

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM CENTRE**

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

29/07/2016

B e f o r e :

MR JUSTICE DOVE

Between:

**SAVE OUR GREENHILLS
COMMUNITY GROUP**

Claimant

- and -

**SECRETARY OF STATE FOR
COMMUNITIES AND
LOCAL GOVERNMENT**

First Defendant

- and -

SHROPSHIRE COUNCIL

**Second
Defendant**

- and -

**TGC RENEWABLES LTD AND
ROBERT WALL**

**Third
Defendant**

**Thea Osmond-Smith (instructed by Freeths) for the Claimant
Richard Moules (instructed by The Government Legal Department) for
the First defendant
The Second Defendant was not represented and did not appear at the hearing
Jeremy Pike (instructed by Temple Bright LLP) for the Third Defendant
Hearing date: 8th July 2016**

Mr Justice Dove :

Introduction

1. This is a challenge under section 288 of the Town and Country Planning Act 1990 in relation to a decision of the first defendant's Inspector on 16th March 2016 in respect of a planning appeal

made by the third defendants. The claimants are a local amenity group who participated both in the planning application and the planning appeal process, objecting to the proposed development. The Inspector allowed the appeal and granted planning permission and this challenge is brought on four Grounds which are specified below. The hearing was a rolled up hearing in which it was necessary to reach a determination both in relation to the question of whether or not permission to proceed should be granted, and also, where appropriate, with the substantive merits of the challenge.

The facts

2. On 2nd October 2014 the third defendant made an application for planning permission for a proposal which was described in the following terms:

“solar farm and associated development”

3. The application form identified that the site was 10.1 hectares in extent and also alluded to the provision of plans and drawings associated with the application, in particular a drawing in relation to site design. On 27th October 2014 the second defendant acknowledged receipt of the application and confirmed that they had validated it on 22nd October 2014. A reference number was allocated to the application and the description of the proposal was altered by the Council to the following:

“construction of a solar park comprising the installation of (circa) 14,200 ground mounted solar panels; inverter cabin; electricity substation; switchroom; coms building; pole mounted CCTV system; 2.4 metre high security fencing; associated access gates and gravel roads.”

4. The application was accompanied and supported by documentation. A Planning, Design And Access statement was provided. In relation to flood risk section 15 of the document provided as follows:

“15.0 Flood Risk

TGC commissioned a Flood Risk Assessment (FRA) and this accompanies the application. The Site is located in Fluvial Zone 1. This implies that the entire developable area of the Site has a lower than 1 in 1,000 year probability of being affected by fluvial flooding.

Notwithstanding the above, the Proposals have the potential to introduce impermeable area around the Site where the land has previously been permeable and thus could increase the flood risk to adjacent sites.

The proposals would only introduce a small area of impermeable surfaces through the steel pile system used for the tables/racking system and the inverter stations concrete bases. Any access and maintenance roads are proposed to be constructed from permeable materials and will therefore not contribute to increasing runoff rates from the Site.

The total impermeable area equates to approximately 270m², which is only around 0.25% of the totally site area and will have a small impact on run off rates from the Site.

It is proposed to incorporate a SuDS scheme, as detailed within the FRA accompanying this application. The scheme will effectively reduce the run off rate to less than the current runoff rates, as storage and infiltration on site will be improved.

On the basis of the above, it is considered that the Proposals comply with Policy CS 18 of the Shropshire Core Strategy as the development would include appropriate SuDS to manage surface water and reduce existing run off rates.”

5. In addition the application was supported by a Heritage Assessment. The Heritage Assessment identified that there were three heritage assets (the listed buildings Wharf House and Dower House and the Neen Sollars conservation area) which required consideration in relation to the proposed development. In relation to Wharf House the assessment, having explained the historic context of the building, provided the following observations in respect of the building’s setting and the impact of the proposed development upon that setting.

“Elements of setting that contribute to the significance of the heritage asset

- 5.10. The building derives its significance in some part from its evidential value, contained in its historic post-medieval fabrics, surviving features and associated outbuildings.
- 5.11. Whilst much of the former Kington and Leominster Canal is now lost, the building derives some historical value and significance from its association with the canal’s construction where it served as the Kington and Leominster Canal Company’s headquarters.
- 5.12. Further significance is derived from the building’s rural setting which is a good reflection of the setting within which the property would have originally been constructed.

Impact of the Proposed Development

- 5.13. Development of a solar PV array at the Site will not impact upon the Listed Building’s physical fabric or its immediate rural setting and therefore will not alter the evidential value which this heritage asset holds.
- 5.14. Views towards the Site from the Listed Building are well screened by the substantial hedges which comprise the property’s northern boundary, and local topography makes it very unlikely that the panels themselves would be visible from within the property’s boundaries.
- 5.15. It is assessed that the Proposed Development will not present any visual impact upon the Listed Building’s wider landscape setting and will not detract from the ability to understand, interpret or appreciate the Listed Building, nor affect the value which its historical value or its wider landscape setting contributes to its overall significance. No negative effect on the Listed Building’s setting is predicted.”
6. In a similar manner in relation to the Dower House the Heritage Assessment described the historic context of the building and then went on to offer the following analysis of the setting of the Heritage Assessment and the impact of the development upon it:

“Elements of setting that contribute to the significance of the heritage asset

- 5.19. The building derives its significance in part from its evidential value, contained in its historic post-medieval fabrics and surviving features.
- 5.20. Further significance is derived from the building’s rural, mostly agricultural, setting which reflects well the setting within which the property would have originally been constructed.

