Neutral Citation Number: [2013] EWHC 11 (ADMIN)

Case No: CO/8849 AND 8922/2012

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/01/2013

Before :

HIS HONOUR JUDGE MACKIE QC

- -

Between :

SOUTH NORTHAMPTONSHIRE COUNCIL(1) **DEIDRE VERONICA WARD(2)**	**Claimants**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT(1) **BROADVIEW ENERGY DEVELOPMENTS LIMITED(2)**	**Defendants**

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- -

Mr Asitha Ranatunga (instructed by **Legal Services, South Northamptonshire Council**) for the First Claimant**, Mr Juan Lopez (**instructed by) for the Second Claimant
Ms Lisa Busch (instructed by **The Treasury Solicitor**) for the First Defendant, **Mr Timothy Corner QC** (instructed by Eversheds LLP for the Second Defendant**)**

Hearing date: 5th December 2012

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Judgment Approved by the court for handing down

JUDGE MACKIE QC :

1. By two separate claims the Claimants seek orders under section 288 of the Town and Country Planning Act 1990 quashing the decision dated 12 July 2012 ("the Decision") of a planning Inspector (Elizabeth Fieldhouse DipTP DipUD MRTPI) appointed by the Secretary of State. The Decision granted planning permission, following an appeal by Broadview Energy Developments Limited ('Broadview'), for a windfarm at Spring Farm Ridge, located between Greatworth and Helmdon in South Northamptonshire ("the Site"). The permission is for the erection of five wind turbines (each with a maximum height of 125m to blade tip) plus underground cabling, meteorological mast, and other ancillary facilities ("the Development").

2. The appeal followed the decision of South Northamptonshire Council ("The Council") the first Claimant, in a notice dated 11 July 2011 to refuse the Development. The decision of the Inspector was issued following a public inquiry held on 15-18 and 22-24 May 2012. Site visits were made on 21, 24 and 28 May 2012. Mrs. Ward, the Second Claimant, opposed the appeal. She is a member of Helmdon Stuchbury and Greatworth Windfarm Action Group ("HSGWAG").

3. By order dated 13 November 2012 the two claims were consolidated. Under both claims the Secretary of State and Broadview are defendants.

The challenges in outline

4. The Council challenges the decision on three grounds each supported by Mrs Ward. The Council submits that the Inspector failed

   - properly to apply the statutory duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 ('the 2004 Act') and thereby failed to attach any or any proper weight to conflicts with Development Plan policy.

   - properly to apply the statutory duties under sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ('the Listed Buildings Act') and thereby failed to have special regard to the desirability of preserving the setting of Listed Buildings and failed to give special attention to the desirability of preserving or enhancing the character or appearance of Conservation Areas.

   - to provide adequate reasons on material matters to the decision, namely how the duty under section 38(6) of the 2004 Act had been applied and / or how the benefits of the proposal outweighed the harm to cultural heritage assets in the light of identified conflicts with Development Plan policy and the duties under the Listed Buildings Act.

5. Mrs Ward relies on two additional grounds not supported by the Council. She submits that the Inspector

   - failed adequately to consider the actual noise impact of wind turbines in amenity terms and/or to examine and/or focus upon noise impacts beyond

the issue of compliance with '*ETSU-R-97: The Assessment and Rating of Noise from Wind Farms'*. The Inspector failed to provide adequate reasons for her approach to examining noise impacts and concluding upon them in terms of ETSU;

- erred in law by adopting a test relating to visual impacts on residential amenity without any basis in law or policy, misapplied the relevant policy in this context, and failed to take into account relevant considerations, namely the impacts which she regarded as falling below the threshold she has wrongly set.

The Legal Framework

6. Section 288(1) of the 1990 Act provides, so far as relevant:

> *"If any person –*
>
> *(a) ...*
>
> *(b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds –*
>
> *(i) that the action is not within the powers of this Act, or*
>
> *(ii) that any of the relevant requirements have not been complied with in relation to that action,*
>
> *he may make an application to the High Court under this section".*

7. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides:

> *"If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".*

8. Section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 provides:

> *"In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority, or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its*

> *setting or any features of special architectural or historic interest which it possesses".*

9. Section 72(1) of the same Act provides:

> *"In the exercise, with respect to any buildings or other land in a conservation area, of any functions under or by virtue of any of the provisions mentioned in subsection (2) [the Planning Acts], special attention shall be paid to the desirability of preserving or enhancing the character or appearance of that area".*

Principles

10. The approach of the court to an application under Section 288 is not in dispute and in the next three paragraphs I adopt the summary in the skeleton argument of Ms Busch who appears for the Secretary of State. A challenge to the decision of an Inspector on a planning application made under section 288 of the 1990 Act may be made on standard public law grounds, including the grounds that the Inspector's conclusion was perverse, that he failed to take account of relevant considerations or took account of irrelevant ones, and that he failed to give reasons which were proper and adequate, and/or clear and intelligible, and/or which dealt with the substantial points which had been raised in a preceding Inquiry (Seddon Properties v Secretary of State for the Environment [1978] JPL 835 per Forbes J; cited in Bolton MBC v Secretary of State for the Environment [1991] JPL 241 (CA)).

11. The weight to be attached to material considerations and matters of planning judgment are within the exclusive jurisdiction of the Inspector (Tesco Stores Ltd v Secretary of State [1995] 1 WLR 759).

12. An Inspector is not writing an examination paper. His decision-letter must be read in good faith and references to policies must be taken in the context of the general thrust of the Inspector's reasoning. The adequacy of reasons must be assessed by reference to whether the decision leaves room for genuine doubt as to what the decision-maker has decided and why, on a straight-forward, down-to-earth reading of the decision, without excessive legalism or exegetical sophistication (South Somerset DC v Secretary of State for the Environment [1993] 1 PLR 80 at 83E-G and Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P&CR 263 at 271-271).

13. Similarly it is common ground that the requirement to give reasons is accurately summarised by Lord Brown of Eaton-Under-Heywood in South Bucks DC v Porter [2004] 1 WLR 1953, at1964 at paragraph 36 as follows:

> *"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".*

14. Reliance is also placed in Clarke Homes Limited v Secretary of State for the Environment and East Staffordshire District Council (1993) 66 P&CR 263, where Sir Thomas Bingham MR said at p271-272 that the question, when dealing with an allegation of inadequate reasoning in a decision of the Secretary of State, is whether the decision letter

> *"leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication."*

Guidance about the approach to Section 38(6)

15. While Counsel for the Defendants place emphasis on the desirability of leaving the Inspector simply to apply the language of Section 38(6) the Claimants point to the context in which the section was enacted and the guidance in the case law about the approach to it.

