Neutral Citation Number: [2015] EWHC 1173 (Admin)

Case No: CO/4594/2014

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2015

Before:

MR JUSTICE HOLGATE

- -

Between:

WOODCOCK HOLDINGS LIMITED	**Claimant**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**First Defendant**
MID-SUSSEX DISTRICT COUNCIL	**Second Defendant**

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- -

Christopher Boyle Q.C. (instructed by **Russell-Cooke LLP**) for the **Claimant**
Richard Honey (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 25th and 26th February

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Judgment

Mr. Justice Holgate:

Introduction

1. The Claimant, Woodcock Holdings Limited, challenges under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") the decision of the First Defendant, the Secretary of State for Communities and Local Government, dated 4 September 2014 to dismiss its appeal against the refusal by the Second Defendant, Mid-Sussex District Council ("the Council"), of outline planning permission for 120 dwellings, community facility/office space, care home and retail units, at Kingsland Laines, Reeds Lane/London Road, Sayers Common, West Sussex.

2. The Claimant's appeal was heard by an Inspector at a planning inquiry between 8 and 11 October 2013. Originally, the Inspector was going to determine the matter. However, by a letter to the parties from the Planning Inspectorate ("PINS") dated 1 November 2013, the Secretary of State directed that he would decide the appeal himself because it "involves proposals which raised important or novel issues of

development control, and/or legal difficulties". The letter did not explain what those issues or *legal* difficulties might be.

3. The Inspector produced a report to the Secretary of State dated 6 January 2014 in which she firmly recommended that the appeal be allowed and planning permission granted subject to conditions. However, although in his decision letter[1] the Secretary of State agreed with the Inspector's assessment of the merits of the proposal, he dismissed the appeal because the proposal conflicted with, and was premature in relation to, the emerging Hurstpierpoint and Sayers Common 2031 Neighbourhood Plan ("the Neighbourhood Plan") prepared by Hurstpierpoint and Sayers Common Parish Council ("the Parish Council").

4. The appeal site comprises 5.85 hectares of land on the north-western edge of Sayers Common. The southern part of the site contains a large detached house, Kingston Laines and its associated gardens and outbuildings, including stables. The remainder of the site comprises open fields used as paddocks and pasture (IR 2.2). The south western corner of the site abuts existing properties and a recreation ground. To the east, the site abuts residential properties and their gardens. To the west lies a wet woodland area and to the north open land rising in shallow terraces towards a former priory, now occupied by a "specialist education centre" (IR 2.3).

The issues at the public inquiry into the appeal

5. The Council refused the application on five grounds covering (1) the effect of the scheme on the setting of a Grade II listed building (a pair of semi-detached cottages known as Aymers and Sayers), (2) surface water drainage and flooding, (3) the sustainability of the location, (4) the impact of the proposal on highways and (5) the effect of the proposal upon local infrastructure, services and facilities.

6. By the time the inquiry opened, the Council had withdrawn reasons for refusal (3) to (5), including the objection to the sustainability of the location for housing (IR 1.5). The highway objection had been overcome as a result of additional survey work. The contributions from the development contained in a section 106 agreement removed the Council's concerns over the sustainability of the location and effects upon local infrastructure and services (footnote 5 at IR 1.5). That agreement secured the contributions sought by the Council and West Sussex County Council in relation to matters such as education facilities, libraries, children's play space, formal and informal sports facilities and community buildings. The contribution towards community buildings was to be used towards extending and improving the village hall or replacement facilities. The section 106 agreement also required 30% of the residential units to be provided as affordable housing according to a mix of tenure agreed with the Council (IR 11.9 to 11.13). The Inspector concluded that the contributions and obligations secured by the agreement complied with Regulation 122

[1] I will follow the convention of using the prefixes IR and DL to refer to paragraphs in the Inspector's report and the Defendant's decision letter respectively.

of the Community Infrastructure Levy Regulations 2010 (SI 2010 No. 948) (IR 11.16). The Defendant accepted that conclusion (DL 18).

7. Accordingly, at the start of the inquiry the Council was relying upon only the first two of its reasons for refusal, the listed building and drainage/flooding issues. It was represented by Counsel and called two experts on these subjects. However, following cross-examination, the Council confirmed that it was no longer pursuing its opposition in relation to either matter and no longer opposed the grant of planning permission (IR 1.5).

8. Consequently, opposition to the scheme at the inquiry was led by the Parish Council, supported by a number of local residents. The Parish Council's case was set out in section 7 of the Inspector's report. In summary, its main objections concerned effect upon the setting of the listed building, the non-sustainability of the location owing to the inadequate range of services in the village and nearby, and adverse effect upon the character of the settlement. The Parish Council also relied upon its draft Neighbourhood Plan (IR 4.13, 8.27 and 9.1).

9. The Inspector's summary of the Statement of Common Ground agreed between the Claimant and the District Council (IR 5.1) included the following important points which supported the appeal:

   (i) The Council is unable to demonstrate a five year supply of housing land, the agreed supply lying between 1.82 and 2.35 years;

   (ii) There is a demonstrable housing need within the Parish;

   (iii) The site can be drained satisfactorily and will not be at risk of flooding or increase the risk of flooding elsewhere;

   (iv) "The site is in a sustainable location for housing, with good access to a range of local facilities and services". The section 106 agreement had addressed the Council's concern;

   (v) "Although the development would encroach into countryside on the edge of the village, the site is well contained and there would be no unacceptable landscape or visual impacts";

   (vi) "The proposed residential density of 25 dwellings per hectare is appropriate, given the surrounding pattern of development";

   (vii) "Taking account of the proposed community and retail facilities proposed, the level of development is appropriate in the context of the village of Sayers Common";

   (viii) Subject to the planning obligation, the appeal scheme would deliver all necessary infrastructure.

10. In paragraph 4.15 of the Statement of Common Ground it was also agreed that:-

> "It is common ground that only limited weight can be attributed to [the draft Neighbourhood Plan], as it has not been examined or subject to referendum

> (likely to be Autumn 2013), and it maybe subject to considerable change. Consequently, at this time the appeal proposal must be assessed against the Development Plan and relevant material planning considerations, including the Council's lack of a five year housing land supply of deliverable housing sites."

In IR 12.46 the Inspector concluded that, applying the principles in paragraph 216 of the National Planning Policy Framework, "relatively limited weight can be given to the [draft Neighbourhood Plan], since its adoption process still has quite a way to go, and it could be that its policies change along the way" (see also IR 4.13 to like effect).

The procedure followed between the inquiry and the decision letter

11. In view of the Council's withdrawal of its objections to the proposal and its substantial agreement with the merits of the scheme, the Defendant's letter of 1 November 2013 recovering the determination of the appeal from the Inspector, came as a surprise to the Claimant. The planning consultant acting for the Claimant, Mr. Tim Rodway, sent an email to PINS asking why the Defendant had recovered the appeal for his own determination.

12. The reply from PINS dated 19 November 2013 merely stated that "the important and novel issue of development control is the interaction of the appeal with the emerging neighbourhood plan for Hurstpierpoint which is at a relatively advanced stage." On 22 November 2013 PINS announced that the Defendant would issue his decision letter by 8 April 2014.

13. On 22 November 2013 Mr. Rodway sent a further email stating that the proposal had not been refused on prematurity grounds and the main parties to the appeal had agreed that the principle of housing on the appeal site was acceptable, taking into account the lack of a 5 year housing land supply within Mid-Sussex District. He added that because the two site-specific objections had been resolved, the Council was no longer resisting the appeal.

14. On 6 March 2014 the Secretary of State published for the first time national Planning Practice Guidance ("PPG") to supplement the National Planning Policy Framework ("NPPF") which had been published on 27 March 2012. The PPG gave guidance on the subject of prematurity in relation to emerging development plans, including neighbourhood plans

15. It appears that in a letter to the parties dated 20 January 2014 (which is not before the Court) the Secretary of State announced that he would not determine the Claimant's appeal yet because he had decided to consider it alongside two other matters, a recovered appeal at Little Park Farm and Highfield Drive, Hurstpierpoint and a called-in planning application at College Lane, Hurstpierpoint. On 17 March 2014 the Secretary of State gave the Appellant, the Council, and the Parish Council an opportunity to make written representations on the effect of the new PPG on the Claimant's appeal.

16. Between 27 March and 7 April 2014 there followed an exchange of written representations by planning consultants acting on behalf of the Claimant and the Parish Council.

17. Eventually on 4 September 2014 the Secretary of State's issued his decision on the Claimant's appeal together with his decisions on the two other matters he had considered in tandem. All three cases were the subject of reports from the same Inspector and decision letters prepared by the same officer. The Secretary of State accepted the Inspector's recommendation to reject the proposal for 81 houses on the site at College Lane, Hurstpierpoint, not only because of unacceptable impact on a Local Gap designated in the Mid Sussex Local Plan and consequent lack of sustainability (DL 21), but also prematurity in relation to the draft Neighbourhood Plan. On the proposal for 157 houses at Little Park Farm and Highfield Drive, Hurstpierpoint, the Defendant decided to grant permission, relying upon the allocation of those sites in the draft Neighbourhood Plan and also stating that the development was sustainable (DL 18, 21 and 23).

Planning Policies

National Planning Policy Framework

18. In order to "boost significantly the supply of housing" local planning authorities are required by paragraph 47 of the NPPF to "identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5%....to ensure choice and competition in the market for land."

19. Paragraph 49 provides:-

> "Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites."

20. The presumption in favour of sustainable development is contained in paragraph 14:-

> "At the heart of the National Planning Policy Framework is a **presumption in favour of sustainable development**, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> For **plan-making** this means that:
>
> • local planning authorities should positively seek opportunities to meet the development needs of their area;
>
> • Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
>
> – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this

> Framework taken as a whole; or
>
> – specific policies in this Framework indicate development should be restricted.
>
> For **decision-taking** this means:
>
> • approving development proposals that accord with the development plan without delay; and
>
> • where the development plan is absent, silent or relevant policies are out of date, granting permission unless:
>
> – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
>
> – specific policies in this Framework indicate development should be restricted."

21. So where a local planning authority cannot demonstrate a five year supply of housing land, policies "for the supply of housing" are treated as being out of date, so that the presumption in favour of sustainable development in paragraph 14 is engaged. Mr. Honey for the Secretary of State accepted that the trigger in paragraph 49 applies just as much to "housing supply policies" in a neighbourhood plan which has been "made" (i.e. formally adopted) as to other types of statutory development plan. In my judgment that must be correct.

22. In this context paragraph 12 of the NPPF should be noted:-

> "This National Planning Policy Framework does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise. It is highly desirable that local planning authorities should have an up-to-date plan in place."

23. Paragraph 17 of the NPPF sets out twelve "core land-use planning principles", the first of which requires that planning should:-

> "be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area. Plans should be kept up-to-date, and be based on joint working and co-operation to address larger than local issues. They should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency"

The third core principle requires planning to:-

> "proactively drive and support sustainable economic development to deliver the homes, business and industrial units, infrastructure and thriving local places that the country needs. Every effort should be made objectively to identify and then meet the housing, business and other development needs of an area, and respond positively to wider opportunities for growth. Plans should take account of market signals, such as land prices and housing affordability, and set out a clear strategy for allocating sufficient land which is suitable for development in their area, taking account of the needs of the residential and business communities"

24. Mr. Honey emphasised those parts of the NPPF which attach importance to neighbourhood plans and planning (e.g. paragraphs 183 to 185). Paragraph 198 provides that "where a planning application conflicts with a neighbourhood plan that has been brought into force, planning permission should not normally be granted". However, the Secretary of State accepts through Mr. Honey, that paragraph 198 neither (a) gives enhanced status to neighbourhood plans as compared with other statutory development plans, nor (b) modifies the application of section 38(6) of the Planning and Compulsory Purchase Act 2004 ("the 2004 Act"). Moreover, housing supply policies in neighbourhood plans are not exempted from the effect of paragraph 49 and the presumption in paragraph 14 of the NPPF (see paragraph 21 above).

