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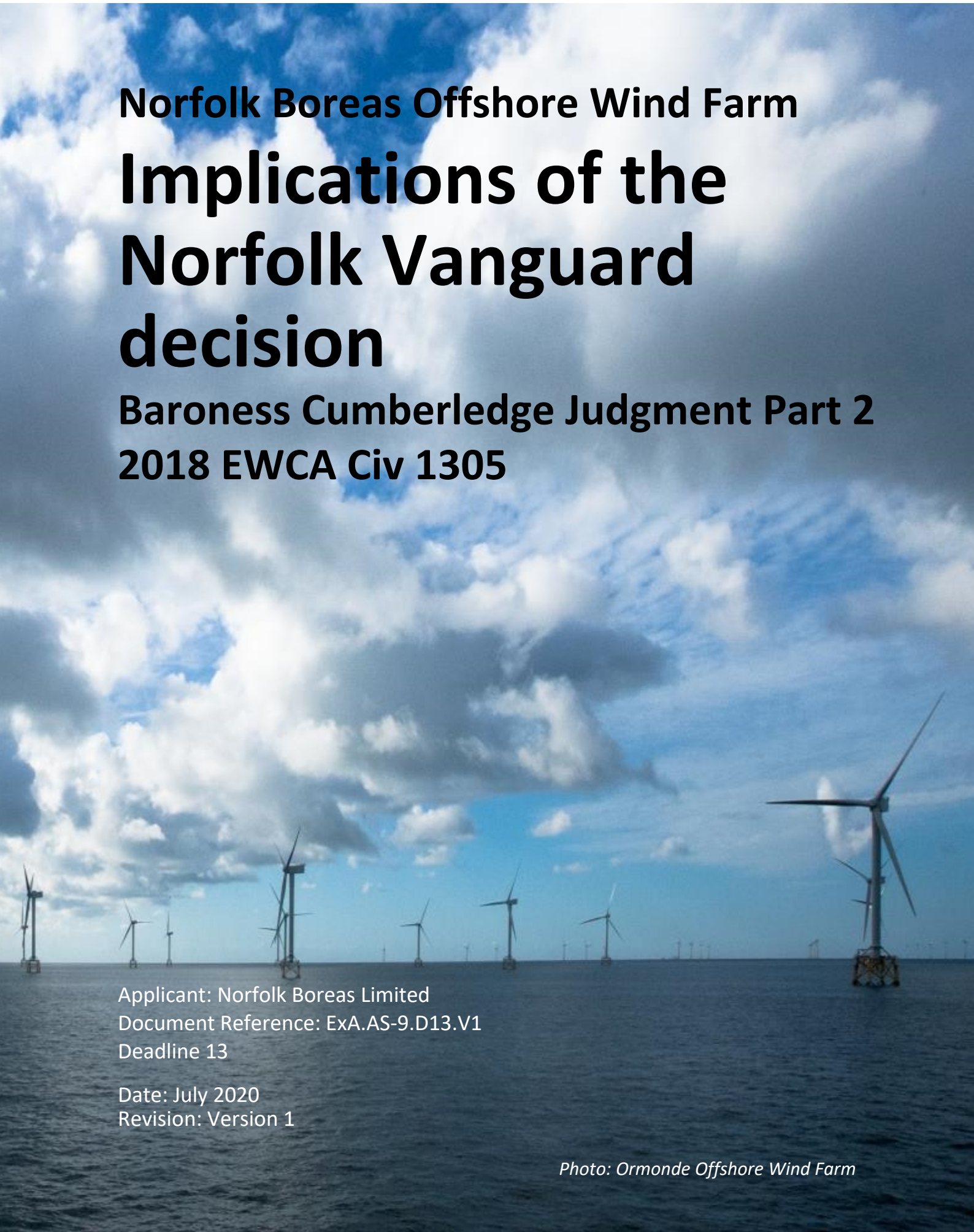

Norfolk Boreas Offshore Wind Farm

Implications of the Norfolk Vanguard decision

Baroness Cumberledge Judgment Part 2
2018 EWCA Civ 1305

Applicant: Norfolk Boreas Limited
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Case No: C1/2017/2379

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JOHN HOWELL Q.C. (sitting as a Deputy Judge of the High Court)
[2017] EWHC 2057 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 June 2018

Before:

Lord Justice Lindblom
Lord Justice Moylan
and
Lord Justice Peter Jackson

- -

Between:

DLA Delivery Ltd.	**Appellant**
- and -	
(1) Baroness Cumberlege of Newick **(2) Patrick Cumberlege**	**Respondents**
- and -	
Secretary of State for Communities and Local Government	**Interested Party**

- -
- -

Mr Christopher Young Q.C. and Ms Thea Osmund Smith (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Ms Heather Sargent (instructed by **DAC Beachcroft LLP**) for the **Respondents**
The Interested Party did not appear and was not represented.

Hearing dates: 28 February and 1 March 2018

- -

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

Lord Justice Lindblom:

Introduction

1. Did the Secretary of State for Communities and Local Government, when determining an appeal against the refusal of planning permission for a development of housing, err in law in failing to take into account a recent decision of his own – even though he had not been asked to do so? That is the main question in this appeal.

2. The appellant, DLA Delivery Ltd., appeals against the order of Mr John Howell Q.C., sitting as a deputy judge of the High Court, dated 4 August 2017, by which he allowed the application of the respondents, Baroness Cumberlege of Newick and her husband, Mr Patrick Cumberlege, under section 288 of the Town and Country Planning Act 1990, challenging the decision of the interested party, the Secretary of State, in a decision letter dated 23 November 2016, to allow an appeal by DLA Delivery under section 78 of the 1990 Act. The section 78 appeal was against the decision of Lewes District Council, as local planning authority, to refuse DLA Delivery's application for outline planning permission for a development of up to 50 dwellings on land at Mitchelswood Farm, Allington Road, Newick. Baroness Cumberlege and her husband are residents of Newick and members of the Newick Village Society. They were objectors to DLA Delivery's proposal.

3. The section 78 appeal was heard by an inspector at an inquiry in February 2016. Newick Village Society appeared at the inquiry, opposing the appeal. After the inquiry, on 24 May 2016, the Secretary of State recovered the appeal for his own determination, under section 79 of the 1990 Act, because it involved residential development of more than 10 units in an area where a "qualifying body" had submitted "a neighbourhood plan proposal" to the local planning authority or a neighbourhood plan had been made. In his report, dated 5 August 2016, the inspector recommended that the appeal be allowed and planning permission granted, subject to conditions. In his decision letter the Secretary of State largely agreed with the inspector's conclusions and accepted his recommendation. One of his conclusions was that saved Policy CT1 of the Lewes District Local Plan – which required development to be "contained within … Planning Boundaries" – was "out of date", and that the policy for the "presumption in favour of sustainable development" in paragraph 14 of the National Planning Policy Framework ("the NPPF") was therefore engaged.

4. The Secretary of State's decision was challenged on two grounds: first, that he had failed to take into account as a material consideration his own conclusion, in a decision letter dated 19 September 2016 – some nine weeks earlier – dismissing an appeal for a proposed development of housing at Broyle Gate Farm, Lewes Road, Ringmer, that Policy CT1 was "up-to-date for the purposes of this appeal"; and secondly, that he had made a material error of fact in treating the appeal site as lying outside the 7km "zone of influence" for the Ashdown Forest Special Protection Area ("SPA") and Special Area of Conservation ("SAC"), or had unlawfully granted planning permission without imposing a condition to ensure that the new housing would be built outside the "zone of influence". Before the hearing, on 14 March 2017, the Secretary of State submitted to judgment on the first ground. However, DLA Delivery sought to defend his decision. The council played no part in the proceedings. The judge upheld the application on both grounds. He also granted permission to appeal.

