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Case No: AC-2023-BHM-000122; CO/2189/2023

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

Birmingham Civil & Family Justice Centre
33 Bull Street,
Birmingham B4 6DS

Date: 16/11/2023

Before :

MR JUSTICE EYRE

- -

Between :

NRS Saredon Aggregates Limited	**Claimant**
- and -	
(1) The Secretary Of State For Levelling Up, Housing And Communities	**Defendant**
and	
(2) Worcestershire County Council	
- and -	
Stop The Quarry Campaign	**Interested Party**

- -

Jenny Wigley KC (instructed by **Newhall Solicitors LLP**) for the **Claimant**
Rose Grogan (instructed by **Government Legal Department**) for the **First Defendant**
Sarah Clover (instructed by **Legal Governance Worcestershire County Council**) for the **Second Defendant**
Sioned Davies (instructed by **MFG Solicitors LLP**) for the **Interested Party**

Hearing date: 31st October 2023

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Approved Judgment

This judgment was handed down remotely at 10.00am on 16th November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE EYRE

Mr Justice Eyre:

Introduction.

1. This is a statutory review pursuant to section 288 of the Town and Country Planning Act 1990 ("the 1990 Act") against the decision of Inspector Stephen Normington. By his decision of 5th May 2023 ("the Decision") the Inspector dismissed the Claimant's appeal against the Second Defendant's refusal of planning permission for a sand and gravel quarry.

2. The review is brought with permission on two grounds. The first is that the Inspector erred in law in the approach to the weight to be attached to biodiversity net gain which he set out at [195] of the Decision Letter. The second is that the Inspector failed to comply with his duty pursuant to section 70(2) of the 1990 Act and section 38(6) of the Planning and Compulsory Purchase Act 2004 to make his determination in accordance with the applicable development plan in the absence of material considerations to the contrary.

The Factual Background.

3. The Claimant is engaged in the extraction of minerals and its proposal related to land at Lea Castle Farm, Broadwaters, Kidderminster ("the Site"). The proposal was for use of the Site as a sand and gravel quarry. A total of approximately 3m tonnes of sand and gravel were to be extracted over a period of about 10 years. The Site as a whole covers approximately 46ha but the mineral extraction was to be from two areas within the Site: one of approximately 12.5ha and the other of approximately 13.5ha. In the course of the extraction and afterwards the Site was to be restored using inert material imported to the Site together with material from the Site. The restoration would include new agricultural parkland, woodland areas, and hedgerows together with footpaths and bridleways. It was agreed that after the completion of the restoration there would be a biodiversity net gain of more than 39.31%BU for habitats and 107.51%HU for hedgerows.

4. The Second Defendant refused the Claimant's application for planning permission on 27th May 2022. The Claimant appealed under section 78 of the 1990 Act and the inquiry was held over eight days in February and March 2023. The Interested Party is a group of local residents who are opposed to the proposed development and the group took part in the inquiry as a Rule 6 Party.

The Legislative and Policy Context.

5. Section 70(2) of the 1990 Act requires that when dealing with an application for planning permission the authority shall have regard to the provisions of the development plan so far as material to the application. Section 38(6) of the 2004 Act provides that if regard is to be had to the development plan then "the determination must be made in accordance with the plan unless material considerations indicate otherwise".

6. It was common ground before the Inspector and before me that the relevant development plan consisted of the Worcestershire Minerals Local Plan 2018 – 2036

("the MLP"); the Waste Core Strategy for Worcestershire 2012 – 2027; and the Wyre Forest District Local Plan 2016 – 2036. Of those, attention was focused on the MLP.

7. The MLP identified five strategic corridors and provided that mineral supply would be delivered from working and processing at sites focused in those corridors. The MLP provided at MLP 2 for specific sites and preferred areas to be allocated in the corridors. However, by MLP 3 it also provided for there to be mineral extraction at other locations in the corridors subject to specified criteria. The Site is in the North West Worcestershire Strategic Corridor ("the Corridor"). It was not an allocated site in the MLP but was within the wider area of search provided for in that plan.

8. Policy MLP 7 addressed green infrastructure thus:

> "Planning permission will be granted where it is demonstrated that the proposed mineral development will conserve and enhance networks of green infrastructure throughout the life of the development.
>
> A level of technical assessment appropriate to the proposed development will be required to demonstrate how, throughout its lifetime, the delivery of multiple benefits will be optimised, taking account of:
>
> a) the local economic, social and environmental context of the site;
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> b) the potential impacts of climate change;
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> c) site-specific opportunities to:
>
> i. protect and enhance inherent landscape character;
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> ii. conserve, restore and enhance ecological networks and deliver net gains for biodiversity;
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> iii. conserve and enhance the condition, legibility and understanding of heritage assets and their setting;
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> iv. reduce the causes and impacts of flooding;
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> v. protect and enhance the surface water and groundwater resources at the local and catchment scale;
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> vi. improve the condition, legibility an understanding of geodiversity; and
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> vii. enhance the rights of way network and provision of publicly accessible green space;
>
> d) the green infrastructure priorities of the relevant strategic corridor (where the proposed development is within a strategic corridor) or the strategic context of green infrastructure components within the wider green infrastructure network (where the proposed development is not within a strategic corridor); and
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> e) how green infrastructure benefits will be secured for the long term.
>
> Where the proposed development is within a strategic corridor and the proposal would make very limited or no contribution to the delivery of the priorities of the relevant strategic corridor as a while, this will only be considered appropriate were the economic, social and/or environmental benefits of the proposed development outweigh the benefits which could be realised by delivering the priorities of the relevant strategic corridor."

9. Policy MLP 11 addressed green infrastructure in the Corridor in these terms:

> "Planning permission will be granted for mineral development within the North West Worcestershire Strategic Corridor that contributes towards the quality, character and

distinctiveness of the corridor through the conservation, delivery and enhancement of green infrastructure networks.

