Neutral Citation Number: [2019] EWCA Civ 1543

Case No: C1/2017/3476

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ADMINISTRATIVE COURT**
**PLANNING COURT**
**MR JUSTICE SUPPERSTONE**
**[2017] EWHC 2768 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2019

**Before:**

**Lord Justice McCombe**
**Lord Justice Lindblom**
**and**
**Lord Justice Peter Jackson**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **Gladman Developments Ltd.** | **Appellant** |
| **- and -** | |
| **Secretary of State for Communities and Local Government** | **First Respondent** |
| **- and -** | |
| **Swale Borough Council** | **Second Respondent** |
| **- and -** | |
| **CPRE Kent** | **Third Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr Richard Kimblin Q.C. and Mr Oliver Lawrence** (instructed by **Addleshaw Goddard LLP**) for the **Appellant**
**Mr Richard Moules** (instructed by **the Government Legal Department**) for the **First Respondent**
**The Second Respondent did not appear and was not represented.**
**Dr Ashley Bowes** (instructed by **Richard Buxton Solicitors**) for the **Third Respondent**

Hearing date: 8 May 2019

- - - - - - - - - - - - - - - - - - - - -

# Judgment Approved by the court
# for handing down
# (subject to editorial corrections)

## Lord Justice Lindblom:

*Introduction*

1. Did an inspector determining appeals under section 78 of the Town and Country Planning Act 1990 fail to deal lawfully with the likely effects of the proposed housing development on air quality? That is the main question in this appeal.

2. The appellant, Gladman Developments Ltd., appeals against the order of Supperstone J., dated 6 November 2017, dismissing its application under section 288 of the 1990 Act, by which it had challenged the decision of an inspector appointed by the first respondent, the Secretary of State for Communities and Local Government, in a decision letter dated 9 January 2017. The inspector dismissed two appeals under section 78. Each was against a failure by the second respondent, Swale Borough Council, to determine an application for outline planning permission for housing development on land at London Road, Newington: the first ("Appeal A"), for a development of up to 330 dwellings and 60 units of "Extra Care accommodation"; the second ("Appeal B"), for a development of up to 140 dwellings and 60 units of "Extra Care accommodation". The council has taken no part in the proceedings, either in this court or below. The third respondent, Campaign to Protect Rural England (Kent Branch) ("CPRE Kent"), is an objector to the proposed development and a rule 6 party. It has actively opposed the challenge to the inspector's decision.

3. The appeal sites are farmland to the south of London Road. They are not allocated for development in the Swale Borough Local Plan 2008. The inspector held an inquiry into the appeals on six days between 1 and 22 November 2016. When the inquiry opened, he identified 10 "main issues", and added another in the light of the representations of CPRE Kent (paragraph 14 of the decision letter). Gladman succeeded on nine of those issues, but not on the third – "[the] effect of the appeal proposals on landscape character and on the form of Newington" – or the eighth – "[the] effect of the appeal proposals, including any proposed mitigation measures, on air quality, particularly in the Newington and Rainham Air Quality Management Areas". The challenge attacked the inspector's conclusions on the eighth issue alone.

4. Supperstone J. rejected every ground of the claim. I granted permission to appeal on 3 October 2018.

*The issues in the appeal*

5. There are six grounds of appeal. They contend that the judge's conclusions are contrary to Directive 2008/50/EC "on ambient air quality and cleaner air for Europe" ("the Air Quality Directive") and irreconcilable with the decision of Garnham J. in *R. (on the application of ClientEarth) (No.2) v Secretary of State for Environment, Food and Rural Affairs* [2016] EWHC 2740 (Admin), [2017] P.T.S.R. 203, and that he was wrong to hold that the inspector could not reach a view on the likely effectiveness of measures to improve air quality in the national air quality plan (ground 1); that the inspector should have seen the relevance to his decision of the proposed measures to bring air quality within limit values, and the "presumption" in paragraph 122 of the National Planning Policy Framework, as published in March 2012 ("the NPPF") (ground 2); that his approach to the mitigation measures proposed by Gladman was wrong (ground 3); that he erred in failing to consider the imposition of a

suitable "Grampian" – or negative – condition (see *Grampian Regional Council v City of Aberdeen District Council* (1983) 47 P. & C.R. 633) (ground 4); that it was unfair of him not to give Gladman an opportunity to overcome the shortcomings he saw in the proposed mitigation (ground 5); and that he failed to provide adequate reasons for concluding that the proposals were inconsistent with the air quality action plans for Newington and Rainham, and contrary to the policy in paragraph 124 of the NPPF (ground 6).