16. In City of Edinburgh Council v Secretary of State for Scotland [1997) 1 WLR 1447 the House of Lords examined the approach to be properly taken by the decision-maker over the Scottish provision then equivalent to section 38(6) of the 2004 Act (namely, s.18A of the Town and Country (Scotland) Act 1972):

> *"By virtue of section 18A the development plan is no longer simply one of the material considerations. Its provisions, provided that they are relevant to the*

> *particular application, are to govern the decision unless there are material considerations which indicate that in the particular case the provisions of the development plan should not be followed. If it is thought to be useful to talk of presumptions in this field, it can be said that there is now a presumption that the development plan is to govern the decision on an application for planning permission...*
>
> *Moreover the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker" (per Lord Clyde at 1458C – H)."*

17. The approach to be adopted by the decision-maker in respect of the development plan has recently been specifically considered in the context of wind farm development, in Sea & Land Power & Energy Ltd. v SSCLG et al. [2012] EWHC 1419 (Admin) in which it was observed that section 38(6) gives effect to a system which is *"plan-led"*:

> *"There is thus a statutory presumption in favour of the statutory development plan, here that includes the local plan and its policies on landscape. In contrast national planning policies...are merely other material considerations" (per Lang J, para. 53).*

18. Mr Ranatunga for the Council also points to the context of Section 38 as the successor to Section 54A of the Planning and Compensation Act 1991, described in the Encyclopedia as weighting *"the balance in favour of the development plan by requiring all decisions under this section actually to be made in accordance with the plan except where material considerations indicate otherwise."*

19. I attach importance to the entirety of the relevant parts of the speeches of Lord Hope and Lord Clyde in City of Edinburgh and also to the summary of the position, on which the judge in Sea & Land based the observation set out above, by Lindblom J in Cala Homes (South) Ltd v Secretary of State for Communities and Local Government and Winchester City Council [2011] 1 P. & C.R. 22 at paras. 27 - 28, 32 and 48:

> *"27. In England (as elsewhere in the United Kingdom) the planning system is still "plan-led". In statutory—as opposed to policy—terms, the priority to be given to the development plan in development*

control decision-making is encapsulated in s. 38 (6) of the 2004 Act, which provides:

"If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

28. Section 38(6) must be read together with s.7G(2) of the 1990 Act. The effect of those two provisions is that the determination of an application for planning permission is to be made in accordance with the development plan, unless material considerations indicate otherwise. The provision then equivalent to s.38{6) in the Scottish legislation (S.18A of the Town and Country Planning (Scotland) Act 1972 , the counterpart of s.54A of the 1990 Act) was examined and explained by the House of Lords in Edinburgh City Council *v* Secretary of State for Scotland [1997] 1 *W1.R. 1447. In his speech in that case Lord Hope said this (at pp. 1449H-1450G):*

"Section 18A of the Act of 1972 ... creates a presumption in favour of the development plan. That section has to be read together with section 26(1) of the Act of 1972 [the provision in the Scottish legislation equivalent to section 70(2) of the 1990 Art]. Under the previous law, prior to the introduction of section I8A into that Act, the presumption was in favour of development ... it is not in doubt that the purpose of the amendment introduced by section I8A was to enhance the status, in this exercise of judgment, of the development plan. It requires to be emphasised, however, that the matter is nevertheless still one of judgment, and that this judgment is to be exercised by the decision-taker. The development plan does not, even with the benefit of section 18A, have absolute authority. The planning authority is not obliged, to adopt Lord Guest's words in Simpson v. Edinburgh Corporation 1960 S.C. 313 , 318, 'slavishly to adhere to' it. It is at liberty to depart from the development plan if material considerations indicate otherwise. No doubt the enhanced status of the development plan will ensure that in most cases decisions about the control of development will be taken in accordance with what it has laid down. But some of its provisions may become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant In such a case the decision where the balance

lies between its provisions on the one hand and other material considerations on the other which favour the development, or which may provide more up-to-date guidance as to the tests which must be satisfied, will continue, as before, to be a matter for the planning authority.

The presumption which section 18A lays down is a statutory requirement It has the force of law behind it But it is, in essence, a presumption of fact, and it is with regard to the facts that the judgment has to be exercised. The primary responsibility lies with the decision-taker. The function of the court is, as before, a limited one. All the court can do is to review die decision, as the only grounds on which it may be challenged in terms of the statute are those which section 233(1) of the Act lays down. I do not think that it is helpful in this context, therefore, to regard the presumption in favour of the development plan as a governing or paramount one. The only questions for the court are whether the decision-taker had regard to the presumption, whether the other considerations which he regarded as material were relevant considerations to which be was entitled to have regard and whether, looked at as a whole, his decision was irrational. It would be a mistake to think that the effect of section 18A was to increase the power of the court to intervene in decisions about planning control".

...

32. ...a statement of national planning policy, however made, is capable of being a material consideration in the determination of a planning application. This was recognised by Lord Hope in the passage of his speech in City of Edinburgh *which I have set out above (see, for example, the decision of Carnwath J., as he then was, in* R. v Bolton MBC Ex p. Kirkman *[1998] Env. L.R. 560 (at p.567); (1998) 76 P.&C.R. 548)*

...

48. Four features of the plan-led system are salient in the decision of the House of Lords in City of Edinburgh: *first, that both the relevant provisions of the development plan and other material considerations must be taken into account by the decision-maker (see what was said by Lord Clyde in his speech at p.457F-H, citing Lord Guest's distinction between having regard to the plan and slavish adherence to it in* Simpson *v* Edinburgh Carp *1960 S.C. 313, at pp.318-319);*

> *secondly, that the development plan has "priority" in the determination of planning applications (see what was said by Lord Clyde at p.l458B); thirdly, that this "priority" is not to be equated to a "mere mechanical preference", for there remains "a valuable element of flexibility" and if there are considerations indicating the plan should not be followed a decision contrary to its provisions can properly be made (see what was said by Lord Clyde at p,1458F); and fourthly, that s.38(6) leaves to the decision-maker the assessment of the facts and the weighing of the considerations material to the decision (see what Lord Clyde said at p,1458G-H). This exercise is a practical one. It entails for the maker of the decision the question "whether there are considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given to it" (see Lord Clyde's speech at P.1459D-H). As was acknowledged by Lord Hope (at p,1450D) it may be, for example, that some of the provisions of the development plan "become outdated as national policies change, or circumstances may have occurred which show that they are no longer relevant". When this happens, the balance between the provisions of the plan and the considerations pulling against it is for the decision-maker to strike (ibid.)."*

20. I conclude from all this that the section requires not a simple weighing up of the requirement of the plan against the material considerations but an exercise that recognises that while material considerations may outweigh the requirements of a development plan , the starting point is the plan which receives priority. The scales do not start off in even balance.

