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Case No: CO/1578/2023
AC-2023-LON-001347

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 November 2023

Before :

MRS JUSTICE LANG DBE

- -

Between :

(1) TIMOTHY JAMES HOUSE **(2) ISOBEL HOUSE**	**Claimants**
- and -	
(1) WAVERLEY BOROUGH COUNCIL **(2) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES**	**Defendants**

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- -

Charles Banner KC and Matthew Henderson (instructed by **Penningtons Manches Cooper LLP**) for the **Claimants**
Wayne Beglan and Jack Barber (instructed by **Legal Services**) for the **First Defendant**
Jack Smyth (instructed by the **Government Legal Department**) for the **Second Defendant**

Hearing dates: 7 & 8 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mrs Justice Lang:

1. The Claimants seek a statutory review, pursuant to section 113 of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004"), of the decision by the First Defendant ("the Council") to adopt the Waverley Borough Local Plan Part 2: Site Allocations and Development Management Policies ("LPP2"), on 21 March 2023.

2. The Claimants own and occupy a dwelling house with land at Upper Sattenham, Station Lane, Milford, Godalming ("the Property"). The Property has the benefit of a restrictive covenant which includes within its scope a site now proposed by the Council for development, comprising 27 acres of open land, to the north of the Property, which was formerly part of Milford Golf Course ("the Golf Course Site"). The effect of the restrictive covenant is to restrict the development of the Golf Course Site to one detached house (plus ancillary accommodation) per acre.

3. The Council is the local planning authority for the Borough of Waverley. It has allocated the Golf Course Site for residential development, and it has granted planning permission for the construction of 190 dwellings.

4. The Second Defendant ("the Secretary of State") appointed an inspector to examine LPP2, pursuant to section 20 PCPA 2004. Following the Inspector's Report ("IR"), the Council decided to adopt LPP2 as modified.

5. The Claimants' grounds of challenge may be summarised as follows:

    i) **Ground 1:** The Inspector unlawfully failed to consider whether it was sound to restrict the scope of LPP2 to be a "daughter document" to the Waverley Borough Local Plan Part 1: Strategy Policies and Sites ("LPP1"). The Inspector was required to consider the scope of LPP2 by the statutory framework and/or because it was so obviously material to the Inspector's statutory task.

    ii) **Ground 2**: Even if the Inspector was not required to consider the scope of LPP2, nevertheless his approach to the examination of LPP2 was unlawful because he misinterpreted LPP1, and failed to take into account material considerations which were required to be taken into account by the statutory framework and/or because they were so obviously material to the soundness of LPP2.

    iii) **Ground 3**: The Inspector's conclusion that there was a reasonable prospect of varying or discharging the restrictive covenant over the Golf Course Site was irrational.

6. On 5 July 2023, I granted the Claimants permission to proceed with the claim for statutory review.

Planning history

7. The Claimants' house was constructed in 1929, on agricultural land which was transferred from the vendor to the purchaser by a conveyance dated 17 October 1929. The conveyance contained a restrictive covenant which benefitted the Property, and

burdened the open land identified on the title plan, namely, adjacent land to the north of the Property, and land immediately opposite the Property. The terms of the restrictive covenant were as follows:

> "Not to erect on the said land more than one detached dwellinghouse to the acre with usual domestic offices at an aggregate prime cost of not less than £1750 in labour materials and construction Provided always that on any plot forming part of the said land and being not less than One acre in area on which such detached dwellinghouse as aforesaid (and no more) is erected, there may also be erected one lodge and one cottage suitable and intended for occupation by a gardener chauffeur or other employee of the occupier of the said dwellinghouse but the costs of any such lodge and one cottage shall not be included in arriving at the said prime cost of the said dwellinghouse and its domestic offices."

8. The Claimants purchased the Property in 1998 and continue to live there. The restrictive covenant is shown on the official Charges Register for the Property.

9. On 25 February 1992, the Council granted planning permission for a golf course on part of the open land burdened by the restrictive covenant, and Milford Golf Course was developed. The owners of Milford Golf Course (Crown Golf) subsequently sold a portion of their land (the Golf Course Site) to Stretton Milford Limited for development by Cala Homes.

LPP1

10. On 1 February 2018, Mr Bore, a Planning Inspector appointed by the Secretary of State, issued a report on the examination of LPP1. On 20 February 2018, the Council adopted LPP1. It set out the strategic policies relating to the development and use of land for the period up to 2032.

11. In his report, Mr Bore summarised the housing strategies as follows:

> "47. The plan is strategic and does not itself aim to allocate a full range of sites to meet the housing requirement. Having regard to the estimated contributions from all sources, sites for some 1,525 dwellings need to be allocated in Local Plan Part 2 "Site Allocations and Development Management Policies", and in neighbourhood plans. The Council intends to bring forward Local Plan Part 2 quickly; Annex 1 of the Council's LDS indicates that it is due to be published in June 2018 with adoption in April 2019. Its early adoption in accordance with this timetable, and a positive approach to site identification, are critical to meeting the housing requirement. There is every indication that the Council will adhere to the projected timetable.
>
> ……

> 49. There are enough indications to be confident that the housing requirement will be delivered over the plan period, with the assistance of Part 2 and neighbourhood plans. A large number of possible housing sites have been submitted for the Council's consideration. With the provisions of the submitted plan, as modified, and with the realistic prospect of adequate allocations in Part 2 of the Plan, the housing requirement of a minimum of 590 dpa set out in MM3 is capable of being delivered over the plan period.
>
> 50. The trajectory also indicates that there is a sufficient supply of specific deliverable sites to provide 5 years' supply of housing against the housing requirement…."

12. LPP1 allocated a number of strategic development sites, the largest of which was Dunsfold Aerodrome. Despite opposition from the Claimants, who relied upon the restrictive covenant, the Golf Course Site was allocated for 180 dwellings under Policy SS6, to be delivered over the course of the plan period. The Golf Course Site was also removed from the Green Belt.

13. The Claimants applied for a statutory planning review of the adoption of LPP1, but permission was refused by John Howell QC, sitting as a Deputy High Court Judge, on 19 June 2018.

Planning permission for the Golf Course Site

14. On 28 February 2019, the Council granted outline planning permission on the Golf Course Site for 190 dwellings (including 57 affordable dwellings), despite opposition from the Claimants. It also entered into an agreement pursuant to section 106 Town and Country Planning Act 1990 ("TCPA 1990").

15. On 19 November 2021, the Council approved reserved matters of appearance, landscaping, layout and scale under the outline permission.

LPP2

16. Although the Council began preparation of LPP2 in 2017, progress has been slower than anticipated. There was a consultation on Issues and Options between June and July 2017, and a statutory consultation on the Preferred Options draft plan was undertaken between May to July 2018. The Pre-Submission draft plan was prepared between July 2018 and August 2020, and a statutory consultation took place between November 2020 and January 2021. The Council submitted the draft plan to the Secretary of State on 22 December 2021.

17. The Secretary of State appointed Mr Fort, a Planning Inspector, to undertake an independent examination of the plan, which commenced in January 2022. Examination hearings took place between July and September 2022. A schedule of proposed Main Modifications to the plan was undertaken between December 2022 and January 2023.

18. The Inspector issued the IR on 13 March 2023. The Inspector found the plan to be legally compliant and sound, subject to the Main Modifications which were identified in the examination process. The Inspector did not accept the representations made by the Claimants that the Golf Course Site should no longer be allocated because there was no reasonable prospect that it would become available.

19. The Council adopted the LPP2, as modified, on 21 March 2023.

Legal framework

Statutory scheme

20. The statutory scheme for the preparation, examination and adoption of development plans is set out in the PCPA 2004 and the Town and Country Planning (Local Planning) (England) Regulations 2012 ("the 2012 Regulations").

21. Section 17(3) and Section 17(6) PCPA 2004 provide as follows:

> "(3) The local planning authority's local development documents must (taken as a whole) set out the authority's policies (however expressed) relating to the development and use of land in their area.
>
> ….
>
> (6) The authority must keep under review their local development documents having regard to the results of any review carried out under section 13 or 14."

22. The preparation of local development documents is governed by section 19 PCPA 2004:

> "(1) Development plan documents must be prepared in accordance with the Local Development Scheme.
>
> …..
>
> (1B) Each local planning authority must identify the strategic priorities for the development and use of land in the authority's area.
>
> (1C) Policies to address those priorities must be set out in the local planning authority's development plan documents (taken as a whole).
>
> …..
>
> (2) In preparing a development plan document or any other local development document, the local planning authority must have regard to –

> (a) national policies and advice contained in guidance issued by the Secretary of State;
>
> ….
>
> (h) any other local development document which has been adopted by the authority;
>
> (j) such other matters as the Secretary of State prescribes."