The issues in the appeal

5. In granting permission to appeal the judge identified three questions for this court. Those three questions were modified somewhat in the course of argument before us. As they emerged from counsel's submissions, the issues are these:

    (1) Did the judge apply the correct test in law in considering whether the Secretary of State's decision was unlawful because he failed to take into account his conclusion on Policy CT1 in his decision letter on the Ringmer appeal?
    (2) Did the Secretary of State err in law in failing to take into account his decision in the Ringmer appeal?
    (3) Did the Secretary of State misapply regulation 68(3) of the Conservation of Habitats and Species Regulations 2010 ("the Habitats regulations")?

Policy CT1

6. The relevant history of the development plan is set out in the judgment in the court below (paragraphs 15 to 23). By the time of the Secretary of State's decision in the Newick appeal, it comprised the Lewes District Local Plan, Part 1, Joint Core Strategy 2010-2030 (adopted in May 2016), certain saved policies of the Lewes District Local Plan (adopted in March 2003) and the Newick Neighbourhood Plan (adopted in July 2015). Upon the adoption of the joint core strategy some of the policies of the local plan that had previously been saved by the Secretary of State in 2007 were replaced. Others, including Policy CT1, were not.

7. Policy CT1 states:

> "Planning Boundary and Key Countryside Policy
>
> CT1 Development will be contained within the Planning Boundaries as shown on the Proposals Map. Planning permission will not be granted for development outside the Planning Boundaries, other than for that specifically referred to in other chapters of the Plan or listed below:
>
> …
> (b) new residential development in the Countryside (Policy RES6 & RES7)
> …
> (e) affordable homes exceptions sites (Policy RES10)
> …
> (h) any other development in the countryside for which a specific policy reference is made [elsewhere] in the Plan
> …
>
> The retention of the open character of the countryside is of heightened importance where it separates settlements and prevents their coalescence. … ."

8. Among the settlements for which planning boundaries were defined on the proposals map were Newick, Ringmer and Ringmer (The Broyle). Mitchelswood Farm is outside the planning boundary for Newick.

The Secretary of State's conclusions on Policy CT1 in the Ringmer appeal

9. The proposal in the Ringmer appeal was for a development of up to 70 dwellings at Broyle Gate Farm. The Secretary of State recovered the appeal for his own determination on 6 October 2015, because it related to proposed residential development of more than 10 units in an area where a "qualifying body" had submitted a neighbourhood plan. The inquiry was held in May 2016. The inspector's report is dated 15 June 2016.

10. Under the heading "Planning boundaries", the inspector said there was "no dispute that the housing element of the proposals would be outside the planning boundary for Ringmer and therefore contrary to retained Policy CT1", and "[the] question of whether this policy should be regarded as up-to-date was a controversial matter …". The "residential element" of the proposal, was, he said, "a very substantial element of the scheme as a whole". It followed that "the scheme as a whole should be regarded as being in conflict with Policy CT1" (paragraph 10.7). Although the Ringmer Neighbourhood Plan "[did] not define settlement boundaries, except in relation to its own allocations … , it [was] to be read together with the JCS so the Policy CT1 planning boundaries could be taken to apply, as far as still relevant". Policy 4.1 "[sought] to resist development outside planning boundaries, where there would be an adverse effect on the countryside or rural landscape, unless it can be demonstrated that the benefits of the proposals would outweigh the adverse effects. …" (paragraph 10.8).

11. In a subsequent passage of his report (in paragraphs 10.39 to 10.44), under the heading "Whether relevant policies for the supply of housing are up-to-date", the inspector concluded:

> "10.39 The appellant agreed that the Council is able to demonstrate a five year supply of deliverable housing sites in accordance with the requirements of the Framework. It was not suggested that there is any objection in principle to a planning boundary policy such as Policy CT1. Nevertheless, the appellant argued that the Policy CT1 planning boundaries should be regarded as out-of-date on the basis that they were drawn in the context of the LP03 for the purposes of meeting housing requirements up to 2011. Further, it was argued that the boundaries would not meet housing requirements up to 2030, that they would need to be varied to accommodate the JCS strategic allocations and neighbourhood plan allocations and that they are bound to be reviewed in the LPPt2. …
>
> 10.40 The first point to note is that the CT1 planning boundaries have been retained in the JCS, pending review through the LPPt2. Although originally defined in relation to the LP03, they must now be considered in the context of a development plan context which also includes:
>
> - the JCS strategic allocations
> - the JCS planned growth targets for specified settlements
> - neighbourhood plan allocations[.]
>
> At the Inquiry the Council accepted that the JCS Inspector did not find the retained policies sound in the sense of examining them individually against an evidence base. However, he found the JCS as a whole sound, including its provisions to save certain policies pending review under LPPt2. To my mind that is an important point, particularly given that the JCS was adopted as recently as May 2016. It seems to me that, in finding the JCS as a whole sound, the JCS Inspector was

> accepting the approach of allocating some of the development sites now, whilst retaining the CT1 boundaries for the time being pending review through LPPt2. That is a strong indication that the CT1 planning boundaries should be regarded as up-to-date. …
>
> 10.41 Nevertheless, it is relevant to consider the practical consequences of the approach that has been taken. The JCS housing requirement up to 2030 is 6,900 dwellings, or around 345 dwellings per year. After making allowances for completions, commitments, windfalls and rural exception sites there is a balance of 3,597 dwellings which is to be met from strategic site allocations … (which have already been identified), planned growth at specified levels in identified settlements and about 200 units in locations to be determined. The residual figure of 200 is therefore a relatively small amount, amounting to less than one year's requirement. …
>
> 10.42 The JCS requirement for Ringmer and Broyle Side is 385 dwellings. Allowing for commitments, completions and the strategic allocation at [Bishop's] Lane leaves a balance of 217 units. The RNP has already allocated sites for 184 units leaving just 33 still to be determined. The Council suggested that all of these could be accommodated by increasing delivery at Caburn Field, a site currently allocated for 40 units. Given that the site extends to some 1.3ha, and is centrally located within the village, it seems reasonable to assume some uplift on the current figure … . However, in the absence of further information about the prospective scheme for this site it is not possible to form a view on whether as many as 70 is likely to be achievable. That said, even if no allowance is made for additional delivery at Caburn Field, 33 is still a relatively small number amounting to less than 10% of the total growth planned for Ringmer up to 2030. …
>
> 10.43 It is possible that some of the 200 units in locations still to be determined will ultimately be allocated to Ringmer and/or Broyle Side. However, it seems likely that the local planning authority would look first to the four towns in the District, as these are likely to offer the most sustainable locations. Moreover, the exercise of seeking locations for those units will no doubt have regard to the infrastructure constraints at Ringmer identified by the JCS Inspector. …
>
> 10.44 The broad conclusion is that a large proportion of the total growth planned, or likely to be planned, for Ringmer up to 2030 has already been provided for in the JCS and RNP. Bearing in mind that:
>
> - the district has a five year supply of housing sites
> - the JCS has been adopted, and the RNP has been made, very recently and
> - there is an identified process for allocating the balance of the housing sites required[.]
>
> I conclude that Policy CT1 should be regarded as up-to-date for the purposes of this appeal."