21. There is more debate about the legal approach to the Listed Buildings Act and the grounds relied upon by Mrs Ward which I will deal with later.

The Appeal Decision

22. The detailed nature of some of the grounds requires me to summarise the Decision with particular emphasis on the passages criticised by the Claimants. I observe first that the Decision is accepted to be very thorough and conscientious except, on the case of the Claimants, in some detailed respects referred to below and secondly that, as appears from the Statement of Common Ground, it is agreed that the Inspector identified the correct planning policies. In summarising the Decision I will, like the parties, refer to its paragraphs as "DL1" etc.

23. The main issues are listed at DL 4 as being:

    i) The impact of the proposal on the surrounding area in terms of landscape character and visual effects.

ii) The effect of the development on the setting of heritage assets.

iii) The effect on the amenity of nearby occupiers both during construction and in operation, particularly with respect to visual intrusion, shadow flicker and noise and general disturbance.

iv) Whether as a result of the proposed turbine siting there would be an unacceptable perception of harm to the safety of users of the local public rights of way network and the byway open to all traffic.

24. The Inspector then added:

> *"Finally, I consider whether any harm which may result from the above issues would be sufficient to outweigh the benefits, particularly in terms of climate change, which flow from renewable energy generation".*

25. At DL5, under the heading *"Reasons",* and the sub-heading *"Policy framework in respect of renewable energy"*, the Inspector summarised Government policy with respect to renewable energy as set out in its UK Renewable Energy Strategy, Overarching National Policy Statement for Energy, the UK Renewable Energy Strategy Roadmap and the Carbon Plan. At DL6 she noted that the Companion Guide to PPS22: Planning for Renewable Energy remained relevant.

26. In DL7-8 the Inspector summarised the policy for renewable energy described in the National Planning Policy Framework ("the Framework") and dealt with the development plan at DL9. As to the Local Plan, the Inspector said, at DL 12:

> *"The LP does not refer to renewable energy but the Council adopted the South Northamptonshire Wind Turbines in the Open Countryside Supplementary Planning Document in December 2010 (SPD). The SPD is afforded some weight as a material consideration. This guide sets out a positive approach to wind energy but does not set targets. However, the Low Carbon Energy Opportunities and Heat Mapping for Local Planning Areas Across the East Midlands: Final Report March 2011 identifies South Northamptonshire as one of only four districts in which on-shore wind has the greatest potential. On-shore wind is likely to provide the overwhelming contribution to capacity. The appeal site is in a location which is identified as one of the areas having the greatest technical resource for onshore wind energy production".*

27. The relationship between the Framework and development plan policies is described at DL13:

> *"Since the Framework came into force, the saved policies of the adopted RSS and the LP should be given due weight according to the degree of consistency with the Framework, as advised in paragraph 215 of the Framework. In the absence of any local plan policies on renewable energy, the policies in the Framework in relation to renewable energy are afforded considerable weight. The other relevant policies considered in the body of this decision are found to be consistent with the broad policy principles of the Framework".*

28. The Inspector noted at DL14 that the West Northamptonshire Joint Core Strategy – Pre Submission – February 2011 was at a fairly early stage in its preparation and could be subject to change, so could only be afforded very limited weight.

29. The Inspector then turned to landscape character and visual effects, the characteristics of the appeal site and its surroundings at DL 15-16, location within the 2003 County wide landscape character assessment at DL18 and at DL 19 with the results of a local landscape and visual assessment carried out by the First Claimant.

30. The Inspector observed, at DL 21, that the appeal site lay within an area with no specific landscape designation and would not impact harmfully on views from the AONB or its character. At DL 23, the Inspector observed that in view of the scale and number of turbines proposed, the development would have a major impact on the landscape. In DL24-32, the Inspector considered the impact which the proposal would have on landscape and views from a number of viewpoints. She concluded at DL 33:

> *"Views within the theoretical windfarm landscape would benefit from the filtering of nearby trees and hedgerows but the turbines would be dominant elements in the landscape and are not one of the exceptions in LP policy EV2 to the presumption against development in open countryside or areas for the distribution of development in CS policy S1".*

31. The Inspector then turned to heritage assets. She noted that the development would not have a direct impact on any heritage assets, any potential impact would be to the settings of those assets. At DL35 the Inspector said:

> *"The Framework requires local plans to set out a positive strategy for the conservation and enjoyment of the historic environment. It recognises that heritage assets are an irreplaceable resource and they should be conserved in a manner appropriate to their significance. The significance of a heritage asset can be harmed or lost through alteration or destruction of the heritage asset or development within its setting".*

32. She noted that there were many designated heritage assets within five kilometres of the appeal site, including eight scheduled monuments, 319 listed buildings, eight conservation areas and one registered park and garden as well as undesignated assets nearby (DL37). At DL38 the Inspector stated:

> *" In considering whether a proposed development would lead to substantial or less than substantial harm to the significance of a designated heritage asset, paragraphs 133 and 134 of the Framework, put simply, require the harm to be weighed against any public benefits – the greater the negative impact the greater the benefit required to justify approval".*

33. From DL39-54 the Inspector conducted a detailed assessment of the impact which the development would have on the settings of the heritage assets liable to be affected by it, concluding, at DL55:

> *"While in some instances considerable, the adverse impact of the proposed wind turbines would be reversible and there would remain areas from which the turbines would not be seen. Overall, the proposal would cause harm to the setting of a range of designated heritage assets and therefore fail to accord with the relevant parts of RSS policy 26, LP policies G3, EV11 and EV12 and CS policy S11 that aim to preserve or enhance the character, appearance and setting of heritage assets. However, in no case has the impact of the proposal been found to be 'substantial harm' in terms of paragraph 133 of the Framework. Therefore the impact would fall within the policy in paragraph 134 of the Framework and this harm should be weighed against the public benefits of the proposal".*

34. The Inspector next dealt with the issue of *"Residential amenity – visual intrusion"*, introducing this topic (DL 56):

> *"The planning system exists to regulate the use and development of land in the public interest and there is public interest in avoiding the effects of climate change. The outlook from private property is a private interest not a public one. However, where the visual impact of a proposal is such as to cause unreasonable living conditions/amenity for the occupants of individual homes, and might be widely regarded as making the property an unattractive place in which to live, that is a legitimate matter of public interest".*

35. At DL 58 she said:

> *"The residential surveys by the Appellant and the Council considered views from residential properties*

> *within 2 km to determine whether the proposed turbines would be overbearing or overwhelming, dominate the outlook to the extent that the proposal would be oppressive or adversely affect the living conditions. The Appellant found no overbearing or overwhelming effects from the proposal on any property although accepted that houses that fell within 0.8 km of the nearest turbine would fall within the 'dominant' range of the proposal. The conclusions were not disputed by the Council for the majority of properties except Stuchbury Hall Farm from where the Council considered the wind turbine(s) would be a noticeably overwhelming and an unavoidable presence".*

36. The visual impact which the development would have for Stuchbury Hall Farm, for the reasons set out from DL59-61,would not be overwhelming or inescapable in the overall views from the property. As to the view from within the fields the development would be *"unpleasantly imposing and pervasive"*. However, it would not be *"so overwhelming as to make the property unattractive and/or an unsatisfactory place to live"* (DL62).