23. Section 20 PCPA 2004 provides for independent examination by a person appointed by the Secretary of State:

> "(1) The local planning authority must submit every development plan document to the Secretary of State for independent Examination by an Inspector.
>
> (2) But the authority must not submit such a document unless –
>
> (a) they have complied with any relevant requirements contained in regulations under this Part, and
>
> (b) they think the document is ready for independent Examination.
>
> ….
>
> (4) The Examination must be carried out by a person appointed by the Secretary of State.
>
> (5) The purpose of an independent Examination is to determine in respect of the development plan document –
>
> (a) whether it satisfies the requirements of sections 19 and 24 (1), regulations under section 17 (7) and any regulations under section 36 relating to the preparation of development plan documents;
>
> (b) whether it is sound; and
>
> (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.
>
> (6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the Examination.
>
> (7) Where the person appointed to carry out the Examination –
>
> (a) has carried it out, and

> (b) considers that, in all the circumstances, it would be reasonable to conclude –
>
> (i) that the document satisfies the requirements mentioned in sub-section (5)(a) and is sound; and
>
> (ii) that the local planning authority have complied with any duty imposed on the authority by section 33A in relation to the document's preparation, the person must recommend that the document is adopted and give reasons for the recommendation.
>
> (7A) Where the person appointed to carry out the Examination—
>
> (a) has carried it out, and
>
> (b) is not required by sub-section (7) to recommend that the document is adopted, the person must recommend non-adoption of the document and give reasons for the recommendation.
>
> (7B) Sub-section (7C) applies where the person appointed to carry out the Examination—
>
> (a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in sub-section (5) (a) and is sound, but (b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.
>
> (7C) If asked to do so by the local planning authority, the person appointed to carry out the Examination must recommend modifications of the document that would make it one that—
>
> (a) satisfies the requirements mentioned in sub-section (5) (a), and
>
> (b) is sound.
>
> ……"

24. Section 23 makes provision for the adoption of the local development document, as follows:

> "(2) If the person appointed to carry out the independent Examination of a development plan document recommends that it is adopted, the authority may adopt the document –
>
> (a) as it is, or
>
> (b) with modifications that (taken together) do not materially affect the policies set out in it.

> (2A) Sub-section (3) applies if the person appointed to carry out the independent Examination of a development plan document—
>
> (a) recommends non-adoption, and
>
> (b) under section 20 (7C) recommends modifications ('the main modifications').
>
> (3) The authority may adopt the document –
>
> (a) with the main modifications, or
>
> (b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications.
>
> (4) The authority must not adopt a development plan document unless they do in accordance with subsection (2) or (3).
>
> (5) A document is adopted for the purposes of this section if it is adopted by resolution of the authority."

25. A development plan document may not be questioned in any proceedings other than a claim for statutory review under section 113 PCPA 2004, on the ground that the document is not within the appropriate power and a procedural requirement has not been complied with. A challenge may only be brought on public law grounds; it is not a review of the merits. See *Solihull MBC v Gallagher Homes Ltd* [2014] EWCA Civ 1610, per Laws LJ at [2].

26. Regulation 8 of the 2012 Regulations provides:

> "…..
>
> (4) Subject to paragraph (5), the policies contained in a local plan must be consistent with the adopted development plan.
>
> (5) Where a local plan contains a policy that is intended to supersede another policy in the adopted development plan, it must state that fact and identify the superseded policy."

Section 84 Law of Property Act 1925

27. The Upper Tribunal has power, under section 84 of the Law of Property Act 1925 ("LPA 1925"), to discharge or modify a restrictive covenant affecting land on the ground, *inter alia*, that it is impeding some reasonable use of the land which is contrary to the public interest, and that money will be adequate compensation for any loss or disadvantage suffered by the discharge or modification. The leading case is *Millgate Developments Ltd v Alexander Devine Children's Cancer Trust* [2020] UKSC 45.

National Planning Policy Framework

28. Plan making is addressed in section 3 of the National Planning Policy Framework ("the Framework"), at paragraphs 15 to 37. It distinguishes between strategic policies, which set out overall strategies, and non-strategic policies, which set out more detailed policies for specific areas, neighbourhoods or types of development.

29. Paragraph 33 provides that policies in local plans should be reviewed to assess whether they need updating at least once every five years.

30. Policy guidance on the examination of plans is set out at paragraphs 35 and 36:

> "35. Local plans and spatial development strategies are examined to assess whether they have been prepared in accordance with legal and procedural requirements, and whether they are sound. Plans are 'sound' if they are:
>
> a) **Positively prepared -** providing a strategy which, as a minimum, seeks to meet the area's objectively assessed needs [FN21 Where this relates to housing, such needs should be assessed using a clear and justified method, as set out in paragraph 61 of this Framework]; and is informed by agreements with other authorities, so that unmet need from neighbouring areas is accommodated where it is practical to do so and is consistent with achieving sustainable development;
>
> b) **Justified -** an appropriate strategy, taking into account the reasonable alternatives, and based on proportionate evidence;
>
> c) **Effective -** deliverable over the plan period, and based on effective joint working on cross-boundary strategic matters that have been dealt with rather than deferred, as evidenced by the statement of common ground; and
>
> d) **Consistent with national policy -** enabling the delivery of sustainable development in accordance with the policies in this Framework and other statements of national planning policy, where relevant.
>
> 36. These tests of soundness will be applied to non-strategic policies in a proportionate way, taking into account the extent to which they are consistent with relevant strategic policies for the area."

31. The approach to the policy concept of soundness was explained in *Barratt Development Limited v City of Wakefield M.D.C.* [2010] EWCA Civ 897; [2011] JPL 48, per Carnwath LJ, at [11], [33].

32. In *Grand Union Investments Limited v Dacorum B.C.* [2014] EWHC 1894 (Admin), Lindblom J. summarised the principles at [56], [59] and [67], as follows:

> "56. Testing the soundness of a plan is not a task for the court. It is a task that lies within the realm of planning judgment exercised under the relevant statutory scheme in the light of relevant policy and guidance. The court's jurisdiction under section 113 of the 2004 Act is limited to review on traditional public law grounds (see the judgment of Keene L.J. in *Blyth Valley Borough Council v Persimmon Homes (North East) Limited* [2008] EWCA Civ 861, at paragraph 8). The question in this case, as the parties agree, is whether the Council's adoption of the plan on the inspector's recommendation was irrational. As has been said many times, a claimant who seeks to persuade the court that a planning decision-maker has lapsed into irrationality will have to demonstrate an unusually bad error of judgment. He must show that the decision falls outside the range of judgment open to a reasonable decision-maker (see, for example, the judgment of Lord Bingham C.J., as he then was, in *R. v Secretary of State for the Home Department, ex parte Hindley* [1998] QB 751, at p. 777A).
>
> …
>
> 59. But the guidance as to "soundness" in the NPPF is policy, not law, and it should not be treated as law. As Carnwath L.J., as he then was, said in *Barratt Developments Plc v The City of Wakefield Metropolitan District Council* [2010] EWCA Civ 897 (in paragraph 11 of his judgment), so long as the inspector and the local planning authority reach a conclusion on soundness which is not "irrational (meaning perverse)", their decision cannot be questioned in the courts, and the mere fact that they have not followed relevant guidance in national policy in every respect does not make their conclusion unlawful. Soundness, he said (at paragraph 33) was "a matter to be judged by the inspector and the local planning authority, and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law".
>
> …
>
> 67. The assessment of soundness was not an abstract exercise. It was essentially a practical one. If the core strategy as submitted was unsound, the inspector had to consider why and to what extent it was unsound, what the consequences of its unsoundness might be, and, in the light of that, whether its unsoundness could be satisfactorily remedied without the whole process having to be aborted and begun again, or at least suspended until further work had been done."

33. Section 5 of the Framework is titled "Delivering a sufficient supply of homes". Paragraph 68 states:

> "68. Strategic policy-making authorities should have a clear understanding of the land available in their area through the preparation of a strategic housing land availability assessment. From this, planning policies should identify a sufficient supply and mix of sites, taking into account their availability, suitability and likely economic viability. Planning policies should identify a supply of:
>
> a) specific, deliverable sites for years one to five of the plan period [FN34 With an appropriate buffer, as set out in paragraph 74. See Glossary for definitions of deliverable and developable.]; and
>
> b) specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15 of the plan."

34. Paragraph 74 provides:

> "74. Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years' worth of housing against their housing requirement set out in adopted strategic policies [FN38 For the avoidance of doubt, a five year supply of deliverable sites for travellers - as defined in Annex 1 to Planning Policy for Traveller Sites - should be assessed separately, in line with the policy in that document.], or against their local housing need where the strategic policies are more than five years old [FN39 Unless these strategic policies have been reviewed and found not to require updating. Where local housing need is used as the basis for assessing whether a five year supply of specific deliverable sites exists, it should be calculated using the standard method set out in national planning guidance.].
>
> The supply of specific deliverable sites should in addition include a buffer (moved forward from later in the plan period) of:
>
> a) 5% to ensure choice and competition in the market for land; or
>
> b) 10% where the local planning authority wishes to demonstrate a five year supply of deliverable sites through an annual position statement or recently adopted plan [FN40 For the purposes of paragraphs 74b and 75 a plan adopted between 1 May and 31

> October will be considered 'recently adopted' until 31 October of the following year; and a plan adopted between 1 November and 30 April will be considered recently adopted until 31 October in the same year.], to account for any fluctuations in the market during that year; or
>
> c) 20% where there has been significant under delivery of housing over the previous three years, to improve the prospect of achieving the planned supply [FN41 This will be measured against the Housing Delivery Test, where this indicates that delivery was below 85% of the housing requirement.]."

