Neutral Citation Number: [2023] EWHC 2842 (Admin)

Case No: CO/1120/2023
AC-2023-LON-000276

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15 November 2023

Before :

MRS JUSTICE LANG DBE

- -

Between :

BRAMLEY SOLAR FARM RESIDENTS GROUP	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Defendants**
(2) BRAMLEY SOLAR LIMITED	
(3) BASINGSTOKE AND DEANE BOROUGH COUNCIL	

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Saira Kabir Sheikh KC and Michael Feeney (instructed by **Freeths LLP**) for the **Claimant**
Robert Williams (instructed by the **Government Legal Department**) for the **First Defendant**
Thea Osmund-Smith and Odette Chalaby (instructed by **Burgess Salmon LLP**) for the **Second Defendant**
The **Third Defendant** did not appear and was not represented

Hearing dates: 17 to 19 October 2023

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 15 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Lang :

1. The Claimant applies for a statutory review, pursuant to section 288 of the Town and Country Planning Act 1990 ("TCPA 1990"), of the decision, dated 13 February 2023, made by an Inspector appointed by the First Defendant ("the Secretary of State"), to allow the appeal of the Second Defendant ("BSL") and grant planning permission for the installation of a renewable led energy generating station ("the Development") at Minchens Lane, Bramley, Hampshire ("the Site"), following the refusal of permission by the Third Defendant ("the Council").

2. The Claimant comprises a group of over 450 local residents who oppose the proposed Development. The Chairman is Mr Leigh Harrison FCA and the Secretary is Mr Steve Spillane. The Claimant objected to the application for planning permission when it was under consideration by the Council (the local planning authority). At the appeal before the Inspector, they were granted Rule 6(6) status under the Town and Country Planning (Inquiries Procedure) (England) Rules 2000, and they opposed the appeal and the grant of planning permission. It was not in dispute before me that the Claimant is a person aggrieved for the purposes of section 288 TCPA 1990. Unincorporated associations that do not have legal personality can bring statutory challenges in their own name: *Aireborough Neighbourhood Development Forum v Leeds City Council* [2020] EWHC 45 (Admin), at [29].

3. BSL has at times acted through its parent company, Enso Energy, but I do not attach any significance to that. To avoid confusion, I have referred to "BSL" throughout this judgment.

4. The grounds of challenge may be summarised as follows:

    i) The Inspector erred in law by considering the Revised Scheme, as he failed to address whether the Revised Scheme was substantially different from the Original Scheme and/or he acted unreasonably/irrationally in referring to the changes as minor, and/or he failed to give adequate reasons for his conclusions.

    ii) The Inspector erred in law in considering the Revised Scheme, as the consultation on the Revised Scheme was procedurally unfair and caused prejudice to the Claimant.

    iii) The Inspector acted unfairly and erred in law by failing to reach a determination before the Inquiry as to whether the Original Scheme or the Revised Scheme would be considered at the Inquiry.

    iv) The Inspector erred in law by failing to have regard to the objections associated with the proposed access onto Bramley Road ("the Bramley Road Access") and/or to provide adequate reasons for considering that the Access was acceptable.

    v) The Inspector erred in law by misinterpreting paragraph 174(b) of the National Planning Policy Framework ("the Framework").

    vi) The Inspector erred in law by failing to have regard to the Claimant's case on (1) valued landscape and (2) battery storage. Further and/or alternatively, the

Inspector erred in law by failing to give adequate reasons for his conclusions on these issues.

vii) The Inspector erred in law by failing to take into account a material consideration, namely a lack of identified alternative sites being considered.

5. I granted the Claimant permission to apply for planning statutory review, on all grounds, on the papers on 24 April 2023.

Planning history

6. The Site extends across 85 ha of agricultural land, currently used as 6 fields of arable farmland and grassland, within a predominantly rural landscape on the fringe of Bramley village. It is an area of archaeological interest, and it is within the setting of several listed buildings. It is close to a Conservation Area. The Site also contains numerous public rights of way ("PROWs").

7. On 28 November 2020, BSL applied to the Council for planning permission. The Original Scheme comprised an energy generating station, ground mounted photovoltaic solar arrays installed across 5 of the 6 fields, together with a significant amount of associated infrastructure, including sixteen transformer stations, under-ground and over-ground cabling and a battery storage facility. There would be approximately 100,000 Solar Photovoltaic panels and the boundaries of the Site would have 2m high fencing for 6.84km with CCTV cameras at regular intervals. There were landscaping biodiversity enhancements, including a proposed Forest School, associated car parking and a Nature Area at the Site. It was claimed that it would generate an export capacity of up to 45MW for a period of 40 years.

8. The Council's Screening Opinion, dated 1 October 2020, determined that the Original Scheme fell within Schedule 2 of the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 ("the EIA Regulations"). Therefore, the Original Scheme was subject to an Environmental Impact Assessment ("EIA"), and the application was accompanied by an Environmental Statement ("ES"). It was not in dispute that the ES formed an acceptable basis upon which the Council could determine the application.

9. The Council carried out a consultation in accordance with the statutory requirements. Thereafter, amendments were made to the proposed scheme, and consulted upon by the Council, in June and December 2021.

10. There were about 683 objections to the application which were summarised in the Officer's Report ("OR"), dated 20 April 2022. The OR recommended the Original Scheme for approval, subject to conditions.

11. However, the Council refused planning permission, on 21 April 2022, on the following grounds:

> "1. The proposed development due to its scale would have an adverse impact on the landscape character and visual amenity of the area and upon the enjoyment of public rights of way where the harm would not be outweighed by the benefits of delivering a

> form of renewable energy. The proposal is contrary to the National Planning Policy Framework (2021) and Policies EM1 and EM8 of the Basingstoke and Deane Local Plan 2011-2029 and Policy D1 of the Bramley Neighbourhood Development Plan 2011-2029.
>
> 2. The proposed development would result in harm to the local historic environment having particular regard to the potential archaeological interest on the site itself contrary to the National Planning Policy Framework (2021), Policies EM8 and EM11 of the Basingstoke and Deane Local Plan 2011-2029 and Policy D1 of the Bramley Neighbourhood Development Plan 2011-2029."

12. On 16 June 2022, BSL's agents wrote to the Council, enclosing notification of its intention to appeal against the refusal of planning permission. BSL informed the Council that it was "proposing minor changes to the refused scheme to be considered through the planning appeal process" (hereinafter "the Revised Scheme"). It went on to say:

> "Paragraph M.2.2 of Annex M of the Planning Inspectorate Procedural Guide, Planning appeals – England, March 2021 explains that a Planning Inspector is able to take account of amendments during the appeal process under the Wheatcroft Principles and that a consideration for the Inspector is whether the amendment(s) sought might prejudice anyone involved in the appeal.
>
> BSL is proposing minor changes to the masterplan to remove a small number of solar panels and a proposed forest school and car parking associated with the forest school. These areas will instead be replaced by landscape and biodiversity enhancement planting. The intended Appellant also seeks to amend the Description of Development to remove reference to the proposed forest school and associated car parking.
>
> Where scheme changes are sought in relation to a planning appeal under the Wheatcroft Principle the onus is on the appellant to notify interested parties of these changes to demonstrate that no one is prejudiced.
>
> BSL is proposing to notify the following parties before the planning appeal is submitted to the Planning Inspectorate:
>
> • neighbours living in close proximity to the site;
>
> • members of the public who responded to Basingstoke and Deane Borough Council when the planning application was lodged;
>
> • local councillors who responded to the planning application;
>
> • the Local Planning Authority; and

• statutory and non-statutory consultees that responded to Basingstoke and Deane Borough Council when the planning application was submitted:

o Bramley Parish Council

o Silchester Parish Council

o BDBC Biodiversity, Landscape, Historic Environment, Trees, Transport

o Hampshire County Council (HCC) Highways

o HCC Historic Environment

o HCC Flooding

o HCC Archaeology

o Environment Agency

o Hampshire Countryside Access

o Hampshire Environmental Protection Team

o Historic England

o Natural England

o Ramblers Association

o British Horse Society

Each party will be sent a letter explaining what is happening and the changes proposed. This letter will include a link to a dedicated website which will include information relevant to the proposed changes and details of how people can respond to the Appellant. Hard copies of information will be made available upon request.

The letters will be posted by Royal Mail. The LPA and statutory consultee will be sent information by email.

Consequential on the changes to the scheme now proposed, as well as those that occurred during the determination period of the planning application, the scheme the Inspector will consider will differ slightly from that subject to the Environmental Statement that accompanied the planning application. To ensure the Inspector as competent authority under the EIA Regulations has the necessary analysis to undertake this role BSL will also be producing an ES Addendum document to be read alongside the submitted ES documentation and to cover the changes between the submitted and appealed schemes. Although these differences will be relatively slight and in all cases intended to reduce

> environmental effects nevertheless we believe it correct to update the ES in this manner. This will also be subject to consultation and will be part of the consultation package.
>
> Those notified will be given a period of 30 days to respond to BSL should they wish to. BSL will take note of any responses received within this period and then forward them on to the Planning Inspectorate.
>
> The process that BSL is proposing is separate to, and does not replace, the notification process that the LPA must undertake within one week of the start date of the appeal.
>
> BSL wishes to provide the LPA with the opportunity to comment on the notification approach set out in this letter before information is issued to the interested parties. I therefore ask that you respond to me in writing within 5 working days of the date of this letter with any comments.
>
> You can contact me via email or phone via the details within the header of this letter should you have any questions in the meantime."

13. The Council did not object to BSL's proposal to amend the scheme and undertake a further consultation, but it took the view that it had no formal role to play in this exercise since its decision was under appeal, and therefore it was not under any obligation to assist in the consultation. It declined BSL's request for the Council to be the named recipient for consultation responses.

14. BSL filed its appeal to the Planning Inspectorate (PINS) on 4 August 2022. In a covering letter to the Planning Inspectorate it gave details of its proposed amendments and the proposed consultation procedure.

15. Consultation letters were sent out by BSL on 11 August 2022, giving a deadline of 30 September 2022 for responses. The email and postal addresses for responses to the consultation were hosted by BSL, but the letter to consultees explained that:

> "It is important to note that responses to this consultation are for the use of the Inspector who will consider the Appeal. Bramley Solar Ltd is facilitating the consultation but neither it nor Basingstoke and Deane Borough Council … should be thought of as recipients of comments."
>
> …..
>
> "All comments received will be forwarded to the Planning Inspectorate and Basingstoke and Deane Borough Council prior to the opening of the Public Inquiry to be considered alongside all other consultation responses that have been received on the planning application….."

16. The letter listed the revised plans and summarised the proposed changes as follows:

> "**The first change** is to decrease the size of the solar array being proposed within Field 1. This will be achieved through the removal of the first five meters of solar modules along the western boundary of Field 1.
>
> The purpose of this change is to increase the distance between the Silchester Trail public right of way (PROW) and the solar panels in Field 1 to an offset of 20 metres ….."
>
> [Plans]
>
> "**The second change** is to remove the Forest School, which was to be sited to the east of Field 3. This amendment reflects that the Appellant does not believe there to be a party willing to take on and manage the Forest School. Due to this proposed change, the description of development will be amended …. the change is solely to remove reference to the Forest School, the area of which is …. proposed now to be included in a larger Nature Area."
>
> [Plans]
>
> "**The third amendment** is an enhancement of landscape screening between Field 1 (southern edge) and Field 2 (northern edge) by increasing the size of the stock planting i.e. larger trees. There will also be enhancement of landscape screening between Brenda Parker Way as it (1) passes along the northern and eastern edges of Bramley Frith Wood south west of Field 2 solar panels and (2) between it and the central western edge of Field 6."