37. As regards Grange Farm and other properties, the turbines and blades would be likely to be viewed from the edge of the field adjoining the properties; but those views would be filtered or indirect. There would be visual harm from rotating blades, and the turbines would *"dominate as a narrow arc in the overall view"*. Nevertheless *"in view of the aspect, planting and width of view, the visibility of the turbines would not be overwhelming or inescapable"*. (DL63).

38. At DL64 the Inspector said:

> *"From other curtilages and/or properties visited in the area, some have limited screening that would break up views but the attractiveness of some of the properties would be diminished. The impact on some properties would be likely to be substantial and unpleasantly imposing. Nevertheless, the majority would have other aspects or are well separated from the proposal so that the wind turbines would not be overwhelming nor make them unattractive and/or unsatisfactory places in which to live. The relevant provisions of LP policy G3 and CS policy S11 would not be contravened in this respect".*

39. As regards the issue of *"Residential amenity – noise and general disturbance"*, the Inspector noted at DL66 that PPS22 indicated that the report entitled *"The Assessment and Rating of Noise from Wind Farms" (ETSU-R-97)* should be used when assessing and rating noise from wind energy developments. This was carried through, as she also noted, to more recent Government advice, with the footnote to paragraph 97 of the Framework advising that, in assessing the likely impacts of potential wind energy development, the approach in EN-3 read with EN-1 should be followed; while

EN-3 provided that the ETSU-R-97 report should be used for assessing the impact of noise from a windfarm.

40. The Inspector then recorded (DL69) that a suggested condition *"would accord with the maximum day and night time noise immission levels in ETSU-R-97",* adding:

> *"No harm is found in respect of noise immission levels suggested in the condition and there would be no conflict with the advice in CG PPS22, EN-1, EN-3 and the Framework in this respect. Subject to the proposed condition there would be no conflict with LP policy G3 (D) or emerging CS policy S11(3) in respect of noise".*

41. At DL70, the Inspector considered Amplitude Modulation ("AM"), remarking that ETSU-R-97 took account of this. She added that maximum noise levels could be controlled by condition.

42. The Inspector's overall conclusion about residential amenity is at DL72:

> *"Overall in relation to the effect on the living conditions of residents, it has been found that the proposed development may be dominant but would not be overwhelming and inescapable for residential occupiers. There may be unsettling stacking of turbines or at least blades visible from some properties and a considerable number of residents would see the turbines as prominent and uncharacteristic structures. Such impacts would diminish with distance and there is nothing to suggest that such effects would be experienced in relation to the house and garden as a whole of the affected properties. The properties would not become unattractive and/or unsuitable places in which to live. Subject to appropriate controls through conditions, there would be no harm by reason of shadow flicker and any noise as a result of the proposal could be controlled to accord with Government policy".*

43. At DL73-79 the Inspector dealt with the impact of the development on "*Public footpaths, bridleways and byway"*, concluding, at DL 79, that:

> *"The proposed development would be a visible presence in the area and result in the loss of a perception of tranquillity contrary to the aims of RSS policy 1, LP policy G3 and CS policy S1. Nevertheless, with the intermittent filtering/screening effect of vegetation and any twists and turns along routes, the ever changing views would not necessarily always include turbines. The proposal would not result in PRoWs or the BOAT being inaccessible or unavailable*

> *and no significant harm is found in relation to the usage of public rights of way".*

44. *"Other matters"*, namely, ecology, aviation, grid connection, highway safety and human rights are dealt with in DL80-84.

45. The Inspector set out her *"Overall balance and conclusions"* at DL85-92. There is a clear national and regional need for renewable energy which weighs heavily in favour of the development and is supported by Government and regional policy and a local SPD. Wide economic and environmental benefits attach to all renewable energy proposals and are significant material considerations which have to be given substantial weight (DL85). Nevertheless, the Government's intention is not that all renewable energy schemes should be supported irrespective of any harm that might be caused. The Framework advises that planning plays a key role in helping to shape places to secure radical reductions in greenhouse gas emissions. The delivery of renewable and low carbon energy and associated infrastructure is identified as being central to the economic, social and environmental dimensions of sustainable development. However, the Framework advises that it is necessary to ensure that the impact of the development is acceptable (DL85). LP policy EV2 and CS policy S1 aim to prevent development in the countryside/rural areas that does not fit into the identified categories. Wind turbines do not fall into the accepted and identified uses. However, due to the size and number of turbines, the proposal would be likely to have to be located in the countryside rather than in a settlement (DL86).

46. As the concluding paragraphs are much relied on I set out the relevant ones in full;

> *"87 The benefits of producing renewable energy and assisting in meeting national obligations, aspirations and helping to reduce the impact of climate change have to be set against the identified harm. Any wind farm is likely to bring change to the landscape and outlook of people living nearby but the fact that the development would be for a period of 25 years and is reversible has to be borne in mind. However, such a period would be a long time for any perceived harm and therefore the fact that the development would be for a temporary period carries little weight. The question is whether any harm would be so serious as to significantly damage interests of acknowledged importance.*
>
> *88 In this particular case, the proposal would bring about a significant change to the landscape and from some viewpoints the proposed windfarm would become a key feature at odds with the scale of the landscape with a subsequent adverse impact. There would be harm to the setting of a range of heritage assets at the level of harm would be less than substantial.*