35. The Glossary in Annex 2 includes the following definitions:

> "**Deliverable**: To be considered deliverable, sites for housing should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years. In particular: a) sites which do not involve major development and have planning permission, and all sites with detailed planning permission, should be considered deliverable until permission expires, unless there is clear evidence that homes will not be delivered within five years (for example because they are no longer viable, there is no longer a demand for the type of units or sites have long term phasing plans). b) where a site has outline planning permission for major development, has been allocated in a development plan, has a grant of permission in principle, or is identified on a brownfield register, it should only be considered deliverable where there is clear evidence that housing completions will begin on site within five years.
>
> …
>
> **Developable:** To be considered developable, sites should be in a suitable location for housing development with a reasonable prospect that they will be available and could be viably developed at the point envisaged."

Challenges to Inspectors' decisions

36. In *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746, at [6] – [7], Lindblom LJ set out the principles upon which the Court will act in an application for statutory review under section 288 TCPA 1990. Those principles are also relevant to an application for statutory review under section 113 PCPA 2004. Lindblom LJ held:

> "6. In my judgment at first instance in *Bloor Homes East Midlands Ltd. v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) (at paragraph 19) I set out the "seven familiar principles" that will guide the court in

handling a challenge under section 288. This case, like many others now coming before the Planning Court and this court too, calls for those principles to be stated again – and reinforced. They are:

> "(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to "rehearse every argument relating to each matter in every paragraph" (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
>
> (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the "principal important controversial issues". An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).
>
> (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, "provided that it does not lapse into Wednesbury irrationality" to give material considerations "whatever weight [it] thinks fit or no weight at all" (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 74, at paragraph 6).

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

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment (1993)* 66 P. & C.R. 80, at p.83E-H).

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

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

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

37. In *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] 1 WLR 1865, Lord Carnwath JSC held at [25]:

> "… the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly."

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

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

> "36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to

> reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

40. In *CPRE Surrey v Waverley BC* [2019] EWCA Civ 1826, Lindblom LJ held, at [72], that an inspector conducting a local plan examination is required to give reasons for his conclusions and recommendations. The requisite standard of reasons is that set out in the *South Bucks DC* case. He added, at [75]:

> "Generally at least, the reasons provided in an inspector's report on the examination of a local plan may well satisfy the required standard if they are more succinctly expressed that the reasons in the report or decision letter of an inspector in a s.78 appeal against the refusal of planning permission. As Mr Beglan submitted, it is not likely that an inspector conducting a local plan examination will have to set out the evidence given by every participant if he is to convey to the "knowledgeable audience" for his report a clear enough understanding of how he has decided the main issues before him."

Grounds 1 and 2

41. It is convenient to consider Grounds 1 and 2 together because of the overlap between them.

Case law

42. In *Oxted Residential Ltd v Tandridge District Council* [2016] EWCA Civ 414, the Court of Appeal dismissed a judicial review claim challenging a local planning authority's adoption of its Local Plan Part 2, to support a core strategy prepared under national planning policy for housing land supply that had been superseded by the Framework, and was now out of date.

43. The main ground of challenge was that the inspector who conducted the examination, and in turn the local planning authority which adopted it, did not and could not, lawfully find it to be sound under the relevant statutory requirements, because it was not informed by the "objectively assessed" housing needs of the district, as government policy in the Framework required.

44. In his judgment, Lindblom LJ addressed several of the issues which have arisen in this case. He held as follows:

> "27. Challenges such as this to the adoption of a development plan document by a local planning authority will seldom succeed. That is largely because the task of testing the soundness of a development plan document is not a task for the court. It lies squarely within the realm of planning judgment, exercised within the relevant statutory scheme and in the light of relevant policy and guidance. Under section 113 of the 2004 Act the court's role is to review that exercise of judgment, on traditional public law grounds. The question here – as it was, for example, in Grand Union Investments – is whether the local planning authority's adoption of the plan under challenge, following the recommendation of the inspector who conducted the Examination, was perverse – that is to say that the adoption of the plan was beyond the range of reasonable judgment. As Carnwath L.J., as he then was, said in *Barratt Developments Plc v City of Wakefield Council* [2010] EWCA Civ 897 (in paragraph 11 of his judgment), provided the inspector and the local planning authority reach a conclusion on soundness that is not "irrational" (meaning "perverse"), their decision cannot be questioned in the courts. Soundness, said Carnwath L.J. (at paragraph 33), was a "matter to be judged by the inspector and the Council, and raises no issue of law, unless their decision is shown to have been "irrational", or they are shown to have ignored the relevant guidance or other considerations, which were necessarily material in law".
>
> 28. As Mr Rhodri Price Lewis Q.C., for the council, submitted, the fatal misconception in Mr Clay's argument is the idea that the local plan part 2 was a development plan document in which the council was obliged by statute, or at least in the light of government policy in the NPPF, to rectify any shortcomings in the core strategy's approach to housing land supply, and, in particular, to undertake an assessment of the "objectively assessed needs" for housing. That was not so.
>
> 29. An issue similar to this arose in *Gladman Developments Ltd. v Wokingham Borough Council* [2014] EWHC 2320 (Admin). In that case the claimant challenged a development plan document in which the local planning authority had made allocations to address a housing requirement derived from the South East Plan, in a core strategy prepared under the policies in PPS3. It was argued that the inspector who conducted the Examination could not find the plan sound because it was not based on a requirement derived from "objectively assessed needs" for the authority's area, as paragraph 47 of the NPPF now requires. That argument was rejected by Lewis J. in a comprehensive and, in my view, compelling analysis. Lewis J.

was satisfied that the inspector did not have to determine whether the housing requirement in the core strategy represented the "objectively assessed needs", or to endorse the requirement itself. He gave five reasons for this conclusion in a passage of his judgment (paragraphs 60 to 69) quoted in full by Dove J. in his (in paragraph 38). He later adopted essentially the same approach in *R. (on the application of Gladman Developments Ltd.) v Aylesbury Vale District Council* [2014] EWHC 4323 (Admin) (at paragraphs 67 to 69).

30. The five reasons given by Lewis J., paraphrased and in summary, were these.

31. First, the statutory scheme does not require the approach contended for. A development plan may comprise several development plan documents. In preparing a development plan document the local planning authority must have regard to any other development plan document already adopted, such as a core strategy (section 19(2)(h) of the 2004 Act), and the inspector conducting the Examination must ensure that this has been done (section 20(5)(a)). There is nothing in the statutory scheme to prevent the adoption, for example, of a development plan document that is making allocations consistent with an adopted core strategy, simply because the core strategy may require revision or amendment to bring it into line with national policy (paragraphs 61 and 62 of the judgment).

32. Secondly, the relevant policies in the NPPF, properly understood, do not require every development plan document within its broad definition of a "Local Plan" to fulfil all the requirements described in paragraph 47. Where one of the necessary purposes of a particular development plan document is to identify the level of housing need that requires to be met in the relevant area, "as far as is consistent with the policies set out in [the NPPF]", the provisions of the NPPF bearing on that purpose, including paragraphs 158 and 159 as well as paragraph 47, will be engaged. However, as Lewis J. aptly put it, "[properly] read, … [the NPPF] does not require a development plan document which is dealing with the allocation of sites for an amount of housing provision agreed to be necessary to address, also, the question of whether further housing provision will need to be made" (paragraphs 63 to 65).

33. Thirdly, it is difficult to reconcile with the NPPF's encouragement for the timely preparation and adoption of local plans the proposition that a local planning authority cannot prepare, and an inspector cannot consider the soundness of, "a development plan document dealing with the allocation of necessary housing until further steps are taken to identify whether additional housing is required" (paragraph 66).

34. Fourthly, the notion that the policy in paragraph 47 of the NPPF can be used as a means of compelling a full, objective assessment of housing need before a development plan document making allocations for "housing need already established" can be adopted is also unnecessary. An authority is under a statutory requirement, in section 17(6) of the 2004 Act, to keep its local development documents under review (paragraph 67).

35. And fifthly, this analysis was consistent with the first instance decision in *Solihull Metropolitan Council v Gallagher Estates* – later upheld on appeal – though here the circumstances were different. Here the inspector was "examining a plan which proposed site allocations for housing which, as a minimum, would contribute towards the agreed housing need of the area" (paragraph 68).

36. For those five reasons, Lewis J. concluded, the inspector was "not required by reason of [the NPPF] to consider an objective assessment of housing need in order to assess whether this development plan document was sound" (paragraph 69).