12. The inspector then (in paragraphs 10.45 to 10.47) discussed three recent appeal decisions in Lewes district – at North Chailey, Wivelsfield and Bishop's Lane, Ringmer – in which Policy CT1 had been considered:

> "10.45 Reference was made to three recent appeal decisions in Lewes District, relating to sites at North Chailey, Wivelsfield and Bishop's Lane, Ringmer. The appellant contended that these decisions support the proposition that CT1 should be regarded as out-of-date. At North Chailey, the Inspector found the planning boundary to be out-of-date in circumstances where the boundary was tightly drawn and it was common ground that it could not accommodate the level of housing required by the JCS. There was no neighbourhood plan. This contrasts with the situation in Ringmer where there is a neighbourhood plan which, together with the JCS, has made provision for most of the relevant housing requirement. …
>
> 10.46 The situation at Wivelsfield was different in that the Inspector there did not expressly find Policy CT1 to be out-of-date. Instead, she concluded that it '*does not fully accord with the Framework*', a position which the Council appears to have agreed with in that case … . The arguments appear to have been put rather differently in that appeal. In the present appeal, there was no suggestion from any party that Policy CT1 is, in principle, inconsistent with the Framework. In any event, the Wivelsfield decision appears to have turned on the fact that the scheme was found to accord with the emerging JCS (at it then was) and was a preferred site in an emerging neighbourhood plan. The facts are therefore quite different to the current appeal.
>
> 10.47 From my reading of the [Bishop's] Lane Inspector's Report, it does not appear that the Inspector found Policy CT1 to be out-of-date. Rather, he found that it was outweighed by the compliance of the appeal scheme with the emerging development plan context, albeit that there was a degree of conflict with the emerging RNP. This reasoning was accepted by the Secretary of State … . Consequently, while I have noted all three of the decisions referred to, they do not alter my findings as set out above. …".

13. He therefore concluded (in paragraph 10.48):

> "10.48 There was no suggestion from any party that any relevant policy other than Policy CT1 should be regarded as out-of-date or inconsistent with the Framework. I therefore conclude that the development plan context for this appeal should be regarded as up-to-date."

14. That conclusion was carried into the inspector's "Planning balance", where he said that the proposal would conflict with Policy CT1 and other policies of the development plan, and with "the development plan as a whole" (paragraph 10.76); that the development plan was "up-to-date" and that he had "not identified any reason to reduce the weight to be attached to any of the policies relevant to this appeal" (paragraph 10.77); and that other material considerations were "not sufficient to indicate that the appeal should be determined other than in accordance with the development plan" (paragraph 10.81). He did not apply the "presumption in favour of sustainable development" in paragraph 14 of the NPPF. And he therefore recommended that the appeal be dismissed (paragraph 11.1).

15. In his decision letter the Secretary of State agreed with the inspector's conclusions and accepted his recommendation (paragraph 3). As for "Planning boundaries and site allocations", he agreed with the inspector that "[for] the reasons given at IR10.7-10.8, … the

scheme as a whole should be regarded as being in conflict with JCS Policy CT1 and therefore with RNP Policy 4.1 …" (paragraph 7). In his "Conclusions on the development plan" he agreed with the inspector "that the conflicts with saved policies CT1 and RG3 and with RNP Policies 6.3 and 7.4 are of sufficient importance to conclude that the appeal scheme would conflict with the development plan as a whole", and also "that the conflict with RNP Policy 4.1 needs to be weighed in the overall balance …" (paragraph 13). On the question "Whether relevant policies for the supply of housing are up-to-date", he said (in paragraph 14):

> "14. Having carefully considered the Inspector's arguments at IR10.39-10.48, the Secretary of State agrees with his conclusion at IR10.42 and IR10.48 that JCS Policy CT1 should be regarded as up-to-date for the purposes of this appeal."

His conclusions on the planning balance also matched those of the inspector. He did not apply the so-called "tilted balance" under the policy for the "presumption in favour of sustainable development" in paragraph 14 of the NPPF. He said that "the development plan is up-to-date and no reasons have been identified to reduce the weight to be attached to any of the policies relevant to this appeal" (paragraph 22). And he found that the balance of other considerations was "not sufficient to indicate that the appeal should be determined other than in accordance with the development plan" (paragraph 23).

The Secretary of State's conclusions on Policy CT1 in the Newick appeal

16. The inspector in the Newick appeal found that Policy CT1 "only has a limited degree of consistency with [the NPPF] and does not reflect its presumption in favour of sustainable development" (paragraph 151 of his report). The Lewes District Local Plan "was adopted in 2003 and covered the period up to 2011", so that "[the] spatial distribution of development that Policy CT1 seeks to control is … based on the requirements of the previous plan for the District" (paragraph 153). He went on to say (in paragraphs 154 and 155):

> "154. The JCS has now been adopted and sets out a requirement to provide at least 6,900 new homes in the District, with a minimum of 100 dwellings in Newick. Although the NNP has proactively allocated sites to meet this figure ahead of the Site Allocations process, it is clearly expressed as a 'minimum', and must be read in the context of a full objectively assessed need for some 10,900 new homes. With this in mind the Council accepts that more sites may be allocated for housing in the village in the Part 2 Site Allocations process … . JCS Policy SP2 also includes roughly 200 units in locations 'to be determined', some of which *could* be in Newick. As the NNP process demonstrates, achieving the strategic aspirations of the JCS cannot be met by only containing development within the planning boundaries.
>
> 155. In summary therefore, whilst the housing requirement for the District and its spatial distribution is up-to-date, the restrictive nature of Policy CT1, based on the old LDLP, is not. Along with its consistency with the Framework this point was acknowledged by the Council in preparation of the JCS, confirming that *"The wording of Policy CT1 itself will need amending to ensure that it is consistent with the strategic policies of the Core Strategy and the more permissive approach to development in rural areas set out in the NPPF."*"

The policy for the "presumption in favour of sustainable development" in paragraph 14 of the NPPF was therefore engaged (paragraph 156).

17. Later in his report, under the heading "Balancing Exercise and Conclusion on Main Issue", the inspector said (in paragraphs 226 to 228):

> "226. … It is … common ground that the proposal conflicts with saved LDLP Policy CT1 by reason of its location beyond the planning boundary for Newick.
>
> 227. However, Policy CT1 was adopted in 2003 and seeks to limit development within the planning boundaries defined under the LDLP, which expired in 2011. It does not reflect the housing requirement or spatial distribution set out in the recently adopted JCS, and its protection of the countryside from encroachment by inappropriate development is not, as the Council contend, entirely consistent with the Framework. Based on the evidence provided the weight which can be attributed to this policy conflict is therefore reduced, and for the purposes of the Framework it is out-of-date.
>
> 228. In saving CT1 beyond 2007 the Secretary of State confirmed that it must be read in the context of other material considerations. This includes the Framework, and where relevant policies are out-of-date, its presumption in favour of sustainable development. In achieving sustainable development the Framework sets out three dimensions; the economic, social and environmental. It also confirms that these roles are mutually dependant, and I have considered the proposal on the same basis."

18. In his decision letter the Secretary of State said (in paragraph 27):

> "27. For the reasons given by the Inspector at IR227-228 the Secretary of State agrees that saved LDLP Policy CT1 is out of date. As such the Secretary of State considers that paragraph 14 of the Framework is engaged. He has therefore considered whether the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the Framework policies as a whole."

and (in paragraph 33):

> "33. He also finds that the weight that can be given to the conflict with LDLP Policy CT1 is reduced for the reasons set out by the Inspector or IR227, and he gives only limited weight to this conflict."

The Wivelsfield decision

19. On 14 March 2017, some four months after he had issued his decision letter in the Newick appeal, the Secretary of State dismissed an appeal against the council's refusal of planning permission for a development of 95 dwellings on land at Ditchling Road, Wivelsfield. The inspector's report in that case had been submitted to the Secretary of State on 25 October 2016, about five weeks after his decision in the Ringmer appeal and about four weeks

before his decision in the Newick appeal. The inspector concluded (in paragraph 328 of his report) that "policy CT1 is not out-of-date for the purposes of paragraph 14 of the NPPF, and … the conflict with it should be given significant weight in the decision". The Secretary of State did not disagree. In his decision letter he said that he "agrees that LP policy CT1 is not out of date (either by operation of paragraph 215 or paragraph 49 of the Framework) and that the conflict with it should be given significant weight in the decision" (paragraph 15), and that he "considers that the appeal scheme is not in accordance with the saved policies CT1 and [Wivelsfield Neighbourhood Plan] Policy 1, that these policies should be considered up to date …" (paragraph 18). He did not apply the "presumption in favour of sustainable development" in paragraph 14 of the NPPF. He concluded (ibid.) that the proposal was not in accordance with the development plan, and that material considerations weighing in its favour did not outweigh that conflict with the plan.

