Appendices to Accompany Hearing Statement on Ecology Matters

In respect of:

Land at Mockbeggars Farm, London Road,

Budletts Common, Uckfield, TN22 2EB

Prepared by:

Dr Dan Simpson

BSc(hons), PhD(Bris), CEcol, MCIEEM

On behalf of:

Obsidian Strategic Asset Management Ltd

Planning Application Reference: WD/2022/0648/MAO

PINS Reference: APP/C1435/W/23/3330872

9th January 2024

Appendix DS1:

Legislation

LEGISLATION SUMMARY

1. In England and Wales primary legislation is made by the UK Parliament, and in Scotland by the Scottish Parliament, in the form of Acts. The main piece of legislation relating to nature conservation in the UK is the Wildlife and Countryside Act 1981 (as amended).

2. Acts of Parliament confer powers on Ministers to make more detailed orders, rules or regulations by means of secondary legislation in the form of statutory instruments. Statutory instruments are used to provide the necessary detail that would be too complex to include in an Act itself[1]. The provisions of an Act of Parliament can also be enforced, amended or updated by secondary legislation.

3. In summary, the key pieces of legislation relating to nature conservation in the UK are:

    - Wildlife and Countryside Act 1981 (as amended)
    - Protection of Badgers Act 1992
    - Hedgerows Regulations 1997
    - Countryside and Rights of Way (CRoW) Act for England and Wales 2000
    - Natural Environment and Rural Communities Act 2006
    - Conservation of Habitats and Species Regulations 2017

4. A brief summary of the relevant legislation is provided below. The original Acts and instruments should be referred to for the full and most up to date text of the legislation.

5. **Wildlife and Countryside Act 1981 (as amended)**. The WCA Act provides for the notification and confirmation of Sites of Special Scientific Interest (SSSIs) identified for their flora, fauna, geological or physiographical features. The Act contains strict measures for the protection and management of SSSIs.

6. The Act also refers to the treatment of UK wildlife including protected species listed under Schedules 1 (birds), 5 (mammals, herpetofauna, fish, invertebrates) and 8 (plants).

7. Under Section 1(1) of the Act, all wild birds are protected such that is an offence to intentionally:

    - Kill, injure or take any wild bird;
    - Take, damage or destroy the nest of any wild bird whilst in use* or being built;
    - Take or destroy an egg of any wild bird.

    * The nests of birds that re-use their nests as listed under Schedule ZA1, e.g. Golden Eagle, are protected against taking, damage or destruction irrespective of whether they are in use or not.

8. Offences in respect of Schedule 1 birds are subject to special, i.e. higher, penalties. Schedule 1 birds also receive greater protection such that it is an offence to intentionally or recklessly:

    - Disturb any wild bird included in Schedule 1 while it is building a nest or while it is in, on or near a nest containing eggs or young;
    - Disturb dependent young of such a bird.

[1] http://www.parliament.uk/business/bills-and-legislation/secondary-legislation/statutory-instruments/

9. Under Section 9(1) of the Act, it is an offence to:

- Intentionally kill, injure or take any wild animal included in Schedule 5.

10. In addition, under Section 9(4) it is an offence to intentionally or recklessly:

- Obstruct access to, any structure or place which any wild animal included in Schedule 5 uses for shelter or protection; or
- Disturb any wild animal included in Schedule 5 while occupying a structure or place which it uses for that purpose.

11. Under Section 13(1) it is an offence:

- To intentionally pick, uproot or destroy any wild plant listed in Schedule 8; or
- Unless the authorised person, to intentionally uproot any wild plant not included in Schedule 8.

12. The Act also contains measures (S.14) for preventing the establishment of non-native species that may be detrimental to native wildlife, prohibiting the introduction into the wild of animals (releases or allows to escape) and plants (plants or causes to grow) listed under Schedule 9.

13. **Protection of Badgers Act 1992.** The Act aims to protect the species from persecution, rather than being a response to an unfavourable conservation status, as the species is in fact common over most of Britain. It should be noted that the legislation is not intended to prevent properly authorised development. Under the Act it is an offence to:

- Wilfully kill, injure, take, possess or cruelly ill-treat* a Badger, or attempt to do so;
- To intentionally or recklessly interfere with a sett# (this includes disturbing Badgers whilst they are occupying a sett, as well as damaging or destroying a sett or obstructing access to it).

* the intentional elimination of sufficient foraging area to support a known social group of Badgers may, in certain circumstances, be construed as an offence

\# A sett is defined as "*any structure or place which displays signs indicating current use by a Badger*". Natural England advice (June 2009) is that a sett is protected so long as such signs remain present, which in practice could potentially be for some time after the last actual occupation by Badger. Interference with a sett includes blocking tunnels or damaging the sett in any way

14. Licences can be obtained from the Statutory Nature Conservation Organisation (SNCO) for development activities that would otherwise be unlawful under the legislation, provided there is suitable justification. The SNCO for England is Natural England.

15. **Hedgerows Regulations 1997**. 'Important' hedgerows (as defined by the Regulations) are protected from removal (up-rooting or otherwise destroying). Various criteria specified in the Regulations are employed to identify 'important' hedgerows for wildlife, landscape or historical reasons.

16. **Countryside and Rights of Way (CRoW) Act for England and Wales 2000.** The CRoW Act provides increased measures for the management and protection of SSSIs and strengthens wildlife enforcement legislation. Schedule 12 of the Act amends the species provisions of the WCA 1981, strengthening the legal protection for threatened species. The Act also introduced a duty on Government to have regard to the conservation of biodiversity and maintain lists of species and habitats for which conservation steps should be taken or promoted, in accordance with the Convention on Biological Diversity.

17. **Natural Environment and Rural Communities Act 2006.** Section 41 of the NERC Act requires the Secretary of State to publish a list of habitats and species that are of principal importance for the conservation of biodiversity in England. The S41 list is used to guide decision-makers such as local planning authorities, in implementing their duty under Section 40 of the Act, to have regard to the conservation of biodiversity in England, when exercising their normal functions. 56 habitats and 943 species of principal importance are included on the S41 list. These are all the habitats and species in England that were identified as requiring action in the UK Biodiversity Action Plan (BAP).

