Neutral Citation Number: [2018] EWHC 1799 (Admin)

Case No: CO/5381/2017

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/07/2018

Before :

MR JUSTICE OUSELEY

- -

Between :

CEG LAND PROMOTIONS II LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
- and -	
AYLESBURY VALE DISTRICT COUNCIL	**Interested Party**

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- -

MR JAMES STRACHAN QC AND MR NED HELME
(instructed by **CLYDE AND CO**) for the **Claimant**
MR TIM BULEY
(instructed by **GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**
Aylesbury Vale District Council did not appear

Hearing dates: 3 & 4 JULY 2018

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Judgment Approved

MR JUSTICE OUSELEY :

1. The Claimant sought planning permission from Aylesbury Vale District Council for up to 175 dwellings and associated development on land adjoining Wendover in Buckinghamshire. The application was not determined in the allotted time; the Claimant appealed to the Secretary of State. Following an Inquiry, the Inspector dismissed the appeal in a Decision Letter, DL, dated 9 October 2017.

2. The Inspector concluded that the District Council did not have a five-year supply of housing land. Accordingly, she concluded that [14] of the National Planning Policy Framework, the Framework, applied; permission therefore should be granted unless the adverse impacts significantly and demonstrably outweighed the benefits, "when assessed against the policies in the Framework taken as a whole". In planning jargon, this "tilted the balance" in favour of granting permission: the "tilted balance" was thus in operation. She accepted the Claimant's argument that [109] of the Framework, a policy which deals with the protection of landscape, to put it very generally for the moment, was not a specific policy which indicated that development should be

restricted. Had she concluded that it was such a policy, the "tilted balance" would have been disapplied.

3. However, she concluded that there were indeed adverse impacts of the development which would significantly and demonstrably outweigh the benefits. She summarised these in DL [146]:

> "146. In this case I have concluded that there would be moderate to substantial harm to landscape character, limited harm to the setting of the AONB, moderate to substantial harm to settlement character and the rural setting of Wendover. There would also be material adverse visual effects and the irrevocable loss of part of a valued landscape. In these important environmental respects the proposal would be contrary to development plan policies which are entirely consistent with the Framework. Due to the overarching nature of the policies and the degree of contravention I conclude that the proposal would be contrary to the development plan as a whole. In combination this accumulation of harms would be significant in terms of their scale and severity and as such they attract very substantial weight."

4. Mr Strachan QC, who also appeared for the Claimant at the Inquiry, challenged the decision on one ground for which he had received permission from Holgate J, on oral renewal, and sought permission to amend his grounds to challenge it on a new but related basis. Both concerned the Inspector's approach to the landscape issues. He had permission to contend that she had misinterpreted [109] of the Framework, because she had failed to identify any features of the development site itself which could make it "valued landscape" for the purposes of [109]; she had misinterpreted a number of High Court judgments, including one of mine, which Mr Strachan submitted, properly understood, required the development site itself to have such characteristics as would make it a "valued landscape"; it was inadequate if the development site itself lacked such characteristics and was but part of a wider area which had those characteristics. This was Ground 1.

5. The ground which he sought to add was the logically prior issue of whether the policy in relation to "valued landscape" in [109] of the Framework, permitted the same harm to be double counted, once under the [109] evaluation and once under the Development Plan evaluation. He submitted that it did not, but that the Inspector had irrationally adopted such an approach. This was Ground 1A. He accepted that this latter point had not been argued before the Inspector, but he said that this was because the route whereby she had reached her conclusion, and which raised this issue of law, had not been anticipated. Mr Strachan did not raise this as an issue of fairness.

6. It was convenient to hear all the argument however on both issues, and I did so. I now grant permission to the Claimant to amend their grounds to add Ground 1A, and I grant permission to argue it. It does, on analysis, raise a point of law on the interpretation of the DL, notably of DL [76], which depends in part on the interpretation of the Framework. There are no other issues, such as an analysis of other Plan policies, for reasons to which I come, upon which an Inspector's appraisal would be necessary, if this point were to be raised. There are no factual or evidential

issues, and the point, if raised, could not have called for further evidence. There is no prejudice to the Defendant or the Interested Party. This does not give rise to any of the issues which I dealt with in [23] of *Humphris v SSCLG* [2012] EWHC 1237 (Admin).