Issue (1) – the relevant test for material considerations

20. Before us, this issue was not controversial. The parties were agreed on the approach the court should take, which is already the subject of ample authority.

21. Prominent in the case law is the decision of House of Lords in *In re Findlay* [1985] A.C. 318 (at pp.333 and 334). In that case there was no express statutory requirement for consultation, and it was impossible to imply any such requirement into the statute. But the "Wednesbury principle" was invoked in support of a submission that no reasonable Home Secretary could have reasonably omitted to consult the Parole Board on the new policy in question. In his speech Lord Scarman referred (at p.333F to p.334B) to two passages in the judgment of Cooke J. in *CREEDNZ Inc. v Governor-General* [1981] 1 N.Z.L.R. 172 (at p.183). The first passage was this:

> "What has to be emphasised is that it is only when the statute expressly or impliedly identifies considerations required to be taken into account by the authority as a matter of legal obligation that the court holds a decision invalid on the ground now invoked. It is not enough that a consideration is one that may properly be taken into account, nor even that it is one which many people, including the court itself, would have taken into account if they had to make the decision."

But it was the second passage that Lord Scarman found decisive. As he said:

> "… [Cooke J.] in a later passage [also on p.183], did recognise that in certain circumstances, notwithstanding the silence of the statute, "there will be some matters so obviously material to a decision on a particular project that anything short of direct consideration of them by the ministers … would not be in accordance with the intention of the Act"."

Those two passages of Cooke J.'s judgment in *CREEDNZ* were, in Lord Scarman's view, "a correct statement of principle".

22. In this case, the judge undertook a careful review of the relevant authorities. Having done so, he concluded (in paragraph 74 of his judgment) that "on analysis it seems … the matter is "so obviously material" in such circumstances when no reasonable person would have failed to take it into account", and (in paragraph 77) that it was "simpler and less likely to

mislead or produce an incorrect result to ask … only whether the matter is one that no reasonable decision-maker would have failed to take into account in the circumstances".

23. Both Ms Heather Sargent, on behalf of Baroness Cumberlege and her husband, and Mr Christopher Young Q.C., for DLA Delivery, were content for us to adopt that approach in considering whether the Secretary of State ought to have taken into account his own previous decision in the Ringmer appeal. They both acknowledged that he was obliged to do that if, in the circumstances, no reasonable Secretary of State would have failed to do so.

24. I agree. In this sense, the two "tests" are, it seems to me, effectively one and the same. As well as Lord Scarman's speech in *In re Findlay*, endorsing as "a correct statement of principle" the two passages to which he referred in Cooke J.'s judgment in *CREEDNZ*, I have in mind the speech of Lord Brown of Eaton-under-Heywood in *R. (on the application of Hurst) v H.M. Coroner for the Northern District London* [2007] 2 A.C. 189, in which (at paragraph 57) he cited the same two passages of Cooke J.'s judgment and went on to say (in paragraphs 58 and 59):

> "58. … [It] seems to me quite impossible to say that the unincorporated international obligation on the United Kingdom here was "so obviously material" to the coroner's decision whether or not to resume this inquest that he was required to give it "direct consideration. …
>
> 59. Even, therefore, had the coroner recognised and felt able to satisfy the international law obligation upon the United Kingdom by reopening the inquest, I for my part would not hold his refusal to do so irrational or otherwise unlawful."

25. In the context of planning law, one can point to the judgment of Carnwath L.J., as he then was, in *Derbyshire Dales District Council v Secretary of State for Communities and Local Government* [2010] 1 P. & C.R. 19, which, as the judge acknowledged (in footnote 9 to his judgment), was "consistent with the interpretation of *In re Findlay* as imposing a *Wednesbury* test". Carnwath L.J. referred (in paragraph 25 of his judgment) to Cooke J.'s "important statement of principle" in *CREEDNZ*, which "had been adopted by the House of Lords in *Re Findlay* …", and by the Court of Appeal in *R. (on the application of the National Association of Health Stores) v Department of Health* [2005] EWCA Civ 154. He noted (in paragraph 26) that Cooke J. "took as a starting point" the observation of Lord Greene M.R. in the Wednesbury case (*Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 K.B. 223, at p.228) that "[if], in the statute conferring the discretion there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters". He quoted the two passages of Cooke J.'s judgment in *CREEDNZ* approved by Lord Scarman in *In re Findlay* (ibid. and paragraph 27). As he put it (in paragraph 28), recalling what Cooke J. had said:

> "28. It seems, therefore, that it is not enough that, in the judge's view, consideration of a particular matter might realistically have made a difference. Short of irrationality, the question is one of statutory construction. It is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") requires to be taken into account "as a matter of legal obligation"."

26. I see no need for any further discussion of the relevant jurisprudence, nor any need to add to it. The essential principles are already sufficiently clear in the authorities (see, for example, though in quite different legal context, the recent judgment of the Divisional Court in *R. (on the application of DSD and others) v The Parole Board of England and Wales and others* [2018] EWHC 694 (Admin), at paragraph 141).

Issue (2) – did the Secretary of State fail to have regard to a relevant previous appeal decision?

27. In submitting to judgment, the Secretary of State accepted that his decision to allow the Newick appeal had been made unlawfully, because he had not had regard to his decision in the Ringmer appeal. In the Treasury Solicitor's letter to the court dated 14 March 2017 the Secretary of State conceded that the Newick decision should be quashed "because [he had] failed to take into account the "[Ringmer] decision" and specifically the finding in that earlier decision that development plan policy CT1 "should be regarded as up-to-date for the purposes of this appeal"". The statement of reasons attached to the draft consent order proposed by the Secretary of State said:

> "The Secretary of State probably should be cognisant of decisions in his own name, whether or not flagged up in the materials before him: [*Dear v Secretary of State for Communities and Local Government*] [2015] EWHC 29 (Admin) at [32]. The conclusion as to policy CT1 in the [Ringmer] decision was in the circumstances obviously material to the present case (adopting the language of [*Derbyshire Dales District Council*] at [28]) such that the Secretary of State was required to take the [Ringmer] decision into account as a matter of legal obligation and provide reasons for departing from his prior conclusion as to Policy CT1.
>
> The Secretary of State did not take the [Ringmer] decision into account in determining the [Newick] appeal. He concedes that this was an error of law vitiating the [Newick] appeal."

28. It is well established, as a general principle, that policies issued to guide the exercise of administrative discretion are an essential means of securing consistency in decision-making, and that such policies should be consistently applied (see, for example, the judgment of Lord Dyson in *R. (on the application of Lumba) v Secretary of State for the Home Department* [2012] 1 A.C. 245, at paragraphs 26 and 34). And that principle certainly applies in the sphere of land use planning, where, under the statutory code, decisions on applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise (section 38(6) of the Planning and Compulsory Purchase Act 2004). As Lord Clyde said in *R. (on the application of Alconbury Developments Ltd.) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 A.C. 295 (at paragraph 140):

> "140. Planning and the development of land are matters which concern the community as a whole, not only the locality where the particular case arises. They involve wider social and economic interests, considerations which are properly to be subject to a central supervision. By means of a central authority some degree of coherence and consistency in the development of land can be secured. National planning guidance can be prepared and promulgated and that guidance will influence the

> local development plans and policies which the planning authorities will use in resolving their own local problems. …".