18. **Conservation of Habitats and Species Regulations 2017 (as amended).** The Regulations enact the European Union's Habitats Directive (92/43/EEC) in the UK. The Habitats Directive was designed to contribute to the maintenance of biodiversity within member states through the conservation of sites, known in the UK as Special Areas of Conservation (SACs), containing habitats and species selected as being of EC importance (as listed in Annexes I and II of the Habitats Directive respectively). Member states are required to take measures to maintain or restore these natural and semi-natural habitats and wild species at a favourable conservation status.

19. The Regulations also require the compilation and maintenance of a register of European sites, to include SACs and Special Protection Areas (SPAs)[2] classified under Council Directive 79/409/EEC on the Conservation of Wild Birds (the Birds Directive). These sites constitute the Natura 2000 network. The Regulations impose restrictions on planning decisions likely to significantly affect SPAs or SACs.

20. The Regulations also provide protection to European Protected Species of animals that largely overlaps with the WCA 1981, albeit the provisions are generally stricter. Under Regulation 43 it is an offence, *inter alia*, to:

- Deliberately capture, injure or kill any wild animal of a European Protected Species;
- Deliberately disturb any wild animals of any such species, including in particular any disturbance likely to impair their ability to survive, to breed or reproduce, to rear or nurture their young, to hibernate or migrate, or which is likely to affect significantly their local distribution or abundance;
- Deliberately take or destroy the eggs of such an animal;
- Damage or destroy a breeding site or resting place of such an animal.

21. Similar protection is afforded to European Protected Species of plants, as detailed under Regulation 47.

22. The Regulations do provide a licensing system that permits otherwise illegal activities in relation to European Protected Species, subject to certain tests being fulfilled.

[2] Special Protection Areas (SPAs) are protected sites classified in accordance with Article 4 of the EC Directive on the Conservation of Wild Birds (79/409/EEC) (aka the Birds Directive), which came into force in April 1979. SPAs are classified for rare and vulnerable birds (as listed on Annex I of the Directive), and for regularly occurring migratory species.

Appendix DS2:

BNG PPG Paragraph: 003 Reference ID: 74-003-2023

GOV.UK

Guidance

Draft biodiversity net gain planning practice guidance

Guidance covers biodiversity net gain which will come into force on the date the regulations come into force and biodiversity net gain will commence. This will be updated once the date is confirmed.

From: Department for Levelling Up, Housing and Communities (/government/organisations/department-for-levelling-up-housing-and-communities)

Published 29 November 2023

Applies to England

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Related content

Collection

Biodiversity net gain (/government/collections/biodiversity-net-gain)

106 planning obligations to secure significant onsite biodiversity gains and registered offsite biodiversity gains.

Finally, following the approval of the Biodiversity Gain Plan and commencement of development, there will be an important role for local planning authorities to monitor the implementation of biodiversity net gain and, where appropriate, take enforcement action if conditions or obligations related to biodiversity net gain are not met.

Paragraph: 002 Reference ID: 74-002-2023

Which planning permissions are in scope and which are exempt from biodiversity net gain?

While every grant of planning permission in England is deemed to have been granted subject to the general biodiversity gain condition, commencement and transitional arrangements, as well as exemptions, mean that certain permissions are not subject to biodiversity net gain.

Biodiversity net gain has only been commenced for planning permissions granted in respect to an application made after [January xx 2024 subject to parliamentary timetabling]. Permissions granted for applications made before this date are not subject to biodiversity net gain.

This general commencement for applications does not apply to:

- retrospective planning permissions made under section 73A; and
- section 73 permissions where the original permission which the section 73 relates to was either granted before [January xx 2024 subject to parliamentary timetabling] or the application for the original permission was made before [January xx 2024 subject to parliamentary timetabling]

Biodiversity net gain has not been commenced yet for planning permissions which have granted through other routes to permissions. These include:

- local development orders
- neighbourhood development orders
- successful enforcement appeals
- deemed planning permission

The grant of permission in principle is not within the scope of biodiversity net gain (as it is not a grant of planning permission), but the subsequent technical details consent (as a grant of planning permission) would be subject to the general biodiversity gain condition.

The approval of reserved matters for outline planning permissions are not within the scope of biodiversity net gain (as they are not a grant of planning permission).

There are specific exemptions from biodiversity net gain for certain types of development. The exemptions are set out in paragraph 17 of Schedule 7A of the Town and Country Planning Act 1990 (https://www.legislation.gov.uk/ukpga/2021/30/schedule/14/enacted) and the Biodiversity Gain Requirements (Exemptions) Regulations [2024].

The general biodiversity gain condition does not apply to the following types of development:

- **Temporary exemption for non-major developments (until April 2024)** Defined as development not defined as major development under the Article 2 Town and Country Planning (Development Management Procedure) (England) Order 2015 (https://www.legislation.gov.uk/uksi/2015/595/article/2) . The exemption will continue to apply to section 73 permissions where the original permission which the section 73 relates to was subject to this temporary exemption.
- **Householder development** as defined within article 2(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (https://www.legislation.gov.uk/uksi/2015/595/article/2).
- **Development granted planning permission by a development order under section 59** This includes permitted development rights.

- **Development subject to the de minimis exemption** - development that does not impact a priority habitat and impacts less than 25 square metres (e.g. 5m by 5m) of habitat, or 5 metres of linear habitats such as hedgerows.
- **Self-build and custom build development** - development which:
  - consists of no more than 9 dwellings, and
  - is carried out on a site which has an area no larger than 0.5 hectares, and
- consists exclusively of dwellings which are self-build or custom housebuilding as defined in section 1(A1) of the Self-build and Custom Housebuilding Act 2015 (https://www.legislation.gov.uk/ukpga/2015/17/section/1).
- **Urgent Crown development granted under s293A TCPA 1990**.
- **Development of a biodiversity gain site** - development which is undertaken solely or mainly for the purpose of fulfilling, in whole or in part, the biodiversity gain planning condition which applies in relation to another development.
- **Development related to the high speed railway transport network** - development forming part of, or ancillary to, the high speed railway transport network comprising connections between all or any of the places or parts of the transport network specified in section 1(2) of the High Speed Rail (Preparation) Act 2013 (https://www.legislation.gov.uk/ukpga/2013/31/section/1)

Paragraph: 003 Reference ID: 74-003-2023

How is the biodiversity gain objective of 10% gain calculated?