17. BSL gave a deadline of 30 September 2022 for responses to the consultation.

18. From 15 August 2022 onwards, the Council publicised the planning appeal documents, which included the documents relating to the Revised Scheme, in the discharge of its statutory obligations to notify persons of a pending appeal and inquiry. It advised that any comments should be made to PINS by 14 September 2022, which was earlier than the deadline of 30 September 2022 given by BSL.

19. On 5 September 2022, Mr Spillane wrote to PINS, on behalf of the Claimant, opposing the application to amend the Original Scheme.

20. On 5 September 2022, Mr Spillane wrote to BSL, on behalf of the Claimant, complaining that the Claimant had not been included in the consultation on the Revised Scheme, despite having lodged objections in its own name to the planning application. Mr Spillane criticised the narrow scope of the consultation, which was only directed at those who had responded to the initial consultation, not the wider community. Mr Spillane acknowledged that individual objectors had received the consultation letter and informed the Claimant. The consultation letter addressed to Mr Spillane was included in the evidence.

21. On 7 October 2022, Mr Spillane wrote to PINS, on behalf of the Claimant, complaining about the inadequacies of the consultation on the Revised Scheme, including the lack of notices posted at the Site prior to 5 September 2022.

22. The Inspector (Mr Richard McCoy BSc MSc DipTP MRTPI IHBC) held a Case Management Conference on 27 October 2022. The Council, BSL and the Claimant were represented. BSL asked for the Revised Scheme to be considered at the Inquiry. The Claimant submitted that the Inquiry should only consider the Original Scheme. The Council had no objection to the Revised Scheme being considered, but wished to see either the Revised Scheme or the Original Scheme presented at the Inquiry. The Inspector decided that, given the dispute concerning consultation, and since the proposed amendments were not extensive, it would be pertinent to consider both iterations of the proposal at the Inquiry.

The Inspector's decision

23. The Inspector held an Inquiry over 7 days in December 2022, and made a site visit on the final day. By a Decision Letter ("DL"), dated 13 February 2023, he allowed BSL's appeal and granted planning permission for the Development.

24. At DL/3, the Inspector noted that the full ES, comprising both the original ES and the Addendum, was subject to formal consultation. He considered that the EIA process had been undertaken appropriately.

25. At DL/6-9, he considered the application to amend the Original Scheme, and concluded that the appeal could properly be pursued on the basis of the Revised Scheme.

26. The main issues were identified as the effect of the development on the character and appearance of the surrounding area, and on the significance of nearby heritage assets (DL/12).

27. At DL/18-24, the Inspector assessed the value of the landscape. He decided that it was not a valued landscape for the purposes of paragraph 174 of the Framework. Overall, he concluded that the appeal site and surrounding landscape was of a medium landscape value with a corresponding sensitivity to change.

28. The Inspector considered the landscape and visual impact at DL/25–38. At DL/28 the Inspector concluded that the adverse impacts would be localised and would decrease over the lifetime of the development. At DL/32 the Inspector dismissed concerns raised over the impact on recreational use of public rights of way. At DL/35 he found that the greatest visual impact would have a moderate/slight adverse impact, but this could be mitigated against. The Inspector summarised his findings at DL/36 and found that, due to the moderate/slight effects, there was a conflict with Policy EM1 of the Basingstoke and Deane Local Plan 2011-2029 and Policy D1 of the Bramley Neighbourhood Development Plan 2011-2049.

29. At DL/55-60 the Inspector considered and dismissed the Claimant's argument that permission should be refused because of the BSL's failure to consider alternative sites which would avoid the use of Best and Most Versatile Agricultural Land ("BMV land").

30. At DL/70 the Inspector accepted the assessment of the Council and Hampshire County Council (the highways authority) on the issue of highway safety. There were no objections, subject to conditions and the approval of an amended Construction Traffic Management Plan, and the proposal would accord with Local Plan Policies CN9, EN8 and EM10 and Policy T2 of the Neighbourhood Plan.

31. At DL/73–79, the Inspector identified the benefits of the proposed Development as a source of renewable energy to which he gave considerable weight. The Government has recognised a climate emergency, and the Climate Change Act 2008 sets a legally binding target to reduce net greenhouse gas emissions by 100% (Net Zero), by 2050. The Clean Growth Strategy anticipates that the Net Zero target requires, amongst other things, a diverse electricity system, based on the growth of renewable energy resources. The British Energy Security Strategy anticipates a five-fold increase of solar capacity in the UK from 14GW to 70GW by 2035.

32. The Council's Energy Opportunities Plan 2010 recommended at least 166GWh of renewable energy in its area by 2020, but only 56.2GWh had been achieved by 2021. This proposal would generate 45MW sufficient to power 11,150 homes each year.

33. The Inspector also identified the provision of a biodiversity net gain of 100% from the Development as a benefit which attracted significant weight in favour of the proposal.

34. The Inspector undertook the planning balance exercise at DL/80-85 as follows:

> "80. NPS for Energy (EN-1) advises that when 'having regard to siting, operational and other relevant constraints the aim should be to minimise harm to the landscape, providing reasonable mitigation where possible and appropriate.' It further states that a judgement is to be made as to 'whether any adverse impact on the landscape would be so damaging that it is not offset by the benefits (including need) of the project' having regard also to whether the project is temporary and/or capable of being reversed. LP Policy EM8 also includes a requirement to consider benefits against impacts of this type of development.
>
> 81. As such, both national and development plan policy recognise that large scale solar farms may result in some landscape and visual impact harm. However, these policies indicate that development can be approved where the harm is outweighed by the benefits. I note that the Council's planning and landscape officers who in recommending approval of the proposal at the application stage considered that the limited adverse impacts of the scheme would be mitigated by the proposed extensive planting and reversible nature of the proposal.
>
> 82. In my judgement, the combination of topography, existing hedgerow and trees and the enhanced planting set out in the LEMP, particularly as the planting matures, would mean that the adverse effect on landscape character and visual impact would be limited and highly localised. Moreover, once decommissioned, there would be no residual adverse landscape effects with the enhanced landscape and biodiversity likely to endure. In which case, whilst there would be some localised moderate/slight harm in terms of landscape character and visual impact, in conflict with the relevant development plan policies, the imperative to tackle climate change, as recognised in legislation and energy policy, and the very significant benefits of the scheme clearly and

> decisively outweigh the moderate/slight harm, in accordance with LP Policy EM8.
>
> 83. Turning to heritage, the proposal would result in less than substantial harm to the significance of several designated heritage assets. The harm would be very minor and would be reversed once the solar farm is decommissioned. Nevertheless, where a proposal results in less than substantial harm, NPPF paragraph 199 requires great weight to be given to the conservation of the designated heritage assets. In addition, NPPF paragraph 202 makes clear that such harm is to be weighed against the public benefits of the proposal. Public benefits in respect of NPPF paragraph 202 will provide benefits that will inure for the wider community and not just for private individuals or corporations. It was not suggested that the proposal is necessary in order to secure the optimum viable use of the designated heritage assets.
>
> 84. In my judgment, the public benefits of this proposal which would contribute towards achieving net zero as part of a decisive shift away from fossil fuels, assist with increasing solar capacity in the UK from 14GW to 70GW by 2035, assist with achieving the Council's Climate Emergency Action Plan (2021), reduce carbon dioxide emissions by around 9,381 tonnes annually and provide a biodiversity net gain of 100%, are very significant and outweigh the less than substantial harm to the affected designated heritage assets, giving great weight to the conservation of each of them. The Council confirmed that in its view there was no conflict with LP Policy EM11 which seeks to conserve the Borough's heritage assets, given the outweighing benefits and from my assessment I have no reason to disagree.
>
> 85. Drawing the above together, I conclude the proposal would make a material and early contribution to the objective of achieving the decarbonisation of energy production and that to allow the proposed solar farm would not conflict with the objectives of relevant development and national planning policy when taken as a whole."

Legal framework

35. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with, and in consequence, the interests of the applicant have been substantially prejudiced.

36. In *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6] – [7], Lindblom LJ set out the principles upon which the Court will act in a challenge under section 288 TCPA 1990, as follows:

"6. In my judgment at first instance in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) (at paragraph 19) I set out the "seven familiar principles" that will guide the court in handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need 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).
>
> (2) The reasons for an appeal 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. But the reasons need refer only to the main issues in the dispute, not to every material consideration (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).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, 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 v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and 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 judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one 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, *South Somerset District Council v The Secretary of State for the Environment (1993)* 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. in *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145)."

> 7. Both the Supreme Court and the Court of Appeal have, in recent cases, emphasized the limits to the court's role in construing planning policy (see the judgment of Lord Carnwath in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2017] UKSC 37, at paragraphs 22 to 26, and my judgment in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314, at paragraph 41). More broadly, though in the same vein, this court has cautioned against the dangers of excessive legalism infecting the planning system – a warning I think we must now repeat in this appeal (see my judgment in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 50). There is no place in challenges to planning decisions for the kind of hypercritical scrutiny that this court has always rejected – whether of decision letters of the Secretary of State and his inspectors or of planning officers' reports to committee. The conclusions in an inspector's report or decision letter, or in an officer's report, should not be laboriously dissected in an effort to find fault (see my judgment in *Mansell*, at paragraphs 41 and 42, and the judgment of the Chancellor of the High Court, at paragraph 63)."

37. A decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well-informed reader who understands the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P & CR 263, at 271; *Seddon Properties Ltd v Secretary of State for the Environment* (1981) 42 P & CR 26, at 28; and *South Somerset District Council v Secretary of State for the Environment* (1993) 66 P & CR 83.

38. The Inspector was under a duty to give reasons for his decision. In *South Buckinghamshire District Council v Porter* (No 2) [2004] 1 WLR 1953, Lord Brown reviewed the authorities and gave the following guidance on the nature and extent of the inspector's duty to give reasons:

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents

> to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

Grounds of challenge

Ground 1: Amending the Original Scheme

Law and guidance

39. The "Wheatcroft Principles" derive from *Bernard Wheatcroft Ltd v Secretary of State for the Environment* (1982) 43 P & CR 233, in which Forbes J. held that it was permissible for the Secretary of State, when hearing an appeal, to grant planning permission on conditions that had the effect of reducing the permitted development below the development originally applied for. He said, at 241:

> "The true test is …that accepted by both counsel: is the effect of the conditional planning permission to allow development that is in substance not that which was applied for? Of course, in deciding whether or not there is a substantial difference the local planning authority, or the Secretary of State will be exercising a judgment, and a judgment which the courts will not ordinarily interfere with unless it is manifestly unreasonably exercise. The main, but not the only, criterion on which that judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation…"

40. *Wheatcroft* has been applied in several cases, including *Breckland District Council v Secretary of State for the Environment* (1993) 65 P & CR 34 in which Mr David Widdicombe QC held that, as the proposed amendment was clearly a substantial one, it was not necessary to consider whether there had been a failure to consult those affected (at 41).

41. In *R (British Telecommunications Plc v Gloucester City Council* [2002] 2 P & CR 33, Elias J. dismissed a challenge to the Council's grant of planning permission with amendments to the original application. He observed, at [33], that it was inevitable that, in the course of consultation, ideas may emerge which lead to a modification of the original planning application. It was plainly in the public interest that proposed developments should be improved in this way, as if the law were too quick to compel applicants to go through all the formal stages of a fresh application, it would inevitably deter developers from being receptive to sensible proposals for change.

