REP1 [RWE]

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BY EMAIL & POST

Dear Mr Scott

ELECTRICITY ACT 1989 & TOWN AND COUNTRY PLANNING ACT 1990

THE ELECTRICITY GENERATING STATIONS AND OVERHEAD LINES (INQUIRIES PROCEDURE) (ENGLAND AND WALES) RULES 2007

RE-DETERMINATION OF THE APPLICATION BY RES UK & IRELAND LIMITED ("RES") DATED 27 MARCH 2009 FOR CONSENT TO CONSTRUCT AND OPERATE A 100 MW WIND TURBINE GENERATING STATION IN POWYS, MID-WALES ("LLANBRYNMAIR")

RE-DETERMINATION OF THE APPLICATION BY RWE NPOWER RENEWABLES LIMITED ("RWE") DATED 11 DECEMBER 2008 FOR CONSENT TO CONSTRUCT AND OPERATE A 130-250MW WIND TURBINE GENERATING STATION IN POWYS, MID-WALES ("CARNEDD WEN")

Further Representations on Statement of Matters

Thank you for forwarding the statement of matters for the Carnedd Wen and Llanbrynmair wind energy projects. We act for RWE Innogy UK Limited (previously RWE Npower Renewables Limited) ("RWE").

As you will be aware, following the closure of the Mid-Wales inquiry held in respect of the above matters (the "Inquiry") the Inspector recommended that the Carnedd Wen application for consent under s36 Electricity Act 1989 and deemed planning permission be granted in part, subject to conditions. The reference to 'part' refers to the exclusion of the Carnedd Wen Five and the position regarding these five turbines is set out at 7 below. Contrary to the Inspector's recommendation, the Secretary of State for Energy and Climate Change ("Secretary of State") refused consent on 7 September 2015. This was challenged by RWE and the Secretary of State decision was quashed earlier this year.

In submitting these representations, it is RWE's position that the findings of the Inspector following the Inquiry and the Secretary of State's previous decision are important material considerations to which the Secretary of State should give very significant weight in re-determining the application. Whilst it is clear that the Secretary of State is not bound to follow the previous decision (*St Albans City and District Council v Secretary of State and others [2015] EWHC 655 (Admin)*)[1], it is important to bear in mind "the importance of consistency" in decision making (as per Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment (1993) 65 P&CR 137*)[2] and that clear reasons should be given for departing from previous judgements (ibid), particularly given the extensive and detailed reasoning in the Inspector's Report and the Secretary of State's decision letter (see St Albans ibid). In the light of the legal authorities, it is RWE's view that the Secretary of State should apply his judgement consistently with his predecessor save where it is necessary to change it to address a material change in circumstances or to address an error of law which led to the quashing of the previous decision. In particular we note that the Secretary of State has already concluded, in line with the Inspector that the Carnedd Wen scheme (minus the Carnedd Wen Five) would comply with Planning Policy Wales ("PPW"), Technical Advice Note 8 ("TAN 8 and the Powys Unitary Development Plan ("UDP").

Furthermore, since the Secretary of State set out at DL4.2, that her decision letter of 7 September 2015 contained her reasons for disagreeing with the Inspector, it must be the case that she agreed with all of his conclusions unless otherwise stated.

It is against this background and on the basis that the Secretary of State will fully take into account the information already available that we respond to the statement and set out our position below:

1. **The individual landscape and visual impact of the proposed Llanbrynmair Development**

No comment

2. **The individual landscape and visual impact of the proposed Carnedd Wen Development**

2.2 Overall the Inspector found that the benefits of the proposal, excluding the Carnedd Wen Five, would outweigh its adverse impacts [IR705]. The Inspector concluded that the Carnedd Wen Five would have significantly harmful landscape and visual effects. [IR347].

2.3 The Inspector's overall conclusion was that the omission of the Carnedd Wen Five *"would minimise landscape and visual effects within the Banwy Valley and would overcome the conflict with national and local planning policy"* [IR702] and that, if the Carnedd Wen Five are omitted, *"the balance of consideration indicates"* that section 36 consent and deemed planning permission should be granted [IR704]. In doing so, he doubtless had regard to the requirements of the Electricity Act 1989 Schedule 9 paragraph 1(1) and (2).

2.4 Whilst RWE does not agree that the exclusion of the Carnedd Wen Five is necessary for the proposal to be acceptable, for the reasons set out in its closing submission, it agrees with the Inspector that planning conditions could be imposed to prevent the construction of those turbines, if the Secretary of State determined that consent should be granted subject to their exclusion from the scheme.[IR681]

2.5 The Secretary of State disagreed with the Inspector's conclusion on Carnedd Wen without the Carnedd Wen Five due to the likely harm to the landscape and visual qualities of the Nant yr Eira Valley, the substantial visual impact affecting a number

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1 see Appendix A

2 See Appendix A

of residential properties in the valley, and the adverse effect of views from the south-eastern section of the Snowdonia National Park [DL4.12]

2.6 The Secretary of State agreed with the Inspector that the Carnedd Wen Five are not consistent with National, Welsh or local planning policy and that their benefit in terms of 15MW renewable electricity generating capacity would not outweigh their harm in terms of any landscape and visual effects. [DL4.9]

2.7 The Secretary of State accepted that the visual impacts of the Carnedd Wen development without the Carnedd Wen Five were regarded by the Inspector as acceptable [DL4.6], and significantly the Secretary of State agreed with the Inspector that such proposals would be consistent with Welsh Government planning policies in PPW and TAN 8 and concluded that the proposals would accord with the Powys UDP [DL4.3].

3. **The combined landscape and visual impact of both the proposed Llanbrynmair and Carnedd Wen Developments**

3.2 Other than in respect of the Carnedd Wen Five, the Inspector found that the in-combination landscape and visual impacts of Carnedd Wen and Llanbrynmair were acceptable. [IR 338]

3.3 In the context of considering the cumulative and in-combination effects of Carnedd Wen, together with Llanbrynmair, on the Snowdonia National Park (SNP), the Inspector concluded that there would be no direct physical effect on the SNP [IR389]. He also concluded that from within the SNP the perception of the landscape would be changed by the proposed habitat restoration and wind turbines but that the degree of the effect on the landscape character of the SNP would be slight and not significant [IR390].

3.4 The Inspector considered the cumulative / in-combination effects of the Carnedd Wen and Llanbrynmair schemes on the Nant yr Eira Valley at [IR395] in the following terms (emphasis added):-

3.5 "...The Nant yr Eira Valley and the Llanbrynmair/Carnedd Wen uplands are clearly valued by many local residents and visitors for qualities including natural beauty, rugged rural character and a sense of remoteness and tranquillity [...]. As the proposed turbines would be very large and moving man-made features their presence would be harmful to these qualities. However, the harm would be limited to the life of the wind farms. The proposed developments would both include the replacement of large swathes of conifer plantation with more attractive and diverse moorland which in the long term would be of benefit in terms [sic] natural beauty, ruggedness, remoteness and tranquillity. On balance, and in the long term, I consider that both schemes would involve the restoration of a large enough area of moorland to have an overall benefit sufficient to offset the presence of the turbines for their operational life. Together, they would be of considerable benefit in this respect, and the landscape character of the area would ultimately be substantially improved." It should be noted that the Inspector did not consider that there was any prospect that those benefits would not be forthcoming.

3.6 In terms of the visual impacts on the SNP, the Inspector accepted that the Carnedd Wen and Llanbrynmair schemes would have significant adverse visual effects when seen from the south-eastern section of the SNP but considered that the large, dark, uniform and hard-edged blocks of forestry which currently exist on the Carnedd Wen Plateau are themselves unattractive and have adverse landscape and visual effects. The Inspector went on to state that the Carnedd Wen scheme would replace "large areas of such forestry with more diverse, rounded and natural vegetation which would remain for many years after the lifetime of the wind farm" [IR391]. He concluded that "In this instance there would [...] be long term benefits to the appearance and natural beauty of the Carnedd Wen Plateau and view from

the Park, which should be taken into the balance". Again, there was no doubt in the Inspector's mind as to the accrual of these benefits.

3.7 The conclusion reached at [IR395] is that:-"... there would be no significant direct or indirect effect on the landscape character of the National Park itself. Significant adverse effects on the views from within the Park would be limited to the south-eastern section and would be limited in views out from the Park. The effect of the proposed developments on the special qualities of the National Park would be small, whether individually or in combination with other existing or proposed wind farm developments".

3.8 His conclusions in respect of the landscape and visual effects of the scheme are summarised at [IR700]; the harm to the Nant yr Eira valley "would be limited to the operational life of the proposed development, which ultimately would bring about improvements to the landscape through forestry clearance and moorland restoration" and as to the SNP, "In the long term there would be beneficial effects on views out from the Park".

3.9 The Secretary of State did not consider the impact of Carnedd Wen in-combination with Llanbrynmair because she intended to refuse consent for the Llanbrynmair Development [DL4.6]. She also felt it was appropriate to afford limited weight to possible future improvements in the views out of the SNP due to concerns over the deliverability of those improvements.[DL4.12] RWE believe that such a finding is wholly without foundation and in the circumstances unlawful. In RWE's view it is a conclusion which led to the quashing of the Secretary of State's decision.

4. **The cumulative impact of the proposed Llanbrynmair Development with other wind farms in the Powys area which have already been granted planning permission or where planning permission has been applied for (excluding the proposed Carnedd Wen Development)**

No comment

5. **The cumulative impact of the proposed Carnedd Wen Development with other wind farms in the Powys area which have already been granted planning permission or where planning permission has been applied for (excluding the proposed Llanbrynmair Development)**

6. **The combined cumulative impact of the proposed Llanbrynmair and Carnedd Wen Developments with other wind farms in the Powys areas which have already been granted planning permission or where planning permission has been applied for**

6.2 We will address matters 5 and 6 together

6.3 The Inspector considered the cumulative and combined effects of all schemes at IR498. He noted [at IR501] that the proposed wind farms would all be seen from high ground between Strategic Search Areas (SSAs) B and C. However, the applicants and Powys County Council ("PCC") were in agreement that the distance would be too great for significant cumulative landscape and visual effects between SSAs B and C to arise as a consequence [A9, 869]. The Inspector saw no reason to disagree commenting that SSAs B and C are so far apart that the proposed developments in each would be rarely experienced one after the other as part of a journey. He therefore did not consider that there would be significant sequential cumulative visual impacts, over and above the effects from static viewpoints.

6.4 In relation to the impact of grid connections at IR505 the Inspector confirmed that up to about 320MW could be exported from SSA B via twin 132kV lines, with overhead sections on wooden poles. This would be more than sufficient to meet the

needs of the Llanbrynmair and Carnedd Wen (SSA B) schemes. The high-level assessments of landscape and visual impacts that have been carried out indicate that such a solution would potentially be environmentally acceptable. He also notes that the SSA B schemes before the inquiry would not, of themselves, trigger a need for a 400kV solution.[IR506]

6.5 The Inspector did not consider that the Carnedd Wen scheme would be likely to have an overall adverse effect on the integrity of Glyndwr's Way or its use, either individually or in combination with other proposals. He identified no significant adverse effect on the enjoyment of other recreational routes or tourism. Subject to conditions, impacts on the wider transport network would be mitigated and residual effects would be acceptable. There would be no harm to health from noise, vibration or shadow flicker. The proposal would be broadly neutral in these respects.[IR701].

6.6 As the Secretary of State did not make any mention of cumulative impacts with projects other than Llanbrynmair it must be the case that the Secretary of State did not disagree with the views of the Inspector set out above in respect of cumulative landscape and visual effects. Neither did she question the Inspector's findings on transport, tourism, socio-economic effect, noise or energy need.[IR498-559].

6.7 The Secretary of State considered that there was likely to be a significant effect arising from the Carnedd Wen Development on the Berwyn Special Protection Area ("SPA") and the Pen Llyn a'r Sarnau Special Area of Conservation ("SAC"), when considered both alone and in combination with other plans and projects. The Secretary of State agreed with the Inspector and Natural Resources Wales ("NRW") that, with the mitigation measures secured in the consent, the Development will not have an adverse effect either alone or in combination with other plans or projects, upon the integrity of either the Berwyn SPA or the Pen Llyn a'r Sarnau SAC. [DL5.3]

6.8 We have considered in Section 9 below the extent to which the cumulative baseline may have changed since the Secretary of State's decision.

7. **The extent to which proposed ecological mitigation, restoration or remediation measures and removal of individual wind turbines (including, as applicable, the "Carnedd Wen five" turbines R23, R26, R28, R29 and R30 referred to in the Inspector's Report dated 8 November 2014) would offset any adverse landscape and visual impacts (whether individual, combined or cumulative) of the proposed Developments**

7.2 Overall the Inspector found that the benefits of the development, excluding the Carnedd Wen Five would outweigh its adverse impacts. [IR705/DL 4.10].

7.3 He recorded that "NRW raises no objection to the effect of the proposed development on peat, hydrology and hydrogeology, or habitats".[IR362]

7.4 At IR395 the Inspector noted "On balance, and in the long term, I consider that [Carnedd Wen and Llanbrynmair] would involve the restoration of a large enough area of moorland to have an overall benefit sufficient to offset the presence of the turbines for their operational life. Together, they would be of considerable benefit in this respect, and the landscape character of the area would ultimately be substantially improved."

7.5 The "Planning Balance and Overall Conclusions" were considered by the Inspector at IR699 - 704. He noted that "the habitat restoration and management aspects of the proposal would be of significant benefit in terms of peat, hydrology, hydrogeology, and habitats in the medium to long term" and that "[t]here would be general improvements in terms of biodiversity, and particular benefits to rarer bird

species". He described those benefits, together with the other benefits of the Carnedd Wen scheme, as "very substantial" [IR699].

7.6 The Secretary of State acknowledged that the scheme has other "potential" benefits, noted by the Inspector as including "economic investment, a habitat management scheme and habitat restoration with associated improvements to peat, hydrology, hydrogeology, habitats and biodiversity" [DL4.4].

7.7 It is clear that the Secretary of State accepted those conclusions if the restoration project was delivered [DL4.12]. Her concerns related to uncertainty as to delivery itself. [DL4.10 and 4.12]. The extent and deliverability of these benefits is discussed further at 9 below.

8. **The adequacy of the environmental information produced in support of the applications for the Developments and whether further or updated environmental information is now necessary**

8.2 The Inspector noted his satisfaction that all the environmental statements (ES) and supplementary environmental information (SEI) were published and publicised in accordance with the regulations and meet the requirements and regulations in all other respects [IR29]. The Secretary of State did not disagree with this position and the adequacy of environmental information did not form any part of the reason for which consent was refused.

8.3 RWE are not aware of any material changes that require amendment to the environmental information. There is one additional 6 turbine scheme at Bryn Blaen-Bryn, north of Llangurig. Otherwise the changes brought about to the 2013 baseline as set out in submitted SEI are from projects that were already taken into consideration or projects that are no longer being progressed. (See further paragraph 9.3 below.)

9. **Any other matters arising since 7 September 2015 which interested parties consider are material to the Secretary of State's re-determination of the applications**

Baseline

9.2 "Conjoined Cumulative Landscape and Visual Graphics & Visualisations" dated December 2013 were submitted to the inquiry. Table 2 showed Cumulative Wind Energy Developments. Of the schemes listed (and excluding the status of the FIT turbines in Table 2):

- 1 was approved (Llandinam Repowering);
- 9 were refused/not progressing: (Llanbadarn Fynydd, Llaithddu, Cemmaes 3 (13), Pentre Tump (22), Bryn Titli Extension (24); Bwlch y Sarnau (25), Dyfnant Forest (26), Mynydd Mynyllod (27), Pen Coed (29));
- 2 are under construction: Tirgwynt (12), Garreg Lwyd (14);
- 2 are still at the pre-application stage: Nant y Moch (20), Rhyd Ddu and Mynydd Waun Fawr (30) (renamed Mynydd Lluest y Graig);
- Carno III (17) is subject to a resolution to permit subject to completion of s106 agreement;
- Neuadd Goch Bank (21) is in the appeal process, currently undecided; and

- Mynydd y Gwynt (28) is refused subject to legal challenge.

All of the above projects were considered at the Inquiry.

9.3 There is one new project - Bryn Blaen, North of Llangurig – submitted by Njord Energy for 6 turbines; tip 100m; rotor diameter 41m; outside SSA B which is the subject of an appeal against non-determination and remains undecided. This appeal carries PINS reference APP/T6850/A/15/3133966 and is located approximately 22 km south of the most southerly Carnedd Wen turbine turbine at approximate grid reference SN 90943 82076. Given its distance from Carnedd Wen, the conclusions of the Carnedd Wen ES and SEI and the conclusions of the Inspector described at paragraphs 6.2 to 6.6 above which the Secretary of State did not disagree with, it is RWE's view that there are no additional significant cumulative landscape and/or visual effects as a result of bringing the Bryn Blaen turbines into the equation and no likely significant cumulative environmental effects arising which requires further SEI. This conclusion is supported by PCC's landscape witness to the Bryn Blaen appeal[3]. Both Carnedd Wen and Llanbrynmair were considered in the other cumulative scenarios to which he refers. It should be noted that the same witness appeared on behalf of PCC at the Inquiry for the Carnedd Wen project.

Policy Changes

9.4 Planning Policy Wales ("PPW) (edition 6) was referenced in the Inquiry. PPW (edition 8) came out in January 2016. There are no material changes which would affect the re-determination of this matter.

Local Development Plan update

9.5 PCC has submitted the deposit draft of its new Local Development plan for examination (Deposit Draft June 2015) ("LDP"). The Inspector has written to the Council following the Exploratory Meeting held on 10 May 2016 outlining her decision to suspend the Examination of the LDP for a period of six months to allow the Council time to undertake the additional work (and any relevant public consultation) as discussed at the Exploratory Meeting. It is anticipated that the Examination will resume in late November 2016 with a Pre-hearing Meeting in January 2017 and Hearing Sessions to commence in March 2017.

9.6 Being at the draft stage the LDP is still subject to change and should therefore be accorded a low weight in this re-determination. . The LDP sets the policy for the determination of Micro schemes (<50KW), Sub Local Authority Schemes (50KW-5000KW) and Local Authority Wide Schemes (5,000KW – 50,000KW) other than for onshore wind. The LDP notes that policy for onshore wind schemes is set by PPW, TAN 8 and National Policy Statements in conjunction with policy DM1 (strategic planning matters). Criterion 7 of DM1 safeguards important material assets including wind farms in strategic search areas from incompatible development.

9.7 The LDP seeks:

9.7.1 to rely on the Strategic Search Areas set out in TAN 8;

9.7.2 to set targets for the amount of renewable electricity and heat generating technology facilitated by the LDP at a sub-national level; and

9.7.3 to set local policy on renewable energy which does not duplicate or overlap with National Policy.

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3 See extract of proof at Appendix B – paragraph 7.14

9.8 The deposit draft LDP does not result in any material changes to local planning policy which would affect this re-determination.

Judicial Review

9.9 On 16th October 2015 RWE sought a judicial review of the decision of the Secretary of State to refuse to grant consent for the Carnedd Wen Development on the grounds that the Secretary of State's decision to accord "limited weight" to the landscape improvements proposed as part of the Carnedd Wen scheme was unlawful and irrational and the Secretary of State's overall conclusion, that the adverse effects of the Carnedd Wen scheme outweighed its benefits, was vitiated by a failure to take into account material considerations, namely (a) the evidence presented to the Inquiry as to the timing and certainty of delivery of future landscape improvements and/or (b) the Inspector's conclusions in respect of the timing and certainty of delivery of future landscape improvements.

Background

9.10 In response to NRW's objections to the Development, and following the submission of further information, RWE and NRW had extensive discussions and negotiations which resulted in RWE producing a comprehensive suite of documents explaining in detail the proposed deforestation and habitat restoration proposals which included (collectively, "the Management Plans"):

- a Habitat Restoration and Management Plan ("HRMP");
- a Forestry Management Plan ("FMP");
- a Peat Management Plan ("PMP"); and
- a Drainage Management Plan ("DMP").

9.11 The authors of the Management Plans subsequently gave evidence to the Inquiry on behalf of RWE. Together, they were described by the Inspector as *"a team with considerable expertise and experience [...] to develop a comprehensive and integrated suite of environmental management plans"* [IR351]. It was further agreed with NRW and PCC that the implementation of the Management Plans could be effected by the imposition of (agreed) conditions.

9.12 PCC objected to the Carnedd Wen scheme on a number of grounds, obliging the Secretary of State to cause the Inquiry to be held. By the close of the Inquiry, however, PCC's only remaining objection concerned the landscape and visual effects of the Carnedd Wen Five [IR337]; [IR/A9/303] which as was noted earlier could be 'conditioned out' should the Secretary of State grant consent for Carnedd Wen.

9.13 NRW also objected to the Carnedd Wen scheme. By the close of the Inquiry, NRW's remaining objection was the effect of the scheme on the landscape and amenity of the SNP and on its special qualities, in combination with the Llanbrynmair scheme and other existing wind farms within SSA-B ([IR338]; [IR/A8/3.1]). As a consequence of the agreement reached with NRW and PCC resulting in the Management Plans and proposed conditions, the certainty and/or delivery of the landscape/habitat restoration proposals was not an issue which RWE was required to address at the Inquiry.