37. I think that analysis provides no less effective an answer to Mr Clay's argument in this case than it did to the claimant's submissions in Gladman Developments v Wokingham Borough Council. Mr Clay said that that case was very different from this, because there the development plan document was making allocations, and was "intrinsically, permissive rather than restrictive", and therefore consistent with government policy in the NPPF. However, Dove J. was entirely unconvinced that the facts of the two cases could be materially distinguished on that basis (paragraph 56 of his judgment).

38. I agree with Dove J.. He concentrated, rightly in my view, on the "scope or purpose" of the local plan part 2 (paragraphs 53 to 55 of his judgment). He acknowledged that "the legislation contemplates a modular structure to the Development Plan whereby it can be constructed from a series of individual elements which are to be read together for the purposes of conducting exercises in development control", and that "[these] individual parts may be developed at different times against the backdrop of different national policies for the purposes of Section 19(2)(a) of the 2004 Act" (paragraph 53). An inspector conducting an Examination must establish the true scope of the development plan document he is dealing with, and what it is setting out to do. Only then will he be able properly to judge "whether or not, within that scope and within what it has set out to do", it is "sound" (section 20(5)(b)). His assessment will require him to ask himself, among other things, whether the local planning authority has had regard to national policy (section 19(2)(a)) and to "any other local development document which

has been adopted by the authority" (section 19(2)(h)). The judge noted that in this case there was no complaint of "inconsistency or potential inconsistency with another local development document" (paragraph 54). He went to say this (in paragraph 55):

> "In my view the scope of TLP 2 is clear from paragraphs 1.4 and 1.5. It is clear that it did not include an Examination of the OAN for the defendant. Considering the limited objectives of TLP 2, as set out in its introductory paragraphs, the Inspector was not in my view required to embark upon an inquiry as to what the OAN might be or whether or not the defendant had a five-year supply of housing, and consequentially whether the policies which were being examined were relevant to the supply of housing. The establishment of a new housing requirement for the defendant's administrative area was not a task which TLP 2 had set itself."

39. As the judge recognized, the scope of the local plan part 2 is plain from the text in its "Introduction", and from the policies it contains. It "supports" the core strategy. It does not substitute for the policies of the core strategy an amended or new strategy. That is not what it had to do, nor what it could have done. Its explicit purpose is to provide what it describes as "a set of detailed planning policies to be applied locally in the assessment and determination of planning applications over the plan period", to replace the remaining saved policies of the 2001 local plan (paragraph 1.4), and to provide the "detailed policies" to complement the "strategic policies" in the core strategy (paragraph 1.8). In preparing it, the council was not undertaking the work indicated by paragraphs 47 and 159 of the NPPF. It did not have to carry out an assessment of the housing needs that would have to be met in its area to satisfy the requirements of national policy, as they now are, in paragraph 47 of the NPPF. It was not obliged in this particular plan-making process to "use [its] evidence base to ensure that [its] Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in [the NPPF]". Equally, the inspector who conducted the Examination was not required to scrutinize the council's performance in discharging those requirements of national planning policy. The suggestion that such an exercise was called for in this process is misconceived.

40. In the "Introduction" of his report, in paragraph 1, the inspector reminded himself of the policy for the testing of a plan's soundness in paragraph 182 of the NPPF. In the section headed "Assessment of Soundness", dealing with "Issue 1 – The

Basis for the Overall Approach of the Plan", the inspector grappled with the argument that the core strategy was not consistent with NPPF policy, and was therefore out of date. His conclusions were these:

> "9. A number of representors suggested that the Council's approach, both in terms of co-operation and the consideration of strategic matters, is flawed because the adopted Core Strategy (CS) is out-of-date (2008), particularly in terms of identifying objectively assessed housing need. It was argued that LP2 should be based on an up-to-date CS.
>
> 10. I accept, as do the Council, that some elements of the CS need up-dating and that is one reason why the Council has agreed to undertake a review. Indeed work has already started on what will be called the Tandridge Local Plan Part 1 : Strategic Policies (LP1) and it is anticipated that Regulation 18 public consultation will be undertaken this October, with adoption of the Plan by Spring 2017.
>
> 11. The Introduction to LP2 makes it clear that its role is to support the adopted Core Strategy and that its function is to provide detailed planning policies which can be used in the determination of planning applications. It was suggested that the Council should have initiated co-operation with neighbouring local planning authorities with regard to the assessment of housing need and the formulation of policies and proposals to meet that need. Specific locations for housing development were suggested, for example at Smallfield and in the locality of Domewood. However, it is not the role of LP2 to consider housing need in the District; to allocate sites; to propose the redevelopment of existing buildings (e.g. at Redhill Aerodrome); or to review the Green Belt boundary. These are matters to be tackled in the review of the CS, should circumstances so dictate and there is no reason to doubt that the Council will undertake the duty to co-operate in an appropriate way at that time and ensure that the CS review (LP1) includes policies and proposals which are up-to-date and in compliance with national policy.
>
> 12. It was argued that the Council should withdraw LP2 and concentrate on the preparation of LP1. However, I can see no benefit in that approach. LP2 is primarily a development management tool (not an allocations document) and although I cannot predict what the LP1 may contain, it is likely that many of the

> policies in LP2 will remain applicable, irrespective of any land use allocations or strategic policies that might be included in LP1. Whilst it is a desirable objective, it would be unreasonable in the current circumstances, to expect all the planning documents of the Council to provide a seamless, comprehensive and continuously up-to-date palette of planning policies and proposals. This will hopefully be achieved on adoption of LP1 in 2017. In the meantime the benefits of progressing with LP2 outweigh any disbenefits because the document will provide a clear suite of policies which the Council can use in the determination of planning applications.
>
> 13. Particular concern was raised regarding the revision of some settlement boundaries within the Green Belt without reviewing the District's overall housing requirements and I address that matter under Issue 5.
>
> 14. On this basis I am satisfied that the Council's overall approach to the preparation of LP2 is sound."

> 41. I see no error of law in the approach taken by the inspector there. His conclusions are cogent, his reasoning clear and complete. To hold that his analysis was in any way irrational or perverse would be quite impossible. It is composed of perfectly rational planning judgments. He plainly understood the role of the local plan part 2. He was right to reject the argument made to him that the council could not lawfully, or at least should not, adopt it without first undertaking the exercise prescribed in paragraph 47 of the NPPF. As he acknowledged (in paragraph 11), that was not an exercise necessary in, or appropriate to, this particular plan-making process. Nor was this a process in which allocations of sites for housing were to be made. Nor again was it a process in which the Green Belt boundary ought to have been reviewed. These were matters to be dealt with, in so far as they needed to be, in the review of the core strategy. In the meantime, though the role of the local plan part 2 was a limited one, its policies would still be useful. Dove J.'s conclusions to that effect (in paragraph 58 of his judgment) are, in my view, clearly correct."

45. Although the facts in *Oxted* were somewhat different to this case, the facts in the case of *Gladman Developments Ltd. v Wokingham Borough Council* [2014] EWHC 2320 (Admin), which was approved by the Court of Appeal in *Oxted*, were very similar to this case.

46. In *Aireborough Neighbourhood Development Forum v Leeds City Council* [2020] EWHC 1461 (Admin), the Claimant challenged the Council's decision to adopt the Leeds Site Allocations Plan ("SAP"). Under Ground 3, the Claimant contended that,

on examination, the Inspectors gave inadequate reasons in respect of the justification for Green Belt release. The Council submitted, at [94], that the purpose of the SAP was to provide for the development set out in the Core Strategy, not to question the level of housing need identified in the Core Strategy. Lieven J. held, at [107], that the Inspectors had failed to give adequate reasons, applying the tests in *South Bucks DC v Porter (No. 2)* [2004] 1 WLR 1953 and *CPRE v Waverley BC* [2019] EWCA Civ 1826. In response to the Council's submission, she said:

> "103. I reject Mr Lopez's argument that the job of the SAP was simply to allocate for the figures in the CS, and that the Inspectors therefore did not need to, and indeed should not, have looked at any other figures. The job for the Inspectors in deciding whether there should be GB release was to apply the NPPF, and in particular para 83. They therefore had to determine whether there were exceptional circumstances to justify GB release. If the level of need in the CS was undermined in emerging policy then that was a matter that they had to take into account and give reasons in respect of. The logical outcome of Mr Lopez's argument would be that any change of circumstance which undermined the CS requirement was irrelevant to the determination of exceptional circumstances in the SAP. In my view that cannot be right. The Inspectors had to take the up to date position in respect of all material considerations and that must include the actual level of housing requirement if the policy had become out of date."

47. The *Oxted* case was mentioned earlier in the judgment as part of the material considered by the Inspector, but it does not seem to have been considered by Lieven J. when she reached her conclusions at [103]. I accept Mr Beglan's submission that the probable explanation for this was that Lieven J. was considering different questions to those which arose in *Oxted* and *Gladman.* *Aireborough* was a reasons challenge, and the issue was the application of the Framework in respect of Green Belt land, not the scope of a Local Plan. Although Mr Banner KC urged me to follow *Aireborough,* I consider that *Oxted* is more directly relevant to this case and it is a binding judgment of the Court of Appeal.