7. Mr Strachan's submission that he should be excused for not having raised the issue before the Inspector because he had not anticipated the sequence of arguments which might raise it, largely because of his unexpected success in persuading the Inspector that [109] of the Framework did not contain a specific policy restrictive of development, is unnecessary. His contention, at root, is that the Inspector adopted an approach which is irrational. It should not be necessary to forewarn an Inspector against irrationality, in order to be able to challenge a decision which is irrational, albeit that forewarned an Inspector might have avoided it by coming to a different or differently reasoned conclusion. Mr Buley, for the Secretary of State, had objected to the amendment, in particular because it might have raised issues which required further consideration by the Inspector but he did not in the end press the point, particularly in the light of the way the argument developed. But, in judging whether he is right as to the nature of the Inspector's approach, I shall bear in mind that it does not appear to have been foreshadowed by the arguments of either side, or raised by the Inspector for their comment.

The Decision Letter and the Inspector's approach to landscape issues

8. The most relevant development plan policies, as described by the Inspector, were those in the Aylesbury Vale District Local Plan, adopted in 2004. She identified three policies of relevance to landscape issues. The first was GP.35, a general policy in the section headed "Materials and Design Details." It stated:

> "GP.35 The design of new development proposals should respect and complement:
>
> (a) the physical characteristics of the site and the surroundings;
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> (b) the building tradition, ordering, form and materials of the locality;
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> (c) the historic scale and context of the setting;
>
> (d) the natural qualities and features of the area; and
>
> (e) the effect on important public views and skylines."

9. The Inspector described this in DL [26] as "a general design policy applicable to all development and, as such, the Appellants agree that it is up-to-date and should be accorded full weight." She also referred, second, to a policy relating to rights of way, and continued in DL [27]:

> "Finally RA.2 confirms that, other than for specific proposals and land allocations, new development in the countryside

> should avoid reducing open land which contributes to the form and character of rural settlements, having regard to the need to maintain the individual identities of settlements. Again the judgments required in relation to this policy are applicable to all prospective developments and the Appellants accept that this policy should be accorded full weight. All of these three policies are consistent with the core planning principles in the Framework which, amongst other things, seek to ensure that the intrinsic character and beauty of the open countryside is protected."

This policy is in the section of the Local Plan entitled "Coalescence of Settlements."

10. She did not refer to the policies dealing with designations providing special protection for parts of the extensive countryside within the District: Chilterns AONB, Areas of Attractive Landscape and Local Landscape Areas. None of those designations covered the appeal site.

11. I should also mention former policy RA.1, which stated that the Council, in dealing with proposals for development in rural areas, would give priority to the need to protect the countryside for its own sake. Development in the countryside would not be permitted unless it was necessary for certain appropriate rural activities. This policy was no longer part of the development plan; the District Council stated that it was not saved because sufficient guidance was provided by PPS 7. Of course, this in its turn has been superseded by the Framework. The Inspector did not and had no need to refer to it. But I refer to it because I had to consider the relationship between the coverage of the Local Plan policies and any gap which might be filled by the policies of the Framework in [109], for the purposes of allowing Ground 1A to be argued, and in deciding it.

12. The first main issue the Inspector dealt with was entitled "Effect upon the character and appearance of the landscape." She described the location of the site and, in DL[33], stated that it lay within the Chilterns National Character Area, and at District level, within the Southern Vale Landscape Character Area. She summarised the appeal site's character in DL[35]: "…in short the mature hedgerows along and surrounding the site boundaries and the size and scale of the field result in a surprisingly rural character for a site so close to the settlement." It was typical of the Southern Vale LCA, and "an example of one of the localised pockets of higher quality landscape management…." At DL [37], she said that the topography of the land "and the site's location bordered by three roads combine to make it, locally, a visible part of the LCA and a focal point, particularly in views along Aylesbury Road." She then explained the importance of the footpath crossing the middle of the appeal site and the opportunity it afforded to appreciate the site and its wider context.

13. Next, the Inspector dealt with the effect of the development upon landscape character. It would represent a "substantial adverse change for the site itself." She concluded in DL[39]:

> "39. Whilst the appeal site forms a relatively small parcel within the wider Southern Vale LCA, it is not only typical of the character area, but comprises one of the localised pockets of

> a higher quality. These factors, combined with the nature, size and scale of development and the visibility of the site in this locality, lead me to conclude that the overall effect upon the LCA would be on the spectrum between moderate and substantially adverse."

14. The parties were agreed that the site formed part of the setting of the Chilterns AONB. In DL [40], the Inspector concluded that the development would result in part of the transitional area, linking the edge of the Vale to the foothills and the escarpment beyond, being lost, resulting in "a limited erosion of the setting of the AONB." In longer distance views from the AONB, the development would be seen as a continuation of the existing settlement causing limited visual harm in this wider context: "an adverse change of low magnitude to a landscape receptor of high sensitivity."