PCC and NRW

9.14 RWE's submissions to the Inquiry made repeated reference to the benefits of the Carnedd Wen scheme, including notably the deforestation/habitat restoration proposals (emphasis added). It submitted:-

(1) At IR/A4/1, the scheme *"achieves a number of key policy objectives of relevance to sustainable development: the generation of renewable electricity, the landscape improvement of a large area of currently afforested land and biodiversity gains of national significance"*;

(2) At IR/A4/13, *"[f]rom the outset RWE sought a development layout founded on the principles of avoidance, minimisation and mitigation of potentially significant adverse effects. By these means harm to on-site landscape features was avoided and the substantial potential for landscape enhancement, through the removal of regimented forest plantations and subsequent habitat restoration, was identified"*;

(3) At IR/A4/17, there was a need for *"a proper appreciation of the scope of the project [...] as [...] more than just another wind farm project"* and *"to recognise the fact of and benefits of the habitat restoration and management project"*;

(4) The landscape of the plateau itself would become open and more diverse in character as a consequences of forest removal [IR/A4/19]; there would be benefits for recreational users from the removal of plantation woodland and the restoration of peat habitat [IR/A4/21-22]; and, at IR/A4/22, that *"it must be remembered that the benefits of the removal of forestry will subsist beyond the decommissioning of the wind farm, and will be managed for a total of 50 years from the commencement of development"*;

(5) At IR/A4/26, the proposed wind farm and habitat restoration project *"would, on balance, provide substantial benefits to the interests of the [SNP]"* and that *"in the longer term the net effect would be substantial, positive and worthwhile"*;

(6) At IR/A4/42, *"[i]n order to ensure effective delivery of the landscape enhancements that are integral to the Carnedd Wen wind farm and habitat restoration project, RWE has agreed a number of planning conditions. The conditions envisage a series of environmental implementation plans [i.e. the Management Plans] to ensure the transformation of the site from spruce plantations to a more traditional open peat landscape..."*;

(7) [IR/A4/61-62], *"when weighing the landscape and visual effects of the project from a planning perspective, a significant distinguishing feature of the current proposal is the habitat restoration strategy that forms an integral part of the project. The proposed clear-felling of 1,409 ha of coniferous plantations and the restoration of 459 ha of peat bog will have a beneficial and transformative effect on the landscape of Carnedd Wen"*;

(8) In considering the impact on SNP, at IR/A4/72, *"the development achieves a substantial positive improvement to the landscape and bio-diversity"* and, at IR/A4/73, that *"the proposed wind farm would be compatible with the presence of the National Park, even before the temporary nature of the wind farm and benefit to Park setting arising from the Carnedd Wen habitat restoration strategy are taken into account"*;

(9) In relation to peat, that with the Management Plans in place the peat interest of the site would be well protected [IR/A4/137] and that *"large areas of peatland on the site which have been degraded by drainage, both directly and through water uptake by trees, will be returned to a more natural function, with higher water tables and better conditions for peat formation"* [IR/A4/136]. At IR/A4/142 it said that the peat restoration proposals *"whether viewed individually or in conjunction with the wider habitat restoration initiative of which peat*

management forms a part" are *"environmental benefits on a national scale of significance"*;

(10) At IR/A4/149 and 155, in relation to the hydrological benefits of the Carnedd Wen scheme, that *"[t]he restoration of the site's natural hydrological characteristics is an integral part of RWE's proposals to restore the habitat of Carnedd Wen"*;

(11) As regards the ecological benefits of the scheme, the positive effect of deforestation on the Corsedd Llanbrynmair SSSI were referred to at IR/A4/164. At IR/A4/166, it referred to the conclusion of RWE's ecology consultant as being *"that the [HMRP] would deliver significant gains to biodiversity that considerably outweigh any remaining negative effects of the proposals. In view of these benefits, NRW has indicated that it [sic] agreeable to the approach promoted by RWE"*, [IR/A4/174], it said that *"the Carnedd Wen habitat restoration project represents one of the largest schemes to restore blanket bog from plantation woodland in Wales, and would certainly be the largest such project to be undertaken without recourse to public funding [...] the proposed HRMP would make a significant contribution towards the achievement of Welsh targets for the restoration and enhancement of blanket bog, upland oak woodland and upland heathland, and would provide a framework for ongoing monitoring and research"*. The ecological benefits of the scheme were then summarised at IR/A4/177;

(12) Finally, under "Conclusions on the Planning Balance", at IR/A4/254 the contribution which the Carnedd Wen scheme would make in respect of (*inter alia*) the following is noted: (i) *"Bringing landscape benefits through the habitat restoration programme"*; (ii) *"Bringing biodiversity benefits of significance at a national level"* and (iii) *"Bringing benefits in terms of public access to the countryside"*.

9.15 As noted above, the majority of the objections held by NRW and PCC to the Carnedd Wen scheme at the outset of the Inquiry were resolved during the course of the Inquiry, including objections on ecology/habitats grounds.

9.16 Thus, in its closing submissions NRW emphasised that its role is to sustain and enhance the natural resources of Wales and, wherever possible, to resolve objections relating to landscape, habitats and species with the applicants *"so as to enable development to proceed in a satisfactory manner"*: [IR/A8/1.1]. NRW also explained that:-

(1) whilst at the start of the Inquiry NRW's specific concerns included the effect of the Carnedd Wen scheme on peat and peatland habitats [IR/A8/1.2], the majority of its concerns had been satisfactorily resolved by the provision of SEI[4] and other additional information, or could be so resolved with the imposition of appropriate conditions [IR/A8/1.3];

(2) NRW maintained its objection to the Carnedd Wen scheme on the basis of its impact on landscape and visual amenity [IR/A8/3.1] - not ecology; and

(3) NRW acknowledged the positive benefits of the deforestation and habitat improvement scheme *"embedded in the Carnedd Wen scheme"* [IR/A8/3.4], although its position was that the significant adverse impacts on the SNP should be weighed in the planning balance against the positive benefits of forest removal and habitat improvement [IR/A8/3.7].

9.17 PCC's closing submissions were limited to the Carnedd Wen Five and concentrated on their removal from the scheme [IR/A9/62]. PCC also acknowledged that the

4 Supplementary Environmental Information July 2013

economic and ecological benefits of the Carnedd Wen scheme (including the habitat enhancement scheme) were *"very significant"* [IR/A9/1003] and welcomed and supported the *"significant ecological enhancement proposal"* [IR/A9/1008]. PCC's position was that if the Carnedd Wen Five were removed from the scheme *"the harms no longer clearly outweigh the benefits and the project can be consented"* [IR/A9/1010].

The Inspector's Report

9.18 The key parts of the Inspector's report in respect of Carnedd Wen are set out above.

9.19 The Inspector also noted at IR360 that "... there is a high degree of probability that the environmental measures set out in the various proposed management plans would eventually approximate to full restoration. Even partial restoration, which could be expected in the short to medium term, would in [his] view be a considerable improvement in habitat terms to the existing forestry."

The Secretary of State's decision letter

9.20 The Secretary of State accepted [DL4.3] that the scheme is consistent with (a) energy National Policy Statements EN-1 and EN-3 "in so far as the documents set out a national need for development of new nationally significant electricity generating infrastructure of the type proposed"; (b) Welsh Government policies set out in Planning Policy Wales ("PPW"), as supplemented by government circulars, ministerial letters and a series of TANs including TAN8 on "Planning for Renewable Energy"; and (c) the 2010 Powys Unitary Development Plan ("UDP").

9.21 She acknowledged that the scheme has other "potential" benefits, noted by the Inspector as including "economic investment, a habitat management scheme and habitat restoration with associated improvements to peat, hydrology, hydrogeology, habitats and biodiversity" [DL4.4].

9.22 She noted that the visual impacts of the Carnedd Wen scheme would, without the Carnedd Wen Five and the Llanbrynmair scheme, have been regarded by the Inspector as acceptable [DL4.6]. Also, because she was refusing consent for the Llanbrynmair scheme, she considered the Inspector's findings on the basis of the Carnedd Wen scheme alone (with and without the Carnedd Wen Five) rather than in-combination with Llanbrynmair.

9.23 Having considered what landscape and visual impact the Carnedd Wen Five would have, she agreed with the Inspector that "the Carnedd Wen Five are not consistent with National, Welsh or local planning policy [IR702]" [DL4.9].

9.24 At DL4.10, "The Secretary of State notes (emphasis added):-that the Inspector has found that the Development "would be harmful to valued landscape and visual qualities of the Nant yr Eira Valley" [IR700] and that the "proposed turbines would have a substantial visual impact when seen from a number of residential properties in the valley" [IR700] although overall he finds that the benefits of the Development, excluding the Carnedd Wen Five would outweigh its adverse impacts [IR705]. The Secretary of State further notes that the Inspector considers that there would ultimately be "improvements to the landscape through forestry clearance and moorland restoration" and that he considers that the visual impacts of the turbines, through [sic] substantial in the case of [a] number of residential properties, would not be unacceptable. Whilst taking into account the possible future benefits of the Development in terms of landscape improvement, the Secretary of State considers that, given the uncertainty as to when these benefits might be delivered, these should, in the circumstances, be afforded only limited

weight when set against the more immediately and predictable nature of the adverse impacts of the Development if it were to be granted consent."

The Secretary of State recounted the Inspector's discussion of the effects of the Carnedd Wen scheme on the landscape, visual amenity and special qualities of SNP as set out at 3.6 above, including his conclusion that "because the Development includes the replacement of [...] unattractive blocks of forestry with more diverse and natural vegetation [...] there would be long term benefits to the appearance of the Carnedd Wen plateau, which should be taken into account". She continued: "The Secretary of State, however, feels it is appropriate, for the reasons set out in paragraph 4.10, to afford limited weight to possible future improvements in the views out of the Park".

9.25 The Secretary of State's overall conclusion as regards the landscape and visual impacts of the Carnedd Wen scheme is then set out at DL4.12 as follows:-

"Having carefully considered the Inspector's conclusions on landscape and visual impacts, the Secretary of State agrees with him in respect of the unacceptability of the Carnedd Wen Five but disagrees with the conclusion that, in respect of the other turbines, the adverse visual and landscape effects would be outweighed by the benefits of the Development. The Secretary of State considers that the likely harm to the landscape and visual qualities of the Nant yr Eira Valley and the substantial visual impact affecting a number of residential properties in the valley, and the adverse effects of views from the south-eastern section of the Park are sufficiently significant so as to outweigh the potential benefits of the Development. In reaching this conclusion the Secretary of State has considered whether the adverse landscape and visual impacts could be successfully mitigated but is not persuaded on the evidence that opportunities for sufficient mitigation exist. Those potential future improvements in landscape quality that the Secretary of State accepts do exist will not, in the opinion of [the] Secretary of State provide sufficient mitigation for the more immediately harmful and predictable adverse impacts that would follow from granting consent for the Development."

9.26 Section X of the DL then sets out the Secretary of State's "Conclusion and Decision on the Application" in the following terms [DL10.1]:

"The Secretary of State has considered the views of the Inspector, the Applicant, the Council, consultees and others who have made representations, the matters set out above and all other material considerations. For the reasons given in this letter, the Secretary of State disagrees with the Inspector that consent for the Development should be granted, given the harmful adverse visual effects and landscape impacts of the Development".

9.27 DL10.2 set out the "issues" which the Secretary of State "considers [...] material to the merits of the section 36 consent application". Issue (ii) is that "the Company has identified what can be done to mitigate any potentially adverse impacts of the proposed Development". Issue (v) is HM Government's policies on the need for and development of new electricity generating infrastructure, and specifically wind turbine generating stations, as set out in EN-1 and EN-3. Issue (vi) is Welsh Government energy and climate change policies and local planning policy as set out in the UDP.

9.28 It is apparent from DL4.10 that the Secretary of State refused to grant consent and deemed planning permission because of the limited weight she gave to the improvements to the landscape arising from the Carnedd Wen scheme and that she only gave limited weight to those benefits because of an alleged uncertainty as to when those benefits would be delivered. This was the only reason given by the Secretary of State for dismissing the application. The limited weight meant that the benefits did not outweigh the more immediate and certain adverse impacts the Carnedd Wen scheme would have.

9.29 The Secretary of State expressly gave only limited weight to the future landscape improvements which the Carnedd Wen scheme would bring about: [DL4.10 and 4.11]. It is plain from DL4.12 that her decision to give only limited weight to the proposed landscape improvements was determinative of her overall conclusion stated at DL4.12 that "the likely harm to the landscape and visual qualities of the Nant yr Eira Valley and the substantial visual impact affecting a number of residential properties in the valley, and the adverse effects of views from the south-eastern section of the Park are sufficiently significant so as to outweigh the potential benefits of the Development": see the final two sentences of DL4.12.

9.30 As to the timing of delivery of the proposed landscape improvements, RWE's evidence to the Inquiry was set out in the suite of Management Plans referred to at paragraph 9.10 above and secured by planning conditions. Forestry clearance in particular is clearly set out in a Phased Felling Programme. Furthermore, neither NRW nor PCC suggested that the timing of delivery of the proposed landscape improvements was in doubt.

9.31 Therefore the Secretary of State's reliance on there being "uncertainty" as to the timing of delivery of the proposed landscape improvements is contrary to and not supported by the evidence given to the Inquiry and by the Inspector's conclusions which the Secretary of State does not disagree with. In particular, the evidence before the Inquiry (and accepted by the Inspector) was that forestry clearance – which was a significant element of the proposed landscape improvements - would be accomplished quickly, albeit that full habitat restoration (i.e. the proposed habitat improvements) would take longer.

9.32 The Inspector in his report noted that compliance with the Management Plans (including delivery of the proposed landscape improvements) can be required by agreed conditions, including provision for an Ecological Clerk of Works [IR351]. Draft conditions to this effect were annexed to the Inspector's report [IR/Annex E/Conditions 42 to 46]. At no point has the Secretary of State disagreed with the Inspector as to the efficacy of the Management Plans and/or conditions requiring the landscape/habitat improvements in the Management Plans to be implemented.

9.33 In balancing the adverse effects of the Carnedd Wen scheme against its benefits, the Secretary of State plainly failed in reaching her original decision to have regard to <u>all</u> the benefits of the scheme. She further failed to have regard to the respective durations of (i) the adverse effects and (ii) the benefits of the scheme.

9.34 At DL4.4 the Secretary of State stated that she had considered *"the other potential benefits of the Development"* including (with reference to [IR699]) *"economic investment, a habitat management scheme and habitat restoration with associated improvements to peat, hydrology, hydrogeology, habitats and biodiversity"*. However, nowhere did she consider or explain what weight should be given to these accepted benefits and the Secretary of State therefore failed to weigh the <u>totality</u> of the benefits of the Carnedd Wen scheme in the overall balancing exercise. This is particularly apparent from:-

(1) DL4.10 - 4.12 where the only benefits which the Secretary of State took into account (and then discounted because of the uncertainty of their delivery) are the long term landscape benefits which she concluded did not outweigh the more immediately harmful landscape and visual impacts[5]; and

(2) DL10.1 & 10.2 where the Secretary of State expressly identifies those matters which she considered to be material to the merits of the section 36 consent

5 Habitat restoration on the site, for example, is to be managed for a total of 50 years. i.e. for 25 years beyond the life time of the wind farm [IR/A4].

application but omits any reference to the benefits referred to by the Inspector as being "substantial".

9.35 Nowhere did the Secretary of State undertake a balancing exercise in which all the benefits (including the renewable energy, climate change, economic, ecological, hydrological, hydrogeological and landscape benefits) are weighed against the short-term landscape and visual impacts.

9.36 In consequence of the failure to take into account (i) all the benefits of the scheme and (ii) the respective durations of the adverse effects and benefits of the scheme, the balancing exercise undertaken by the Secretary of State was flawed and the decision to refuse consent was unlawful, and in RWE's view was the reason leading to the Secretary of State agreeing to her decision being quashed.

9.37 In DL4.3 ("Need and Relevant Policy for the Proposed Development") the Secretary of State expressly agreed with the Inspector that the proposed development would be consistent with (i) energy National Policy Statements EN-1 and EN-3 to the extent set out in 9.20 above and (ii) Welsh Government policies set out in PPW as supplemented (including by TAN 8);[6] and that it would be *"acceptable in terms of the Powys Unitary Development Plan (adopted 2010)"*.

9.38 Of the PPW policies, the Inspector particularly noted (at [IR679]) paragraph 12.8.12 and the statement that *"[t]he Welsh Government accepts that the introduction of new, often very large structures for onshore wind needs careful consideration to avoid and where possible minimise their impact"*. He concluded (at [IR702]) that, "... as the harm to the landscape would not be minimised the proposed development would not be consistent with national, Welsh or local planning policy". His concerns related to significant effects of the Carnedd Wen Five within the Banwy Valley. However, the omission of the Carnedd Wen Five *"would minimise landscape and visual effects within the Banwy Valley and would overcome the conflict with national and local planning policy"*.

9.39 In agreeing with her Inspector that the Carnedd Wen scheme would be consistent with PPW, the Secretary of State necessarily accepted that (provided the Carnedd Wen Five were omitted), the scheme would minimise landscape and visual effects.

9.40 Of the UDP policies referred to by the Inspector [IR54-59], Policies E3 and E4 are relevant to the Carnedd Wen scheme. In so far as relevant, Policy E3 provides that (emphasis added):-

> "Policy E3 - Wind-power
>
> Applications for windfarms including extensions to existing sites and individual wind turbine generators will be approved where:
> 1. They do not unacceptably adversely affect the environmental and landscape quality of Powys, either on an individual basis or in combination with other proposed or existing similar developments. Where the cumulative impact of proposals in combination with other approved or existing windfarms would be significantly detrimental to overall environmental quality they will be refused.
> ...
> 7. Applicants are able to demonstrate through land management schemes that there would be adequate mitigation or compensation for any adverse impact on environmental quality, wildlife habitats or heritage features."

9.41 In agreeing with her Inspector that the Carnedd Wen scheme would be acceptable in terms of the UDP, the Secretary of State necessarily accepted (i) that the

6 The Inspector refers to edition 7 of PPW (July 2014) and the Secretary of State to edition 4 (2011) – it is assumed that the Secretary of State's reference is a typographical error.

scheme did not have an unacceptable adverse effect on the environmental and landscape quality of Powys; and (ii) that RWE can demonstrate that there would be adequate mitigation or compensation for any adverse impact on environmental quality.

9.42 Having reached this conclusion that the scheme was policy compliant it was manifestly illogical and inconsistent for the Secretary of State to then take the view in DL4.10-4.12 that the adverse landscape and visual effects impacts should justify the refusal of consent. There is no additional test within Schedule 9 of the Electricity Act 1989 which would be capable of justifying such a conclusion since the matters to be considered under paragraph 1 (1) and (2) of Schedule 9 are already contained within the balancing exercise demanded by national, Welsh and local planning policy which the Secretary of State determined that the Carnedd Wen project (absent the Carnedd Wen Five) complied with.

Concluding Representations

10. We have set out above the key-findings from the Inquiry by reference to the Inspector's report. Where the Inspector has reached a conclusion, the Secretary of State should either accept the finding or put forward an alternative view supported by the reasons for that view. We have set out above the one area where the Secretary of State took a different view to the Inspector and the details of the judicial review which arose as a result.

11. As noted above there are no material changes since 7 September 2015 which will affect the Secretary of State's ability to re-determine this matter on the information already presented.

12. In light of the clarity of the position and the extent and thoroughness of the Inquiry, we do not believe that it is necessary to re-open the inquiry into the Carnedd Wen or Llanbrynmair projects and we request that the Secretary of State determine this matter on the basis of the Inspector's report as presented, the Statement of Facts and Grounds from the judicial review[7] and the representations set out in this letter.

13. It is RWE's view that if the Secretary of State acknowledges the previous findings and corrects them to take account of the legal failings set out in this letter he is bound to conclude that consent should be granted for the Carnedd Wen project absent the Carnedd Wen Five.

Yours faithfully,

Eversheds LLP

Eversheds LLP

Encs:
Appendix A
Appendix B
Appendix C

7 please see Appendix c

plan

Town and Country Planning Act 1990

Planning Application References: P/2014/1102

Appeal References: APP/T6850/A/15/3133966

BRYN BLAEN WIND FARM

Sites at Bryn Blaen y Glyn, Llangurig, Llanidloes, Powys

PROOF OF EVIDENCE ON LANDSCAPE AND VISUAL MATTERS

By PHILIP RUSSELL-VICK DipLA CMLI

On behalf of Powys County Council

APRIL 2016

BRYN BLAEN WIND FARM

LANDSCAPE PROOF OF EVIDENCE

of Philip Russell-Vick DipLA CMLI on behalf of Powys County Council

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APPENDICES(provided under separate cover)

7.0 SUMMARY & CONCLUSIONS

7.1 This Public Inquiry concerns proposals by Bryn Blaen Wind Farm Ltd for the development of a wind farm with an installed capacity of up to 15MW, comprising 6 wind turbines up to 100m high to tip, crane hardstandings, substation, site entrance, new and improved access tracks, all located near Llanidloes, Llangurig and Bryn Blaen y Glyn. This appeal relates to non-determination of the application by the Council. However, the Council took a report to its Planning, Taxi Licensing and Rights of Way Committee on 3rd December 2015 when Members resolved that had they been in a position to determine the application they would have refused it for various reasons including the harm to landscape character and visual amenities.

7.2 The appeal site is relatively remote from large settlements, the nearest village being Llangurig which lies about 2.5km to the south, measured from the centre of the appeal site, and with Llanidloes some 5km to the east. The landform of the local landscape context is defined by the contrast of domed, rolling uplands with the flat-bottomed valleys of the Rivers Wye and Severn respectively. The main body of the appeal site lies at an elevation of between 300m and 450m AOD rising up from the Wye Valley and across part of one of these uplands at Bryn Blaen y Glyn. As perceived from the appeal site and its immediate context distinctly higher and more dramatic landforms lie to the south-west, west and north-west in the form of the Cambrian Mountains; to the north and north-east further higher land is seen across the Clywedog uplands, including Trannon Moor, and beyond towards the Berwyn Mountains and Cadair Idris. To the east the horizon is formed by the long, high Waun Ddubarthog ridge.

7.3 The topography of the Bryn Blaen y Glyn upland is essentially a broadly-domed and rolling landform. Its land use, including the appeal site, is wholly grazing of improved and semi-improved grassland with a considerable number of small but distinct geometric conifer plantations. Within this there are also areas of unimproved grassland of rough grazing interspersed with minor valleys of wet mire. Overall the

character of the landscape of the appeal site and the Bryn Blaen y Glyn upland is visually open, simple and somewhat denuded of what might be considered to otherwise be the 'natural' upland landscape characteristics of upland mid-Wales. In this regard it is not untypical of those higher areas which are capable of being exploited for relatively intensive grazing (roughly 300m to 450m AOD range) but which are in contrast to the higher, more exposed moorlands of above 450m AOD. However, because of its openness the Bryn Blaen y Glyn upland is not experienced in isolation of other landscapes, indeed its character borrows from the richer scenic value of far mountains and high plateau uplands with settled, farmed valleys giving a powerful sense of scale and infinite variety of landscapes stretching to long horizons.

7.4 LANDMAP is the landscape character assessment tool in Wales and comprises various landscape data sets of which Visual & Sensory is the most relevant to landscape character assessment. The Bryn Blaen y Glyn upland and the appeal site lie within the Wye Valley Uplands VSAA. It has a *Moderate* Overall Evaluation, comprising *High* integrity and rarity and *Moderate* scenic quality and character. Its perceptual and other sensory qualities are described as "*attractive, exposed and settled*".

7.5 Within the landscape context of the appeal site there are two VSAAs of *Outstanding* Overall Evaluation. Both lie to the west, occupying higher land than the Bryn Blaen y Glyn upland. The Plynlimon Moorlands VSAA includes the rising landforms between the extensive plantations of Esgair Ychion and the Hafren Forest and the higher Plinlimon VSAA to the west. Both VSAAs would provide some opportunities to view eastwards across the Bryn Blaen y Glyn upland.

7.6 There are also six VSAAs of *High* Overall Evaluation within the landscape context. The area north from the Bryn Blaen y Glyn upland to the Trannon Moors is largely all of *High* Overall Evaluation and includes the Clywedog Upland Grazing VSAA, Lyn Clywedog VSAA and the Upper Severn Valley VSAA. The three other *High* overall Evaluation VSAAs all lie generally to the south. The Old Chapel Hill Mosaic VSAA occupies the rolling farmlands between the Wye and Severn Valleys and below the Waun Ddubarthog Ridge and the Bryn Titli uplands. The Cambrian

Mountains Plateau Tops VSAA lie to the west of the Wye Valley and the length of the Wye Valley south from around adjacent to the northern edge of the Bryn Titli Wind Farm is part of the Wye & Ithon Valley Floors, North VSAA.

7.7 LANSMAP confirms that the landscape context of the appeal site is overwhelmingly highly scenic and of high overall value, with the mountainous landscape to the west being of *Outstanding* Overall Evaluation and, therefore, in accordance with LANDMAP of national importance. Although the landscape of the appeal site and its more immediate surrounds are of a lesser moderate value it has attractive scenic qualities and it also has a degree of visual interrelationship with all of these landscapes.