A level of technical assessment appropriate to the proposed development will be required to demonstrate how, throughout Its lifetime, the development will, where practicable, optimise the contribution the site will make to delivery of the fallowing green infrastructure priorities:

a) conserve, enhance and restore characteristic hedgerow patterns and tree cover along watercourses and streamlines;

b) slow the flow of water in upper reaches and increase flood storage and floodplan connectivity in lower parts of the catchment;

c) create accessible semi-neutral green space, incorporating Information or routes which increase the legibility and understanding of the geodiversity, heritage and character of the area;

d) in the Riverside Meadows, conserve and restore permanent pasture, Incorporating wetland habitats such as fen and marsh, wet grassland, reedbed and lowland meadows alongside pastoral land use;

e) in the Sandstone Estatelands, conserve, enhance and create lowland heathland, acid grassland and scrub.

Proposals should demonstrate how the development will deliver these priorities at each stage of the site's life, and why the proposed scheme Is considered to be the optimal practicable solution. Where site-specific circumstances and/or other policies in the development plan limit the ability to deliver one or more of the priorities, this should be dearly set out in the assessment.

Where the proposal would make very limited or no contribution to the delivery of these priorities as a whole, this will only be considered appropriate where the economic, social and/or environmental benefits of the proposed development outweigh the benefits of delayering the corridor priorities."

10. The Claimant accepted that MLP 11 covered substantially the same matters as MLP 7 albeit with reference to the Corridor. It also accepted that if the Inspector had proper regard to MLP 11 then it was not necessary for him to address MLP 7 separately or rather that having proper regard to MLP 11 would amount to having regard to MLP 7.

11. The Site is in the Green Belt as is most of the Corridor. The relevant green belt policy was MLP 27 in the following terms:

"a) Mineral extraction and/or engineering operations within the Green Beit will be supported where a level of technical assessment appropriate to the proposed development demonstrates that, throughout Its lifetime, the mineral extraction and/or engineering operations will:

» preserve the openness of the Green Belt; and

» not conflict with the purposes of including land within the Green Belt.

b) Where any aspect of the proposed development is Inappropriate in the Green Belt – including mineral extraction and/or engineering operations that cannot satisfy the tests in part (a) above - it will only be supported where a level of technical assessment demonstrates that very special circumstances exist that mean the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.

> Green Belt policy on inappropriate development; and development that may not be inappropriate, is set out in Ministry of Housing, Communities and Local Government (July 2021) *National Planning Policy Framework*, paragraphs 147-151."

12. It was accepted that MLP 27 reflected the approach set out in paragraphs 137 – 150 of the National Policy Planning Framework and to which it referred.

13. The following policies in the MLP were also relevant and it was accepted that the Inspector's paraphrase of them in the following terms was accurate:

> "21. Policy MLP 1 (Spatial Strategy) identifies, amongst other things, that development for sand and gravel will be supported within the strategic corridors and will not normally be supported elsewhere in the county."
>
> "22. Policy MLP 3 (Strategic Location of Development – Areas of Search and Windfall Sites within the Strategic Corridors) sets out, amongst other things, that planning permission will be granted for new mineral developments on windfall sites within the strategic corridors where there is both a shortfall in supply as demonstrated by a shortfall in the landbank or stock of permitted reserves demonstrated in the most recent Local Aggregate Assessment (for aggregate development proposals); there is a demonstrated shortfall in supply of the relevant mineral for particular uses or specifications which would be addressed by the proposed development; or, there is a demonstrated shortfall for a particular geographic market area which would be addressed by the proposed development."
>
> ...
>
> "24. Policy MLP 14 (Scale of Sand and Gravel Provision) reflects the requirements of paragraph 213 of the National Planning Policy Framework (the Framework) by requiring a landbank of at least seven years to be maintained throughout the plan period, and sufficient productive capacity for sand and gravel will be maintained to at least meet the production guideline in the most recent Local Aggregate Assessment to supply a wide range of sand and gravel materials and products. The policy identifies that the County does not have a seven year landbank and that the most recent Local Aggregate Assessment must be referred to in calculating the landbank to support applications. It further identifies that new sites and alterations or extensions to extant sites will provide at least a further capacity to meet an identified shortfall of 11.407 million tonnes of sand and gravel and that proposals for sand and gravel development on windfall sites within the strategic corridors will only be supported where they meet the tests set out in policy MLP 3."
>
> "25. Policy MLP 15 (Delivering a Steady and Adequate Supply of Sand and Gravel) further supports the need to maintain the landbank at seven years and sets out that planning permission will be granted for minerals development that will contribute to maintaining a steady and adequate supply of sand and gravel. It further sets out that a level of technical assessment appropriate to the proposed development will be required to demonstrate the contribution the proposed development will make towards maintaining a landbank of permitted sand and gravel reserves in Worcestershire of at least 7 years and/or enabling Worcestershire's productive capacity for a wide range of sand and gravel materials and products to be maintained or enhanced."

14. By section 98 and Schedule 14 of the Environment Act 2021 provision is made for it to be a condition of the grant of planning permission that the biodiversity gain objective is met. That provision takes the form of the introduction of section 90A and Schedule 7A into the 1990 Act. In summary the effect of paragraphs 2, 13, and 15 of the schedule is that the grant of planning permission will be conditional upon the post-development biodiversity value of the site in question exceeding its pre-development biodiversity

value by at least 10%. These provisions are not yet force. In the consultation document on the implementation of the provisions the Department for Environment, Food and Rural Affairs has stated its intention that when the provisions do come into force they will apply neither to applications made nor to permissions granted before the date the provisions come into force.

The Issues before the Inspector.