15. The Inspector dealt with settlement patterns and coalescence under a separate heading within this general section of her decision. Here, she referred specifically to policy RA.2. Housing development on the appeal site would extend the built envelope of Wendover, and the cluster of properties at World's End would also then read as part of Wendover. She reached this conclusion in relation to coalescence in DL [49]:

> "For these reasons I conclude that there would be a loss of open land contributing to settlement character and a merging of World's end with Wendover. Irrespective of whether or not this merging is characterised as 'coalescence' within the usual planning meaning, it would be contrary to the policy objectives in RA.2 due to the resultant material harm to that settlement character attributable to the loss of the open land which helps to define the character of Wendover. Due to the prominence of this gateway site and its contribution I would quantify the harm to settlement character as moderate to substantial."

16. Under her next subheading of "An assessment of the visual effects of the proposal", the Inspector considered the views obtained from the footpath crossing the site, both of the site and of the wider landscape. The development and its proposed footpath would retain "some partial views of the hills from a suburban setting but they would be a poor compensation for what is currently an uninterrupted view along much of the length of the footpath, of a charming pastoral landscape and an attendant appreciation of the brooding majesty of the scarp." The appeal site also made a contribution to the scenic quality and rural setting of the adjoining Site of Special Scientific Interest. She thought it important to consider the way in which the site was currently seen and experienced from the houses along certain roads as occupiers went about their daily lives and for whom development would bring a significant change. The visual effects from longer viewpoints would be minor.

17. The Inspector then turned to the topic of "valued landscape", introducing it by saying that another contentious issue was "whether the site forms part of a valued landscape in terms of paragraph 109 of the Framework." It was agreed that the site was covered by no statutory or non-statutory designation, which was somewhat unusual for

undeveloped sites around Wendover where much of the land was within the AONB or Green Belt. It did not fall within local plan designations of Areas of Attractive Landscape or Local Landscape Areas. She continued:

> "These areas are expressed to be sensitive landscapes which are the 'valued landscapes' for the district as referred to in national policy. Nevertheless it is well-established that the lack of local or national landscape designation does not preclude the site from being a valued landscape. It was also accepted that the criteria in Box 5.1 of Guidelines for Landscape and Visual Impact Assessment are accepted as a useful tool for assessing value."

18. After dealing with whether in assessing whether land was "valued landscape" for the purposes of [109] attention should be confined to the development site itself, which is at the heart of the Claimant's case on Ground 1, the Inspector reached her conclusions on whether the site was part of a "valued landscape" in these terms:

> "68. Here the landscape under consideration is relatively small scale. In this instance the appeal site is clearly understood to be part of land on the edge of the vales. It is not only representative of that landscape character, it is a pocket of high quality land. It also makes a key contribution to the attractive rural setting of Wendover on a gateway approach and forms part of the countryside which provides the setting for the AONB. It has a scenic value as well above the ordinary for the reasons given. It is adjoined by and associated with the SSSI which adds value to the local landscape and adds to the sense of rural tranquillity. It is not merely a matter of the site's well-used internal footpath providing views of the escarpment; rather it is the expansive and scenic nature of those views seen in the context of an open foreground uncluttered by development which gives the views their value and high quality. That is not to impute the characteristics and value of the adjoining AONB to the appeal site but to recognise that the scarp forms part of the backdrop in the smaller scale landscape of which the appeal site is an integral part. In combination all of these matters and physical characteristics take this site beyond mere countryside and into something below that which is designated but which is a valued landscape.
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> 69. In finding that the site comprises part of a valued landscape I have endorsed the professional judgments of the Council's landscape witness. I acknowledge that this goes against the opinion of both the Appellants' professional witness and that of the consultants tasked by the Council of identifying sensitive landscapes which fed into the Council's subsequent designation of Areas of Attractive Landscape and Local Landscape Areas. These later studies were district wide studies. All of my

> assessments are largely based on qualitative judgments. In coming to my conclusions I have had the benefit of expert opinions focussed on an analysis of the site and its surroundings, as well as several site visits and the evidence of third parties. For all of the reasons given I am satisfied that this site comprises part of a valued landscape and its development would fail to protect and enhance the landscape contrary to the objectives set out in the Framework."

19. The Inspector then turned to the relationship between her finding that the landscape was "valued landscape" and the "tilted balance": in DL[70], she introduced the topic:

> "It is necessary to consider whether the provisions of paragraph 109 of the Framework in relation to valued landscapes comprise a specific policy indicating that development should be restricted in accordance with the fourth bullet point of paragraph 14."

