight Developments' appeal their stance, inevitably, would be that there would be no real risk of a significant effect on the European site. The inspector's "ultra-precautionary" approach went even further than their "very precautionary" approach. Quashing his decision on the basis of that "ultra-precautionary" approach was wholly unnecessary.

45. I disagree. In my view we must consider the judge's exercise of her discretion on the basis that, as I have concluded, she was right to find the inspector's "precautionary" approach legally sound and his conclusions on mitigation legally flawed. I also think that in exercising her discretion, she was plainly right not to be drawn into an evaluation of the evidence before the inspector. To have attempted that would have been to stray beyond her function in a public law challenge such as this.

46. As Mr Price Lewis submitted, the circumstances of this case are not analogous to those in *Champion*. This is not one of those cases in which the court can be confident that, even if the decision-maker had not fallen into error, the decision would have been, or would likely have been, the same (see the judgment of Lord Carnwath in *Walton v Scottish Ministers* [2012] UKSC 44, at paragraphs 102 to 140, and his judgment in *Champion*, at paragraphs 42 and 54 to 66). In this case that is by no means clear. There was no "appropriate assessment". And the inspector's conclusions do not constitute an "appropriate assessment" in all but name. I think the judge was entitled to reject the argument that, had the inspector not gone wrong as she concluded he did, an "appropriate assessment" would still have been unnecessary, or that, if an

"appropriate assessment" had been undertaken, it would have resulted in the conclusion that there would be no significant effect on the integrity of the European site. In my view she was right to entertain serious doubt as to whether, on re-determination, the decision would have been no different. She could not be expected to dismantle the inspector's analysis and then reconstruct it, to establish what his conclusion would have been had he taken a different approach. This would have involved the application of a decision-maker's judgment to the evidence – as if the judge were re-determining the appeal herself. If – as she found and I would hold – the inspector's findings and conclusions on heathland management were defective in law, she was not then required to substitute findings and conclusions of her own. Indeed, she would have been wrong to do so.

47. I do not accept that the judge misunderstood the core strategy inspector's "precautionary conclusions" – as the appeal inspector referred to them (in paragraph 64 of the decision letter) – on which the council relied. Whether or not the council had been unduly slow in carrying out its review of the core strategy, the fact remains that the work was not yet finished and its outcome not yet clear. The judge understood that.

48. What then of Natural England's position? In a letter to the council dated 16 January 2014, responding to consultation on Knight Developments' proposal, they said, under the heading "Ashdown Forest SPA – Objection", that the council "should … determine whether the proposal is likely to have a significant effect on any European site, proceeding to the Appropriate Assessment stage where significant effects cannot be ruled out". They went on to say that "[as] the proposed SANG is not considered to be functional it will be necessary for the Council to secure other mitigation measures within the approach identified in the core strategy policies". As for Knight Developments' air quality assessment, they noted that the council had "asked their own air quality consultants to comment on this aspect [of] the application". So they were "satisfied that air quality impacts will be considered by the Council prior to determination". Having received a revised version of the air quality assessment, Natural England's Lead Adviser, Ms Marian Ashdown, said in an e-mail to the council dated 10 February 2014 that she was "satisfied that as [the council] have air consultants assessing and commenting on this aspect … it is being adequately addressed and therefore Natural England have no need to comment on this aspect".

49. The judge rightly acknowledged that "[domestic] case law has established that the views of Natural England on nature conservation issues deserve great weight, and although an authority is not bound to agree with them, it needs cogent reasons for departing from them". But she did not share the confidence of the Secretary of State and Knight Developments that, if the appeal had to be re-determined, Natural England's position would be that, "even without <u>any</u> mitigation, the development was not likely to have a significant effect on the SAC" (paragraphs 91 and 92 of the judgment). It was, she said, "clear that Natural England did not present a positive case to either [the council] or the Inspector that the proposed development should only be assessed on its own, and not in combination with other proposed development" (paragraph 94). At the inquiry, the council had put forward "cogent arguments in favour of an in-combination approach", and "[despite] his observations about Natural England's views", the inspector had taken that approach. The core strategy inspector had considered "the combined effect of the housing proposed", and "Natural England had agreed with the methodology used by the [council] in its Habitats Assessment for the [core strategy]". This approach was

consistent with regulation 61 of the Habitats regulations. Therefore, as the judge said, she "[could not] be satisfied that an Inspector would decide to disregard the in-combination effects of the proposed development" (paragraph 95).