> *89 Residential amenity could be protected from shadow flicker and the noise immission levels controlled by the imposition of conditions. The proposal would change the outlook from many homes and could be unpleasantly imposing and pervasive to the occupiers of Stuchbury Hall Farm, who work the adjoining land. Turbine blade stacking could be visible from some properties. However, the proposal would not be so overwhelming as to make any property an unattractive and/or unsatisfactory place in which to live.*
>
> ……
>
> *91 Taking account of the statutory duties imposed by the Planning (Listed Buildings and Conservation Areas) Act 1990 and the harm identified to the setting of heritage assets, the balance indicates that the wider benefits attributable to the projects contribute to the case for approval.*
>
> *92 National policy seeks to secure well-planned developments in appropriate locations and the drive to provide renewable energy should not be at the expense of the environment and cultural heritage. Overall the totality of the impact of the proposal, including conflict with development and emerging plan policies, is not sufficient to outweigh the wider economic and environmental benefits of the proposal. The LP policies do not address renewable energy. However the Framework provides the most up-to-date expression of national renewable energy policy. This is a material consideration to which I give significant weight. Having carried out the balancing exercise, I have concluded that the proposal is acceptable in planning terms."*

47. The Inspector then went on to consider the conditions that should be attached to any grant of planning permission.

48. I now turn to the individual challenges made by the Claimants.

Ground 1 - failure to give the weight to the development plan required by Section 38(6)

49. Mr Ranatunga, supported by Mr Lopez submits as follows. The Inspector was required to give effect to the plan-led system through section 38(6) by determining the appeal in accordance with the Development Plan unless material considerations indicated otherwise. The statutory test is not referred to anywhere in the Decision Letter. The Council does not contend that the Inspector was required to refer expressly to section 38(6) of the 2004 Act and its terms, rather than the Decision Letter taken as a whole, must show that the statutory duty has been applied. On a fair reading of the Decision Letter, the

Inspector applied the policy tests in the recently published National Planning Policy Framework. This was only a material consideration under section 38(6) of the 2004 Act and the Inspector failed to give due weight to the Development Plan policies in the assessment. Whilst the Inspector did identify the relevant Development Plan (DL, 9) and did consider the advice in the NPPF that weight should be given to its policies according to the degree of consistency with the Framework (DL, 13), nowhere did the Inspector acknowledge the statutory test under section 38(6) and give priority to the Development Plan unless material considerations indicated otherwise.

50. The Inspector fairly noted that the Local Plan did not contain policies on renewable energy and therefore attached considerable weight to the policies in the NPPF in relation to renewable energy. The reader could thereby properly understand the relative weight attached to renewable energy policy in the NPPF. However, the Inspector expressly left open the position in respect of other Development Plan policies at DL 13.

51. The Inspector identified conflicts with Development Plan policies in respect of the main issues in the appeal. In terms of the scheme's effect in landscape and visual terms there was a conflict with policy EV2 of the Local Plan and S1 of the Core Strategy (DL, 33). In terms of effects on Heritage Assets, there would be conflict with policy 26 of the Regional Strategy, G3, EV11, and EV12 of the Local Plan, and policy S11 of the Core Strategy (DL, 55). In respect of impacts on Public Rights of Way, the Inspector found conflicts with policy 1 of the Regional Strategy, G3 of the Local Plan and policy S1 of the Core Strategy (79). However, there was no other reference to the conflicts with the other policies (Regional Strategy policies 1 and 26, Local Plan policies G3, EV11, and EV12, and Core Strategy policy S11).

52. Far from reflecting the priority to be given to the Development Plan unless material considerations indicate otherwise, the Inspector expressed the question as:

> *'.. whether any harm would be so serious as to significantly damage interests of acknowledged importance.'* (DL, 87)

53. The Inspector appears to have stated a test which was contained in national guidance before the amendments which gave rise to the plan-led system:

> '*There is always a presumption in favour of allowing applications for development, having regard to all material considerations, unless that development would cause demonstrable harm to interests of acknowledged importance.'*
>
> (para. 15 of Planning Policy Guidance 1 (1988), referred to at P70.40 of the Planning Encyclopedia [136a]).

54. Further, in the concluding paragraph of the main text of the Decision Letter (DL, 92) the Inspector appears to have carried out a straightforward balancing exercise of weighing harms against benefits. The NPPF is acknowledged as a material consideration carrying significant weight, but there is no recognition of the primacy of the development plan policies or the plan-led approach under section 38(6) of the 2004 Act. There was a focus on the NPPF without acknowledgement of the references within that policy document to the statutory test. There was reference to an out-of-date 'test' which appeared in national policy before the plan-led approach was adopted (DL, 87 and PPG1), and the application of a straightforward balancing exercise.

55. Ms Busch for the Secretary of State, supported by Mr Corner QC for Broadview, submits that this claim is without merit. The Inspector identified the constituent elements of the development plan at DL9. At DL32,55,79 and 86, she set out various breaches of the policies set out. The Inspector also identified at DL64 and 69 the respects in which the development did not conflict with the relevant policies in the development plan. It cannot sensibly be maintained either that the Inspector failed to assess the development in the light of the relevant policies of the development plan, or that she failed properly to undertake that exercise.

56. The Inspector made it clear throughout her decision notably at DL13 and 85 that she considered that there were material considerations arising in this case to which substantial weight required to be attached.

57. Thus the *"balancing exercise"* which the Inspector confirmed she had undertaken in DL92 was precisely that which she was required to undertake by section 38(6) of the 1990 Act. There were conflicts with the development plan which the Inspector identified but she took the view that those were outweighed by material considerations in the form of national planning policy.

58. The Inspector's remark, at DL87, that *"The question is whether any harm would be so serious as to significantly damage interests of acknowledged importance"* does not show that she applied the wrong test. Ms Busch submits that the remark was made in the context of the Inspector's consideration of the question of whether the fact that the development was temporary and reversible was of any material significance. Mr Corner submits that it must be seen in the context of the reasoning as a whole.

59. Mr Corner's submissions support those of Ms Busch. A proper application of s 38 (6) required the Inspector first to identify the relevant provisions of the development plan, secondly to identify what she considered to be the conflicts with the development plan and thirdly to ask herself whether there were any material considerations of sufficient weight as to warrant the grant of planning permission, notwithstanding these conflicts. The Inspector did all these things. In particular, in the last section of her decision letter she drew together the conclusions in the previous sections, and reached the overall view that despite the conflicts with the development plan there were reasons why permission should be granted, see DL 92. It is clear from DL92 that the Inspector balanced, as she was required to do, the conflicts with the development plan

against the countervailing considerations which might point to the grant of permission.