6. Those six grounds produce three broad issues: first, whether the inspector erred in failing to grasp the significance of Garnham J.'s decision in the ClientEarth proceedings, and the policy in paragraph 122 of the NPPF (grounds 1 and 2); second, whether he failed to deal properly with the proposed mitigation, whether he should have considered a condition preventing the development going ahead until effective mitigation had been secured, and whether his decision is vitiated by procedural unfairness (grounds 3, 4 and 5); and third, whether he failed properly to explain how Gladman's approach to mitigation departed from the air quality action plans (ground 6).

*The Air Quality Directive*

7. Recital (2) to the Air Quality Directive states that "[in] order to protect human health and the environment as a whole, it is particularly important to combat emissions of pollutants at source and to identify and implement the most effective emission reduction measures at local, national and Community level". Recital (9) says that "[where] the objectives for ambient air quality laid down in this Directive are not met, Member States should take action in order to comply with the limit values and critical levels, and where possible, to attain the target values and long-term objectives". Recital (18) says that "[air] quality plans should be developed for zones and agglomerations within which concentrations of pollutants in ambient air exceed the relevant air quality target values or limit values … where applicable".

8. Article 2, "Definitions", defines a "limit value" as "a level fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained". Article 13, "Limit values and alert thresholds for the protection of human health", requires Member States to "ensure that, throughout their zones and agglomerations, levels of sulphur dioxide, $PM_{10}$, lead and carbon monoxide in ambient air do not exceed the limit values laid down in Annex XI". It also states that "[in] respect of nitrogen dioxide and benzene, the limit values specified in Annex XI may not be exceeded from the dates specified therein", and that "[the] alert thresholds for concentrations of sulphur dioxide and nitrogen dioxide in ambient air shall be those laid down in Section A of Annex XII".

9. Article 23, "Air quality plans", states:

> "1. Where, in given zones or agglomerations, the levels of pollutants in ambient air exceed any limit value or target value, plus any relevant margin of tolerance in each case, Member States shall ensure that air quality plans are established for those zones and agglomerations in order to achieve the related limit value or target value specified in Annexes XI and XIV.

> In the event of exceedances of those limit values for which the attainment deadline is already expired, the air quality plans shall set out appropriate measures, so that the exceedance period can be kept as short as possible. …".

Annex XI, "Limit values for the protection of human health", states that the limit value for nitrogen dioxide over a calendar year is 40 $\mu g/m^3$.

10. In England the Air Quality Directive was transposed into domestic law by the Air Quality Standards Regulations 2010 ("the 2010 regulations"). Regulation 26, "Air quality plans", which requires the drawing-up of air quality plans in England, provides that "[where] the levels of sulphur dioxide, nitrogen dioxide, benzene, carbon monoxide, lead and $PM_{10}$ in ambient air exceed any of the limit values in Schedule 2 or the level of $PM_{2.5}$ exceeds the target value in Schedule 3, the Secretary of State must draw up and implement an air quality plan so as to achieve that limit value or target value" (regulation 26(1)); and that "[the] air quality plan must include measures intended to ensure compliance with any relevant limit value within the shortest possible time" (regulation 26(2)).

*The ClientEarth proceedings*

11. In a series of proceedings, and with conspicuous success, ClientEarth has sought the intervention of the court in the process by which the Government has attempted to comply with the requirements of articles 13 and 23 of the Air Quality Directive (see *R. (on the application of Shirley) v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 22, at paragraphs 29 to 32).

12. By the time the inspector made his decision on Gladman's appeals, ClientEarth's second claim for judicial review had been heard and decided by Garnham J. Judgment was handed down on 2 November 2016 – the second day of the inquiry into Gladman's appeals. This was followed on 21 November 2016 – the penultimate day of the inquiry – by a further judgment on relief. In his order, sealed on 22 November 2016, Garnham J. made a declaration that the United Kingdom's 2015 air quality plan did not comply with article 23(1) of the Air Quality Directive and regulation 26(2) of the 2010 regulations. He also made a mandatory order requiring the Secretary of State to publish a draft modified air quality plan complying with the legislation by 24 April 2017 – a deadline he later extended to 9 May 2017, to accommodate the "purdah" period for the 2017 General Election – and to publish a final modified air quality plan by 31 July 2017. On 5 May 2017, some four months after the inspector's decision letter was issued, the Government published the modified air quality plan in draft for public consultation. The 2017 air quality plan was published in final form on 26 July 2017. It is not necessary to relate the subsequent history.