25. Paragraph 216 of the NPPF deals with the weight which may be given to an emerging plan:-

> "From the day of publication, decision-takers may also give weight to relevant policies in emerging plans according to:
>
> - the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given);
>
> - the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given); and
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> - the degree of consistency of the relevant policies in the emerging plan to the policies in this Framework (the closer the policies in the emerging plan to the policies in the Framework, the greater the weight that may be given)."

Planning Practice Guidance

26. The PPG contains guidance on the circumstances in which it may be justifiable to refuse planning permission on the grounds of prematurity:-

> "Annex 1 of the National Planning Policy Framework explains how weight may be given to policies in emerging plans. However in the context of the Framework and in particular the presumption in favour of sustainable development – arguments

> that an application is premature are unlikely to justify a refusal of planning permission other than where it is clear that the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, taking the policies in the Framework and any other material considerations into account. Such circumstances are likely, but not exclusively, to be limited to situations where both:
>
> a) the development proposed is so substantial, or its cumulative effect would be so significant, that to grant permission would undermine the plan-making process by predetermining decisions about the scale, location or phasing of new development that are central to an emerging Local Plan or Neighbourhood Planning; and
>
> b) the emerging plan is at an advanced stage but is not yet formally part of the development plan for the area.
>
> Refusal of planning permission on grounds of prematurity will seldom be justified where a draft Local Plan has yet to be submitted for examination, or in the case of a Neighbourhood Plan, before the end of the local planning authority publicity period. Where planning permission is refused on grounds of prematurity, the local planning authority will need to indicate clearly how the grant of permission for the development concerned would prejudice the outcome of the plan-making process."

27. The PPG addresses the question "Can a Neighbourhood Plan come forward before an up-to-date Local Plan is in place?" as follows:-

> "Neighbourhood plans, when brought into force, become part of the development plan for the neighbourhood area. They can be developed before or at the same time as the local planning authority is producing its Local Plan.
>
> A draft neighbourhood plan or Order must be in general conformity with the strategic policies of the development plan in force if it is to meet the basic condition. A draft Neighbourhood Plan or Order is not tested against the policies in an emerging Local Plan although the reasoning and evidence informing the Local Plan process may be relevant to the consideration of the basic conditions against which a neighbourhood plan is tested.
>
> Where a neighbourhood plan is brought forward before an up-to-date Local Plan is in place the qualifying body and the local planning authority should discuss and aim to agree the relationship between policies in:
>
> - the emerging neighbourhood plan

- the emerging Local Plan
- the adopted development plan

with appropriate regard to national policy and guidance."

28. The PPG also addresses the question "What weight can be given to an emerging neighbourhood plan when determining planning applications":-

> "Planning applications are decided in accordance with the development plan, unless material considerations indicate otherwise. An emerging neighbourhood plan may be a material consideration. Paragraph 216 of the National Planning Policy Framework sets out the weight that may be given to relevant policies in emerging plans in decision taking. Factors to consider include the stage of preparation of the plan and the extent to which there are unresolved objections to relevant policies. Whilst a referendum ensures that the community has the final say on whether the neighbourhood plan comes into force, decision makers should respect evidence of local support prior to the referendum when seeking to apply weight to an emerging neighbourhood plan. The consultation statement submitted with the draft neighbourhood plan should reveal the quality and effectiveness of the consultation that has informed the plan proposals. And all representations on the proposals should have been submitted to the local planning authority by the close of the local planning authority's publicity period. It is for the decision maker in each case to determine what is a material consideration and what weight to give to it."

Ministerial Statement on Neighbourhood Planning published on 10 July 2014

29. DL 7 mentioned the Ministerial Statement on Neighbourhood Planning. Having referred to the Government's "clear policy intention when introducing neighbourhood planning….to provide a powerful set of tools for local people to ensure that they get the right types of development for their community", the Statement explained that the Secretary of State "is therefore keen to give particular scrutiny to planning appeals in, or close to, neighbourhood plan areas to enable him to consider the extent to which the Government's intentions are being achieved on the ground". To that end, the Statement amended the Secretary of State's criteria for considering the recovery of decisions on planning appeals, so as to include proposals for more than 10 dwellings in areas where a neighbourhood plan has either been submitted to the local planning authority or "made" (i.e. formally approved).

30. Mr. Honey did not suggest that the Ministerial Statement should be treated as representing a change in policy. It does not purport to alter the NPPF. Indeed, it reflects the language of the NPPF (e.g. paragraph 184). Plainly, the Statement merely sets out the policy background as part of the explanation for making a *procedural* change, namely to the criteria for recovery of decisions.

Mid-Sussex Local Plan

31. At the time of both the inquiry and the decision letter the statutory development plan comprised the "saved policies" of the Mid-Sussex Local Plan adopted in May 2004. The plan covered a period ending in 2006. The appeal site was located within a "Countryside Area of Development Restraint" to which policy C1 applied. The policy resists new development, subject to certain exceptions, in order to protect the countryside for its own sake. However, given the significant shortfall in the five year land supply, the Inspector concluded that policies for the supply of housing land in the local plan, including policy C1, had to be treated as out of date (IR 12.2). The Secretary of State agreed with that conclusion (DL8).

32. A policy which has the effect of restricting development in the countryside, including housing development, is a "housing supply policy" to which paragraph 49 of the NPPF may apply (see e.g. Cotswold D.C. v Secretary of State [2013] EWHC 3719 (Admin) para 72; South Northamptonshire Council v Secretary of State [2014] EWHC 573 (Admin) para 47; Hopkins Homes Ltd v Secretary of State [2015] EWHC 132 (Admin) para 38). As Ouseley J held in the South Northamptonshire case, policies which restrain development in certain areas are the "obvious counterparts" to policies designed to provide for an appropriate distribution and location of development elsewhere within the plan area.

Draft Mid-Sussex District Plan

33. On 24 July 2013 the Council submitted the Draft Mid-Sussex District (running up to 2031) for examination by an Inspector appointed by the Secretary of State. However, on 2 December 2013 the examining Inspector issued a letter criticising the evidence base for the draft plan and recommended the plan's withdrawal because it was likely to be found "unsound". The Council formally withdrew the plan on 27 May 2014.

Hurstpierpoint and Sayers Common 2031 Neighbourhood Plan

34. At the time of the inquiry into the Claimant's appeal, a draft of the Neighbourhood Plan had been published by the Council for consultation ending on 20 May 2013. Subsequently, in March 2014 the "submission" version of the plan was submitted to the local planning authorities for "examination" and further public consultation took place in April. The Examiner did not consider it necessary to hold a hearing into the draft plan. His report was issued on 23 September 2014 and therefore could not be taken into account by the Secretary of State in his decision letter of 4 September 2014. The District Council accepted the Examiner's recommendations and a statutory referendum was held on 12 February 2015. As a result the District Council formally "made" the Neighbourhood Plan, at which point it became part of the statutory development plan. Thus, the outcome of the examination process was unknown when the decision on the appeal was made.

35. A copy of the submission draft of the neighbourhood plan was provided to the Secretary of State during the representations made in the spring of 2014. The plan's "vision statement" and objectives placed emphasis upon "keeping the village feel and sense of place" (page 4). Basing themselves upon a study undertaken by the District Council in October 2011, the Parish Council's plan estimated that within the parish

between 140 and 395 new houses would need to be built, and opted for a target "in the higher end of this range" (page 12).

36. Paragraph 5.3 of the submission draft plan (2014) referred to an appraisal of 25 housing sites carried out for the Parish Council. As a result, policy H3 of the plan proposed four specific sites in Hurstpierpoint for 252 houses in total. The 2014 draft acknowledged that planning permission had already been granted for 95 houses on two of those sites at Chalkers Lane, even though the 2013 draft of the neighbourhood plan had proposed only 65 houses on those sites. The draft allocations for Hurstpierpoint also included 17 houses at Highfield Drive and 140 houses at Little Park (see paragraph 17 above). Neither when the Secretary of State granted permission on 4 September 2014 for the Highfield Drive/Little Park sites, nor when the Chalkers Lane sites were permitted, does it appear that prematurity in relation to the neighbourhood plan process was of any concern. By the time the Examiner came to issue his report to the District Council on 23 September 2014, the "draft" allocations for 252 dwellings in Hurstpierpoint were all a *fait accompli* because they had all been granted planning permission. In particular, the Defendant granted permission for 157 dwellings, or about 62% of the Hurstpierpoint total, in a decision issued on the same day as his dismissal of refuse the Claimant's appeal for 120 units at Sayers Common on the grounds of prematurity, notwithstanding that there had been objections to the allocation of the Hurstfieldpoint sites (see paragraph 45(ii) below).

37. For Sayers Common paragraph 5.3 of the 2014 draft plan stated "no sites identified but allow for 30 to 40" (this was also reflected in draft policy H 4).

38. Accordingly, the 2014 draft plan provided a total of between 282 and 292 houses for the parish during the period to 2031. As Mr. Boyle QC for the Claimant pointed out, if 120 houses were to be provided in Sayers Common, rather than 30 or 40, the total number of new dwellings within the parish would amount to 372, still below the upper estimate in the draft plan that up to 395 new dwellings would be needed for the parish.

39. Policy H1 sets out criteria for the location of housing development in Hurstpierpoint. Policy H2 did likewise for Sayers Common by providing that new housing development "will be permitted in areas which: (a) positively enhance the existing settlement pattern of the village and (b) can enhance the flood and drainage management in the village". Policy 3 allocated housing sites in Hurstfieldpoint.

40. Policy H4 of the submission draft of the neighbourhood plan dealt with housing provision in Sayers Common as follows:-

> "New housing at Sayers Common will be permitted once the existing drainage infrastructure issues have been resolved to remove the incidence of localised flooding. Within the Plan period the village will accommodate 30 to 40 new homes. A review and appraisal of deliverable housing sites will be undertaken at an early stage in the Plan period."

Thus, the 2014 draft of the Neighbourhood Plan recognised that the policy for Sayers Common would need to be reviewed in the relatively near future even if the plan were to be formally approved.

41. Mr. Honey drew attention to pages 13 - 14 and paragraphs 5.2 and 5.4 of the draft submission version of the neighbourhood plan explaining the rationale for the Parish Council's approach to the scale and distribution of housing in the parish. In particular, it was stated that any new development in Sayers Common would have to take into account constraints affecting local services, such as schools, shops, healthcare and transport connections. Development in the village was also said to be constrained by the inadequate capacity of the wastewater and surface water drainage system and the need for highway improvements.

42. Virtually all of the land outside the current built up area of Sayers Common lies within areas to which either policy C1 or C3 of the draft neighbourhood plan applies. Policy C3 protects defined local gaps. The Claimant's site was subject not to Policy C3 but to Policy C1 which provides:-

> "Development, including formal sports and recreation areas, will be permitted in the countryside, defined as the areas outside the built-up boundaries on the Policies Maps, where:
>
> - It is necessary for the purposes of agriculture, or some other use which has to be located in the countryside;
> - It maintains or where possible enhances the quality of the rural and landscape character of the Parish area;
> - It is supported by a specific policy reference elsewhere in this Plan."

43. Mr. Honey accepted that if paragraph 49 of the NPPF is interpreted as applying to draft as well as adopted development plans, policy C1 of the neighbourhood plan should have been treated in the decision as a "housing supply policy", along with policies H1 to H4.