Stuchbury Hall and Grange Farms

60. The Claimants have a particular concern about these properties and submit as follows. Whilst the Inspector did not find that the impacts on Residential Amenity in relation to a number of properties would give rise to conflict with Development Plan policies (DL, 64), she expressed no view on whether there was a breach of Development Plan policy in respect of the impacts on key residential properties at the heart of the argument on impacts on Residential Amenity: Stuchbury Hall Farm and Grange Farm. This omission was all the more significant given the Inspector's conclusion that the proposed development would be unpleasantly imposing and pervasive (though not overwhelming) at Stuchbury Hall Farm (DL, 62), and that the turbines would dominate a narrow arc in the overall view at Grange Farm (DL, 63). There is nothing in the Decision Letter to indicate whether the Inspector considered there to be a breach of Development Plan policy in respect of those key properties.

61. Quite separately, the Inspector failed to express any view as to whether there was conflict with Development Plan policies when considering the Residential Amenity impacts on Stuchbury Hall Farm and Grange Farm. This omission raises the question of whether the Inspector properly considered there was a breach of Development Plan policy at all in relation to those properties, how much weight (if any) would be attached to any conflicts, and whether any conflicts of Development Plan policy were considered as part of the balance applying the statutory test.

62. Ms Busch responds that claims that the Inspector failed to reach a conclusion as to whether the visual amenity impact of the proposals on Stuchbury Hall Farm and Grange Farm would be contrary to the policies contained in the development plan are incorrect. The Inspector addressed the issue of the impact which the development would have on "Residential amenity – visual intrusion" at DL56-64. At DL64 she concluded that the "*relevant provisions of LP policy G3 and CS policy S11 would not be contravened in this respect*" with regard to all of the visual impacts which she had considered in this part of the DL, including those at Stuchbury Hall and Grange Farm. Mr Corner QC adds that even if this sentence is not read broadly, as he says it should be, the substance of the Inspector's remarks about each property indicate that the Inspector had formed the same view that the policies would not be contravened. I agree.

63. On this particular aspect I consider that the Defendants are right. This Inquiry was a complex and detailed exercise and the Inspector's findings necessarily contain the inaccuracy of any précis. On this aspect of the issue it is clear what she had in mind. The Claimants' criticisms do not cross the legal threshold which I have set out above.

Ground 1 – Decision

64. I identified the approach to an Inspector's decision above. There is no need for an Inspector to set out sections from statutes or recite any particular Mantra. The Decision must not be read like a judgment or a statute. The court should not readily infer that the decision maker erred in law. Nevertheless many people see their lives as being fundamentally affected by a decision to permit a large wind farm in their community. They are entitled to know whether the law has been followed by an Inspector whose decision is so crucial to them. There is no doubt that the Inspector identified the relevant development plan and applied as a material consideration the Framework and other national policy or that she conscientiously weighed up the competing factors.

65. But as I read the Decision she did not accord the development plan the priority required by law. At no point does she mention the priority due to the plan or express herself in terms that indicate that she is aware of the 'plan led' concept. It is clear that this test was drawn to the Inspector's attention at the Inquiry.

66. At DL13 she refers to the plan but in the context of its consistency with the Framework and by reference to its Paragraph 215. That paragraph emphasises that due weight should by given to policies in existing plans according to their degree of consistency with the Framework. But the paragraph does not stand on its own and the Framework makes clear-see Paras 2, 11 and 210 to 212 that applications must be determined in accordance with the development plan unless material considerations indicate otherwise. In the second half of DL13 other relevant planning policies are evaluated against the broad principles of the framework but in terms giving the appearance of being Framework rather than plan led.

67. When addressing *"overall balance and conclusions"* the Inspector starts at DL85 with the Framework and other national policy and at DL86 again identifies planning policies that conflict. At DL87 the benefits of national policy have to be set against the identified harm. The question is identified as whether any harm would be so serious as to significantly damage interests of acknowledged importance. 'Harm' is mentioned at the start and at the end of DL87 and then twice in DL88 (as well as in DL4). While generally giving the Inspector the benefit of the doubt on semantic issues I am unable to see the harm question being referable only to the 25 years point in the middle of DL87, as Ms Busch (but not Mr Corner) contends. However I do not think that the assessment is assisted by close investigation of where the vocabulary of the question may have come from.

68. Matters are drawn together in DL92. National policy seeks well planned developments and the drive for renewable energy should not be at the expense of environment and heritage. The impact of the proposal with its conflicts with the plan does not outweigh the wider benefits. On renewable energy the Framework is up to date but the LP policies do not address the issue.

69. Recognising that I need to read the Decision in a down to earth way as a whole and in context I detect no identification of the priority to be given to the

plan (which may of course have to give way to the material considerations referred to). The exercise is a careful evaluation of competing considerations without any indication that the plan has priority. I conclude that the first Ground succeeds because the Inspector has not accorded the Development plan the weight which Section 38(6) requires.

Ground 2. Failure to apply the statutory duties under sections 66 and 72 of the Planning (Listed Buildings and Conservation Areas) Act 1990

70. Mr Ranatunga submits that the flaw in the Inspector's approach to the impacts on heritage assets was similar to the approach to the statutory duty under section 38(6) of the 2004 Act. The Inspector focused almost entirely on the position under the NPPF, without properly taking into account or applying the statutory tests, in this case under sections 66 and 72 of the Listed Buildings Act.

71. He submits that the Inspector was required to apply separate duties under section 38(6) of the 2004 Act and sections 66 and 72 of the Listed Buildings Act (Heatherington (UK) Ltd. v SOSE (1995) 69 P&CR 374 per Keene J at p.382). There is a bare mention of the statutory tests under the Listed Buildings Act but these were not applied properly. The focus of the Inspector's analysis on cultural heritage impacts was as to whether the harms identified amounted to 'substantial harm' in terms of paragraphs 133 and 134 of the NPPF (DL55). The statutory obligations to have *'special regard to the desirability of preserving'* listed buildings and their settings, and to give *'special attention to the desirability of preserving or enhancing'* the character or appearance of conservation areas were material considerations in that assessment and should have carried considerable weight .In grappling with this statutory duty, the Inspector had to give a high priority to the objective of preserving the listed buildings and their settings and to enhancing the character or appearance of the Conservation Areas (Heatherington, per Keene J, p.380 by reference to South Lakeland DC v SOSE [1992] 2 AC 141 at 146F). The statutory tests under the Listed Buildings Act were not referred to in the analysis of cultural heritage impacts in the Decision Letter (DL, 34 – 55). The only reference to those statutory tests was the bare reference in paragraph 91 of the Decision Letter. It is far from clear from this passage that the Inspector understood that a separate statutory duty was being applied, that that duty constituted (at least) a material consideration.