13. In his judgment on the claim in *ClientEarth (No.2)*, Garnham J. rejected "any suggestion that the state can have regard to cost in fixing the target date for compliance or in determining the route by which the compliance can be achieved where one route produces results quicker than another", stating that "[in] those respects the determining consideration has to be the efficacy of the measures in question and not their cost" – which "flows inevitably from the requirements in [article 23] to keep the exceedance period as short as possible" (paragraph 50 of the judgment). In his view "the measures a member state may adopt should indeed be "proportionate", but they must be proportionate in the sense of being no more than is required to meet the target" (paragraph 51).

14. He therefore accepted the submission made on behalf of ClientEarth "that the Secretary of State must aim to achieve compliance by the soonest date possible", and the submission made on behalf of the Mayor of London that "she must choose a route to that objective which reduces exposure as quickly as possible" (paragraph 52). He also "substantially" agreed with the further submission that "the Secretary of State must choose measures which maximise the prospect of achieving the target …". There is, he said, "no obligation in [article 23], express or implied, that a member state must take all imaginable steps aimed at reducing exposure". That "would be disproportionate …". But "implicit in the obligation "to ensure" is an obligation to take steps which mean meeting the value limits is not just possible, but likely" (paragraph 53). The 2010 regulations "require that the plan must include measures "intended to ensure" compliance within the shortest possible time", and "[the] identified measures cannot intend to ensure an outcome that is anything less than likely" (paragraph 54). And "[the] evidence demonstrates clearly that [Clean Air Zones], the measure identified in the plan as the primary means of reducing nitrogen dioxide emissions, could be introduced more quickly than 2020" (paragraph 65).

15. He concluded (in paragraph 95):

> "95. … (i) … [The] proper construction of article 23 means that the Secretary of State must aim to achieve compliance by the soonest date possible, that she must choose a route to that objective which reduces exposure as quickly as possible, and that she must take steps which mean meeting the value limits is not just possible but likely; (ii) … the Secretary of State fell into error in fixing on a projected compliance date of 2020 …; (iii) … the Secretary of State fell into error by adopting too optimistic a model for future emissions; and (iv) … it would be appropriate to make a declaration that the 2015 [air quality plan] fails to comply with article 23(1) of the [Air Quality Directive] and regulation 26(2) of [the 2010 regulations] …".

*The NPPF*

16. Paragraphs 120, 122 and 124 of the NPPF stated:

> "120. To prevent unacceptable risks from pollution …, planning policies and decisions should ensure that new development is appropriate for its location. The effects (including cumulative effects) of pollution on health, the natural environment or general amenity, and the potential sensitivity of the area or proposed development to adverse effects from pollution, should be taken into account. …
>
> …
>
> 122. … [Local] planning authorities should focus on whether the development itself is an acceptable use of the land, and the impact of the use, rather than the control of processes or emissions themselves where these are subject to approval under pollution control regimes. Local planning authorities should assume that these regimes will operate effectively. Equally, where a planning decision has been made on a particular development, the planning issues should not be revisited through the permitting regimes operated by pollution control authorities.

…

124. Planning policies should sustain compliance with and contribute towards EU limit values or national objectives for pollutants, taking into account the presence of Air Quality Management Areas and the cumulative impacts on air quality from individual sites in local areas. Planning decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan."

17. The policies in those three paragraphs were replicated with minor changes in paragraphs 180, 181 and 183 of the revised NPPF, published in July 2018, and no further change was made in the February 2019 version.