Impact of the Proposed Development

- 5.21. Development of a solar PV array at the Site will not impact upon the building's physical fabric or its immediate rural setting and therefore will not alter the evidential value which this heritage asset holds.
 - 5.22. Views toward the Site from the Listed Building are well screened by the hedges and trees which comprise the property's northern boundary.
 - 5.23. It is assessed that the Proposed Development will not present any visual impact upon the Listed Building's wider landscape setting and will not detract from the ability to understand, interpret or appreciate the Listed Building, nor affect the limited value which its wider setting contributes to its overall significance. No negative effect on the Listed Building's setting is predicted."
7. Finally, in relation to the Neen Sollars Conservation Area the Heritage Assessment set out the historic interest of the conservation area and then, again, set out its analysis of the setting of the conservation area and the impact of the proposed development:

"Elements of setting that contribute to the significance of the heritage asset

- 5.26. The Conservation Area derives its significance from the group value of its historic buildings and area's informal layout and wide variety of architectural forms and styles. The Conservation Area contains fine examples of half-timbered, brick and stone buildings in a variety of traditional building styles with a Grade II* Listed Parish Church of All Saints situated within a spacious setting.

Impact of the Proposed Development

- 5.27. The Proposed Development is not visible in views from the majority of the Conservation Area, where extant buildings, mature trees and hedges, along with the undulating local topography, serve to effectively screen the area from the Site. The only exception may be the area to the extreme south of the churchyard, where there may be intermittent views across the landscape to the Site, more likely in winter when intervening deciduous trees will have lost their foliage. It is assessed that this potential change to the wider agricultural setting of the Conservation Area would result in no adverse impact upon its significance."
8. The application was also supported by a flood risk assessment and SUDS (Sustainable Drainage Strategy) design that provided as follows in relation to the approach to surface water drainage as a consequence of the implementation of the proposal:

"SuDS Design

The impermeable areas across the site are small, therefore no formal drainage is required. As such a pragmatic approach has been taken to promote infiltration and create storage across the site. This involves the installation of swale and scrape features running parallel to the site contours within downslope areas of the site. These features will intercept and distribute flows, create storage, attenuate runoff and promote infiltration across the site.

Since the modules are located on a sloped frame between approximately 0.8m and 2.5m above ground level, it is anticipated that rain falling on each solar panel table will runoff the panels and flow/infiltrate in the sheltered rain shadow area underneath the down-slope modules. A 25mm gap surrounding the panels will allow water to drain off each module.

In addition the SuDS design will not consider the runoff from the access and maintenance roads as these will be constructed of grass trucks /unbound crushed stones / gravel or similar permeable materials, which will allow infiltration of water on these areas. The access roads will therefore not increase surface water runoff rates from the site.

The enclosed layout indicates the solar PV modules will be supported by steel racking systems, which are to be set on driven piles. The increase in impermeable area due to the piles has been estimated to be around 40m².

Including the 4 intervener stations with a plan of around 30m² each and the POC/switch gear station of around 63m², the additional impermeable area is around 183m².

Applying a 20% increase for inconsistencies the total impermeable area is around 270m². Therefore a conservative estimate of the volume of runoff from the total impermeable area had been calculated to be approximately **20.6m³** for a 6 hour duration, 1 in 100 year rainfall event.

In order to adopt a pragmatic approach and promote infiltration across the site, a system of swales and scrapes are proposed to manage the surface water runoff. The details showing surface water management features of varying storage capacity are outlined in Drawing 3001.”

9. The site design plan which accompanied the application was dated 10th January 2014 and was identified as revision A4. In the plan legend, system information was provided in relation to the installation, including that the number of modules which were to be deployed was 14,200.
10. The claimants, amongst others, made representations of objection to the planning application. Amongst the objections which were raised were concerns in relation to landscape and heritage impact, as well as concerns in relation to the agricultural land quality and soil classification for the site contained within the third defendant’s application documentation. The matter progressed and was due to be considered by the second defendant’s planning committee on 10th March 2015. On 6th March 2015 Mr Jamieson, on behalf of the third defendant, submitted a revised site design. The plan was accompanied by an email in which he stated as follows:

“Further to the below, please find attached Site Design Rev. A5. This supersedes Rev. A4.

You will note that we have removed all the panels to the north of the existing overhead line, bringing the panels well away from the ridge line and containing them behind and below this existing visual element.

We are also happy to reduce the panels to a maximum height of 2.6m...

We’re happy to make these changes to alleviate the specific concerns raised over the last few days from the local community, however are somewhat frustrated that these weren’t brought up before. For example, we repeatedly offered to meet with the Parish and the anti-group however this wasn’t take (sic) up. For example, the below is from my email of 28 October 2014 into which you were copied.”

11. Both the email and the plans which were submitted were loaded onto the second defendant’s website. It is to be noted, as Mr Jamieson accepts in his evidence, that the plans contained a typographical error since they were still labelled as revision A4. The system information contained in the legend on the plans had however changed. The information now provided was that the number of modules had increased to 17,180. The effect, therefore, of the changes made by the amendments to the plans were to remove an area of land from the installation and

concentrate a greater number of modules within a smaller site area. Both plans showed the disposition of the panels across the site. The revised site design shows the panels more densely covering the proposed site area. The revisions to the plans were noted by Mr Clayworth who is a member and representative of the claimant. On 6th March 2015 he noted the revisions which had been posted on the second defendant's website and responded to them, in a personal capacity, in the following terms:

"I have seen the proposed revision posted on the portal today.

Mr Jamieson states in his e mail that they have removed all the panels to the North of the existing power line.

When you look at the plan he provides you can see this statement is not true. They are proposing to remove the panels only on the western side of the site.

The eastern side which is more visible from the viewpoints we have used is unaltered.

Consequently the changes have no effect in reducing the impact on landscape character nor the visual impact that our viewpoints demonstrate.

There is no ridge on the eastern side of the site other than the ridge to the south at the top of the slope where they are proposing to locate the comms building, substation and switch room."