42. After considering *Wheatcroft* and *Breckland* DC, Elias J. distinguished the position on appeal:

> "40 In my judgment these cases are not inconsistent with the conclusions I have reached. They still focus on whether the change is substantial bearing in mind the effect on third parties as well as the applicant. But they are concerned with the position on appeal, and plainly there will be a more limited scope to accept what is in effect an amended application at that juncture. It will not be possible at that stage, for example, to permit further consultation. It would plainly not be appropriate to grant planning permission in circumstances where the statutory requirements have not been complied with. The procedure for amendment cannot be used to sidestep the rights of third parties. Not surprisingly, therefore, the question whether an amendment can be fairly and appropriately allowed in that context will be wholly different to the same question when posed by the planning authority itself at a stage when no permission has been granted and further consultation is possible. It follows that these authorities do not affect the conclusions I have reached."

43. I accept the Secretary of State's submission that these *obiter dicta* were misjudged. Experienced planning counsel who appeared before me confirmed that, in practice, consultations on proposed amendments are occasionally undertaken at appeal, by developers or local planning authorities, without any objection from PINS, as in this case. Indeed, PINS states in the 2023 Procedural Guidance, paragraph 16.4, that it may require that proposed amendments are subject to consultation. In my view, it follows that Elias J.'s remarks on the limited scope of amendment on appeal were based on a false premise, namely, that consultation would not take place at appeal stage.

44. In *R (Holborn Studios Ltd) v Hackney LBC* [2017] EWHC 2823 (Admin), Mr John Howell KC, sitting as a Deputy High Court Judge, quashed the Council's grant of planning permission because it included amendments to the scheme upon which the Claimants had not been properly consulted. In his review of the law, he drew a distinction between the substantive and the procedural constraints on amendment, and concluded at [72] that they should not be "conflated". In his view, Forbes J. did conflate the two in *Wheatcroft*. In the interests of procedural fairness, a person might be entitled to be consulted, and make representations upon, a proposed amendment which was adverse to him, even though it did not result in a fundamental change to the development (at [73] – [79]).

45. Mr Howell KC observed, at [64], that the substantive constraint derived from the fact that the legislation only gives power to local planning authorities to determine the application in the terms of the description of the development, as set out in the prescribed application form, which has been subject to the notification and publicity requirements. I note that in this case BSL applied to amend the original description of development so as to delete the reference to the Forest School.

46. Mr Howell KC formulated the test to be applied at [65]:

> "The substantive limitation on the nature of the changes that may be made by an amendment appears to be whether the change

> proposed is substantial or whether the development proposed is not in substance that which was originally applied for, whether or not others have been consulted about the change: see *R* (*British Telecommunications Plc) v Gloucester City Council* [2002] 2 P&CR 33, at paras 38-40; and *Breckland District Council v Secretary of State for the Environment* (1993) 65 P&CR 34, 41."

47. Mr Howell KC did not distinguish between an application to the local planning authority and an appeal to the Secretary of State. He confirmed that the local planning authority has a discretion whether or not to allow an amendment. The exercise of its discretion may be challenged on public law grounds, including whether it was procedurally unfair in the circumstances of the case ([80] – [85]).

48. PINS publishes guidance on amendments in its "Planning Appeals: Procedural Guidance". The introduction to the edition published in October 2023 provides that it is "guidance only, with no legal status". The edition that was in force at the date of the Inquiry and the Inspector's decision was published in December 2022. It states at Annex M:

> "**Annexe M: Can a proposed scheme be amended?**
>
> **M.1 Making a new application**
>
> M.1.1 If an applicant thinks that amending their application proposals will overcome the local planning authority's reasons for refusal they should normally make a fresh planning application. The local planning authority should be open to discussions on whether it is likely to view an amended scheme favourably.
>
> **M.2 If an appeal is made**
>
> M.2.1 If an appeal is made the appeal process should not be used to evolve a scheme and it is important that what is considered by the Inspector is essentially what was considered by the local planning authority, and on which interested people's views were sought.
>
> M.2.2 Where, exceptionally, amendments are proposed during the appeals process the Inspector will take account of the Wheatcroft Principles when deciding if the proposals can be formally amended. In the 'Wheatcroft' judgment the High Court considered the issue of amendments in the context of conditions and established that "the main, but not the only, criterion on which... judgment should be exercised is whether the development is so changed that to grant it would be to deprive those who should have been consulted on the changed development of the opportunity of such consultation" (Bernard Wheatcroft Ltd v SSE [JPL, 1982, P37]. This decision has since been confirmed in Wessex Regional Health Authority v SSE [1984] and Wadehurst Properties v SSE & Wychavon DC [1990] and Breckland DC v SSE and T. Hill [1992]). It has subsequently been established that the power to consider amendments is not

> limited to cases where the effect of a proposed amendment would be to reduce the development (See Breckland DC v. Secretary of State for the Environment (1992) 65 P&CR.34).
>
> M.2.3 Whilst amendments to a scheme might be thought to be of little significance, in some cases even minor changes can materially alter the nature of an application and lead to possible prejudice to other interested people.
>
> M.2.4 The Inspector has to consider if the suggested amendment(s) might prejudice anyone involved in the appeal. He or she may reach the conclusion that the proposed amendment(s) should not be considered and that the appeal has to be decided on the basis of the proposal as set out in the application."

49. On my reading, paragraph M.2.3 reflects the key point made in the *Holborn Studios* case. In the October 2023 edition, at paragraph 16, the substantive and the procedural constraints, as set out in *Holborn Studios*, are separately identified and set out, as a refinement of the Wheatcroft Principles. Paragraph 16.4 provides that if the Planning Inspectorate does decide to accept the proposed amendments, it may require that they are subject to re-consultation.

Claimant's submissions

50. The Claimant submitted that the Inspector erred in law, as he failed to address whether the Revised Scheme was substantially different from the Original Scheme. At DL/7, the Inspector only considered the procedural constraint, not the substantive constraint. His conclusion was based purely on the fact that he believed that there would be no prejudice to the interests of any party. Moreover, he did not have regard to the refinement of the Wheatcroft Principles in the *Holborn Studios* case.

51. Further or in the alternative, the Claimant contended that the Inspector's determination that the modifications were "minor" was irrational. The differences between the Original Scheme and the Revised Scheme were, in reality, substantial. The changing scale and volume of the solar panels changed the amount of BMV land used as part of the development and the removal of the solar panels greatly affected the landscape and visual impact from the PROWs. The Forest School, which was in an area over 100 m long and put forward as a community benefit, was removed entirely. The scale of the changes required an ES Addendum and a revised Landscape and Ecological Management Plan, and could be seen by comparing the original and revised versions of the Landscape Mitigation Plan and the Landscape and Ecology Enhancement Plan.

52. Insofar as the Inspector's reasoning was based on the fact that he believed the amendments went towards addressing the reasons for refusal, this was an immaterial consideration that could not amount to a reason for concluding that the Revised Scheme was not substantially different from the Original Scheme. In any event, the removal of the Forest School was not designed to address a reason for refusal. According to BSL, the Forest School was removed because there was no demand for it, and the land could instead enhance biodiversity. But since there was no biodiversity reason for refusal, the removal of the Forest School could not be justified on the basis that it helped address the

reasons for refusal. By taking this factor into account, the Inspector therefore acted irrationally.

53. Finally, the Inspector did not give adequate reasons for his conclusion as to why the Revised Scheme was not substantially different from the Original Scheme.

Defendants' submissions

54. The Secretary of State submitted as a preliminary point that the Claimant ought not to be permitted to advance this ground of challenge because the basis for the ground, namely, that the Revised Scheme was substantially different to the Original Scheme, was not advanced in the appeal. The focus of the Claimant's case on appeal was that the amendments should not be allowed because the consultation procedure had been unfair.

55. The Secretary of State submitted that the question of whether a change is "substantial" or results in a proposal which "is not in substance that which was originally applied for" was a quintessential matter of planning judgment. The Inspector exercised that judgment lawfully at DL/7 - DL/9. Both the Secretary of State and BSL submitted that it was plainly open to the Inspector to reach this judgment, on the material before him.

56. Both the Secretary of State and BSL submitted that the Inspector's reasons were adequate. The reader would not have been in any doubt that the Inspector fully understood the proposed amendments and judged them to be "minor". The Inspector was not required to explain how each conclusion on each issue had been reached: the duty to give reasons did not extend to a duty to give reasons for reasons.

Conclusions

57. In my judgment, the Secretary of State's preliminary point was not consistent with the evidence. The Claimant contended on numerous occasions that BSL should not be allowed to rely on the Revised Scheme because the proposed modifications were substantially different to the Original Scheme. Although the Claimant was represented by a planning consultant, not a lawyer, there was express reference to a breach of the Wheatcroft Principles. See the Claimant's letter to PINS, dated 5 September 2022; the letter to BSL on 5 September 2022; the Claimant's Statement of Case; the Claimant's opening submission; the proof of evidence of Mr Richard Anstis, planning consultant; and the Claimant's closing submissions.

58. Furthermore, BSL's planning consultant, Mr Robert Asquith, in his proof of evidence, responded to the Claimant's case on this very point, summarising the Claimant's argument as "Recent Appeal Proposal modifications are "major" not "minor"".

59. The Inspector's consideration of BSL's application to amend the Original Scheme was set out at DL/6-9. The Inspector said, at DL/7-9:

> "7 The substantive changes introduced by the amendments comprise a small reduction in the number of proposed solar panels to increase offset distances from public rights of way, bolstering of the planting to enhance screening, and re-purposing of the proposed Forest School to an enlarged nature area. The Council did not object to the revisions and advised that it considers that

> primary consideration should be given to the amended scheme as it has been consulted on and discussed at the Inquiry and is an improvement on the submitted proposal.
>
> 8. As noted above, at the time of submission to the LPA, the application proposal was subject to publication under the DMP. With regard to the revised proposal under this appeal, I heard that the appellant carried out a further consultation exercise comprising letters, site notices, a website hosting scheme details along with a copy being placed at the Council offices in August 2022. Comments were invited before 30 September 2022. An amendment to the ES2 in respect of the proposed revisions was undertaken, dated August 2022, and its conclusions are noted.
>
> 9. Given this further consultation on the revised scheme under this appeal, and as the modifications are minor and go towards addressing the reasons for refusal, I am satisfied that dealing with the appeal on the basis of the amended plans would not prejudice the interests of any party, taking account of the Wheatcroft judgment. I have dealt with the appeal on this basis."

60. The Inspector heard and read submissions on this issue from all parties at the Case Management Conference and the Inquiry. BSL referred to the amendments throughout as "minor modifications" which ought to be allowed, applying the Wheatcroft Principles. The Council also referred to them as "minor modifications" and did not oppose the application to amend. This characterisation was disputed by the Claimant, who referred to the amendments variously as "major", "fundamental" and "significant", and submitted that they should be rejected, applying the Wheatcroft Principles. I have no doubt that, when the Inspector stated that "the modifications are minor" in DL/9, he was referring to this disputed issue, and explaining to the parties that he accepted BSL's submissions. It followed that he was rejecting the Claimant's submissions to the contrary. At this point, he was addressing the substantive element of the Wheatcroft test, not the procedural element, which he had already addressed at DL/8 and the first sentence of DL/9.

61. On my reading of the Decision, at DL/9, the Inspector was correctly applying the 2022 edition of the Procedural Guidance and the Wheatcroft Principles. I accept that he did not refer to the *Holborn Studios* case, and that he might have drafted this paragraph differently if the 2023 edition of the Procedural Guidance had been available to him, which expressly incorporates the *Holborn Studios* refinements. However, I consider a challenge on that basis to be the type of hypercritical and legalistic approach deplored by Lindblom LJ in *St Modwen*. In my view, a consideration of the *Holborn Studios* case would not have made any difference to the Inspector's conclusions in this particular case. *Holborn Studios* was distinguishable from this case on the facts since here there had been a consultation procedure on the amendments, and the Inspector was satisfied that the Claimant had not been prejudiced.