*The air quality action plans*

18. The Newington Air Quality Management Area Action Plan, published by the council in December 2010, sets out, in section 7.1, borough-wide measures to improve air quality, including a discussion of the use of planning conditions and obligations in development:

> "Decisions on applications for planning permission which may affect the Newington AQMA will be determined in the light of … relevant policy, guidance and legislation regarding air pollution, in conjunction with the Council's Environmental Health Department.
>
> Planning conditions will be imposed on planning applications, where appropriate, to address adverse impacts within the application site arising from the development; (conditions can be used to require, for example, the provision of secure cycle storage, landscaping, and dust suppression.)
>
> Where adverse impacts arise off-site or where they cannot otherwise be controlled via planning conditions, the Council, as Local Planning Authority, will, where possible, seek to address them through the use of planning obligations …
>
> Planning obligations may make acceptable a development which would otherwise be considered unacceptable in planning terms. … They can potentially prescribe the nature of development, secure a contribution from a developer to compensate for loss from development or else mitigate impacts from a development. Contributions may be either in cash or in kind; for example, by providing funds for traffic calming measures, enhancements to public transport provision, new recreation facilities etc.
>
> The Local Planning Authority will continue to liaise closely with Environmental Health on applications for planning permission, and will carefully consider whether mitigation measures are required relating to development which could affect the air quality within Newington AQMA. Where these can be secured either through planning conditions or obligations, in accordance with government guidance, legislation and planning policy, the Local Planning Authority will seek to ensure they are provided. Where such measures cannot be secured, and harm to the air quality in the AQMA is significant, planning permission may be refused."

19. Another air quality action plan, published by Medway Council in December 2015, covers the Air Quality Management Area in Rainham.

*The inquiry and the inspector's decision*

20. At the inquiry Gladman was represented by leading counsel, who called five expert witnesses, one of whom, Mr Malcolm Walton, a Technical Director and Principal Environmental Scientist at Wardell Armstrong LLP, gave evidence on air quality. CPRE Kent also called a witness on air quality, Professor Stephen Peckham, the Director of the Centre for Health Services Studies at the University of Kent and Professor of Health Policy at the London School of Hygiene and Tropical Medicine. Gladman produced two section 106 planning obligations in the form of unilateral undertakings, which provided for financial contributions and practical measures to mitigate the effect of the development on air quality.

21. In their evidence both Professor Peckham and Mr Walton stated their views on the likely adequacy of the proposed contributions and mitigation measures. Professor Peckham said (in paragraph 15 of his proof of evidence) that there was "no indication how such financial mitigation is to be used to reduce pollution levels". After judgment had been handed down in *ClientEarth (No.2)* on 2 November 2016, he presented further observations in writing. In his evidence-in-chief Mr Walton acknowledged that it was difficult to quantify the effects of the mitigation measures. None of the parties raised the possibility of a "Grampian" condition being imposed on a grant of planning permission, to prevent the development going ahead until the council was satisfied that an effective scheme for mitigating harm to air quality was in place. Nor did the inspector do so.

22. The inspector dealt with the likely effects of the proposed development on air quality – his eighth main issue – in paragraphs 90 to 106 of his decision letter. He referred to the requirement in Policy SP2 of the local plan, that "adverse impacts [of development] be minimised and mitigated". He noted that paragraph 120 of the NPPF required "the effects of pollution and potential sensitivity of the area to its effects to be taken into account in planning decisions", and that paragraph 124 said "any new development in Air Quality Management Areas … should be consistent with the local air quality management plan" (paragraph 90).

23. He referred to the national air quality standards set out in the 2010 regulations, including "a limit value of 40 micrograms per cubic metre ($\mu g/m^3$) for the annual mean concentration of nitrogen dioxide ($NO_2$)", and the fact that "[limit] values are also set for particulate matter and other pollutants". He acknowledged that "[the] Government is responsible for ensuring that these limit values are met", but that "[in] practice, most of the actions necessary to achieve [compliance with limit values] are devolved to local authorities", which are "required to carry out regular reviews and assessments of air quality", so they can "identify areas where limit values are, or are likely to be, exceeded" (paragraph 91).

24. He then came (in paragraph 92) to Garnham J.'s decision in *ClientEarth (No.2)*:

> "92. Added emphasis to the urgency of meeting the limit values for air pollutants was given by the decision of the High Court in November 2015 quashing the Government's 2015 Air Quality Plan. The court found that the plan should have sought to achieve compliance by the earliest possible date rather than selecting 2020

as its target date. It also found that the Government had adopted too optimistic a model for future vehicle emissions."

25. He referred to the two Air Quality Management Areas: one along a section of London Road and High Street, Newington, the other in High Street, Rainham, and the fact that in 2015 the "annual mean objective of 40μg/$m^3$" for nitrogen dioxide had been "exceeded" at monitoring sites in both (paragraph 93).