12. There is no contemporaneous documentation to explain the second defendant's approach to this new documentation. In response to this challenge the second defendant's solicitor wrote to the claimant's solicitor on 10th May 2016 providing the following explanation for the second defendant's view that the amended plans could be accepted and, further, that there was no need for any formal public re-consultation in relation to those plans. The letter records as follows:

"The amendment did not affect the energy output, the area of the site or any other key aspects of the proposals. The layout changes were considered at the time by the Council to be minor and beneficial in the context of the scale of the development and relevant land use issues. The Council took the view that a formal public re-consultation was not essential in the circumstances and the Inspector accepted this position in determining the application."

13. The officers provided an update report for members which addressed the amended site plan. The update report identified various changes to the proposals but did not note or draw to the attention of members the increase in the number of panels. The update report quoted from Mr Jamieson's email which, again, did not draw attention to the increase in numbers of the panels or modules comprised in the proposal. At the committee the claimants were represented by Mr Clayworth who made representations on their behalf.

14. The evidence demonstrates that copies of the amended site drawing provided originally on 6th March 2015 were distributed to members undertaking the site visit on 10th March 2015 prior to consideration of the application. Furthermore the officer's presentation at the planning committee included the use of the revised and amended site design. The application was recommended for approval by the officers. In the event it was refused for one reason which specifies as follows:

"The proposals are inappropriate in terms of scale and location and fail to protect and enhance the natural and historic environment and the character and high quality of the local countryside. They are therefore contrary to Core Strategy Policies CS5, CS6 and CS17. The proposals also fail to sustain and enhance the significance of the setting of the Neen Sollars Conservation Area and associated heritage assets and therefore conflict with paragraphs 131,

132, 137 and 137 of the NPPF. The renewable energy benefits of the proposals are significantly and demonstrably outweighed by the adverse impacts.”

15. The third defendants appealed against the decision of the second defendant. In the appeal form which they completed they identified the description of development as that which had been changed by the Council and which specified the number of panels as being 14,200. On 16th April 2015 the third defendants wrote to the Planning Inspectorate (“PINS”) confirming that the second defendant had changed the description of development when registering the application. The revised and increased number of panels was not alluded to. In their Statement of Case they also indicated that the description of development was that which included the specification of 14,200 panels. Whilst reference was made within the Statement of Case to the reduction in the land area of the proposal to 7.2 hectares as a result of the amended site design, no reference was made to the increase in the number of solar panels proposed.
16. A letter of notification in relation to the appeal was sent out on 8th July 2015 by the second defendant. That letter also used the description of development from the original application specifying the number of panels as being 14,200. It also advised that the appeal was to be determined on the basis of written representations and that the appeal document could be inspected both on the Planning Portal and on the second defendant’s website, or alternatively by calling at the second defendant’s local office in Ludlow.
17. The claimant commissioned a planning consultant to provide detailed representations in relation to the appeal, in particular in respect of planning policy. That document made a number of representations in relation to agricultural land quality and also the landscape and visual impacts of the proposal. The document did not note the increase in the number of solar panels on the amended drawings, nor did it make any observations in relation to the implications of that revised drawing in terms of the increased number of solar panels.
18. On 10th November 2015 the PINS wrote an email to Mr Jamieson seeking clarity in relation to the plans on the basis of which the application was determined by the second defendant. In the email the following issue was raised:

“The Inspector notes that in the email exchange with the Council on 6th March 2015 various amendments were offered and some of these plans have been submitted with the appeal documents. While he seems to have Rev A5 on the layout it is actually still marked A4 and although the area covered has decreased the number of modules has gone up to 17,180 – clearly the appellant needs to sort this out. However, he does not believe these were ever the subject of consultation and, since the minutes of the committee meeting have not been provided, it is not clear if these suggested changes were reported to members before they determined the application.”

Mr Jamieson responded to the email later on the same day and stated as follows:

“Rev A5 of the site design was submitted 6th March 2015 as noted below. This accompanied the appeal as it was the layout which Grahame [the second defendant’s planning officer] based his presentation on. He was happy to accept this layout as part of the application, supported its inclusion as part of the scheme and it appears on the online public register. The number of panels has increased as the row spacing has been decreased.”

19. Following this exchange of correspondence, which was not publicly available but was correspondence solely between the first, second and third defendants, a site visit occurred on 12th November 2015. Evidence before the court from the Inspector and Mr Jamieson explains that at the site visit Mr Jamieson passed to the Inspector hard copies of the amended drawing with the only change being a corrected reference on the plan from “Rev A4” to “Rev A5”. Mr Clayworth recalls some conversation in relation to “Wheatcroft” (by which I have no doubt is

meant the question of whether or not the amended drawings could be accepted within the context of the appeal) but in the event this issue featured neither in the appeal nor in the considerations in this challenge. Whilst Mr Clayworth registered concern in his first witness statement as to what had been passed to the Inspector I am satisfied on the totality of the evidence that all that was passed were the plans with the revised references as set out above.

20. Following the site visit it appears that the main parties to the appeal were invited to make further representations in the light of the second defendant's adoption of its Site Allocations and Management of Development Plan. The claimant provided a representation in relation to that document but also took the opportunity to make representations to the Inspector in relation to the amended plan. The letter provided as follows:

"Whilst not strictly relevant to the introduction of the plan we also note that the developer submitted revised plans at the last minute and that these were not subject to further and proper consultation. It is not clear if those plans included a red line change to move the track in response to issues raised by the ecology report by Shropshire Council as offered in correspondence from the developer. They certainly changed the layout of the panels and introduced a second inverter building and yet submitted no new reports substantiating the change such as a revised flood report explaining why the run off from more tightly packed panels would not be an issue."