62. At the Inquiry, BSL submitted that the proposed modifications would reduce the adverse impacts of the Development. The Inspector summarised the submission at DL/7, and also referred to the Council's submission that the Revised Scheme was an improvement on the submitted proposal. The Inspector accepted those submissions, stating at DL/9 that the modifications "go towards addressing the reasons for refusal". In my view, this

was a relevant consideration which the Inspector was entitled to take into account, in the exercise of his discretion. The Council refused planning permission in part because of the adverse impact of the development, due to its scale, on the landscape character and visual amenity of the area and the enjoyment of PROWs. So it was not irrational for the Inspector to accept that the adverse impact would be reduced, at least partially, by (1) reducing the size of the solar array so that it was further away from the PROWs; (2) replacing a school with a Nature Area; and (3) increasing landscape screening. On my reading of DL/9, this was a separate consideration from the finding that the modifications were minor. The Inspector did not find that the amendments were minor because they went towards addressing the reason for refusal. He found that they were minor and went towards addressing the reason for refusal.

63. Turning to the rationality challenge, in my judgment, the Inspector was entitled to accept the evidence and submissions of both BSL and the Council that the modifications were minor, and the Revised Scheme was an improvement on the Original Scheme.

64. The first modification reduced the number of solar panels, and set them further back from the PROWs. The third modification enhanced the screening of the solar panels from the PROWs. Both were minor amendments to the plans which were intended to reduce the adverse views of the development for walkers on the footpaths. The opinion of the Council's planning consultant, Ms Karen Tipper, was that, although the modifications were an improvement, they were too minor to adequately address the concerns of the Council and local residents.

65. The Forest School had to be listed in the description of development because it included the construction of a building. However, it was reasonable for the Inspector to accept that its removal was not of sufficient significance to the Development so as to render it a substantially different proposal. The OR referred to it as a community benefit, but explained that it did not meet the CIL (Community Infrastructure Levy) tests and so it could not be afforded weight as a material consideration in the planning balance. Plainly it was not directly related to the solar farm, and it was not considered necessary to make the Development acceptable in planning terms. Mr Asquith explained that the Forest School project was not being pursued because BSL had learned that there was already a similar establishment in Bramley, and there was no demand for another one. No one had shown any interest in operating it. The alternative of extending the adjacent Nature Area over this part of the site was considered to be a better use of the land, as it contributed to a higher amount of biodiversity gain.

66. Neither consultation procedure revealed any real support for the Forest School; indeed the initial proposal was criticised by local residents (see e.g. the OR at pages 283 and 292)

67. In the light of this evidence, I conclude that the Inspector made a lawful exercise of planning judgment when he found that the modifications were minor. The Claimant disagrees with the Inspector's judgment, but that is not a sufficient basis for a legal challenge. In my view, the Claimant has not met the high bar for a successful irrationality claim.

68. In my view, the Inspector's reasons were adequate and met the required standard as set out in *South Bucks DC*. The Inspector was entitled to deal with the issues shortly. As Lindblom LJ held in *St Modwen,* at [6(1)], decision letters are written principally for the parties who know what the issues between them are, and what evidence and argument

has been deployed on those issues. An Inspector does not need to rehearse every argument relating to each matter. The duty to give reasons does not extend to explaining how each conclusion on each issue has been reached; there is not a duty to give reasons for reasons.

69. For these reasons, Ground 1 does not succeed.

Ground 2: Consultation

Law

70. A consultation is unlawful if it is "so unfair as to be unlawful": see, for example, *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649 at [68] and [73].

71. The fact that a consultation was "not perfect or could have been improved" is not enough to render it unlawful, provided that "in all the circumstances, it provided a fair opportunity for those to whom the consultation was directed adequately to address the issue in question": *R (Keep the Horton General) v Oxfordshire Clinical Commissioning Group* [2019] EWCA Civ 646 at [66], per Sir Terence Etherton MR.

72. Furthermore, in order to succeed on a claim for procedural unfairness a claimant must have been materially prejudiced: *Secretary of State for Communities and Local Government v Hopkins Developments Ltd* [2014] EWCA Civ 470 at [49]. This is because there "is not a breach of natural justice "unless the appellant has been substantially prejudiced thereby"": *Swinban*k *v Secretary of State for the Environment & Anor* (1988) 55 P & CR 371, at 376, per David Widdicombe QC.

73. The statutory requirements for publicising a planning application accompanied by an ES are set out in Articles 15(1A) and 15(7) of the Town and Country Planning (Development Management Procedure) (Order) (England) 2015 ("DMPO"). The requirements are that the planning application must be publicised by giving requisite notice by site display for not less than 30 days, by publication of the notice in a local newspaper and by publication of the following information on a website maintained by the Council:

    i) The address or location of the proposed development;

    ii) A description of the proposed development;

    iii) The ES;

    iv) The date by which any representations about the application must be made, not before 30 days after publication;

    v) Where and when the application may be inspected; and

    vi) How representations may be made about the application.

74. If there is an appeal, the local planning authority will be required by PINS to notify statutory consultees and those who made representations on the application, and informing them of their rights to make representations in the appeal. Details of any Inquiry must also be published at the Site and in a local newspaper. See the Town and

Country Planning Appeals (Determination by Inspectors)(Inquiries Procedure)(England) Rules 2000, Rules 4 and 10.

75. The 'Sedley Criteria' set out four common law requirements for a fair consultation (derived from Hodgson J. in *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168). These are (i) The consultation should be undertaken at a time when the proposals are still at a formative stage; (ii) The body undertaking the consultation should provide sufficient reasons and explanation for the decision about which it is consulting to enable the consultees to provide a considered and informed response; (iii) Adequate time to allow for consideration and response must be provided; and (iv) The responses to the consultation must be conscientiously taken into account in reaching the decision about which the public body is consulting.

76. When the duty to consult arises, the manner in which it is conducted will be informed by the common law requirement of fairness, having regard to the statutory context *(R (Moseley) v Haringey LBC* [2015] 1 All ER 495, [44]).

Claimant's submissions

77. The Claimant submitted that the consultation on the Revised Scheme was procedurally unfair and caused prejudice to the Claimant. It relied on the judgment of Elias J. in *British Telecommunications Plc* in support of its proposition that the scope for amendments on appeal was limited because it would be extremely difficult, if not impossible, for consultation to take place.

78. The Claimant contended that consultation at appeal stage must meet the requirements of the DMPO. Here the consultation failed to meet the requirements of the DMPO because it was carried out by the applicant for planning permission, who had a vested interest in the outcome, not by the local planning authority. In particular, the relevant information was not provided on the local authority's website. The consultation letter was not impartial as it described the modifications as "minor" which discouraged readers from examining it in any detail. The public needed to be reassured that their comments would be fairly and conscientiously collated and considered by a neutral public body otherwise they were unlikely to participate. For these reasons it was also procedurally unfair at common law (the Sedley criteria assume that consultation will be undertaken by a public body).

79. A further criticism made by the Claimant was that the deadline for the consultation was 30 September 2022, which was 16 days later than the deadline of 14 September 2022 given by PINS for submitting representations on the appeal. This discrepancy was likely to cause confusion among consultees, and could potentially have affected the number and nature of the responses received by PINS and in the consultation. The different dates also strengthened the impression that the consultation was being carried out by BSL, not an impartial public body.

80. Finally, the Claimant submitted that, given the scale of the changes, a wider consultation ought to have been carried out, which was not focused on those who had previously made representations. A person who had not objected to the Original Scheme may have wished to object to the Revised Scheme because, for example, of the repurposing of the Forest School site as a Nature Area.

Defendants' submissions

81. BSL contended that, because of the minor nature of the modifications, a further consultation was not a legal requirement. However, BSL conducted a full consultation in the interests of community engagement. The consultation was not required to comply with the DMPO because it was at appeal stage. However, BSL expressly did all it could to follow the DMPO requirements. Correspondence at the time showed that the Council agreed with the approach taken. The Council declined to host the consultation website and suggested that it should be hosted by BSL. But the relevant information was provided on the Council's website at the same time because it related to the pending appeal.

82. The Secretary of State submitted that the DMPO requirements do not apply to proposed amendments on appeal. There is no prescribed procedure for consultation in these circumstances and so the applicable standards derived from the common law. There is no rule of law that a consultation on proposed amendments must be carried out by a public body. It is commonplace for appellants to undertake consultations on proposed amendments ahead of inquiries, as PINS does not undertake consultations on behalf of parties.

83. The consultation was not only directed at those who had previously made representations. The amendment proposal was also available to members of the public as it was published on 7 site notices posted in the vicinity of the Site; in a notice in the Basingstoke Gazette; and on BSL's dedicated website.

84. Even if there was force in the Claimant's criticisms of the consultation, it did not suffer any material prejudice as a result. It was fully aware of the proposed amendment of the scheme in advance of the Inquiry and it was able to advance its opposition to it fully, in evidence and submissions.

Conclusions

85. I refer to the law on amendments set out at paragraphs 39 - 49 of my judgment. As I said at paragraph 43, I consider that the *obiter dicta* remarks of Elias J. in *British Telecommunications,* at [40], that at appeal stage "[it] will not be possible …. to permit further consultation" were misjudged. Experienced planning counsel who appeared before me confirmed that, in practice, consultations on proposed amendments are occasionally undertaken at appeal, by developers or local planning authorities, without any objection from PINS, as in this case.

86. The DMPO sets out the requirements for publicising a planning application. There is no legal obligation to comply with these requirements when applying to amend a proposed scheme at an appeal. At appeal stage, there is no statutory obligation to consult on a proposed amendment, but consultation may be required in any particular case in order to meet the common law requirements of fairness.

87. BSL undertook an extensive consultation, largely modelled on the DMPO requirements, which included the following steps:

    i) A detailed letter dated 11 August 2022 sent to all those who were directly consulted and/or sent representations when the planning application was

considered by the Council (772 letters were sent). The Council provided BSL with a list of names and addresses. Some of the addresses in the list were redacted or illegible and it appears that at least one consultation letter was wrongly addressed. The Claimant did not receive a copy of the letter, though the letter was sent to individual members of the Claimant who had made representations, including the Chairman and Secretary of the Claimant.

ii) Site notices were posted at 7 locations in the vicinity of the Site. I was satisfied by the evidence in paragraph 20 of Mr Asquith's witness statement that the Site notices were posted on 10 August 2022, contrary to Mr Spillane's assertion.

iii) A notice published in the Basingstoke Gazette on 11 August 2022.

iv) A dedicated website hosted by BSL with the relevant documents available on it.

v) The Addendum ES was also made available for consultation.

88. I consider that BSL took reasonable steps to notify members of the public of the consultation, by means of the letters, the Site and newspaper notices, and the website. Although some letters were not sent as they should have been, I bear in mind the guidance of the Court of Appeal, in *Keep the Horton General,* that a consultation which is not perfect or could have been improved, will not be unlawful if it provided a fair opportunity to address the issue. In my view, members of the public were given a fair opportunity to address the issue in this case.

89. It is unlikely that members of the public were prejudiced if they did not see BSL's consultation letters or notices because details of the consultation were also posted on the Council's website from 15 August 2022 onwards, in the discharge of its duty to provide information about the appeal, and the right to make representations about it. I was shown a screenshot of the Council's website which confirmed this. The Claimant was also actively communicating with local residents about the Original and Revised Schemes, and in a relatively small community, it seems unlikely that residents were unaware of the proposed Development.