7.8 The main landscape and visual issues relate to the significant adverse effects of the proposed development on the landscape character of the Wye Valley Uplands, Plynlimon Moorlands and Clywedog Uplands Grazing VSAAs, as well as other adverse effects on local landscapes including the Old Chapel Hill Mosaics, Upper Severn Valley and Wye Valley VSAAs, and the adverse visual effects on users of promoted long distance other Public Rights of Way, as well as upon the private views of some local residents. However, the layout and arrangement of the proposals also raise a number of more localised landscape and visual issues related to the arrangement of the turbines, the location of the substation, the significant adverse effects of the 5.4km of new access track and its proposed landscape mitigation.

7.9 *Major-Moderate* or greater significant visual effects would occur up to a maximum distance of around 6km, i.e. effects that would be considered to be significant for the purposes of the EIA Regulations, and just beyond, including *Very High* sensitivity receptors using Glyndŵr's Way. *High* sensitivity receptors include users of other promoted and local Public Rights of Way and Open Access Land, including the Prince Llewelyn Ride, and *High* tending to *Very High* sensitivity receptors at the Lyn Clywedog Reservoir scenic viewpoint, Pen y Gaer Camp and Marsh's Pool where the awareness to change of receptors is likely to be acute. From these locations, assessed to around 4km, there would be *Major* significant visual effects or even

slightly greater at which awareness to change is particularly heightened. Beyond around 4km the magnitude of effect would reduce to *Moderate* such that at the Lyn Clywedog scenic viewpoint, at 5.8km, the significance of the effect would reduce to *Major-Moderate* tending to *Major* due to the raised sensitivity of receptors at this location.

7.10 I record a *Major+* significant effect at one ES viewpoint location near to the wind farm, notably on the Prince Llewelyn Ride, some 200m from the nearest turbine, at which a *Very Substantial* magnitude of visual effect would be experienced. This magnitude of effect would also extend to the whole of that section of the Prince Llewelyn Ride where it crosses the Bryn Blaen y Glyn upland and through the appeal site; a length of around 2.2km. It would also extend to the entire area of Open Access Land at and near the appeal site and an 800m long length of the publicly accessible track along the northern edge of the appeal site. In my judgement a *Very Substantial* magnitude of visual effect would extend out to around 1km from the turbines, depending on the availability of the view.

7.11 Beyond the Bryn Blaen y Glyn upland, because the land falls away on all sides, the magnitude of the effect would also fall away as the visibility of the turbines would partially diminish within the valleys. From the higher landscapes immediately beyond these surrounding valleys the magnitude of effect would tend to increase. I have identified a viewpoint at Marsh's Pool at 2km to the south-east, from where I consider the magnitude of effect would be *Substantial* and the effect of *Major* tending to *Major* + significance due to the acute awareness to change at this location. To the south of the Wye Valley the assessment illustrates that where sufficient height and distance out from the valley is achieved the turbines would come fully into view. To the west from the rising ground to the west of the Bidno Valley from within Open Access Land and the Plynlimon Moorlands VSAA, all six turbines would be largely fully visible and would conflate with the single turbines. The magnitude of effect would still be *Substantial*. From the east, from beyond the Wye Valley, the landscape rises into the complex terrain of the Old Chapel Hill Mosaic VSAA. The ES does not include any viewpoints from this landscape but I have selected a location on the Prince Llewelyn Ride at Bryn Mawr. This view looks across the Bryn Blaen upland to Plinlimon in the distance and the turbines would be

seen in this context. All of the turbines would be visible and the magnitude of effect at this distance would be *Substantial*. From the north and beyond the Severn Valley the landscape rises into the Clywedog uplands and the complex and dramatic topography of the Hills around the Lyn Clywedog reservoir. I have selected a viewpoint from the appellants' heritage evidence from Pen y Gaer Camp Scheduled Monument at 3.9km where I assess the magnitude of effect to be *Substantial* and of *Major* tending to *Major* + significance due to the acute awareness to change of receptors at this location. Further north on the opposite side of the Lyn Clywedog reservoir is a popular and highly scenic viewpoint with its car park, information board and spectacular view across the reservoir. This location is 5.8km from the nearest turbine and at this distance the magnitude of effect would reduce to *Moderate* but the high sensitivity of receptors at this location would mean the significance of the effect would be *Major-Moderate* tending to *Major*. From beyond around 6km all visual effects would diminish to *Moderate* significance or less depending on the sensitivity of the receptor and largely the distance of the viewpoint location and, therefore in my judgement, to below the threshold of significance as the term is used in the EIA Regulations.

7.12 Effects on landscape character are generally perceptual ones on the appearance of the landscape where the consideration of the magnitude can be drawn to some degree from the outcome of the visual impact assessment. Importantly though landscape assessment is concerned with the degree to which the perception of key characteristics of the receiving landscape (a VSAA in this case) are affected by changes, in the same or other landscapes, rather than simply the degree of change to the view itself. Accordingly, landscape assessors seek to analyse where, which and to what degree key characteristics would be altered and, in particular, within what area would the overall character would be changed such that either the wind farm would become a new and equally prominent key characteristic or, within what area would the wind farm become the dominant characteristic.

7.13 The landscape character effects on the *Outstanding* Overall Evaluation Plynlimon Moorlands VSAA, the *High* Overall Evaluation Clywedog Upland Grazing VSAA and the host Wye Valley Uplands VSAA would be significant in the terms expressed in the EIA Regulations. The wind farm would be dominant characteristic to up to

around 1km from the nearest turbine and would become the dominant landscape characteristic of a large part of the northern area of the Wye Valley Uplands VSAA and would become a key characteristic of other areas up to around 4km. It would become a key characteristic of areas of the Clywedog Upland Grazing and Plynlimon Moorlands VSAA up to around 4km and beyond this, to 6km and 7km approximately, it would be a noticeable additional feature, all these effects being significant.

7.14 Of the four cumulative scenarios used for the assessments only the wind farms introduced into the sequence of the second and fourth scenarios have the potential to lead to significant cumulative effects with Bryn Blaen, i.e. Carno III, Llandinam Repowering and Mynydd y Gwynt. In my judgement, all of the other wind farms would be too distant and/or indistinct to have a significant cumulative effect with Bryn Blaen. The visual impact assessment does not reveal any viewpoint locations where the total in-combination of effect would increase the magnitude and significance of visual effect above the category assessed for Bryn Blaen individually. There are several viewpoints, however, where there would be an increase in effect even though the next category would not be reached. Overall my principal concerns with the cumulative landscape impacts of Bryn Blaen and Carno III, mainly, are with the *High* Overall Evaluation Clywedog Uplands Grazing VSAA. It follows that similar findings of the range of significant landscape effects of Carno III, some 11km from Bryn Blaen, would lead to an overlap of these areas, indicating widespread significant effects across very large parts of the Clywedog Uplands Grazing VSAA from these two wind farms in-combination. Whilst there are significant cumulative visual effects on other VSAAs I do not consider the landscape character of them would be significantly affected over and above that effected by Bryn Blaen.

7.15 The appellants presented the detailed Residential Visual Amenity Survey on 10th/11th March 2016. I reviewed this and undertook additional fieldwork. Whilst my detailed methodology is slightly different to that used for the assessment I concur with the assessment of the eight properties identified as being significantly visually affected, although the precise degree varies. I recommended the Council should object to the proposal on the basis of there being unacceptable visual effects on private properties. Reason for Objection 5 was amended by the Council's resolution

on 1st April 2016 and, accordingly, the Council now objects to the unacceptable significant visual effects on the visual amenity of a number of nearby private residential properties.

7.16 In landscape and visual terms I consider that the proposals would have a significant and unacceptable effects on the Wye Valley Uplands, Clywedog Upland Grazing and Plynlimon Moorlands LANDMAP Visual & Sensory Aspect Areas, together with significant adverse visual effects on users of promoted (Prince Llewelyn Bridleway) and other local public rights of way, highways and Open Access Land. My assessment broadly concurs with the findings of the submitted Residential Visual Amenity Survey and I consider that these significant visual effects on some local residents should be considered in the planning balance. Consequently the proposals would be in conflict with the landscape considerations of policies UDP SP12, ENV2, GP1 and E3 of the Powys Unitary Development Plan (March 2010), Technical Advice Note 8: Planning for Renewable Energy (July 2005) and Planning Policy Wales: Edition 8 (2016).

IN THE HIGH COURT OF JUSTICE
Claim No. CO/ /2015
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT OFFICE
PLANNING COURT

BETWEEN:

R (on the application of
RWE INNOGY UK LIMITED)

Claimant

-and-

SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

Defendant

-and-

POWYS COUNTY COUNCIL

First Interested Party

-and-

RES UK & IRELAND LIMITED

Second Interested Party

STATEMENT OF FACTS AND GROUNDS FOR JUDICIAL REVIEW

Suggested essential reading:

- This Statement of Facts and Grounds;
- The witness statement of Marcus Trinick QC on behalf of the Claimant and the exhibits thereto (to follow) ;
- The report of the Defendant's Inspector, Mr A D Poulter, dated 8 December 2014 at Tab 2 paragraphs 18, 26, 34-36, 67-68, 337-395, 498-559 and 677-705;
- The decision letter of the Defendant dated 7 September 2015;

References:

- Paragraphs of the Secretary of State's decision letter of 7 September 2015 are in the format "[DL *paragraph number*]";
- Paragraphs of the Inspector's report dated 8 December 2014 are in the format "[IR *paragraph number*]". References to paragraphs within the annexes to the IR are in the format "[IR/*Annex number/paragraph number*]".
- The page numbers for the claim bundle are stated after the relevant document (pxxx).

INTRODUCTION

1. This is an application for permission to proceed with judicial review of the decision of the Secretary of State for Energy and Climate Change ("**the Secretary of State**") dated 7 September 2015 to refuse the application of RWE Npower Renewables Limited (now RWE Innogy UK Limited; "**RWE**") in respect of the Carnedd WenWind Farm and Habitat Restoration project. RWE's application (the "**Application**" p1177-1184) sought (i) consent under section 36 of the Electricity Act 1989 to construct and operate a wind turbine generating station of a maximum installed capacity of 150MW ("**the Carnedd Wen scheme**") at Carnedd Wen, Powys, Mid-Wales; and (ii) a direction under section 90(2) of the Town and Country Planning Act 1990 that planning permission for the Carnedd Wen scheme be deemed to be granted.

2. The First Interested Party is the local planning authority for the area in which the Carnedd Wen scheme is situated.

3. The Application was one of five applications for wind farm development (and one related grid connection application) in Powys, Mid-Wales heard by the Secretary of State's Inspector Mr A D Poulter ("**the Inspector**") at a conjoined public inquiry held between 4 June 2013 and 30 May 2014 ("**the Inquiry**"). One of the other applications, proposed by the Second Interested Party at Llanbrynmair, was for 30 turbines and was located in the same Strategic Search Area as the Carnedd Wen scheme.

4. In his report dated 8 December 2014 the Inspector recommended that section 36 consent and deemed planning permission be granted in part for the Carnedd Wen scheme (excluding five of the proposed turbines), subject to conditions. However, by her decision letter dated 7 September 2015 (p.1-10) the Secretary of State refused to grant consent for the Carnedd Wen scheme contrary to the recommendation of her Inspector.

5. Permission is sought on the following three grounds:

Ground 1: the Secretary of State is in breach of natural justice by failing to give RWE a fair opportunity to give evidence and/or make representations as to the certainty of when the landscape proposals would be delivered;

Ground 2: the Secretary of State's decision to accord "limited weight" to the landscape improvements proposed as part of the Carnedd Wen scheme is unlawful;

Ground 3: the Secretary of State's overall conclusion that the adverse effects of the Carnedd Wen scheme outweigh its benefits is vitiated by a failure to take into account material considerations; and

Ground 4: the Secretary of State's decision is irrational.

BACKGROUND

The Application and events prior to the Inquiry

6. The applications considered at the Inquiry were the Carnedd Wen scheme, the "Llanbadarn Fynydd", "Llaithddu", "Llandinam Repowering" and "Llanbrynmair" wind farm applications, and an application for the "Llandinam 132kV Line".

7. The Carnedd Wen site is situated within "Strategic Search Area B" ("**SSA-B**"),[1] adjacent to the Llanbrynmair site in a large area of upland plateau. There are

[1] The "Strategic Search Areas" ("**SSAs**") are identified in Planning Policy Wales and Technical Advice Note 8 (TAN 8)(p. 1383-1452) as areas in Wales which, on the basis of substantial empirical research, are considered to be the most appropriate locations for large scale wind farm development in Wales. The intention was to ensure that proposals for a total of 800MW of installed capacity came

existing wind farms within SSA-B (Carno A & B, Cemmaes and Mynydd Clogau). The Carnedd Wen and Llanbrynmair sites lie between the A470 near Talerddig to the south east, the A458 near Foel / Llangadfan to the north east, and the Nant yr Eira Valley to the south east. To the west there are deeply incised river valleys with extensive forestry plantations on higher ground. The Carnedd Wen site is private land currently used for commercial forestry and some agricultural grazing.

8. The wind farm element of the Application as originally submitted on 11 December 2008 was for 65 turbines with a maximum installed capacity of 250MW. The Application was subsequently amended on 5 March 2013 to reduce the number of turbines to 50 turbines with a maximum installed capacity of 150MW. The proposed lifetime of the wind farm element of the Carnedd Wen scheme is 25 years.

9. As amended, the Carnedd Wen scheme also included (as noted by the Inspector at [IR67-68]):

- 1,409ha of forest clearance;
- 459ha of peatland restoration;
- the restoration of a SSSI;
- the restoration of raised bog; and
- the re-establishment of heathland within the site.

10. In response to NRW's objections (see below), and following the submission of further information, the Applicant and NRW had extensive discussions and negotiations which resulted in the Applicant producing a comprehensive suite of documents explaining in detail the proposed deforestation and habitat restoration proposals which included (collectively, "**the Management Plans**") (p1185-1382):

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forward by 2010: see [IR52]. PPW (at [12.8.13]) explains (emphasis added) that "[d]evelopment of a limited number of large-scale (over 25MW) wind energy developments in [the SSAs] will be required to contribute significantly to the Welsh Government's onshore wind energy aspiration for 2GW in total capacity by 2015/17[...]; UK and European renewable energy targets; to mitigate climate change and deliver energy security".

- a Habitat Restoration and Management Plan ("**HRMP**");
- a Forestry Management Plan ("**FMP**");
- a Peat Management Plan ("**PMP**"); and
- a Drainage Management Plan ("**DMP**").

11. The authors of the Management Plans subsequently gave evidence to the Inquiry on behalf of RWE. Together, they were described by the Inspector as "*a team with considerable expertise and experience [...] to develop a comprehensive and integrated suite of environmental management plans*" [IR351]. It was further agreed with NRW and the First Interested Party that the implementation of the Management Plans could be effected by the imposition of (agreed) conditions.

12. The First Interested Party objected to the Carnedd Wen scheme on a number of grounds, obliging the Secretary of State to cause the Inquiry to be held. By the close of the Inquiry, however, the First Interested Party's only remaining objection concerned the landscape and visual effects which five of the proposed turbines (referred to by the Inspector and the Secretary of State as "**the Carnedd Wen Five**") would have [IR337]; [IR/A9 303]. The resolution of the First Interested Party's other objections is explained in the witness statement of Marcus Trinick QC on behalf of RWE.

13. Natural Resources Wales ("**NRW**") also objected to the Carnedd Wen scheme. By the close of the Inquiry, NRW's remaining objection was the effect of the scheme on the landscape and amenity of the Snowdonia National Park ("**SNP**") and on its special qualities, in combination with the Llanbrynmair scheme and other existing wind farms within SSA-B (IR[338]; IR/A8[3.1]). Again, the resolution of NRW's other objections is addressed in the witness statement of Marcus Trinick QC. As a consequence of the agreement reached with NRW and the First Interested Party resulting in the Management Plans and proposed conditions, the certainty and/or delivery of the landscape/habitat restoration proposals was not an issue which RWE was required to address at the inquiry.

14. The other main objector at the Inquiry was a collection of third parties who together formed "**the Alliance**".

The main parties' cases at the Inquiry

15. As recorded by the Inspector at [IR76], the cases for the main parties were set out in comprehensive written submissions that were presented during the closing session of the Inquiry. The closing submissions are annexed to the Inspector's report: RWE's at Annex 4 [IR/A4]; the Alliance's at Annex 7 [IR/A7]; NRW's at Annex 8 [IR/A8]; and the First Interested Party's at Annex 9 [IR/A9].

16. RWE's submissions make repeated reference to the benefits of the Carnedd Wen scheme, including notably the deforestation/habitat restoration proposals (emphasis added). It submitted:-

(1) At [IR/A4/1], the scheme "*achieves a number of key policy objectives of relevance to sustainable development: the generation of renewable electricity, the landscape improvement of a large area of currently afforested land and biodiversity gains of national significance*";

(2) At [IR/A4/13], "*[f]rom the outset RWE sought a development layout founded on the principles of avoidance, minimisation and mitigation of potentially significant adverse effects. By these means harm to on-site landscape features was avoided and the substantial potential for landscape enhancement, through the removal of regimented forest plantations and subsequent habitat restoration, was identified*";

(3) At [IR/A4/17], there was a need for "*a proper appreciation of the scope of the project [...] as [...] more than just another wind farm project*" and "*to recognise the fact of and benefits of the habitat restoration and management project*";

(4) The landscape of the plateau itself would become open and more diverse in character as a consequences of forest removal [IR/A4/19]; there would be benefits for recreational users from the removal of plantation woodland and the restoration of peat habitat [IR/A4/21-22]; and, at [IR/A4/22], that "*it*

must be remembered that the benefits of the removal of forestry will subsist beyond the decommissioning of the wind farm, and will be managed for a total of 50 years from the commencement of development";

(5) At [IR/A4/26], the proposed wind farm and habitat restoration project "*would, on balance, provide substantial benefits to the interests of the [SNP]*" and that "*in the longer term the net effect would be substantial, positive and worthwhile*";

(6) At [IR/A4/42], "*[i]n order to ensure effective delivery of the landscape enhancements that are integral to the Carnedd Wen wind farm and habitat restoration project, RWE has agreed a number of planning conditions. The conditions envisage a series of environmental implementation plans [i.e. the Management Plans] to ensure the transformation of the site from spruce plantations to a more traditional open peat landscape...*";

(7) [IR/A4/61-62], "*when weighing the landscape and visual effects of the project from a planning perspective, a significant distinguishing feature of the current proposal is the habitat restoration strategy that forms an integral part of the project. The proposed clear-felling of 1,409 ha of coniferous plantations and the restoration of 459 ha of peat bog will have a beneficial and transformative effect on the landscape of Carnedd Wen*";

(8) In considering the impact on SNP, at [IR/A4/72], "*the development achieves a substantial positive improvement to the landscape and bio-diversity*" and, at [IR/A4/73], that "*the proposed wind farm would be compatible with the presence of the National Park, even before the temporary nature of the wind farm and benefit to Park setting arising from the Carnedd Wen habitat restoration strategy are taken into account*";

(9) In relation to peat, that with the Management Plans in place the peat interest of the site would be well protected [IR/A4/137] and that "*large areas of peatland on the site which have been degraded by drainage, both directly and through water uptake by trees, will be returned to a more natural function, with higher water*

tables and better conditions for peat formation" [IR/A4/136]. At [IR/A4/142] it said that the peat restoration proposals "*whether viewed individually or in conjunction with the wider habitat restoration initiative of which peat management forms a part*" are "*environmental benefits on a national scale of significance*";

(10) At [IR/A4/149 and 155], in relation to the hydrological benefits of the Carnedd Wen scheme, that "*[t]he restoration of the site's natural hydrological characteristics is an integral part of RWE's proposals to restore the habitat of Carnedd Wen*";

(11) As regards the ecological benefits of the scheme, the positive effect of deforestation on the Corsedd Llanbrynmair SSSI were referred to at [IR/A4/164]. At [IR/A4/166], it referred to the conclusion of RWE's ecology consultant as being "*that the [HMRP] would deliver significant gains to biodiversity that considerably outweigh any remaining negative effects of the proposals. In view of these benefits, NRW has indicated that it [sic] agreeable to the approach promoted by RWE*". [IR/A4/174], it said that "*the Carnedd Wen habitat restoration project represents one of the largest schemes to restore blanket bog from plantation woodland in Wales, and would certainly be the largest such project to be undertaken without recourse to public funding [...] the proposed HRMP would make a significant contribution towards the achievement of Welsh targets for the restoration and enhancement of blanket bog, upland oak woodland and upland heathland, and would provide a framework for ongoing monitoring and research*". The ecological benefits of the scheme were then summarised at [IR/A4/177];

(12) Finally, under "Conclusions on the Planning Balance", at [IR/A4/254] the contribution which the Carnedd Wen scheme would make in respect of (*inter alia*) the following is noted: (i) "*Bringing landscape benefits through the habitat restoration programme*"; (ii) "*Bringing biodiversity benefits of significance at a national level*" and (iii) "*Bringing benefits in terms of public access to the countryside*".

17. As noted above, the majority of the objections held by NRW and the First Interested Party to the Carnedd Wen scheme at the outset of the Inquiry were resolved during the course of the Inquiry, including all objections on ecology/habitats grounds.

18. Thus, in its closing submissions NRW emphasised that its role is to sustain and enhance the natural resources of Wales and, wherever possible, to resolve objections relating to landscape, habitats and species with the applicants *"so as to enable development to proceed in a satisfactory manner"*: [IR/A8/1.1]. NRW also explained that:-

(1) whilst at the start of the Inquiry NRW's specific concerns included the effect of the Carnedd Wen scheme on peat and peatland habitats [IR/A8/1.2], the majority of its concerns had been satisfactorily resolved by the provision of SEI[2] and other additional information, or could be so resolved with the imposition of appropriate conditions [IR/A8/1.3];

(2) NRW maintained its objection to the Carnedd Wen scheme on the basis of its impact on landscape and visual amenity [IR/A8/3.1] - not ecology; and

(3) NRW acknowledged the positive benefits of the deforestation and habitat improvement scheme *"embedded in the Carnedd Wen scheme"* [IR/A8/3.4], although its position was that the significant adverse impacts on the SNP should be weighed in the planning balance against the positive benefits of forest removal and habitat improvement [IR/A8/3.7].

19. The First Interested Party's closing submissions were limited to the Carnedd Wen Five and concentrated on their removal from the scheme [IR/A9/62]. The First Interested Party also acknowledged that the economic and ecological benefits of the Carnedd Wen scheme (including the habitat enhancement scheme) were *"very significant"* [IR/A9/1003] and welcomed and supported the *"significant ecological enhancement proposal"* [IR/A9/1008]. The First Interested Party's position was that

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if the Carnedd Wen Five were removed from the scheme *"the harms no longer clearly outweigh the benefits and the project can be consented"* [IR/A9/1010].

The Inspector's report

20. The Inspector sets out his assessment of the merits of the Carnedd Wen scheme at [IR337 – 377], followed by discussion of cumulative and in-combination effects within SSA-B at [IR378 - 395]. His overall conclusions in respect of the Carnedd Wen scheme then follow at [IR677 – 704] and at [IR705] he reaches the conclusion that section 36 consent and deemed planning permission should be granted in part, omitting the Carnedd Wen Five, and subject to the conditions set out in Annex E to his Report.