21. On 16th March 2016 the Inspector's decision in relation to the appeal was promulgated. In paragraph 1 of the decision letter the Inspector set out that he was proposing to allow the appeal and grant planning permission for a development described in accordance with the description of development given by the second defendant, including within that description the figure of 14,200 panels. In his observations under the heading "Preliminary and Procedural Matters" he observed as follows in respect of the amended plans:

- "7. On 6 March 2015 the appellant made a number of amendments to the submitted planning application. These included a revised site design (layout), some changes to the northern boundary landscape treatments and an offer to reduce the maximum height of the proposed panels to 2.6m. The design and height of the perimeter security fencing had already been amended.
8. The changes were put forward to address concerns raised by SOGHCG and others. The main change was to draw back the northern edge of the panels in the western of the two fields to the line of the overhead power cable thus removing the panels from the north-facing slope in that area. However, in doing so the appellant has increased the number of panels that would be installed from the number given in the summary details above to some 17,200. That is an increase of 21%. The appellant pointed out during the site visit that this would be accommodated by reducing the distance between the arrays. I have no evidence about the impact of this, if any, on the scheme output or the construction period.
9. The Council has confirmed that these changes were not subject to consultation but were reported, displayed and explained to the council members. I understand that they visited the appeal site on the same day that the planning application was determined. The decision that they made was based on the changes put forward on 6 March.
10. This is not a case where the appellant is seeking to amend the proposals through the appeal process. The changes were accepted by the Council notwithstanding the absence of further consultation. Furthermore, SOGHCG and others have had the chance to make comment upon them as part of the appeal process. Taking all these matters into account, I have determined this appeal on the same basis as the Council."

22. The Inspector identified three main issues in respect of the merits of the appeal. Those were firstly, the affect the development would have on the character and appearance of the landscape; secondly, the affect which it would have on the significance of the designated heritage assets in the locality; and thirdly, whether the proposal would accord with National Planning Policy and Guidance for the sighting of ground-mounted solar farms. His conclusions in relation to designated heritage assets are the subject of criticism in this challenge. He analysed the issues and provided the reasons for his conclusion in the following paragraphs.

“33. There are a number of Listed Buildings both within Neen Sollars and the wider area and the majority of the linear settlement is within the Neen Sollars Conservation Area. The development proposed would have no direct effect on any of the Listed Buildings and would have no direct impact on the character or appearance of the Conservation Area. Both these aspects of the Conservation Area, to which I must have regard by statute, would therefore be preserved.

34. The Heritage Assessment explains how the heritage assets that would be subject to detailed settings assessment were selected and how that assessment was carried out. I have no evidence before me to dispute that process. The three assets subject to more detailed analysis were Wharf House and Dower House and the Conservation Area as a whole.

35. In each case the rural setting of the building and Conservation Area adds to the significance of the asset. However, there is no evidence that a designed view forms part of the significance of the setting of either of the houses while it is the buildings themselves and their groupings together with the Church that are the most important elements of the character and appearance of the Conservation Area.

36. As set out under my first main issue the appeal development would affect only a very small part of the landscape. It would not be visually prominent from either Listed Building assessed in detail or from within the public domain of the Conservation Area. In my view, there would be no impact on the setting of any heritage asset and thus no conflict with the objectives of the Framework section 12 which sets out national planning policy to achieve the core planning principle listed in Framework paragraph 17, bullet 10. for the same reasons there would be accordance with SAMDev policy MD13 criteria 1 which requires development proposal to avoid harm or loss of significance to designated or non-designated heritage assets including their settings wherever possible.”
23. Having formed the view that planning permission should be granted the Inspector gave consideration to the question of conditions. Although the material is not directly before the court, it was agreed at the hearing that it was suggested by the second defendant that the Inspector could deploy the conditions which were contained within the Committee Report which was, it will be recalled, a report recommending approval of the application. It is apparent from the Inspector’s reasons that he replicated in his own conditions the issues which were covered by the conditions in the Committee Report but amended them and redrafted them as he considered appropriate. Neither the list of conditions on the officer’s report nor the conditions which the Inspector imposed contained a condition requiring the implementation of the SUDs scheme. This was notwithstanding the comments from the Council’s internal drainage officer that:

“The proposed scrape and swale system shown in drawing J-4864-CFM 3001 in the Flood Risk Assessment is acceptable.”
24. Following the issuing of these proceedings on 7th June 2016 the third defendant entered into a section 106 obligation in which the third defendant covenants with the second defendant to implement the SUDs measures and to maintain grass and vegetation on the site under and

around the solar panels in accordance with a grass management plan to be approved by the second defendant. The section 106 is supported by a document dated 2nd June 2016 entitled Sustainable Drainage Strategy. The text of the document contains a number of similar observations in relation to the SUDs design proposal save that, obviously, there are differences in relation to the extent of impermeable area and the volume of run off. The text of the document is essentially unchanged and the extent of total impermeable area remains calculated at around 270m² in each proposal. The run-off from the impermeable area calculated for a 6 hour, 1 in 100 year rainfall event has changed from 20.6m³ to 20.7m³. The volume of storage from the proposed swales has decreased from 170m³ to 93m³ but still considerably exceeds the calculated run-off. A plan of the SUDs measures is provided in the form of, again, a “conceptual SUDs layout”. The plan shows the conceptual SUDs layout based upon the revised area to be covered by the solar panels.

Policy and Guidance

25. Paragraph 132 of the National Planning Policy Framework (“The Framework”) provides as follows:

“132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset’s conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification.”

It will be apparent from the quotation from the decision letter set out above that these proposals did not involve any direct impact upon any heritage asset. The issues related to the question of the setting of the heritage assets. The definition of the setting of a heritage asset provided by the Framework is as follows:

“**Setting of a heritage asset:** The surroundings in which a heritage asset is experienced. Its extent is not fixed and may change as the asset and its surroundings evolve. Elements of a setting may make a positive or negative contribution to the significance of an asset, may affect the ability to appreciate that significance or may be neutral.”

26. In order to assist in assessing issues of this kind Historic England have published Good Practice Advice in a document entitled “The Setting of Heritage Assets”. Within that document advice is provided in relation to the steps involved in assessing effects on the setting of a heritage asset. The document advocates a staged approach to decision taking in which step one is to identify which heritage assets and their settings are affected; step two is to assess whether, how and to what degree the settings make a contribution to the significance of heritage assets; step three is to assess the effects of the proposed development (whether beneficial or harmful) on that significance; step four is to explore the ways to maximise any enhancement or avoid or minimise harm; and step five is to make and document the decision and to monitor outcomes. Each of those steps is considered in some detail in the advice, and practical guidance is provided as to how those steps are to be undertaken.