72. Ms Busch and Mr Corner respond that the Inspector expressly stated that she had taken account of the statutory duties imposed by the Listed Buildings Act. In the First Defendant's submission, it is plainly apparent that she did take those duties into account, and her reasoning and conclusions were fully in accordance with them. Thus, at DL34 to DL55 the Inspector examined in detail and with care the impact which the development would have upon the setting of the listed buildings and Conservation Areas in issue. In so doing she was herself actively paying due regard and special attention in accordance with sections 66(1) and 72(1) of the Listed Buildings Act.

73. Accordingly, in the First Defendant's submission, it is manifest from the terms of the Decision Letter that she had paid very close consideration to what those

sections required of her in contrast with Heatherington. Having, as she expressly stated, taken account of the duties set out in the Listed Buildings Act, the Inspector was entitled and indeed obliged to take into account, in addition, the relevant policies of the development plan (to which she referred at DL55), and those contained in the Framework (to which she referred at DL35, DL38 and DL55) as a material consideration to which she attributed significant weight.

74. It does not follow from the fact that the Inspector concluded that the development would cause harm to the setting of listed assets the she failed to "have special regard" or to pay attention to the considerations referred to in sections 66(1) and 72(1) of the Listed Buildings Act. She was entitled to and did arrive at the latter conclusion as a result of her assessment of the impacts of the proposal pursuant to the duties set out in those statutory provisions. As was made clear in Heatherington, whether the duty has been complied with is a matter of substance, based on an examination of the decision letter as a whole.

Ground 2 - Decision

75. This ground is not made out. The Claimants complain essentially that the Inspector carried out an exercise under the Framework and not that required by Sections 66 and 72. Ms Busch and Mr Corner argue that the performance of the statutory duty involves an exercise and is not a separate test. That may be right. Further the Framework test had to be carried out anyway as they point out. More fundamentally the Inspector states explicitly (as she did not have to do) that she has had regard to the sections and she has clearly examined the heritage aspects in careful detail over many paragraphs. It was conceded that the Inspector did not have to repeat a detailed exercise, applying the sections, paragraph by paragraph. She was not obliged to write an exam answer to show that she has done what she has stated she has done. The situation is different from cases such as Heatherington where there was no sign that the Inspector had paid explicit regard to the statutory duties. In Heatherington the Appellant's argument for permission for continued use of a listed building for offices rested partly on its contention that the Council's preferred residential use would fail to preserve features of special interest of that building. The Inspector did not ask himself whether introduction of a residential use would fail to preserve special features, but only whether residential use would have a "serious effect". In contrast in this case the Inspector was aware of the duties and had regard to them.

Ground 3 - Reasons challenge arising from Grounds 1 and 2

76. This ground is developed in the skeleton arguments but I do not propose to deal with it separately. The argument is superfluous given my conclusion about Ground 1. It will not succeed on Ground 2 for the same reasons as that Ground fails. Further the reasons challenge on its own does not meet the requirement of the last sentence of Paragraph 36 of South Bucks which I set out above.

Ground 4. Failure to consider adequately noise impact of the wind turbines

77. This relates to the issue "*the effect on the amenity of nearby occupiers both during construction and in operation, particularly with respect to visual intrusion, shadow flicker and noise and general disturbance*" (DL4). The Inspector's conclusions on noise at DL72 were: "*any noise as a result of the proposal could be controlled to accord with Government policy*" and , at DL89 "*residential amenity could be protected from shadow flicker and the noise immission levels controlled by the imposition of conditions*". DL 90 indicates that other noise issues will be dealt with by conditions.

78. Mr Lopez for the Second Claimant complains that the Inspector only considered noise in terms of compliance with noise limits derived from *ETSU-R-97: The Assessment and Rating of Noise from Wind Farms* ("ETSU") (DL 66 and 69). Whilst identifying that the decision-maker should use ETSU in the assessment and rating of noise from wind energy developments the Inspector has wrongly equated compliance with ETSU with there being "no harm" in planning terms and/or with there being no conflict with the relevant policy under the Local Plan, policy G3(D). In summary, it is said that the Inspector erred by failing to consider whether the noise impact of the proposal would be harmful notwithstanding that it would be required to comply with noise conditions that followed the ETSU guidance. It is said that this amounted to a wrongful substitution of a test of ETSU compliance for the actual test in policy G3 (D) of the Local Plan, namely that a development should not unacceptably harm the amenities of local residents.

79. Mr Lopez submits that the approach of the Court of Appeal in Tegni Cymru Cyf v Welsh Ministers [2010] EWCA Civ 1635 confirmed the need for the Inspector to look beyond the mere issue of ETSU compliance and to further consider the actual noise impact of wind turbines in amenity terms, reflecting the need to strike a balance. The fact of ETSU compliance did not mean that local residents would not be adversely affected by noise levels which do not exceed guideline levels. Hence, ETSU did not afford a complete answer. In Tegni Cymru Cyf Pitchford LJ noted that it had been decided by the inspector that "*ETSU indicative levels in relation to the proposal which he was considering were not the last word on "acceptable" noise levels*", and that Wyn Williams J (at first instance) had acknowledged that ETSU "*did not represent an absolute standard against which the proposal was to be judged*". He submits that a similar approach was adopted by the High Court in considering ETSU in Lee v SSCLG [2011] EWHC 807 (Admin) and in Hulme v SSCLG [2010] EWHC 2386 (Admin).

80. He says that it follows that compliance with ETSU-derived noise limits cannot amount to the only relevant consideration and that it was necessary, either in principle or within the context of the particular determination to be made by the Inspector, for the Inspector to consider the acceptability of noise effects more generally, and in actual terms (i.e. in the real world). In failing to address her mind to the proper application of the policy G3(D), or alternatively in failing to have regard to the application of this policy at all, the Inspector has failed to discharge the s.38(6) duty and has failed also to take into account a

(highly) relevant consideration, namely the actual impact of noise on residential amenity in the real world.

81. In the First Defendant's submission, the Inspector acted entirely lawfully in treating ETSU-R-97 as setting the benchmark for acceptable noise impacts. The Inspector recorded that, in the absence of any competing background noise data and having regard to all the material, she accepted the Second Defendant's background noise evidence. She rejected the contention that the direction from which noise was received would lead to greater noise levels or that those provided for (ie by condition) having regard to ETSU-R-97 would not be met. She held that, as a result of an appropriate condition designed to ensure that maximum day and night time noise immission levels would accord with the limits set out in ETSU-R-97, the development would be consistent with the relevant policies contained in PPS22 and the Framework. She also held that, subject again to the imposition of the envisaged condition, the development would not cause harm in terms of noise, and that it would not conflict with LP policy G3(D) or emerging CS policy S11(3). The Inspector did not fail to consider whether the noise impacts would be harmful, notwithstanding compliance with ETSU-R-97 or to apply LP policy G3(D).