44. The scale and distribution of housing in the draft neighbourhood plan was the subject of objections, which were summarised in the "Consultation Statement" on the 2013 draft of the neighbourhood plan. The Parish Council sent that document to the Secretary of State as part of its post-inquiry representations. The 2013 draft plan had proposed a distribution of housing within the parish broadly similar to that contained in the 2014 draft. Policy H1 set a housing target of 230 to 255 new homes for the parish overall, with most of the allocations being proposed at Hurstpierpoint and only 30 to 40 dwellings at Sayers Common without identifying any allocations (policy H7).

45. In summary, the objections to the draft neighbourhood plan included the following points:-

(i) The Claimant contended that the housing figure for the parish should be "revised upwards sharply to ensure that it covers a 20 year period". It explained why constraints to development in Sayers Common would be resolved by the Claimant's appeal proposal and therefore did not justify the proposed cap on development. There was an identified housing need within the parish (at the time of the appeal 45 households on the District Council's

housing register with connections to Sayers Common and 214 households for Hurstpierpoint). Sayers Common could accept up to 120 houses;

(ii) Thakeham Homes contended that the neighbourhood plan should not be based upon the figures produced by the District Council to which there was a large level of objection. The future housing need figures in the neighbourhood plan were flawed and did not take account of projected household growth. A study produced by consultants indicated a minimum requirement of 700 dwellings for the parish. Objections were made to the proposed allocations at Hurstpierpoint, namely Chalkers Lane, Highfield Drive and Little Park;

(iii) Rydon Homes submitted that the plan's proposed allocation of new housing should be considered a minimum figure and there should be flexibility to accommodate extensions shown to be sustainable.

46. In relation to Sayers Common, the Parish Council responded in paragraph 8.58 of the Consultation Statement that policy H4 of the submission draft of the neighbourhood plan reflected the same housing numbers as in policy H7 of the 2013 draft, but sites had not been identified owing "to infrastructure issues in the village, notably drainage and surface water flooding". Paragraph 8.59 referred to the need to address "sustainability issues for the village".

47. In response to the Secretary of State's invitation of 17 March 2014, the Claimant and the Parish Council made representations on the draft neighbourhood plan and the weight to be attached to it in the light of the PPG. In its representations the Claimant submitted (in summary):-

(i) When determining the weight to be given to the neighbourhood plan it was relevant for the Secretary of State to consider not only the stage reached by the plan but also the extent to which there were unresolved objections and conflict with policies of the NPPF. Accordingly, the Claimant contended that no weight should be given to the draft plans;

(ii) In the absence of an up-to-date strategic housing policy for the District Council's area, "the neighbourhood plan has no adopted housing policy to conform with". The Claimant relied upon the recommendation of the Examiner into another neighbourhood plan within Mid-Sussex (Slaugham), namely that in the absence of strategic housing policies it would be useful for the parish to make an "objective assessment" of their housing needs. Hurstpierpoint and Sayers Common Parish Council had not made any such assessment;

(iii) The proposal in policy H4 of the neighbourhood plan to provide a maximum of only 30 to 40 new homes in Sayers Common conflicted with the "flexibility" required by the NPPF, especially in the absence of an objective assessment of housing needs (relying upon the Examiner's Report on the Slaugham plan);

(iv) In the absence of strategic housing numbers or an objective assessment of housing need for the parish, the draft plan should not determine the number of new homes for the parish overall and new housing in Sayers Common should

not be capped at 30 – 40 dwellings (following the approach taken on the Ascot, Sunninghill and Sunningdale Neighbourhood Plan);

(v) The Claimant's objections to the neighbourhood plan had explained that the appeal proposal would overcome the infrastructure constraints for Sayers Common and that there was no justification for the cap.

48. In its representations to the Secretary of State the Parish Council submitted (in summary):-

(i) The draft neighbourhood plan should carry "significant weight" "having regard to the advanced progress of the Neighbourhood Plan". The Consultation Statement showed there to be general support for the plan and "very few areas of objection";

(ii) The proposal to provide 282-292 new homes within the parish between 2011 to 2031 represented a significant contribution to sustainable development, both in real terms and relative to the size of the parish;

(iii) Delivery would best be achieved by the identification of sites primarily in and around Hurstpierpoint and "a non-site specific allocation of some 30 – 40 dwellings in Sayers Common". This would strike the appropriate balance for sustainable development;

(iv) The appeal proposal conflicted with policies C1, H1 and H4 of the draft neighbourhood plan because it proposed substantially more than the 30 or 40 dwellings laid down in the draft plan for Sayers Common in order to protect the environmental character and feel of the village. This conflict significantly weighed against the proposal.

49. It is apparent from paragraphs 47 and 48 above that there was a head-on conflict between the Parish Council and the Claimant (and other developers) as to the approach which the plan should take to the distribution of development at Hurstpierpoint and in particular at Sayers Common. As to the latter, there was an issue as to whether the proposed allocation of 30 – 40 dwellings should be regarded as a cap, which if substantially exceeded would result in harm to the character of the village. It is therefore plain that the significance of the outstanding objections to the draft plan was a substantial issue before the Secretary of State in the appeal.

Inspector's Report and the decision letter on the planning appeal

50. The Inspector's conclusions may be summarised as follows:-

(i) The main consideration in the appeal was whether the proposal constituted sustainable development for the purposes of the NPPF (IR 12.3);

(ii) The appeal site is for the most part visually enclosed (IR 12.4). The effect on the landscape character would be moderate/minor, which would be acceptable in planning terms (IR 12.5);

(iii) The proposed density of 25 dwellings per hectare is appropriate, given the surrounding pattern of development. The care/nursing home and community

hall buildings, although larger structures, need not undermine the established character and appearance of the area, subject to control of the detailed design (IR 12.6);

(iv) Any impact on character and appearance of the area in general would be more than compensated for by the proposed new planting (IR 12.7);

(v) The proposed development would not undermine the significance of the listed building (IR 12.16). The proposal would not affect any historic component of the setting of the listed building. Any harm to the listed building would be less than substantial (IR 12.18);

(vi) The proposed land drainage system would be effective to overcome flooding and drainage problems at the site and would be likely to help address flooding problems experienced on adjoining sites (IR 12.25);

(vii) The proposed access arrangements and effects on highway safety would be acceptable (IR 12.27 to 12.29);

(viii) Residents of Sayers Common have access to a reasonable range of services and facilities. It would be appropriate to permit further development at the village, there being a range of services and facilities to support an increased population and also because the development would have the potential to help maintain the viability of those services and facilities (IR 12.41). The District Council's Rural Issues Background Paper (2009) identified Sayers Common as being suitable for 30 - 100 dwellings over the plan period, with the potential to accommodate development closer to the higher figure. The 2009 Paper also stated that future development could generate sufficient demand for a local shop to become viable and thus to create a more distinct centre allowing the village to become more self-sufficient (IR 12.42).

(ix) The locational characteristics of the site are acceptable as regards accessibility to local services and facilities. The site would contribute economic growth in the area by providing much needed market and affordable housing against the background of the shortfall in the five year land supply. The proposal accords with the objectives in the NPPF of securing economic growth and boosting the supply of housing (IR13.1). The scheme would not have a significant adverse effect on the character and appearance of the area and could be adequately drained, without increasing flood risk elsewhere (IR 13.2). The less than substantial harm to the listed building is clearly outweighed by the timely public benefit of providing much needed housing (IR 13.3).

(x) As to paragraph 216 of the NPPF, only "relatively limited weight" could be given to the draft neighbourhood plan, given that there was some way to go before adoption and policies could change (IR 12.46);

(xi) The scheme would represent a sustainable form of development in economic, social and environment terms. There was a compelling case for releasing the site for the proposed development (IR 13.4).

51. In my judgment each of the matters of common ground between the Council and the Claimant summarised in IR 5.1 and set out in paragraph 9 above, were obviously important to the determination of the appeal. It follows that although the Secretary of State was not obliged in his decision to follow all or any of those points, nevertheless if he was going to disagree materially with any such matter, he would have been obliged to say so and explain why he took a different view. But the Secretary of State did not do that. Instead, in his decision letter the Secretary of State expressly endorsed points (i) to (ix) from the Inspector's Report summarised in paragraph 50 above (DL8 to DL13). In DL 8 to 13 and 19 the Secretary of State explicitly agreed with IR 12.2 to 12.42 and 13.2 to 13.3 (the reference in DL 10 to IR 13.2 must have been intended to read IR 13.3 given the text which follows). It is clear from the references given above and from the opening text of DL 19 that the Secretary of State agreed with the thrust of IR 13.1

52. Thus it is plain beyond argument that the Secretary of State agreed with the entirety of the Inspector's reasoning as to why the location for the development proposed is sustainable in all relevant respects, and not merely in terms of accessibility (DL 9, 13, 18 and 19). The sole reason given for the Secretary of State's disagreement with his Inspector's recommendation to grant planning permission was that the proposal conflicted with the emerging neighbourhood plan and was premature in relation to that plan. The whole of the Secretary of State's reasoning on this aspect, including his reaction, if any, to the representations responding to his letter to the parties dated 17 March 2014, is contained in DL 14 to 16 and DL 19, which read as follows:-

> "14. The Secretary of State has given careful consideration to the Inspector's description of the relationship between the NP and the appeal proposal at IR12.44-12.46, including policy H7 of the emerging NP which indicated that new housing at Sayers Common will only be permitted once the existing drainage infrastructure issues have been resolved and that the village might accommodate 30-40 new homes (IR12.44).
>
> 15. The Secretary of State has also taken account of the fact that, since the Inspector wrote her Report, substantial progress has been made in respect of the emerging NP, which has now been submitted to the Council for examination. Therefore, although the NP has yet to complete its assessment by an independent examiner and, if approved, be put to public referendum, the terms of the Framework and the guidance mean that it can now be given more weight than when the Inspector was considering it (IR 12.46)
>
> 16. Although the Inspector goes on to point out that the NP will need to be in conformity with the development plan and should not promote less development than is required to meet the housing needs of the area, the Secretary of State considers it appropriate (as stated in the Written Ministerial Statement of 10 July 2014 – referred to in paragraph 7 above) to give local people an opportunity to ensure they get the right types of development needs. The Secretary of State has therefore given significant weight to the fact that the emerging NP has

> identified housing allocations elsewhere within the NP area and that the Council has yet to complete an up-to-date objectively assessed housing needs analysis against which to measure the overall NP proposals. In the light of these, he considers it appropriate, as things currently stand, to tip the planning balance in favour of the emerging NP proposals, while accepting that these may need to be revisited in due course.
>
> ….
>
> 19. Overall, while the Secretary of State agrees with the Inspector that the appeal site is acceptable in terms of its locational characteristics and economic growth and, in principle, in boosting significantly the supply of housing, he also gives significant weight to the stage reached by the emerging NP which does not identify the site for this purpose. Therefore, while he appreciates that the remaining stages through which the NP has to pass may show that more land needs to be allocated, he considers that it would be inappropriate to prejudge that at this stage."

53. Reading the decision letter as a whole, the Secretary of State's reasoning was as follows:-

(i) Taking into account the section 106 obligation, the appeal proposed the development of 120 houses in a sustainable location with good access to a range of local facilities and services. The obligation would deliver all necessary infrastructure and overcome any drainage issues;

(ii) The proposed encroachment into the countryside was acceptable. Any impact on the character and appearance of the area would be more than compensated for by the proposed new planting;

(iii) The proposed development density of 25 dwellings per hectare was appropriate to the pattern of the existing surrounding development. The level of development proposed was appropriate in the context of Sayers Common;

(iv) The proposal accorded with two principal thrusts of the NPPF, boosting significantly housing supply and securing economic growth;

(v) But given the stage it had reached, significant weight should be given to the draft neighbourhood plan and its identification of housing allocations elsewhere within the parish and to the fact that "the [District] Council has yet to complete an up-to-date objectively assessed housing needs analysis against which to measure the overall [Neighbourhood Plan] proposals". "In the light of *these*, he considers it appropriate, as things currently stand, *to tip the planning balance in favour of the emerging [Neighbourhood Plan] proposals*, whilst accepting that these may need to be revisited in due course" (emphasis added). Significant weight should be given to the fact that the plan did not identify the appeal site for housing, whilst appreciating "that the remaining stages through which the [Neighbourhood Plan] has to pass may show that

more land needs to be allocated". That was a matter which should not be prejudged in the determination of the appeal.