27. Reliance is also placed by the claimant on the PINs “Procedural Guide applying to planning appeals in England”. In particular reliance is placed upon section N in which the guidance considers the question: “Can a proposed scheme be amended?” The guidance provides as follows:

“N.2.1 If an appeal is made the appeal process should not be used to evolve a scheme and it is important that what is considered by the Inspector is essentially what was considered by the local planning authority, and on which interested people’s views were sought.”

28. Further guidance relied upon by the claimant and published by PINS is their “Planning Inspectorate Good Practice Advice Note 09”. This Note deals with where amendments are proposed to schemes at appeal. The Note addresses the benefit of constructive dialogue leading to amendments being agreed prior to a local planning authority’s decision, and the approach to amendments to a scheme which it is proposed to appeal or where an appeal has been lodged in the following paragraphs:
- “9. The delivery of an efficient, customer focused appeal process which is of benefit to all depends on continuing constructive dialogue between the applicant and the local planning authority during the progress of planning applications. Where such dialogue takes place it should be possible for acceptable amendments to be agreed prior to the local planning authority’s decision. Thus should there be any subsequent appeal it can be about the scheme considered by the local planning authority, including any amendments made to overcome legitimate planning concerns. This allows the local planning authority to conduct any necessary public consultation in accordance with their SCI, ensuring that any third parties who may be interested in a proposal have a fair opportunity to comment on any amendments to a scheme before it comes to appeal...”
13. However, where it is clear that the local planning authority are unwilling to co-operate in a constructive dialogue it may be necessary for the appellant to carry out consultation on amendments to a scheme on which it is proposed to appeal or where an appeal has been lodged. In deciding whether the amendments can be accepted in such cases it will be crucial to consider proposed amendments and make their views on them known. Where consultation has been carried out by the appellant, particular care will need to be taken to ensure that statutory bodies and local people have been made properly aware of what is proposed and have had adequate chance to comment; timescale will clearly be relevant.”

The Grounds

29. The case presented at the hearing by Ms Osmund-Smith on behalf of the claimant was articulated in four Grounds. Ground 1 is an allegation of procedural unfairness and breach of legitimate expectation. It is contended that there was unfairness in the failure to fully advertise the change in the development, and in particular the description of development which was affected by the submission of the amended plan and the increase in the number of panels from 14,200 to 17,180. The failure to publicise this change, it was contended, deprived the claimant of the opportunity to make representations in relation to the environmental effects of a more densely crowded proposal in terms of the disposition of the panels, and the effects that that might have in respect of flooding, landscape and visual effects and ecology. Furthermore, it was submitted under Ground 1 that there was a legitimate expectation that the first defendant would comply with the guidance contained in the PINS advice set out above and consult upon the changes which had been affected by the submission and acceptance of the amended plans.
30. Ground 2 is related to Ground 1 and is the contention that there was a failure by the Inspector to undertake any proper or sufficient enquiry into the effects, or potential effects, of the revised scheme. There was no evidence provided to the Inspector as to what the environmental effects of significantly increasing the number and density of the solar panels might be and it was incumbent upon the Inspector to undertake enquiries and require the provision of evidence in respect of those effects.
31. Ground 3 related, initially, to the failure of the Inspector to impose a condition requiring that a SUDS drainage scheme as set out in the application’s supporting documentation and endorsed by the Council’s drainage officer. In the light of the completion of the section 106 obligation this argument evolved into the contention that it was illegitimate to rely upon the section 106 obligation that committed the third defendants to the implementation of a SUDS scheme as it had not been the subject of any public consultation and had not been part of the planning

process. Thus, reliance on the section 106 obligation to avoid the claimant's contentions under Ground 3 was said to be illegitimate.

32. Ground 4 relates to the Inspector's conclusions in respect of the impact on heritage assets. It was submitted that the Inspector, having concluded that the appeal site was part of the setting of the three heritage assets concerned, had failed to assess the extent of the impact of the development on the significance of those assets as a consequence of the impact on their setting. In failing to do so he had failed to properly apply the policy of the Framework and, moreover, failed to apply the statutory test from section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and therefore was guilty of an error of law in the conclusions which he had reached.

The law

33. Section 70 of the Town and Country Planning Act 1990 provides a discretion to grant planning permission and requires regard to be had to the provisions of the development plan. Section 38(6) of the Planning and Compulsory Purchase Act 2004 states that:

"Regard is to be had to the development plan for the purposes of any determination to be made under the Planning Act the determination must be made in accordance with plan unless material considerations indicate otherwise."

34. Section 66(1) of the Listed Buildings Act provides as follows:

"in considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State, shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

35. In the case of *Mordue* [2015] EWCA Civ 1234 the Court of Appeal considered the implications of the duty under section 66 of the Listed Buildings Act, in particular in the light of the Court of Appeal's decision in *East Northamptonshire District Council v Secretary of State for Communities and Local Government* [2014] EWCA Civ 137. Giving the leading judgement in the Court of Appeal Sales LJ (with whom the other members of the court agreed) provided the following at paragraph 28 in relation to the approach to be taken by a decision maker in relation to the section 66(1) duty:

"...Paragraph 134 of the NPPF appears as part of a fasciculus of paragraphs, set out above, which lay down an approach which corresponds with the duty in s.66(1). Generally, a decision-maker who works through those paragraphs in accordance with their terms will have complied with the s.66(1) duty. When an expert planning inspector refers to a paragraph within that grouping of provisions (as the Inspector referred to para.134 of the NPPF in the Decision Letter in this case) then-absent some positive contrary indication in other parts of the text of his reasons-the appropriate inference is that he has taken properly into account all those provisions, not that he has forgotten about all the other paragraphs apart from the specific one he has mentioned. Working through these paragraphs, a decision-maker who had properly directed himself by reference to them would indeed have arrived at the conclusion that the case fell within para.134, as the Inspector did."