50. I do not see how it can be said that the judge misconstrued Natural England's position, or the inspector's understanding of it. As she recognized, it was up to the inspector as "competent authority" to give due weight to the view of Natural England, having regard to their status, responsibilities and expertise as "appropriate conservation body". That could properly have been considerable weight (see the first instance judgment in *R. (on the application of Prideaux) v Buckinghamshire County Council* [2013] Env. L.R. 32, at paragraph 116). But how much weight was for the inspector to decide, not for the court in reviewing the legality of his decision. He was certainly not bound to adopt Natural England's view as his own (see Baroness Hale's judgment in *R. (on the application of Morge) v Hampshire County Council* [2011] 1 W.L.R. 268, at paragraph 45). And he did not.

51. With Natural England's general position on "in-combination assessment" in mind – as he made clear in paragraph 70 of the decision letter – the inspector nevertheless preferred a "more precautionary approach" than theirs. Knowing, as he did, that they had not objected to this proposal, he nevertheless found it necessary to take mitigation into account and rely upon it. He concluded that "with mitigation" there would be no [likely significant effects]" on the European site (paragraphs 70 to 72) – but not that without mitigation there would still be none. The judge was right. In this case Natural England had not positively advised the council to consider the proposal on its own, rather than in combination with other development. They had left that to the council. Nor had they advocated a less demanding "precautionary" approach than the inspector adopted. Whether they will do that if the appeal is remitted to the Secretary of State for re-determination is, at least, open to doubt.

52. In my view, therefore, the judge was right to exercise her discretion as she did.

Did the inspector misinterpret and misapply the policy in paragraph 116 of the NPPF

53. The first of the inspector's "main issues" was the effect the proposed development would have on the "character and appearance of the area", having regard to "the adopted development boundary" and the AONB (paragraph 9 of the decision letter).

54. In the section of the NPPF headed "Conserving and enhancing the natural environment", paragraph 115 says that "[great] weight should be given to conserving landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to landscape and scenic beauty". Paragraph 116 states:

> "Planning permission should be refused for major developments in these designated areas except in exceptional circumstances and where it can be demonstrated they are in the public interest. Consideration of such applications should include an assessment of:
>
> - the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy;

- the cost of, and scope for, developing elsewhere outside the designated area, or meeting the need for it in some other way; and
- any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated."

55. The inspector noted that "[some] 60% of Wealden District is designated as AONB" (paragraph 34 of the decision letter). He found "on balance" that the proposed development "would have a neutral effect on the contribution that the appeal site makes to the landscape and scenic beauty of the AONB", that it "would not harm the important characteristics of the AONB" protected in development plan policy, and that it "would accord with the requirement in [paragraph 115 of the NPPF] to give great weight to conserving landscape and scenic beauty in AONBs" (paragraph 40). The parties had agreed that this would be "major" development within the policy in paragraph 116 of the NPPF (paragraph 41). Later in the decision letter, under the heading "Benefits", the inspector concluded that the proposed development "would provide housing towards the unmet full [objectively assessed needs]". The council had conceded that there was a "large need" for affordable housing. The strategic sites local plan ("SSLP") had proposed housing provision at Pine Grove in central Crowborough. But the SSLP inspector had recommended against this, and now that the SSLP had been withdrawn "the need for housing in Crowborough" was "likely to be even greater" (paragraph 83).

56. The inspector came back to the policy in paragraph 116 of the NPPF in paragraphs 88 to 91 of the decision letter. Having quoted the policy (in paragraph 88), he went on to say:

> "89. While housing, and [affordable housing ("AH")], could theoretically be developed elsewhere, most of the district is within the AONB and so there are few alternatives that are not equally constrained. The Council put forward the Pine Grove and South East Crowborough (SEC) emerging allocations. However[,] … the Pine Grove allocation was not endorsed by the SSLP Inspector and SEC has potential highway problems. Even if the latter can be resolved, and it appeared to me that they could, this does not alter the fact that there is a need for more housing as well as at SEC. Even if the search for alternative sites is taken wider than Crowborough, there is a lack of housing land to meet the full OAN and one alternative being considered when preparing the draft [core strategy] would itself be in the AONB. The existence of other sites, which collectively still fall short of the full OAN, does not amount to an alternative and there are no plans, through the duty to cooperate or otherwise, for neighbouring districts to provide for the shortfall.
>
> 90. Moreover, the withdrawal of the SSLP makes it less likely that more sites will come forward and strengthens the case that housing can amount to exceptional circumstances. This applies particularly to the AH which would amount to 40% of the proposed dwellings. In the absence of adequate housing land to meet the full OAN, let alone the AH requirements, I find that there is a need for the development. Moreover, taken with the lack of harm that would be caused to its landscape and scenic beauty, I find that this need amounts to exceptional circumstances to justify development in the AONB.