15. The Second Defendant's decision notice had identified nine reasons for the refusal of planning permission. However, by the time of the appeal hearing the Second Defendant only relied on the second of those which was that of unacceptable impact on the openness of the Green Belt. The Interested Party maintained its opposition on wider grounds.

16. The Revised Statement of Common Ground identified those matters which were agreed and those which were not agreed as between the Claimant and the Second Defendant. The core of the disagreement was as to whether the benefits of the development were such as to amount to very special circumstances for the purposes of the Green Belt policies of the development plan although it is to be noted that the Claimant did not accept that the proposed development was inappropriate development in the Green Belt. The following points are relevant for current purposes:

    i) The nature of the proposed restoration scheme was agreed.

    ii) The parties were agreed as to the relevant development plan.

    iii) The parties listed the policies in the development plan which were considered relevant to the appeal. Those included the policies to which I have referred together with others which did not feature in the submissions before me.

    iv) It was agreed that the Second Defendant did not have a sufficient landbank in relation to mineral extraction and that the development would contribute to the landbank.

    v) The amount of the biodiversity net gain which would be provided by the restoration scheme was agreed in the amounts I have set out above.

    vi) The matters on which there was disagreement (in relation to the single ground of opposition ultimately maintained by the Second Defendant) were stated thus at 8.1:

        "...

        - The spatial and visual impact of the development on the openness of the Green Belt.
        - The cumulative impact of the development in conjunction with adjacent development at Lea Castle Village as secured by consent 17/0205/OUTL and Wyre Forest Local Plan Policy SP.LCVl on the purposes of the appeal site as Green Belt land across the lifespan of development.
        - The appropriateness of the development in Framework terms and the requirement for consideration of very special circumstances taking into consideration Framework paragraphs 147, 148 and 150.

- The conflict of development with purpose a) unrestricted sprawl and c) encroachment of the Green Belt as defined by paragraph 138 of the Framework.
- The weight provided to individual material considerations sought to be considered in balance; including the weight prescribed to the contribution of the site to minerals supply, the economic benefits from job creation, biodiversity net gain benefit and the benefit applied to the restoration scheme.
- The developments accordance with Policy MLP 27 of the Minerals Local Plan, Policy WCS 13 of the Waste Core Strategy, Policy DM.22 of the Wyre Forest District Council Local Plan and relevant chapters of the Framework."

17. Liam Toland provided the planning evidence for the Claimant. In section 10 of his proof he addressed very special circumstances. He began by saying that in his view the development was not inappropriate development in the Green Belt but then explained that, if a different view were to be taken, the balance of that section of the proof contained the matters which he considered to be very special circumstances overcoming the great weight attached to protecting the Green Belt.

18. At section 10.5 Mr Toland dealt with the restoration scheme and the biodiversity benefits. At 10.5.8 he referred to the amount of the biodiversity net gain and then said, at 10.5.9:

> "Although lower than the Metric 2.0 figure, the 39.31% net gain is nearly 4 times that required by legislation contained in the forthcoming Environmental Bill."

19. At 10.5.10 and 10.5.12 Mr Toland said that the benefits were "substantial and wide-reaching" and that the "restoration and biodiversity benefits of the scheme contribute to VSC and [are] a major benefit of the appeal proposal". He concluded thus at 10.6:

> **"**Based on the above, even if the Appeal Scheme is found to be inappropriate development in the Green Belt, there are significant factors that weigh in favour of the scheme which I consider taken as a whole constitute VSC (i.e. the potential harm to the GB by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations (NPPF para.148))."

20. Christopher Whitehouse gave the Second Defendant's planning evidence.

21. At Section 5 of his proof Mr Whitehouse explained why in his view there were not very special circumstances warranting inappropriate development in the Green Belt. At 5.4 he accepted that the restoration scheme would have "some substantial benefits for biodiversity in the long term". However, he said that there were a number of high risk aspects of whether the restoration would be successfully delivered and that these were such as to "limit the benefits to moderate in [the] planning balance". In addition he pointed out that policy required the site to be restored and so the restoration was not to be seen as a benefit and was to have "negligible weight" attached to it.

22. The Second Defendant's position as to the weight to be attached to the biodiversity gains remained that they were moderate and Miss Clover put the point thus in paragraph 41 of her closing submissions at the inquiry:

> "CW attributes moderate beneficial weight to the biodiversity gains. They are undoubtedly present, however, they are not as great as was previously assessed, and do not carry the weight that the Appellant claims for them. CW (5.3) identifies that the higher risk aspects

> of the deliverability of the restoration scheme across the long term limit the benefits to moderate in planning balance."

23. The Claimant was represented at the inquiry by Satnam Choongh. In his closing submissions Mr Choongh addressed the impact of the development on the character and appearance of the Site. He noted the level of biodiversity net gain recorded in the Statement of Common Ground saying "there will be BNG of almost 40%, 4 times that required by national planning policy" (in fact that should have been a reference to the forthcoming legislation). At [81] – [94] Mr Choongh addressed the question of very special circumstances saying, at [87]:

> "The Appellant does not claim that restoration *per se* should attract positive weight in the VSC balancing act. The fact of restoration is one of the factors that goes into the assessment to support the argument that this development will preserve openness. What the Appellant claims goes to VSC is that the restoration provides a beneficial impact over and above the base-line, as accepted by the County's Landscape officer and as (we say) is obvious from the range of improvements and benefits that will be delivered."

24. Against that background the Inspector, at [8], identified the main issues before him as being:

> "• The need for the proposed development with particular regard to the landbank position for sand and gravel and the need for inert waste disposal in the County.
>
> • The effect on the openness of the Green Belt, and the purposes of including land within it, and whether the proposal would be inappropriate development in the Green Belt having regard to the Framework and relevant development plan policies.
>
> • The effect of the proposed development on local amenity and the living conditions of the occupants of existing and future nearby dwellings and the amenity of pupils and staff at Heathfield Knoll School and First Steps Day Nursery with particular regard to noise, dust, air quality and health.
>
> • Whether the effects of the proposed development on the character and appearance of the area, outlook from nearby properties, highway safety and the efficient operation of the highway network, Public Rights of Way, heritage assets and the local economy or other matters weigh in the planning balance.
>
> • The planning balance with particular regard to whether the proposal is inappropriate development and whether the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations so as to amount to the very special circumstances necessary to justify the development."