21. At [IR341 – 346], the Inspector considers the landscape/visual effects of the Carnedd Wen Five (i.e. the only element of the Carnedd Wen scheme to which the First Interested Party continued to object), concluding at [IR347] as follows:-

> *"I conclude for these reasons that the 'Carnedd Wen five' turbines would have significantly harmful landscape and visual effects. Their omission from the proposed scheme would therefore protect the Banwy Valley from the locally harmful landscape character effect of extending the wind farm landscape off the plateau and onto the valley sides, and would avoid the harmful effects over a considerable populated and well traversed area. It would also be consistent with the approach taken elsewhere in Powys of containing wind farm development back from the edges of plateaus."*

22. At [IR349 – 362], the Inspector considers RWE's deforestation/habitat restoration proposals. In particular, he records that:-

    (1) The proposal includes the clearance of about 1,200ha of conifer plantation over a period of about 5 years [IR349];

    (2) Alongside the construction of the wind farm and its infrastructure, many kilometres of drainage ditches would be blocked up to raise the water table, thus providing better conditions for moorland vegetation and peat formation; excavated peat would be reused within the site; the land would

then be managed to encourage the re-establishment of moorland vegetation and habitats [IR349];

(3) RWE had engaged "*a team with considerable expertise and experience of such programmes, including construction managers with extensive experience of similar schemes in Scotland, to develop a comprehensive and integrated suite of environmental management plans*" [IR351]. Compliance with the Management Plans could be required by agreed conditions, which could also require that provision be made for an Ecological Clerk of Works with overall responsibility for the coordination and implementation of the Management Plans;

(4) There was no evidence that the faster than normal proposed rate of forestry clearance would have any adverse environmental effects [IR352];

(5) A Natural England Evidence Review of blanket bog restoration found that whilst an holistic approach to the restoration of peat habitats was necessary, most studies showed that blocking drains raised water tables and encouraged wetland plants over relatively short timescales. Whilst improvements in function might not be rapid and the timescale to full recovery might be long, there was no evidence that blanket peat could not be restored [IR354];

(6) The Management Plans "*adopt an integrated approach and would facilitate best practice in the holistic management of the restoration of the site. They are also long term*" [IR355];

(7) There was evidence that similar habitat restoration schemes in Wales and elsewhere, whilst of smaller scale, had proved to be successful in raising ground water levels and promoting the re-establishment of moorland vegetation with a small area on the Carnedd Wen site itself cleared just a few years ago already well on the way to returning to a moorland habitat. The

Inspector could therefore *"see no reason in principle why such habitat restoration cannot be successfully 'scaled up' to that of the proposed development"* [IR356]; and

(8) The forestry to be cleared comprised dense monoculture of coniferous trees which represented a very poor habitat for wildlife [IR359].

23. At [IR360 - 362], the Inspector concludes that (emphasis added):-

> *"360. As noted in the Natural England review the recovery of peat habitats takes time, and there can be no guarantee that full recovery would be achieved in this instance. However, subject to the agreed conditions I consider that there is a high degree of probability that the environmental measures set out in the various proposed management plans would eventually approximate to full restoration. Even partial restoration, which could be expected in the short to medium term, would in my view be a considerable improvement in habitat terms to the existing forestry.*
>
> *361. In its evidence to the inquiry the Alliance has advocated continuation of the current management of the land for forestry for the time being, as current UK Forestry Standards would ultimately require more sympathetic replanting. However, in the absence of the proposed wind farm it is likely that the existing conifer plantations would remain for many years. There can be no certainty about the forestry standards that would apply at the end of the life of the existing forestry. The opportunity to secure the restoration of scarce moorland habitat through a comprehensive scheme of habitat restoration would be lost, and poor habitats would remain for many years. I consider for these reasons that the approach advocated by the Alliance would not be in the interests of ecology.*
>
> *362. NRW raises no objection to the effect of the proposed development on peat, hydrology and hydrogeology, or habitats. For the reasons above I am satisfied that there would be no unacceptable effects in these respects, and that there would be significant benefits in the medium to long term."*

24. Under the heading of Biodiversity, the Inspector notes that the restored moorland habitats can be expected to bring about general improvements in terms of

biodiversity, and in particular to benefit rarer species (black grouse and hen harrier) [IR363].

25. Under Socio-Economic Effects, the Inspector also concludes that the replacement of large areas of forestry of little amenity value with open moorland permitting panoramic views would enhance the value of the site to visitors [IR368].

26. The Inspector considers the cumulative / in-combination effects of the Carnedd Wen and Llanbrynmair schemes on the Nant yr Eira Valley at [IR395] in the following terms (emphasis added):-

> "...*The Nant yr Eira Valley and the Llanbrynmair/Carnedd Wen uplands are clearly valued by many local residents and visitors for qualities including natural beauty, rugged rural character and a sense of remoteness and tranquillity [...]. As the proposed turbines would be very large and moving man-made features their presence would be harmful to these qualities. However, the harm would be limited to the life of the wind farms. The proposed developments would both include the replacement of large swathes of conifer plantation with more attractive and diverse moorland which in the long term would be of benefit in terms [sic] natural beauty, ruggedness, remoteness and tranquillity. On balance, and in the long term, I consider that both schemes would involve the restoration of a large enough area of moorland to have an overall benefit sufficient to offset the presence of the turbines for their operational life. Together, they would be of considerable benefit in this respect, and the landscape character of the area would ultimately be substantially improved.*"

27. In the context of considering the cumulative and in-combination effects of Carnedd Wen, together with Llanbrynmair, on the SNP, the Inspector concludes that there would be no direct physical effect on the SNP [IR389]. He also concludes that from within the SNP the perception of the landscape would be changed by the proposed habitat restoration and wind turbines but that the degree of the effect on the landscape character of the SNP would be slight and not significant [IR390].

28. In terms of the visual impacts on the SNP, the Inspector accepts that the Carnedd Wen and Llanbrynmair schemes would have significant adverse visual effects

when seen from the south-eastern section of the SNP but considers that the large, dark, uniform and hard-edged blocks of forestry which exist on the Carnedd Wen Plateau are unattractive and have adverse landscape and visual effects and that the Carnedd Wen scheme would replace *"large areas of such forestry with more diverse, rounded and natural vegetation which would remain for many years after the lifetime of the wind farm"* [IR391]. He concludes that "*in this instance there would [...] be long term benefits to the appearance and natural beauty of the Carnedd Wen Plateau and view from the Park, which should be taken into the balance*".

29. The conclusion reached at [IR395] is that:-

> *"... there would be no significant direct or indirect effect on the landscape character of the National Park itself. Significant adverse effects on the views from within the Park would be limited to the south-eastern section and would be limited in views out from the Park. The effect of the proposed developments on the special qualities of the National Park would be small, whether individually or in combination with other existing or proposed wind farm developments".*

30. The "Planning Balance and Overall Conclusions" are considered by the Inspector at [IR699 - 704]. He notes that "*the habitat restoration and management aspects of the proposal would be of significant benefit in terms of peat, hydrology, hydrogeology, and habitats in the medium to long term*" and that "*[t]here would be general improvements in terms of biodiversity, and particular benefits to rarer bird species*". He describes those benefits, together with the other benefits of the Carnedd Wen scheme, as "*very substantial*" [IR699]. His conclusions in respect of the landscape and visual effects of the scheme are summarised at [IR700]; the harm to the Nant yr Eira valley "*would be limited to the operational life of the proposed development, which ultimately would bring about improvements to the landscape through forestry clearance and moorland restoration*" and as to the SNP, "*in the long term there would be beneficial effects on views out from the Park*".

31. The Inspector's overall conclusion is that the omission of the Carnedd Wen Five "*would minimise landscape and visual effects within the Banwy Valley and would overcome the conflict with national and local planning policy*" [IR702] and that, if the

Carnedd Wen Five are omitted, "*the balance of consideration indicates*" that section 36 consent and deemed planning permission should be granted [IR704].

The Secretary of State's decision letter

32. From the Secretary of State's decision letter dated 7 September 2015 ("**DL**"), the reasons for rejecting (at [DL4.2]) the Inspector's recommendation that the Carnedd Wen scheme should, with the exception of the Carnedd Wen Five, be consented appear to be as follows:-

    (1) She accepts [DL4.3] that the scheme is consistent with (a) energy National Policy Statements EN-1 and EN-3 *"in so far as the documents set out a national need for development of new nationally significant electricity generating infrastructure of the type proposed"*; (b) Welsh Government policies set out in Planning Policy Wales ("**PPW**"), as supplemented by government circulars, ministerial letters and a series of Technical Advice Notes ("**TANs**") including TAN8 on "Planning for Renewable Energy"; and (c) the 2010 Powys Unitary Development Plan ("**UDP**").

    (2) She acknowledges that the scheme has other *"potential"* benefits, noted by the Inspector as including *"economic investment, a habitat management scheme and habitat restoration with associated improvements to peat, hydrology, hydrogeology, habitats and biodiversity"* [DL4.4].

    (3) She notes that the visual impacts of the Carnedd Wen scheme would, without the Carnedd Wen Five and the Llanbrynmair scheme, have been regarded by the Inspector as acceptable [DL4.6]. And, because she was refusing consent for the Llanbrynmair scheme, she considers the Inspector's findings on the basis of the Carnedd Wen scheme alone (with and without the Carnedd Wen Five) rather than in-combination with Llanbrynmair.

    (4) Having considered what landscape and visual impact the Carnedd Wen Five would have, she agrees with the Inspector that *"the Carnedd Wen Five are not consistent with National, Welsh or local planning policy [IR702]"* [DL4.9].

(5) At [DL4.10], the Secretary of State then says this (emphasis added):-

> *"The Secretary of State notes that the Inspector has found that the Development "would be harmful to valued landscape and visual qualities of the Nant yr Eira Valley" [IR700] and that the "proposed turbines would have a substantial visual impact when seen from a number of residential properties in the valley" [IR700] although overall he finds that the benefits of the Development, excluding the Carnedd Wen Five would outweigh its adverse impacts [IR705]. The Secretary of State further notes that the Inspector considers that there would ultimately be "improvements to the landscape through forestry clearance and moorland restoration" and that he considers that the visual impacts of the turbines, though [sic] substantial in the case of [a] number of residential properties, would not be unacceptable. Whilst taking into account the possible future benefits of the Development in terms of landscape improvement, the Secretary of State considers that, given the uncertainty as to when these benefits might be delivered, these should, in the circumstances, be afforded only limited weight when set against the more immediately and predictable nature of the adverse impacts of the Development if it were to be granted consent."*

(6) The Secretary of State recounts the Inspector's discussion of the effects of the Carnedd Wen scheme on the landscape, visual amenity and special qualities of SNP at [DL4.11], including his conclusion that "*because the Development includes the replacement of [...] unattractive blocks of forestry with more diverse and natural vegetation [...] there would be long term benefits to the appearance of the Carnedd Wen plateau, which should be taken into account*". She continues:

> "*The Secretary of State, however, feels it is appropriate, for the reasons set out in paragraph 4.10, to afford limited weight to possible future improvements in the views out of the Park*".

33. The Secretary of State's overall conclusion as regards the landscape and visual impacts of the Carnedd Wen scheme is then set out at [DL4.12] as follows:-

> *"Having carefully considered the Inspector's conclusions on landscape and visual impacts, the Secretary of State agrees with him in respect of the unacceptability of the Carnedd Wen Five but disagrees with the conclusion that, in respect of the other turbines, the adverse visual and landscape effects would be outweighed by the benefits of the Development. The Secretary of State considers that the likely harm to the landscape and visual qualities of the Nant yr Eira Valley and the substantial visual impact affecting a number of*

residential properties in the valley, and the adverse effects of views from the south-eastern section of the Park are sufficiently significant so as to outweigh the potential benefits of the Development. In reaching this conclusion the Secretary of State has considered whether the adverse landscape and visual impacts could be successfully mitigated but is not persuaded on the evidence that opportunities for sufficient mitigation exist. Those potential future improvements in landscape quality that the Secretary of State accepts do exist will not, in the opinion of [the] Secretary of State provide sufficient mitigation for the more immediately harmful and predictable adverse impacts that would follow from granting consent for the Development."

34. Section V of the DL then deals with the requirements of the Habitats Regulations; section VI addresses issues raised following the close of the Inquiry and section VII sets out the Secretary of State's decision not to reopen the Inquiry; section VIII is concerned with the Equality Act 2010 and section IX with the Human Rights Act 1998.

35. Section X of the DL then sets out the Secretary of State's "Conclusion and Decision on the Application". [DL10.1] is in the following terms:

"The Secretary of State has considered the views of the Inspector, the Applicant, the Council, consultees and others who have made representations, the matters set out above and all other material considerations. For the reasons given in this letter, the Secretary of State disagrees with the Inspector that consent for the Development should be granted, given the harmful adverse visual effects and landscape impacts of the Development".

36. [DL10.2] sets out the "issues" which the Secretary of State "*considers [...] material to the merits of the section 36 consent application*". Issue (ii) is that "*the Company has identified what can be done to mitigate any potentially adverse impacts of the proposed Development*". Issue (v) is HM Government's policies on the need for and development of new electricity generating infrastructure, and specifically wind turbine generating stations, as set out in EN-1 (p. 1481-1602) and EN-3 (p.1603-1684). Issue (vi) is Welsh Government energy and climate change policies and local planning policy as set out in the UDP.

37. It is apparent from DL4.10 that the Secretary of State refused to grant consent and deemed planning permission because of the limited weight she gave to the improvements to the landscape arising from the Carnedd Wen scheme and that she only gave limited weight to those benefits because of an alleged uncertainty as to when those benefits would be delivered.

GROUNDS OF CLAIM

Ground 1: the Secretary of State is in breach of natural justice by failing to give RWE a fair opportunity to give evidence and/or make representations as to the certainty of when the landscape/ habitat restoration proposals would be delivered.

38. Natural justice (or procedural fairness) requires any participant in adversarial proceedings to (a) know the case which he has to meet and (b) have a reasonable opportunity to adduce evidence and make submissions in relation to that case. And, where there is procedural unfairness which materially prejudices a party, that may be a good ground for quashing the Inspector's decision - see ***Hopkins Developments Ltd v Secretary of State*** [2014] EWCA Civ 470 (p.2009-2028).

39. In the present case the only reason given by the Secretary of State for dismissing the application was that, in her view, there was *"uncertainty as to when the* [landscape] *benefits might be delivered"*. Therefore, the Secretary of State only gave those benefits limited weight and consequently they did not outweigh the more immediate and certain adverse impacts the Carnedd Wen scheme would have.

40. The "uncertainty" relied on by the Secretary of State as to the delivery of the landscape benefits is not supported by the evidence presented to the Inquiry (see Ground 2 below). Moreover, the certainty of the landscape/habitat restoration scheme (including their delivery) had been agreed with NRW and the First Interested Party through the Management Plans and agreed conditions and was not therefore a matter which was in issue at the Inquiry. Therefore, if the Secretary of State wished to rely on an alleged "uncertainty" as regards when the landscape improvements would be delivered (as she did), RWE was entitled to have the reasoning behind the alleged "uncertainty" set out and a reasonable opportunity to

adduce evidence and make submissions in relation to the certainty of delivery of the landscape improvements.

41. RWE was not given an opportunity to give evidence and/or make submissions on the issue of the certainty of the delivery of the landscape/habitat restoration proposals and there has been a breach of natural justice amounting to procedural unfairness.

42. Further, RWE has been materially prejudiced by the Secretary of State's breach of natural justice. Had the Secretary of State's concerns as regards the "uncertainty" of when the landscape proposals would be delivered been raised by the Secretary of State before reaching her decision, RWE would have been in a position to present evidence and make submissions on that issue.,

Ground 2: the Secretary of State's decision to accord "limited weight" to the landscape improvements proposed as part of the Carnedd Wen scheme is unlawful

43. There are three limbs to this second ground of challenge:

(1) That the Secretary of State's decision to afford only limited weight to the future landscape improvements which the Carnedd Wen scheme would bring about is vitiated by a failure to take into account material considerations, namely (a) the evidence presented to the Inquiry as to the timing and certainty of delivery of future landscape improvements; and/or (b) the Inspector's conclusions in respect of the timing and certainty of delivery of future landscape improvements.

(2) Alternatively, if contrary to the above the Secretary of State's decision to afford only limited weight to the proposed landscape improvements is not vitiated by a failure to take into account material considerations, it is irrational.

(3) In either event, the Secretary of State's decision to afford only limited weight to the proposed landscape improvements is vitiated by a failure to provide adequate reasons.

Ground 2(a)

44. In ***Tesco Stores Ltd v Secretary of State for the Environment*** [1995] 1 WLR 759 at 780 (p. 1695-1720), Lord Hoffmann said (emphasis added):-

> "...The law has always made a clear distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority. Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into *Wednesbury* irrationality) to give them whatever weight the planning authority thinks fit or no weight at all...
>
> This distinction between whether something is a material consideration and the weight which it should be given is only one aspect of a fundamental principle of British planning law, namely that the courts are concerned only with the legality of the decision-making process and not with the merits of the decision. If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State".

45. As to the requirement noted by Lord Hoffmann in ***Tesco Stores*** that the decision-maker must have regard to all material considerations, it is not enough for a decision-maker merely to have regard to a relevant consideration if he misunderstands or misinterprets it: ***R (Mavalon Care Ltd) v Pembrokeshire County Council*** [2011] EWHC 3371 (Admin) at [52] (p.1720-1742), with reference to the judgment of McCowan LJ in ***Horsham DC v Secretary of State for the Environment*** [1992] 1 PLR 81 at 92 (p.1743-1756).

46. The Secretary of State expressly gave only limited weight to the future landscape improvements which the Carnedd Wen scheme would bring about: [DL4.10 and

4.11]. It is plain from [DL4.12] that her decision to give only limited weight to the proposed landscape improvements was determinative of her overall conclusion stated at [DL4.12] that *"the likely harm to the landscape and visual qualities of the Nant yr Eira Valley and the substantial visual impact affecting a number of residential properties in the valley, and the adverse effects of views from the south-eastern section of the Park are sufficiently significant so as to outweigh the potential benefits of the Development"*: see the final two sentences of [DL4.12].

47. It is accepted that (i) the weight to be given to the future landscape improvements which the Carnedd Wen scheme would bring about; and (ii) the overall conclusion as to whether the adverse effects of the scheme outweigh its benefits, were matters of judgement for the Secretary of State.

48. However, the Secretary of State's exercise of her judgement as to the weight to be given to the proposed landscape improvements is flawed because of her failure to take into account the evidence and/or the Inspector's conclusions as to the certainty of the benefits the landscape improvements would have. Consequently, her overall conclusion as to whether the adverse effects of the scheme outweigh its benefits is also flawed.

49. The only reason given by the Secretary of State for according limited weight to the future landscape improvements which the Carnedd Wen scheme would have was that there is *"uncertainty as to when these benefits might be delivered"*, as against *"the more immediately and predictable nature of the adverse impacts of the Development"*: [DL4.10]. The Secretary of State thus proceeded on the understanding that there was doubt over (i) the timing of delivery of the future landscape improvements; and (ii) the certainty of delivery of the future landscape improvements (see the references in [DL4.10-4.12] to *"possible"* and *"potential"* future landscape improvements in contrast to *"more … predictable"* adverse impacts).

50. However, the evidence presented to the Inquiry and the Inspector's report make it plain that there was no uncertainty as to either the timing or the certainty of the delivery of the future landscape improvements.

51. As to the timing of delivery of the proposed landscape improvements, RWE's evidence to the Inquiry was set out in the Management Plans and July 2013 SEI and secured by planning conditions. Forestry clearance in particular is clearly set out in a Phased Felling Programme.

52. Further, neither NRW nor the First Interested Party suggested that the timing of delivery of the proposed landscape improvements was in doubt.

53. The Inspector, with reference to the Alliance's closing submissions, records at [IR349] that it is proposed to clear *"about 1,200 Ha of conifer plantation over a period of about 5 years, with a peak of about 515 Ha in one year"* and that the proposed rate of forestry clearance is *faster* than that of many commercial forestry sites [IR352]. He further noted that he had seen from his site visit that an area cleared *"just a few years ago"* was *"already well on the way to returning to a moorland habitat"* [IR356]. Finally, whilst the Inspector acknowledges that *"the recovery of peat habitats takes time"*, his view was that *"[e]ven partial restoration, which could be expected in the short to medium term, would... be a considerable improvement in habitat terms to the existing forestry"* [IR360].

54. Therefore the Secretary of State's reliance on there being *"uncertainty"* as to the timing of delivery of the proposed landscape improvements is contrary to and not supported by the evidence given to the Inquiry and by the Inspector's conclusions which the Secretary of State does not disagree with. In particular, the evidence before the Inquiry (and accepted by the Inspector) was that forestry clearance – which was a significant element of the proposed landscape improvements - would be accomplished quickly, albeit that full habitat restoration (i.e. the proposed habitat improvements) would take longer.

55. As to the certainty of delivery of the proposed landscape improvements, in its closing submissions to the Inquiry RWE explained that it had agreed a number of planning conditions *"[i]n order to ensure effective delivery of the landscape enhancements that are integral to the Carnedd Wen wind farm and habitat restoration project"* and that the conditions envisage the Management Plans would *"ensure the transformation of the site from spruce plantations to a more traditional open peat landscape..."* [IR/A4/42]. The witness statement of Marcus Trinick (paras 19-21) provides further detail regarding the timing and certainty of the restoration.

56. Neither NRW nor the First Interested Party suggested that there was any uncertainty as to the delivery of the proposed landscape improvements through the agreed conditions.

57. The Inspector in his report notes that compliance with the Management Plans (including delivery of the proposed landscape improvements) can be required by agreed conditions, including provision for an Ecological Clerk of Works [IR351]. Draft conditions to this effect were annexed to the Inspector's report [IR/Annex E/Conditions 42 to 46]. At no point has the Secretary of State disagreed with the Inspector as to the efficacy of the Management Plans and/or conditions requiring the landscape/habitat improvements in the Management Plans to be implemented.

58. Again, therefore, the Secretary of State's reliance on there being *"uncertainty"* as to the delivery of the proposed landscape improvements is contrary to and unsupported by the evidence presented to the Inquiry and the Inspector's report.

59. It follows from the above that the Secretary of State has misunderstood, and therefore failed to take into account, the evidence presented to the Inquiry and/or the conclusions set out in the Inspector's report as regards the certainty of the timing and/or delivery of the proposed landscape improvements. Therefore, the basis for the Secretary of State giving only *"limited weight"* to the benefits of the landscape improvements is legally flawed and vitiates her overall conclusion that the adverse effects outweighed the benefits of the Carnedd Wen scheme.

Ground 2b

60. Where a judgment is not one that a reasonable Secretary of State, on the material before him, could reasonably make, it is irrational in the ***Wednesbury*** sense and unlawful (***R v Secretary of State for the Home Department, ex p Brind*** [1991] 1 AC 696, 749A-B and 751E) (p1757-1828).