> 91. As set out above, mitigation would be put in place to deal with the detrimental effects. For all these reasons, I find that exceptional circumstances do exist and that the proposals would accord with [paragraph 116 of the NPPF]. I note that at Heathfield and Wadhurst the Council also found that the need for housing, and AH, amounted to the exceptional circumstances with regard to [paragraph 116 of the NPPF]. I find that this analysis should also apply to the appeal proposals and that no precedent would be set by allowing this appeal."

57. The inspector then returned to housing need in the context of planning policy. He said the core strategy had been found to be sound "with a housing requirement well below that of the full [objectively assessed need] for the area based on the constraints of the AONB and [Ashdown Forest]". There was "still a demonstrable need for housing and [affordable housing] in the area". Although there were "sound reasons for the requirement to be constrained, including the AONB and [Ashdown Forest]", neither of those constraints should apply here (paragraph 92).

58. The judge rejected the council's criticisms of the inspector's treatment of the issue of need (paragraph 112 of the judgment). But she accepted the argument that he did not adequately assess alternative sites for the proposed development. He had made a "mistake of fact" in paragraph 89 of his decision letter; the SSLP inspector had not concluded that the Pine Grove site should not be developed – merely that the number of dwellings allocated on that site should be reduced (paragraph 114). Apart from the South East Crowborough site, he had made no findings about the availability and suitability of other sites in Crowborough put forward as alternatives by the council (paragraphs 116 and 117). He seems to have rejected other sites as alternatives, said the judge, "not because they were unsuitable, but because taken cumulatively they fell short of meeting the full objective assessed need for housing in the area" (paragraph 118). The judge recognized that "possible alternative sites are only one of a number of factors to be considered" under the policy in paragraph 116 of the NPPF. But, she said, "the use of the word "should" indicates that it is a mandatory consideration" (paragraph 120). The inspector had not adequately investigated or assessed alternative sites, either in Crowborough or in the district as a whole, and so he had not properly applied the policy in paragraph 116 of the NPPF. This was, said the judge, "a significant failure, given the high level of protection afforded to AONBs under national planning policy" (paragraph 121).

59. Those conclusions of the judge were attacked by Mr Kimblin and Mr Maurici. They submitted that the inspector had properly dealt with the matters referred to in the three bullet points in paragraph 116 of the NPPF, and had concluded, in the exercise of his planning judgment, that "exceptional circumstances" had been demonstrated, "in the public interest", for this development in the AONB to be approved. That conclusion was set in the inspector's broader assessment of housing needs in the district. In considering the factors referred to in the second bullet point, he was entitled to take into account the objectively assessed needs for market and affordable housing. Mr Maurici also submitted that the inspector was right to concentrate on housing needs in Crowborough – consistently with the council's own approach when considering proposals for housing development in Heathfield and Wadhurst. But he had not confined his assessment of alternative sites to those in Crowborough. He had also considered the availability of sites throughout the district. The judge was wrong to find that Knight Developments had not challenged the availability or suitability of sites beyond Crowborough. Its evidence at the inquiry, through its witness Mr Roland Bolton, was that there were not

enough sites in the district to provide a five-year supply of housing to meet relevant housing need. In Crowborough, the council's own evidence had suggested a need for more than 1,500 affordable dwellings in the 20 year plan period, which implied a requirement for sites to accommodate some 4,500 dwellings. And the council's witness Mr Christopher Bending had accepted that in Crowborough there was land only for some 1,400 dwellings.

60. Mr Price Lewis defended the judge's conclusions. The council's case at the inquiry had been that there was no good reason to limit the search for alternative sites to Crowborough, given that there were areas of land outside the AONB elsewhere in the district which could accommodate housing development, but that even if the search were restricted to Crowborough there were sites capable of accommodating more than 1,400 dwellings. The inspector did not grapple with that evidence. He was not in a position to conclude that if the full objectively assessed need for housing in the district were to be met it would be necessary for sites in the AONB to be developed. But the more fundamental error in his consideration of alternative sites was that it was based on the false concept that he could properly take into account unconstrained housing need.

61. In my view the inspector's treatment of alternative sites does not display any error of law. I therefore disagree with the judge's conclusion on this issue.