Claimants' submissions on Ground 1

48. On Ground 1, the Claimants contended that the Inspector erred in accepting, without interrogation, the Council's promotion of LPP2 as a "daughter document" to LPP1, which only included non-strategic policies, and so did not consider whether the strategic approach in LPP1 needed to be updated, supplemented or revised by LPP2. This starting point led the Inspector to reject the submissions of the Claimants and others that LPP2 was deficient because it failed to allocate sufficient sites to address the delays in delivery of LPP1 strategic allocations and to ensure a 5 year housing land supply.

49. The Claimants' first submission was that the statutory scheme does not compel such an approach: in principle, Development Plan Documents ("DPDs") may be of equal status and a later DPD may supersede an earlier one. The Inspector was referred to the Mid

Sussex Site Allocations Development Plan Document as an illustration of a subsequent DPD which sought to make good a housing shortfall in an earlier DPD.

50. The Claimants' second submission was that the Inspector was required to consider whether the requirements of section 19(1C) PCPA 2004 were met, including whether LPP2 contained policies which tackled the identified strategic objective of meeting the full housing requirement.

51. The Claimants' third submission, in the alternative, was that the Inspector was required to consider whether the scope of LPP2 was sound in order to assess the soundness of the policies in LPP2. Scope was an obviously material consideration in the discharge of the duty in section 20(5)(b) PCPA 2004.

52. Fourthly, the Claimants submitted that the scope of LPP2 was an obviously material consideration to the assessment of soundness under paragraph 35 of the Framework:

    i) Whether LPP2 was positively prepared, providing a strategy which meets the area's objectively assessed needs;

    ii) Whether LPP2 was justified, it was obviously material to consider how far it should contribute to the overarching strategy in LPP1;

    iii) Whether LPP2 was consistent with national policy on the delivery of housing.

53. The Inspector erred in failing to consider, or reach conclusions on, these matters. At the hearing (though not in their pleaded case), the Claimants alleged that the Inspector mistakenly accepted the Council's submission that the scope of LPP2 was "forbidden territory".

Claimants' submissions on Ground 2

54. The Claimants relied on Ground 2, in the alternative to Ground 1. They submitted that the Inspector unlawfully failed to consider and interrogate (1) the effect of LPP2 on the delivery of the housing requirement in LPP1 and/or (2) the maintenance of a 5 year housing land supply after the adoption of LPP2.

55. The Claimants' first submission was that the Inspector misinterpreted the modular approach, prescribed by LPP1, as rendering unnecessary consideration of either a 5 year housing land supply or whether the housing requirement would be met during the plan period. This was a misinterpretation of LPP1.

56. In LPP1, the twin strategic objectives in relation to housing in Policy ALH1 were (a) at least 11,210 net additional homes over the plan period; and (2) securing and maintaining a 5 year housing land supply in accordance with the requirements of the Framework. LPP1 envisaged that LPP2, along with other Local Plan documents, would support these strategic objectives.

57. The modular approach in LPP1 did not prevent, or render unnecessary, consideration of whether the Council could demonstrate a 5 year housing land supply on the adoption of LPP2, or whether LPP2 would ensure the delivery of the housing requirement before the end of the plan period.

58. The Claimants' second submission was that, by disregarding consideration of whether the Council could demonstrate a 5 year housing land supply on the adoption of LPP2, or whether LPP2 would ensure the delivery of the housing requirement before the end of the plan period, the Inspector failed to take into account mandatory considerations, which he was required to take into account either by the statutory framework, or because they were so obviously material.

59. The Inspector was required, under section 20(5)(a) PCPA 2004, to consider whether the requirements of the 2012 Regulations were satisfied by LPP2. Regulation 8(4) of the 2012 Regulations provides that the policies contained in a local plan must be consistent with the adopted development plan, unless expressly superseded under regulation 8(5). By excluding consideration of how LPP2 supported the twin strategic objectives, the Inspector failed to consider the consistency of LPP1 and LPP2, as required by the statutory scheme.

60. Further or alternatively, the delivery of 11,210 homes and the maintenance of a 5 year housing land supply were obviously material considerations which the Inspector was required to take into account, but failed to do so.

Defendants' submissions on Grounds 1 and 2

61. The Council and the Secretary of State submitted that, during the examination, the Inspector undertook extensive consideration of the issues raised in Grounds 1 and 2 and addressed those issues, to the extent required, in the IR. Issue 1 in the IR was framed by the Inspector to consider whether LPP2 met the tests of soundness in relation to its approach to meeting housing requirements.

62. On Ground 1, the Council submitted that its adoption of a modular approach to the development plan was, in principle, permissible: *Oxted* at [30]. The Inspector recognised that the scope of LPP2, as advanced by the Council, was consistent with LPP1 as a daughter document forming part of the development plan, alongside other development plan documents. The Inspector did consider the proper scope of LPP2, and whether it should do more. In making an overall assessment on whether LPP2 was sound, the Inspector accepted the Council's approach in the exercise of his planning judgment. The Secretary of State's primary submission was that the claim was an impermissible challenge to the Inspector's exercise of planning judgment.

63. On Ground 2, the Council submitted that the Inspector correctly interpreted LPP1 and concluded, in the exercise of his planning judgment, that the test of soundness did not require (a) LPP2 to demonstrate a 5 year housing land supply or (b) that adoption of LPP2 would ensure delivery of the housing requirement by the end of the plan period. The Inspector acknowledged the statutory requirement for consistency and concluded that the requirement was satisfied. The Secretary of State also submitted that, on the Inspector's findings, LPP2 supported the objectives contained within LPP1. The Inspector found that the housing allocations would make a significant contribution to the Borough's housing supply.

Conclusions on Grounds 1 and 2

LPP1

64. Both LPP1 and LPP2 are part of the Local Plan, applying regulation 6 of the 2012 Regulations. They are also part of the adopted development plan, applying section 38(2) PCPA 2004.

65. LPP1 set out the strategic policies relating to the development and use of land in Waverley and development proposals within it. It provided, at paragraph 1.2:

> "The Local Plan Part 1 provides the framework for other Local Plan documents which will contain more detailed policies and the identification and allocation of land for non-strategic development to support the overall vision and strategy for the area. Local Plan Part 2, which is to follow, will contain development management policies, site allocations and land designations. The scope of Local Plan Part 2 provides the potential to allocate sites of any size."

66. Policy ALH1 of LPP1 set the amount and location of housing for the Borough. It stated that the Council would make provision for at least 11,210 net additional homes in the period from 2013 to 2032. Each parish was allocated a minimum number of new homes to accommodate. The allocation for the village of Witley, including Milford, was 480. The policy was to be delivered by decisions on planning applications, detailed application of the Local Plan Parts 1 and 2, and Neighbourhood Plans.

67. LPP1 allocated a number of strategic development sites. Under Policy SS6, the Golf Course Site was allocated for 180 dwellings. LPP1 anticipated that 100 dwellings would be delivered in the first 5 years, with 80 dwellings delivered in the subsequent 4 years. Under Policy SS7, the former site of Dunsford Aerodrome was a major site allocation, expected to deliver 2,600 homes over the plan period.

LPP2

68. The scope and purpose of LPP2 is described in the Council's Local Development Scheme, dated October 2021, as follows:

> "This document will be directly linked to Local Plan Part 1 and its purpose is to provide the more detailed day-to-day planning policies, replacing the retained policies from the 2002 Local Plan. It will also deal with site-specific issues, including identifying the specific sites needed to meet housing or other land use needs."

69. The Preamble to LPP2 explained that:

> "Local Plan Part 2 (LPP2) is the 'daughter document' of 'Local Plan Part 1: Strategic Policies and Sites' (adopted February 2018)(LPP1). It provides a suite of development management

> policies and allocates sites for housing and other uses consistent with the strategic approach expressed in LPP1. The Plan sits alongside neighbourhood plans both made and in preparation. LPP2 replaces all the remaining policies contained within the 'Waveney Borough Local Plan 2002'."

70. LPP2 only allocated sites where the minimum number of houses distributed to that parish by Policy AH1 had not been met, and there was no neighbourhood plan which made provision for allocations. For example, in Witley and Milford, LPP2 provided, at paragraph 7.19:

> "The minimum housing target for the parish of Witley (including Milford) is 480, as set in Local Plan Part 1. As of 1st April 2022, there have been 100 completions within Witley parish. There are also 188 outstanding permissions. This totals 288 committed dwellings for Witley, meaning that there is an outstanding requirement to allocate a minimum of 192 dwellings through Local Plan Part 2."

The examination

71. During the examination, the Claimants, as well as potential developers seeking allocation for their sites, made representations to the Inspector that the housing allocations in LPP2 were insufficient and ought to be increased.