90. In my view, there is no legal requirement or guidance to the effect that a consultation on a proposed amendment should be conducted by a local planning authority or other public body. In this case, the Council was not willing to conduct any consultation. It also expressly refused BSL's requests that the Council host consultation documentation on its website, and allow responses from consultees to be sent direct to the Council, rather than to BSL. The Council did not object to BSL's consultation proposals but it took the view that it had no formal role to play since its decision was under appeal, and therefore it was not under any obligation to assist in the consultation exercise. Since PINS does not conduct consultations on behalf of parties, BSL had no alternative but to conduct the consultation itself.

91. In its consultation notices BSL stated:

> "It is important to note that responses to this consultation are for the use of the Inspector who will consider the Appeal. Bramley Solar Ltd is facilitating the consultation but neither it nor Basingstoke and Deane Borough Council … should be thought of as recipients of comments."

…..

> "All comments received will be forwarded to the Planning Inspectorate and Basingstoke and Deane Borough Council prior to the opening of the Public Inquiry to be considered alongside all other consultation responses that have been received on the planning application….."

92. In my view, this statement was sufficient to avert the risk that anyone would be deterred from responding to the consultation on the grounds that it was conducted by BSL, not the Council.

93. The deadline for responses to the consultation on the amendments was 30 September 2022, whereas the deadline for responses to PINS on the appeal was 14 September 2022. BSL explained its choice of deadline in its Statement of Case as follows:

> "6.27. A date will be set for responses to the consultation which will allow a minimum of 30 days for responses. This is the period required by the EIA Regulations and has been chosen because it exceeds the minimum 21 days required by the DMPO."

94. In my view, BSL's choice of deadline was reasonable and fair. There was no evidence to support the allegation that it caused confusion. In my view, it would have been sufficiently clear to members of the public that there were two separate consultations, each with different deadlines.

95. In any event, I accept the submissions of the Secretary of State and BSL that the Claimant has not established material prejudice as a result of any failings in the consultation procedure because it had adequate time to consider and respond to the application to amend, and its views were fairly considered by the Inspector. It participated as a Rule 6 party in the Inquiry, making written and oral submissions, and calling witnesses, in opposition to the amendment. The Claimant raised its concerns about the consultation procedure at the Case Management Conference and the Inquiry. The Inspector was satisfied that the Claimant and its members were not prejudiced (DL/8,9).

96. For these reasons, Ground 2 does not succeed.

Ground 3: Determination before Inquiry commenced

Claimant's submissions

97. The Claimant submitted that the Inspector erred in law in failing to reach a determination before the Inquiry began as to whether the Original Scheme or the Revised Scheme would be considered at the Inquiry. An Inquiry proceeds on the basis that permission is being sought for a defined development, and permission cannot simultaneously be sought for two different schemes.

98. The Claimant further submitted that fairness requires that every party to an Inquiry knows what is being addressed. In support of that submission, the Claimant cited the judgment of Jackson LJ in *Hopkins Developments Ltd v Secretary of State for Communities and Local Government* [2014] PTSR 1145, at [62]:

> "Any party to a planning inquiry is entitled (a) to know the case he has to meet and (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.
>
> If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the Inspector's decision.
>
> ….."

99. Mr Richard Anstis, the Claimant's planning consultant and representative at the Inquiry, considered that the Inspector's approach caused confusion and uncertainty during the Inquiry as it was not clear which scheme was under consideration. Mr Anstis also complained that extra work and expense was incurred by the need to address both schemes in proofs of evidence and submissions.

Defendants' submissions

100. The Secretary of State and BSL submitted that there was no requirement in law, policy or guidance to determine the amendment application in advance of the Inquiry. The Inspector's approach was open to him, and it was procedurally fair.

101. The Secretary of State and BSL submitted that Mr Anstis did not raise any concerns during the Inquiry that he or the Claimant's witnesses were confused or uncertain. Mr Anstis dealt with both schemes together in his Closing Submissions, apparently without difficulty. As the differences between the two schemes were minor, they played little part in the discussions at the Inquiry.

Conclusions

102. The Summary Note of the Case Management Conference stated:

> "12. The appellant wishes for revised details to be considered at the Inquiry. This is disputed by the Residents Group. The Council indicated that it has no objections to the revised details being considered but would wish to see either the revised scheme or the scheme as determined by the Council presented in evidence at the Inquiry. However, given the revisions as described by the appellant are not extensive, and the dispute between the appellant and the Residents Group concerning consultation on the revisions, it would be [pertinent] to consider both iterations of the proposal at the Inquiry to enable the parties to fully cover the areas in dispute, in their respective evidence."

103. In my judgment, the Inspector was entitled, in the exercise of his discretionary case management powers, to decide that it was appropriate to determine this disputed issue at the Inquiry. This was procedurally fair because it enabled all the parties to present their cases fully in their evidence and submissions. In particular, the Claimant was given the opportunity to ventilate its concern about the consultation process and the significance of the proposed amendments.

104. The procedure adopted by the Inspector also allowed him to reach a judgment on the issue, having considered all the relevant evidence and legal submissions. He was far better informed about the Original and the Revised Schemes, and in a better position to give a sound ruling, at the end of a 7 day Inquiry, than he would have been at the Case Management Conference.

105. I agree with the Secretary of State and BSL that there is no requirement in law, policy or guidance that only one scheme can be considered at an Inquiry. It is not unusual for multiple schemes for the same site to be considered at an Inquiry.

106. The procedure adopted at this Inquiry met the requirements of procedural fairness, summarised in *Hopkins*. The parties knew the case they had to meet, and had a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case. The three amendments were limited in scope and were factually straightforward. As the differences between the two schemes were minor, they played little part in the discussions at the Inquiry. If Mr Anstis was confused or unclear as to the matters under discussion at any stage of the Inquiry, I would have expected him to raise this concern with the Inspector during the Inquiry, and make reference to any such difficulty in his Closing Submissions. He did not do so, and he took a full part in the Inquiry. It was open to the Claimant to seek an order for costs against BSL in respect of the additional preparation required to address the amendment application. Therefore I do not consider that the Claimant was prejudiced.

107. For these reasons, Ground 3 does not succeed.

Ground 4: Bramley Road access

Planning history

108. The Construction Traffic Management Plan provided, at paragraph 2.3, that all construction vehicles would enter the Site via Minchens Lane. Paragraph 5.17 provided that, once the Site was operational, maintenance vehicles would enter the Site via existing agricultural accesses on Minchens Lane, Olivers Lane and Bramley Road. Maintenance traffic was likely to be one visit per month in a transit van.

109. In January 2022, Mr Leigh Harrison sent a letter of objection to the Council contending that the proposed access at Bramley Road was unsafe and unsuitable because it was a narrow single track road which was used extensively by pedestrians on a PROW, as well as by cyclists; it had insufficient visibility splays; and the access into Field 1 was merely a field track which was prone to flooding. He complained that Hampshire County Council had not adequately assessed the access at Bramley Road.

110. Neither Hampshire County Council nor the Council's Transport Officer raised any objections to the access proposals when they were under consideration by the Council.

111. The OR, in the section headed "Traffic Generation and highway safety", stated that the Bramley Road access to Field 1 was not proposed as an access for construction traffic. This was to be enforced by draft condition 26 which stated:

> "There shall be no construction traffic accessing the site via the field access to the north east corner of Field 1 from Bramley Lane."

112. The OR assessed operational use at the Site (including but not limited to Bramley Road) as follows:

> "During operation, access to the site will be required to undertake the cleaning of the panels …and maintenance such as checking panels and replacing any defective components should any of the equipment fail. During operation, this will utilise small vehicles such as 4 x 4 or transit vans accessing the site approximately once a month. Other maintenance will comprise occasional mowing and/or grazing by sheep.
>
> The volume of traffic accessing the site has been assessed by HCC and is not considered to have a material effect on the safety or operation of the local highway network."

113. The Claimant submitted a paper on access to the Site at the Inquiry, which included the issues raised by Mr Harrison in January 2022, and it referred to the Bramley Road access in its Closing Submissions. The Claimant submitted that proposed amendments to the entrance to the access could not be implemented because the land was owned by a third party who would not consent to the proposals.

114. BSL responded to the concerns raised. Mr Asquith's rebuttal evidence stated, *inter alia*, that "[t]he field parcels retained for agriculture in Fields 1 and 2 will be accessed using a combination of the proposed access roads and agricultural tracks or "green lanes" …. The use of green lanes …. reduces the amount of land dedicated to access roads …It is a low maintenance/minimal disruption approach….".

115. BSL also submitted a paper in response to the Claimant's paper on access concerns, which stated, *inter alia*, that operational access to Field 1 would be via an existing agricultural access on Bramley Road. The access was "within the landowner's demise". Operational use was likely to be just one vehicle trip per month, in a transit van (paragraph 1.14). Paragraph 1.10 stated:

> "As this is an existing access, used by agricultural vehicles, it was not necessary to assess its operation for a single transit van trip per month. Notwithstanding this, and for completeness, the access is shown in Drawing SK05. This demonstrates that the access is appropriate for use."

116. The Inspector visited the Bramley Road access during his Site visit.

117. At DL/70-71 the Inspector set out his conclusions as follows:

> "70. With regard to highway safety, I note that the Council's Transport Officer and the County Council's Highways Officer raised no objections to the proposal subject to suitably worded conditions being attached to any grant of planning permission. The conditions would include requiring the submission and

> approval of an amended Construction Traffic Management Plan and against this background the Council considers that the proposal would accord with LP Policies CN9, EN8 and EM10 and Policy T2 of the Neighbourhood Plan. From my assessment, I have no reason to disagree.
>
> 71. I heard that the occupiers of Brookside Grange enjoy private rights of access over the access track to the northeast corner of Field 1 which is proposed for access to the proposal. Be that as it may, this would be a private matter for the relevant parties to address and is not determinative to my decision."

118. After the Inquiry, but before the DL was issued, Mr Harrison, on behalf of the Claimant, asked Hampshire County Council to prevent the unsuitable access proposed at Bramley Road. Following lengthy and somewhat confused email exchanges about the extent of its earlier assessment, Hampshire County Council confirmed that, as the operational phase would only generate one vehicle per month, using an existing field access from Bramley Road, no further information was needed, and no objection was made.

Claimant's submissions

119. The Claimant submitted that the Inspector erred in law by failing to have regard to the objections associated with the Bramley Road access into Field 1 of the Site, and/or to provide adequate reasons for considering that the access was acceptable. The Inspector was under a *Tameside*[1] duty to take reasonable steps to acquaint himself with the relevant material, including investigating the extent and adequacy of the assessment by Hampshire County Council.

Defendants' submissions

120. The Secretary of State and BSL submitted that the Bramley Road access was not a main issue in the appeal. It was open to the Inspector to reach the conclusions set out at DL/70-71. In order to succeed in a *Tameside* challenge, a claimant must demonstrate that the decision maker acted irrationally by failing to make further enquiries. The Inspector did not act irrationally in concluding that he had sufficient information available to him on the Bramley Road access.

121. The Inspector's reasons, namely, that he had no reason to disagree with the assessment of the independent professional officers who raised no highways objections, and that private land rights were outside the scope of the appeal, were sufficient, and met the required legal standard.

Conclusions

122. The main issues in the appeal were identified at the Case Management Conference and set out at DL/12. It was never suggested by the Claimant or any other party that the Bramley Road access was a main issue.

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[1] *Secretary of State for Education and Science v Tameside MBC* [1977] AC 1014

123. The Inspector's reasons, at DL/70-71, met the required legal standard, as set out in *South Bucks DC*. The Inspector's reasons were briefly stated, adequate and intelligible. He explained that he had no reason to disagree with the independent professional officers in the County Council and the Council who had reviewed the scheme and raised no highway objections, subject to suitable conditions. The possibility of private rights of access was a private matter. The DL was directed at parties to the appeal who were well aware of the evidence and submissions on the Bramley Road access.