The biodiversity gain objective of at least a 10% gain is measured against the pre-development biodiversity value of the onsite habitat for the development. The objective is met if this value is exceeded by at least 10% through a combination of:

Appendix DS3:

High Court Judgement [2023] EWHC 2795 (Admin)

Neutral Citation Number: [2023] EWHC 2795 (Admin)

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

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

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

Date: 16/11/2023

Before :

MR JUSTICE EYRE

- -

Between :

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

- -

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

Hearing date: 31st October 2023

- -

Approved Judgment

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

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MR JUSTICE EYRE

Mr Justice Eyre:

Introduction.

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

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

The Factual Background.

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

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

The Legislative and Policy Context.

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

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

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

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

8. Policy MLP 7 addressed green infrastructure thus:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

» preserve the openness of the Green Belt; and

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

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

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

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

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

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

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

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

The Issues before the Inspector.

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

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

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

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

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

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

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

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

        "...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Decision Letter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Procedural History.

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

The Grounds of Challenge.

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

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

Ground 1

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ground 2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion.

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

Appendix DS4:

Bat Survey Results 2023

Technical Note 02

Project: Land at Mockbeggars Farm, London Road, Budletts Common, Uckfield
Planning Ref: WD/2022/0648/MAO
Date: 5th January 2024

Bat Survey Update 2023

1 Introduction

1.1 Aspect Ecology was originally commissioned by Obsidian Strategic in June 2021 to undertake an Ecological Appraisal in respect of the proposed development of land at Mockbeggars Farm, London Road, Budletts Common, Uckfield, TN22 2EB, centred at grid reference TQ 475230, hereafter referred to as 'the site'. The results of the previous work undertaken in 2021 are detailed within Aspect Ecology's Ecological Appraisal, dated January 2022.

1.2 Given the time which has elapsed since the previous survey work in 2021 Aspect Ecology was subsequently commissioned by Obsidian Strategic in July 2023 to update the previous bat survey work. The following document details the methods, results and evaluation of the updated bat survey work completed at the site in 2023.

2 Methodology

Activity Surveys

2.1 Walked transect surveys were undertaken in July, August and September 2023 to ascertain the current level of usage of the site by foraging or commuting bats. This survey method involves walking planned transect routes with listening points covering key habitats/features. Anabat Scout handheld bat detectors were employed to aid identification of any bats observed. Each transect was walked from approximately 15 minutes prior to sunset, for 2-3 hours, with a 5 minute stop at each listening point. This survey work was carried out during suitable weather conditions, as set out in Table 2.1 below.

Table 2.1. Dusk walked transect survey details.

Date	Start & end times & time of sunset	Transect / location	Equipment used	Weather
24/07/2023	Start time: 21.00 End time: 22.59 Sunset: 21.00	Transect A	Anabat Scout.	Occasional light rain, 100% cloud, BF1, 14°C
Comments: The survey was undertaken by 2 surveyors under direction of licence holder 2015-14046-CLS-CLS.				
22/08/2023	Start time: 20.07 End time: 22.07 Sunset: 20.07	Transect A	Anabat Scout.	Dry, 5% cloud, BF2, 16-18°C
Comments: The survey was undertaken by 2 surveyors under direction of licence holder 2015-14046-CLS-CLS.				
11/09/2023	Start time: 19.23 End time: 21.23 Sunset: 19.23	Transect A	Anabat Scout.	Dry, 30% cloud, BF2, 18-21°C
Comments: The survey was undertaken by 2 surveyors under direction of licence holder 2015-14046-CLS-CLS.				

BF0 = calm, BF12 = hurricane force

2.2 Automated static detector surveys were also carried out during which Song Meter 4 (SM4) detectors were positioned at two locations within the site in July, August and September 2023 for a minimum of five nights during suitable weather to record any bat activity. Detector 1 was situated on the western boundary of the site within the hedgerow adjacent to London Road and detector 2 was located in the centre of the site at an existing hedgerow in close proximity to off-site ancient woodland, which is located adjacent to the south-eastern boundary (see Plan 6212/ECO4). The detectors were set to switch on approximately 30 minutes before sunset and switch off approximately 30 minutes after sunrise. The weather conditions during the static detector surveys are provided in Table 2.2 below.

Table 2.2. Automated detector survey details.

Survey Date	Weather Conditions			
	Wind (BF)	Temp(°c)	Cloud Cover (%)	Precipitation
24/07/2023	2 - 3	13 - 14	40 - 80	Occasional Light Rain
25/07/2023	2	12 - 15	10 - 90	Dry
26/07/2023	3 - 5	15 - 16	90 - 100	Rain
27/07/2023	3 - 4	17	60 - 100	Dry
28/07/2023	3 - 4	16	20 - 80	Occasional Light Rain
29/07/2023	5	14 - 16	10 - 80	Dry
30/07/2023	4	16-17	90-100	Occasional Light Rain
22/08/2023	2	14 - 16	10 - 30	Dry
23/08/2023	1 - 2	17 - 18	30 - 90	Occasional Light Rain
24/08/2023	2	15 - 17	30 - 100	Dry
25/08/2023	3	12 - 15	20 - 80	Rain
26/08/2023	3	9 - 12	40 - 90	Occasional Light Rain
27/08/2023	2 - 3	10 - 13	10 - 80	Occasional Light Rain
28/08/2023	2 - 3	10 - 13	0 - 10	Dry
11/09/2023	2 - 3	16 - 17	20 - 30	Dry
12/09/2023	3 - 4	15 - 16	60 - 100	Dry
13/09/2023	1 - 3	13 - 17	10 - 100	Dry
14/09/2023	1 - 2	14 - 15	10	Dry
15/09/2023	2	16 - 17	10 - 20	Dry
16/09/2023	3 - 4	16 - 17	10 - 60	Dry
17/09/2023	1 - 4	17 - 18	40 - 90	Rain

BF0 = calm, BF12 = hurricane force

Analysis of Bat Survey Recordings

2.3 All bat calls were analysed using Aanabat Insight v2.0.1 to verify the species recorded during the survey work. Where recordings could not be reliably attributed to species (such as for *Myotis* species) or where overlaps between otherwise distinguishable species occur (such as in Pipistrelle bat calls around 40kHz or 50kHz) calls were identified to genus level; in the case of calls which could not be distinguished between *Nyctalus* sp. and Serotine *Eptesicus serotinus*, these have been labelled as 'unidentified big bat' species.