25. That summary was clearly correct and the core issues between the Claimant and the Second Defendant were those relating to the Green Belt identified at the second and fifth bullet points.

The Decision Letter.

26. The Inspector began by setting out preliminary and procedural matters and identifying the main issues in the terms I have just quoted. He described the Site and the proposed development. The Inspector then set out the planning policy context. In doing so he listed those policies in the development plan which he considered to be "the most important policies … that are relevant to the determination of this appeal". No issue is taken with the Inspector's paraphrase of the effect of the particular policies. The policies which he listed included MLP 1, 3, 11, 14, 15, and 27. The Inspector did not refer to

MLP 7 but as noted above the effect of that was replicated in relation the Corridor by MLP 11.

27. At [44] – [58] the Inspector addressed the need for sand and gravel and inert fill provision. At [50] he noted that:

> "Taking the above factors into account, it is clear that a seven year landbank for sand and gravel cannot be demonstrated in the County. The appeal scheme would make a notable contribution to the supply of needed minerals which is a matter of substantial significance that should, in accordance with Paragraph 211 of the Framework, be given great weight. On this basis the appeal scheme would accord with policies MLP 3, MLP 14 and MLP 15 of the MLP."

28. The Inspector addressed Green Belt issues at [59] – [87]. At [60] he noted that the Site played an "extremely important Green Belt function" and that he had "attached considerable weight" to that factor. The Inspector considered the impact of the proposed development on the openness of the Green Belt concluding in the following terms at [87] that it would not preserve that openness and so would be inappropriate development:

> "For the above reasons, the appeal scheme would not preserve the openness of the Green Belt. Consequently, the exception for mineral extraction would not apply. Therefore, the proposal would be inappropriate development in the Green Belt, which is by definition harmful to the Green Belt. However, before any determination can be made of the extent to which the proposal would be contrary to national and local Green Belt planning policy, it is necessary to consider whether the inappropriateness of the proposed development, and any other harm, is clearly outweighed in the planning balance by other considerations so as to amount to the very special circumstances necessary to justify the development."

29. From [88] – [119] the Inspector addressed the effect of the development on local amenity and living conditions concluding, at [119], that there would be no conflict with the relevant policies of the development plan.

30. The Inspector dealt with the effect on the character and appearance of the Site at [120] – [131]. He concluded again that there would be no conflict with the relevant policies. At [122] the Inspector said that the restoration works would "provide slight to notable benefits to landscape character". He returned to that point explaining his assessment of the weight to be given to this consideration thus at [129] – [130]:

> "129. The proposed restoration scheme would deliver a number of landscaping improvements which I have set out earlier in this decision. Although the landform would broadly reflect the current slope profiles, the restored height of some parts would be lower than existing ground levels. However, I accept that, overall, the restoration scheme would deliver landscape benefits.
>
> 130. However, restoration of mineral workings to high environmental standards is a requirement set out in paragraph 211(e) of the Framework and reflected to some extent in local development plan policy. There is therefore and inherent policy requirement that mineral workings should have a high standard of restoration. The existing landscape is one of a former parkland and would be restored back to a parkland on completion of the restoration work, albeit with enhanced planting. Taking into account the policy requirements, I consider that the landscape benefits of the scheme should be afforded moderate weight in the planning balance."

31. From [132] – [166] the Inspector addressed the impact of the development on public rights of way, highway safety, the local highway network, and nearby heritage assets. In each case he concluded that there would be no conflict with the relevant policies. He recorded that the proposed additions to the public right of way network would offer "a benefit of minor significance, which should be given slight weight in the planning balance". He then addressed the effect on the local economy, hydrology and hydrogeology, and the Convention Rights of the Child. In each instance he found that there was either no conflict with policy or no matter adverse to the development.

32. The Inspector turned to the planning balance at [188] – [200]. He explained that his conclusion as to the effect of the development on the openness of the Green Belt meant that it was inappropriate development which was by definition harmful and as such not to be approved unless there were very special circumstances clearly outweighing the harm to the Green Belt.

33. At [191] the Inspector said that the development's contribution to the supply of minerals was a matter to be given great weight. Then at [192] he said that that economic benefits of the development were to be awarded moderate weight. At [193] the Inspector said that the temporary nature of the development had only slight positive weight and was a factor relevant to the quantum of the harm from the development rather than a factor which could be used to consider whether there were very special circumstances warranting permission. At [194] the Inspector said that the landscape benefits of the development were to be afforded moderate weight and repeated his assessment that the enhancements of the public right of way network had slight weight.

34. Then at [195] the Inspector addressed the effect of the biodiversity net gain in these terms:

> "There is no dispute between the main parties that the proposal would deliver biodiversity net gain of +39.31%BU for habitats, and +107.51%hu for hedgerows. The net gain would be nearly 4 times that required by forthcoming legislation. However, some of the biodiversity net gain that would be achieved is required to meet national policy and future legislative requirements in order to mitigate the environmental impact of the development. Consequently, I consider that such enhancements should be afforded only moderate weight."

35. At [196] the Inspector noted that the benefits he had already identified outweighed the less than substantial harm to two heritage assets.

36. At [197] the Inspector explained that he had attached significant weight to the local importance of the Site in fulfilling Green Belt purposes by reason of its location and contained nature.