124. This was not a main issue, and the Inspector was not required to give more detailed reasons. An Inspector does not need to "rehearse every argument relating to each matter in every paragraph": per Lindblom LJ in *St Modwen* at [6(1)]. The lawful brevity of the reasons cannot properly be used as a springboard for an allegation that the Inspector failed to have regard to the Claimant's objections. In my view, there is no basis for concluding that the Inspector did not have regard to the evidence. On a fair reading of the DL, the Inspector accepted the judgment of the officers, which was supported by the evidence submitted by BSL, and he did not accept the Claimant's submissions and evidence.

125. The *Tameside* duty, which requires a decision-maker to take reasonable steps to acquaint himself with the relevant information, is an aspect of the doctrine of irrationality. It is for the decision-maker, not the court, to decide upon the manner and intensity of the inquiry to be undertaken. The court should only intervene if no reasonable decision-maker could suppose that that it possessed the information necessary for its decision (See *R (Campaign Against Arms Trade) v Secretary of State for International Trade* [2019] 1 WLR 5765 at [58], [59]).

126. In my judgment, the Inspector was entitled to conclude that he had sufficient information to determine this issue on the basis of the material summarised above at paragraphs 109 – 116, and his own Site visit.

127. For these reasons, Ground 4 does not succeed.

Ground 5 and 6 (1): Paragraph 174 NPPF

Law and policy

128. Paragraph 174 of the Framework (July 2021 ed.) provides:

> "174. Planning policies and decisions should contribute to and enhance the natural and local environment by:
>
> a) protecting and enhancing valued landscapes, sites of biodiversity or geological value and soils (in a manner commensurate with their statutory status or identified quality in the development plan);
>
> b) recognising the intrinsic character and beauty of the countryside, and the wider benefits from natural capital and ecosystem services – including the economic and other benefits of the best and most versatile agricultural land, and of trees and woodland;

……"

129. The Framework does not define the term "valued landscape", and a valued landscape does not have to carry any designation (*Stroud DC v SSCLG* [2015] EWHC 488 (Admin), [13]). The Guidelines for Landscape and Visual Impact Assessment (3rd ed) ("GLVIA") set out eight factors which can help identify valued landscapes: landscape quality, scenic quality, rarity, representativeness, conservation interests, recreational value, perceptual aspects and associations.

130. In *Cawrey Ltd v Secretary of State for Communities and Local Government* [2016] EWHC 1198 (Admin), at [49], Gilbart J. addressed the equivalent of paragraph 174(b) in the 2012 edition of the Framework:

> "NPPF undoubtedly recognises the intrinsic character of the countryside as a core principle. The fact that paragraph [109] may recognise that some has a value worthy of designation for the quality of its landscape does not thereby imply that the loss of undesignated countryside is not of itself capable of being harmful in the planning balance, and there is nothing in Stroud DC v SSCLG [2015] EWHC 488 per Ouseley J or in Cheshire East BC v SSCLG [2016] EWHC 694 per Patterson J which suggests otherwise. Insofar as Kenneth Parker J in Colman v SSCLG may be interpreted as suggesting that such protection was no longer given by NPPF, I respectfully disagree with him. For it would be very odd indeed if the core principle at paragraph [17] of NPPF of "recognising the intrinsic beauty and character of the countryside" was to be taken as only applying to those areas with a designation. Undesignated areas- "ordinary countryside" as per Ouseley J in Stroud DC- many not justify the same level of protection, but NPPF, properly read, cannot be interpreted as removing it altogether."

131. In *De Souza v Secretary of State for Communities and Local Government* [2015] EWHC 2245 (Admin), at [32], Ouseley J. held:

> ""Recognising intrinsic character" must involve some response to that recognition which is inherently a protective or safeguarding one. The inherent beauty or character of the countryside does not presuppose some areas of the countryside have intrinsic beauty but other areas have none. The very concept of intrinsic character and beauty recognises that all countryside will have some such qualities."

Claimant's submissions

132. On Ground 5, the Claimant submitted that the Inspector misinterpreted paragraph 174(b) of the Framework when he stated, at DL/18:

> "The National Planning Policy Framework (NPPF) in recognising the intrinsic character and beauty of the countryside, does not seek

> to protect all countryside from development, rather focusing on the protection of valued landscapes."

133. The Claimant contended that this summary was directly contrary to the cases of *Cawrey* and *De Souza*, which explicitly state that in order to "recognise" the intrinsic character and beauty of the countryside there must be a protective response. Even if there is greater protection for valued landscapes than for other types of countryside, the Framework affords protection to all countryside.

134. Once the Inspector concluded that the Site was not a valued landscape, the Inspector's misreading of paragraph 174(b) led him to believe that the Revised Scheme was not in conflict with the Framework's requirement to recognise the intrinsic character and beauty of the countryside. This was a material error which infected his assessment of the Revised Scheme as a whole, especially since landscape harm was the main basis of the Council and Claimant's cases at the Inquiry.

135. On Ground 6(1), the Claimant submitted that the Inspector failed to grapple with the Claimant's submissions on a "principal controversial issue", namely, whether or not the Site was a valued landscape. The Inspector's reasons, which were set out in DL/18-19, were inadequate, as they gave rise to substantial doubt as to the basis of the Inspector's decision. The Inspector may have erroneously placed weight on the fact that the Site was not a designated landscape.

Defendants' submissions

136. On Ground 5, the Secretary of State and BSL submitted that paragraph 174 of the Framework draws a distinction in respect of the policy applicable to valued landscape and other countryside. Valued landscapes are to be "protected" and "enhanced" whereas other countryside is to be "recognised" for its intrinsic character and beauty. Whilst the court in *De Souza* held that "recognise" must have some protective implication, the level of protection afforded to valued landscape is plainly higher. The Inspector was referring to this distinction in DL/18.

137. Although the Inspector concluded that the countryside in question did not constitute a valued landscape, he did not treat this as meaning that it had no intrinsic character and beauty worth protecting. In accordance with paragraph 174(b), the Inspector undertook a detailed assessment of the impact of the proposed development on the landscape character and visual amenity of the countryside; assessed the harm that the development would cause; and weighed this in the planning balance.

138. On Ground 6(1), the Secretary of State and BSL submitted that the Inspector gave adequate reasons for his conclusion that the landscape in question was not a valued landscape. Those reasons met the required legal standard. He did not treat the lack of designation as determinative. Realistically, the Inspector's assessment of the landscape in question at DL/20-24, which led him to the conclusion that the landscape was of medium value, must also have informed his conclusion on the question of whether or not it was a valued landscape.

Conclusions

139. On Ground 5, the starting point is that the court should presume that a specialist planning inspector has understood the policy framework correctly: per Lord Carnwath JSC in *Hopkins Homes v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, at [25].

140. In my judgment, in the first sentence of DL/18 the Inspector correctly summarised paragraph 174(a) and (b) of the Framework, albeit in a condensed way. I accept the submission of counsel for the Secretary of State and BSL that paragraph 174 of the Framework draws a distinction in respect of the policy applicable to valued landscape and other countryside, at sub-paragraphs (a) and (b). Valued landscapes are to be "protected" and "enhanced" whereas other countryside is to be "recognised" for its intrinsic character and beauty. Whilst the court in *De Souza* held that "recognise" must have some protective implication, the level of protection afforded to valued landscape is plainly higher. The Inspector was referring to this distinction in DL/18.

141. At DL/20–24, the Inspector undertook a detailed assessment of the landscape, identifying its intrinsic character, and concluding that it had a "medium landscape value". At DL/25–36, he assessed the harm which the development would cause to the landscape, in detail. At DL/81-82, he weighed the landscape harm in the planning balance. In this process, the Inspector both recognised and safeguarded the intrinsic character and beauty of the countryside, in accordance with paragraph 174(b) of the Framework.

142. On Ground 6(1), the Inspector received and heard a considerable body of evidence from landscape witnesses for BSL, the Council and the Claimant. A Landscape and Visual Impact Assessment was also submitted. The Inspector conducted a Site visit which must have assisted him in assessing the landscape. These matters are referred to in DL/18-24. Realistically, in reaching his decision, the Inspector will then have had to assess all the landscape evidence in order to decide how to classify the landscape in question – was it a valued landscape, and if not, what value should be attributed to it? So the Secretary of State and BSL are clearly correct in submitting that the reasons for the Inspector's decision on valued landscape include not only his conclusion at DL/19, but also his landscape assessment at DL/20–24.

143. The Inspector was correct to consider whether or not the land in question was designated, as this was a relevant consideration. However, the DL does not at any point suggest that he treated designation as determinative of the valued landscape issue.

144. In my judgment, the Inspector's reasons were adequate and intelligible and met the required legal standard set out in *South Bucks DC*. The Inspector acknowledged the strong feelings expressed by the Claimant and interested parties regarding the esteem in which the local landscape was held. However, he concluded, based on the evidence he received at the Inquiry as well as his Site visit, that he was in agreement with the view expressed by the witnesses for BSL and the Council to the effect that this was not a valued landscape. The Inspector was not required to address the Claimant's evidence more fully or "rehearse every argument relating to each matter in every paragraph": per Lindblom LJ in *St Modwen* at [6(1)].

145. For these reasons, Ground 5 and Ground 6(1) do not succeed.

Ground 6(2): Battery storage

Planning history

146. The proposed Development included a battery storage facility to store energy at times of low demand and release this to the grid when demand was higher or solar irradiance was lower. This would comprise the siting of twenty battery storage containers housed in shipping containers.

147. Mr Simon Bailey, an engineering consultant, submitted written representations to the Council on 1 March 2021. He contended that the public benefit of the battery storage element was unclear, since the primary function of the proposed batteries was to create very short term storage to allow BSL to "load shift".

148. Mr Peter Lo, an engineering consultant instructed by BSL, critically reviewed Mr Bailey's representations in a proof of evidence dated 10 November 2022.

149. Mr Bailey subsequently provided a proof of evidence to the Inquiry which addressed the capacity of the national grid power network and the need to consider alternatives. However, it did not deal with battery storage, and the Claimant did not present any other witness on the issue of battery storage.

150. At the Inquiry, BSL chose not to call Mr Lo as a witness because battery storage did not feature as a disputed area in the Claimant's or the Council's proofs of evidence. Moreover, the Inquiry timetable was under considerable pressure of time in the run up to Christmas. As Mr Lo had responded fully in writing to Mr Bailey's representations, BSL considered there would be no purpose served by calling him.

151. Mr Anstis, on behalf of the Claimant, objected to BSL's decision not to call Mr Lo as a witness, and asked that he attend so that he could be cross-examined by Mr Anstis. This dispute was raised with the Inspector who took the view that it was for each party to decide whether to call their respective witnesses.

152. The Claimant's case was that battery storage was not an outright benefit that should be afforded positive weight in the planning balance. Mr Anstis said in his Closing Submissions "in considering the Planning Balance …. the public benefit of the battery storage element of this proposal is not at all clear, since the primary function of the proposed batteries is to create very short term storage…. to allow the appellant to 'load shift' and trade that power on the market ….". He added that, "whilst there are no objections to the commercial objectives of the appellant, they are not a public benefit".