62. One must start with the words of the policy itself, read properly in context (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13, at paragraphs 17 to 19). The context here includes the familiar and important policies of the NPPF directed to the identification and meeting of housing needs. The policy in paragraph 116 of the NPPF is a policy for development control. It applies to development of all kinds. Where the proposal in question is a proposal for housing development, it must be read together with the policies for housing need and supply in paragraphs 47 and 49 of the NPPF. The inspector was clearly well aware of those policies, and their importance.

63. The policy requires the exercise of planning judgment. The decision-maker must consider whether there are "exceptional circumstances" justifying the granting of planning permission for the development in question, and whether granting permission would be "in the public interest". The three bullet points do not exclude other considerations relevant to those questions. The first requires the decision-maker to consider the "need for the development", including "any national considerations" – for example, the considerations of national policy for housing need and supply. The second bullet point does not refer specifically to alternative sites. It refers to the "cost" and "scope" for development "elsewhere outside the designated area", and to the possibility of meeting of the need for the development "in some other way". In many cases, this will involve the consideration of alternative sites. But the policy does not prescribe for the decision-maker how alternative sites are to be assessed in any particular case. It does not say that this exercise must relate to the whole of a local planning authority's administrative area, or to an area larger or smaller than that. This will always depend on the circumstances of the case in hand. The third bullet point requires the decision-maker to consider potential harm in the three respects referred to – again, always a matter of planning judgment.

64. If this understanding of the policy in paragraph 116 is correct, I do not think the inspector can be said to have misconstrued or misapplied it in this case. The policy allowed him a broad

discretion in making each of the planning judgments required, in the particular context in which those judgments had to be made. In my view, he made each of those planning judgments lawfully, on the evidence before him.

65. There is, and can be, no challenge to inspector's conclusion on the effect the development would have upon "the landscape and scenic beauty of the AONB", which, he said, would be "neutral" (paragraph 40 of the decision letter). Nor is there now any challenge to his conclusions on housing need – that, both in Crowborough and in the district as a whole, there was a need for additional housing and additional affordable housing, an identified planning need which the proposed development would help to meet (paragraph 83). It was with those two conclusions in mind that he came to consider the availability and suitability of alternative sites.

66. The relevant need in this case was not for a particular kind of development such as a new supermarket, school or sewage treatment works, for which only a very small number of potential sites might be available or suitable. It was a general need for housing and affordable housing. But because most of the district was within the AONB, there were few alternative sites suitable for housing development that were "not equally constrained" (paragraph 89 of the decision letter) – that is, in the language of the second bullet point in paragraph 116 of the NPPF, few such sites "outside the designated area". This was a matter of fact, as found by the inspector. His conclusion that there was "a lack of housing land to meet the full [objectively assessed need]" was not limited to Crowborough; it was explicitly a conclusion on the basis of a "search for alternative sites taken wider than Crowborough". He was not satisfied that such other sites as were available for housing development in the district would be sufficient to meet the need, or that the shortfall would be made up by development elsewhere. This was a matter of planning judgment for him. He also found that those other sites would "collectively still fall short of the full [objectively assessed need]", so they "[did] not amount to an alternative". This too was a matter of planning judgment. He was also entitled to take into account the fact that "the withdrawal of the SSLP makes it less likely that more sites will come forward", particularly for affordable housing: yet again, a matter of planning judgment.

67. These were all relevant considerations, indeed obviously powerful considerations, which the inspector was entitled to take into account and give weight in making the judgment he did on the questions arising from the second bullet point in paragraph 116. They informed his broader conclusion that there were, in this case, "exceptional circumstances" justifying approval of the development in the AONB, and that the appeal proposal was therefore in accordance with the policy.

68. I do not think the policy in paragraph 116 of the NPPF obliged the inspector to deal in his decision letter with every potential site for housing in the district, one by one. And on a fair reading of paragraphs 89 to 91 of the decision letter, his conclusions in those paragraphs are not undone by the error he made in what he said about the allocation of the Pine Grove site. The decisive consideration was, clearly, the remaining need for market and affordable housing both in Crowborough and in the district as a whole.

69. I do not accept, therefore, that the inspector's consideration of alternative sites demonstrated either a misunderstanding of the policy in paragraph 116 of the NPPF or an unlawful misapplication of that policy, or that it was otherwise legally unsound.

Conclusion

70. In my view, for the reasons I have given, the grounds of appeal relating to the inspector's conclusions on alternative sites are good, but those which go to his consideration of the possible effects of the proposed development on the European site must fail. I would therefore dismiss both appeals against the judge's order quashing the inspector's decision.

Lord Justice McFarlane

71. I agree.