29. That previous decisions of the Secretary of State or his inspectors on planning appeals are capable of being material considerations is also well established (see, for example, *Solihull Metropolitan Borough Council v Gallagher Estates Ltd.* [2014] EWCA Civ 1610, *R. (on the application of Fox Strategic Land and Property Ltd.) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198, *Dunster Properties Ltd. v First Secretary of State* [2007] 2 P. & C.R. 26, *R. v Secretary of State for the Environment, ex parte Baber* [1996] J.P.L. 1034, and *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P. & C.R. 137. The classic statement of principle here is to be found in the judgment of Mann L.J. in *North Wiltshire District Council* (at p.145):

> "… It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

30. In *Baber* Glidewell L.J. (at p.1040) suggested a slightly different question for the decision-maker, which was: "[A] previous decision having been drawn to my attention, do I take the view that it may well be sufficiently closely related to the matters in issue in my appeal that I ought to have regard to it and either follow it or distinguish it?". Morritt L.J. (at p.1041) framed the question slightly differently again: "May the earlier decision be sufficiently related to the decision I have to make? That is something that I should properly comment on either following or, if disagreeing, saying why".

31. In these proceedings we are concerned with a previous appeal decision of the Secretary of State issued after the close of the inquiry in the case under consideration, and not relied

upon by any of the parties in further representations to the Secretary of State before he made the challenged decision. How should the court approach such a case?

32. Rightly in my view, the judge rejected a submission made to him on behalf of DLA Delivery that, as a matter of law, when the previous decision in question has not been placed before the Secretary of State by one or more of the parties, he is never obliged to have regard to it. There can be no "absolute rule" to that effect – as the judge demonstrated (in paragraphs 86 to 106 of his judgment), having regard to a decision-maker's general obligation to take reasonable steps to acquaint himself with the relevant information to enable him to decide relevant questions correctly, an obligation emphasized by Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] A.C. 1014 (at p.1065). As the judge concluded, the relevant authorities do not establish so rigid a principle (see, in particular, the first instance judgments in *St Albans City and District Council v Secretary of State for Communities and Local Government* [2015] EWHC 655 (Admin) (at paragraphs 88 to 101), *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin) (at paragraph 61), *London Borough of Hounslow Council v Secretary of State for Communities and Local Government and Kapoor* [2009] EWHC 1055 (Admin) (at paragraphs 13 to 19), and *Grantchester Retail Parks Plc v Secretary of State for Transport, Local Government and the Regions and Luton Borough Council* [2003] EWHC 92 (Admin) (at paragraphs 26 to 28)). And the decisions of the Court of Appeal in *The Bath Society v Secretary of State for the Environment* [1991] 1 W.L.R. 1303, and *R. (on the application of Connolly) v Havering London Borough Council* [2010] 2 P. & C.R. 1 seem incompatible with it. In *Connolly*, the judge at first instance had quashed an inspector's decision on the ground of a mistake of fact concerning the existence of a relevant previous decision to which the local planning authority had failed to refer. The judge's decision was upheld by this court. In *Bath Society* the Secretary of State allowed an appeal and granted planning permission for a housing development without taking into account the recommendation in the local plan inspector's report that the land should be allocated as open space. The appeal inspector had been unaware of the local plan inspector's report; the Secretary of State had received it, but not in connection with the appeal. Glidewell L.J. concluded (at p.1313c-d) that he had erred in "failing to comply with his duty to have regard to this material consideration".

33. The approach taken at first instance in *Dear* – the case referred to by the Secretary of State in submitting to judgment in these proceedings – seems to have been similar. There the forthcoming decision of an inspector in another appeal had been mentioned to the Secretary of State, but not for its possible relevance to the issue with which the challenge to his decision was ultimately concerned – whether there was a realistic prospect of sites for travellers coming forward in the relevant period. On that issue the Secretary of State's decision, though consistent with the recommendation made to him in his inspector's report, was inconsistent with the inspector's decision in the other case, issued about two months before. H.H.J. Belcher, sitting as a deputy judge of the High Court, was inclined to accept that the Secretary of State "… should be cognisant of decisions in his name, whether or not flagged up in the materials before him …", and that he "[could not] avoid the issue of consistency by suggesting that it was for [the claimant] to inform him of decisions made on his behalf after the close of her appeal". But she did not have to go that far, because the inspector's decision in the other case had been "clearly flagged in the materials, albeit on a different point" – whether there was a need for travellers' sites. In the circumstances, the Secretary of State "should have had regard to" the inspector's decision (paragraph 32 of the judgment).

34. I would accept three general propositions, which I think accord with the basic principles referred to by Mann L.J. in *North Wiltshire District Council* and applied since in several decisions of this court, and which align with the judge's conclusions in this case (in particular, in paragraphs 100 to 105 of his judgment). First, because consistency in planning decision-making is important, there will be cases in which it would be unreasonable for the Secretary of State not to have regard to a previous appeal decision bearing on the issues in the appeal he is considering. This may sometimes be so even though none of the parties has relied on the previous decision or brought it to the Secretary of State's attention (paragraph 100). And it may be necessary in those circumstances, in the interests of fairness, to give the parties an opportunity to make further representations in the light of the previous decision. Secondly, the court should not attempt to prescribe or limit the circumstances in which a previous decision can be a material consideration. It may be material, for example, because it relates to the same site, or to the same or a similar form of development on another site to which the same policy of the development plan relates, or to the interpretation or application of a particular policy common to both cases (see paragraph 92 of Holgate J.'s judgment in *St Albans City and District Council*). Thirdly, the circumstances in which it can be unreasonable for the Secretary of State to fail to take into account a previous appeal decision that has not been brought to his notice by one of the parties will vary. But in tackling this question, it will be necessary for the court to consider whether the Secretary of State was actually aware, or ought to have been aware, of the previous decision and its significance for the appeal now being determined (paragraphs 100, 101 and 105 of the judgment). As the judge said, "[before] the close of the "adversarial" part of the proceedings, the Secretary of State and his inspectors can normally rely, not unreasonably, on participants to draw attention to any relevant decision[, but] that does not mean that they are never required to make further enquiries about any matter, including about other … decisions that may be significant" (paragraph 101).

35. In a witness statement dated 8 November 2017, Mr Philip Barber, the Decision Officer in the Planning Casework Unit responsible for issuing the decision on the Newick appeal, tells the court that the number of appeals dealt with by the Planning Inspectorate each year is between 11,000 and 13,000 (paragraph 4), and that the number of cases in which an application is called in or an appeal recovered by the Secretary of State is between 60 and 90 (paragraph 7). When this decision was made, the Planning Casework Unit "did not routinely undertake a search for potentially relevant" previous decisions of the Secretary of State (paragraph 9). It "did not undertake a search in this case, nor did it identify the [Ringmer appeal decision] in any other way" (paragraph 10). Since the Planning Casework Unit was restructured in April 2017 a different procedure has been adopted, in which, says Mr Barber, "team leaders identify any other relevant decisions in an area where we have recently issued a decision, … consider any implications of this", and "then ensure that all members of staff in the Planning Casework Unit are made aware of any such relevant decisions" (paragraph 13).

36. Like the judge, I would not accept that, as a matter of law, the Secretary of State ought to be aware of every previous decision taken in his name, whether by himself or a ministerial predecessor or by one of the inspectors to whom his decision-making function is largely delegated. In my view that concept is unrealistic and unworkable, given the number of decisions on planning appeals that have been made, year upon year, since the modern statutory code came into existence under the Town and Country Planning Act 1947. There will, however, be circumstances in which, having regard to the interests of consistency in

decision-making, the court is prepared to hold that the Secretary of State has acted unreasonably in not taking into account a previous decision of his own. Whether this is so in a particular case will always depend on the facts and circumstances (paragraphs 102 to 104 of the judgment). A possible example would be a case in which, within a short span of time, the Secretary of State has called in applications for his own determination, or recovered jurisdiction in appeals, in cases of a sufficiently similar kind, to which the same policies of the development plan apply.

37. Was the Secretary of State's decision on the Ringmer appeal – in particular, his conclusion on Policy CT1 – "obviously material" to the Newick appeal, as he has conceded**.** And was it, in the circumstances, unreasonable for him not to have regard to that decision? If he was to depart from the Ringmer decision on that particular point, did he have to explain why? And was his failure to have regard to it enough to vitiate the decision he made in the Newick appeal? In my view the answer to all these questions is "Yes".