36. The question of the requirements of fairness in the context of a planning appeal has recently been considered by the Court of Appeal in the case of *Hopkins Developments Limited v Secretary of State for Communities and Local Governments* [2014] EWCA Civ 470. It is important to note that this case focused in particular upon the provisions of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, and in particular the provisions of those rules relating to the identification of the

main issues and the emergence of issues which become determinative during the course of a public inquiry process. Nevertheless the court provided more general observations. Jackson LJ at paragraph 62 of his judgement provided so far as generally relevant as follows:

“62 From reviewing the authorities I derive the following principles: i) Any party to a planning inquiry is entitled (a) to know the case which he has to meet and (b) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case. ii) If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the Inspector’s decision.”

37. Beatson LJ provides further analysis of the principles at paragraphs 85 to 87 of his judgement as follows:

“85 Provided that certain factors are borne in mind, it does not generally matter whether what is at issue is characterised as “natural justice” or “procedural fairness”. The first of those factors is that it is a commonplace that in the context of administrative decision-making the ascertainment of what procedures are required is acutely sensitive to context and the particular factual situation. Fairness is thus a flexible concept, as well as, of course, being subject to any particular requirements in primary and secondary legislation: see *R (L) v West London Mental Health NHS Trust* [2014] EWCA 47 at [67], citing *inter alia* *R v Secretary of State for the Home Department, ex p Doody* [1994] 1 AC 531, at 560 (per Lord Mustill). Here the relevant legislative and policy framework is contained in the 2000 Regulations and PINS 01/2009.

86 Secondly, the term “fairness”, when first used, was a signal that, although the reach of the “right to be heard” limb of the principle of natural justice had been expanded to new situations, the procedures required in those situations might be less onerous and less formal because of the nature of the decision that is to be made. But, although the precise content of the procedure required will depend on the particular context and circumstances, the underlying principle is of general applicability: *Bushell v Secretary of State for the Environment* [1981] AC 75 at 95B – C per Lord Diplock; *Lloyd v McMahon* [1987] AC 625 at 702 per Lord Bridge; and Craig, *Administrative Law* 6th ed., (2008) at 12–009 – 12–010.

87 Thirdly, it is important to identify what the “right to be heard” limb of the common law principle gives the individual affected. In *R (Gul) v Secretary of State for Justice* [2014] EWHC 373 (Admin) at [34], I stated that:

“it is clear from decisions in the last 60 years that what is required is an opportunity to be heard, an opportunity to participate in the procedure by which the decision is made.”

I gave as examples the classic statement by Denning LJ in *Abbott v Sullivan* [1952] 1 KB 189 at 198 and the recent statement by Lord Reed in *Osborne v Parole Board* [2013] UKSC 61 at [68]. The decisions to which my Lord has referred and which I discuss briefly at [89] – [92] show that this is also the broad position in the context of planning inquiries.”

38. The approach to be taken by the court in considering decision letters provided in appeals under section 78 of the Town and Country Planning Act 1990 is now very well established. The decision letter should be read fairly and as a whole recognising that it is addressed to parties who were well aware of the issues involved and the arguments which had been made. Decision letters should be read bearing in mind that they are exercises of practical decision making: they are not statutes, contracts or legal instruments and should not be subject to forensic linguistic dissection as if they were. They do not need to deal with each and every issue which may have been raised or rehearsed and analyse every argument made, but should address to the substantial points which it is necessary for the decision-maker to deal with and which have

driven the choices and decisions which the decision-maker has taken. The standard of reasons required have been set out in *South Bucks DC v Porter (No2)* [2004] 1 WLR 1953 at paragraph 36 as follows:

- “36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”
39. In *Hayes v Wychavon DC* [2014] EWHC 1987 Lang J concluded that the principles which applied in relation to testing whether or not a public body has undertaken adequate investigation of the materials pertinent to its decision as set out by Laws J in *R (Keaton) v London Borough of Newham* [2004] EWCA Civ 55 applied equally to a planning authority undertaking investigations in relation to a planning application. In my view they must also apply equally to an Inspector or the Secretary of State when undertaking an appeal under section 78 of the 1990 Act. When it is alleged that an Inspector has failed in his or her duty to make sufficient enquiries into the planning merits, the question which the court has to answer is whether the enquiry which was made was so inadequate that no reasonable Inspector could suppose that he or she had sufficient material available upon which to decide whether or not to grant planning permission.
40. The principles in relation to legitimate expectation in a case such as this are well known. Where an individual has been given a promise by a public body as to how it will behave in the future in certain defined circumstances, and the public body fails to act in accordance with that promise, then the court will hold the public body to the promise if it chooses to treat the individual in a different way. The starting point for the enquiry in such cases has to be what the member of the public could legitimately expect, or what promise has been made to that member of the public, and in what circumstances was that promise made. This is the essential qualifying condition for a legitimate expectation to be actionable. Thereafter it is necessary for the member of the public to demonstrate that the promise has, on the facts of their case, been broken and their legitimate expectation of how the public body would behave has been frustrated.
41. Finally the court has the discretion not to quash a decision even if illegality has been found in the decision-making process. The test to be applied in considering whether or not this discretion should be exercised is whether or not the decision-maker would necessarily have arrived at the same decision even if he had not acted erroneously, or alternatively that there is no real possibility that a different decision would have been reached (see *Simplex (GE Holdings) Limited v Secretary of State for the Environment* (1989) 57 P&CR 306 and *Bolton MBC v Secretary of State for the Environment* (1991) 61 P&CR 343). Whilst the parties referred to section 31 of the Senior Courts Act 1981 and the amendments which were recently made to that

section, it is important to note that the section applies specifically to judicial review claims only and not to statutory challenges of this type. I leave open for consideration in another case whether the principles set out in section 31(2A), (3C) and (3D) should be read across into a challenge under section 288 of the 1990 Act or other similar statutory challenges.