Limitations

2.4 The bat activity surveys covered the summer and autumn seasons but due to the timing of instruction no surveys were possible in spring. Accordingly, survey effort was increased to compensate for this, with seven days of survey during each static deployment rather than the five days required under guidance. Based on the survey data obtained during summer and autumn, further survey work in spring would be unlikely to change the overall evaluation of bat activity at the site and, more importantly, would not alter the proposed approach to mitigation for bats. As such, the absence of a spring bat survey is not a significant limitation.

2.5 A recognised limitation of bat activity surveys is that bat detectors can only provide an index of activity rather than absolute numbers of bats. Therefore, the results of the bat activity surveys should only be considered indicative of the amount of use bats make of an area rather than the abundance of bats. In addition, some bat species, e.g. Brown Long-eared Bat, are difficult to detect due to their quiet echolocation calls so may be under-represented.

3 Survey Results and Evaluation

3.1 **Manual walked transect surveys.** The detailed activity survey results are summarised below and illustrated on Plan 6212/ECO4.

Table 3.1. Results of the dusk walked transect on 24th July 2023.

Species	Number of Passes Recorded	Approximate % of Total Passes Recorded
Common Pipistrelle	4	40
Soprano Pipistrelle	2	20
Unidentified Big Bat	3	30
Long-eared Bat sp.	1	10
Total	**10**	**100**

Table 3.2. Results of the dusk walked transect on 22nd August 2023.

Species	Number of Passes Recorded	Approximate % of Total Passes Recorded
Common Pipistrelle	28	68
Soprano Pipistrelle	3	7
Pipistrelle sp.	1	3
Myotis sp.	7	17
Long-eared Bat sp.	2	5
Total	**41**	**100**

Table 3.3. Results of the dusk walked transect on 11th September 2023.

Species	Number of Passes Recorded	Approximate % of Total Passes Recorded
Common Pipistrelle	22	88
Soprano Pipistrelle	2	8
Nathusius' Pipistrelle	1	4
Total	**25**	**100**

3.2 As shown by the above results, during the dusk and dawn surveys in July 2023, Common Pipistrelle was the most commonly recorded species, accounting for 40% of all registrations. Soprano Pipistrelle and unidentified Big Bat were recorded to a lesser extent in July 2023, accounting for 20% and 30% respectively, whilst Long-eared Bat sp. was represented by a single pass. In the August and September surveys, the most commonly recorded species was also Common Pipistrelle, accounting for 68% and 88% of passes respectively.

3.3 Soprano Pipistrelle was recorded at relatively low levels in August and September 2023. Low numbers of registrations of Myotis species were recorded in August, accounting for a total of seven passes, whilst a single Long-eared Bat sp. pass was recorded again in August 2023 and a single Nathusius' Pipistrelle pass was recorded during the September 2023 survey.

3.4 During the walked transects, the highest relative levels of bat activity were recorded along the central hedgerow and south-western boundaries of the site, adjacent to the off-site ancient woodland, and comparatively lower levels of bat activity were recorded along the eastern, western, southern and northern site boundaries (see Plan 6212/ECO4).

3.5 **Remote Detector Surveys.** The results of the automated static bat surveys are summarised in Tables 3.4 and 3.5 below.

Table 3.4. Automated static bat survey summary for Location 1 (Western Site Boundary Hedgerow).

Survey Date	Detector Location 1: Western Site Boundary Hedgerow						
	Number of registrations by species#						
	Myotis	Barb	'Big Bat'	Pip 45	Pip 55	Naths Pip	LE
24th July 2023	4	0	1	11	3	0	3
25th July 2023	3	0	1	7	0	0	2
26th July 2023	0	0	0	6	1	0	0
27th July 2023	17	0	1	41	22	0	4
28th July 2023	16	0	1	45	9	0	1
29th July 2023	32	0	3	93	9	0	8
30th July 2023	7	0	2	62	30	0	0
22nd August 2023	6	0	2	20	11	0	7
23rd August 2023	5	0	5	64	13	0	7
24th August 2023	11	0	7	6	8	0	6
25th August 2023	8	0	1	18	4	0	10
26th August 2023	3	0	0	4	2	0	5
27th August 2023	4	0	0	29	5	0	6
28th August 2023	3	0	1	32	9	0	4
11th September 2023	26	0	1	14	10	1	17
12th September 2023	27	0	0	110	350	1	6
13th September 2023	17	0	1	9	3	4	7
14th September 2023	14	0	0	5	3	1	1
15th September 2023	20	1	0	18	23	1	5
16th September 2023	25	0	1	134	39	0	3
17th September 2023	18	0	0	41	18	2	3
Total registrations	**266**	**1**	**28**	**769**	**572**	**10**	**105**
Approximate % of total registrations	**15**	**0.05**	**1.60**	**44**	**33**	**0.6**	**6**

Key:
Myotis- *Myotis* sp.
Barb - Barbastelle
Pip 45- Common Pipistrelle
Pip 55- Soprano Pipistrelle
Naths Pip- Nathusius' Pipistrelle
'Big Bat' - Noctule, Leislers or Serotine
LE - Long-eared Bat sp.
- Figures shown are the total no. of registrations recorded during the dusk to the proceeding dawn period for each date shown, i.e. a recording 'night' for the 24th July will be registrations recorded from ~20.30 on the 24/07 till 05:45 on the morning of the 25/07.

Table 3.5. Automated static bat survey summary for Location 2 (Central Hedgerow).