38. In the court below it was submitted on behalf of DLA Delivery that the Secretary of State's decision on the Ringmer appeal was itself "perverse, irrational and *Wednesbury* unreasonable" – because Policy CT1 was a policy dealing only with growth until 2011 and was now necessarily out of date, and also because the protection of the countryside under Policy CT1 was inconsistent with national planning policy in the NPPF. The judge rightly rejected that submission (in paragraphs 112 to 117 of his judgment). At the time of the Secretary of State's decision on the Newick appeal, the Ringmer decision stood unchallenged. The court did not have to review the legal soundness of that earlier decision before determining whether it was a material consideration in the decision under challenge in these proceedings.

39. Mr Young's argument in this court was, in essence, that the two cases were readily distinguishable. The sites and proposals were different. They were in different settlements. Though both settlements were rural service centres for which neighbourhood plans had been prepared, the circumstances were not the same. It was open to each of the two inspectors in the appeals, and in turn the Secretary of State, to conclude as they did when considering whether or not Policy CT1 was up to date. In the Newick appeal the Secretary of State was clearly entitled to conclude that the policy was out of date (see the judgment of Lord Carnwath in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865, at paragraph 63).

40. Ms Sargent submitted that the facts and circumstances of the two cases, including the position relating to the relevant housing requirements, were plainly parallel, but that the approach taken by the inspectors, and by the Secretary of State, was starkly different. There was an obvious and irreconcilable inconsistency between the two decisions, both on the question of whether Policy CT1 was generally up to date, and also on the question of whether it was up to date in the particular circumstances of either settlement.

41. I cannot accept Mr Young's submissions. The decision in the Ringmer appeal was undoubtedly a material consideration in the Newick appeal. And there was, between the two decisions, an obvious and unexplained difference in the Secretary of State's approach to the status of Policy CT1, which was a matter of basic importance in both appeals.

42. There were, I think, at least three factors that, taken together, made it unreasonable for the Secretary of State not to have regard to the Ringmer decision before determining the

Newick appeal, and, in particular, before reaching a conclusion on the question of whether Policy CT1 was up to date.

43. First, the two proposals were for the same form of development in the same district – housing on unallocated sites outside planning boundaries as defined for the purposes of Policy CT1, in settlements identified as "rural service centres" in the joint core strategy. They were subject to the same district-wide policies in the development plan, including the relevant policies of the joint core strategy and the "saved policies" of the 2003 local plan, one of which was Policy CT1. Each was on the edge of a rural settlement for which a neighbourhood plan had been prepared. The schemes were of similar scale; the Newick proposal was for a development of up to 50 dwellings, the Ringmer proposal for a development of up to 70. And the applications for planning permission had been before the council for determination at the same time. In the Newick case the application had been submitted in September 2014, and was refused in February 2015; in the Ringmer case the application had been submitted in December 2014, and was refused in May 2015.

44. Secondly, both appeals had been recovered for determination by the Secretary of State for the same reason – essentially because, in each case, they related to a proposal for housing development of more than 10 dwellings in an area where a neighbourhood plan had been prepared. Implicit in the decision to recover appeals in such cases was the need for a consistent approach to their determination.

45. Thirdly, the appeals were before the Secretary of State at the same time, and the two decision-making processes were largely concurrent. In the Newick appeal, the inquiry was held in February 2016, the appeal was recovered in May 2016, the inspector reported in August 2016, and the Secretary of State's decision was issued in November 2016. The Ringmer appeal was recovered by the Secretary of State in October 2015, the inquiry was held in May 2016, the inspector reported in June 2016, and the decision was issued in September 2016 – some seven months after the inquiry in the Newick appeal had closed, and about six weeks after the Secretary of State had received the inspector's report in that case. So both inspectors' reports were with the Secretary of State at the same time, before he issued his decision on the Ringmer appeal. And when he made the Newick decision some nine weeks later, the Ringmer decision had not been the subject of any legal challenge.

46. It would not have been difficult for those whose task it was to prepare decision letters on behalf of the Secretary of State to find out whether another decision had recently been made by him in which effectively the same issues had been dealt with. But I think it is right to go further. In the particular circumstances here, no reasonable Secretary of State, aware of his responsibility for securing consistency in development control decision-making, would have failed to take reasonable steps to ensure that his own decisions on cases of the same kind, in the same district, taken within the same period, and which, for the same reason, he had recovered to determine himself, were consistent with each other – or, if they were not consistent, that the inconsistency was clearly explained. In determining the Newick appeal, he was, in my view, obliged to have regard to his very recent decision in the Ringmer case, even though none of the parties had sought to rely on that decision or brought it to his attention. In the circumstances the onus lay on him to inform himself of the decision, and to have regard to it.

47. Were the two decisions inconsistent, so as to require of the Secretary of State in his decision letter on the Newick appeal a clear explanation for the main points of difference between them? In my opinion they were.

48. The inspector in the Ringmer appeal had been faced with an argument that the planning boundaries under Policy CT1 were now out of date because they had been defined in the Lewes District Plan with a view to meeting housing requirements only to 2011, would not enable housing requirements to 2030 to be met, would have to be varied to accommodate the strategic allocations in the joint core strategy and allocations in neighbourhood plans, and were bound to be reviewed in the Lewes District Local Plan, Part 2 (paragraph 10.39 of the inspector's report). He rejected that argument. The planning boundaries under Policy CT1 had been retained in the joint core strategy, pending their review in the Lewes District Local Plan, Part 2. The joint core strategy inspector had concluded that the joint core strategy "as a whole" was sound. This was "an important point". The joint core strategy had been adopted only in May 2016. In the inspector's view, this was "a strong indication" that the planning boundaries under Policy CT1 "should be regarded as up-to-date" (paragraph 10.40). The residual housing requirement figure of 200 dwellings was "relatively small" (paragraph 10.41). The joint core strategy housing requirement for Ringmer and Broyle Side, of 385 dwellings, had almost been met. Once allowance was made for commitments, completions and the strategic allocation at Bishop's Lane, a balance of 217 dwellings remained, and the Ringmer Neighbourhood Plan had already allocated sites for "184 units" – which left only 33 "still to be determined" (paragraph 10.42). Some of the 200 dwellings "in locations still to be determined" might be allocated in Ringmer or Broyle Side, but it seemed likely that the council would look first at the four towns in the district (paragraph 10.43). The inspector did not say it was necessary to place his assessment in the context of the full, objectively assessed need for housing. There was, as he said, a five-year supply of housing sites in the district. The joint core strategy had been adopted, and the Ringmer Neighbourhood Plan made, very recently. And there was a process for allocating the balance of the sites required for housing. The inspector concluded, therefore, that "Policy CT1 should be regarded as up-to-date for the purposes of this appeal" (paragraph 10.44), and also that "the development plan context for this appeal should be regarded as up-to-date" (paragraph 10.48).

49. None of those conclusions was doubted by the Secretary of State in his decision letter. He agreed with the conclusion in paragraph 10.48 of the inspector's report – that "the development plan context for this appeal", including Policy CT1, "should be regarded as up-to-date for the purposes of this appeal" (paragraph 14 of the decision letter). This conclusion was not said to be confined to the effect of Policy CT1 in the settlement of Ringmer alone, or merely to the planning boundary for that particular settlement. Reflecting the general conclusions in paragraphs 10.39 to 10.44 and 10.48 of the inspector's report, it was relevant to the application of Policy CT1 as a district-wide policy. In the light of the inspector's conclusion in paragraph 10.48 that "the development plan context for this appeal" should be regarded as "up-to-date", the force of the words "for the purposes of this appeal" was to emphasize that the relevant policies of the plan, including Policy CT1, remained up to date, at this stage, for a development control decision to which that policy was relevant.