Conclusions

42. In relation to Ground 1 I accept that it would have been at least desirable for the third defendant to have firstly, specifically alluded to the increase in the number of panels in their email of 6th March 2015 describing the changes in the plan and, secondly, to have amended the description of development so as to replace the figure of 14,200 with the figure from the amended plans of 17,180. Whilst I have no doubt that the omission to do so was entirely in good faith, and simply an oversight, it did lead to the use of a description of development which was inaccurate within the appeal. That said, I am not satisfied that the way in which the amendments were treated gave rise to any unfairness in the appeal process so far as the claimants are concerned for the following reasons.
43. Firstly, and by way of background, specific information as to the number of panels which formed part of the proposal were not required by the Town and Country Planning (Development Management Procedure) (England) Order 2010. In particular article 6 of the 2010 Order describes the information and documentation required by a planning application and at article 6(b) requires the provision of any particulars specified or referred to in the application form. Further article 6(1)(c)(2) requires the provision of “any other plans, drawings and information necessary to describe the development which is the subject of the application”. Thus the number of panels was not required by the application form. Further, the number of panels was at all times clear from the site design drawing which specified the number of panels in its legend. Thus, the information which was necessary to comply with the statutory requirements for a planning application was made available.
44. Secondly, and flowing from this first point, the amended drawing which was submitted on 6th March 2015 made clear to the public that the application proposal included provision for 17,180 panels. To my mind that is clear not only from the legend on the plan but also from a simple visual comparison between the drawings illustrating the change in the density of the panels from revision A4 to revision A5. Again, whilst it is unfortunate that the revision number was not changed in the plans submitted on 6th March 2015, the two plans are quite clearly different, and the accompanying email made that pellucidly clear. This point is to some extent reinforced by the enquiries which were made by PINS on 10th November 2015 which illustrates that the Inspector had identified the increase in the number of panels. Thus, I am satisfied that the amended drawing placed fairly and squarely into the public domain a proposal which included amongst its amendments an increase in the number of panels and the density of their coverage and that was clear and obvious from the publicly available materials.
45. I am unable to accept the submissions made on behalf of the claimant that there was a legitimate expectation in this case, based upon the PINS guidance which has been set out above, that there would be further consultation in respect of the amended revision A5. The guidance to which reference has been made is guidance which relates to circumstances where plans are proposed to be amended either after the local planning authority’s decision has been made and with an appeal in prospect, or alternatively during the currency of an appeal. For a variety of good reasons (including, for instance, the fact that PINS are not well placed to conduct the kind of comprehensive statutory and informal consultation undertaken by a local planning authority in the development control process) amendment of plans after the local planning authority’s decision or in the context of an appeal may well give rise to concerns as to the reach of public engagement in respect of amended proposals. Circumstances here were, however, very different. This was an amendment to the proposal which occurred before the second defendant reached its decision. As has been set out above the amended drawing formed

the basis of the site visit but, more importantly, the basis of the presentation to committee at a meeting which was addressed by the claimant. It is common ground that the amended drawing was the one used to illustrate the officer's presentation to the committee. The drawing together with its accompanying email were then placed on the Council's website and made publicly available. In the light of these matters I am wholly unpersuaded that the PINs guidance gave rise to any legitimate expectation since that guidance does not apply to circumstances where the amendment has been made prior to the local planning authority's decision. Thus, it is not a promise as to future conduct or behaviour which could bite in the present circumstances since this was not a case in which the amendment was made after the local planning authority's decision.

46. Considering the position in relation to what Beatson LJ characterised in paragraph 87 of the *Hopkins Developments* case as the opportunity to be heard and the opportunity to participate in the procedure, the following is additionally relevant. Whilst I accept that neither in the appeal form, nor in the third defendant's appeal statement, is the change in number of panels specifically advertised, and nor does the Inspector (although alive to the increase in panels) seek to change the description of development, nevertheless the claimant instructed a planning consultant who would undoubtedly have consulted the current plans forming the planning application before the appeal in order to undertake his planning policy analysis. Secondly, by the time the claimant's representations in the appeal were being submitted in August 2015 (and indeed the submissions on behalf of other parties objecting to the proposals) the amended drawing had been publicly available for some considerable time. Thirdly, on 28th January 2016 the claimant in making representations to PINs made reference to the amended drawings and the increase in the number of panels proposed prior to the decision being reached. Thus, viewing the evidence overall I am entirely satisfied that the claimant clearly had both an opportunity to be heard, or to comment, and an opportunity to participate in the appeal process in terms of making representations about the increase in the number of panels which were proposed. That increase was clear and in the public domain from prior to the second defendant's decision and was available, accessible and publicised throughout the appeal process. This permitted the clear opportunity to raise issues in relation to it in the course of the appeal process. I am therefore unpersuaded that there was any unfairness or breach of legitimate expectation in the first defendant's decision and, whilst in my view this ground was arguable, upon analysis it must be dismissed.
47. Turning to Ground 2 as was accepted at the appeal hearing there is to some extent overlap between Grounds 1 and 2. In my view it is an important part of the backdrop to the assessment of whether or not there is any substance in Ground 2 to recall that the Inspector is an expert tribunal undertaking his own de novo determination of the planning merits. Whilst the claimant is entitled to contend that the Inspector had not been provided with any evidence about the environmental effects of the scheme as amended (in terms of differences as to the impacts in respect of flooding or landscape and visual or cultural heritage issues) in my view the absence of evidence before the Inspector does not equate to an irrational failure on his part to call for further information about the environmental implications of the reduction in land area and the increase in the number of panels.
48. Firstly, whether the changes in the amended drawings called for additional information about the impact of those changes was a matter for his judgement. It is plain from the passages set out above in relation to procedural matters, that in exercising his judgement he did not consider that the changes proposed called for further information. Secondly, up until the letter written by the claimant on 28th January 2016 no issue had been raised by any party as to a need for further reports, evidence or information arising from the changed site design. Whilst the letter of 28th January 2016 raises the issue of the third defendant not having provided any "new reports substantiating the change such as a revised flood report explaining why the runoff from more tightly packed panels would not be an issue" I am unpersuaded that it was irrational of the Inspector not to call for such new material. Whilst the reports and information which he had

furnished with the application pertained to drawing A4 he was entitled in my view to form the judgement that the changes proposed in the amended drawings neither invalidated the information which was already before him, nor required the provision of further information in respect of environmental effects. Again, as with Ground 1, I am satisfied that this Ground is properly arguable, but on analysis do not consider that it succeeds.