Survey Date	Detector Location 2: Central Hedgerow						
	Number of registrations by species#						
	Myotis	**Barb**	**'Big Bat'**	**Pip 45**	**Pip 55**	**Naths Pip**	**LE**
24th July 2023	5	0	1	40	32	0	6
25th July 2023	6	0	0	6	4	0	3
26th July 2023	4	0	0	7	101	0	1
27th July 2023	39	0	2	414	641	0	2
28th July 2023	46	0	2	470	373	0	2
29th July 2023	18	0	3	292	252	1	4
30th July 2023	4	0	1	118	176	0	1
22nd August 2023	6	0	1	22	63	0	4
23rd August 2023	8	0	4	43	30	0	2
24th August 2023	2	0	2	23	74	0	3
25th August 2023	9	0	0	19	42	0	1
26th August 2023	2	0	1	5	2	0	0
27th August 2023	6	0	0	25	7	0	3
28th August 2023	10	0	0	48	37	0	1
11th September 2023	5	0	2	75	48	0	2
12th September 2023	8	1	0	13	104	1	1
13th September 2023	8	0	0	9	4	0	0
14th September 2023	7	0	0	0	6	0	1
15th September 2023	3	0	0	17	200	0	1
16th September 2023	13	0	0	15	58	0	1
17th September 2023	9	1	0	33	64	5	0
Total registrations	**218**	**2**	**19**	**1,694**	**2,318**	**7**	**39**
Approximate % of total registrations	**5**	**<0.05**	**0.44**	**39**	**54**	**0.16**	**0.9**

Key:

Myotis- *Myotis* sp.

Pip 45- Common Pipistrelle

Pip 55- Soprano Pipistrelle

Pip- Common Pipistrelle or Soprano Pipistrelle

'Big Bat' - Noctule, Leislers or Serotine

LE - Long-eared Bat sp.

- Figures shown are the total no. of registrations recorded during the dusk to the proceeding dawn period for each date shown, i.e. a recording 'night' for the 24th July will be registrations recorded from ~20.30 on the 24/07 till 05:45 on the morning of the 25/07.

3.6 **Summary.** During the automated surveys, 44% of all registrations at Location 1 (western site boundary) were attributed to Common Pipistrelle, 33% to Soprano Pipistrelle and 15% to '*Myotis*', with the remainder attributed to Big Bat species (1.6%), Long-eared Bat sp. (6%), Nathusius' Pipistrelle (0.6%) and a single Barbastelle pass (0.05%). At Location 2 (central hedgerow), 54% of registrations were attributed to Soprano Pipistrelle, 39% to Common Pipistrelle and the remainder to *Myotis* species (5%), 'Big Bats' (0.44%), Long-eared Bat sp. (0.9%), Nathusius' Pipistrelle (0.16%) and two Barbastelle passes (<0.05%).

3.7 With the exception of Common and Soprano Pipistrelle, the average number of bat passes per night generally fell within the range of 0-10 passes for all species during each recording session and at both locations. Overall across all species, a higher average number of passes per night was recorded at Location 1 (~187 passes per night) compared to Location 1 (~85 passes per night).

4 Evaluation and Assessment

4.1 The findings of the update 2023 bat activity survey work closely align with the findings of the 2021 survey work, which also showed that the highest relative levels of bat activity within the site occur adjacent to the central hedgerow and along the boundaries with the adjacent off-site ancient woodland. It is therefore concluded that the evaluation and assessment of potential impacts on foraging and commuting bats set out within the 2022 Ecological Appraisal report remains valid and appropriate.

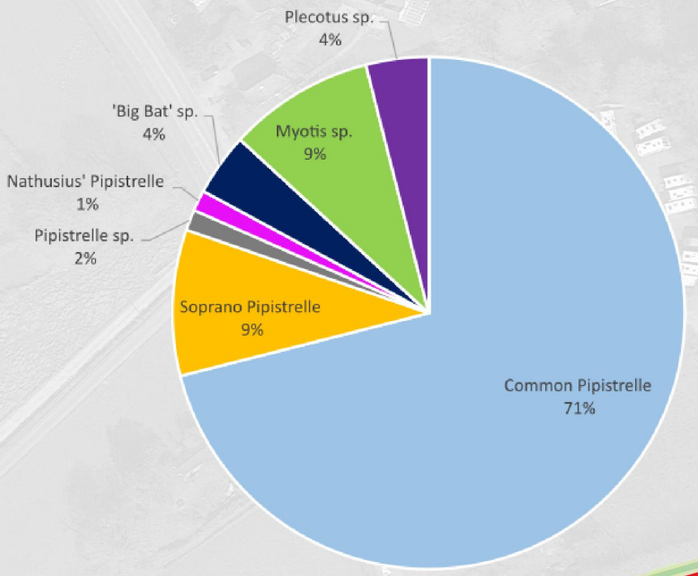
Enclosed

- Plan 6212/ECO4 – Bat Survey Results - 2023

Plan 6212/ECO4:

Bat Survey Results - 2023

Bat Walked Activity Survey
3 Surveys, July-September
Total Call Registrations: 76



Bat Static Detector Survey
Location 1
Total Call Registrations: 1,751

Bat Static Detector Survey
Location 2
Total Call Registrations: 4,297

Key:

- Site Boundary
- Static Detector Locations

Bat Walked Activity Survey Listening Points

- High
- Moderate
- Low
- Negligible

Bat Walked Activity Survey Transect

- High
- Moderate
- Low
- Negligible

Results Key

High: >1 Passes per minute

Moderate: 0.51-1.0 Passes per minute

Low: 0.01-0.50 Passes per minute

Negligible: 0 Passes per minute

aspect ecology

Aspect Ecology Limited - West Court - Hardwick Business Park
Noral Way - Banbury - Oxfordshire - OX16 2AF
01295 279721 - info@aspect-ecology.com - www.aspect-ecology.com

Mockbeggars Farm, Uckfield	PROJECT
Bat Survey Results - 2023	TITLE
6212/ECO4	DRAWING NO.
B/JP	REV
January 2024	DATE

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aspect

Aspect Ecology Ltd
West Court
Hardwick Business Park
Noral Way
Banbury
Oxfordshire OX16 2AF

T: 01295 279721
E: info@aspect-ecology.com
W: www.aspect-ecology.com

Appendix DS5:

Forestry Commission & Natural England (2022) Ancient woodland, ancient trees and veteran trees: advice for making planning decisions

GOV.UK

Guidance

Ancient woodland, ancient trees and veteran trees: advice for making planning decisions

How to assess a planning application when there are ancient woodland, ancient trees or veteran trees on or near a proposed development site.