37. At [198] and [199] the Inspector returned to the question of the impact of the development on the openness of the Green Belt noting the risk that the harm to that openness could extend beyond the contemplated period of 11 years.

38. The culmination of the Inspector's consideration of the planning balance was at [200] where he said:

> "I have set out above the spatial importance of this area of Green Belt. This contributes to my view in this case that the appeal site plays an extremely important Green Belt role. In this inappropriate development scenario, I consider that the other considerations

> comprising the benefits of the proposed sand and gravel extraction, and the other material planning benefits that I have identified above, would not outweigh the harm to the openness of the Green Belt that I have found in this case. Although very finely balanced, in my judgement, the harm by reason of inappropriateness as a consequence of the loss of openness, is not clearly outweighed by other considerations, and the VSC necessary to justify the development would not outweigh the harm. Therefore, the proposed development would conflict with Policy MLP 27 of the MLP, Policy WSC 13 of the WCS, Policy DM.22 of the WFDLP, and would be contrary to national policy concerning the Green Belt."

39. In the light of that conclusion the Inspector dismissed the appeal.

The Procedural History.

40. The Claimant originally advanced three grounds of challenge to the Decision. I granted permission on paper in respect of the first ground. HH Judge Jarman KC granted permission for the second ground on the Claimant's renewed application and the third ground was not pursued after my initial refusal of permission.

The Grounds of Challenge.

41. The first ground of challenge addressed the approach which the Inspector took to the weight to be attached to the biodiversity net gain as set out in the Decision Letter at [195]. The Claimant focused on the fact that the Inspector said that some of the biodiversity net gain was "required to meet national policy and future legislative requirements". It was said that the last four words showed that the Inspector was proceeding on the mistaken basis that the requirement under the Environment Act 2021 for an increase in biodiversity value of at least 10% would apply retrospectively to a permission granted to the Claimant. It is said that the Inspector regarded this as a consideration reducing the weight to be attached to the biodiversity net gain and in so doing he erred in law. In essence it was said that the Inspector erred in basing his judgement as to the weight to be attached to the biodiversity net gain on a mistaken understanding of the law.

42. Ground 2 alleged a breach of the Inspector's duty under section 38(6). The Claimant said that the Inspector had failed to address the question of whether the proposed development was compliant with the development plan. It was said that he had focused on the question of compliance with MLP 27 rather than, as he should have done, considering whether was compliance with the development plan as a whole.

Ground 1

43. The parties were correctly agreed that questions of planning judgement were for the Inspector. If the Inspector's conclusion as to the weight to be attached to the biodiversity net gain was reached as a matter of planning judgement properly taking account of material considerations then it was not open to challenge (there being no suggestion of irrationality here). However, the interpretation of the law and the question of what is a material consideration are matters for the court. Thus there is "a clear distinction between the question of whether something is a material consideration and the weight it should be given. The former is a question of law and the latter is a question of planning judgement which is entirely a matter for the planning authority" (per Lord Hoffmann in *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR

759 at 780 F – G). If the Inspector's assessment of the weight to be given to the biodiversity net gain was based on an incorrect view of the law or involved taking account of a matter which was not properly a material consideration that would have been an error of law causing him to exercise his planning judgement on an incorrect basis.

44. As will be seen this ground of challenge turned on the differing contentions as to the correct interpretation of [195] of the Decision Letter. The Defendants and the Interested Party accepted that the Inspector would have erred in law if he had approached the matter on the basis that the requirements of section 90A and of Schedule 7A of the 1990 Act would apply retrospectively to the proposed development when they came into effect as the Claimant said he had. Conversely the Claimant accepted that provided the Inspector had correctly understood that those provisions would not have retrospective effect and had taken no regard to them in respect of the proposed development then it was open to him to reduce the weight he attributed to the biodiversity net gain. The Claimant's case in respect of this ground depended on its contention that the Inspector proceeded on the basis that some of the biodiversity net gain which would result from the development would be needed to meet the requirements of these provisions which would apply to the development even if planning permission were given by the Inspector and so given before the provisions came into force.

The Approach to be taken to the Interpretation of the Decision Letter.

45. There was also substantial agreement as to the approach to be taken to the interpretation of the Decision Letter: the issue was as to the conclusions to which the application of that approach should lead.

46. The approach to interpretation of the Decision Letter depends on the "seven familiar principles" which were set out by Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), [2017] PTSR 1283 at [19] and restated and reinforced by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643 [2018] PTSR 746 at [6] and [7]. I have those principles in mind and need not set them out in full here. In short the Decision Letter must be read benevolently avoiding hypercritical analysis and excessive legalism. The Decision Letter is to be read as a whole and not subjected to laborious dissection. It is, moreover, to be read in context with important aspects of that context being the way in which matters were approached at the inquiry (and in particular the matters which were in issue there) and the fact that the letter is addressed to parties who are informed about the history of and the issues in contention in relation to the relevant application.

The Application of that Approach to Paragraph 195 of the Decision Letter.

47. The Claimant says that the language of [195] is clear and that only one interpretation is possible. It says that the Inspector noted the Claimant's argument that the biodiversity net gain would be about four times that "required by forthcoming legislation". The Inspector having noted that, the use my him of "however" indicated that he was introducing a qualification to that point. In saying some of the gain "that would be achieved" was "required to meet … future legislative requirements" and saying that this was required "in order to mitigate the environmental impact of the development" the Inspector was indicating that he regarded those future requirements as being relevant

to the biodiversity net gain resulting from the development with which he was concerned. The next sentence explaining that he was affording the enhancements only moderate weight began with "consequently" and made it clear that the reason for the decision as to the level of weight was at least in part because of the Inspector's view as to the requirements of the forthcoming legislation.