72. The Claimants relied upon the restrictive covenant over the Golf Course Site, which they were not willing to release. They identified nine changes in circumstances since the examination of LPP1 which meant that the developer's prospects of success on an application to discharge the covenant had materially decreased. It followed that the Golf Course Site would not come forward for development during the plan period. Therefore LPP2 was unsound because it did not provide a strategy that would meet the Borough's objectively assessed needs in the plan period, as set out in LPP1.

73. Potential developers seeking allocations for their sites submitted that the Council's housing supply had deteriorated during the long delay since the adoption of LPP1 in 2018. They submitted that the Council was unable to demonstrate a 5 year housing land supply, and cited appeal decisions in support, (though the Council produced evidence that it did currently have a 5 year housing land supply). They pointed out that the allocation at the Golf Course Site would not be delivered within the plan period, and the rate of delivery from Dunsfold Aerodrome would be significantly lower than expected, with a reduction of 1650 dwellings over the plan period.

74. In those circumstances, the potential developers submitted that the Council could not simply rely upon the trajectory of housing delivery as set out in LPP1. Instead, LPP2 had to be based upon an assessment of the current housing land supply position to determine what was required over the remainder of the plan period, so as to ensure that the full housing need requirement in LPP1 would be met.

75. The Council supported the approach adopted in the draft plan. It responded to Questions 4 and 5, under Issue (iii), in *Matter 6*: *Housing requirement and general*

supply matters in the Inspector's Matters, Issues & Questions ("MIQs") as follows (the Inspector's questions are set out in bold below):

> "**4. Some representors make reference to the delivery of housing on the LPP1's strategic sites not progressing at a rate previously anticipated, and comments have been made about potential increases to the Borough's objectively assessed need since the adoption of LPP1. Taking into account the Gladman Development Ltd v Wokingham BC11, and Oxted Residential Ltd v Tandridge DC12 judgements, is it within the scope of the LPP2 to address either of these issues at this time?**
>
> The objectively assessed need for housing in Waverley in the development plan period has been established by LPP1. The role of LPP2 is to plan for the allocation of sites as envisaged by the strategic policies set in LPP1. Both the Gladman Development Ltd v Wokingham BC [2014] EWHC 2320 (Admin), and Oxted Residential Ltd v Tandridge DC [2016] EWCA Civ 414 judgements made clear that it is not the function of a subordinate plan (i.e. LPP2) to re-open the Borough's objectively assessed need established within a strategic plan (i.e. LPP1). Therefore, the Council consider that any change to the objectively assessed need for the Borough would need to be undertaken through a review of LPP1 and is not a matter within the scope of LPP2.
>
> **5. Would the allocation of sites for housing outside of the above-mentioned settlements (i.e. in M6,I(i),Q1) be within the scope of LPP2? Although LPP1 did not specifically identify which settlements would be allocated housing through LPP2, it did make clear that to meet the LPP1 housing requirement additional housing would be allocated through either LPP2 or through the relevant neighbourhood plan. In supporting the aims of the Localism Act and neighbourhood planning, LPP2 only deals with housing allocations in the settlements of Haslemere and Witley (including Milford); as these areas have not met their minimum housing allocation set in LPP1 and are not dealing with housing allocations within their respective neighbourhood plans.**
>
> During the preparation of LPP2, the Council engaged with the relevant town and parish councils to understand those that would be allocating housing to meet the identified LPP1 housing requirement through their neighbourhood plans. Neighbourhood plans have been adopted for Bramley, Chiddingfold and Farnham which deal with the housing requirement for these settlements. Neighbourhood plans for Cranleigh, Dunsfold and Elstead are being prepared which will deal with the housing allocations for these settlements. Although it is not indicated to be an issue currently, the Council consider that any delay to the

> preparation of neighbourhood plans and consequential impact on housing supply and delivery, would be for a review of LPP1 to consider.
>
> The Council consider that although the allocation of housing outside of the settlements of Haslemere and Witley (including Milford) may be strictly lawful, it is not necessary to render the plan sound and it also runs against the strategy set out by LPP1. As a result of these reasons, it is also not presently supported by a sufficient evidence base. As a result of the Council's decision to only allocate sites in the settlements of Haslemere and Witley (including Milford), the evidence base does not currently provide the basis for the allocation of housing outside the identified settlements. Therefore, it would not be proportionate or, in fact, appropriate for LPP2 to allocate sites for housing outside of the aforementioned settlements."

The Inspector's Report

76. It is apparent from the Inspector's Report, the MIQs, the written submissions and the transcripts of the examination hearings (exhibited to Mr Longley's witness statement) that the issues raised under Grounds 1 and 2 in this challenge were presented to the Inspector at some length, and that he addressed them.

77. At IR/1, the Inspector correctly set out the legal and policy framework for his examination. At IR/10-11, he considered the "Context of the Plan":

> "Context of the Plan
>
> 10. The LPP2 relates to Waverley Borough, a largely rural district with over 90% of its area comprising open countryside, including landscapes within an Area of Outstanding Natural Beauty (AONB), and European Protected Sites. A significant proportion of the Borough is also within the Green Belt. The Borough contains a number of settlements of varying size ranging from the main settlements of Farnham, Godalming, Haslemere and Cranleigh to large villages such as Witley and Milford, to smaller villages. The historic character and significance of the Borough is also reflected in the presence of 43 conservation areas and around 1800 listed buildings.
>
> 11. The Plan is the 'daughter document' of the Local Plan Part 1: Strategic Policies and Sites (adopted February 2018) (LPP1), which amongst other things contains the overall spatial strategy for the Borough, and sets out its housing requirement, including how this will be distributed amongst the settlements. LPP1 includes the allocations and related policies relevant to the Dunsfold Aerodrome new settlement, where it anticipates that around 2600 houses would be developed. LPP2 also sits

> alongside neighbourhood plans both made and in preparation. The plan period of LPP2 runs to 2031/32."

78. Under the main heading "Assessment of Soundness", the Inspector identified 9 main issues. Issue 1 was framed as "Does LPP2 set out a positively prepared, justified and effective approach to meeting housing requirements in a way that is consistent with LPP1 and national policy?" This formulation reflected the statutory and Framework tests to be applied in the Examination.

79. The first sub-topic was "The scope of LPP2 and relationship to housing supply matters" which was directly relevant to the matters raised by the Claimants and others at the examination, and in Grounds 1 and 2 of this claim.

80. At IR/27, the Inspector accepted the Council's characterisation of the scope and purpose of LPP2:

> "27. Section 19(2)(h) of the 2004 Act requires local planning authorities to have regard to any other local development document which has been adopted by the authority when preparing a development plan document. Regulation 8 of the 2012 Regulations provides that policies contained in a local plan must be consistent with the adopted development plan, unless they are intended to supersede adopted policies. As set out above, LPP2 is a 'daughter document' of LPP1, and will form part of the development plan alongside made neighbourhood plans and those currently in preparation when they are made. It is not intended that LPP2's policies would supersede those of LPP1."

81. Here the Inspector acknowledged the statutory requirement for consistency with LPP1, and concluded that the requirement was satisfied. The adoption of a modular approach to the development plan is, in principle, permissible: see per Lindblom LJ in *Oxted*, citing *Gladman*, at [31], and at [38]. The Council, in the exercise of its planning judgment, had decided that LPP2 should be a "daughter document" to LPP1, and presented LPP2 for examination on that basis. The Inspector was entitled, in the exercise of his planning judgment, to accept the Council's approach as appropriate.

82. At IR/30, the Inspector went on to consider the Council's modular approach in more detail, and found that it was consistent with the provisions of the PCPA 2004, the Framework and the Planning Practice Guidance ("PPG"). He considered that LPP1 was "unambiguous in terms of the modular approach that is to be taken to the development plan". In my view, the Claimants' submission that he misinterpreted LPP1 is unarguable.

83. At IR/31, the Inspector sufficiently explained why he did not accept the representations made to him that LPP2 should identify and maintain a 5 year housing land supply, and meet the area's objectively addressed needs, and its affordable housing requirement. He said:

> "In this context, the Council's position that it is not necessary for LPP2 to identify a five-year supply is a soundly-based one, as it

> is only one component of the policies directed to this matter in relation to the Borough as a whole. I therefore find no inconsistency with the Framework (at paragraph 68) in these regards, insofar as the requirement for planning policies to identify a five-year supply is concerned, as this LPP2 does not contain all of the development plan policies relevant to the area. Neither is the expressed purpose of the LPP2, as set out either in the terse description given in the LDS, or in the fuller explanation set out in the Plan's introduction, to establish a five-year supply. Furthermore, due to the modular nature of the development plan relevant to the Borough, neither is it necessary for the LPP2 to seek to meet the area's objectively addressed needs, or its affordable housing requirement in full. Nevertheless, meeting the requirements for the settlements named above is a legitimate focus for its policies and one to which I return more fully below."

In my view, this was an exercise of planning judgment which he was entitled to make.

84. The Inspector distinguished the Mid Sussex SAP, and concluded that it did not "constitute a precedent that needed to be followed …. to achieve a sound and/or legally compliant outcome" (at IR/32).