153. The Inspector addressed battery storage at DL/61-62 as follows:

> "61. Turning to the matter of battery storage, the 20no. proposed battery containers would enable storage of around 40MWh, being slightly less than the amount of electricity the solar farm would generate in one hour of peak operation. This is in line with the British Energy Security Strategy which encourages "all forms of flexibility" in the energy system and supports solar co-located with storage to maximise efficiency. It also aligns with the strategy for achieving net zero carbon, increasing energy security

> and reducing energy bills. It is a means of load shifting whereby energy generated during times when demand is at its lowest could be released back to the grid at times of peak demand.
>
> 62. I have considered the effect of the proposal on landscape character and in terms of its visual impact, including the proposed battery storage facility, above. In terms of the principle, I consider that the battery storage aspect of the proposal will offer flexibility in operation and maximise energy resources in a balanced and efficient way and does not weigh against the development."

154. The Inspector did not include battery storage as a public benefit at DL/73-79, nor did he ascribe it any positive weight in the planning balance.

Claimant's submissions

155. The Claimant submitted that, despite the fact that the public benefit was an issue directly in dispute between the parties, the Inspector failed to grapple with Mr Bailey's points or give reasons for rejecting them, saying only that "I consider that the battery storage aspect of the proposal will offer flexibility in operation and maximise energy resources in a balanced and efficient way". This statement, which adopted Mr Lo's evidence, gave the Inspector's conclusion on this issue but not the reasoning that led him to this conclusion. This lack of reasoning was compounded by the fact that the Inspector did not allow the Claimant to cross-examine Mr Lo, despite the Claimant requesting to do so. The Inspector therefore did not allow the Claimant fully to make its case.

Defendants' submissions

156. The Secretary of State submitted that this ground of challenge was hopeless because the Inspector did not treat battery storage as a public benefit of the Development. He treated it as essentially neutral in the planning balance, as the Claimant asked him to do. The Inspector was entitled to accept Mr Lo's evidence that battery storage would offer flexibility and maximise energy resources. His reasons met the required legal standard.

157. The Secretary of State and BSL submitted that the Inspector was entitled to take the view that it was up to the parties to decide which witnesses to call in the circumstances of this case.

Conclusions

158. I have been unable to discern any procedural unfairness in the Inspector's approach on this issue. If the Claimant wished to dispute Mr Lo's statement, it could and should have called a witness to do so. No explanation has been given for the fact that Mr Bailey did not address battery storage in his Proof of Evidence. BSL was entitled to decide which witnesses to call on its behalf. As neither the Claimant nor the Council proffered any witnesses on battery storage, there was no need for BSL to call Mr Lo. It would have been highly unusual for the Inspector to issue a witness summons in respect of an expert witness in these circumstances, and he was entitled to take the view that it was a matter for the parties to decide which witnesses they wished to call.

159. In my view, the Inspector was entitled to accept Mr Lo's evidence that battery storage would offer flexibility and maximise energy resources. The reasons he gave, at DL/61-62, were adequate and intelligible and met the legal standard in *South Bucks DC*. This was not a main issue. He was not required to set out reasons for not accepting the views expressed by Mr Bailey in his representations to the Council, particularly when they had not been advanced in evidence at the Inquiry.

160. In any event, the Inspector accepted the Claimant's submission, as presented by Mr Anstis in Closing Submissions, that battery storage should not be treated as a public benefit. He did not include it in his description of public benefits. At DL/62, he merely held that it did not weigh against the development. Thus, he treated it as a neutral factor for the purposes of the planning balance. Therefore the Claimant was not prejudiced by the Inspector's approach to this issue.

161. For these reasons, Ground 6(2) does not succeed.

Ground 7: Alternative sites

Law and policy

162. The authorities on alternative sites were helpfully reviewed by Holgate J. in *R (Save Stonehenge World Heritage Site Ltd) v Secretary of State for Transport* [2022] PTSR 74, at [268] – [272]:

> "268 The principles on whether alternative sites or options may permissibly be taken into account or whether, going further, they are an "obviously material consideration" which must be taken into account, are well established and need only be summarised here.
>
> 269 The analysis by Simon Brown J (as he then was) in *Trusthouse Forte Hotels Ltd v Secretary of State for the Environment* (1986) 53 P & CR 293,299–300 has subsequently been endorsed in several authorities. First, land may be developed in any way which is acceptable for planning purposes. The fact that other land exists upon which the development proposed would be yet more acceptable for such purposes would not justify the refusal of planning permission for that proposal. But, secondly, where there are clear planning objections to development upon a particular site then "it may well be relevant and indeed necessary" to consider whether there is a more appropriate site elsewhere. "This is particularly so where the development is bound to have significant adverse e□ects and where the major argument advanced in support of the application is that the need for the development outweighs the planning disadvantages inherent in it." Examples of this second situation may include infrastructure projects of national importance. The judge added that, even in some cases which have these characteristics, it may not be necessary to consider alternatives if the environmental impact is relatively slight and the objections not especially strong.

> 270 The Court of Appeal approved a similar set of principles in *R (Mount Cook Land Ltd) v Westminster City Council* [2017] PTSR 1166, at para 30. Thus, in the absence of conflict with planning policy and/or other planning harm, the relative advantages of alternative uses on the application site or of the same use on alternative sites are normally irrelevant. In those "exceptional circumstances" where alternatives might be relevant, vague or inchoate schemes, or which have no real possibility of coming about, are either irrelevant or, where relevant, should be given little or no weight.
>
> 271 Essentially the same approach was set out by the Court of Appeal in *R (Jones) v North Warwickshire Borough Council* [2001] 2 P LR 59, paras 22–30. At para 30 Laws LJ stated:
>
> > "it seems to me that all these materials broadly point to a general proposition, which is that consideration of alternative sites would only be relevant to a planning application in exceptional circumstances. Generally speaking—and I lay down no fixed rule, any more than did Oliver LJ or Simon Brown J—such circumstances will particularly arise where the proposed development, though desirable in itself, involves on the site proposed such conspicuous adverse e□ects that the possibility of an alternative site lacking such drawbacks necessarily itself becomes, in the mind of a reasonable local authority, a relevant planning consideration upon the application in question."
>
> 272 In *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P & CR 19 Carnwath LJ emphasised the need to draw a distinction between two categories of legal error: first, where it is said that the decision-maker erred by taking alternatives into account and second, where it is said that he had erred" "by failing to take them into account (paras 17 and 35). In the second category an error of law cannot arise unless there was a legal or policy requirement to take alternatives into account, or such alternatives were an "obviously material" consideration in the case so that it was irrational not to take them into account (paras 16–28)."

163. In *R (Substation Action Save East Suffolk Limited) v SS BEIS* [2022] EWHC 3177 (Admin), following a review of the authorities, I concluded, at [214]:

> "Furthermore, in my judgment, the Defendant and Applicants were correct to submit that the case law does indicate that consideration of alternative sites will only be relevant to a planning application in exceptional circumstances (see *Mount Cook*, cited at [270] in *Stonehenge*; *Jones* cited at [271] in *Stonehenge*; *Langley Park*, cited at [273] in *Stonehenge*, and see also in the law report at [2010] 1 P & CR 10, at [37], [40]). This principle was applied by Holgate J. in the *Stonehenge* case, at

> [277], when he found that the circumstances were "wholly exceptional"."

164. The Planning Practice Guidance ("PPG") on Renewable and Low Carbon Energy provides, at Paragraph 013 Reference ID 5-013-20150327:

> "**What are the particular planning considerations that relate to large scale ground-mounted solar photovoltaic farms?**
>
> The deployment of large-scale solar farms can have a negative impact on the rural environment, particularly in undulating landscapes. However, the visual impact of a well-planned and well-screened solar farm can be properly addressed within the landscape if planned sensitively.
>
> Particular factors a local planning authority will need to consider include:
>
> - encouraging the effective use of land by focussing large scale solar farms on previously developed and non agricultural land, provided that it is not of high environmental value;
>
> - where a proposal involves greenfield land, whether (i) the proposed use of any agricultural land has been shown to be necessary and poorer quality land has been used in preference to higher quality land; and (ii) the proposal allows for continued agricultural use where applicable and/or encourages biodiversity improvements around arrays …..
>
> - that solar farms are normally temporary structures and planning conditions can be used to ensure that the installations are removed when no longer in use and the land is restored to its previous use;
>
> - the proposal's visual impact, the effect on landscape of glint and glare and on neighbouring uses and aircraft safety;
>
> - the extent to which there may be additional impacts if solar arrays follow the daily movement of the sun;
>
> - the need for, and impact of, security measures such as lights and fencing;
>
> - great care should be taken to ensure heritage assets are conserved in a manner appropriate to their significance ….;
>
> - the potential to mitigate landscape and visual impacts through, for example, screening with native hedges;

- the energy generating potential, which can vary for a number of reasons including, latitude and aspect.

  …..

- the potential to mitigate landscape and visual impacts through, for example, screening with native hedges

- ……..”

165. Counsel referred to case law on challenges based on an alleged misinterpretation or failure to apply the PPG. In *Solo Retail Limited v Torridge District Council* [2019] EWHC 489 (Admin) Lieven J. explained at [33] that:

> “… the NPPG has to be treated with considerable caution when the Court is asked to find that there has been a misinterpretation of planning policy set out therein, under para 18 of Tesco v Dundee. As is well known the NPPG is not consulted upon, unlike the NPPF and Development Plan policies. It is subject to no external scrutiny, again unlike the NPPF, let alone a Development Plan. It can, and sometimes does, change without any forewarning. The NPPG is not drafted for or by lawyers, and there is no public system for checking for inconsistencies or tensions between paragraphs. It is intended, as its name suggests, to be guidance not policy and it must therefore be considered by the Courts in that light. It will thus, in my view, rarely be amenable to the type of legal analysis by the Courts which the Supreme Court in Tesco v Dundee applied to the Development Policy there in issue.”

166. In *R (White Waltham Airfield Limited) v Royal Borough of Windsor and Maidenhead* [2021] EWHC 3408 (Admin), I stated at [78]:

> “The Claimant is seeking to elevate the PPG into a binding code which strictly prescribes the steps that a local planning authority must follow when undertaking its assessment, otherwise it will be found to have acted unlawfully. In my judgment, that is a mistaken approach. The PPG is merely practice guidance, which is intended to support the policies in the NPPF.”

167. At the time of the DL, the draft National Policy Statement for Renewable Energy Infrastructure (EN-3) provided:

> “Agriculture land classification and land type
>
> 2.48.13 Solar is a highly flexible technology and as such can be deployed on a wide variety of land types. Where possible, ground mounted Solar PV projects should utilise previously developed land, brownfield land, contaminated land, industrial land, or agricultural land preferably of classification 3b, 4, and 5 (avoiding the use of “Best and Most Versatile” cropland where possible).

> However, land type should not be a predominating factor in determining the suitability of the site location."