50. In the Newick appeal, however, whilst the facts and circumstances were plainly similar, the conclusions of the inspector and the Secretary of State on the question of whether Policy CT1 was up to date were markedly different.

51. The inspector in the Newick appeal acknowledged that the Newick Neighbourhood Plan had "proactively allocated" sites to meet the requirement of 100 dwellings, though he observed that this was a "minimum" figure, and that Policy SP2 of the joint core strategy included "roughly 200 units" in locations "to be determined", some of which, he said, "*could* be in Newick" (paragraph 154).

52. He gave three main reasons for his view that Policy CT1 was out of date. First, the policy sought to limit development within the planning boundaries defined in the Lewes District Local Plan, which had been adopted in 2003 and "expired in 2011". Secondly, it did not reflect the "housing requirement" or the "spatial distribution" in the recently adopted joint core strategy. And thirdly, its protection of the countryside was "not … entirely consistent" with the NPPF (paragraph 227). The Secretary of State had confirmed when saving Policy CT1 beyond 2007, that the policy had to be "read in the context of other material considerations", including, "where relevant policies are out-of-date", the NPPF policy for the "presumption in favour of sustainable development" (paragraph 228).

53. As the Secretary of State made clear in paragraph 27 of his decision letter, he agreed with the "reasons" given by the inspector in paragraphs 227 and 228 of the report, and it was for those reasons that he shared the inspector's view that "saved LDLP Policy CT1 is out of date". He went on, in paragraph 33, to confirm his agreement with the inspector's "reasons" in paragraph 227 of the report as a basis for giving "only limited weight" to the proposal's conflict with Policy CT1. These conclusions, like the inspector's on which they were based, were all expressed in general terms. They were not said to relate only to the application of Policy CT1 to the settlement of Newick, or to the planning boundary for that settlement. They were entirely unqualified. Their tenor was that Policy CT1 was out of date in its application throughout the district of Lewes.

54. In my view the relevant reasons and conclusions of the inspector and Secretary of State in the Ringmer appeal are irreconcilable with those of the inspector and Secretary of State in the Newick appeal. The approach to the question of whether Policy CT1 was up to date was quite different between the two cases.

55. The first and second of the three reasons given by the inspector in the Newick appeal to explain his conclusion that Policy CT1 was out of date are not consistent with the approach of the inspector and the Secretary of State in the Ringmer appeal. In the Newick appeal, the fact that the planning boundaries had been defined in a local plan whose period ended in 2011 was seen as a consideration supporting the view that the policy was out of date. So was the fact that the policy did not reflect the "housing requirement" and the "spatial distribution" in the recently adopted joint core strategy. The conclusion that the policy was out of date was accepted by the Secretary of State in that appeal. In sharp contrast, the Ringmer appeal inspector, in finding Policy CT1 up to date, thought it significant that the joint core strategy as a whole, including its retention of the existing planning boundaries, had been assessed as sound, that a large proportion of the planned growth in the joint core strategy – for the period to 2030 – had already been provided for, and that, in the process for allocating the remainder of the sites required, the council was likely to look first at the four towns in the district. Nothing was said in either decision letter to differentiate the prospect of further allocations being made in Newick from the prospect of this happening in Ringmer, or to distinguish between the two settlements in any other relevant respect. The third reason given by the Newick appeal inspector for his conclusion that Policy CT1 was

out of date – that its protection of the countryside was "not … entirely consistent" with the NPPF – did not feature in the conclusions of the Ringmer appeal inspector. The fact that in saving Policy CT1 beyond 2007, the Secretary of State had said it must be "read in the context of other material considerations", including NPPF policy for the "presumption in favour of sustainable development" – was another general point, which, if significant, would have been equally so in the Ringmer appeal.

56. The two cases were, as Mann L.J. put it in *North Wiltshire District Council* (at p.145), "like cases", in the sense of their being, on the face of it, indistinguishable on an issue of critical importance in their determination – the interpretation and application of a relevant and significant policy in the development plan (see, for example, the first instance judgment in *Pertemps Investments Ltd. v Secretary of State for Communities and Local Government and others* [2015] EWHC 2308 (Admin), at paragraph 61). Notwithstanding the other respects in which they were different on their facts – as Mr Young emphasized, their circumstances were closely enough related on that crucial issue to call for a clear explanation of the Secretary of State's approach in the second case if it was to diverge materially from the approach he had taken in the first. Policy CT1 was relevant in both cases, and in essentially the same way. Yet the approach taken to the status of that policy – whether it was up to date or not, the conclusion reached on this question, and the consequences of that conclusion – in particular, whether the "presumption in favour of sustainable development" was engaged or not, were different. It cannot be said that such differences as there were between the two cases made it unnecessary for the Secretary of State, when determining the Newick appeal, to take into account his decision in the Ringmer appeal, and his conclusion there that Policy CT1 was up to date. And if his approach to that issue and his conclusion on it were to be different, he had to explain why. No reasonable Secretary of State could have failed to do that. The interests of consistency in appellate decision-making required it.

57. My conclusion here would be the same even if my understanding of the Secretary of State's use of the expression "for the purposes of this appeal" in paragraph 14 of his decision letter in the Ringmer appeal was wrong, and in using it he was indeed seeking to confine his conclusion on the status of Policy CT1 to that particular appeal. If this is what he meant, why was his approach so obviously different in the Newick appeal, where he concluded that the policy was out of date in a general way, throughout the district? And if the policy was up to date in the Ringmer appeal, why was it not up to date in the Newick appeal? In the light of the Ringmer appeal inspector's reasons and conclusions, and the Secretary of State's endorsement of them, those questions were unavoidable. But they went unanswered. No attempt was made by the Secretary of State to square his conclusion in the Newick appeal to the effect that the policy was simply out of date in a general sense with his prior conclusion in the Ringmer appeal to the effect that it was up to date at least in Ringmer. This of itself was an inconsistency. And it was not addressed by the Secretary of State.

58. I therefore agree with the judge that the Secretary of State erred in the Newick appeal in failing to take into account and distinguish his own decision in the Ringmer appeal. As the judge said, aptly in my view, "[it] can only undermine public confidence in the operation of the development control system for there to be two decisions of the Secretary of State himself, issued from the same unit of his department … within 10 weeks of each other, reaching a different conclusion on whether or not a development plan policy is up-to-date without any reference to, or sufficient explanation in the later one[,] for the difference" (paragraph 122 of the judgment). The Secretary of State did not explain, or recognize, the inconsistency between these two decisions, in his approach to the status of Policy CT1, his

relevant conclusion, and the consequences of it. The error of law is clear. The Secretary of State was right to acknowledge it when submitting to judgment in the court below. And there was no proper basis here for the court to withhold relief. The judge's conclusion that the decision had to be quashed was plainly correct (paragraph 159).

59. The Secretary of State's relevant conclusion in his subsequent decision in the Wivelsfield case, that Policy CT1 was up to date, only accentuates the error he made. That later decision cannot, of course, play any part in the analysis on which we decide this issue in the appeal before us.

Issue (3) – regulation 68(3) of the Habitats regulations

60. Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ("the Habitats Directive") provides that "[any] plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon … shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives", and that "[in] the light of the conclusions of the assessment of the implications for the site … , the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public".

61. Regulations 61 and 68 of the Habitats regulations apply to the granting of planning permission under Part 3 of the 1990 Act. Regulation 61(1) provides that "[a] competent authority, before deciding to … give any permission … for … a plan or project which … is likely to have a significant effect on a European site … must make an appropriate assessment of the implications for that site in view of that site's conservation objectives". Regulation 61(6) provides that "[in] considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the … permission … should be given". Regulation 68(3) provides:

> "(3) Where the assessment provisions apply, outline planning permission must not be granted unless the competent authority are satisfied (whether by reason of the conditions and limitations to which the outline planning permission is to be made subject, or otherwise) that no development likely adversely to affect the integrity of a European site … could be carried out under the permission, whether before or after obtaining approval of any reserved matters."