20. The Inspector concluded, contrary to what the Secretary of State appeared previously to have thought the position to be, a position which Lewis J had considered to be unarguably correct on a judicial review permission application, and contrary to Mr Strachan's pessimism in advancing his argument to her, that paragraph 109 in relation to valued landscapes was not such a specific policy. Mr Buley confirmed, on instructions, that the Secretary of State was of the view that the Inspector here was indeed correct. She concluded that paragraph 109 was exhortation and aspiration rather than restriction, noting that she had found that the development "would result in the loss of an important part of a valued landscape."

21. Her conclusions on the whole section of the DL devoted to landscape issues were:

> "76 There would be harm to landscape character by the loss of part of the land of the character type identified. Whilst the visual effects would largely be localised, the development would have significant adverse visual effects in a number of key respects. In addition there would be material harm to the rural setting and settlement pattern of Wendover and further limited harm to the setting of the AONB. There would also be the erosion of part of a valued landscape. These harms are substantial and are contrary to the local plan and national policy objectives already set out. In combination these harms attract significant weight."

22. Finally, she set out her overall conclusion so far as material, in DL [146], which I have already set out above. There is a difference in language between that paragraph and DL [76] which I need to consider in the context of Ground 1A, which centres on the fourth sentence of DL[76].

Ground 1A

23. Ground 1A logically comes before Ground 1, and I deal with it first. Although this ground was fully argued with very substantial Skeleton Arguments, the arguments, and Counsels' understanding of their opponents' positions developed during the hearing; the disputes also narrowed.

24. I need to set out some parts of the Framework. In relation to development control, despite some of its language, it is no more than a material consideration, to be taken into account in deciding planning applications under s70 of the Town and Country Planning Act 1990. It is a material consideration which may indicate that a decision should be made which does not accord with the development plan; s38(6) Planning and Compulsory Purchase Act 2004.

25. One of its "Core planning principles" in [17], is to take account of the different roles and character of different areas, "recognising the intrinsic character and beauty of the countryside and supporting thriving rural communities within it." Section 11 is entitled "Conserving and enhancing the natural environment." It starts with [109], which states "The planning system should contribute to and enhance the natural and local environment by: protecting and enhancing valued landscapes, …". The next paragraphs deal with how plans should minimise adverse effects on the environment, allocating land with the least environmental value, the use of previously developed land and of poorer quality agricultural land in preference to higher quality land. [113] deals with landscape in these terms:

> "Local planning authorities should set criteria based policies against which proposals for any development on or affecting protected wildlife or geodiversity sites or landscape areas will be judged. Distinctions should be made between the hierarchy of international, national and locally designated sites, so that protection is commensurate with their status and gives appropriate weight to their importance and the contribution that they make to wider ecological networks."

26. [115] refers to National Parks, and AONBs, as having a higher status of protection in relation to landscape and scenic beauty, to which great weight should be given. Other topics are covered, but there is no coherent pattern in which the various topics to which section 11 relates, which go beyond landscape, are dealt with by one paragraph on plan-making and one on decision-taking. Some do, some do not.

27. The DL refers to [14], which sets out that at the heart of the Framework is "a **presumption in favour of sustainable development**", a "golden thread" running through those two aspects, which it then deals with separately. "For **decision-taking** this means: …

> "where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:

- any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against policies in this Framework taken as a whole; or

- specific policies in this Framework indicate development should be restricted."

28. I have also made reference to the Local Plan landscape policies. The two which provided the framework for the Inspector's consideration of landscape issues might be thought inapt for the scope which they were given: GS.35 is in the section dealing with materials and design; it specifically refers to control of the design of new development. It might be thought to assume rather than to control the locational principles of development, being equally applicable to the design of a housing estate as to a barn. RA2 deals with settlement patterns and coalescence, and the Inspector refers to it in that context. The rights of way policy is also discussed.

29. I was concerned, given what appeared to be the limited coverage of the development plan policies, especially with the demise of RA.1, to ascertain for the purposes of Ground 1A, how the development plan policies might relate to [109], and whether there were policies missing from the debate, or missing from the Local Plan, which might have affected the way in which the Inspector approached the role of [109], using it to fill gaps in the coverage of the Local Plan, or in the policies placed before her. This would have affected my willingness to permit Ground 1A to be argued. However, I am satisfied, whatever appear to me to be the limitations of the coverage of the surviving Local Plan policies, that the parties to the Inquiry interpreted them as providing coverage which was comprehensive in relation to all the landscape issues which arose: assessment of quality, role and all material impacts. I did not understand that fact to be disputed before me. Nor did I see anything in the DL to suggest that the Inspector had approached the issues or her decision differently; and the contrary was not suggested either.