61. If, contrary to Ground 1a above, the Secretary of State did properly understand and take into account the evidence presented to the Inquiry and/or the Inspector's conclusions as regards the certainty of the timing and delivery of the proposed landscape improvements, her decision to give only limited weight to those improvements because of the "uncertainty" surrounding their delivery is irrational. It simply flies in the face of the evidence and of the Inspector's report which provide no basis on which the Secretary of State could rationally conclude that only limited weight should be given to the landscape benefits of the scheme. It is not, therefore, a decision which a reasonable Secretary of State, having regard to the evidence and the Inspector's report, could reasonably take.

Ground 2c

62. The leading authority on the proper approach to a reasons challenge in the planning context is the judgment of Lord Brown in ***South Bucks DC v Porter (No. 2)*** [2004] 1 WLR 1953, at [36] (p. 1829-1842)(emphasis added):-

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

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

63. The reasoning set out in the DL gives rise to a substantial doubt as to whether the Secretary of State erred by failing to take into account - or properly to understand - the evidence and the Inspector's report in respect of the certainty of the timing and delivery of the proposed landscape improvements. This is clearly an important matter given that the Secretary of State's decision to give only limited weight to those improvements was plainly determinative in reaching her conclusion on the overall planning balance - see [DL4.12].

64. In view of Ground 1b above, the reasoning also plainly gives rise to a substantial doubt as to whether the Secretary of State erred in failing to exercise her planning judgement in a rational manner when determining how much weight should be given to the proposed landscape improvements.

65. Further, RWE is substantially prejudiced by the inadequacies in the Secretary of State's reasoning. It is unable to assess its prospects of obtaining permission for any alternative development. In particular, having provided the Inquiry with cogent evidence as to the landscape improvements which the Inspector accepted as providing substantial benefits (and which were not disputed by the First Interested Party or NRW), RWE cannot now know what more it could do to enable more than limited weight to be given to those benefits.

Ground 2: the Secretary of State's conclusion that the adverse effects of the Carnedd Wen scheme outweigh the benefits is vitiated by failure to take into account material considerations

66. It is well established that planning decision letters are to be read fairly and as a whole: see ***R (Zurich Assurance Limited trading as Threadneedle Property Investments) v North Lincolnshire Council*** **[2012] EWHC 3708** (p. 1843-1868) and ***R (on the application of Smech Properties Limited) v Runnymeade Borough Council*** **[2015] EWHC 823** (p. 1869-1898).

67. In balancing the adverse effects of the Carnedd Wen scheme against its benefits, the Secretary of State has failed to have regard to all the benefits of the scheme. She further errs in failing to have regard to the respective durations of (i) the adverse effects and (ii) the benefits of the scheme.

68. At [DL4.4] the Secretary of State states that she has considered "*the other potential benefits of the Development*" including (with reference to [IR699]) "*economic investment, a habitat management scheme and habitat restoration with associated improvements to peat, hydrology, hydrogeology, habitats and biodiversity*". However, nowhere does she consider or explain what weight should be given to these accepted benefits and the Secretary of State has failed to weigh the totality of the benefits of the Carnedd Wen scheme in the overall balancing exercise. This is particularly apparent from:-

    (1) [DL4.10 - 4.12] where the only benefits which the Secretary of State takes into account (and then discounts because of the uncertainty of their delivery) are the long term landscape benefits which she concludes do not outweigh the more immediately harmful landscape and visual impacts[3]; and

    (2) [DL10.1 & 10.2] where the Secretary of State expressly identifies those matters which she considered to be material to the merits of the section 36 consent

[3] Habitat restoration on the site, for example, is to be managed for a total of 50 years. i.e. for 25 years beyond the life time of the wind farm (witness statement para 21(c) and [IR/4]- closing submissions of Marcus Trinick QC .

application but omits any reference to the benefits referred to by the Inspector as being "substantial".

69. Nowhere does the Secretary of State purport to undertake a balancing exercise in which all the benefits (including the renewable energy, climate change, economic, ecological, hydrological, hydrogeological and landscape benefits) are weighed against the short-term landscape and visual impacts.

70. In consequence of the failure to take into account (i) all the benefits of the scheme and (ii) the respective durations of the adverse effects and benefits of the scheme, the balancing exercise undertaken by the Secretary of State is flawed and the decision to refuse consent in consequence is unlawful.

Ground 3: the Secretary of State's decision is irrational

71. A decision which is illogical is susceptible to challenge on the ground of ***Wednesbury*** irrationality. In ***R v Parliamentary Commission for Administration, ex p Balchin*** [1998] 1 PLR 1 (p. 1899-1910) Sedley J (as he then was) explained (at [28]) that a claimant:

> "...does not have to demonstrate, as respondents sometimes suggest is the case, a decision so bizarre that its author must be regarded as temporarily unhinged. What the not very apposite term 'irrationality' generally means in this branch of the law is a decision which does not add up – in which, in other words, there is a *[sic]* error of reasoning which robs the decision of logic".

72. Similarly in ***R (Interbrew SA) v Competition Commission*** [2001] EWHC Admin 367 (p. 1911-1946), Moses J (as he then was) considered whether the reasoning "lacked cogency" and whether it "stacked-up" and in ***R (o.a.o. Norwich and Peterborough Building Society) v Financial Ombudsman Service Limited*** [2002] EWHC 2379 (Admin) (p.1947-1988), Ouseley J agreed with a description of legal irrationality (derived from ***ex p Balchin***) as "a decision which did not "add-up"" (at [59]).

73. In [DL4.3] ("Need and Relevant Policy for the Proposed Development") the Secretary of State expressly agrees with the Inspector that the proposed development would be consistent with (i) energy National Policy Statements EN-1 and EN-3 and (ii) Welsh Government policies set out in PPW as supplemented (including by TAN 8);[4] and that it would be *"acceptable in terms of the Powys Unitary Development Plan (adopted 2010)"*.

74. Of the PPW policies, the Inspector particularly noted (at [IR679]) paragraph 12.8.12 and the statement that *"[t]he Welsh Government accepts that the introduction of new, often very large structures for onshore wind needs careful consideration to avoid and where possible minimise their impact"*. He concluded (at [IR702]) that, "... the harm to the landscape would not be minimised the proposed development would not be consistent with national, Welsh or local planning policy". However, the omission of the Carnedd Wen Five *"would minimise landscape and visual effects within the Banwy Valley and would overcome the conflict with national and local planning policy"*.

75. In agreeing with her Inspector that the Carnedd Wen scheme would be consistent with PPW, the Secretary of State necessarily accepted that (provided the Carnedd Wen Five were omitted), the scheme would minimise landscape and visual effects.

76. Of the UDP policies referred to by the Inspector [IR54-59], Policies E3 and E4 are relevant to the Carnedd Wen scheme. In so far as relevant, Policy E3 (p.1469-1480) provides that (emphasis added):-

> "Policy E3 - Wind-power
> Applications for windfarms including extensions to existing sites and individual wind turbine generators will be approved where:
> 1. They do not unacceptably adversely affect the environmental and landscape quality of Powys, either on an individual basis or in combination with other proposed or existing similar developments. Where the cumulative impact of proposals in combination with other

[4] The Inspector refers to edition 7 of PPW (July 2014) and the Secretary of State to edition 4 (2011) – it is assumed that the Secretary of State's reference is a typographical error.

approved or existing windfarms would be significantly detrimental to overall environmental quality they will be refused.

...

7. Applicants are able to demonstrate through land management schemes that there would be adequate mitigation or compensation for any adverse impact on environmental quality, wildlife habitats or heritage features."

77. In agreeing with her Inspector that the Carnedd Wen scheme would be acceptable in terms of the UDP, the Secretary of State necessarily accepted (i) that the scheme does not have an unacceptable adverse effect on the environmental and landscape quality of Powys; and (ii) that RWE can demonstrate that there would be adequate mitigation for any adverse impact on environmental quality.

78. Having reached the conclusion that the scheme was policy compliant it is manifestly illogical and inconsistent for the Secretary of State to then take the view in [DL4.10-4.12] that the adverse landscape and visual effects impacts are unacceptable and justify the refusal of consent. Her conclusion that the Carnedd Wen scheme complies with national, Welsh and local plan policy cannot be reconciled with her later conclusion that there are unacceptable landscape and visual impacts which cannot be mitigated such as to justify the refusal of consent – see ***Aberdeenshire Council v Scottish Ministers*** [2008] S.C. 485 (p.1989-2008).

79. There is a further inconsistency in the Secretary of State's Decision Letter. The reason given by the Secretary of State for giving limited weight to the landscape benefits was expressed to be the uncertainty as to when those landscape benefits would be delivered when set against *"the more immediately [sic] and predictable nature of the adverse impacts of the Development"* [DL4.10]. However, those impacts are then characterised in [DL10.2(ii)] as *"potentially adverse impacts of the proposed Development"*. Whereas in [DL4.10] the Secretary of State appears to have concluded that the adverse landscape impacts had a considerable degree of certainty because they were immediate and predictable in [DL4.12(ii)] her

description of those same impacts as being only potentially adverse are less certain and inconsistent with her earlier conclusion.

80. There is yet a further inconsistency. At [DL4.6] the Secretary of State records, without disagreeing, the Inspector's conclusion that the landscape and visual effects of the Carnedd Wen scheme (without the Carnedd Wen Five) in combination with the Llanbrynmair wind farm were acceptable. However, the Secretary of State then considered the Carnedd Wen scheme on its own and concluded that the landscape and visual impacts of that scheme alone were unacceptable. It is irrational and inconsistent to conclude that the landscape and visual effects of the Carnedd Wen scheme in combination with Llanbrynmair would be acceptable but then conclude that the landscape and visual effects of the Carnedd Wen scheme alone would be unacceptable.

81. The Secretary of State's decision to refuse the Application is therefore illogical/inconsistent and thus unlawful. Alternatively, the Secretary of State's decision is irrational in the sense that it does not "add-up" and/or the Secretary of State's reasoning is unintelligible and thus fails to satisfy the requirements of ***South Bucks v Porter (No. 2)*** (above)(p.1829-1842).

APPLICATION FOR A PROTECTIVE COSTS ORDER

82. This claim is an "Aarhus Convention claim" within the meaning of CPR r.45.41(2) and RWE is entitled under CPR r.45.43 and Practice Direction 45 paragraph 5 to a Protective Costs Order in the sum of £10,000 subject to a reciprocal cap of £35,000 on the amount of costs recoverable from the Defendant.

CONCLUSION

83. For any or all of the reasons set out above, the Claimant respectfully requests an Order:

(i) Granting the Claimant a Protective Costs Order limiting its costs liability to the Defendant and/or the Interested Party to a total of £10,000, subject to a reciprocal cap of £35,000 on the amount of costs recoverable by the Claimant; and

(ii) Granting permission to proceed with the claim.

JOHN LITTON QC
HEATHER SARGENT

Landmark Chambers
180 Fleet Street
London
EC4A 2HG

16 October 2015

Claim No. CO/ /2015

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

BETWEEN:

R (on the application of
RWE INNOGY UK LIMITED)
Claimant

-and-

SECRETARY OF STATE FOR ENERGY
AND CLIMATE CHANGE
Defendant

POWYS COUNTY COUNCIL
First Interested Party

-and-

RES UK & IRELAND LIMITED
Second Interested Party

STATEMENT OF FACTS AND GROUNDS FOR JUDICIAL REVIEW

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Case No: CO/3953/2014

Neutral Citation Number: [2015] EWHC 655 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2015

Before:

MR. JUSTICE HOLGATE

Between:

ST ALBANS CITY AND DISTRICT COUNCIL — **Claimant**

- and –

1. SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

2. HELIOSLOUGH LIMITED

3. HERTFORDSHIRE COUNTY COUNCIL

4. GOODMAN LOGISTICS DEVELOPMENT (UK) LIMITED

Defendants

and

STRIFE LIMITED — **Interested Party**

Matthew Reed and Sasha Blackmore (instructed by **St. Albans City and District Council**) for the **Claimant**
Stephen Whale (instructed by **The Treasury Solicitor**) for the **First Defendant**
Martin Kingston QC and David Forsdick QC (instructed by **Hogan Lovells**) for the **Second Defendant**
Paul Stinchcombe QC and Ned Helme (instructed by **Wayne Leighton LLP**) for the **Interested Party**

Hearing dates: 3rd and 4th February 2015

Judgment

MR JUSTICE HOLGATE:

Background

1. The Claimant, St. Albans City and District Council ("the Council"), challenges the decision of the Secretary of State for Communities and Local Government given by letter dated 14 July 2014 to grant planning permission for a strategic rail freight interchange ("SRFI") on land in and around the former Radlett Aerodrome, North Orbital Road, Upper Colne Valley, Hertfordshire. The Secretary of State allowed the appeal by the Second Defendant, Helioslough Limited ("Helioslough") under section 78 of the Town and County Planning Act 1990 ("TCPA 1990") against the refusal of planning permission by the Council. The challenge is brought under section 288 of the TCPA 1990.

2. STRiFE Limited ("Strife") was set up to campaign against the SRFI proposal by channelling representations from local communities affected by the proposals. The organisation was formed in 2006 and appeared at the public inquiries into Helioslough's proposals held in 2007 and 2009. On 29 December 2014 Stewart J ordered that Strife should appear in these proceedings as an Interested Party rather than as the Third Defendant.

3. The appeal proposal covers eight parcels of land referred to as Areas 1 to 8 and amounting in total to 419 ha. The whole of the site falls within the Metropolitan Green Belt and the Council's administrative area. The SRFI and connecting roadways are proposed to be located in Area 1, which has an area of 146 ha. It is bounded by the A414 dual carriageway to the north, the Midland Main Line on an embankment to the east and the M25 to the south. The settlements of Park Street and Frogmore lie to the west. Area 2, occupying 26 ha, lies immediately to the east of the Midland Main Line. A new railway line would be provided through Area 2 to link the railway sidings in Area 1 to the existing main railway line. Areas 3 to 8 would generally remain in agricultural/woodland use with improved public access, and some more formal recreational uses, so as to form a country park. Additional landscaping would be provided in Areas 3 to 8.

Green Belt policy

4. At the time of the decision dated 14 July 2014 national policy on development in the Green Belt was set out in the National Planning Policy Framework ("NPPF"). The policy came into force on 27 March 2012. For the purposes of these proceedings, Green Belt policy prior to the NPPF was not materially different. Paragraph 87 states: "As with previous Green Belt policy, inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances." It was common ground that Helioslough's proposal fell within the definition of inappropriate development contained in paragraph 89. Paragraph 88 provides:

> "When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations."

First Appeal

5. The proposal has been the subject of two planning applications. The first was made on 26 July 2006 and refused by the Council. The public inquiry into Helioslough's appeal sat between November and December 2007. The main issue was whether the harm to the Green Belt and other harm was clearly outweighed by very special circumstances, notably the need for the SRFI in the proposed location. The Inspector, Mr. Andrew Phillipson, produced a report to the Secretary of State on 4 June 2008, in which he found that Helioslough's assessment of alternative sites for the SRFI was materially flawed. Because of that "critical" failing he recommended that planning permission should be refused (IR 16.203-16.204 and 17.1).[1]

6. However, in IR 16.202 Inspector Phillipson stated:-

   (i) The need for SRFIs to serve London and the South East was capable of being a very special circumstance clearly outweighing harm;

   (ii) If it had been demonstrated that no other site would come forward to meet the need for further SRFIs to serve London and the South East that would be satisfied by the appeal proposal, he would have taken the view that the harm to the Green Belt and other harm identified from the proposal would be outweighed by the need to develop a SRFI on the appeal site, and would have recommended the grant of planning permission.

7. The Secretary of State's decision on the first appeal was issued on 1 October 2008. The then Secretary of State broadly agreed with her Inspector's conclusions and accepted the recommendation to dismiss the appeal and refuse permission. In DL 58 she stated:-

> "The Secretary of State considers that the need for SRFIs to serve London and the South East is a material consideration of very considerable weight and, had the appellant demonstrated that there were no other alternative sites for the proposal, this would almost certainly have led her to conclude that this consideration, together with the other benefits she has referred to above were capable of outweighing the harm to the Green Belt and the other harm which she has identified in this case (IR 16.202). However, like the Inspector, she considers the appellant's Alternative Sites Assessment to be materially flawed and its results to be wholly unconvincing (IR 16.203). She considers this failing to be critical. In view of this, she concludes that the appellant has not shown that the need for the proposal or the benefits referred to above constitute other considerations which clearly outweigh the harm to the Green Belt and other harm which this development would cause, and that very special circumstances to justify the development have not been demonstrated."

[1] I adopt the convention of referring to paragraph numbers in the Inspector's Report and Secretary of State's decision letter with the prefixes IR and DL respectively.

Second Appeal

8. On 9 April 2009 Helioslough lodged a second application which was identical to the first. It was refused by the Council on 21 July 2009 and the subsequent appeal under section 78 was considered at a public inquiry between November and December 2009. The Inspector, Mr. A. Mead, produced his report to the Secretary of State on 10 March 2010. In that report the Inspector accepted that Helioslough had demonstrated a lack of suitable alternative sites. In particular he concluded that the location of the Colnbrook site in a Strategic Gap between Slough and London as well as in the Green Belt "weighed heavily" against it being preferred to the appeal site (IR 13.115). Having balanced the various planning considerations in IR 13.118 to 13.119, Inspector Mead concluded that very special circumstances had been shown to outweigh harm and recommended that planning permission be granted.

9. The Secretary of State's first decision letter on the second appeal was issued on 7 July 2010. He broadly agreed with Inspector Mead's conclusions save in one respect. He disagreed that the location of the Colnbrook site within the Green Belt and a Strategic Gap "weighed heavily" against it being preferred to the appeal site. He considered that an SRFI at Colnbrook could be less harmful and consequently he was not satisfied that very special circumstances had been demonstrated so as to outweigh the harm. He therefore dismissed the second appeal. Also on 7 July 2010 the Secretary of State issued a decision letter on Helioslough's application for costs in which he accepted Inspector Mead's recommendation in a separate report that a partial award be made against the Council.

Challenge in the High Court to the dismissal of the second appeal

10. Helioslough brought a challenge to the Secretary of State's decision under section 288 of the TCPA 1990. On 1 July 2011 HH Judge Milwyn Jarman QC ordered that the Secretary of State's decision be quashed ([2011] EWHC 2054 (Admin)). In summary the Judge held that the Secretary of State had misconstrued the Strategic Gap policy in Slough's Core Strategy and consequently had failed to treat that as an additional policy restraint over and above the Green Belt designation. The Secretary of State had failed to appreciate that the Strategic Gap policy had been formulated because of the special sensitivity of the tightly defined area to which it applied and the "very high bar" set by that policy, namely that development must be shown to be "essential" (paragraphs 79 to 88 of the judgment).

Redetermination of the second appeal

11. The process of redetermining the second appeal began with a letter from the Secretary of State dated 15 September 2011. Substantial written representations were submitted and exchanged in several rounds. The parties had access to the 2010 report of Inspector Mead as well as the 2008 report of Inspector Phillipson.

12. In a letter dated 19 September 2012 the Secretary of State indicated that the Helioslough appeal should be conjoined with an appeal into a proposal for an SRFI at Colnbrook and that the inquiry into the Helioslough appeal should be reopened. However, after representations had been made, the Secretary of State wrote on 14 December 2012 to say that he had changed his mind and had decided not to conjoin

the appeals or to reopen the inquiry into Helioslough's appeal. No challenge has been brought in these proceedings by the Claimant to that procedural decision.

13. On 20 December 2012 the Secretary of State issued a letter stating that he was minded to allow Helioslough's second appeal and grant planning permission, subject to a satisfactory section 106 obligation being entered into. An obligation was submitted to the Secretary of State on 20 December 2013 and on 14 February 2014 representations thereon were invited. That final stage led to the issuing of the decision letter dated 14 July 2014 which the Council now challenges.

Grounds of challenge

14. In summary the Council puts forward two grounds of challenge:-

(i) The Secretary of State erred by setting a legal test requiring a "very good reason" to be shown for departing from a conclusion reached in the 2008 Inspector's Report and the 2008 decision letter on the first appeal. In this way the Secretary of State improperly fettered his discretion when determining the second appeal;

(ii) The Secretary of State failed to take into account his decision dated 7 July 2014 in which he refused the application by Veolia ES (UK) Limited for planning permission for a waste management facility on a site at New Barnfield, 4 miles away from the Helioslough site.

Relevant legal principles

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

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

(b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirement in relation to it, may quash that order or action."

16. The general principles concerning the grounds upon which a Court may be asked to quash a decision of an Inspector or the Secretary are well-established. I gratefully adopt the summary given by Lindblom J at paragraph 19 of his judgment in Bloor Homes East Midlands Ltd v Secretary of State for Communities and local Government [2014] EWHC 754 (Admin).

Ground 1

The issue

17. The Council, supported by Strife, challenges DL 22 of the decision dated 14 July 2014. In that paragraph the Secretary of State agreed with Inspector Mead's reasoning at IR 13.8 to 13.18 on how the decision in the first appeal should be approached in the determination of the second appeal and with the conclusion at IR 13.19 that the Secretary of State would be able to differ from conclusions reached in the 2008 decision if there was "a very good planning reason for doing so".

18. The Council's complaint is that the approach taken by the Secretary of State involved a self-misdirection on a question of law. Mr. Reed submits that the Secretary of State went beyond simply explaining the *weight* he would give to conclusions reached in the decision on the first application; instead he imposed a legal test requiring a very good planning reason to justify modifying one of those earlier conclusions. It is said that by imposing that incorrect legal test the Secretary of State improperly fettered the scope of his discretion or his ability to make judgments on the issues arising on the second application.

19. It is common ground between the parties that there could be no justification for imposing a legal test requiring "a very good planning reason" to be shown before a second decision-maker is able to depart from a conclusion reached by a first decision-maker, whether generally or in this particular case. None of the authorities dealing with the importance of consistency in decision-making, whether in planning or other areas of public law, could support any such proposition. Accordingly, the central issue is whether the Secretary of State's decision letter dated 14 July 2014 is to be interpreted as if it purported to impose such a *legal* test for departing from conclusions reached in the 2008 decision.

The King's Cross case

20. The submissions before Inspector Mead focussed upon one authority, the decision of Sullivan J (as he then was) in R (King's Cross Railway Land Group) v Camden LBC [2007] EWHC 1515 (Admin). Inspector Mead at IR 13.16 indicated that he would follow "findings" in the King's Cross case and so this is where the analysis should begin.

21. The judicial review sought to quash the planning permission and consents granted by Camden LBC for the redevelopment and regeneration of 26 hectares of land at King's Cross. Following a meeting on 8 and 9 March 2006, and with the benefit of an officer's report and appendices nearly 900 pages long, the relevant committee resolved to grant planning permission subject to the completion of a section 106 agreement. Before that agreement could be concluded local elections took place in May 2006 and the composition of the committee changed. When the agreement was completed the matter was put before the new committee on 16 November 2006 so that it could decide whether planning permission should still be granted. That committee was dealing with the same application as had been considered by the former committee only 8 months beforehand.

22. For present purposes the relevant ground of challenge to the November 2006 decision was that the committee's ability to reach a different conclusion had been improperly fettered by a direction they should not reach a different decision unless a change of circumstances had occurred (paragraphs 21 and 61). The judge rejected that contention (paragraph 65).