From: Natural England (/government/organisations/natural-england) and Forestry Commission (/government/organisations/forestry-commission)

Published 14 January 2022

Applies to England

Contents

- — Ancient woodland
- — Ancient and veteran trees
- — Making decisions
- — Assess the effects of development
- — Avoid impacts, reduce (mitigate) impacts, and compensate as a last resort

Related content

How to benefit species and habitats biodiversity in your woodland (/guidance/how-to-benefit-species-and-habitats-biodiversity-in-your-woodland)

- — Ancient woodland, ancient and veteran tree management
- — When to contact Natural England
- — When to contact the Forestry Commission

This is the Natural England and Forestry Commission ‘standing advice’ for ancient woodland, ancient trees and veteran trees. It is a material planning consideration for local planning authorities (LPAs).

You should take this advice into account when making planning decisions that affect ancient woodland, ancient trees or veteran trees.

Natural England and the Forestry Commission will only provide specific advice on planning applications as set out in the ‘when to contact’ sections, or in exceptional circumstances.

This guidance may be useful for decision makers who are responsible for major infrastructure projects, such as road and rail schemes.

Ancient woodland

Ancient woodland takes hundreds of years to establish and is defined as an irreplaceable habitat. It is a valuable natural asset important for:

- wildlife (which include rare and threatened species) - there is also standing advice for protected species (https://www.gov.uk/guidance/protected-species-how-to-review-planning-applications)
- soils
- carbon capture and storage
- contributing to the seed bank and genetic diversity
- recreation, health and wellbeing
- cultural, historical and landscape value

It’s any area that’s been wooded continuously since at least 1600 AD. It includes:

Planning applications affecting trees and woodland (/guidance/planning-applications-affecting-trees-and-woodland)

Managing ancient and native woodland in England (/government/publications/managing-ancient-and-native-woodland-in-england)

The benefits of woodland creation: Woods for Nature (/government/publications/the-benefits-of-woodland-creation-woods-for-nature)

Bats: advice for making planning decisions (/guidance/bats-advice-for-making-planning-decisions)

Detailed guidance

Protected species and development: advice for local planning authorities (/guidance/protected-species-how-to-review-planning-applications)

- ancient semi-natural woodland mainly made up of trees and shrubs native to the site, usually arising from natural regeneration
- plantations on ancient woodland sites - replanted with conifer or broadleaved trees that retain ancient woodland features, such as undisturbed soil, ground flora and fungi

They have equal protection in the National Planning Policy Framework (https://www.gov.uk/government/publications/national-planning-policy-framework--2) (NPPF).

Other distinct forms of ancient woodland are:

- wood pastures identified as ancient
- historic parkland, which is protected as a heritage asset in the NPPF

Many of these do not appear on the ancient woodland inventory (AWI) because their low tree density does not register as woodland on historic maps.

You should consider wood pastures identified as ancient in the same way as other ancient woodland when making planning decisions.

'Wooded continuously' does not mean there's been continuous tree cover across the whole site. Not all trees in the woodland have to be old. Open ground, both temporary and permanent, is an important component of ancient woodlands.

Ancient and veteran trees

Ancient and veteran trees can be individual trees or groups of trees within wood pastures, historic parkland, hedgerows, orchards, parks or other areas. They are often found outside ancient woodlands. They are also irreplaceable habitats.

Ancient trees

An ancient tree is exceptionally valuable. Attributes can include its:

- great age
- size
- condition
- biodiversity value as a result of significant wood decay and the habitat created from the ageing process
- cultural and heritage value

Very few trees of any species become ancient.

Veteran trees

A veteran tree may not be very old, but it has significant decay features, such as branch death and hollowing. These features contribute to its exceptional biodiversity, cultural and heritage value.

All ancient trees are veteran trees, but not all veteran trees are ancient. The age at which a tree becomes ancient or veteran will vary by species because each species ages at a different rate.

Making decisions

When making planning decisions, you should consider:

- conserving and enhancing biodiversity
- avoiding and reducing the level of impact of the proposed development on ancient woodland and ancient and veteran trees

You should refuse planning permission if development will result in the loss or deterioration of ancient woodland, ancient trees and veteran trees unless both of the following applies:

- there are wholly exceptional reasons
- there's a suitable compensation strategy in place (this must not be a part of considerations of wholly exceptional reasons) - see paragraphs 33 and 34 of the planning practice guidance (https://www.gov.uk/guidance/natural-environment#biodiversity-geodiversity-and-ecosystems) on compensation guidance

You should make decisions in line with paragraph 180 (c) of the NPPF.

Ancient woodland, ancient trees and veteran trees are irreplaceable. Therefore, you should not consider proposed compensation measures as part of your assessment of the merits of the development proposal.

Assess the effects of development

When making decisions on planning applications, you should assess the direct and indirect effects of development on:

- ancient woodland
- ancient trees and veteran trees

You should consider both the construction and operational effects of the proposed development.

Consult inventories

You can use inventories to help you decide whether a development proposal will affect ancient woodland (including wood pastures identified as ancient) or ancient and veteran trees:

- Natural England's AWI - download the data (https://naturalengland-defra.opendata.arcgis.com/datasets/Defra::ancient-woodland-england/about) or view it on the Magic map system (http://magic.gov.uk/MagicMap.aspx?chosenLayers=ancwoodIndex,bapdecIndex,orchardIndex,bapwoodIndex,backdropDIndex,backdropIndex,europeIndex,vmlBWIndex,25kBWIndex,50kBWIndex,250kBWIndex,miniscaleBWIndex,baseIndex&box=207763:417195:576753:592195&useDefaultbackgroundMapping=false) (zoom in to see local detail)
- the Woodland Trust's ancient tree inventory (http://www.ancient-tree-hunt.org.uk/) (ATI) (click on 'Tree search' and enter a postcode) - only a small proportion of ancient or veteran trees are recorded on this inventory
- Natural England's wood pasture and parkland inventory (includes ancient sites) (http://magic.gov.uk/MagicMap.aspx?

chosenLayers=bapwoodIndex,backdropDIndex,backdropIndex,europeIndex,vmlBWIndex,25kBWIndex,50kBWIndex,250kBWIndex,miniscaleBWIndex,baseIndex&box=207763:417195:576753:592195&useDefaultbackgroundMapping=false) on the Magic map system (zoom in to see local detail)

Ancient woodlands smaller than 2 hectares may not appear on these inventories. Local record centres (https://www.alerc.org.uk/) may hold data on smaller ancient woodlands.