Relevant Legal Principles

Development Plans

54. Section 70(2) of the 1990 Act provides that when dealing with a planning application a planning authority must have regard to those provisions of the development plan which are relevant to that application along with "any other material considerations". By section 38(6) of the 2004 Act such a "determination must be made in accordance with the [development] plan unless material considerations indicate otherwise."

55. Section 38(3) of the 2004 Act provides that the "development plan" comprises "the development plan documents (taken as a whole) which have been adopted or approved in relation to that area" and "the neighbourhood development plans which have been made in relation to that area". The "development plan documents" comprise the local planning authority's "local development documents" setting out its policies for the development and use of land in its area and specified as development plan documents in its "local development scheme" (sections 15, 17 and 37(1) to (3)).

Neighbourhood Plans

56. Sections 38A to 38C of the 2004 Act provide for the making and content of neighbourhood plans. Sections 38A(3) and 38C(5) and Schedule 4B (of the 1990 Act as modified) govern the process by which such plans are prepared and ultimately brought into force. The Examiner must consider whether the "basic conditions" in paragraph 8(2) of schedule 4B are met (paragraph 8(1)). In that regard he or she must be satisfied (inter alia) that it is appropriate to make the plan "having regard to" national policies, and that the plan contributes to the achievement of sustainable development and is "in general conformity with the strategic policies" of the development plan. Paragraph 8(6) of schedule 4B prevents the Examiner from considering any matters falling outside paragraph 8(1) (apart from compatibility with Convention rights).

57. Thus, in contrast to the Examination of a development plan document, the remit of an Examiner dealing with a neighbourhood plan does not include the requirement to consider whether that plan is "sound" (cf. section 20(5)(b) of the 2004 Act). So the requirements of "soundness" contained in paragraph 182 of the NPPF do not apply to a neighbourhood plan. Accordingly, there is no need to consider whether a neighbourhood plan is based upon a *strategy* prepared to meet objectively assessed development and infrastructure requirements, or whether it represents the most appropriate strategy considered against reasonable alternatives and is based upon proportionate evidence (see also paragraph 055 of the Planning Practice Guidance).

58. The Planning Practice Guidance (in the version dated 6 March 2014) adds that a neighbourhood plan "must not constrain the delivery of important national policy objectives" (paragraph 069). Presumably that would include the twelve core principles set out in paragraph 17 of the NPPF in so far as they are relevant to a particular plan (see paragraph 23 above).

59. The purpose and scope of the neighbourhood plan process was considered by Supperstone J in BDW Trading Limited v Cheshire West and Cheshire Borough Council [2014] EWHC 1470 (Admin). His judgment was handed down on 9 May 2014, well before the decision letter in the present case.

60. In BDW the Claimant challenged the examination of a draft neighbourhood plan which contained a policy limiting the size of new housing sites within or adjacent to a particular settlement to 30 homes. The criticisms included a failure to consider whether constraint policies in the draft plan were compatible with the NPPF (in particular paragraph 47), a failure to address the absence of up-to-date strategic housing policies in a local plan, and a failure to consider whether there was a proper evidential basis to support the draft policy (see paragraphs 78 to 80 of the judgment). The challenge failed.

61. Supperstone J decided that the criticisms failed to appreciate the limited role of the examination of a neighbourhood plan, namely, to consider whether the "basic conditions had been met". He held that the Examiner had been entitled to conclude that the draft plan had regard to the NPPF because the need to plan positively for growth was acknowledged and the relevant policy did *not place a limit on the total amount* of housing to be built (paragraphs 33 and 81 of judgment).

62. In addition the Judge held:-

    (i) The basic condition in paragraph 8(2)(e) only requires the Examiner to consider whether the draft neighbourhood plan *as a whole* is in general conformity with the adopted development plan *as a whole*. Whether there is a tension between one policy of the neighbourhood plan and one element of the local plan is *not* a matter for the Examiner to determine (paragraph 82);

    (ii) The Examiner was not obliged to consider the wider ramifications of the draft policy upon the delivery of housing. The limited role of an Examiner to have regard to national policy when considering a draft policy applicable to a small geographical area should not be confused with the more investigative scrutiny required by the 2004 Act in order for an Inspector examining a draft local plan to determine whether such a plan is "sound" (see sections 20(7) to (7C) and 23 of the 2004 Act) (paragraph 83 of the judgment);

    (iii) Whereas under paragraph 182 of the NPPF a local plan needs to be "consistent with national policy", an Examiner of a neighbourhood plan has a *discretion* to determine whether it is *appropriate* that the plan should proceed *having regard to* national policy (paragraph 84);

    (iv) The Examiner of a neighbourhood plan does not consider whether that plan is "justified" in the sense used in paragraph 182 of the NPPF. In other words, the Examiner does not have to consider whether a draft policy is supported by a "proportionate evidence base" (paragraph 85).

    To some extent the principles set out above are reflected in the Secretary of State's PPG. It is to be assumed that those principles were well-known to him when he reached his decision in the present case on 4 September 2014 (see e.g. Bloor Homes

East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWCH 754 (Admin) at paragraph 19(6)).

63. In Gladman Developments Ltd v Aylesbury Vale District Council [2014] EWHC 4323 (Admin) the Claimant challenged a decision to "make" a neighbourhood plan essentially on the grounds that it was *legally* impermissible for a neighbourhood plan to include policies for the allocation of housing sites and the delineation of settlement boundaries at a time when the local planning authority had not adopted a local plan containing strategic housing policies to meet the objectively assessed housing needs of the district. The challenge failed. Lewis J held:-

(i) Paragraph 8(2)(e) of schedule 4B to the 1990 Act only requires general conformity with the strategic policies of the development if such policies exist. Where they do not, paragraph 8(2)(e) is not engaged, but that does not mean that a neighbourhood plan cannot be prepared and formally "made" (paragraphs 58 to 59 and 65 of the judgment);

(ii) If a local planning authority finds that housing needs in its area are not being met, it should review its development plan documents. Once adopted such policies prevail over any earlier neighbourhood plan inconsistent therewith (section 38(6) of the 2004 Act) (paragraph 66);

(iii) If a neighbourhood plan (or certain of its policies) becomes out of date, that may be a material consideration justifying departure from that plan and granting planning permission for development in breach of those policies (paragraph 67);

(iv) Although a neighbourhood plan may include policies on the location and use of land for housing (or other development) and may address local needs in its area, such policies should not be treated as "strategic policies" contained in a development plan document. The body responsible for a neighbourhood plan does not have the function of preparing strategic policies to meet the assessed development needs across a local plan area (paragraphs 73 to 78).

64. The judgment in Gladman was handed down on 18 December 2014. On 5 February 2015 Sullivan LJ granted leave to appeal on the basis that, even if the grounds of appeal did not have a real prospect of success, the proper interpretation of legislation and national policy governing the relationship between neighbourhood plans and development plan documents should be considered by the Court of Appeal as a matter of considerable public importance. Gladman was to have been heard together with an appeal from Larkfleet Homes Limited v Rutland County Council [2014] EWHC 4095 (Admin). But a consent order has been filed withdrawing the appeal in Gladman. In Larkfleet Collins J rejected a contention that the legislation on its true construction does not permit neighbourhood plans to make site allocations. This contention has not been advanced in the present case, but if the Court of Appeal were to accept it, then it would reinforce the conclusions to which I have come under grounds 1 and 2 below.

The Court's powers to quash

65. Section 288 of the 1990 Act provides as follows:-

> "(1) If any person –
>
> (a)…….
>
> (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds –
>
> (i) that the action is not within the powers of this Act, or
>
> (ii) that any of the relevant requirements have not been complied with in relation to that action,
>
> He may make an application to the High Court under this section.
>
> (2), (3), (4) …..
>
> (5) On any application under this section the High Court –
>
> (a) …..;
>
> (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action."

66. The general principles by reference to which a Court may quash a decision of an Inspector or the Secretary of State are well-established. I gratefully adopt the summary given by Lindblom J at paragraph 19 of his judgment in Bloor Homes East Midlands Ltd (supra).

67. Mr. Honey adds that an adverse inference that a decision-maker misunderstood the materiality of a matter or failed to have regard to it, should only be drawn in relation to something which is a main issue and where all other known facts and circumstances appear to point overwhelmingly to a different conclusion (South Bucks District Council v Porter (No. 2) [2004] 1WLR 1953 para 34).

68. Mr Boyle QC's oral submissions began with ground 4.

Ground 4

69. The Claimant challenges DL 16 and 19 in which the Defendant attached significant weight to the fact that the appeal site had not been identified for housing purposes in the draft neighbourhood plan which instead had "identified allocations elsewhere" (i.e. at Hurstpierpoint). Mr Boyle QC submitted that the Defendant failed to identify the nature and extent of any conflict with the plan properly interpreted. He said that the nature of any such conflict should be made sufficiently clear, partly so as to enable a fair-minded reader to see whether the policy in question had been properly understood. Because the decision turned upon the plan, Mr Boyle relied upon Tesco Stores Ltd v Dundee City Council [2012] PTSR 983 at paragraphs 17-22. The

interpretation of planning policy is matter of law and therefore a matter to be decided by the courts. He also relied upon Lord Reed's statement at paragraph 22:-

> "Where it is concluded that the proposal is not in accordance with the development plan, it is necessary to understand the nature and extent of the departure from the plan which the grant of consent would involve in order to consider on a proper basis whether such a departure is justified by other material considerations."

Although that statement was directed to conflict with a statutory development plan, there is no logical reason why the same approach should not also apply where conflict with a draft plan is relied upon as a "material consideration".

70. Mr Boyle QC submitted that the decision letter simply focussed on the fact that the appeal site had not been identified or allocated in the draft plan for housing. But, whereas the draft plan had identified four specific sites in Hurstpierpoint, it had expressly refrained from identifying any sites at all in Sayers Common, but simply stated that 30-40 homes should be provided there (see e.g. paragraph 5.3 and Policy H4). Accordingly, he said that a proposal for say 30 houses (for example a smaller scheme on the appeal site itself) could not be in conflict with the draft plan on the grounds that the site had not been *identified* in that document. In the absence of any other conflict with the draft plan, a proposal for 30 houses which overcame the drainage and infrastructure issues would accord with the plan. Accordingly, it was submitted that the Defendant's reliance upon the non-identification of the appeal site in the draft plan involved a misinterpretation of the plan's policies.

71. Mr Boyle QC added that although it might have been said that the proposal conflicted with draft policy H4 because the *scale* of the appeal scheme for 120 houses was far in excess of the 30-40 dwellings proposed for Sayers Common as a whole, the Secretary of State did not expressly rely upon that point in his decision letter. Had he done so, the Secretary of State would have needed to weigh that conflict against his own clear conclusions that the appeal site was a sustainable location for housing, the infrastructure constraints affecting Sayers Common would be overcome by the appeal proposal, and the density and scale of the housing proposed was acceptable for Sayers Common (see paragraphs 51 – 53 above). If the neighbourhood plan had already been formally approved, the absence of any harm, including harm arising from conflict with policy H4, could result in planning permission being granted. The same approach would apply where a neighbourhood plan is in draft, subject to any separate, and properly justifiable, prematurity objection. In the present case the decision letter made no attempt to weigh the positive findings in support of the proposal against any complaint that its scale exceeded the 30-40 dwellings in draft policy H4.