48. For the Second Defendant Miss Clover submitted that for the Inspector to have regarded future legislation which was not yet in force and which would not have a retrospective effect as relevant to the Claimant's application would be a serious error. She said that as a consequence the court should be slow to conclude that the experienced Inspector had made such an error. There is considerable force in this point and it chimes with the requirement that I read the Decision Letter benevolently avoiding excessive legalism and unrealistic dissection of the text. If the words used by the Inspector can properly be interpreted in a way which does not involve such an error then that interpretation is to be adopted. However, if the only interpretation which is properly possible on a benevolent reading of the words is that advanced by the Claimant then the fact that this means that the Inspector made a serious error cannot justify a different and unrealistic or artificial reading.

49. For the First Defendant Miss Grogan said that the dispute before the Inspector was about the weight to be given to the biodiversity net gain in light of the fact that there would be restoration of the Site and that national policy required the environmental and biodiversity position to be positive at least to some degree after the restoration. Miss Grogan said that the Inspector's words should be read in light of that and that he should be seen as saying that the weight to be attached to the biodiversity net gain should be reduced because some would be required in order to mitigate the effects of the quarrying. The Inspector's use of the phrase "in order to mitigate the environmental impact of the development" might be seen as giving some support to that interpretation. I found it somewhat puzzling that the Inspector used that phrase in the context of addressing the weight to be given to the gain resulting from the restoration. Use of that phrase would be more apt if the Inspector had been concerned at this point with environmental impacts in the course of the development or if the environmental impact after the restoration would remain negative. In both of those contexts it could make sense to talk of mitigating the impacts but such a term does not fit readily with an assessment of the weight to be given to what it was agreed would be a positive impact after restoration. However, such puzzlement and concern could have been dismissed as excessive legalism or undue textual dissection but for the Inspector's reference to "future legislative requirements". Miss Grogan's submission does not overcome the problems flowing from the Inspector's use of those words.

50. Counsel for both defendants and for the Interested Party all made the point that the Claimant had raised the issue of the effect of the future legislation and that the reference to this had been derived from Mr Toland's proof. There were two aspects of the arguments put forward in this regard neither of which when analysed advanced matters.

51. The first aspect of the arguments was that the error had been caused by Mr Toland's reference to the future legislation. It is undoubtedly correct that the first reference to the future legislation came there but that does not alter the position. The Claimant's submissions had not been that the forthcoming legislation would require some biodiversity net gain and that weight should be given because the development was providing more than was required. Rather the Claimant's submission was that the fact

that the biodiversity net gain was nearly four times more than would be required if the forthcoming legislation were applicable was an indication by analogy of the extent of that gain and of the weight to be attached to it. That submission could not properly be regarded as having been such as would be likely to draw the Inspector into error. Even if the submission had been such as was likely to cause an error of law that would not make the error any less an error of law.

52. The second aspect of the argument is to say that the Claimant's submissions provided the context in which the Inspector's language is to be interpreted. It was said, by Miss Grogan, that the Inspector was to be seen as saying that the effect which the future legislative requirements would have on other sites meant that less weight than would otherwise have been the case was to be attached to the biodiversity net gain here. The point which it is submitted that the Inspector was making was that as biodiversity net gain would become more common by reason of the legislation and would be obtained at other sites which would be subject to the provision this meant that less weight attached to the gain on the Site. As will be seen below I have concluded that this is not a tenable reading of the Inspector's language but even if it had been such an approach would still have involved an error of law. It would involve taking account in respect of this development and this Site of the potential impact on other sites of legislation which was not yet in force and which might never come into force. That would be an error because it would involve the Inspector proceeding on the basis of a state of the law which might never come about. The position might have been different if the date for the coming into force of the new provisions had been set by the Act or by statutory instrument such that it could be said with confidence that they would come into force on a particular date but that was not the position here.

53. For the Interested Party Miss Davies pointed out that when it is in force schedule 7A will require a 10% gain. She submitted that in the light of this if the Inspector had been taking account of the forthcoming legislation he could have been expected to have referred to that percentage and to have said that he was reducing the benefit by that amount for the purposes of assessing its weight. I cannot accept that such a mechanistic approach would necessarily have been taken and expressed if the Inspector had taken account of the forthcoming legislation. The submission fails, moreover, to explain what the Inspector meant by the use of the words "future legislative requirements" in the context of a reference to the biodiversity net gain from this development.

54. On behalf of both defendants and the Interested Party it was said that the interpretation advanced by the Claimant was not the correct way to read the language used by the Inspector. However, it was notable that none of those parties was able to advance an alternative interpretation which accorded readily with the language and structure of [195].

55. I have reflected on the language used by the Inspector and have reminded myself of the principles which are to govern my approach to the interpretation of the Decision Letter. Nonetheless I am driven to the conclusion that the meaning and effect of [195] is that the Inspector noted the extent of the biodiversity net gain but then decided that the weight to be attributed to that gain was to be reduced because some of the gain would be needed anyway in respect of the development at the Site by reason of the future legislative requirements. I have concluded that this is the only interpretation which makes sense of the language used by the Inspector and the way in which he structured that paragraph. The sentence beginning "however" can only be read as being the reason

given by the Inspector for rejecting the Claimant's contention that considerable weight was to be given to the biodiversity net gain and that reason was in part the belief that some of the gain would be required by the future legislation. If instead of the words "some of the biodiversity net gain that would be achieved" the Inspector had used the words "some of that net gain" the fact that he was referring back to the biodiversity net gain on which the Claimant was relying and was doing so in relation to the Site would have been clear beyond peradventure. The words which he used were to the same effect and it is clear that in the sentence beginning "however" the Inspector was addressing that gain and having regard to the gain at the Site.

The Lawfulness of the Inspector's Assessment of the Weight to be attached to the Biodiversity Net Gain.