82. Mr Corner submits that the cases show that the Secretary of State or his Inspector is entitled to find that although a proposed wind farm would operate within the relevant ETSU limits, local residents would still suffer unacceptable noise disturbance. However, it is one thing to say that an Inspector may rationally conclude, in the exercise of his planning judgement, that ETSU indicative levels should not be determinative of the assessment of noise impact in a particular case. It is quite another to contend that a different Inspector, assessing a different proposal for a different site, may not conclude that ETSU does, in fact provide an appropriate basis for assessment.

83. In the present case, the Inspector decided that ETSU did, in fact, provide an appropriate basis for assessment, stating at DL 66 that

> *"ETSU-R-97 gives indicative noise levels calculated to offer a reasonable degree of protection to wind farm neighbours, without placing unreasonable restrictions on wind farm development."*

84. That was the methodology recommended by central government in current policy documents. Mr Corner says that it is suggested by Mrs Ward that in following the approach in ETSU the Inspector took an approach at odds with policy G3 (D) of the Local Plan. However that policy (see W/1/page109) simply requires that the impacts of development *"will not unacceptably harm the amenities of any neighbouring properties."* The policy necessarily gives rise to the need for a methodology to assess such impacts, and the Inspector cannot be faulted for having chosen to apply the ETSU methodology.

Ground 4 - Decision

85. As I see it this Ground was raised and decided at the Inquiry and is not for this Court. The fact that the law recognises that in some cases an Inspector can

validly decide to take factors other than ETSU into account does not mean that in other situations an Inspector may not lawfully conclude that ETSU compliance is the right measure. In this case the Inspector considered the matter with care and then decided, unsurprisingly perhaps given the national guidance, to apply ETSU and attach a condition. This was a matter for her to decide and she did so lawfully.

Ground 5. Visual Impacts on residential amenity

86. Mr Lopez contends that in assessing the impact of the proposal on residential amenity, the Inspector erred by applying a test that had no basis in law or policy, asking whether the impact would be such as to make a property an "unattractive" or "unsatisfactory" or "unsuitable" place to live. The Inspector's conclusions at DL 72 and DL 89 indicate that if an impact was not considered by the Inspector to meet those thresholds, it was not taken into account by her in the planning balance. I will set out the argument of Mr Lopez in more detail.

87. Mr Lopez starts at DL56 where the Inspector said:

> *"The planning system exists to regulate the use and development of land in the public interest and there is public interest in avoiding the effects of climate change. The outlook from private property is a private interest not a public one. However, where the visual impact of a proposal is such as to cause unreasonable living conditions/amenity for the occupants of individual homes, and might be widely regarded as making the property an unattractive place in which to live, that is a legitimate matter of public interest."*

88. He submits that the Inspector then applies this as a test in reaching conclusions about individual properties such as Stuchbury Hall Farm and overall at DL 62, 64, 72 and 89. The source for the 'test' is not referenced in the DL but appears to be taken from the decision of another Inspector on an appeal in respect of land at Enifer Downs, Langdon, Dover. At the inquiry, the Council had argued before the Inspector that the above should not be applied as a test (as the Inspector did in fact apply it) and pointed out that it had no basis in law or policy.(The Defendants accept that this might well have been the source of the words used.)

89. Mr Lopez submits that DL 56 indicates that visual impacts of the Development which fell below the threshold there set out amounted to private and not public concerns for the planning system and were not taken into account by the Inspector. The conclusions at DL 89 and 72 are consonant with the Inspector not including visual impacts assessed as falling below this threshold, as part of a global assessment of the cumulative adverse effects in the overall balance. The Inspector was however required to take into account the visual impacts she has dismissed. The Inspector's approach is not in accordance with Government policy. The "General Principles" document which formerly accompanying Planning Policy Statement 1 had advised that

the question to be considered was: "*whether the proposal would unacceptably affect amenities and the existing use of land and buildings which ought to be protected in the public interest*". The Technical Annex on Wind in the Companion Guide to PPS22: Renewable Energy advises: "*the material question is whether the proposal would have a detrimental effect ... on amenities that ought, in the public interest, to be protected*". Local plan policy G3 required the Inspector to consider whether the development would "*not unacceptably harm the amenities of any neighbouring properties*" and whether the development would be an "*unacceptable visual intrusion into the surrounding landscape*" . These requirements are materially different from the test which has in fact been adopted by the Inspector. In essence, these development plan policy requirements presented a lower threshold for visual impacts to be taken into account.Impacts which would have fallen short of the Inspector's threshold would nonetheless have amounted to relevant considerations required to be taken into account. The Inspector recorded instances of harm arising from the Development in terms of visual impacts which were significant, amounted to material considerations and should not have been left out of account in the overall balance. Accordingly, the Inspector has erred by adopting a test without any basis in law or policy, has misapplied the relevant policy, and has left out of account relevant considerations, namely the impacts which she regarded as falling below the threshold she has wrongly set.

90. Ms Busch responds that the Inspector's findings need to be read in the light of the distinction she draws at DL56 between impacts on amenity which are of purely private concern, and those which are matters of public interest so as to amount to legitimate planning considerations. The Inspector was plainly right and entitled to draw such a distinction, and to conduct her assessment of impact in the light of it. In DL 64, the Inspector assessed the effect on visual amenity against LP policy G3, which required her to consider whether the development would unacceptably harm the amenities of neighbouring properties and to assess whether the development would be an unacceptable intrusion into the surrounding landscape. In assessing whether the proposals would contravene the policy, the Inspector was entitled and bound to use her own judgment, and she was entitled to use the adjectives she did in order to reach and explain her conclusions as to whether the policy was contravened.

Ground 5-Decision

91. I can put my decision briefly. The Defendants are correct. The Inspector was making a planning judgment. As I see it, looking at the reasoning in the manner which the law requires, she did not apply a higher threshold of acceptability than that set out in the Local Plan. She was conducting an exercise by reference to the plan. For the reasons given in the cases referred to above it would be wrong for the Court to judge the Decision by applying the ingenious but close analysis of the text adopted by Mr Lopez.

Conclusion

92. Ground one succeeds but the other four grounds fail.

93. I am sending out a draft judgment on 21 December, even though judgment cannot be handed down this term, as I understand that there is a degree of urgency.

94. Questions of remedy and other matters which cannot be agreed will be dealt with at the hand down of this judgment. I shall be grateful if Counsel will let me have, not less than 48 hours before the hearing, a list of corrections of the usual kind and a draft order, both preferably agreed and a note of any matters they wish to raise.