72. Mr. Honey responded firstly that the Secretary of State's decision letter did not dismiss the appeal because of any conflict with the draft plan. Instead, he said that the sole reason for refusal had been the prematurity of the proposal in relation to that plan. The issue of "prematurity" is the subject of a separate challenge under ground 2.

73. I agree with Mr. Boyle QC that the Secretary of State dismissed the Claimant's appeal because of a combination of conflict with the policies of the emerging Neighbourhood

Plan and prematurity in relation to the examination of that plan. The appeal was not dismissed simply because of prematurity. Although the second sentence of DL19 relied upon prematurity to dismiss the appeal, it is plain that DL16 and the first sentence of DL19 also rejected the proposal because it had not been "identified" in the draft plan for release, in other words, because of a conflict with the draft neighbourhood plan.

74. Moreover, there is a second aspect of DL16 which makes it plain that the Secretary of State did not treat prematurity as the *sole* reason for dismissing the appeal. He decided that it was appropriate "to tip the planning balance in favour of the emerging neighbourhood plan proposals" "in the light of these [considerations]". The matters to which he was referring included not only the identification of "housing allocations elsewhere" (i.e. at Hurstpierpoint) but also "the [District] Council has yet to complete an up-to-date objectively assessed housing needs analysis against which to measure the overall neighbourhood plan proposals". It could not be suggested, and Mr. Honey did not attempt to do so, that this second factor had anything to do with a prematurity objection. Instead, it was a matter relied upon by the Secretary of State, like the non-identification of the appeal site, in order to give greater weight to his conclusion that the appeal proposals conflicted with the emerging neighbourhood plan.

75. It should also be remembered that the Secretary of State chose to determine the Claimant's appeal alongside two other proposals. The Little Park Farm/Highfield Drive proposals were approved by the Secretary of State in part because the two sites had been allocated in the draft neighbourhood plan, a matter to which he attached "significant weight" (see DL 17 and 18). The Defendant did not raise prematurity as an issue in those appeals. However, the Secretary of State dismissed the Claimant's appeal not only because of prematurity but also because the site had not been identified in the draft plan, a matter to which he gave "significant weight" once again. Therefore, an important distinction between the two decisions was that the appeal site had not been "identified" in the draft plan for release as a housing site whereas the other sites had, i.e. it was in conflict with that plan.

76. Secondly, Mr. Honey put forward an alternative argument in order to avoid the Claimant's submission that the Defendant had misinterpreted the draft plan (the "non-identification of the appeal site" point – see paragraph 70 above). He submitted that it should be inferred that the Secretary of State treated the *scale* of the Claimant's proposal as conflicting with the *distribution* of housing proposed in the draft neighbourhood plan, or the spatial strategy of the draft plan. In part he relied by analogy upon paragraphs 36, 44, 46 to 48, 51 and 53 of the judgment of Lindblom J in Crane v Secretary of State for Communities and Local Government [2015] EWHC 425 (Admin). In that case it was held, on a proper construction of the policies, that the Secretary of State had been entitled to conclude that a proposal for housing on an *unallocated* site was in conflict with an *approved* neighbourhood plan which contained *comprehensive site allocations* sufficient to meet the requirement set for that area in an adopted district-wide core strategy. Mr Honey submitted that the same approach should be adopted in the present case to the interpretation of the draft plan and thus to the decision letter.

77. The poor quality of the reasoning in the decision letter on this aspect, in contrast to the clear reasoning of the decision letter in Crane, is most regrettable, particularly in a case where the Defendant was differing from his Inspector on a critical issue to do

with planning policies, rather than, for example, aesthetic judgment. Nevertheless, I accept Mr Honey's second submission.

78. At first sight it would appear from DL 16 and DL 19 that the Secretary of State only had in mind the non-identification of the appeal site in the draft plan. But the statement in DL 19 that the examination of the draft plan might show that more land needs to be "allocated" indicates that what the Secretary of State in fact had in mind was the possibility that the scale of the housing proposed for Sayers Common might be increased. In addition, I explain below when dealing with ground 1 that the Defendant treated draft policy H4 as imposing a cap which would be breached by the appeal proposal. For these reasons I accept that, reading the decision letter as a whole and in the context of the materials before him, the Secretary of State decided that the proposal conflicted with the draft policy for Sayers Common, because the 120 houses proposed substantially exceeded the 30 – 40 dwellings identified in draft policy H4. The references to the non-identification of the appeal site in the draft plan were simply a clumsy way of expressing this point.

79. Although I accept that the approach taken in Crane to the construction of policy is analogous, it is also necessary to bear in mind for the remaining issues in this challenge, that there are some important differences between the two cases. In Crane the Secretary of State gave an explicit and detailed explanation as to why the proposal was in clear conflict with the *comprehensive* spatial strategy of the neighbourhood plan (see e.g. paragraphs 5, 7 - 8, 11, 13, 29 and 34 of the judgment). First, the neighbourhood plan contained allocations and not housing numbers without allocations. Second, those allocations met substantially more than the housing needs identified by the adopted core strategy for the area of the neighbourhood plan. Third, the documentation for the examination of the plan had explained why allocations to meet the requirements of the Core Strategy had been located on certain sites and others had been rejected. Mr. Crane's site had been considered to be remote from the village centre (paragraphs 33 and 34 of judgment). In the present case the draft neighbourhood plan did not propose any allocations at Sayers Common or discuss the relative merits of sites. It merely proposed, in the absence of a core strategy or even an up to date and objective assessment of housing needs, to cap the number of new dwellings for the village as a whole at 30 - 40.

80. Accordingly, I must reject Mr Boyle's first submission as summarised in paragraph 70 above. The Defendant did not misinterpret the draft plan by failing to appreciate that it contained no allocations of sites at Sayers Common. However, Mr. Honey's second submission (paragraph 76 above) does not overcome the flaw in the decision letter already identified in paragraph 71 of this judgment. The Secretary of State was obliged to weigh the conflict with the strategy in the draft plan, by virtue of the *scale* of the appeal proposal, against his positive findings that the proposal would give rise to no harm as regards *scale*, its effect on the character of the village, infrastructure requirements or other harm. The decision letter failed to carry out that exercise.

81. Moreover, the Defendant's decision is legally flawed in other respects. As referred to in paragraph 74 above, the Secretary of State decided to "tip the balance in favour of" the draft proposals in the neighbourhood plan as part of his reasoning for dismissing the appeal, because the District Council had yet to complete an up-to-date objectively assessed analysis of housing needs against which to measure those draft proposals. Although it had been held that a body preparing a neighbourhood plan does not have

the function of preparing strategic policies to meet assessed housing needs across a local plan area and need not be concerned with wider issues for the delivery of housing (paragraphs 62 and 63 above), it cannot follow that the absence of any objective assessment of housing needs at the district level could justify *increasing* the weight to be given to a draft neighbourhood plan. The lack of such an assessment was plainly irrelevant for that purpose. I do not intend any criticism of Mr. Honey when I say that he was unable to proffer any explanation for the Secretary of State's reliance in DL16 upon this factor.

82. The legal errors in the decision do not end there. In the Claimant's post-inquiry representations to the Secretary of State it was submitted that in the absence of any objective assessment of housing need, whether for the district or for the parish, the neighbourhood plan should not attempt to fix an overall quantum of new homes for the parish or Sayers Common, following the conclusions in the Examiner's Report into the Ascot, Sunninghill and Sunningdale Neighbourhood Plan. It was said, therefore, that the amount of new housing in Sayers Common should not be capped at 30-40 dwellings (see paragraph 47(iv) above). That was a substantial point which the Secretary of State was obliged to deal with in the decision letter.

83. The Secretary of State's reliance in DL16 upon the lack of an objective assessment of housing need in order to *increase* the weight given to the draft plan only serves to demonstrate that he failed to take into account (let alone give reasons in relation to) the argument that there should not be any such cap. The Secretary of State's submission that he treated the appeal proposal as conflicting with the distribution of housing in policies H3 and H4 of the draft plan reinforces this point. Plainly, the Secretary of State failed to give any consideration to the merits of the Claimant's proposal in the light of all of his conclusions in favour of granting permission, but on the basis that the cap in policy H4 was liable to be removed.

84. For these reasons, ground 4 succeeds and the decision must be quashed, in summary, for each of the following separate reasons. First, the Defendant treated the proposal as being in conflict with the *scale* of housing proposed in the draft plan for Sayers Common, but he failed to weigh that conclusion against his findings that the scale and density of the proposal are acceptable for the village, the location is sustainable and the proposal would overcome any infrastructure constraints. Second, and in any event, the Secretary of State decided to *increase* the weight given to the policies in the draft plan because of an immaterial consideration, namely the lack of any up-to-date objective assessment of housing needs against which to measure the proposals in that plan. Third, the Secretary of State failed to take into account, alternatively to give any reasons in relation to, the Claimant's case that the weight to be attached to policy H4 of the draft plan should be reduced because it imposed a cap on housing at Sayers Common despite the absence of an up-to-date objective assessment of housing needs.

85. Mr. Honey accepted very fairly that if the Court should conclude that either grounds 3 or 4 are made out, it would be inappropriate to ask for the Court's discretion to be exercised against the quashing of the decision.

Ground 3

86. It is common ground that policies C1 and H1 to H4 of the neighbourhood plan represent "housing supply policies" for the purposes of paragraph 49 of the NPPF (see

paragraphs 32 and 43 above). Accordingly, there is no dispute that if at the date when that plan formally became part of the statutory development plan (19 March 2015) a 5 year supply of housing land could not be shown, (a) those policies would then be treated as out of date and (b) the presumption in paragraph 14 of the NPPF would apply to a decision at that stage whether to grant planning permission.

87. In Crane Lindblom J held (paragraph 71) that in such a situation the NPPF does not prescribe the weight to be given to "out of date policies". As he pointed out, in many cases the weight may be greatly reduced, but this will vary according to the circumstances. It must follow, of course, that where paragraph 49 of the NPPF applies, the decision-maker is also obliged to decide how much weight should be given to the housing supply policies of a plan (or plans) by assessing the reasons why those policies are to be treated as out of date and any other relevant circumstances.

88. In the present case it is accepted by the Secretary of State that in his decision he did not apply paragraph 49 of the NPPF to the policies of the draft neighbourhood plan and therefore the weighting exercise to which I have just referred was not carried out. Accordingly, the issue between the parties is whether, as the Claimant maintains, paragraph 49 can apply to an emerging development plan or whether, as the Defendant maintains, it only applies to a plan forming part of the statutory development plan. The Claimant submits that this issue is important in the present case because in DL16 and DL19 the Secretary of State decided to attach "significant weight" to the housing supply policies in the draft neighbourhood plan simply because of the stage reached in the process leading to formal approval of those policies and *without* also weighing the considerations set out in paragraph 71 of Crane (see paragraph 87 above).

89. Mr. Honey rightly emphasised the need to read the NPPF as a whole (see Crane paragraph 73). That must apply to the proper understanding of paragraphs 14 and 49. It should also be emphasised that the issue between the parties in this case applies not only to draft neighbourhood plans but also to draft local plans.