168. The March 2023 draft version of EN-3 is in similar terms.

The Inspector's decision

169. The relevant passages in the DL are as follows:

> "55. Concerns were raised regarding a lack of detail demonstrating that alternative sites, including the use of previously developed land, was considered by the appellant. Reference was made to the advice contained in the 2015 iteration of the Planning Practice Guidance (PPG) regarding the range of factors to be considered for large, ground-mounted, solar developments. In particular, the use of greenfield sites and the preference for utilising poorer quality, ahead of higher quality, land.
>
> 56. However, the PPG states that a range of factors should be considered including whether the use of agricultural land is necessary, the temporary and reversible nature of the proposal, and the potential to mitigate landscape impacts through screening. This will involve a range of inputs, from grid connection to land ownership, landscape and visual effects and mitigation. The submitted details set out the reasons for the selection of the appeal site, including connecting to the national grid. LP Policy EM8 requires proposals to demonstrate such connections, and in this case, a connection to the national grid through the nearby Bramley substation has been secured. Given the constraints on the wider distribution network this is a matter which increases the compliance of the proposal with local policy.
>
> 57. Since 2015, Parliament has declared a climate emergency and the Climate Change Act 2008 (2050 Target Amendment) Order 2019 requires the achievement of net zero by 20508. I was not directed to any legal or policy requirements which set out a sequential approach to considering alternative sites with developments such as the appeal proposal. Of particular relevance, LP Policy EM8 does not require the demonstration of any sequential approach to site selection as confirmed by the Council. Accordingly, I do not consider that planning permission should be withheld on the basis of a lack of identified alternative sites being considered.
>
> 58. With regard to the use of agricultural land, Natural England's Agricultural Land Classification System (ALC) shows the site to be located within an area that contains Grade 2 land within Field 1 and the remainder as Grade 3. The submitted details include an Agricultural Land Quality Assessment. This shows that around 53% of the appeal site is Best and Most Valuable Agricultural

> Land (BMVAL). However, not all of this land would be covered by PV panels.
>
> 59. While the use of higher quality agricultural land is discouraged, the proposal is for a temporary period of forty years which could be secured by a condition attached to any grant of planning permission. The agricultural land would not be permanently or irreversibly lost, particularly as pasture grazing would occur between the solar panels. This would allow the land to recover from intensive use, and the soil condition and structure to improve. The use of the soils for grassland under solar panels should serve to improve soil health and biodiversity and the proposed LEMP, which could be secured by a condition attached to any grant of planning permission, includes measures to improve the biodiversity of the land under and around the panels.
>
> 60. Particular concerns were raised regarding compaction during construction and decommissioning. However, the submission of a Soils Management Plan, to be agreed in writing by the LPA, is intended to minimise such impacts. This could be secured by way of a condition, as suggested by the appellant, attached to any grant of planning permission. I note that Natural England as the statutory consultee on agricultural land, raised no comments in its consultation response in this regard. Against this background, I consider that the proposal would not be harmful in respect of BMVAL and would accord with LP Policy EM8 which requires consideration of the impacts of renewable energy developments on high grade agricultural land."

Claimant's submissions

170. The Claimant submitted that, on the evidence of Mr Bailey, BSL's search for alternatives was inadequate. The search was limited to within 5 km of the Bramley 400kV grid substation. Mr Bailey's own assessment of lower grade agricultural land determined that up to 5,000 ha of Grade 4 land is within 1 km of a 33kV transmission line within the Bramley grid supply point distribution network. If only about 5% of this area were found to be suitable for solar development, then Mr Bailey estimated that this would be sufficient to provide up to 200 MW of solar generation capacity.

171. The Inspector's reasoning and conclusion were legally flawed because the PPG imposed a duty to consider alternatives to the application site. The PPG explicitly provides that an applicant must show that the proposed use of any agricultural land is "necessary", and the only way to do this is through a sequential approach to demonstrate that there are no other sequentially preferable sites that do not involve the use of agricultural land. The inclusion of a similar necessity test in EN-3, via the words 'Where possible', strengthens the policy imperative to conduct a sequential test.

172. Although BSL submitted that they had considered alternative sites, it was significant that the Inspector did not find that this was the case, instead concluding merely that planning permission should not be withheld on the basis of a lack of identified alternative sites

being considered. In placing no weight on BSL's failure to consider alternative sites the Inspector therefore erred in law.

173. In the course of her submissions, Ms Sheikh KC expanded the scope of her pleaded case to claim that the second principle in *Trust House Forte* applied to this case, namely, that consideration of alternative sites was relevant or necessary in developments of national or regional importance which are bound to have significant adverse effects but where the need for development outweighs the planning disadvantage (summarised at paragraph 162 above in the judgment of Holgate J. in *Stonehenge*). I upheld the Defendants' objections to this, as it was far too late for her to make such a significant amendment which had not been considered or addressed by the Defendants. A transcript of my ruling has been applied for.

Defendants' submissions

174. The Secretary of State and BSL submitted that the PPG is guidance only, and does not establish binding requirements which must be followed in order for a decision to be lawful: see *Solo Retail* and *White Waltham Airfield*.

175. The Inspector had proper regard to the guidance in the PPG in his consideration of the various factors at DL/56–60. Paragraph 13 of the PPG only requires that decision makers "consider" whether the use of agricultural land has "been shown to be necessary". It does not mandate the consideration of alternatives. Still less does it require a sequential test be adopted. Where national policy requires a sequential test to be applied (e.g. town centre uses or flooding) it expressly provides as much (see the Framework paragraphs 87–91 and 161-168). Therefore the Inspector was correct to observe that he had not been directed to "any legal or policy requirements which set out a sequential approach to considering alternative sites with developments such as the appeal proposal".

176. Draft policy EN-3 cannot be read as mandating a sequential search for alternatives. It only applies "where possible" and adds the caveat:

> "However, land type should not be a predominating factor in determining the suitability of the site location.".

Conclusions

177. The PPG is merely practice guidance which supports the policies in the Framework. It is not a binding code which prescribes the steps that must be taken when planning a solar farm: see *Solo Retail* and *White Waltham Airfield*.

178. Paragraph 013 of the PPG sets out a list of factors that a local planning authority "will need to consider" which include "encouraging" development on brownfield and non-agricultural land. However, Paragraph 013 envisages that there will be proposals involving greenfield land, in which case the local planning authority should consider whether the proposed use of agricultural land has been shown to be necessary, poorer quality land has been used in preference to higher quality land, and whether the proposal allows for continued agricultural use and/or encourages biodiversity improvements around arrays.

179. I agree with the Secretary of State and BSL that the PPG does not mandate the consideration of alternatives. Still less does it require a sequential test be adopted. Where national policy requires a sequential test to be applied (e.g. sequential tests for town centre uses or flooding in the Framework) it expressly provides as much. Therefore the Inspector was correct to observe, at DL/57, that he had not been directed to "any legal or policy requirements which set out a sequential approach to considering alternative sites with developments such as the appeal proposal".

180. I also agree with the Secretary of State and BSL that draft policy EN-3 cannot be read as mandating a sequential search for alternatives, as it only applies "where possible" and states that "land type should not be a predominating factor in determining the suitability of the site location".

181. The Inspector considered the PPG Guidance, and the range of factors to be considered, at DL/55–60. This included consideration of the use of agricultural land and findings that the proposal would not be harmful to BMV land; not all of the BMV land would be covered by panels; there would be ongoing opportunities for pasture grazing; the improvement of the soil and biodiversity; and the temporary nature of the Development.

182. At DL/56 he referred to BSL's "submitted details" which "set out the reasons for the selection of the appeal site, including connecting to the national grid" which increased compliance with LP Policy EM8, given the constraints on the wider distribution network. The "energy generating potential" at a site is also a factor referred to in the PPG.

183. In my view, the Inspector was here alluding to the evidence from BSL on its reasons for site selection. At application stage, it was summarised in the OR as follows:

> "Whilst need for the development does not need to be demonstrated, supporting information to the application has sought to explain the reason for the site location and indicates that in determining the location of this particular development, the primary factor was a need to be close to an available grid location point which in turn influences the viability of the project. The application confirms that a Connection Agreement has been secured with National Grid to connect to the Bramley Substation which has capacity and the availability to receive a connection from a renewable energy source.
>
> A 5km search radius was then undertaken around the Bramley Substation. Land closer to the connection point presents a more viable and efficient the development and the less disturbance occurs environmentally. The area around the substation outside of the built up areas comprises mainly agricultural land, determining that such land is prime for consideration. Land was then selected having regard to criteria such as the availability of land, its Grade, allocation for other land uses, the topography and any designations (e.g. nature, historic and landscape). Following engagement with landowners, the application site under consideration was put forward comprising suitable, available and accessible land.

> In addressing the location, the proposal is considered to accord with Policy EM8 and the PPG that require a demonstration that the development can link to the existing infrastructure such as the national grid or the road network. The physical and environmental impacts of the proposal are assessed within this report having regard to the relevant development plan policies.
>
> Alternatives
>
> Representations to the application have raised concern as to the lack of detail provided on alternative sites, to include the use of previously developed land. The method of site selection is set out above and there is no requirement in Policy EM8 to demonstrate any sequential approach to site selection. As such the matter of seeking and presenting alternative sites cannot be afforded material weight in the planning balance.
>
> The Environmental Statement does however provide consideration of alternative options for the development, such as utilising the site for a differing renewable energy source such as for wind turbines or considering alternative layouts, design and access points. A 'Do Nothing' option was also considered which would not provide a contribution towards the need for alternative renewable energy nor the long term environmental benefits that would accompany the application such as benefits to soil quality, biodiversity, landscaping and to farm diversification."

184. At appeal stage, Mr Asquith addressed site selection in his proof of evidence as follows:

> "Agricultural Land.
>
> 10.11. Mr Askew's evidence shows that as a percentage of the Appeal Proposals site 69% is either not farmland or is lower quality, comprised of 3b quality (and other) land, or is not "under solar panels". Areas within the application site to the west of Fields 1 and 2 and to the east of Field 5 are to be retained for agriculture and these areas are mainly 3a land (BMV). Of the higher quality Best and Most Versatile (BMV) land to be used none is Grade 1 (Excellent) and 14.9 hectares out of 26.4 hectares is 3a that is the lowest category of BMV agricultural land.
>
> 10.12. The separate evidence of Frankie Whitaker BEng MEng IET of ITPEnergised concerns the grid connection.
>
> 10.13. The grid connection opportunity at the Appeal Proposals is to the National Grid. This is the Transmission Grid, not the Distribution (or DNO) grid to which solar farms tend to be connected. Mr Whitaker's evidence explains this. In the Basingstoke area the DNO grid is constrained. In contrast the area is one in which charging structures are favourable for Transmission Grid connections. With a Transmission Grid connection there are benefits of being within two kilometres. It

> is also generally true that the shorter a connection the better – there will be less land use and environmental disruption, fewer physical resources required (cable, insulation etc), less to go wrong, and less potential for power to be lost to resistance.
>
> 10.14. The Planning Statement accompanying the application sets out that within five kilometres of the point of connection at Bramley there is no area of land to accommodate a solar farm of the size suggested by the Grid Connection opportunity (circa 45+MW) in a way that would use any lesser amount of BMV. Hence, particularly in view of the issues above, use of land immediately adjacent to Bramley Frith Sub Station is preferred.
>
> 10.15. Alternatives other than the use of an equivalent area of farmland to the Appeal Proposals are not available. There are no brownfield sites of this size, nor even sufficient smaller sites to be used together and, of course, such brownfield land as is available tends to be under pressure for permanent developments such as of housing. Smaller projects are not viable as the Transmission Grid connection requires the scale of generation proposed. Rooftop solar is in any event not an alternative to large ground mounted solar with battery storage. They are both needed to achieve the 70GW solar Net Zero ambitions of the BESS.
>
> 10.16. There will be no permanent loss of agricultural land. After 40 years, or before that if the solar farm and batteries ceases operation, the land will be restored to its former use. The solar farm and battery structures will be "light touch" and on their removal the land could easily be restored to the type of agriculture undertaken there now.
>
> 10.17. During the lifetime of the solar farm there will be some food producing agricultural activities under and around the solar panels, in the form of sheep grazing."

185. Thus, I consider that there was ample evidence before the Inspector to inform his consideration of the factors identified in the PPG, and to support the conclusions in the DL. In view of his conclusion that BSL was not required to demonstrate a sequential approach to alternative site selection, the Inspector did not have to address Mr Bailey's evidence on alternative sites.

186. For these reasons, Ground 7 does not succeed.

Final conclusion

187. For the reasons set out above, the claim for planning statutory review under section 288 TCPA 1990 is dismissed.