56. The effect of that interpretation is that when assessing the weight to be attributed to the biodiversity net gain for the purposes of assessing whether there were very special circumstances outweighing the harm to the openness of the Green Belt the Inspector reduced that weight on the basis of a mistaken view as to the law. He did so believing incorrectly that some of the net gain would be required in any event by reason of the forthcoming legislation. That was an error of law and meant that the Inspector exercised his planning judgement as to the weight to be given to that material consideration (namely the net gain) on a basis which was wrong in law.

The Impact of the Inspector's Error on the Decision.

57. I turn to consider the impact of the Inspector's error on the Decision and whether relief should be refused on the ground that the Decision would have been the same even if the error had not been made. The effect of the decision in *Simplex GE Holdings Ltd v Secretary of State for the Environment* [2017] PTSR 1041 is that I have to ask two closely-related questions: first, whether the error was material in the sense of being more than insignificant or insubstantial and, second, whether I can be satisfied that the Inspector would necessarily have come to the same conclusion even if he had not made the error. In that exercise I have to remember that the Inspector was the decision maker and that I have to avoid trespassing into matters of planning judgement or seeking to second-guess what the Inspector would have done.

58. Here, for the following reasons, the error was material and I cannot be satisfied that the Decision would necessarily have been the same but for the error.

59. The Inspector was engaged in assessing whether the benefits of the proposed development were such as to amount to very special circumstances and to outweigh the harm caused to the openness of the Green Belt. The Inspector concluded that the benefits did not have that effect but said that the point was "very finely balanced". In that exercise an error causing the Inspector to reduce the weight to be attached to a particular benefit on a false basis was clearly material.

60. There is no way of knowing the extent to which the Inspector reduced the weight to be attached to the benefit of the biodiversity net gain. It cannot be known whether but for the error he would have said that great weight should be given to that factor or that he would have given it only marginally more than the moderate weight which he in fact accorded to it. It is to be remembered that the Inspector was engaged in an exercise of judgement and not one of arithmetical calculation. As I said in *Sefton MBC v Secretary*

of State for Housing, Communities, and Local Government [2021] EWHC 1082 (Admin), [2021] PTSR 1662 at [33] the reference to weight in the National Policy Planning Framework and in MLP 27 is ultimately a metaphor and is:

> "being used to emphasise the importance of the Green Belt. It is used to make it clear to decision makers that they cannot approve inappropriate development in the Green Belt unless the considerations in favour of the development are such as truly constitute very special circumstances so that the development can be permitted notwithstanding the importance given to the Green Belt."

61. The fact that the extent of the reduction made cannot be known means that we cannot know whether the result would have been the same if the Inspector had not reduced the weight he attached to the biodiversity net gain. It may be that the attribution of great rather than moderate weight to that consideration would have tipped the balance in favour of the development. In that regard I have already noted the Inspector's assessment that the question was "very finely balanced". It may well be that the ultimate result would have been the same but I cannot say that it would necessarily have been the same nor exclude the possibility that the outcome would have been different.

62. It follows that the challenge succeeds on ground 1 and that the Decision falls to be quashed by reason of the error of law identified there.

Ground 2

63. The Claimant said that the Inspector should have had regard to the development plan as a whole. He should have considered whether the development was in accordance with that plan taking account of and resolving conflicts between different policies in the plan. Having made that assessment he should have made his determination in accordance with the development plan in the absence of material considerations to the contrary. Instead of undertaking that exercise the Inspector, in the Claimant's analysis, focused on a single policy, namely MLP 27, and considered compliance or non-compliance with that. He did not have proper regard to the policies supportive of the Claimant's application, in particular MLP 11 but also MLP 14 and MLP 15. He thereby failed to have regard to the development plan as a whole. Miss Wigley said that this failing might have been obviated if the Inspector had taken account of the supportive policies as part of the exercise of assessing whether there were very special circumstances for the purposes of MLP 27 and so had used that test as a proxy for compliance with the plan as a whole but he had not done that.

64. The Defendants and the Interested Party said that the Inspector was clearly aware of his duty under section 38 (6). He made repeated references to the relevant policies in the plan taking account of those which were supportive of the development. The Inspector treated compliance or otherwise with MLP 27 as being decisive but in the context of the Claimant's appeal that was an entirely proper course and amounted, the Defendants and the Interested Party say, to acting in accordance with the development plan seen as a whole.

The Nature of the Inspector's Section 38(6) Duty and the Approach to Assessing whether that Duty has been performed.

65. The starting point is that in order to comply with his section 38(6) duty the Inspector had to have regard to and give priority to the development plan. The position was

explained thus by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1459 D – H (addressing the equivalent provision in the Town & Country Planning (Scotland) Act 1972):

> "In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in light of the whole plan the proposal does or does not accord with it. He will also have to identify all the other material considerations which are relevant to the application and to which he should have regard. He will then have to note which of them support the application and which of them do not, and he will have to assess the weight to be given to all of these considerations. He will have to decide 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. And having weighed these considerations and determined these matters he will require to form his opinion on the disposal of the application. If he fails to take account of some material consideration or takes account of some consideration which is irrelevant to the application his decision will be open to challenge. But the assessment of the considerations can only be challenged on the ground that it is irrational or perverse."

66. There is no prescribed method which must be followed but the decision maker must make an assessment of the effect of the development plan and must then determine whether the proposal in question is compliant with or in conflict with the plan seen as a whole: see *Tiviot Way Investments Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 2489 (Admin) at [27] – [36], *R (Hampton Bishop PC) v Herefordshire Council* [2014] EWCA Civ 878 at [28], *BDW Trading Ltd v Secretary of State for Communities and Local Government* [2016] EWCA Civ 493, [2017] PTSR 1337 at [21], and *R (Wyatt) v Fareham BC* [2022] EWCA Civ 983 at [79] – [80].