23. Much of the discussion before the Inspector and in this Court centred on paragraphs 17 to 20 of the judgment which read as follows:-

> "17. I accept the submission of Mr Hobson, QC, on behalf of the Claimant, that the weight to be attached in any particular case to the desirability of consistency and decision-making, and hence the weight to be attached to the March 2006 resolution, was a matter for the Committee to decide in November 2006. However, given the desirability in principle (to put it no higher) of consistency in decision-making by local planning authorities, Mr Hobson rightly accepted that in practice the Committee in November 2006 would have to have a "good planning reason" for changing its mind. That is simply a reflection of the practical realities. If a local planning authority which has decided only eight months previously, following extensive consultations and very detailed consideration, that planning permission should be granted is unable to give a good and, I would say, a very good planning reason for changing its mind, it will probably face an appeal, at which it will be unsuccessful, following which it may well be ordered to pay costs on the basis that its change of mind (for no good planning reason) was unreasonable.
>
> 18. Mr Hobson submits, correctly, that while a material change of circumstances since an earlier decision is capable of being a good reason for a change of mind, it is not the only ground on which a local planning authority may change its mind. A change of mind may be justified even though there has been no change of circumstances whatsoever if the subsequent decision taken considers that a different weight should be given to one or more of the relevant factors, thus causing the balance to be struck against rather than in favour of granting planning permission.

> 19. An example canvassed during the course of submissions was that of a local planning authority which resolved to grant planning permission for an inappropriate development in the green belt, subject to a section 106 agreement, on the basis that the very special circumstances prayed in aid by the applicant outweighed the harm to the green belt and other harm. On revisiting the matter when the section 106 agreement was finalised, that local planning authority could properly reverse its earlier decision if, on reflection, it considered the harm was not outweighed by the special circumstances. Thus, it was not necessary for the Committee in November 2006 to be satisfied that there had been any material change of circumstances since March 2006. It was entitled to conclude that, having regard to all the circumstances considered in March 2006, a different balance should be struck.
>
> 20. Neither the defendant nor the interested party dissented from the proposition that, as a matter of law, there did not need to have been a material change of circumstances in order to justify a different decision in November 2006. A change in circumstances was one of the more obvious reasons which might justify a change of mind by a local planning authority, but it was not the only possible reason."

24. From these paragraphs it can be seen that Sullivan J's reasoning included the following points:-

    (i) There did not have to be a material change of circumstance to justify a change of mind on the part of the Council (paragraph 18);

    (ii) Absent a material change of circumstances a subsequent decision-maker may be justified in reaching a different conclusion because he considers that a different weight should be given to one or more relevant factors, thus resulting in the planning balance being struck in a different way and a different outcome (paragraph 18). The Judge gave a practical example of how such a situation could arise (paragraph 19);

    (iii) In view of the "desirability in principle.... of consistency in decision-making by local planning authorities" the Claimant accepted that the Council would have to have a good reason for changing its mind. The Judge added that bearing in mind the "practical realities", namely that a decision to refuse might well lead to a successful appeal to the Secretary of State and an order for costs, the Committee would have to have "in practice" "a very good planning reason" for changing its mind (paragraphs 18 and 26).

25. It is plain from the phrases "practical realities" and "in practice" that Sullivan J's comments did not involve laying down any legal test as to the basis upon which a decision-maker could change its mind in that kind of situation. Instead, the Judge's remarks reflected the weight which should be attached to the Committee's earlier "detailed consideration" of the merits of the application "following extensive consultations", and thus the strength (i.e. weight) to be expected of any change of

opinion in the evaluation of those merits. That is reinforced by the context in which the judge's remarks were made as set out in paragraphs 15 and 16 of the judgment. It was common ground that the Committee's resolution in March 2006 engaged the consistency principle laid down in North Wiltshire District Council v Secretary of State for Environment (1993) 65 P. &C.R. 137.

26. Having regard to "the importance of consistency" (per Mann LJ) will often involve deciding how much weight to give to an earlier relevant decision. Where a decision-maker accepts that its earlier decision involved a very careful evaluation of the merits of an application, *a fortiori* after thorough testing, it may well decide *as a matter of judgment* that it should not come to a different evaluation, for example on visual impact, without having "weighty" or "very weighty" grounds for doing so. A judgment of that nature would be a perfectly permissible outcome when applying the consistency principle.

27. Ultimately this issue in the King's Cross case turned upon a statement made by a Councillor during the second meeting to the effect the Council could not change its mind unless a very clear justification could be found in some change of circumstances (paragraph 61). Sullivan J held that that had not been a statement of legal principle but rather a summary of the advice received that "in the real world", absent a material change of circumstances, it would not be possible as a *matter of fact*, not law, to provide a clear justification for a change of mind. The judge held that that *factual* conclusion was wholly unsurprising, given the length of the consultation process up until March 2006 and the very detailed consideration given to the issues at the first meeting and the Officers' reports (paragraph 65).

The circumstances of the present case

28. A similar situation arose in the present case. The proposal involved a very large scheme. A substantial environmental statement was provided with the application and there would have been extensive statutory consultation (see e.g. Inspector Phillipson's IR 1.3 and 1.9). The first public inquiry sat for 26 days between 6 November 2007 and 20 December 2007 (IR 1.1). The Inspector made lengthy inspections of the site and surrounding area (IR 1.2). Evidence was called at the inquiry by the developer, the Council, Strife, and by representative bodies such as the St. Albans Civic Society and the Ramblers Association. Eighteen or so interested persons appeared at the inquiry, including MPs for St. Albans and Hertsmere, local Councillors and representatives of various residents' associations. The developer called nine expert witnesses and the Council eight. In the usual way the expert evidence would have been exchanged in advance and rebuttals produced. The evidence would have been tested at some length through cross-examination. The Inspector then produced a detailed report of some 206 pages on 4 June 2008. The Inspector's conclusions were set out in 205 paragraphs in section 16 of his report and occupied some 50 pages. Those conclusions were set out in a carefully structured manner, dealing with the various types of harm and the benefits of the proposal topic by topic, before coming to the overall balancing exercise at IR 16.175 to 16.205. The report then had to be considered by the Secretary of State and the decision letter was issued on 1 October 2008.

29. Given that the conclusions in 2008 of the Inspector and the Secretary of State were the result of that process it would be wholly unsurprising if considerable weight were

to be given to their judgment and evaluation in the determination of the identical second application. Some of their reasoning pointed in favour of the proposal and some against. On harm to the Green Belt for example, Inspector Phillipson and the Secretary of State identified some serious impacts. On the second application the Council itself relied upon a number of those earlier conclusions. As Inspector Mead recorded (IR 8.22):-

> "...the Council has, to a considerable extent, followed the assessment of the Inspector in relation to the degree of impact on the Green Belt and has, accordingly, considered it appropriate to adopt those findings, but not wholly. It has decided that it is appropriate not to agree with Inspector Phillipson on the questions of whether the development will contravene the purpose of preventing settlements from merging with one another."

30. In those circumstances Mr. Reed accepted that if Inspector Mead and the Secretary of State in his 2014 decision letter had simply said that, as a matter of fact or judgment rather than law, they would follow earlier conclusions unless persuaded that there was a very good reason not to do so, then no legal challenge would have been brought on this aspect. Accordingly, ground 1 depends upon the Court being persuaded that the Inspector and Secretary of State erred by adopting "good" or "very good" reasons as a *legal* test for determining whether to depart from earlier conclusions of their colleagues on the first application. Strife adopted the same position as the Council.

Could the Secretary of State simply have said "I disagree with the first decision"?

31. Mr. Stinchcombe QC (for Strife) submitted that Inspector Mead and the Secretary of State could have departed from earlier conclusions by simply saying "I disagree" and then going on to express their own conclusions. In his oral submissions that contention was said to be based upon the decision of the Court of Appeal in Dunster Properties Limited v First Secretary of State [2007] 2 P & CR 26. In paragraph 33 of his skeleton he relied upon R v Secretary of State for the Environment ex parte Gosport B.C [1992] J.P.L 476, 480. I cannot accept the submission. Indeed, if that approach had been followed by the Secretary of State in his 2014 decision so as to result in a refusal of permission, I suspect that Helioslough would have had a good case for seeking to have any such decision quashed.

32. Dunster was concerned with successive applications for permission to erect a first floor extension to a flat in a conservation area. A second Inspector stated in effect that he disagreed with his colleague's view that an appropriately designed extension to that flat would be acceptable *in principle* but had given no reasons for taking that view. He merely stated that each case should be decided on its own merits and referred back to his own reasoning for rejecting the particular *design* he had to consider (paragraph 9). The Court of Appeal held that the second Inspector did not discharge his statutory obligation to give reasons. Lloyd LJ held that it was not sufficient for the Inspector in the second appeal, having disagreed on the question of principle, to decline to give any reasoning on that inconsistency between the two decisions. He failed to grasp "the intellectual nettle of the disagreement" which is what was needed if he was to have proper regard to the previous decision (paragraphs 21 and 23).

33. As to the reliance by the Council and by Strife upon page 480 of the Gosport case, it is apparent from page 477 of the report that the Secretary of State did in fact give a number of reasons as to why he differed from the Inspector, either as to the extent of visual impact or the weight to be given to that impact. In the present case where the issues in the first inquiry were canvassed so extensively and detailed reasoning given in the first Inspector's report and the decision letter which followed it, the Secretary of State would have been ill-advised to issue a second decision letter in which he merely said that he disagreed with key aspects of the first decision.

Whether the Council was impeded in presenting its case at the second inquiry

34. On 8 October 2009 a pre-inquiry meeting was held in advance of the second inquiry in order to deal with procedural issues. Inspector Mead received written submissions from the Council and Helioslough on how the conclusions in the first Inspector's Report and the first decision letter should be treated. Subsequently, the Inspector issued his "notes" on the meeting for the benefit of participants in the inquiry. He did not issue any ruling on this subject. Instead, in paragraph 11 he referred to paragraph B29 of Circular 03/2009 as an example of circumstances in which costs *might* be awarded against a local planning authority (i.e. persisting in an objection previously rejected by the Secretary of State). In paragraph 12 the Inspector plainly and accurately stated:-

> "The Council has the responsibility for the presentation of its own case and whether or not, in the circumstances, its evidence remains within the bounds of reasonableness."

35. For completeness, I note that paragraph 10 of the Council's skeleton claimed that because of the approach which the Inspector had indicated he would take to the earlier report and decision, the Council resolved to withdraw or amend certain of its reasons for refusal "whilst maintaining its position that this was not the appropriate approach to the fresh discretion" that was to be exercised (see also paragraph 11). In my judgment any implication that the Council's case had been prejudiced at the inquiry, whether as to scope or content, because of a stance taken by the Inspector was cogently refuted by Mr. Kingston QC in his oral submissions on behalf of Helioslough. The matter was dealt with entirely properly by the Inspector at IR 13.17 and 13.18. In any event, Mr. Reed confirmed that this aspect did not form any part of the Council's challenge and so I do not address the matter further.

The parties' submissions at the second inquiry on the first appeal decision

36. In order to see the Inspector's reasoning on the treatment of the previous report and decision in context, it is necessary to consider the positions adopted by the parties. Helioslough approached the second inquiry on the basis that the one matter upon which they had failed in the first appeal was the robustness of their alternative sites assessment to demonstrate that there were no other sites for an SRFI in the North West sector of the M25 area which would involve less harm to the Green Belt (Inspector Mead IR 7.1). The developer contended that the first decision letter was "of very considerable weight" and that absent a material change of circumstance, a conclusion of the previous Inspector would have to be accorded very significant weight (IR 7.8). It was submitted that although the Secretary of State was legally entitled to come to a different conclusion on aspects of the case or on the overall

balance, absent any material change of circumstance "there would be no rational reason for him to do so" (IR 7.10). Helioslough sought to argue that in view of the full nature of the first inquiry, any attempt to rely upon new or "better evidence" or a revisiting of an earlier judgment would be "unsustainable on the facts here" (IR 7.11).

37. The Council relied upon paragraphs 17 to 20 of the decision in the King's Cross case (IR 8.6) and in summary submitted that (IR 8.7 to 8.10):-

(i) A change of mind from the earlier decision would need to be based upon a "good reason";

(ii) A "good reason" could be, but was not restricted to, a change of circumstances;

(iii) The decision-maker may have a "good reason" to reach a different decision simply because he takes a different view from the previous decision-maker or decides that the balance should be struck in a different way;

(iv) A new argument, piece of evidence or compelling presentation of evidence could amount to a "good reason"

(v) Thus, there was no principle which limited the Secretary of State to considering whether there had been a change of circumstance since the previous decision. Such an approach would involve an error of law.

38. It is important to note that on a correct understanding of the passages relied upon by the Council from the King's Cross decision (recorded as part of the Council's case in IR 8.6), and consistently with the Council's submissions in this court, the Council's stance at the inquiry was that the Secretary of State was entitled to approach the matter by considering whether there was a "good reason" to justify a change of mind, *treated as a matter of fact or judgment*. Given the reference by Sullivan J to "very good reason" in the passage expressly relied upon by the Council, the position should not be any different if the decision-maker were merely to add the adverb "very". As an exercise of judgment, the expressions "good" and "very good" can simply refer to the weight considered to be appropriate to overcome the weight being given to conclusions in an earlier decision. Essentially, therefore, the issue is whether, on a fair reading of the Inspector's report and the decision letter, the Secretary of State moved from that position to laying down a legal principle or test, albeit that no party at the inquiry suggested that he should do so.

39. Strife adopted substantially the same position as the Council before Inspector Mead (IR 9.3 to 9.9). They expressly accepted that there should be "the requisite good reason" to disagree with the view of the previous Inspector or Secretary of State but explained why such a reason should not be restricted to a material change in circumstances.

Discussion

40. Paragraphs 13.8 to 13.19 of Inspector Mead's report appear in a section headed "legal submissions". Contrary to a suggestion made by the Council, I do not think that the use of that phrase can be taken to mean that all of the text which follows, and in particular IR 13.15 and 13.16, should be treated as setting out principles of law or legal tests. This section of the report deals with submissions, as opposed to evidence, from the respective legal teams at the inquiry and referred, in part, to case law on the principle of consistency in decision-making. IR 13.10 summarised the Council's submissions, from which it was plain, as I have already explained, that the phrase "good reason" was taken from the King's Cross case, not as a legal test, but as a practical assessment of the weight to be attached to conclusions in the earlier report and decision and hence material to the reasoning which could support a different view being taken.

41. Given the Council's reliance upon the King's Cross decision, it was entirely permissible for the Inspector to point out that in fact Sullivan J had thought that "a very good reason" should be given for a change of mind in that case given its practical realities, and to adopt the same approach in the present case as a matter of judgment (IR 13.12 to 13.13). The Inspector expressly rejected Helioslough's argument that, absent a material change in circumstance, there would be no rational reason for coming to a different conclusion from one reached previously. True enough the Inspector went on to say that the phrase "a very good planning reason" described "the appropriate test for a change of mind". But he referred to this as his "opinion" as to how a reason for departing from an earlier conclusion would appropriately be described. The language of IR 13.13 is entirely consistent with the Inspector expressing his judgment on how these matters should be weighed.

42. That understanding of Inspector Mead's report is reinforced by IR 13.14. There the Inspector referred once again to his "opinion" on this matter, basing himself upon the principle in the North Wiltshire case that a subsequent decision-maker can disagree with a critical aspect of a previous indistinguishable decision, provided that reasons are given. IR 13.13 and 14.14 are also inconsistent with the Council's suggestion that the Inspector laid down some legal standard that had to be reached before being able to come to a different view.

43. In IR 13.15 the Inspector expressly referred back to IR 8.7 in which he had summarised the Council's contention that a "good reason" could be based simply upon a change of view or different judgment. The Inspector thought that was "far too simplistic". He was concerned that a different decision resulting from "a mere change of view or opinion" could "*appear* unsound" (my emphasis) unless "supported by an adequate chain of logic". The Council criticised the Inspector's reference to an "adequate chain of logic" as excluding a simple change of mind (Council's skeleton paragraph 71). But the Council went on to state that a change of mind would suffice "*provided that* he gives reasons for doing so" (emphasis added). Given that this was a case in which the consistency principle was plainly engaged, in my judgment it is obvious that the Inspector was seeking to guard against the risk of a change of mind appearing to be arbitrary unless sufficiently explained so as to justify a different conclusion. The word "logic" simply referred to "reasoning". Properly read, there is no significant difference between IR 13.15 and the position of the Council in paragraph 71 of its skeleton. The Inspector's approach in IR 13.15 accorded with

Dunster. Certainly the paragraphs cannot be taken to have laid down a *legal* test or standard for departing from conclusions in the previous decision.

44. In oral argument the criticism of Inspector Mead's report ultimately centred on IR 13.16 which reads:-

> "13.16 Therefore, following the findings in the *Kings Cross Railway Lands Group* case, whereas for reasons of consistency I accept that identical cases should be decided alike, I consider that neither I nor the Secretary of State are bound to follow either the conclusions of the previous Inspector or the decision provided that there are very good planning reasons, which are clearly explained, why such disagreement has occurred."

45. The Council criticised the words "bound to follow". But I do not accept that when read properly in context those words indicate that the Inspector misdirected himself by imposing a legal test (or a fetter) or created any uncertainty so as to render his reasoning inadequate (in the sense explained by the House of Lords in South Buckinghamshire DC v Porter (No. 2) [2004] 1 WLR 1953). The phrase used by the Inspector should not be read as meaning "legally bound to follow". Instead, in my judgment it refers to the weight being attached to the conclusions in the 2008 Inspector's report and the 2008 decision letter following a very thorough examination and testing of the SRFI proposal. The Inspector decided that he should "follow the findings" in the King's Cross case. It would have been plain to the Inspector that Sullivan J did not use the words "a very good planning reason" in order to lay down a legal test. The "findings" in that case refer to the "practical realities" facing a local planning authority which had considered the same application in considerable depth a few months beforehand. Here, Inspector Mead was simply setting out his judgment as to the implications of the consistency principle for this case, in circumstances where it was plain that the Helioslough proposal had already been considered thoroughly at a lengthy public inquiry and in a detailed report.

46. For the same reasons I consider that IR 13.19 should be understood in the same way as 13.16 and indeed the preceding paragraphs of the report. IR 13.19 reads as follows:-

> "13.19 Therefore, in my opinion, the Secretary of State may consider that, if there is a very good planning reason, he is able to differ from the conclusions or decision of his predecessor."

The same conclusion also applied to DL 22.

47. Nevertheless, the Council submitted that there were three examples which showed that the Inspector, and likewise the Secretary of State, had in fact applied "the very good planning reason" phrase as a legal test and thus improperly fettered their discretion. It was also submitted that these examples showed that they had failed to make their own assessment of the merits of the proposal. I should record that Mr. Reed very fairly accepted that the examples he gave were the best that the Council could put forward to support ground 1. It should also be noted that these examples related to individual components of the overall balancing exercise which the decision-maker had to undertake. It was not suggested, nor could it have been, that in the

second appeal either the Inspector or the Secretary of State failed to carry out that exercise for themselves (see IR 13.118 to 13.119 and DL 52 to 53).

48. The first example concerned the issue of whether the proposal would result in the merging of certain settlements. This had been considered in some detail in IR 16.10 and 16.11 of Inspector Phillipson's report and in DL 21 and 22 of the first decision letter. In these passages the concerns about merger had been rejected. The same subject was dealt with by Inspector Mead at IR 13.36 to 13.38 of his report. The Council submitted that these paragraphs showed that the process of reasoning in the determination of the second application was tainted by the adoption of the "very good planning reason" legal test. I disagree.

49. IR 13.36 begins by referring back to the conclusions in the first decision letter. Inspector Mead then identified the Council's reasons for taking a different view. In IR 13.37 Inspector Mead summarised conclusions reached previously by his colleagues, but in IR 13.38 to 13.39 plainly set out his own independent assessment. In the 2014 decision letter the Secretary of State agreed with that evaluation (DL 24). The merger concern was rejected in the decision letter determining the second appeal by a process of independent reasoning and certainly not by simply asking the question whether there was a very good reason to differ from the conclusions in the 2008 report and decision letter.

50. The Council also relied upon the Inspector's report on Helioslough's application for an award of costs against the Council. The report was produced on 19 May 2010. The Secretary of State's decision letter, in which he adopted the Inspector's conclusions, was dated 7 July 2010. At paragraph 200 of his report, Inspector Mead referred back to his main report in which he had agreed with the Council that "a very good planning reason" could constitute a sound basis on which to depart from conclusions of Inspector Phillipson or of the 2008 decision letter. The Inspector then stated that where the Council had put forward very good planning reasons for not supporting a previous conclusion, it could not be said that the Council had acted "unreasonably" so to justify an award of costs.

51. Here too it is plain that the Inspector was making a judgment as to the weight to be attached to the earlier decision. He was not referring to a legal test. First, he rejected Helioslough's contention that the Council's case in respect of Green Belt issues should have been confined to a consideration of the developer's new alternative site analysis. He agreed with the Council (IR 201) that it had relied upon a reason for refusal of permission which "involved a judgment on where the balance would lie in terms of harm in order to assess whether very special circumstances existed" and that the Council had adduced substantial evidence on that matter as well as alternative sites. But the Inspector concluded that the Council had nonetheless acted unreasonably because the evidence on harm to the Green Belt, including the merger of settlements issue, involved repetition of arguments thoroughly aired at the previous inquiry, nothing new of substance had been added and no "very good planning reasons" advanced "to *suggest*" that the Secretary of State should come to a different conclusion (IR 202). He added that it was difficult to avoid the conclusion that it had been unnecessary for the Council to revisit those subjects, absent any material change in circumstances, "in the light of the evidently thorough inspection of the site and surroundings by the first Inspector". It is therefore plain that Inspector Mead's conclusions on costs rested on his assessment of the considerable weight to be

attached to the first decision and the robustness of the Council's case for coming to a different view. None of his reasoning suggests that Inspector Mead applied a legal test rather than his judgment.

52. In any event, the costs decision letter issued in 2010 was never the subject of a legal challenge by the Council and cannot alter the fact that in his substantive report the Inspector demonstrated that his conclusions were based upon his own independent assessment (IR 13.38 and 13.39).

53. I should record that Mr. Reed regarded the merger example as the strongest of the three examples put forward by the Council. The second example concerned landscape and visual impact. In IR 2008 Inspector Phillipson had concluded that the overall effect of the proposal (including the country park areas) would be "moderately adverse", the effect of the development proposed to be located in Area 1 would be "significantly adverse" and plainly the planting proposed in Areas 3 to 8 would not offset the harm in area 1 (IR 16.22). In the 2008 decision letter (DL 22) the Secretary of State agreed with that assessment.

54. In 2010 Inspector Mead dealt with landscape and visual impact at IR 13.41 to 13.44. At the second inquiry the Council largely agreed with the conclusions reached in the 2008 report on this aspect (Inspector Mead IR 8.24, 13.41 and 13.42), but raised two additional impacts (effects of embankments and cuttings of the proposed railway line and impact on views from Shenley Ridge). The Council itself described those impacts as "moderate adverse" and unsurprisingly the Inspector, having agreed with that assessment, concluded that "this does not increase the severity of the impact as was concluded previously by the Secretary of State". The Inspector explicitly agreed (IR 13.42) with the Council's assessment of the railway cuttings and embankments and stated "this would not be inconsistent with the overall conclusions of the Secretary of State on the first appeal".