30. Mr Strachan's primary submission on this ground proceeds in two steps: (1) the Inspector in DL [76] treated the harm done to "valued landscape" as additional to the harm done to the landscape through its breaches of development plan policy; (2) this was irrational as the harm was the same. Alternatively, if the Inspector meant that she was giving greater weight to the adverse effect of development because the breaches of development plan landscape policy were also breaches of national policy in [109] of the Framework, the decision would have been equally irrational.

31. Mr Buley agreed that adding harm through breaches of the development plan policies to breaches of the "valued landscape" policy in [109] of the Framework would have been irrational, but contended that the Inspector had not done so. He contended that it would not have been irrational for her to give greater weight to breaches of development plan policy because they were also breaches of national policy. But as I understood the evolution of both sides' arguments, he submitted that her approach had been altogether simpler, noting, as she was bound to do for the purposes of [14] of the Framework, that the development harmed "valued landscapes," and breached development plan policies, both of which she had lawfully concluded it did.

32. It was not in issue, but that [109] functions in two ways. Its first role is to inform the production of up to date landscape policies in the development plan. An up to date plan would have policies for the assessment and protection of "valued landscapes", including, where appropriate, their designation. These policies would not have to adopt that specific language, but would have to achieve at least that end. If development breached those plan policies, and was not in accordance with the plan policies viewed overall, s38(6) of the 2004 Act would require its refusal unless material considerations indicated otherwise. If development breached a plan's up to date landscape policies, but the plan was out of date in other relevant aspects, because there was no five-year housing land supply, as here, the tilted balance would operate.

33. Mr Strachan submitted that [109] would not have introduced a major new policy concerning "valued landscapes", existing separately from development plans, without that intention being made clear. Instead, it was the successor, albeit in shortened form, to Planning Policy Statement 7, entitled "Sustainable Development in Rural Areas". One of the Government's objectives had been to raise the quality of the environment in rural areas through promoting "continued protection of the open countryside for the benefit of all, with the highest level of protection for our most valued landscape and environmental resources." Sustainable patterns of development would provide opportunities for people to enjoy the wider countryside. The Government recognised that there were "areas of landscape outside nationally designated areas that are particularly highly valued locally." Carefully drafted criteria-based policies using landscape character assessment should provide sufficient protection without the need for rigid local designations, which should only be deployed where criteria-based policies provided inadequate protection. He also referred me to the former Planning Policy Statement 1 to much the same effect. I accept this point.

34. Mr Strachan also accepted that where, as [14] of the Framework says, relevant policies were absent or the plan was silent or out of date, [109] would be a policy to be applied in development control, as a material consideration. It was common ground that the Inspector had to consider [109] because the District Council was found not to have a five year housing land supply. The "tilted balance" test in [14] applied, and was to be measured against the policies in the Framework, unless it was to be disapplied because specific Framework policies restricted the development. It followed that the Inspector had to consider both the substance of "valued landscape" policy in [109] in the application of the "tilted balance" and then whether it was a restrictive policy causing the "tilted balance" to be disapplied. There could be no complaint, nor was there, about the fact that the Inspector did in fact ask herself whether the landscape was "valued landscape" which the development would harm rather than protect.

35. Neither side suggested, at the Inquiry or before me, that [109] became material as a policy in its own right, to be given separate or additional weight, because RA1, now absent from the Plan as an unsaved policy, lived on in part or whole, in PPS7, (as noted in the current, but not recent, printed version of the Plan), and PPS7 itself had been later superseded by the Framework.

36. Mr Strachan demonstrated, and this was also not at issue, that the Inspector's analysis of "valued landscape" in DL [68] drew upon her analysis of its nature, value and role in the preceding sections of her discussion of landscape issues. She was, in my judgment, clearly drawing the threads together of her earlier analysis, in a summary of

why the landscape was "valued landscape". No topic was added, and no topic fell out of account.

37. It was not at issue either that, where the development plan landscape policies were as comprehensive as the Framework required in [109], were consistent with it, and up to date, there was no scope for [109] to provide some *additional* policy of development control, beyond the role ascribed by [14], so as to mean that the harm that breached Local Plan policies could be added to the same harm described as a breach of the Framework policy in [109]. To do so would be illogical double-counting. This was because the purposes of paragraph [14] with [109] of the Framework in relation to landscape had been fulfilled, and the national policy was met through the very terms of the Local Plan. As I have said, the parties agreed that the Local Plan policies on landscape were up to date, relevant and had no material gaps. At DL[26 – 27] the Inspector accepted the Local Plan policies as up to date, relevant and consistent with [109], and found no gaps in their coverage. Her analysis of harm under Local Plan policies and of "valued landscape" for [109] purposes, showed that the latter was no more than a drawing together of the points already evaluated under the former.

38. The issue here was not whether such double-counting was illogical but whether the Inspector had indeed double-counted the same harm.