49. Turning to Ground 3, perhaps the high point of the claimant's case is the reliance on what was observed in the Planning Design and Access statement (set out above) which indicated that in the view of the author the proposals complied with policy CS18 of the Core Strategy on the basis that the development included appropriate SUDs to manage surface water and reduce existing runoff rates. That said it is notable that neither the Council's drainage officer nor the officers in their report to committee suggested that it was necessary for there to be a condition incorporating the SUDs scheme. Furthermore, the Inspector did not suggest that a condition securing the implementation of SUDs was necessary or required. Thus, this is not a case where the need for a condition has been identified and therefore omitted in error, but rather a case in which neither the second defendant nor the first defendant on appeal has thought such a condition appropriate.
50. In any event, and notwithstanding those observations, the third defendant has now provided a section 106 obligation which covenants for the implementation of a SUDs scheme, albeit one which is different in detailed design terms from that contemplated by the original Flood Risk Assessment. That is necessarily the case because the site area has changed. In my view the claimant's complaint that this section 106 obligation is not an answer to their claim because the scheme which it proposes has not been consulted upon is without merit. In reality when the plans are compared, whilst the site area has changed, the principles of the conceptual SUDs layout has remained the same, namely the provision of a swale across the contours and northern edge of the site and a scrape on east-west access across the site. Whilst the details of the figures calculated for impermeable area and therefore runoff from that impermeable area during a six hour one in 100 year rainfall event have changed the principles of the calculation which were undisputed in the appeal process have remained the same. Whilst the extent of storage provided to conceptual SUDs layouts have changed as a consequence of the difference in the site design the calculations of the extent of the storage show, as they did in the original calculations, a significant excess over the minimum required storage from the calculations of run-off from a 6 hour 1 in 100 year event. Thus, without venturing into the merits of the issues in respect of flood storage it suffices to observe that the principle of the calculations and the nature of the conclusions which were found acceptable by the Council's drainage officer, the officers in their report and the Inspector at appeal have essentially remained almost identical. In short, therefore, the conclusion to which the court is inevitably driven is that the decision would be the same.
51. I have reached the conclusion that Ground 3 is not arguable and permission should be refused. This is principally, if not exclusively, on the basis that drainage was not a principal controversial or main issue in the appeal and secondly that neither the second defendant nor the first defendant on appeal had considered it appropriate to impose a condition requiring the implementation of the conceptual SUDs scheme. There is in reality nothing to gainsay the propriety of that conclusion. However, and in any event, the existence of the section 106 obligation leads me to the conclusion that the outcome of the decision would now, inevitably, be the same and that there is no basis in any event to grant relief. I am therefore satisfied that Ground 3 should be refused permission.
52. Ground 4 relies upon a particular reading of the Inspector's conclusions at paragraphs 34-36. As set out above, these conclusions have to be read in a straightforward manner and in the light of the fact that the decision is addressed to well informed participants in the process. As noted in paragraph 34 of the Inspector's conclusions there was no apparent dispute that the three heritage assets to be subject to more detailed analysis were Wharf House, Dower House and the

Neen Sollars conservation area as a whole. The claimant's contention is that in the first sentence of paragraph 35 the Inspector concludes that the appeal site is part of the rural setting of each building and the conservation area. Having read the Inspector's decision in that way it is then submitted that if the appeal site is in the setting of each of the buildings and the conservation area, then there will be a change in that setting and that the Inspector needed to assess whether that change in the setting was positive, neutral or negative in terms of the significance of the heritage asset. His conclusion in paragraph 36 that there would be "no impact on the setting of any heritage asset" was inconsistent with his conclusion that the appeal site was within the setting of the heritage assets. As a consequence there was a failure to properly apply the Framework and to engage with the duty under section 66 of the Listed Buildings Act.

53. In my view this submission rests, at the outset, upon a failure to fairly read the Inspector's report as a whole and in the context of the conclusions which have been set out above from the Heritage Assessment. When read together in my view there is no justification for the suggestion that in the first sentence of paragraph 35 of the decision the Inspector has concluded that the appeal site is within the rural setting of each building and the conservation area. He is not in that sentence referring to the appeal scheme but the heritage assets themselves. The assessment of the setting of the heritage assets, which is quintessentially a matter for the Inspector's judgement, is set out in paragraph 36. He explains that the appeal development would only affect a very small part of the landscape and evaluates the visual relationship between the appeal site and each of the heritage assets. This approach cannot be criticised, and explains the conclusions he reaches that there would be "no impact on the setting of any heritage asset". Once he had reached that judgement there was firstly, no need for him to go on to consider the impact on any significance of the heritage asset as a result of a non-existent impact on its setting, nor, secondly was there any basis upon which it could be said that the proposals infringed either national or local policy. Thus, whilst I take the view that Ground 4 was arguable and permission should be granted, on analysis I am not satisfied that it is made out and it must be dismissed.
54. As a consequence of the reasoning which I have set out above, I am satisfied that permission should be granted for Grounds 1, 2 and 4 but refused on Ground 3. On analysis I am satisfied that Grounds 1, 2 and 4 should be dismissed and therefore that the claimant's challenge fails.