55. It is plain that here too the Inspector made his own independent assessment of the impacts of the scheme (IR 13.43 and 13.44). Having concluded that the overall effects would be "moderately adverse", he then said:-

> "Therefore, I do not dissent from the previous conclusions of the Secretary of State. Neither it appears from submissions, does the Council, albeit it claims that the effects would be unacceptable."

The Inspector stated that the acceptability or otherwise of the impacts was a matter for the final planning balance. He returned to the subject at IR 13.107 and plainly said that he agreed with the conclusions in the 2008 decision letter "based on the evidence I heard at this inquiry".

56. The Council did not suggest that the Inspector misrepresented its case at the second inquiry. In these circumstances it is impossible to see how the second example could support ground 1. Equally it comes as no surprise to learn that the Council was ordered to pay Helioslough's costs in respect of the visual impact topic (IR 204 and 205 of the Costs Report). The Inspector indicated that the Council had not really attempted "to persuade the Secretary of State to change a conclusion previously reached". In his reply, Mr. Reed said that the Council would not rely upon the

landscape and visual impact example, if the merger example failed to support ground 1, which in my view it does. But I would go further. The second example is untenable.

57. The third example concerned the issue of whether it had been appropriate for the developer to restrict the area of search for alternative sites to the North West sector of London and the M25. Inspector Mead concluded that it was appropriate for the reasons given in IR 13.84 to 13.88. Here again the complaint was that the second Inspector and the Secretary of State had improperly fettered their discretion by treating the 2008 decision as something which needed to be displaced by a very good planning reason. But Mr. Reed accepted that IR 13.84 to 13.88 themselves disclosed no error of law. In other words, this example depends upon the Court being prepared to accept (a) that IR 13.16 was erroneous as a matter of law and (b) that IR 13.84 to 13.88 had been tainted by IR 13.16. By definition therefore this so-called third example cannot provide any support for the error alleged to have been made in IR 13.16. In any event, the short answer is that IR 13.84 to 13.88 contain clear evidence of the Inspector reaching his own independent conclusions on the objections raised by the Council and others.

58. Moreover, there are a number of examples which show that the Inspector did not apply a legal test requiring a "very good planning reason":-

> "I have no reason to disagree" (IR 13.54)
>
> "there has been no convincing evidence submitted to this inquiry to cause me to come to a different conclusion in relation to areas 3 to 8" (IR 13.105)
>
> "there is no sound reason why I should depart from those views" (IR 13.106)
>
> "I have no reason to disagree with that conclusion (IR 13.110).

59. Having carefully reviewed Inspector Mead's report, the 2010 report and decision on costs and the 2014 decision letter, I am left in no doubt that the Inspector and the Secretary of State did not either misdirect themselves by imposing a legal test requiring a good or very good planning reason for disagreeing with the earlier decision to be shown or improperly fetter the scope of their discretion to reach independent judgments on the merits of the second application. The allegation is unfounded. Moreover, there is no basis for suggesting that the reasoning of the Secretary of State (or the Inspector) was inadequate in relation to this issue. The consequence of these conclusions is that ground 1 must be rejected.

The Council's approach between 2010 and 2014 to the 2010 Inspector's report

60. I would add that if there was any real reason to think that the Secretary of State (or Inspector Mead) had committed the error alleged, then it is most surprising that the point was not raised before the present challenge to the decision letter of 14 July 2014. The Council now argues that the alleged error also appeared in Inspector Mead's report on Helioslough's application for costs, which was published at the same time as the costs decision letter dated 7 July 2010. As Mr. Reed accepted, the

effect of that decision was to require the Council to pay Helioslough a substantial sum. It was open to the Council to challenge that decision by an application for judicial review. Indeed, it was clearly in the financial interests of the Council to do so if it thought that there had been a self-misdirection. The fact that no such challenge was brought indicates that neither the costs decision and report nor Inspector Mead's 2010 report on the public inquiry were then interpreted in the way which the Council now seeks to do.

61. Mr. Mead's report on the second inquiry was also published on 7 July 2010 along with the first decision letter on the second appeal. When Helioslough challenged that decision within the 6 week time limit under section 288 of the 1990 Act, it must have been clear to the Council that there was a risk of the decision being quashed and the second appeal having to be re-determined (as indeed subsequently turned out to be the case). As mentioned during argument, if the Council had read Inspector Mead's report and the 2010 decision letter as proceeding on an improper legal basis, it was then open to the Council to bring proceedings for judicial review so as to prevent any redetermination being flawed by the same error (see e.g. R v Secretary of State ex parte GLC [1985] J.P.L 868; R (Redditch BC) v First Secretary of State [2003] 2 P & CR 25). But even if I am wrong about that, once the 2010 decision was quashed by the High Court and the second appeal had to be redetermined, it is very surprising that the alleged error of law was not raised at that stage if Inspector Mead's report and the 2010 decision letter are to be read in the way now being suggested. Given the extent of the argument at the second inquiry on the approach to be taken to the 2008 decision, the misdirection now alleged by the Council should have been self-evident if that is the proper way in which to read the 2010 report (and the decision letter).

62. The same comment applies to subsequent stages of the redetermination process. On 14 December 2012 the Secretary of State announced that he would not re-open the inquiry into Helioslough's appeal or require it to be conjoined with the appeal into an interchange proposed at Colnbrook. On 20 December 2012 the Secretary of State issued a letter stating that he was minded to allow Helioslough's second appeal on the basis that he agreed with Inspector Mead's conclusions (see in particular his agreement with IR 13.8 to IR 13.19 in paragraph 19 of the letter). On 19 February 2014 and 1 April 2014 the Secretary of State invited comments and then "final comments" on the section 106 obligation submitted by Helioslough. At that stage it must have been obvious that the final decision letter was likely to be issued shortly.

63. At paragraphs 21 and 22 of its representations dated 12 October 2011 Helioslough had relied upon the approach taken by Inspector Mead. Paragraphs 10 and 11 of the Council's response dated 10 November 2011 did not raise any error of law. Similarly Strife, although represented throughout by Solicitors, did not raise the point (see letters of 14 October and 10 November 2011, 30 March 2012 and 4 March 2014).

64. At none of these key points in the redetermination of the second appeal did the Council raise the error now alleged under ground 1. The Council submitted that it acted in good faith throughout and "was not aware of any such error". Even on that basis, the implication is that throughout the period July 2010 to March 2014 the Council did not interpret Inspector Mead's response to the parties' submissions at the second inquiry as laying down some improper legal test as opposed to expressing his judgment on matters of weight.

65. For all these reasons I reject ground 1.

Ground 2

Points of agreement and disagreement

66. Whereas it was common ground that the Secretary of State's decision dated 1 October 2008, and the report of Inspector Phillipson preceding it, were "material considerations" which should be taken into account in the redetermination of Helioslough's second application, the parties were divided on whether the Secretary of State's decision dated 7 July 2014 on Veolia's appeal on the New Barnfield site was a material consideration at all.

67. The parties were also divided as to the legal basis upon which that issue should be decided. In summary, the Council and Strife submitted that the test in this case should be whether the Veolia decision was "sufficiently closely related" to the issues in Helioslough's appeal (R v Secretary of State for the Environment ex parte Baber [1996] J.P.L. 1034, 1040), or whether it would have "tipped the balance" to some extent in the appeal, one way or another (R (Kides) v South Cambridgeshire D.C. [2003] 1 P. & C.R. 19, para 121). They submitted that that Kides test is substantially the same as the test stated in Bolton MBC v Secretary of State [1991] 61 P. & C.R. 343, 352), namely there is a real possibility that the factor might have resulted in a different decision if it had been taken into account.

68. The Secretary of State and Helioslough submitted that the correct test is given in Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2010] J.P.L. 341 at paras 23 to 28, namely that it is necessary to show that the matter was one which the statute expressly or impliedly (because "obviously material") required to be taken into account "as a matter of legal obligation." It is insufficient that the consideration of a factor "might realistically" have led to a different result. The Secretary of State went further by submitting that the decision of the Court of Appeal in North Wiltshire District Council v Secretary of State (1993) 65 P. & C.R. 137, and by the same token the Baber case, did not lay down any principles for determining the materiality of other planning decisions, but were merely concerned with the adequacy of the reasoning given by the decision-makers in those cases.

69. It is common ground that in his 2014 decision on Helioslough's appeal the Secretary of State did not take into account the Veolia decision (see paragraph 12 of Christine Symes' witness statement) and thus did not make any assessment of whether that decision was "material". It is also agreed that in these circumstances it is the Court's task to determine that issue. Mr. Whale went on to accept that if the Court should decide that the Veolia decision was "obviously material", the Secretary of State's failure to do so would render the Helioslough decision liable to be quashed, without the Court needing to determine whether in addition the Secretary of State had acted unfairly by failing to give the Council and others an opportunity to make representations on any implications of the Veolia decision before determining Helioslough's appeal.

70. For his part, Mr. Reed accepted that the Council's contention that the Secretary of State had acted unfairly in that respect depended critically upon the Court reaching

the conclusion that the Veolia decision was material in this case. Thus, if the Court should decide that the Secretary of State had not been obliged to take the Veolia decision into account in the present case, he accepted that the allegation of procedural unfairness would fall away. He also accepted that the burden lies with the Council, as the Claimant, to persuade the Court that the Veolia decision was material. Mr. Stinchcombe Q.C. did not dissent from these concessions.

The obligation to take into account material considerations

71. The starting point is section 70(2) of TCPA 1990 which requires the decision-maker to take into account not only the development plan (and in England any relevant "local finance considerations" as defined in subsection (4)) but also "any other material considerations".

72. In section 70(2) "material" means "relevant". It is for the courts to determine whether or not a consideration is relevant. But it is for the decision-maker to attribute to a relevant consideration such weight as he thinks fit and the courts will not interfere unless his judgment is irrational (Tesco Stores Ltd v Secretary of State [1995] 1 WLR 759, 764).

73. The general principle is that any consideration which relates to the use and development of land is capable of being a planning consideration, but "whether a particular consideration falling within that broad class is material in any given case will depend on the circumstances" (Stringer v Ministry of Housing and Local Government [1970] 1 WLR 1281, 1294). Plainly, the considerations taken into account in the Veolia decision were relevant planning matters in that decision, but the issue here is the relevance of those matters to the determination of the Heliosiough appeal.

74. In the Derbyshire Dales case the High Court had to address the relevance of alternative sites for the location of a proposed development to the determination of a planning application for that proposal. In summary, Carnwath LJ (as he then was) referred to case law establishing the following propositions:-

(i) There is an important distinction between (1) cases where a possible alternative site is *potentially* relevant so that a decision-maker does not err in law if he has regard to it and (2) cases where an alternative is *necessarily* relevant so that he errs in law by failing to have regard to it (paragraph 17);

(ii) Following CREEDNZ [1981] 1 NZLR 172, 182; Re Findlay [1985] AC 318, 333-4; and R (National Association of Health Stores v Secretary of State for Health) [2005] EWCA Civ 154, in the second category of cases the issue depends upon *statutory construction* or upon whether it can be shown that the decision-maker acted *irrationally* by failing to take alternative sites into account. As to statutory construction, it is necessary to show that planning legislation either *expressly* requires alternative sites to be taken into account, or *impliedly* does so because that is "so obviously material" to a decision on a particular project that a failure to consider alternative sites directly *would not accord with the intention of the legislation* (paragraphs 25-28 and Lord Scarman in Re Findlay at [1985] AC 384);

(iii) Planning legislation does not *expressly* require alternative sites to be taken into account (paragraph 36), but a legal obligation to consider alternatives may arise from the requirements of national or local policy (paragraph 37).

(iv) Otherwise the matter is one for the planning judgment of the decision-maker on the facts of the case (paragraphs 28 and 36). In assessing whether it was irrational for the decision-maker not to have regard to alternative sites, a relevant factor is whether alternatives have been identified and were before the decision-maker (paragraphs 21, 22 and 35) That factor was treated as having "crucial" importance in the circumstances of Secretary of State v Edwards (1995) 68 P. &C.R. 60, in contrast to Derbyshire Dales where no alternatives had been identified and it was simply the *possibility* of there being alternatives which was said to be material (paragraph 22).

As Carnwath LJ noted, a similar analysis is to be found in Wade: Administrative Law (11th Edition) at pp. 324-325.

75. In point (ii) above the implied statutory obligation to take into account an "obviously material" factor reflects the basic principle in Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 that a statutory power or discretion is required to be exercised so as to promote the policy or objectives of the legislation (see also R v Tower Hamlets LBC ex parte Chetnik Ltd [1988] AC 859, 888 and R (Cala Homes (South) Limited) v Secretary of State for Communities and Local Government [2011] JPL 1458, para. 15).

76. In Derbyshire Dales Carnwath LJ pointed out (paragraph 24) that the decision in Bolton MBC had been concerned primarily with the rejection of the appellant's argument in that case that a failure to have regard to a non-mandatory consideration could *only* invalidate a decision if the failure to do so could be treated as *irrational* (see (1991) 61 P. & C.R. at pp 349-351). As Carnwath LJ also stated (paragraph 28), a decision may also be invalidated if the decision-maker ignores a consideration which the operative legislation required him to take into account either expressly or, because it was "obviously material", impliedly.

77. Having rejected the appellant's submission in Bolton, the Court of Appeal went on to hold that the "relative importance" of a material consideration is "a very major aspect" of the question whether the decision-maker was obliged to take it into account (page 352). The Court of Appeal expressly endorsed the distinction drawn in the CREEDNZ case between matters which legislation requires a decision-maker to take into account and other matters where the "obligation to take into account is to be implied from the nature of the decision and of the matter in question" (pages 352 – 3). It is for the Court to decide whether there was a legal requirement to take into account matters in that second category. Thus far, the approach taken by the Court of Appeal in Bolton is not significantly different from the analysis of Carnwath LJ in Derbyshire Dales.

78. The apparent difference is said to be that in Bolton the Court of Appeal went on to lay down a relatively low threshold for determining whether a consideration was something that, by implication, the decision-maker was required to take into account, i.e. whether in the opinion of the Court it might realistically have led to a different result, as compared with whether the consideration was "obviously material".

79. In fact Glidewell LJ stated (p. 353) that a Court should decide that a decision-maker errs in failing to take account a potentially relevant consideration where either:-

(i) the matter was *fundamental to the decision*; or

(ii) "it is *clear* that there is a real possibility that the consideration of the matter would have made a difference to the decision" (emphasis added).

He continued:-

> "...if the judge is *uncertain* whether the matter could have had this effect or was of such importance in the decision-making process, then he does not have before him the material necessary for him to conclude that the decision was invalid" (emphasis added)."

80. The words I have emphasised above in the judgement of Glidewell LJ indicate that any difference between the tests given in the Bolton case and in Findlay for assessing the *importance* of a consideration is not substantial. In any event, a test given in an authority for determining whether a consideration was sufficiently important that there was an *implicit* legal obligation to take it into account, should not be divorced from the context in which the case was decided.

81. For example, the Bolton case was concerned with whether the decision-maker was obliged to take into account a landowner's late objection to a compulsory purchase order, which had been made necessary because of a change in Government policy undermining the landowner's earlier agreement with the acquiring authority and the withdrawal of its initial objection. The context in which the Court of Appeal formulated its "test" of materiality was a statutory code intended to provide a procedure for examining the justification for a proposed expropriation of private land and objections thereto.

82. By contrast, when dealing with the relevance of alternatives to an applicant's proposal, the principle is that there is no *general* requirement for alternative sites or schemes to be considered (see e.g. R (Jones) v North Warwickshire B.C. [2001] P.L.C.R. 31). The object is to see whether or not a proposal is acceptable on its own merits. In that context, therefore, much of the case law focuses on why it should be relevant to require the consideration of alternatives. This may be because of a legal or policy requirement or because of the particular, if not special, circumstances of the case.

83. Similarly, the passage relied upon by the Council and by Strife in paragraph 121 of Kides on the materiality of a consideration was expressly stated by Parker LJ to apply "in this context". That case was essentially concerned with a procedural issue, namely the circumstances in which a local planning authority, having resolved to grant planning permission but delegated the actual grant of permission to an officer, might itself have to reconsider the matter if subsequently a material change of circumstance (such as a change of policy) should occur before the permission is actually granted.

84. In particular, because the obligation in section 70(2) to take into account "other material considerations" *is imposed on the planning authority itself*, and not upon an officer (paragraph 125), unless acting within the scope of an authority delegated to him, the Court explained the circumstances in which an officer, "erring on the side of caution", could proceed to issue a grant of permission without needing to refer the matter back to the authority. He should be satisfied that (a) the authority is aware of the new factor; (b) that it has considered it with the application in mind; and (c) that on a reconsideration the authority *would* reach (not *might* reach) the same decision (paragraph 126). I would understand (c) to arise where (a) and (b) do not. It was only in that context therefore, that the Court of Appeal held in paragraph 121 that a consideration is "material" if it is a factor which, when taken into account by the decision-maker, would tip the balance to some extent, one way or another. Parker LJ went on to say: "In other words, it must be a factor which has some weight in the decision-making process, although plainly it may not be determinative".

85. But the Court of Appeal was only concerned with the circumstances in which the merits of an application already considered by a planning authority might have to be revisited by the authority itself, as the body charged with the obligation under section 70(2) to take into account material considerations, because of a new factor which that authority had not already taken into account. That new factor might not be something which the authority is legally *obliged* to take into account; it might only be a factor which the authority would be legally *entitled* to take into account (paragraph 74(1) above). Where the new matter falls into the second category, then unless it is referred back by the planning officer, the authority will be unable to choose whether to take it into account. The discretion to decide whether to take into account a "non-obligatory" consideration is vested in the authority, unless properly delegated to an officer. That explains the Court of Appeal's cautious approach and the threshold it set for requiring an officer to refer an application back to the decision-maker.

86. The reliance by the Claimant and Strife upon Kides is misconceived. That decision has nothing to do with the basis upon which it should be determined whether a consideration was one which the authority was obliged to take into account, as opposed to one which it was entitled to take into account. It is plain that the decision in Kides was not intended to detract from basic principles on "materiality" laid down in cases such as Findlay and CREEDNZ. Nor could it be suggested that Kides altered the principles laid down in the case law on whether a decision-maker is obliged to take into account alternative sites, or for that matter previous planning decisions.

87. Accordingly, when determining whether a consideration is material, tests such as "obviously material" (Findlay) or "whether the matter was fundamental to the decision or it is clear that there was a real possibility of it making a difference to the decision" (Bolton) cannot be considered in the abstract. Regard must be had to the context. In the present case we are dealing with the basis for determining whether there was an obligation to take into account a previous planning decision.

The law on whether a previous planning decision must be taken into account

88. I turn to the Secretary of State's submission that the sole test for determining whether a decision-maker is obliged to take into account a previous planning decision is whether the earlier decision is "obviously material" and that North Wiltshire and Baber do not add any more specific tests.

89. North Wiltshire was concerned with a planning appeal in which an Inspector had granted planning permission for a dwelling on the basis that the site lay within the physical limits of the village. He did not deal with an earlier appeal decision to which he had been referred, in which a similar proposal had been refused on the grounds that the same site lay outside the physical limits of the village. The Court of Appeal pointed out that the second Inspector's decision had necessarily required a determination as to whether the site lay within the physical limits of the village and that had also been a critical aspect of the first decision. The second Inspector gave no indication that he had taken the earlier decision into account; if he had, he must be taken to have disagreed with it and yet had given no reasons for doing so (p. 146).

90. The general principles were laid down in the judgment of Mann LJ p. 145:-

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases must be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is a disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate."

91. The North Wiltshire case established the importance in development management of consistency between indistinguishable planning decisions. However, the circumstances in which a previous decision may be relevant cover a broad spectrum

92. In some instances the earlier decision may relate to the same development proposal on the same site (as here the Secretary of State's decision of 1 October 2008 on the first Helioslough application) or the same type of development on the same site (as in North Wiltshire; Dunster Properties Limited v First Secretary of State [2007] 2 P & CR 26; and R (Mid-Counties Co-Operative Limited) v Forest of Dean D.C. [2013] J.P.L. 1551). In some cases a previous decision may relate to a similar type of development in the same terrace or road, where similar planning issues or policies apply (e.g. Butterworth v Secretary of State for Communities and Local Government [2015] EWHC 108 (Admin)). In other situations a previous decision may relate to a completely different proposal on a different site but the *interpretation* of a planning policy is relevant to a subsequent determination (e.g. the "spatial objectives" for Sandbach considered in R (Fox Strategic Land and Property Ltd) v Secretary of State [2013] 1 P. & C.R. 6. Alternatively, a previous decision may be material because of the way in which a particular policy relevant to a later decision was *applied* in circumstances of sufficient similarity to the case under consideration.

93. The rationale which links these examples is the importance of consistency for decision-making in "like cases". But this is not an absolute principle. A subsequent decision-maker may disagree with an earlier decision which is material and drawn to his attention, provided that he gives reasons for so doing and has regard to the importance of consistency.

94. "Likeness" or similarity will depend upon the circumstances. Where an earlier decision interpreted a policy relevant to a subsequent decision, the issue in point is objective in nature (see e.g. Tesco Stores Ltd v Dundee City Council [2012] PTSR 983). In other cases "likeness", or whether an earlier decision is "distinguishable in some relevant respect" (Mann LJ in North Wiltshire at page 115), may depend not only upon identifying matters in an earlier decision of potential relevance, but also the exercise of judgment (whether by the decision-maker or by a reviewing Court) on the nature or degree of similarity. For these reasons I do not accept that the sole test suggested by the Secretary of State, namely whether a consideration is "obviously material", enables the Court, without more, to determine in all cases whether there was an implicit obligation to take into account an earlier planning decision.

95. In North Wiltshire Mann LJ suggested a practical test, namely if a subsequent case is decided in a particular way does that *necessarily* involve agreeing or disagreeing with some critical aspect of an earlier decision. That was said to be a *sufficient* test in the North Wiltshire case because there the Court held (p. 146) that *of necessity* the second decision-maker must have been disagreeing with a critical aspect of the first decision. Of course, in that case the two decisions related to the same type of development on the same site.

96. However, the test suggested in North Wiltshire will not necessarily be sufficient for all cases. That is confirmed by the decision of the Court of Appeal in Baber ([1996] J.P.L 1034). Residents of a hamlet successfully challenged the grant on appeal of a planning permission for an equestrian centre in the Green Belt accessed by a very narrow track. The Court of Appeal held that the Inspector, in deciding that the effect

upon residential amenity of the use of the track was acceptable, ought to have considered an earlier appeal decision in which another Inspector had rejected a proposal for a race horse training establishment on a different site on the grounds of the adverse effect on residential amenity from traffic using a different lane but with similar characteristics nearby.

97. Glidewell LJ held (p. 1040) that the appropriate test was whether the earlier decision drawn to the second Inspector's attention was "sufficiently closely related" to the issues in the subsequent appeal that he should have had regard to it. Applying that test, Glidewell LJ concluded that although the two proposed developments were not identical, the lanes affected were of about the same width and adjacent to properties in the same hamlet, and the issues raised were so similar that the earlier decision ought to have been taken into account and dealt with in the second decision.