90. Paragraph 49 appears in the section of the NPPF (paragraphs 47 to 55) devoted to "delivering a wide choice of high quality homes". The overall objective of paragraph 47 is "to boost significantly the supply of housing". The first requirement is for local planning authorities "to use their evidence base to ensure that their 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 this Framework…". The second requirement, to identify and update annually a 5 year supply of deliverable housing land, is set out in paragraph 18 of this judgment. The third requirement is that the authorities should "identify a supply of specific, developable sites or broad locations for growth, for years 6 - 10 and, where possible, for years 11 - 15". Fourthly, local planning authorities must illustrate the expected rate of housing delivery (both for market and affordable housing) "through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing detailing how they will maintain delivery of a five-year supply of housing land to meet their housing target". Thus, it is plain that national policy attaches considerable importance to local planning authorities being able to identify a 5 year supply of housing land to meet properly assessed housing needs *on an ongoing basis*.

91. The requirement that a local planning authority should be able to identify a 5 year supply of housing land pre-dates the NPPF. It was previously contained in paragraph 71 of PPS3 (dated June 2011). It is helpful to compare PPS3 and the NPPF.

92. In St Albans City and District Council v Hunston Properties [2013] EWCA Civ 1610 and Solihull Metropolitan Borough Council v Gallagher Estates Limited [2014] EWCA Civ 1610 the Court of Appeal decided how the approach to the provision of housing in the NPPF compares to the former PPS3 (see e.g. Gallagher at paragraphs 14 to 16):-

(i) Whereas PPS3 required a housing strategy to be formulated by carrying out a balancing exercise of all material considerations (including need, demand and other policy matters), the NPPF requires authorities making local plans to focus on the "full objectively assessed need for housing" and to meet that need unless, and only to the extent that, other policy factors in the NPPF dictate otherwise;

(ii) Thus according to paragraph 14 of the NPPF, Local Plans must meet objectively assessed housing needs (with sufficient flexibility to adapt to rapid change) unless "any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole" or "*specific* policies in this Framework indicate development should be restricted";

(iii) The NPPF contains "a greater policy emphasis on housing provision", by laying down an approach which requires the making of a local plan to begin with full objectively assessed housing needs and only then to determine whether other NPPF policies require that less housing should be provided than needed;

(iv) The increased emphasis in the NPPF upon the provision of housing can properly be described as a "radical change".

Similarly, paragraph 9 of the NPPF states that the pursuit of sustainable development involves not only seeking positive improvements in the quality of the environment and in people's quality of life, but also "widening the choice of high quality homes". The first and third core principles in paragraph 17 of the NPPF (quoted in paragraph 23 above) are also significant in this context.

93. In Tewkesbury Borough Council v Secretary of State for Communities and Local Government [2013] EWHC 286 (Admin) Males J compared the policies in PPS3 and the NPPF requiring a 5 year supply of housing land (see paragraphs 16 to 21). Paragraph 71 of PPS3 provided that where a local planning authority could not demonstrate an up-to-date 5 year supply of deliverable housing sites, planning applications for housing should be considered "favourably" having regard to policies in the PPS including the need to ensure that developments reflect "the need and demand for housing in, and the spatial vision for, the area". The Judge concluded that:-

> "both before and after the issue of the NPPF, the need to ensure a five year supply of housing land was of significant importance."

He pointed out that whereas the PPS had required "favourable consideration" to be given to housing proposals (subject to the policies of PPS3), the NPPF created a "rebuttable presumption in favour of the grant of planning permission". That distinction is consistent with the view of the Court of Appeal in Gallagher that the increased emphasis in the NPPF upon the provision of housing represents a "radical change" from PPS3. It is also consistent with the explicitly stated need "to boost significantly the supply of housing". At the same time, I agree with the observation of Males J that however important the absence of a 5 years supply of housing may be in the circumstances of a particular case, the NPPF does not provide that that factor must be treated as conclusive by itself (paragraph 21 of Tewkesbury).

94. It is plain that paragraph 71 of PPS3 did not restrict the requirement to give "favourable consideration" to a housing proposal (for example on an unallocated site) to cases where the relevant planning policies were solely contained in a statutory development plan. Nor did it treat that "favourable consideration" as offsetting only policy objections contained in a statutory, as opposed to an emerging, development plan.

95. In my judgment it would be inappropriate to treat paragraph 49 as restricting the circumstances in which national policy lends additional support to a housing proposal because of the lack of a 5 year supply of land, to cases where the "relevant policies for the supply of housing" are contained in statutory, but not draft, development plans. Such a change in national policy regarding the importance of maintaining a 5 year supply of housing land would require explicit language to that effect (see by analogy Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government [2015] PTSR 274 paragraph 16). I am reinforced in that view by the "radical change" introduced by the NPPF which gives greater, not less, emphasis to meeting housing needs.

96. Paragraph 49 of the NPPF simply refers to "relevant policies for the supply of housing" without restricting that expression to policies in a statutory development plan.

97. But Mr. Honey relied upon the first sentence of paragraph 49 which states:-

> "Housing applications should be considered in the context of the presumption in favour of sustainable development."

He submits that that is a reference back to paragraph 14 of the NPPF and that because references in paragraph 14 to the "development plan" are concerned solely with documents forming part of the statutory development plan, and not with draft plans, paragraph 49 must be read down in the same way.

98. I agree with Mr. Honey that references in paragraph 14, and generally in the NPPF, to "the development plan" relate to adopted or formally approved plans not draft plans (see also the definition of "development plan" in the Glossary at Annex 2 to the

NPPF). Nothing in this judgment affects that general point. However, that is insufficient to deal with the proper construction of paragraph 49.

99. The NPPF should not be construed as if it were a statute or a contract, any more than a development plan, and regard should be had to both the context and object of the policy being interpreted (Tesco Stores v Dundee City Council [2012] PTSR 983 paragraphs 19, 21 and 25 - 27). Thus, it may be relevant, and sometimes necessary, to adopt a purposive construction of the policy in question.

100. In my judgment, the starting point should be paragraph 49 rather than paragraph 14. Paragraph 14 is of general application for the determination of planning applications in the context of section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. We are dealing instead with a specific group of policies, which have the objective of boosting significantly the supply of housing and requiring local planning authorities to identify on a continuing basis a 5 year supply of housing land to meet properly assessed housing needs. In particular, we are concerned with a policy, paragraph 49, which deals with the consequences of an authority's failure to meet that obligation.

101. As I have said, the first key phrase in paragraph 49, "relevant policies for the supply of housing", is not limited to relevant policies in the statutory development plan. The language is capable of referring to policies in a draft development plan. It is also capable of referring to policies in a statutory development plan which *as a matter of fact* is up to date because that plan has only recently been adopted. Thus, the second key phrase, "should not be considered up-to-date", operates as a deeming provision which treats the relevant policies as being out of date so as to engage "the presumption in favour of sustainable development" (the third key phrase in paragraph 49). Plainly, the object is to increase the likelihood of planning permission being granted for a housing proposal where a 5 year supply does not exist, by applying a "presumption in favour of sustainable development", subject to taking into account all other material considerations in a particular case, whether they tell in favour of or against the grant of planning permission, or are neutral.

102. Paragraph 6 of the NPPF states that "the purpose of the planning system is to contribute to the achievement of sustainable development" and that paragraphs 18 to 219 of the NPPF, taken as a whole, define what is meant by "sustainable development". Paragraph 9 specifically identifies "widening the choice of high quality homes" (dealt with in paragraphs 47 to 55 of the NPPF) as one aspect of the "pursuit of sustainable development" (see paragraph 92 above) Therefore what is to be encouraged as "sustainable development" is not assessed solely against policies in statutory development plans. The concept is much broader.

103. Paragraph 14 explains what the presumption in favour of sustainable development means for "decision-taking". The first bullet point requires development in accordance with the statutory development plan to be approved without delay. The second bullet point creates a presumption in favour of granting permission in three situations. The first is where there is no statutory development plan. The second is where there is such a plan, but it is silent on the matter in question. The third is where "relevant policies are out-of-date". It is arguable that that phrase is not restricted to policies in a statutory development plan, but even if the contrary view is taken, it does not follow that Mr Honey's reading of paragraph 49 is correct. First, paragraph 14 is simply a broad statement of general application. Second, it does not deal specifically

with a situation where there is a shortage of housing land. Third, the phrase in paragraph 14 "relevant policies *are* out-of-date" without more, simply refers to policies which are *actually out of date*. Fourth, paragraph 49 operates as a deeming provision so as to require housing supply policies to be *treated* as "out-of date" even if that would not otherwise be the case under paragraph 14. Fifth, it follows that paragraph 49 can only be read as *extending the ambit* of paragraph 14. It has the effect of extending the scope of the presumption in favour of development set out in paragraph 14, (a) so as to apply to draft as well as adopted development plan policies, but (b) only where a 5 year supply of housing land does not exist and (c) solely in relation to "housing supply policies".

104. Once the correct interaction between paragraphs 14 and 49 is appreciated, in a case where a 5 year supply of housing land does not exist, it does no violence to the language of paragraph 14 to treat the presumption in favour of sustainable development as weighing against housing supply policies, including those which restrain development, whether they are contained in statutory or draft development plans.

105. As Lindblom J pointed out in Crane (paragraph 71), where paragraph 49 and the presumption in paragraph 14 apply, the NPPF does not stipulate how much weight should be given to "out of date" policies. That is a matter to be assessed by the decision-maker in the light of the reasons for the shortfall and other relevant circumstances, including, for example, any interim measures being taken by the local planning authority to release land for housing in order to address the shortfall (see paragraph 87 above).

106. The construction for which the Claimant has contended is sensible. First, it promotes, rather than undermines, the positive objectives of paragraphs 47 to 49 of the NPPF. Second, paragraph 49 is a deeming mechanism which simply uses the label "out of date" to engage the presumption in favour of granting permission contained in paragraph 14. Third, even on the Secretary of State's case, paragraph 49 would operate to treat the housing supply policies in a *statutory* development plan as being "out of date" even if the document had been formally approved only shortly beforehand and could not otherwise be regarded as "out of date". That could happen where the rate of take up of housing land during the period immediately before and after adoption was much higher than had been assumed in the policies for the overall duration of the plan. It would make no sense to treat the "presumption in favour" as a factor weighing against, for example, a general countryside protection policy contained in a statutory development plan but not the same policy contained in a draft plan, *a fortiori* where the latter would otherwise attract considerable weight because it is close to being adopted. The same analysis applies to policies identifying the numbers and locations of housing to be provided.

107. Mr. Honey submitted that the construction of paragraph 49 which I have accepted "would mean that no emerging development plan document [e.g. a local plan] which sought to address a shortfall in housing land supply could ever be taken into account as a weighty material consideration and applied whilst it was emerging, because until the point of adoption the authority could not demonstrate a five year supply of deliverable housing sites". He added that "it must be possible to take into account the housing allocations in an emerging development plan document which is at an advanced stage of preparation before that plan is adopted". In the light of the decision

in Crane, that concern is wholly unjustified. Paragraphs 14 and 49 of the NPPF do not prevent any regard being had to policies which are *deemed* to be out of date because of the lack of a 5 year supply of housing land. Nor does the NPPF specify how much weight should be given to such policies.

108. The NPPF does not lay down a monolithic approach to that issue, whether in relation to an adopted or a draft local plan. Instead, the issue is to be assessed according to the relevant circumstances of the case, including the reasons for the shortfall and steps being taken to address that issue, in addition to applying the presumption in favour of granting permission and considering the matters specified in paragraph 14 of the NPPF (see Crane paragraphs 71 to 75).

109. In many cases a neighbourhood plan will be prepared after housing requirements have been assessed and strategic policies formulated in an adopted local plan. In that situation, the policies in a neighbourhood plan must be "in general conformity with the strategic policies" of that local plan (see paragraph 56 above). Paragraph 184 of the NPPF adds that a neighbourhood plan should reflect, and should plan, positively to support the strategic policies in a local plan. "Neighbourhood plans….should not promote less development than set out in the local plan or undermine its strategic policies".