85. At IR/33, the Inspector addressed the concerns raised by the Claimants and the potential developers about the delay in the supply of housing, and the need for further housing allocations, but he did not accept their proposed solutions, in the exercise of his judgment. He accepted the Council's submission that strategic matters would be more appropriately considered in a review of LPP1, pursuant to the 2012 Regulations and paragraph 33 of the Framework. He then set out the further factors that weighed in favour of the Council's approach, and against the approach contended for by the Claimants and the potential developers, stating at IR/34:

> "34. Moreover, LPP2 seeks to bring forward a considerable number of allocations in a Borough heavily constrained in development terms by both AONB and the Green Belt, alongside a number of other relevant designations. As a result, the delivery of LPP2's allocations would make a significant contribution to the Borough's housing supply. Consequently, the timely adoption of the LPP2 weighs in favour of it in housing supply terms, as opposed to a lengthy process which sought to retrofit remedial actions to address perceived weaknesses of LPP1 as MMs to the LPP2. These matters would, in any event, go clearly beyond the expressed scope of LPP2. Furthermore, LPP2 is not solely focused on the provision of housing and covers a wide range of land use planning issues. These considerations taken together with the modular nature of the development plan lead me to the view that the potential implications of the Framework in terms of decision-making on applications for residential development, should the Council be unable to demonstrate a 5 year supply, do not undermine the overall effectiveness of LPP2, or indicate that it has not been positively prepared."

This was clearly an exercise of planning judgment that the Inspector was entitled to make.

Summary of conclusions

86. In conclusion, I cannot accept the Claimants' submissions that the Inspector failed to consider and reach conclusions on the matters set out in Grounds 1 and 2, in particular, the status and scope of LPP2, and whether it should demonstrate that the Council's 5 year housing land supply was met and ensure the delivery of the housing requirement before the end of the plan period. These matters were considered at length in the examination. The Inspector adequately addressed those matters in the IR, bearing in mind the standard of reasons required (*CPRE Surrey v Waverley BC* [2019] EWCA Civ 1826, per Lindblom LJ at [71]-[75]).

87. The Inspector correctly applied the statutory requirements for an examination which are set out in section 20(5)(a) PCPA 2004, including the requirements of section 19 PCPA 2004 and the 2012 Regulations. He also determined whether LPP2 was sound, as required by section 20(5)(b) PCPA 2004. In my view, the headings "Assessment of Soundness" and "The scope of LPP2 and relationship to housing supply matters" make it clear beyond doubt that the Inspector was assessing the soundness of the scope of LPP2 at IR/27 to IR/37, as well as the soundness of the policies within LPP2. Contrary to the Claimants' submissions, the Inspector did not treat the scope of LPP2 as "forbidden territory" which he should not consider, even if that was the approach the Council invited him to take. I note that in *Oxted*, at [40]-[41], Lindblom LJ approved the Inspector's assessment of the submissions on the scope of the development plan, and did not suggest that the Inspector should simply have refused to consider such submissions. I consider that, in principle, an Inspector may consider issues of scope under section 20(5)(a) – (b) PCPA 2004, although the analysis in *Gladman* and *Oxted* indicates that challenges to scope will rarely succeed.

88. In my judgment, the Claimants have subjected the IR to the type of "hypercritical scrutiny" which was deplored by Lindblom LJ in *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746, at [7]. On close analysis, it is apparent that the IR does not disclose any error of law by the Inspector. This is a case in which the Claimants and the potential developers are seeking to re-run the submissions they made at the examination, and which the Inspector rejected in the IR. In reaching his conclusions, the Inspector made a series of planning judgments which cannot be challenged on an application for statutory review under section 113 PCPA 2004: see Lindblom LJ in *Oxted*, at [27].

89. For these reasons, Grounds 1 and 2 do not succeed.

Ground 3

The Inspector's Report

90. The Inspector's conclusions on the Golf Course Site are set out at IR/40-45:

"**Witley (including Milford) Requirements**

40. LPP1 includes Policy SS6, an allocation for a strategic housing site at Land opposite Milford Golf Course, which subsequently gained full planning permission for residential development in November 2021. In addition to allocating the site for housing, LPP1 removed it from the Green Belt by way of boundary alterations, which were found to be justified by exceptional circumstances. Indeed, on the basis of its assistance in meeting housing needs, its sustainable location, its degree of enclosure, its limited impact on important characteristics of Green Belt function, and that it would enable a strong Green Belt boundary, the Inspector's Report on LPP1 concludes that the site is "very well-chosen".

41. However, the SS6 site is subject to a restrictive covenant which places limitations on its development, meaning that the planning permission cannot currently be implemented. The beneficiaries of the covenant have made it clear that they do not intend to remove the restriction it imposes voluntarily. The Law of Property Act 1925 (the 1925 Act) makes provision (in s84) for application to the Upper Tribunal to discharge or modify restrictions arising under covenants where the Tribunal is satisfied that certain grounds are met. At the time of closure of the hearings in September 2022, no such application had been made.

42. Nevertheless, the site was actively promoted as an allocation during the preparation and examination of LPP1. Moreover, activity relating to the site has progressed further with full planning permission being secured, followed by work relating to the discharge of planning conditions. These actions clearly point to a willingness to secure development on the site on the part of its promoters. Against this background, it has not been demonstrated that the lack of progress in terms of a s84 application, is evidence of reduced appetite on the part of the site promoters to pursue the development of the consented scheme. Furthermore, it is clearly a reasonable position on their part to secure full planning permission for the site prior to applying to the Upper Tribunal.

43. The outcome of any application pursuant to s84 is of course, unknowable at this point. I have been provided with several decisions of the Upper Tribunal and appeals pursuant to them, which are on the whole, fact specific. None are directly analogous to the proposals relating to the SS6 site. It is also relevant that the legal opinion provided on behalf of the beneficiary of the covenant, estimates "at least 70%" chance of success for their client in any such action – which leaves around a 30% chance, even on their analysis, that the case could go the other way. Taking these considerations together leads me to the view that there is at least a reasonable prospect at this stage that

> a s84 application could be determined in favour of the development as proposed.
>
> 44. Estimates of the time it may take for a s.84 application to be determined have been suggested during the examination. At this stage, it is likely that there would be implications for the extant planning permission, particularly if the commencement of development does not take place within the relevant timeframe required by conditions (i.e. November 2023). However, if the permission were to lapse it is open to the site promoters to progress fresh planning applications, which would benefit from the site's removal from the Green Belt as a result of LPP1, and from work that has supported the extant permission.
>
> 45. It is clear, however, that the outcome of a s84 application may mean that the restrictive covenant remains in place for the remainder of the plan period and thus could inhibit the development of the site. It may also be the case, despite the position set out in their SoCG with the Council, that the site promoters decide against progressing a s84 application. Nevertheless, it is relevant that two plan reviews are likely to take place (one of LPP1 and one relating to LPP2) before the site is anticipated to deliver the bulk of its housing. This means that progress in respect of the SS6 allocation can be monitored actively and that any necessary alterations to the development plan's approach to the site in particular, and Witley's requirement more generally, can be adequately reflected in any updates. Taken together with the consideration of exceptional circumstances necessary to make Green Belt boundary alterations, which are set out in detail below, the above matters lead me to the view that it remains reasonable at this stage to include the anticipated yield of the SS6 site as a commitment against Witley's housing requirement."

Claimants' submissions

91. The Claimants submitted that the Inspector's conclusion that the Golf Course Site was developable within the plan period was irrational (as defined in *R (Law Society) v Lord Chancellor* [2019] 1 WLR 1649, per Carr J. at [98]).

92. The term "developable" is defined in the Glossary to the Framework as follows:

> "**Developable**: To be considered developable, sites should be in a suitable location for housing development with a reasonable prospect that they will be available and could be viably developed at the point envisaged."

93. The Inspector's conclusion that there was a reasonable prospect of success in an application under section 84 LPA 1925 was irrational for the following reasons.

94. The continued promotion of the Golf Course Site was not a factor that had any bearing on the prospects of success for an application pursuant to section 84 LPA 1925. Rather, the continued promotion was only relevant to whether such an application would be made.

95. The Inspector considered that the outcome of the section 84 application was "unknowable" but then, inexplicably, went on to conclude that there was a reasonable prospect of the application succeeding on the basis of the Claimants' Opinion. It was irrational to conclude that there was a reasonable prospect of the application succeeding on the basis of the Claimants' Opinion (which was the only assessment of the merits of an application before the Inspector). The Opinion concluded that there was at least a 70% chance of defeating the application. It is extremely unlikely that any Counsel's Opinion will ever predict 100%, or close to 100%, prospects of success, given the inevitable litigation uncertainties, even in the most compelling of cases. It follows that the assessment of at least a 70% prospect of success (which the Inspector took at face value and did not gainsay) was as close to a certain outcome as the Claimants were ever likely to obtain. It further follows that it was irrational to equate a less than 30% prospect of success with a '*reasonable prospect*': not only was this significantly below the balance of probabilities, but, properly understood, it was an assessment that the application was most likely doomed.