98. Similarly, Morritt LJ held that the practical test suggested in North Wiltshire, namely whether the second Inspector necessarily disagreed with some critical aspect of the first decision, was too high for the circumstances in Baber. Instead, a "sufficient" test for Baber was whether the earlier decision was "sufficiently related" to the decision needing to be made in the second appeal (p. 1041).

99. It is plain from the above analysis that the Secretary of State's submission that North Wiltshire and Baber were simply concerned with adequacy of reasoning is untenable.

100. Here, the decision on the Veolia appeal which the Council contends ought to have been taken into account, was for a different type of development (waste management) on a different site and in another part of the Green Belt, albeit only 4 miles or so from the Helioslough site. Mr. Reed accepted that his client would have wanted to rely upon the decision, not because of any interpretation of policy relevant to the Helioslough decision, but because of the way in which Green Belt policy was *applied* to the circumstances of that case. The argument depends upon similarities between the two cases as claimed by the Council, but plainly they must be assessed together with any relevant dissimilarities.

101. In view of the nature of the Council's argument, I consider that the "obviously material" test should be applied in this case by following the approach taken in Baber, namely whether those aspects of the Veolia decision relied upon by the Council were sufficiently closely related to Helioslough's appeal proposal as to oblige the Secretary of State to deal with them in his decision on the latter. However, for the reasons set out below I do not think that the test in Bolton would produce a different outcome.

The findings in the Veolia decision

102. In the Veolia decision the Secretary of State refused an application for planning permission for a Recycling and Energy Recovery Facility ("RERF") at New Barnfield, Hatfield, Hertfordshire. In their conclusions on the RERF, both the Inspector and the Secretary of State identified the harm arising from the proposal and then went on to consider the very special circumstances said clearly to outweigh that harm. They concluded that the objections to the proposal were just as strong as the points telling in its favour and so in the final balancing exercise they decided that the applicant had not demonstrated very special circumstances which clearly outweighed harm.

103. In Veolia's application the Inspector found that there was a strong case for the development on waste management grounds (IR 1076). For example, it would have enabled all of the local authority collected waste in Hertfordshire, and other waste, to be diverted from landfill sites, and avoided the transportation of that waste outside the County. There were no satisfactory alternatives for dealing with the amount of waste which the RERF would handle. Smaller schemes on a range of sites were judged to be unsatisfactory because of considerable delay (in the order of 10 years) in achieving delivery, the export of waste to landfill sites outside the County would have to continue in the meantime, and there were doubts as to whether such alternatives would be visually less intrusive.

104. The Veolia Inspector found (inter alia) that the proposed RERF would cause serious harm to the openness of the Green Belt, serious harm to the character and appearance of the area, harm to the amenity of users of public footpaths, and significant harm to heritage assets, including the ensemble at Hatfield House and Hatfield Park (IR 1059 to 1061, 1062 and 1074). The effects of the proposal on the Green Belt were dealt with at IR 727 to 742. The Inspector found that the volume of the RERF would be about 20 times the volume of the existing development on the site, which mainly comprised single storey buildings (IR 728). Accordingly, the RERF fell to be treated as "inappropriate development" requiring to be justified by very special circumstances (IR 733). He also found that the site occupied a prominent location (IR 729) and that the proposed development would contribute significantly to the sprawl of a large built up area and the encroachment of development into the countryside (IR 730).

105. In his decision letter of 7 July 2014 on Veolia's application the Secretary of State agreed with the Inspector's conclusion on harm and how the planning balance should be struck (see e.g. paragraphs 19 to 25 and 50 to 55).

The findings in the Helioslough decision

106. In the Helioslough decision letter issued on 14 July 2014, the Secretary of State agreed (DL 24) with Inspector Mead's assessment of harm to the Green Belt (IR 13.35 to 13.40). The SRFI would have a substantial impact on the openness of the Green Belt which could not be mitigated, there would be a significant encroachment into the open countryside, contribution to urban sprawl and some harm to the setting of St. Albans. On the other hand, the proposal would not lead to the merging of neighbouring towns. It was also found that the overall effect on the landscape would be moderately adverse (DL 25 and IR 13.41 to 13.44) and there would be harm to ecological interests (DL 25 and IR 13.46).

107. On the benefits of the proposal, the Inspector and the Secretary of State decided that national and regional policies supported the need to provide SRFIs to serve London and the South East as part of a national network (IR 13.29 to 13.34 and DL 31). The existence of that need was not disputed and "very considerable weight" was attached to it (IR 13.111 and DL 44). The broad sector North West of London was the appropriate area within which to search for sites (IR 13.112 and DL 45). There were no more appropriate locations for the SRFI which would cause less harm to the Green Belt (IR 13.114 and DL 45 and 53). In addition, the proposal would provide for a country park and a bypass as well as improvements to footpaths (IR 13.119 and DL 44 and 53). It was concluded that these matters clearly outweighed the harm identified (DL 53).

The Claimant's submissions

108. In paragraph 5 of his first witness statement Richard Tilley, a planning consultant acting for Helioslough, pointed out that the Council had not explained what it would have said going beyond its earlier representations if it had been in a position to rely upon the Veolia decision. In paragraph 6 he denied that the Veolia decision had any implications for the acceptability of the SRFI. The Veolia decision simply demonstrated what was considered to be unacceptable on the specific facts of that case.

109. In his first witness statement Richard Hargreaves, the Council's planning witness at the public inquiry into the SRFI proposal, responded to Mr. Tilley. In paragraph 3 he relied upon the following similarities between the schemes:-

(i) both involved major public infrastructure schemes the need for which was accepted;

(ii) both were located entirely within the Green Belt, indeed "the same Green Belt area", and were located only 4 miles apart;

(iii) both involved substantial encroachment into the countryside and substantial impacts on the openness of the Green Belt and significant harm to the Green Belt;

110. Mr. Reed did not suggest that these similarities were sufficient to bring the consistency principle into play in the decision of the SRFI proposal. In my judgment he was plainly right not to do so. Mr. Hargreaves's points are too generalised, or involve too high a level of abstraction, to give rise to any obligation on the part of the Secretary of State to take into account and compare his decision on Veolia's RERF with his assessment of Helioslough's SRFI. Even if it were to be accepted for the sake of argument that the two sites lie in the same "Green Belt area" (whatever precisely that may mean), the mere fact that both proposals involved, for example, substantial impacts on the openness of the Green Belt would not have been sufficient here to oblige the Secretary of State to take into account the Veolia decision in Helioslough's appeal. First, "substantial impacts" may not involve similarity as to type or degree of impact. Second, even if it were to be assumed that there was a sufficient similarity in respect of harm, the Veolia application was not rejected simply because of that harm, but because in the final balancing exercise the very special circumstances identified were judged to be insufficient to "clearly outweigh" that harm. In other words, that harm did not constitute a freestanding reason for refusal but formed part of the overall balancing exercise which involved weighing specific findings on harm against the specific need arguments in Veolia's case.

111. Consequently, Mr. Reed's submissions on why the consistency principle was engaged in this case, relied upon paragraph 4 of Mr. Hargreaves' first witness statement in which he set out seven more specific matters which the Council say they would have wished to advance. It is these matters which Mr. Reed argues involved sufficient similarity between the two proposals, or a sufficiently close relationship, as to oblige the Secretary of State to have regard to the Veolia decision from the point of view of consistency. In summary, those seven matters were:-

(i) The scale of SRFI and the area it occupies is substantially larger than the RERF. The area of the SRFI is about 12 times greater than that of the RERF and has a commensurately greater impact on openness. If the smaller scheme had a sufficient impact on openness to warrant a refusal, then the larger scheme should also have been refused "in terms of this *one criteria*" (emphasis added). It is also suggested that this one factor could by *itself* have made a difference to the outcome of the Helioslough appeal;

(ii) The same point is made in relation to the overall volume of the SRFI. The volume of the RERF was said to be greater than the volume of the existing development on the New Barnfield site. The SRFI would be located on a site with very little existing development and would have a volume of 6,269,920 cu. m. compared to the 585,000 cu. m. of the RERF;

(iii) Likewise both proposals involved significant encroachment into the countryside and contributed to urban sprawl, but it is said that the sprawl of the RERF is substantially less than that of the SRFI because of the differences in the scale of the two developments and so the same consequences follow as in (i) and (ii) above;

(iv) In the Veolia case it was found that the RERF would occupy a prominent location (IR 729) and that there would be serious harm to the character and appearance of the landscape of the area (IR 777 and IR 1060). The SRFI is similarly located (i.e. gentle ridge and local area of high ground) and if the same approach had been taken in the SRFI decision as in the RERF decision, the Secretary of State would have decided that the impact across the whole site was greater than "moderate adverse";

(v) In the Veolia decision it was said that the scale of the development would be detrimental to the visual perception of the remaining gap between Hatfield and Welham Green and that would be harmful to one of the purposes of the Green Belt, namely to prevent neighbouring settlements merging into one another (DL 21). In the Helioslough decision it was concluded that the proposal would not lead to the merging of neighbouring towns, namely St. Albans merging with Radlett or Park Street and Frogmore merging with Napsbury or London Colney (DL 24 and IR 13.36 to 13.36). However, Mr. Hargreaves says that the gap between settlements to the east and west of the SRFI would be reduced to only 25%, which would be a much greater reduction than in the Veolia proposal and therefore the conclusion in the RERF decision on merger should also have been reached on the SRFI decision;

(vi) In the Veolia application the Secretary of State concluded that although the on-site landscaping proposed, including ground modelling and planting, would partially soften the appearance of the RERF and provide some mitigation by year 15, "it could not be wholly effective in view of the scale and prominent siting of the structure" (DL 24 and IR 777). In the Helioslough decision, the Secretary of State agreed (DL 25) with the conclusions of Inspector Mead (IR 13.41 to 13.44), which were similar to those of Inspector Phillipson (IR 16.14 to 16.22) and the first decision letter (DL 24 to 27). In other words, the mitigation works proposed in areas 3 to 8 would do practically nothing to ameliorate the impact of the built development (located in areas 1 and 2). The

improvement in Areas 3 to 8 would not offset harm to the landscape caused by development on Area 1 and the overall impact on the entire site would be moderately adverse. Mr. Hargreaves asserts that the mitigation proposed for the SRFI would be much less effective than that proposed for the RERF and, given the larger scale and volume of the SRFI, "the Secretary of State could have reached a different view on this point had he considered the different approach adopted to the same sort of harm in the New Barnfield RERF decision";

(vii) In the Veolia case there was a "strong waste management case" and no better performing alternative sites and yet the proposal was refused permission, whereas in the SRFI case the need case was accepted as clearly outweighing the harm identified.

Discussion

112. In my judgment the Council's argument is flawed. On the material before the Court it is impossible to reach the conclusion that, as a matter of law, matters in the Veolia decision upon which the Council relies were sufficiently closely related to the issues in the Helioslough appeal, so that they were "obviously material" to the latter and the Secretary of State was under an obligation to take them into account. Alternatively, applying the test in Bolton, the Council has not shown that the matters in the Veolia decision upon which it relies were either fundamental to Helioslough's appeal or that it is clear that there is a real possibility that these matters would have made a difference to the Helioslough decision if they had been taken into account.

113. Points (i) to (iii) essentially involve the same line of argument, namely if the impact of the smaller Veolia scheme had been sufficient to warrant a refusal because of its effect on the openness of the Green Belt and its contribution to urban sprawl, the same approach should have resulted in the dismissal of Helioslough's appeal. But in my judgment the argument is misconceived because it ignores the basis upon which the Veolia application was refused by the Secretary of State. In that case the Secretary of State accepted that there was a strong need argument. So the application was not rejected simply because of harm to the Green Belt and other planning interests but because that harm was not outweighed, let alone clearly outweighed, by the need for the development and other benefits. According to the Secretary of State's reasoning in the Veolia decision upon which the Council seeks to rely, the disbenefits of the proposal should not be considered in isolation from its benefits. The two are intrinsically linked because of the requirement to carry out the balancing exercise. The same applies to the Helioslough decision, as can be seen, for example, in paragraph 13.44 of the report of Inspector Mead where he stated that the acceptability or otherwise of the landscape harm he had identified could not be judged until the final balancing of harm and other considerations was evaluated. The Council has not suggested that that approach involved any legal error. Plainly it does not.

114. As I have already mentioned, the Council does not rely upon the Veolia decision for the interpretation of policy, but rather for the way in which policy, in particular Green Belt policy, was applied. Mr. Hargreaves' witness statement asserts that the approach taken to that policy in the Helioslough decision differed from that taken in the Veolia decision. I do not accept that. Essentially the approach was the same. In each case, the need for the development proposed and the availability or otherwise of

alternatives, together with any benefits, were evaluated and then weighed against the extent to which that development would cause harm to the Green Belt and other harm. The differences between the two cases concerns the *weight* given to each of these various factors.

115. In my judgment the weighing of these factors in the overall balance in the Veolia decision was *case and site specific* and the same is true for the Helioslough decision. Take for example the questions of need and alternative sites. In Veolia the need related to the disposal of waste arising within the County and the avoidance of the use of landfill for the disposal of that waste. The proposal was supported to some extent by local planning policy, in particular policy at the County level. By contrast the SRFI was a proposal supported by national and regional policy for infrastructure forming part of the national rail and road network. Indeed, Mr. Hargreaves accepted that there was a national need for the SRFI (para. 4(7) of first witness statement). Thus, it was possible for the need in the Helioslough case, to which the Secretary of State gave "very considerable weight", to outweigh more readily the overall harm of the SRFI, to which he attached "substantial weight" (DL 41 and 44), even if be assumed *for the sake of argument* that the harm in the Helioslough case was greater than that in the Veolia case.

116. In paragraph 9 of his second witness statement Mr. Hargreaves contends that the need in the two cases is comparable by pointing out that the RERF at New Barnfield would, in diverting waste from landfill, contribute towards a national obligation in the EU Landfill Directive to meet targets for 2020. But Mr. Reed accepted that that contribution is limited to waste arising within one county, Hertfordshire. By contrast, the proposed SRFI would form part of a national transport network enabling goods to be distributed to or from the London and South East regions. The purposes and significance of the two developments are plainly different. There is no justification for assuming that the weight to be given to the need for each of the schemes is the same or even comparable.

117. The two developments also have different requirements as to the amount of land needed. The overall area of the New Barnfield site was 12.62 ha (para. 15 of the Inspector's Report). The site selection criteria for the SRFI included a minimum site area of 40 ha (Inspector Mead IR 13.89). Self-evidently, development of an SRFI on a larger scale on a larger site may well have a greater impact on the openness of the Green Belt, but that simply flows from the requirements or needs of the development if it is to go ahead. It follows ineluctably that (i) the harmful effects of the SRFI cannot be divorced from the requirements of that development, (ii) these issues are bound up with the need for the development, and (iii) it is pointless to make a comparison between the harmful effects of the RERF and of the SRFI in isolation from the requirements of, and need for, the development. The Council's argument does not address this. Once these additional factors are taken into account, it is obvious that the two proposed developments and their effects cannot meaningfully be compared in the way the Council seeks to do.

118. Indeed, Mr. Hargreaves "let the cat out of the bag" when he made it clear that the Council contends that point (i), scale of development, should be considered in isolation (see paragraph 4 of his first witness statement). The same goes for his points (ii) and (iii). For the reasons I have set out, that approach is untenable.

119. The same flaw applies to the Council's points (iv) to (vii). In addition, points (iv) and (vi), namely the effect of the prominence of the two sites on the landscape assessment and mitigation measures, have been contradicted by Mr. Tilley in paragraphs 3 and 4 of his second witness statement. I acknowledge that in paragraphs 3 to 7 of his second witness statement Mr. Hargreaves takes issue with Mr. Tilley, but it is not possible in proceedings for judicial review or statutory review to resolve issues of this kind. In such circumstances the general principle is that the Court will proceed on the basis of the factual and/or opinion evidence stated by those defending the decision under challenge (see e.g. R v Camden LBC ex parte Cran (1996) 94 LGR 8, 12).

120. Furthermore, the Council's contention in point (iv) is muddled. It is suggested that if the Veolia decision had been taken into account in the determination of Helioslough's appeal, the Secretary of State would have concluded that the landscape harm across the whole of the appeal site would be greater than "moderately adverse". But that ignores the fact that, as Mr. Reed accepted, it was the Council's case before the Secretary of State that the overall effect of the SRFI proposal would indeed be "moderately adverse" (see Inspector Mead's report – IR 8.25 to 8.28 and 13.41 to 13.42 and 13.44). Accordingly this point is entirely hollow.

121. There remains point (v), the issue of whether the development would lead to the merging of neighbouring towns. But from a plan shown to the Court during the hearing, it can be seen that in the two cases before him the Secretary of State was dealing with entirely different gaps between different settlements in different parts of the Green Belt. From the material before the Court, I am quite unable to say that either the characteristics of those gaps, or the effects of the respective developments on those gaps, would be in any way similar or comparable. Of even greater importance is the reasoning of Inspector Mead at IR 13.37 to 13.38, from which it is plain that he made his own assessment of the effect of the SRFI development and the new railway line on the gaps and the separation remaining between settlements. This type of assessment was site-specific in each instance and there was no legal obligation upon the Secretary of State to have in mind another site-specific assessment made in the Veolia decision as to the effect of the proposal in that case upon an entirely different gap. I distinguish Baber in which both of the appeal decisions concerned a single factor, namely the effect of traffic generated by developments with certain similarities upon the residential amenity of properties in the same small hamlet, and not as part of an exercise balancing need against harm.

122. For these reasons, I have reached the firm conclusion that the circumstances of the Veolia case were not sufficiently similar or related to the issues in the Helioslough case that the Secretary of State was obliged to take into account the Veolia decision when determining Helioslough's appeal. The two decisions are plainly distinguishable.

123. I note that in paragraph 9 of the Council's Statement of Facts and Grounds reliance was placed upon Veolia's challenge to an alleged failure by the Secretary of State in that case to take the Helioslough decision into account and an unexplained inconsistency of approach. However, as appears from paragraph 45 of my judgment at [2015] EWHC 91 (Admin), Veolia did not attempt at the hearing to demonstrate any relevant similarities and the ground fell away. So this point can add nothing to the merits of the Council's challenge here.

Fairness

124. The Council also complains that the Secretary of State acted unfairly by failing to give them an opportunity to make representations on the Veolia decision. Alternatively, the Council traced the process followed by the Secretary of State in the redetermination of Helioslough's second appeal following the quashing by the High Court [2011] EWHC 2054 (Admin) of the decision dated 7 July 2010. They submitted that they had gained a legitimate expectation of being consulted upon, and being able to make representations upon, any new matter which the Council considered to be material to the redetermination (see e.g. paragraph 3(c) of the Secretary of State's letter dated 15 September 2011). The Council submitted that the Veolia decision fell within the scope of that expectation.

125. The Council accepted that, in place of "the fair crack of the whip" approach in Fairmont Investment Ltd v Secretary of State [1976] 1WLR 1255, 1266 the relevant test is whether there has been procedural unfairness which materially prejudiced the claimant. (Hopkins v Secretary of State for Communities and Local Government [2014] PTSR 1145, paragraphs 49 and 62-3). That reflects the statement by Lord Denning MR. in George v Secretary of State (1979) 77 LGR 689, 695

> "there is no such thing as a technical breach of material justice....you should not find a breach of natural justice unless there has been substantial prejudice to the applicant as a result of the mistake or error which has been made."

126. For that reason, Mr. Reed was correct to accept that if the Veolia decision was not a material consideration in the determination of Helioslough's appeal, as I have decided, then the Council's challenge based on unfairness and legitimate expectation falls away. I agree and therefore will not address issues such as whether the Secretary of State was obliged to allow the Council (and others) an opportunity to make representations on the Veolia decision, or whether the Council had a sufficient opportunity between obtaining the Veolia decision by its own efforts and the issuing of the Helioslough decision on 14 July 2014 in which to ask for the determination of the latter to be deferred pending representations on any implications of the Veolia decision.

The effect in this case of the quashing of the Veolia decision

127. Likewise, I will not decide the argument raised by the Secretary of State and by Helioslough that the effect of the High Court's quashing order on 22 January 2015 in Veolia's challenge was to render the Veolia decision of no legal effect from the outset for any purpose and thus prevent the Council from pursuing Ground 2 (applying Boddington v British Transport Police [1999] 2 AC 143, 155C). If it had been necessary for me to decide the point, I doubt whether I would have accepted it on the argument I heard.

128. First, the Boddington principle is not absolute (see e.g. R (Shoesmith) v Ofsted [2011] PTSR 1459). Second, there is authority to the effect that when a planning decision by the Secretary of State or an Inspector is quashed, it does not follow that reliance cannot be placed upon any part of that decision at all. For example, it may be possible to have regard to parts of the decision which are not tainted or affected by the

legal grounds upon which the quashing was based (see e.g. Vallis v Secretary of State for Communities and Local Government [2012] EWHC 578 (Admin) paragraphs 14 and 27). Third, the decisions of the High Court and the Court of Appeal in Fox Strategic Land and Property Ltd v Secretary of State [2013] 1 P&CR 6 proceeded on the basis that when the decision in Fox's case was re-determined as a result of a quashing order, that part of the decision in the Richborough appeal relating to the spatial vision for Sandbach would be taken into account, notwithstanding that the Richborough decision had already been quashed on other grounds. Mr. Whale accepted this, but merely added that the Boddington point had not been argued in Fox. That response suggested that the Secretary of State has not thought through the implications for other cases of the "knock out blow" he seeks to deliver in the present case, and therefore the matter should await full argument and citation of relevant authorities in a case where a decision on the issue is necessary. Fourth, the Secretary of State should reconsider his argument in the light of regulation 19 of the Town and County Planning Act (Inquiries Procedure) (England) Rules 2000 (SI 2000 No 1624) and parallel rules for decisions by Inspectors. These rules proceed on the basis that when an appeal has to be redetermined following a quashing, there is no legal principle requiring the whole decision to be treated as if it had never existed, so as to make it necessary for all of the merits of the appeal to be redetermined.

Conclusion

129. For the above reasons, grounds 1 and 2 fail and the claim must be dismissed.

Addendum

130. The parties agree that the Court should order that the application be dismissed and the Claimant should pay the First Defendant's costs in the sum of £13,269.00.

131. However, there are issues as to whether:-

(i) The Claimant should pay the costs sought by the Second Defendant;

(ii) The Claimant should have permission to appeal;

(iii) If the answer to (ii) is no, whether time under CPR 52.4(2) for filing a notice of appeal should be extended to 13 April 2015.

I am grateful for the written submissions which I have carefully considered.

Costs

132. The Second Defendant asks that the Claimant be ordered to pay its costs reasonably incurred in preparing a skeleton argument and preparing and presenting evidence to complete the factual background given by the Claimant and the First Defendant in the specific respects set out in the draft order submitted.

133. The main principles governing the award of a second set of costs are set out in the decision of the House of Lords in Bolton MDC v Secretary of State [1995] 1WLR 1176. The First Defendant is entitled to the whole of his costs in any event.