110. Where a neighbourhood plan is being prepared so as to be in general conformity with the relevant parts of a local plan, but a 5 year supply of housing land does not exist, paragraph 49 applies to both the housing supply policies in both the adopted local plan and the draft neighbourhood plan, so that when a planning application for housing comes to be determined (a) the presumption in paragraph 14 will apply (subject to assessing the matters specified which may tell against the grant of planning permission) and (b) the weight to be attached to housing supply policies in each of the plans will need to be assessed and taken into account as explained in Crane.

111. The same principles apply in a situation where a local plan has not yet been adopted, a 5 year supply of housing land for the district cannot be shown, but a draft neighbourhood plan "seeks to lead" as Mr. Honey put it, in order to make provision for housing needs in a much smaller plan area. Mr. Honey complains that on the construction of paragraph 49 I have upheld, such a *draft* neighbourhood plan would always be treated as "out of date" unless and until the 5 year land supply issue for the whole district is resolved. But this concern is also, with respect, misconceived (see paragraphs 107 to 108 above).

112. A further problem with Mr. Honey's complaint is that it would also arise where a neighbourhood plan has been recently approved, in advance of any local plan, but nevertheless has to be treated as "out of date" because of the lack of a district-wide 5 year supply of housing land and the application of paragraphs 14 and 49 of the NPPF (see the common ground recorded at paragraph 86 above). The discontinuity between the geographical coverage of a neighbourhood plan and the requirement of a 5 year supply for the whole of a local plan area is inherent in paragraphs 14 and 49 of the NPPF, even on the construction for which the Secretary of State contends. It therefore provides no support whatsoever for his argument that paragraph 49 does not apply to *draft* development plans, including a neighbourhood plan. Instead, the outcome of applying paragraphs 14 and 49 of the NPPF where either a draft or approved neighbourhood plan precedes a local plan, will depend upon the outcome of

the assessment described in paragraph 105 above in the particular circumstances of each case.

113. By contrast the Secretary of State's construction of paragraph 49 of the NPPF would cause that policy to operate in an arbitrary way for which no justification has been offered. In a case where a district-wide 5 year supply of housing land does not exist, paragraphs 14 and 49 of the NPPF would apply to the housing supply policies in a neighbourhood plan from the very moment when it becomes part of a statutory development plan, but not a few months beforehand or even a week beforehand.

114. For all these reasons, I conclude that paragraphs 14 and 49 do apply to the housing supply policies in a draft development plan, including a draft neighbourhood plan, and therefore should have been applied in the present case when assessing the weight to be attached to those policies in the Neighbourhood Plan and to any conflict with such policies. The Defendant accepts that that was not done in the decision letter and so I uphold ground 3 as a separate reason for quashing the decision.

115. Even if a contrary view were to be taken, so that paragraph 49 does not apply to housing supply policies in an emerging plan, logically it would nevertheless be necessary for the decision-maker to assess how much weight should be given to those policies, and that must involve taking into account the lack of housing land and the clear policy imperative in paragraphs 47 to 49 that a sufficient supply of land should be identifiable at all times. In other words the exercise which Crane requires to be carried out where paragraph 49 does apply (see paragraphs 87, 105 and 108 above), would still need to be undertaken for housing supply policies contained in a draft plan. In the present case it is accepted by the Secretary of State that when he decided how much weight to give to the draft neighbourhood plan he did not carry out that exercise (see paragraphs 87 to 88 above) and so the decision must be quashed in any event.

Ground 2

116. The Claimant submits that the Secretary of State failed to take into account and apply his own policy on prematurity contained in the PPG (see paragraph 26 above). In particular it is submitted that:-

(i) The Defendant failed to indicate how the grant of permission would predetermine decisions about the scale, location or phasing of new development that were "central" to the draft Neighbourhood Plan;

(ii) The Defendant failed to identify any adverse impacts from granting permission or to consider whether it was clear that such impacts significantly and demonstrably outweighed the benefits of the proposal.

117. Mr. Honey submitted that in DL15 the Secretary of State had regard to the NPPF and the PPG on the issue of prematurity. But it is important to note that DL15 simply referred to the weight which to be given to the draft plan by virtue of the *stage* it had reached in the examination process. In my judgment that is only one of the considerations in the PPG when dealing with prematurity, namely prematurity is seldom justified as a ground of refusal in the case of a draft neighbourhood plan before the end of the local authority publicity period (see paragraph 26 above).

Whether a draft plan has reached a sufficiently advanced stage is simply treated by the PPG as an entry point for considering prematurity as a possible reason for refusal. That factor does not exhaust in all cases the factors which the PPG requires to be assessed. Plainly, therefore, DL15 did not address the key parts of the PPG upon which ground 2 relies.

118. Under grounds 3 and 4 I have already considered the way in which DL16 dealt with the weight to be given to the draft Neighbourhood Plan. I merely add that DL16 did not address (a) the predetermination of issues central to the plan or (b) how any such predetermination would amount to an adverse impact clearly outweighing the benefits of the proposal.

119. Although Mr. Honey argued that prematurity was the sole reason why the Secretary of State disagreed with the Inspector's recommendation to grant planning permission, the only explicit reference to that subject is to be found in DL19. Having stated that the appeal site had not been allocated in the draft neighbourhood plan, the decision letter continued:-

> "Therefore, while he appreciates that the remaining stages through which the Neighbourhood Plan has to pass may show that more land needs to be allocated, he considers that it would be inappropriate to prejudge that at this stage."

120. Mr. Honey submitted that from the circumstances known to the parties it was obvious how allowing the appeal would prejudice the taking of a decision on a matter central to the examination of the draft plan. He said that the draft plan proposed 282 - 292 new dwellings for the parish as a whole, of which 85% would be distributed to Hurstpierpoint and only 15% to Sayers Common and so allowing the appeal would predetermine (a) whether the total housing allocation should be increased to 372 units and (b) whether the total allocation for Sayers Common should be increased from 30 - 40 units to 120 units. However, as explained in paragraph 36 above, the allocations of sites in Hurstpierpoint were already a *fait accompli* by the time of the examination into the neighbourhood plan.

121. Mr. Boyle QC responded that the Secretary of State's submissions demonstrated that he had not in fact had regard to key aspects of the policy in the PPG on prematurity. In particular he did not address the requirement to identify how granting permission would be prejudicial to the outcome of central issues affecting the draft plan, so as to amount to an adverse impact significantly and demonstrably outweighing the benefits already accepted by the Secretary of State. I agree with Mr. Boyle.

122. In my judgment it was wholly unsatisfactory for the Secretary of State to disagree with the Inspector's carefully reasoned recommendation that the appeal should be allowed by putting forward such sparse reasoning on prematurity as appears in DL 19. He simply stated that it was "inappropriate" to prejudge whether more land should be allocated in Sayers Common. That did not give effect to the criteria in the PPG. Furthermore, when *all* the relevant circumstances are borne in mind, it is plain that the Secretary of State did not take into account and apply his policy on the circumstances in which prematurity may justify a refusal of planning permission.

123. As Mr. Honey explained, the spatial strategy of the draft plan was based upon firstly the objective of retaining the "village feel" of Sayers Common and secondly the infrastructure constraints affecting the village (see paragraph 35 above). The Secretary of State's decision letter did *not* suggest that *those issues* should be left to the examination of the draft plan. Instead, in determining the Claimant's planning appeal, he reached his own conclusions on those matters, in agreement with the Inspector's views. Thus, the Secretary of State agreed with the Claimant (and thereby disagreed with the Parish Council) that the scale and density of the proposal was appropriate for the village, there would be no adverse effect on the character of the area and any infrastructure constraints would be overcome by the appeal proposal (paragraphs 50 to 54 above). The Secretary of State in substance rejected the Parish Council's representation that development of 120 houses in Sayers Common, exceeding the draft proposal for 30 - 40 dwellings, would cause harm to the character of the village (cf. paragraphs 48 to 49 above). The effect of the Secretary of State's clear conclusions on the merits of the proposal was to negate the rationale for draft policy H4.

124. Furthermore, when the Secretary of State issued his decision on 4 September 2014, the examination of the draft plan had yet to be concluded. If it were correct to assume that the examination would consider the merits of releasing the appeal site for housing, he ought to have appreciated that his own clear conclusions on the acceptability of the appeal proposal in terms of its effect on the village and the overcoming of infrastructure constraints would be highly material considerations, applying the well-known "consistency principle" in North Wiltshire District Council v Secretary of State (1993) 65 P&CR 137 and other related authorities. Under the neighbourhood plan system which he created, and also on the material before him, the Secretary of State had no reason to think that the examination of the draft plan would not be concluded in the near future. Unsurprisingly, the Secretary of State did not suggest in his decision letter that the appeal should be dismissed on prematurity grounds so that his conclusions as to why the development of the site for 120 houses was appropriate for Sayers Common, could be revisited so soon in the examination of the draft plan, and with any realistic prospect of different conclusions being reached by the Examiner.

125. A proper understanding of the decision letter cannot be divorced from the realities facing the Secretary of State, in particular the basis for draft policy H4 in the neighbourhood plan and the Secretary of State's own views upon the very same matters. When those points are brought back into focus, it becomes clear that the Secretary of State did not apply himself to the key tests in the PPG on prematurity as to whether particular issues should be determined in the examination of a neighbourhood plan rather than in the decision on a planning appeal. The relevant issues were determined by the Secretary of State in the planning appeal in any event. The suggestion of prematurity in DL 19 was devoid of any content.

126. There is a further difficulty with Mr. Honey's numerical argument (paragraph 120 above). True enough policy H4 identified only 30-40 dwellings as being appropriate for Sayers Common, whereas the appeal proposal was for 120 dwellings. But, the Secretary of State should have appreciated from the BDW case (as well as from the Claimant's post-inquiry representations) that policy H4 would not satisfy the requirement in the "basic condition" to have regard to the NPPF, and in particular the

need for "flexibility" and "to plan positively for growth", unless it was amended so as to remove the cap limiting new housing in the village to 30 - 40 dwellings (see paragraphs 47 and 61 above).

127. This point has all the more force in the present case because of the absence of an up-to-date objective assessment of housing need. The Secretary of State referred in DL16 to the lack of any such analysis against which to measure the proposals in the draft neighbourhood plan. But as I have already held, the Defendant erred in law by relying upon that matter as a factor *lending support* to those draft policies (paragraph 81 above) and by failing instead to deal with the Claimant's contention that any cap should be removed for the very same reason (paragraphs 47 and 83 above).[2]

128. For all these reasons I uphold ground 2 as a separate basis for quashing the decision letter. Applying the test in Simplex G.E. (Holdings) Limited v Secretary of State for the Environment (1987) 57 P & CR 306, I do not accept that the Secretary of State's decision would necessarily have been the same if the error under ground 2 had not been made. First, conflict with the draft neighbourhood plan was identified in the decision letter as a reason for refusal of permission. The appeal was dismissed for that reason in combination with prematurity. Second, prematurity formed a substantial part of the reasoning for dismissal of the appeal and, on the material before the Secretary of State, I can see no basis upon which the Court could infer that the appeal would necessarily have been dismissed on that ground if the decision had not been flawed by the errors identified above.

129. The reasons I have already given are sufficient to vitiate the Defendant's decision to dismiss the appeal by reference to prematurity. But the arguments in this case have revealed a troubling failure by the Defendant to appreciate the limited scope of the examination of a neighbourhood plan and the implications this undoubtedly has for reliance upon prematurity in relation to that process as a reason for refusing planning permission. The conclusions I set out below reflect the decisions of the High Court in BDW and Gladman.

130. As I have mentioned, the judgment in BDW was given well before the Defendant's decision on the present appeal. The decision in Gladman was handed down on 18 December 2014, but the principles set out by Lewis J in his judgment were based directly upon the statutory scheme for neighbourhood planning promoted by the Secretary of State.