39. While I can see why Mr Strachan submits she did so, I do not accept his submission. There is a danger of over-analysing decision letters, with the risk that in doing so, error is found where none exists. When I first read this Decision Letter, I could see nothing wrong with it; it was internally logical; it dealt with the issues within the correct structure; the Inspector had dealt correctly with two more difficult issues – the effect of my decision in *Stroud* and the disapplication of the tilted balance; she had balanced harm to the landscape against the absence of a five year housing land supply, expressing a clear planning judgment, and applying the "tilted balance". This is a far from promising basis for a legal challenge, let alone an irrationality challenge.

40. Moreover, no-one had submitted to her that there should be a double-counting of harm. The parties' evidence and submissions contain nothing to suggest a double-counting approach. The references to [109] by the Council were not to that effect. She would have been well aware that her analysis of harm to "valued landscape" included nothing not already covered in her analysis of harm under Local Plan policies but that [109] required her to consider separately whether the landscape being harmed was valued. The irrationality of double-counting harm, on the basis of the evidence and arguments she had and the conclusions she reached, would have been evident. I am not prepared to conclude that she did so unless impelled to do so by her words.

41. This turns on the true reading of DL [76], indeed on the true meaning of the first of the last three sentences and of the effect of the word "also": "There would also be the erosion of part of a valued landscape. These harms are substantial and are contrary to the local plan and national policy objectives already set out. In combination these harms attract significant weight."

42. Mr Strachan accepted that the DL had to be read as a whole. But he submitted that the only fair reading of it was that the Inspector had been irrational in the way he had described. He said that the different way in which the overall conclusions in DL [146]

were expressed, should not be used to interpret the particular passage where she dealt with the specific issue in a different way. I disagree. Read as a whole, those two paragraphs suggest that rather more is being made of the first sentence set out above than is warranted. The asserted error is not repeated in DL [146], which I find surprising if she meant that the harm to the "valued landscape" was additional to the harm to the landscape measured against Local Plan policies, let alone if that addition was important. Instead, no objection can be raised to the second part of the second sentence of [146]: "There would also be material adverse visual effects and the irrevocable loss of part of a valued landscape." The Inspector then goes on to hold the proposal to breach development plan policies in all those respects, policies which are entirely consistent with the Framework. She is doing no more in DL [76] than pointing out that the development breaches Local Plan policies consistent with the Framework, which is necessarily also breached. If there could be any doubt, it is resolved by [146].

43. Moreover, I consider what she said to be simply the reflection of the fact that she had to consider the Local Plan policies and also "valued landscapes" for the purposes of [14] of the Framework, and found the landscape to be valued. It was necessary for some comment in relation to that to appear in her conclusions. But it was no more than that she had also found that it was a valued landscape to which harm would be done.

44. It would not have been wrong to comment that the proposal breached a national policy with which the Local Plan policies were consistent. Strictly that can be said to be superfluous, because it adds nothing to the Local Plan policies, but it indicates no double-counting. It is difficult to see that what she has said could be challenged in the absence of the word "also" or if she had said that "this" also amounts to harm to "valued landscape". Mr Strachan's analysis requires a precision of language which an Inspector, even a judge, might not deploy, unless aware that someone might argue that the language could be construed in a particular but unintended way.

45. On that basis, the first way in which Mr Strachan put Ground 1A fails.

46. However, the way in which Mr Strachan had developed the basis for his "double-counting" argument and the debate over what the Inspector had meant in DL[76] had led to a broader debate, about the relationship between [109] and [14] of the Framework and the policies of the development plan. The second way Mr Strachan put his case was that, if the Inspector in DL [76] had given additional weight to the policy on "valued landscape" in [109] over and above that weight which she gave to Local Plan policies for the protection of "valued landscapes", devised to meet the Framework, that too would have been illogical. In effect there was no warranty for giving Local Plan policies greater weight when they were up to date and consistent with the Framework and then adding further weight to them on account of the Framework policy which they embodied.

47. The first issue here was whether such an approach was illogical at all, in the sense which made it unlawful. Mr Buley pointed out that the weight to be given to certain forms of harm and to certain policies was a matter of planning judgment for the Inspector. He submitted that the fact that breaching the Local Plan landscape policies also meant that a national policy on landscape was breached meant that greater weight could be given to such breaches. It was not different in reality to say that greater

weight could be given to policies which embodied the requirements of [109]. I am far from clear that in the end the parties were saying something different at all, much though they might have thought that they were.