67. There can be cases where the outcome turns on "the application of a single and simply expressed policy directly relevant to the critical issue" (see *BDW Trading* at [30]. However, there will be other cases where the policies in the development plan pull in different directions in relation to a particular proposal. In such cases the decision maker will have to address that conflict in order to assess whether the proposal in question is or is not compliant with the plan as a whole (see *Lark Energy Ltd v Secretary of State for Communities and Local Government & another* [2014] EWHC 2006 (Admin) at [56] and [57]).

68. In assessing whether the Inspector complied with his section 38(6) duty the Decision Letter must be read in the light of the approach I have summarised at [46] above. The Inspector did not have to adopt a mantra or a particular form of words (see *BDW Trading* at [24]). Moreover, regard must be had to the context and in particular to the evidence and argument presented to the Inspector and to the matters in issue before him (see *BDW Trading* at [28]).

69. The Inspector's duty was to comply with section 38(6) in substance and not just in form. There had to be a real assessment of whether the development was or was not in accordance with the development plan as a whole. However, the question of whether the Inspector has fulfilled that duty is also to be seen as a matter of substance and not of form. The key question is whether it is apparent from a fair reading of the Decision Letter read as a whole and seen in context that the Inspector had in reality undertaken the necessary exercise of assessing whether the development was in accordance with the development plan also seen as a whole. The court must look to the substance of what was done rather than seeking for any set structure or form of words.

Was there Compliance with the Section 38(6) Duty?

70. The Inspector clearly had his section 38(6) duty well in mind. He referred expressly to that provision at the start of his treatment of the planning policy context and in that part of the Decision Letter he identified the relevant policies from the development plan and summarised their effect. Moreover, in his treatment of particular matters the Inspector typically ended the section in question by recording his conclusion as to whether or not there was conflict with those policies in the development plan which he regarded as relevant to the topic under consideration. That was an exercise in assessing whether there was compliance with the development plan.

71. In his treatment of the planning balance the Inspector focused on Green Belt issues and the question of compliance or otherwise with MLP 27. It is apparent that he regarded this as the determining issue. That was understandable because that had been at the heart of the matters in dispute between the parties at the inquiry. The core questions had been whether the development would amount to inappropriate development in the Green Belt and whether, if it did, there were very special circumstances outweighing the harm to the Green Belt. Having determined that the development would be inappropriate development it was inevitable that the Inspector would turn to and focus on the question of the presence or absence of very special circumstances.

72. The Inspector's approach of regarding MLP 27 as the key policy was sensible and appropriate in the context where not all of the Corridor was in the Green Belt. It is artificial and unrealistic to say that there was a conflict between that policy and the other policies. The other policies were not specific to the Green Belt whereas MLP 27 was specific to the Green Belt. It is to be remembered that MLP 27 was part of the MLP and so was expressly a minerals-related policy. It was, accordingly, appropriate for that to be seen as the predominant policy when a Green Belt issue arose and for the other policies to be seen as subordinate to it when development in the Green Belt was proposed.

73. It was inconceivable that there could be circumstances when a development could be assessed as being non-compliant with MLP 27 but still compliant with the development plan as a whole. Miss Wigley submitted that such an outcome was a possibility but I do not accept that it was. It would mean that a development could be found to have been inappropriate development in the Green Belt and not to be justified by very special circumstances outweighing the harm to the Green Belt but that it could still be said to be compliant with the development plan because of the operation of other policies which were not specific to the Green Belt. That would be an outcome verging on the absurd.

74. The Inspector did not adopt a mechanistic approach of saying that for particular reasons he found the development to be or not to be compliant with the development plan as a whole. He did not need to do that in circumstances where his analysis was pervaded by consideration of the issues of compliance or non-compliance with the policies of that plan. As I have just explained the Inspector was entitled to regard MLP 27 as the key policy. There will be cases where a focus on a single policy can mean that a decision maker is not having regard to a development plan as a whole. Conversely, there are cases where, as Lindblom LJ explained in *BDW Trading* at [30], a single policy directly relevant to the critical issue is determinative of the outcome. The situation here was very much closer to the latter than the former situation. Moreover, the Inspector did not focus on a single policy to the exclusion of the others. Rather he considered the relevant policies in turn but approached the matter on the footing that MLP 27 was the key and viewed the other policies in the light of that policy. He was entitled to do that. It is, therefore, apparent from a fair reading of the Decision Letter in context that the Inspector had regard to the development plan and concluded that by virtue of the location of the proposed development and of the non-compliance with MLP 27 it was not compliant with the development plan taken as a whole. It follows that the Inspector acted in accordance with his section 38(6) duty and this ground of challenge fails.

75. For completeness I should add that I regard Miss Wigley's contention that the Inspector would have complied with his section 38(6) duty if he had had regard to the other policies in his assessment of the presence or absence of very special circumstances as supporting rather than undermining the conclusion I have just reached. Miss Wigley submitted that the Inspector could have used the very special circumstances exercise as a proxy for the assessment of whether or not there was compliance with the development plan as a whole. However, that would still have been an application of MLP 27 and a consideration of whether or not there was compliance with that policy. That confirms the validity of the Inspector's approach of regarding MLP 27 as the crucial policy. Alternatively this was a variant of the argument I have dismissed above that there could be a development in the Green Belt which was not compliant with MLP 27 because it was inappropriate development and there were no very special circumstances but which was nonetheless compliant with the development plan. Miss Wigley referred me to the approach of Patterson J in *R (Khan) v London Borough of Sutton* [2014] EWHC 2663 (Admin) at [78] but the position there was very different from that here. There the conclusion had been that there were very special circumstances for the purposes of the equivalent provision of the NPPF. That assessment had been reached in part by reference to the other development plan policies but it was very far from being the kind of proxy exercise which Miss Wigley appeared to contemplate.

Conclusion.

76. It follows that the claim succeeds on ground 1 but fails on ground 2. The Decision is accordingly to be quashed.