131. Although a neighbourhood plan must be in general conformity with the strategic policies of the local plan and should not provide for less development than is promoted by the local plan (paragraph 184 of the NPPF), these principles do not apply where a neighbourhood plan is progressed in advance of the adoption of any local plan. The absence of a local plan does not preclude the preparation and formal

[2] Although not strictly relevant to the legal soundness of the Defendant's decision letter, the Examiner subsequently reported that in order to accord with the NPPF, H4 would have to be amended by removing the cap on the number of units to be built in Sayers Common and the plan was formally approved with that amendment.

approval of a neighbourhood plan. The body responsible for a neighbourhood plan does not have the function of preparing strategic policies to meet assessed housing needs (paragraph 63 above).

132. Apart from any issues as to compatibility with convention rights, the examination of a draft neighbourhood plan may only consider whether the "basic conditions" are met (paragraph 56 above). The basic conditions do not include the issue of whether the plan is "sound" in the sense in which that term is used when dealing with development plan documents (sections 20 (5)(b) of the 2004 Act and paragraph 182 of the NPPF). Therefore, where a neighbourhood plan precedes a local plan, the effect of paragraph 8 of Schedule 4B of the 1990 Act is that the examination of a neighbourhood plan cannot consider whether it is based upon a strategy to meet objectively assessed housing needs. Nor can the examination consider whether the proposed strategy is the most appropriate or justified by a proportionate evidence base (paragraphs 57, 62 and 63 above).

133. The Secretary of State's PPG also explains how the examination of a neighbourhood plan is very different from that of a local plan. The Examiner is limited to testing whether the neighbourhood plan meets the "basic conditions" and "is not testing the soundness of a neighbourhood plan or examining *other material considerations*" (paragraph 055 with emphasis added). Although the Examiner has a discretion as to whether to conduct the examination by way of a public hearing, paragraphs 056 of the PPG "expects" that the examination will proceed by considering written representations and not a hearing. The statutory scheme for the preparation of neighbourhood plans has been designed so as to make the evidential and procedural requirements, and the intensity of independent examination, less onerous for the promoting body than in the case of a local plan.

134. As in Veolia ES (UK) Ltd v Secretary of State for Communities and Local Government [2015] EWHC 91 (Admin) at paragraph 49,

> "I respectfully agree with the approach taken by Frances Patterson QC (as she then was) in paragraph 64 of the judgment in Truro City Council v Cornwall City Council [2013] EWHC 2525 (Admin):
>
> > "It is quite impossible to divorce the issue of prematurity from the local plan process: after all, the impugned decision is premature to what? The essence of a successful claim of prematurity is that the development proposed predetermines and pre-empts a decision which ought to be taken in the Development Plan process by reason of its scale, location and/or nature or that there is a real risk that it might do so.""

The suggestion that an issue ought to be determined in the examination of a draft neighbourhood plan rather than in a planning appeal assumes that that issue will fall within the remit of that examination. If that assumption is incorrect, then prematurity does not arise.

135. In the present case the Secretary of State did not give any consideration to that essential question. In DL16 he noted that the District Council had not carried out an

up to date objective assessment of housing need against which to test the proposals in the draft neighbourhood plan. There was no evidence before the Secretary of State as to when that work would be done. There was no suggestion that it would be carried out by the District Council before the examination of the neighbourhood plan. There is no requirement for such an assessment to be in place before a neighbourhood plan may be prepared and approved. Where no such assessment exists, there is no requirement for the body preparing the neighbourhood plan to undertake that work and its absence does not go to the issue of whether the statutory "basic conditions" have been met. Moreover, the examination does not consider whether the policies of a plan are "justified" by a proportionate evidence base (the "soundness" test). However, in DL19 the Secretary of State assumed that the remaining stages of the neighbourhood plan "may show that more land needs to be allocated". But given the absence of any proper need assessment by the District Council and the limited statutory ambit of the process for the preparation and examination of a neighbourhood plan, the Secretary of State has made an assumption which was essential to the dismissal of the appeal but which was not based upon any evidential or legal justification. For these additional reasons under ground 2 the Secretary of State's decision must be quashed.

136. The approach subsequently taken in the Examiner's report issued on 23 September 2014 was consistent with the limitations upon the process for preparing and examining neighbourhood plans. In summary the Examiner concluded:-

(i) The plan had *taken into account* "consultation" on housing matters, demographic changes and household formation rates and allowed for economic growth generated by demands outside the plan area. The plan "recognises that, in order to meet future demands, housing numbers are likely to be at the higher end of an identified range – towards 395 new homes" (page 23);

(ii) Whilst seeking to safeguard the area's "village feel", "nowhere in the Neighbourhood Plan is there an absolute limit or a maximum cap on the number of houses to be built over the plan period", i.e. for the plan area as a whole (page 23);

(iii) The plan recognises the inevitability of greenfield release for the delivery of housing (page 23);

(iv) The plan's "proactive approach" in "facilitating a sustainable level of growth within the Parish" [but, I interpolate, without any specific conclusion in relation to Sayers Common] had been criticised for providing too much development, but on the other hand it had been supported in the majority of representations (page 24);

(v) As to representations on "the subject of housing numbers and the absence of up to date strategic policy in this regard", "it is firmly established within national policy that a neighbourhood plan can be made whether or not district-wide housing policies are up to date" (page 24).

(vi) As to representations that policy H3 should allow further sites to be promoted and provide greater flexibility, the Examiner responded that the policy "simply

provides for specific allocations, *rather than precludes all other development from taking place*" (page 26 with emphasis added);

(vii) However, the Examiner recommended that in order to accord with the requirements in the NPPF to promote sustainable growth combined with a flexible approach, the "maximum number" in H4 of 30 - 40 homes for Sayers Common should be removed and replaced with the words "it is anticipated that the village will accommodate around 30 - 40 dwellings during the plan period" (page 26).

137. The Secretary of State did not suggest in his submissions to the Court that the Examiner's Report had dealt inadequately with the objections made to the draft plan. Instead, the level of scrutiny of the plan in response to these objections, which scrutiny might be described as somewhat superficial, apparently accords with the statutory scheme and policies governing neighbourhood planning. What is not to be found in the Examiner's Report is any finding as to whether more housing land needed to be allocated in Sayers Common, and in any event whether 120 houses could be accommodated there without any detriment. If, however, upon reflection it is thought by the Secretary of State that issues of this kind ought to be dealt with in the examination of a neighbourhood plan *to the level of scrutiny that could properly found a prematurity objection in a planning appeal* (see paragraph 134 above), then consideration needs to be given to amending the NPPF and PPG (and possibly the legislation) so as to extend the ambit of the process for preparing and examining neighbourhood plans.

Ground 1

138. The Claimant submits that the Secretary of State failed to take into account and apply his own policy in relation to the weight to be given to an emerging plan contained in paragraph 216 of the NPPF. The reasoning in the decision letter on the weight to be given to the draft neighbourhood plan only applied the first criterion in paragraph 216, namely the stage which the plan had reached in the process leading towards its final approval (see paragraph 25 above). The decision letter did not deal with the second and third criteria of that policy, namely the extent to which there are unresolved objections to relevant policies in the draft plan (and the significance of those objections) and the degree of consistency of the policies with the NPPF. It is submitted that the Secretary of State failed to have regard to the second and third criteria, alternatively, if he did, he failed to give any reasons in relation thereto.

139. The Claimant also submits that the second and third criteria were particularly pertinent in the present case because (a) the draft neighbourhood plan was proceeding in advance of an up to date local plan to establish objectively assessed housing needs and strategic housing policies and (b) the draft plan had yet to be examined. This is to be contrasted with, for example, a situation where the report into the examination of a draft plan has been published and it may then be possible to attach significant weight to a draft policy simply because of the very advanced stage which the plan has reached.

140. The Secretary of State submitted that it was not necessary for a decision-maker to recite and apply each of the three criteria in paragraph 216 of the NPPF because they were simply factors to be taken into account in judging the weight to be attached to a

draft plan rather than free-standing tests. The three criteria were not "principal important controversial issues" in their own right attracting an obligation to give reasons. It was also submitted that it could not be inferred from the absence in the decision letter of any finding under the second and third criteria that they had not been taken into account, citing the speech of Lord Lloyd of Berwick in Bolton MDC v Secretary of State for the Environment (1995) 71 P & CR 309, 314 - 5.

141. In my judgment, the policy in paragraph 216 of the NPPF should be read as a whole. It is not a policy which simply makes the trite point that decision-makers may give weight to relevant policies in emerging plans. Rather it is a policy that they may do so "according to" the three criteria or factors which follow. The policy clearly stipulates that the three criteria are relevant in each case. Of course, when dealing with a particular planning proposal it may be the case that the relevant policies in a draft plan have not attracted any objections and so it would not be necessary to consider the second criterion *beyond that initial stage*. But plainly the second criterion is material in each case in order to ascertain whether a relevant draft policy has attracted any objections and if so, their nature, before going on to make an assessment of the significance of any such objections.

142. When applying paragraph 216, an Inspector or the Secretary of State determining a planning appeal is largely dependant upon the information provided by the parties on the application of the three criteria. By contrast, where a decision is being taken by a local planning authority which is also responsible for the draft plan in question, that authority is unlikely to be dependant upon others to provide the information needed to apply the three criteria. It has ready access to that information itself.

143. In my judgment it is plain that in this case substantial information was placed before the Secretary of State which resulted in the application of the second and third criteria becoming "principal important controversial issues" for the Secretary of State to grapple with and determine (see paragraphs 45, 47 and 48 above). For example, the Parish Council submitted to the Defendant that the appeal should be dismissed because it proposed substantially more than the 30 - 40 houses and therefore conflicted with policies C1, H1 and H4 of the draft plan. But the Claimant submitted that H4 was in conflict with the NPPF because it imposed a cap on the scale of new housing in Sayers Common and did not provide the "flexibility" required by national policy.

144. It follows that if the Secretary of State had applied the second and third criteria in paragraph 216 of the NPPF, he was obliged to give reasons explaining how he had done so and resolved important planning issues raised by the parties. He did not give any such reasoning in the decision letter. That is a sufficient basis upon which to uphold ground 1.

145. However, in my judgment the legal error goes further. The decision letter reveals that the Secretary of State did not apply the second and third criteria at all. In DL19 he stated that the issue of whether more land needed to be "allocated" at Sayers Common should not be "prejudged", but should instead be left to the examination of the draft plan. The clear implication was that the Defendant considered that the appeal site should not be released for housing development unless and until the figures setting the cap for Sayers Common in policy H4 are increased. Thus, the Secretary of State did not assess *whether* the inclusion of *any* cap in draft policy H4 accorded with the

NPPF, nor the strength of the objections made to the plan, particularly that policy, (taking into account paragraphs 33 and 81 of BDW and Reports into the Examination of Neighbourhood Plans cited by the Claimant). The criticism in paragraph 83 above also applies under ground 1.

146. Mr. Honey submitted that even if the second and third criteria in paragraph 216 of the NPPF had been addressed, the decision on the weight to be given to the draft plan would have remained unchanged and the decision would necessarily have been the same, at least in that respect. I am quite unable to accept that submission. For the reasons I have given it cannot be inferred that if, for example, the Secretary of State had addressed the objections to "the cap", he would necessarily have attached the same weight to the draft plan, in particular H4. Indeed, if he had given little weight to the "cap", he might well have treated his acceptance of the strong merits of the proposal as decisive.

Conclusion

147. For all the reasons given above, I uphold each of grounds 1, 2, 3 and 4 as freestanding reasons for quashing the decision dated 4 September 2014.