62. Core Policy 10.3 of the joint core strategy seeks to give effect to the "precautionary principle" – as amplified, for example, in the judgment of the Court of Justice of the European Union in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] 2 C.M.L.R. 31 (see, in particular, paragraphs 43 to 45). It states that "[to] ensure that [the SAC] and [the SPA] is protected from recreational pressure, residential development that results in a net increase of one or more dwellings within 7km of the Ashdown Forest will be required to contribute" to "[the] provision of Suitable Alternative Natural Greenspaces (SANGs) at the ratio of 8 hectares per additional 1,000 residents", and "[the] implementation of an Ashdown Forest Strategic Access Management and Monitoring Strategy (SAMMS)". It continues:

> "Until such a time that appropriate mitigation is delivered, development that results in a net increase of one or more dwellings within 7km of Ashdown Forest will be resisted. …".

63. DLA Delivery's application for planning permission being in outline with all matters except access reserved for future determination, the inspector confirmed that he had considered the proposal on the basis that the layout, scale, appearance and landscaping of the development were all indicative (paragraph 2 of his report). He had before him an illustrative masterplan (drawing no. ZMG734/022), showing a layout for a development of "49 Units".

64. Among the matters agreed between the parties in the statement of common ground, as the inspector said, was that "[the] site is located outside the 7km zone of influence surrounding the Ashford Forest Special Protection Area …" (paragraph 29 of his report). This was not correct. At its north-eastern end the site extended a short distance into the 7km "zone of influence", though the illustrative masterplan did not show any buildings in that part of the site. Later in his report, the inspector said that "[the] Ashdown Forest SPA and SAC are located approximately 7km to the north of Mitchelswood Farm", and that he had "therefore had regard to the effect of the proposal on the integrity of this European site …" (paragraph 212). Repeating the parties' error in the statement of common ground, he went on to say (in paragraph 213):

> "213. Although the appeal site is situated close to the boundary of the 7km 'Zone of Influence', it is nonetheless located outside the designated area. This led to the Council's conclusion that, following assessment by Natural England, the proposal would not result in any likely significant effects on the internationally important features [of] the designated areas, either in isolation or combined with other projects. Based on the evidence provided I have no reasons to disagree."

65. The inspector recommended the imposition of a condition – condition 7 – requiring the submission and approval of a scheme of ecological enhancement and management (paragraph 134). Condition 7 states:

> "7) No development shall take place until a detailed scheme of ecological enhancements and mitigation measures, to include on-going management as necessary, based on the recommendations of the Ecological Assessment (September 2014) by Aspect Ecology Ltd has been submitted to and approved in writing by the local planning authority. The scheme shall be carried out and managed thereafter in accordance with the approved details."

66. In his decision letter the Secretary of State referred to the council's conclusion that the proposed development would not result in any likely significant effects on the Ashdown Forest SPA and SAC, and agreed with the inspector's conclusion in paragraph 213 of his report "that the proposal would not result in any likely significant effects on the internationally important features of the designated areas, either in isolation or combined with other projects" (paragraph 21). He imposed condition 7 on the outline planning permission, as recommended by the inspector (paragraph 25).

67. The judge accepted Ms Sargent's argument that the inspector's conclusion in paragraph 213 of his report, which the Secretary of State adopted, was wrong as a matter of fact, that the

error was material, and that condition 7 was ineffective to ensure that the part of the site within the 7km "zone of influence" was kept free from construction. He was not persuaded by Mr Young's argument – which was put forward again in the appeal – that, as the illustrative masterplan demonstrates, the development could be confined to the part of the site outside the "zone of influence", that the council could be relied upon not to approve any submission of reserved matters showing built development within it, that it was inconceivable that any houses would be constructed there, and that any breach of regulation 68(3) was, in any event, "de minimis" (paragraphs 135 to 140 of the judgment).

68. I agree with the judge. The inspector may have been led into error by the parties, but it is clear that he was in error, and so too was the Secretary of State. Part of the site is within the 7km "zone of influence". Condition 7 does not prevent the erection of buildings on that land. No other restriction on the outline planning permission does so. It is possible that at the reserved matters stage the scheme submitted for approval would avoid siting buildings within the "zone of influence". But the developer, whoever it is, would be free to bring forward a layout in which the 50 dwellings were differently arranged on the site, with one or more of them inside the 7km "zone of influence".

69. The crucial point, however, as the judge recognized (in paragraph 136 of his judgment), is that the designation of the 7km "zone of influence", to which Core Policy 10.3 applies, is the means by which the "precautionary principle" is given effect. It ensures that development, including housing development, will not adversely affect the integrity of the Ashdown Forest SPA and SAC. Regulation 68(3) does not provide that outline planning permission may be granted if the competent authority is satisfied that no development likely to affect the integrity of a European site is likely to be carried out, or would be carried out, under the permission. It provides that outline planning permission "must not be granted unless" the competent authority is "satisfied … that no [such] development … could be carried out …". The relevant test here is stringent. It applies specifically to the granting of outline planning permission, not to the approval of reserved matters. It can, in principle, be satisfied by the imposition of a suitable condition. But its terms reflect the strict application of the "precautionary principle" that is required in a decision authorizing development (see, for example, the judgment of the Court of Justice of the European Union in Case C-258/11 *Sweetman v An Bord Pleanala* [2014] P.T.S.R. 1092, at paragraph 51).

70. In this case, not only did the Secretary of State make a mistake of fact as to the relationship between the site of the proposed development and the 7km "zone of influence", but that mistake led him to decide the appeal in breach of article 6(3) of the Habitats Directive and regulation 68(3) of the Habitats regulations. This would have been enough on its own to justify an order quashing the planning permission, even if that outcome was not also inevitable in any event, given the Secretary of State's failure to take into account his decision in the Ringmer appeal.

71. Shortly before the hearing of the appeal, on 26 February 2018, DLA Delivery made an application for leave to adduce as further evidence a draft section 106 planning obligation, in the form of a unilateral undertaking, which would have committed itself and its successors in title not to construct any building on the part of the site within the 7km "zone of influence". The council pointed out several basic shortcomings in the draft unilateral undertaking, and, not surprisingly, opposed this new evidence being adduced at that very late stage. At the end of the hearing we announced our decision to refuse the application, and undertook to give our reasons when judgment was handed down. After the hearing, on

19 April 2018, Mr Young sent an e-mail to the court, to which a signed unilateral undertaking was attached. No formal application to adduce that evidence was made at that stage, but Ms Sargent made it clear that any such application would be opposed. Nevertheless, on 22 May 2018, such an application was made. I would also reject this even more belated attempt to bring new evidence before the court, and for essentially the same reasons as I would give for refusing the application that was made on the eve of the hearing. The reasons can be shortly stated. They rest on the familiar principles in *Ladd v Marshall* [1954] 1 W.L.R. 1489, *Hertfordshire Investments Ltd. v Bubb* [2000] W.L.R. 2318 and *E v Secretary of State for the Home Department* [2004] Q.B. 1044. As Hale L.J., as she then was, said in *Bubb*, parties "should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed". That principle applies as strongly in challenges to planning decisions as it does in other proceedings. Here, in my view, the application to adduce new evidence came far too late, and with no proper explanation or excuse. No such application was made in the court below. The unilateral undertaking, if it was to be relied upon, could and should have been presented to the court at that stage. Even then, however, the new evidence would have made no difference to the outcome, for the Secretary of State's decision would have had to be quashed in any event – because Baroness Cumberlege's challenge succeeded on the ground relating to inconsistency. That will be so in this court too if the appeal should fail, as I think it must, on that distinct and separate issue.

Conclusion

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

Lord Justice Moylan

73. I agree.

Lord Justice Peter Jackson

74. I also agree.