96. Further, the possibility of plan reviews before the end of the plan period was no answer as the task for the Inspector was to determine wither the Golf Course Site was developable now.

Defendants' submissions

97. The Defendants submitted that the question of whether, and if so at what rate, the Golf Course Site might provide housing units during the life of LPP2 was a matter of planning judgment for the Inspector.

98. The Claimants' approach failed to read the Inspector's reasons as a whole. As well as the matters referred to by the Claimants, it can be assumed that he took into account the report of the Inspector examining LPP1 and all the other written and oral evidence before him.

99. The continued promotion of the Golf Club Site was relevant to the question whether an application pursuant to section 84 LPA 1925 would be made.

100. The Inspector acknowledged that the outcome of an application to discharge was uncertain, and it could go either way. However, on the basis of the evidence before him, he was entitled to conclude that there was a reasonable prospect that an application to discharge would succeed. His reasons for concluding that the Golf Course Site should remain as a commitment against Witley's housing requirement were rational and reasonable.

Conclusions

101. In my judgment, the Claimants' analysis of the Inspector's reasoning did not take into account the entirety of the evidence before the Inspector which he can be assumed to have taken into account when reaching his conclusion. He was not required to reference every aspect of the evidence in the IR to meet the required standard of reasons (see *South Bucks DC* and *CPRE Surrey*).

102. Importantly, the Inspector's starting point, at IR/40 was the allocation of the Golf Course Site for 180 dwellings in LPP1, despite the existence of the restrictive covenant. At the examination of LPP1, Inspector Bore received representations from the Claimants, including letters from their solicitors and leading Counsel's opinion dated 6 July 2017, which advised that it was "highly unlikely" that an application to discharge or modify the restrictive covenant would succeed on the grounds of public interest since housing requirements could be met elsewhere. In response, the Council submitted two Notes from Mr Beglan of Counsel, which agreed with the representations made by Crown Golf to the effect that it was "very likely" that the restrictive covenant would be released. Inspector Bore concluded that there was a reasonable prospect of a discharge or variation of the restrictive covenant.

103. Under Policy SS6, the Golf Course Site was allocated for 180 dwellings, to be delivered over the course of the plan period. The Golf Course Site was also removed from the Green Belt. Mr Bore set out the reasons for these decisions as follows:

> "Milford
>
> 119. Milford is proposed for removal from the Green Belt. As discussed above, this is justified by exceptional circumstances as it would enable the village to cater for modest development needs.
>
> 120. It is also proposed to release land from the Green Belt for strategic housing site SS6, land opposite Milford Golf Course, which is allocated for around 180 dwellings. Although partially serving Milford, this site is also well related to Godalming. It is relatively flat and well-enclosed and development would have very little effect on the wider landscape or on the openness of the Green Belt other than the site itself. The Green Belt Review pointed towards the potential for release of this land and the setting of a long-term village development boundary in conjunction with the removal of the whole village from the Green Belt.
>
> 121. In the pre-submission consultation version of the plan, this land was shown as a strategic site for housing but was not removed from the Green Belt, the expectation being that the Green Belt boundary would be adjusted later, in Local Plan Part 2. However, it is not a sound approach to allocate a strategic site for housing but leave it in the Green Belt as this would signal mixed intentions and undermine the value of the housing allocation. MM12 modifies Policy RE2 to remove the land from

> the Green Belt; this is consistent with the housing allocation and enables the site to be brought forward earlier to help meet the housing requirement.
>
> 122. There is an 88 year old covenant on the land limiting development to 27 dwellings. Covenants are not normally planning matters, but it has been suggested that, were delivery restricted to only 27 dwellings, this would not represent the exceptional circumstances required to support the change in the Green Belt boundary. However, the need for housing land to be made available in the public interest and the strategic exceptional circumstances for Green Belt release point to a reasonable prospect of the covenant being varied, modified or discharged under s84 of the Law of Property Act 1925 to enable the full capacity of the site to be achieved.
>
> ……
>
> 125. Having regard to the characteristics of the site opposite Milford Golf Course, the pressing need to provide for additional housing, the ability of the site to help towards meeting the housing needs of both Godalming and Milford, the sustainable location of the site, the fact that it is well enclosed and would enable a strong new Green Belt boundary to be established, and the limited impact that the site's release would have on the important characteristics of Green Belt function, it is evident that this is a very well-chosen site and its release from the Green Belt is justified by exceptional circumstances."

104. In my view, the Inspector was entitled to assess the likelihood of an application to discharge the restrictive covenant in IR/41 and IR/42 since, in the absence of any application, the development would not proceed. Indeed the Claimants, in their statement under Matter 6, relied on the fact that nearly four and a half years had passed since the LPP1 Inspector's report and no application had been made to the Upper Tribunal by the owner of the Golf Course Site. On 27 September 2022, at the end of the examination of LPP2, the Council and Stretton Milford Limited submitted a Statement of Common Ground which confirmed the intention to apply to the Upper Tribunal to discharge the restrictive covenant in the near future, subject to counsel's advice and expert evidence. This was part of the body of evidence supporting the Inspector's conclusion in IR/42 that the promoters were intending to pursue the development.

105. On my reading, the first sentence of IR/43 merely acknowledged that no one could be certain, at that time, how the Upper Tribunal would determine a future application to discharge. In my view, it was appropriate for the Inspector to acknowledge that obvious fact, before proceeding to express his view on the prospects of success.

106. In considering the prospects of success, I consider it is highly likely that the Inspector took into account all the evidence and submissions before him, including the updating Note from Mr Beglan, dated 19 August 2022, which was provided at the request of the

Inspector. Mr Beglan advised favourably on the prospects of success on an application to discharge, in the following terms:

> "8. As to modification, ultimately that is a decision for the upper tribunal. However, in the Council's view there are a number of features in this case which militate strongly in favour of an appropriate modification being made, in light of the clear public interest that is impeded by strict adherence to the terms of the restrictive covenant. They have largely been set out before *[FN 4: This note should be read in conjunction with the Council's two previous notes on this issue, and is intended to be supplemental to those notes.]* and have not changed to the detriment of the Council's position. The Council continues to consider that the public interest case is compelling. The relevant factors include:
>
> a. MGC benefits from its allocation and status as a strategic site (i.e. necessarily one of importance to both the overall integrity of the local plan and to the provision of appropriate levels of housing in Witney and Milford).
>
> b. That allocation was made on the basis that exceptional circumstances had been demonstrated. The connection of such a case to a strong public interest is both clear and obvious.
>
> c. Inspector Bore concluded, for the reasons he stated, that the site was very well chosen.
>
> d. The development will provide a substantial number of new homes. Against that, the only claim in terms of an enforceable covenant is that one property will suffer significant detriment.
>
> e. MGC now benefits from full planning permission, without any suggestion that there is a significant impediment to it being built out if the covenant is suitably modified.
>
> f. The "reasonable user" part of the statutory test is therefore, in the Council's view, highly likely to be taken as satisfied.
>
> g. The significance of the detriment mentioned above will in any event be mitigated by a number of factors including the various conditions which apply to the Permitted Scheme, and the general requirement of high quality design.
>
> h. In that respect, in granting the planning permission, the Council was of the view that it would not result in significant (or even material) detriment to Upper Sattenham in terms of its residential amenity.
>
> i. The covenant is old, and was not imposed during the purchase of the property by the Houses. The public interest in enforcing

> contractual rights (as opposed to property rights) therefore does not have full force in this case. The public interest in enforcing property rights remains.
>
> j. The covenant does permit significant development on the land. It is a prohibition designed to limit, not prelude, development of the land."

107. In my view, it is highly unlikely that the Inspector misunderstood the prospects of success given in the Opinion from Ms Windsor of Counsel, on behalf of the Claimants. She clearly stated in paragraph 1 "In my opinion, Mr and Mrs House are very likely to be able to defeat the proposed application…". However, she could not be 100% certain of the outcome, given the nature of the statutory tests to be applied which require the Upper Tribunal to exercise a judgment. The Inspector correctly read her Opinion to mean that there was a 30% chance that the application to discharge would succeed.

108. In deciding whether the site was developable, the Inspector had to form an opinion as to whether there was "a reasonable prospect that [it] will be available and could be viably developed at the point envisaged" (i.e. within the plan period). It can be assumed that, in forming his opinion, he had regard to the evidence and submissions before him. In concluding that the Golf Course Site was developable, he made an exercise of planning judgment, which was open to him on the evidence. In my judgment, the high threshold for an irrationality challenge has not been reached.

109. Finally, the Claimants are correct to point out that the Inspector did not place any reliance on the compulsory powers in section 203 of the Housing and Planning Act 2016 as the Council confirmed its current position was that it did not intend to exercise that power (see Note of Mr Beglan dated 19 August 2022). There was insufficient evidence before the Inspector that the statutory requirements (including purchase of the land by the local authority) would be met.

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

Final conclusions

111. For the reasons set out above, the claim for statutory review is dismissed.