48. There is little authority on the relationship between such policies and [14] of the Framework or [109]. I was referred to the decisions in *Preston New Road Action Group v SSCLG* [2017] EWHC 808 (Admin), [2017] Env LR 33, Dove J, and [2018] EWCA Civ 9, [2018] Env LR 18, Lindblom LJ with whom Simon and Henderson LJJ agreed, upholding Dove J. This concerned the landscape policies in the Local Plan and in the Framework at [109] which a fracking proposal was said to breach. The issue was whether the proposal contravened either or both of those policies, on their proper interpretation. The interaction between the two groups of policies was not at issue. It appears not to have been contended, in a way which would have assisted Mr Strachan, that if the Local Plan policies were up to date and breached, there was no need to consider [109]. Mr Strachan pointed out that Dove J referred to [109] of the Framework, in [92] of his judgment, as "very plainly setting out a high-level strategic objective for the whole of the planning system." He continued: "How that objective is then achieved is to be articulated in the planning policies which address the appraisal of landscape impact in the context of particular kinds of development... the phrase 'protecting and enhancing valued landscapes' is a phrase which, properly interpreted, calls for an overall assessment of harm to the landscape …." Mr Strachan submitted that this showed that Local Plan policies which embodied [109] could not then have weight added to them beyond the weight accorded to them as relevant, up to date policies, consistent with and embodying the requirements of [109].

49. At [40], in Lindblom LJ's judgment, which does assist Mr Strachan to a degree, he said that, in Lancashire, there were development plan policies that did what the planning system was encouraged to do by [109] of the Framework. Those landscape policies, although directed at minerals, provided for the protection and enhancement of the landscape in decision-making on proposals for minerals development, including a landscape that is locally 'valued'. He added: "if a scheme complies with those policies, as the inspector and the Secretary of State concluded here, it is difficult to see how it could be regarded as being in conflict with national policy in paragraph 109." This, submitted Mr Strachan, does not suggest an additional role for [109] over and above that given to those development plan policies which do what [109] encouraged them to do.

50. Mr Strachan drew an imperfect but not uninstructive comparison with the illogicality of an Inspector holding that Green Belt policy should be given weight because it was in the Local Plan, and then more weight because it was a national policy. Here the Local Plan provided what the Framework required for landscape protection rather than simply adopting a national policy; but the national policy is that local plans should articulate and provide for the policy. If they did so, the need for the harm significantly to outweigh the benefits in [14], would be measured against the up to date policies in the Local Plan; the task of [109] would already have been fulfilled because the Local Plan policies were up to date; in effect they were the embodiment of the Framework.

51. I reject Mr Strachan's argument and with it Ground 1A. I do not read the Inspector as saying anything more than I have already set out, and so this second point does not arise.

52. Were the second point to arise, however, I make the following observations. Of course, when judging a "tilted balance" under [14] which requires harm and benefit to be measured against the Framework policies, greater weight can rationally be given to harm which breaches its policies than to harm which only breaches Local Plan policies, or to put it another way, greater weight can be given to those policies than to other Local Plan policies. After all, s38(6) means that Local Plan policies which are inconsistent with the Framework still provide the statutory basis for the decision. But the weight given to the "other material considerations" means that those which accord with the Framework are weightier.

53. However, once a Local Plan policy and the harm arising is given its due weight because of the fullness to which it reflects the obligation in [109] of the Framework to produce such policies, then to give the policy, or the harm under it, greater weight because of the Framework policy, is to use the Framework policy twice over: once to give weight to the Local Plan policy because of the Framework and second to give weight to the Framework whose weight has already been reflected in the weight given to the Local Plan policy. That would be as irrational as double-counting harm; it is really just a different way of putting the same point and suffers from the same vice. I do not think that the Inspector made the error in either form; her point was altogether more simple, for the reasons already given, and they apply to this way of putting the same essential point as they do to the double-counting point.

Ground 1

54. The issue is described in the DL:

> "64. Pointing to the Stroud judgment the Appellants further contend that the appeal site itself has to have some demonstrable physical attributes which take it beyond mere countryside in order to qualify as a valued landscape. The council's interpretation is that the appeal site cannot be considered in isolation from its surroundings and that in the Stroud judgment the Court was looking at matters beyond the site in examining the potential demonstrable physical attributes.
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> 65. In coming to a view as to whether or not a site falls to be classified as a valued landscape within the terms of the Framework, it seems to me that one first has to consider the extent of the land which makes up the landscape under consideration before examining whether or not there are features which make it valued. Developments and appeal sites vary in size. For example it is possible to conceive of a small site sitting within a much larger field/combination of fields which comprise a landscape and which have demonstrable physical characteristics taking that landscape out of the ordinary. The small site itself may not exhibit any of the demonstrable physical features but as long as it forms an integral part of a wider 'valued landscape' I consider that it would deserve protection under the auspices of paragraph 109 of the Framework. To require the small site itself to demonstrate the physical features in order to qualify as a valued