You should use this guidance for all ancient woodlands and ancient and veteran trees whether they're on the inventories or not. New data can be added to the AWI and ATI at any time. A review of the AWI is ongoing.

You should contact Natural England if a site has evidence of ancient woodland on it and is not on the inventory.

Direct and indirect effects of development

Development, including construction and operational activities can affect ancient woodland, ancient and veteran trees, and the wildlife they support on the site or nearby. Use this assessment guide (https://assets.publishing.service.gov.uk/media/61d5c3238fa8f54c18a64185/Ancient_woodland_assessment_guide.docx) (MS Word Document, 82.2 KB) to:

- help you make planning decisions in line with the NPPF
- keep a record of your assessment

You'll need to download the assessment guide and save it to your desktop to fill it in.

Direct effects of development can cause the loss or deterioration of ancient woodland or ancient and veteran trees by:

- damaging or destroying all or part of them (including their soils, ground flora or fungi)
- damaging roots and understorey (all the vegetation under the taller trees)

- damaging or compacting soil
- damaging functional habitat connections, such as open habitats between the trees in wood pasture and parkland
- increasing levels of air and light pollution, noise and vibration
- changing the water table or drainage
- damaging archaeological features or heritage assets
- changing the woodland ecosystem by removing the woodland edge or thinning trees - causing greater wind damage and soil loss

Indirect effects of development can also cause the loss or deterioration of ancient woodland, ancient and veteran trees by:

- breaking up or destroying working connections between woodlands, or ancient trees or veteran trees - affecting protected species, such as bats or wood-decay insects
- reducing the amount of semi-natural habitats next to ancient woodland that provide important dispersal and feeding habitat for woodland species
- reducing the resilience of the woodland or trees and making them more vulnerable to change
- increasing the amount of dust, light, water, air and soil pollution
- increasing disturbance to wildlife, such as noise from additional people and traffic
- increasing damage to habitat, for example trampling of plants and erosion of soil by people accessing the woodland or tree root protection areas
- increasing damaging activities like fly-tipping and the impact of domestic pets
- increasing the risk of damage to people and property by falling branches or trees requiring tree management that could cause habitat deterioration
- changing the landscape character of the area

Providing evidence

You should work with the developer to make sure there's enough suitable evidence to make a decision. This may include fieldwork and historic maps.

You should ask developers for a tree survey and an ecological survey, where appropriate. The tree survey should follow guidance in British Standard BS 5837 'Trees in relation to demolition, design and development' (https://shop.bsigroup.com/ProductDetail/?pid=000000000030213642). Ecological surveys should follow best practice guidance. You can get further information from the Chartered Institute of Ecology and Environmental Management resource hub (https://cieem.net/i-am/resources-hub/) and from Natural England's protected species standing advice (https://www.gov.uk/guidance/protected-species-how-to-review-planning-applications).

You must make sure the developer includes mitigation measures in their development proposal to avoid and reduce harm caused by development on ancient woodlands, ancient and veteran trees. They may also need to include a suitable compensation strategy.

Avoid impacts, reduce (mitigate) impacts, and compensate as a last resort

You and the developer should identify ways to avoid negative effects on ancient woodland or ancient and veteran trees. For example, selecting an alternative site for development or redesigning the scheme.

You should decide on the weight given to ancient woodland and ancient and veteran trees in planning decisions on a case-by-case basis. You should do this by taking account of the NPPF and relevant development plan policies.

If you decide to grant planning permission that results in unavoidable loss or deterioration where wholly exceptional reasons are demonstrated, you

should use planning conditions or obligations to make sure the developer:

- avoids damage
- mitigates against damage
- compensates for loss or damage (use as a last resort)

This is known as the mitigation hierarchy. You should apply the mitigation hierarchy in line with NPPF paragraph 180a to avoid significant harm to biodiversity.

See the government policy for woodland and trees (https://www.gov.uk/government/publications/keepers-of-time-a-statement-of-policy-for-englands-ancient-and-native-woodland) describing the opportunities for improving ancient and native woodlands.

Existing condition of ancient woodland, ancient and veteran trees

Where a proposal involves the loss or deterioration of ancient woodland or ancient or veteran trees you should not take account of the existing condition of the ancient woodland or ancient or veteran tree when you assess the merits of the development proposal. Its existing condition is not a reason to give permission for development. A woodland or tree in poor condition can be improved with good management.

Mitigation measures

Mitigation measures will depend on the type of development. They could include:

- putting up screening barriers to protect ancient woodland or ancient and veteran trees from dust and pollution
- measures to reduce noise or light
- designing open space to protect ancient or veteran trees
- rerouting footpaths and managing vegetation to deflect trampling pressure away from sensitive locations

- creating buffer zones

Use of buffer zones

Buffer zones can protect ancient woodland and individual ancient and veteran trees and provide valuable habitat for woodland wildlife, such as feeding bats and birds. The size and type of buffer zone should vary depending on the:

- scale and type of development and its effect on ancient woodland, ancient and veteran trees
- character of the surrounding area

For example, larger buffer zones are more likely to be needed if the surrounding area is:

- less densely wooded
- close to residential areas
- steeply sloped

Buffer zone recommendations

For ancient woodlands, the proposal should have a buffer zone of at least 15 metres from the boundary of the woodland to avoid root damage (known as the root protection area). Where assessment shows other impacts are likely to extend beyond this distance, the proposal is likely to need a larger buffer zone. For example, the effect of air pollution from development that results in a significant increase in traffic.

For ancient or veteran trees (including those on the woodland boundary), the buffer zone should be at least 15 times larger than the diameter of the tree. The buffer zone should be 5 metres from the edge of the tree’s canopy if that area is larger than 15 times the tree’s diameter. This will create a minimum root protection area.

Where assessment shows other impacts are likely to extend beyond this distance, the proposal is likely to need a larger buffer zone.

Where possible, a buffer zone should:

- contribute to wider ecological networks
- be part of the green infrastructure of the area

A buffer zone should consist of semi-natural habitats such as:

- woodland
- a mix of scrub, grassland, heathland and wetland

The proposal should include creating or establishing habitat with local and appropriate native species in the buffer zone.

You should consider if access is appropriate. You can allow access to buffer zones if the habitat is not harmed by trampling.