> landscape seems to me to be a formulaic, literal approach to the interpretation of the question and an approach which could lead to anomalies. It could lead to individual parcels of land being examined for physical characteristics deterministic of value. Adjoining parcels of land could be categorised as valued landscapes and 'not valued landscapes' on this basis.
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> 66. Further I do not accept that the Stroud case is authority for the proposition that one must only look to the site itself in seeking to identify demonstrable physical characteristics. In examining matters Mr Justice Ouseley confirmed that the Inspector was entitled to come to certain judgments about the factors and evidence in relation to matters outside the confines of the site itself. When assessing what constitutes a valued landscape I consider it more important to examine the bigger picture in terms of the value of the site and its surroundings. That is not to borrow the features of the adjoining land but to assess the site in situ as an integral part of the surrounding land rather than divorcing it from its surroundings and then to conduct an examination of its value.
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> 67. As already indicated I find some difficulty in ascribing the term landscape to an appeal site comprising one large agricultural field. To my mind the term 'landscape' denotes an area somewhat wider than the appeal site in this case. In this regard I note the reference of my colleague in the Loughborough appeal to the GLVIA definition of landscape as '*an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors*'. I endorse the view that '*it is about the relationship between people and place, and perceptions turn land into the concept of landscape'.*

55. Mr Strachan submitted that this involved a misunderstanding of my judgment in *Stroud District Council v SSCLG and Gladman Developments Ltd* [2015] EWHC 488 (Admin), which, it was suggested by Mr Buley could not have been intended to lay down any general principle, as it was an extempore judgment and, he might have added, late on a Friday afternoon. Mr Buley also pointed out that the SSCLG did not participate in the debate, as he had already conceded the claim on other grounds, and might have expressed views on how "valued landscapes" should in this respect be judged.

56. There are two points of principle to be noted (1) *Stroud* decided that the concept of "valued landscapes" in [109] of the Framework is not confined to landscapes which have a particular designation; (2) cases are almost always decided on the basis of their facts and the arguments presented; *Stroud* most certainly was.

57. The question whether the judgment of "valued landscape" had to be reached by examining the "demonstrable physical attributes" of the development site alone, regardless of any wider area of which it formed part, was not the point. The question of whether the Inspector, in that case, had erred in law in his judgment that the site

was not a "valued landscape", albeit not designated, was argued on the very basis that he ought to have found that the site itself did possess "demonstrable physical attributes".

58. I was not laying down or purporting to lay down any principle of the sort which Mr Strachan attributed to me. Indeed, although he submitted that had I done so, I would inevitably have been right because the alternative was illogical, I rather disagree. The concept of "demonstrable physical attributes" was simply the phrase adopted by the Inspector in the *Stroud* case. He examined them in relation to the site. The argument in the case was whether he was right or wrong in law in his conclusions that the site did not possess them. The case was argued in that way, simply adopting his language for the purposes of disputing his conclusions. At [17] of my judgment, I considered an argument about the role of the site in the wider landscape. I rejected it, not because a role in the setting of the AONB was incapable of falling within the concept of the site's "demonstrable physical attributes", as if that should be confined to an examination of the site itself, but because the specific policy dealing with the setting of the AONB did not cover the site. So, the Inspector's conclusion that that was not a "demonstrable physical attribute" of the site was not unlawful.

59. The site did itself have particular attributes upon which the District Council relied. However, the site's definition by the red line on the application form took the form it did in order to incorporate landscape mitigation measures and footpath provision. It would be bizarre if the way in which the red line was drawn, defining the site on whatever basis was appropriate, and which need have nothing to do with landscape issues, crucially affected landscape evaluation. It would be equally bizarre to adopt a wholly artificial approach to landscape evaluation where, in most cases, a development site is but part of a wider landscape. In my judgment, the Inspector, in the case before me now, has analysed the issue very well and come to the entirely correct conclusion.

60. My judgment in the *Stroud* case has been followed in other cases, notably by Hickinbottom J in *Forest of Dean District Council v SSCLG and Gladman Developments Ltd* [2016] EWHC 2429 (Admin). But he followed it for the point of principle that a "valued landscape" was not co-terminous with designation. The issue which Mr Strachan raises in this case was not raised in that case though it appears that the argument may have been confined, as it largely was in *Stroud*, to the characteristics of the development site itself. Either way it is not an authority which supports Mr Strachan in this case. The Inspector's decision is correct.

Overall conclusion

61. I dismiss the claim on both Grounds.