You should not approve development proposals, including gardens, within a buffer zone.

You should only approve sustainable drainage schemes if:

- they do not affect root protection areas
- any change to the water table does not negatively affect ancient woodland or ancient and veteran trees

Compensation measures

Compensation measures are always a last resort. These measures can only partially compensate for loss or damage.

Compensation measures should be appropriate for the site and for the scale and nature of the impacts on it. A compensation strategy could include measures to:

- create new native woodland or wood pasture and allow for natural regeneration
- improve the condition of the woodland
- remove invasive species
- restore or manage other ancient woodland, including plantations on ancient woodland sites, wood pasture and parkland

- connect woodland and ancient and veteran trees separated by development with green bridges, tunnels or hedgerows
- produce long-term management plans for new woodland and ancient woodland - including deer management
- manage ancient and veteran trees to improve their condition
- plant or protect individual trees that could become veteran and ancient trees in future

The compensation strategy should include monitoring the ecology of the site over an agreed period.

Create new native woodland

Planting new trees and creating new native woodland is not a direct replacement for lost or damaged trees or woodland.

You can accept large-scale woodland creation as a compensation measure alongside other measures. This could be on soil that has been moved from the destroyed area of ancient woodland (soil translocation) which could include other ancient woodland ecosystem features, such as:

- tree hulks
- coppice stools
- saplings

You cannot accept plans to move an ancient woodland ecosystem because:

- it’s not possible to replicate the same conditions at another site
- it’s no longer an ancient woodland

You should not accept plans to relocate individual trees as a compensation measure. It may not be possible to do and would also break connections with the woodland ecosystem.

See ‘A habitats translocation policy for Britain’ (https://webarchive.nationalarchives.gov.uk/20080718180931/http:/www.jncc.gov.uk/pdf/habitats_policy.pdf)

published by the Joint Nature Conservation Committee (2003) for more about moving habitats.

New woodland creation can be effective where it links to and extends existing woodland, as long as it does not affect:

- other semi-natural habitats
- heritage features
- protected species

Restore or improve ancient woodland

Proposals can partially compensate for loss or damage of ancient woodland with measures to:

- improve and restore plantations on ancient woodland sites
- improve the management of nearby ancient woodland sites and connecting them better to semi-natural habitat
- improve the condition of important features of ancient woodland
- improve access for management purposes

Proposals can partially compensate for loss or damage to wood pasture by restoring semi-natural open habitat, managed by grazing, with open grown trees.

You may need to ask for a management plan. You can monitor the ecology of the site, over an agreed period, to help you advise on management measures.

Proposals to create new woodland, or to restore or improve ancient woodland should follow the UK Forestry Standard (https://www.gov.uk/government/publications/the-uk-forestry-standard).

Compensate for the loss or deterioration of ancient and veteran trees

Proposals can partially compensate for the loss or deterioration of ancient and veteran trees by

planting:

- young trees of the same species with space around each one to develop an open crown
- new trees near to the trees they're replacing

Proposals should include compensation measures to manage nearby ancient and veteran trees (including dead and dying trees) to help prolong their life. You should tell developers to get advice from a registered tree consultant (arboriculturist) before they carry out work on veteran trees by contacting the:

- Arboricultural Association (https://www.trees.org.uk/Other-Pages/Contact-Us)
- Institute of Chartered Foresters (https://www.charteredforesters.org/contact-us/)

They should leave the intact hulk of the ancient or veteran tree where it is (preferably standing) to benefit invertebrates and fungi. If that's not possible, move it near other ancient and veteran trees or parkland in the area.

Ancient woodland, ancient and veteran tree management

For more information on management practices, read:

- How to manage and protect woodland wildlife (https://www.gov.uk/guidance/manage-and-protect-woodland-wildlife)
- Veteran trees: a guide for good management (http://publications.naturalengland.org.uk/publication/75035) published on Natural England's evidence catalogue
- Managing ancient and native woodland in England (https://www.gov.uk/government/publications/managing-ancient-and-native-woodland-in-england)
- Ancient and other veteran trees: further guidance on management (http://ancienttreeforum.co.uk/wp-content/uploads/2015/02/ATF_book.pdf) published by The Tree Council

- Ancient tree guide 3: trees and development (https://www.woodlandtrust.org.uk/publications/2011/12/ancient-trees-and-development/) and other ancient tree guides (https://www.woodlandtrust.org.uk/publications/?q=ancient+tree+guides+&p=1) published by The Woodland Trust
- Managing England's woodlands in a climate emergency (https://www.gov.uk/government/publications/managing-englands-woodlands-in-a-climate-emergency) published by the Forestry Commission

When to contact Natural England

Natural England is a statutory consultee (https://www.gov.uk/guidance/consultation-and-pre-decision-matters#Statutory-consultees) for proposals that affect any sites of special scientific interest (http://designatedsites.naturalengland.org.uk/). For all other proposals that affect ancient woodland or ancient and veteran trees, you should use the guidance on this page. Natural England will only provide advice if consulted on other cases in exceptional circumstances.

> Natural England
> Electra Way
> Crewe Business Park
> Crewe
> Cheshire
> CW1 6GJ

Email: consultations@naturalengland.org.uk

Telephone: 0300 060 3900

When to contact the Forestry Commission

The Forestry Commission is a non-statutory consultee (https://www.gov.uk/guidance/consultation-and-pre-decision-matters#Non-statutory-consultees) for development proposals that include or are likely to affect ancient woodland. You should use the guidance on this page to assess proposals.

Contact your Forestry Commission area office (https://www.gov.uk/government/organisations/forestry-commission/about/access-and-opening#area-offices) for issues not covered by this standing advice.

You should consult Forestry England (https://www.forestryengland.uk/our-offices) for planning proposals close to, or affecting a public forest in England (https://www.forestryengland.uk/visit).

620 Bristol Business Park
Coldharbour Lane
Bristol
BS16 1EJ

Telephone: 0300 067 4000
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Explore the topic

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Land species (/environment/planning-development-protected-sites-species-land-species)

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aspect

Aspect Ecology Ltd
West Court
Hardwick Business Park
Noral Way
Banbury
Oxfordshire OX16 2AF

T: 01295 279721
E: info@aspect-ecology.com
W: www.aspect-ecology.com