26. He then turned to Gladman's evidence on air quality at the inquiry, which included air quality assessments for each appeal proposal, carried out in September 2016 (paragraph 94). For both schemes, in two of the scenarios considered, "moderate adverse" impacts had been found at the receptor site in the centre of Newington "a short distance from the monitoring site at which the highest annual mean $NO_2$ concentrations were recorded in 2015", and "slight adverse" impacts at two others (paragraph 95).

27. Having considered the evidence of reductions in annual mean $NO_2$ concentrations in Newington between 2010 and 2014 and in particular between 2012 and 2014, the inspector thought it was "optimistic … to expect that $NO_2$ concentrations will fall by the substantial amounts predicted in Scenario 2" – the "without development" scenario for the opening year (paragraph 97). Sensitivity tests had therefore been undertaken, on the basis of emission factors that remained unchanged between 2015 and 2020. These showed, for both appeal schemes, in the "with development" scenarios, "substantial adverse" effects at three receptor sites in Newington, as well as "moderate adverse" and "slight adverse" effects at between three and five other receptor sites in each of these scenarios. And "[in] each case the limit value for annual mean $NO_2$ concentrations would be exceeded at five receptor sites, in some cases by a considerable amount" (paragraph 98).

28. He continued (in paragraphs 99 to 104):

> "99. The sensitivity scenarios are probably too pessimistic: as the appellants' witness pointed out, tightening of emission standards for new vehicles should, over time, bring about substantial further reductions in $NO_2$ emissions from traffic. But I was given no firm data on the rate at which this is likely to occur. In the absence of any conclusive evidence on this point, I consider it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent that informed the modelling of original Scenarios 2 to 5. My view is reinforced by the High Court's finding on the excessive optimism of future emissions modelling. This means that original Scenarios 3 and 5 cannot be taken as reliable projections of the likely impacts of the appeal proposals on air quality.
>
> 100. In my view the likelihood is that the impacts of the appeal proposals will fall somewhere between the best case original Scenarios 3 and 5 and the worst case sensitivity versions of those scenarios. Without further modelling it would be unwise to try to assess those impacts too precisely, but it seems safe to say that the possibility of "substantial adverse" impacts on receptors in Newington cannot be ruled out, and that "moderate adverse" impacts and exceedance of the limit value at a number of receptors in both Newington and Rainham are almost certain. This would be the case whether or not the cumulative impacts of other developments are factored in.

101. It might well be that, on this analysis, the limit values for $NO_2$ concentration levels would be exceeded in Newington and Rainham in 2020 even without the proposed developments. But this would not justify the further worsening of air quality that the modelling indicates would arise were either development to go ahead.

102. Both "moderate adverse" and "substantial adverse" impacts are considered likely to have a significant effect on human health, according to the 2015 publication *Land-Use Planning & Development Control: Planning for Air Quality* [produced by Environmental Protection UK and the Institute of Air Quality Management]. In accordance with guidance in that publication, the appellants propose to fund measures to mitigate the adverse impacts of the developments on both the Newington and Rainham AQMAs. Contributions to fund those measures are calculated using the DEFRA Emission Factors Toolkit and secured by the unilateral undertakings.

103. However, the level of contribution for each appeal scheme is based on 2020 emission factors. As I have found, on the evidence before me it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent assumed in the modelling of original Scenarios 2 to 5. Consequently the contributions may well not reflect the true impacts of the developments.

104. Proposed mitigation measures are outlined in the unilateral undertakings and the final mitigation scheme is subject to the approval of the Council. The proposed measures include electric vehicle charging points for each dwelling, green travel measures and incentives to encourage the use of walking, cycling, public transport and electric or low emission vehicles. No specific evidence has been provided, however, to show how effective those measures are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast $NO_2$ emissions."

29. He therefore concluded (in paragraphs 105 and 106):

"105. Drawing all this together, I find that it is more probable than not that both appeal proposals would have at least a moderately adverse impact on air quality in the Newington and Rainham AQMAs, and thus a significant effect on human health. While measures are proposed to mitigate those adverse impacts, there is no clear evidence to demonstrate their likely effectiveness, and it may well be that the contributions to fund the measures fail to reflect the full scale of the impacts.

106. I therefore conclude on the eighth main issue that, even after taking into account the proposed mitigation measures, the appeal proposals are likely to have an adverse effect on air quality, particularly in Newington and Rainham AQMAs. I reach this conclusion for the reasons set out above, notwithstanding that the Council raise no objection to the proposals on air quality grounds. Both proposals would thereby conflict with the guidance in NPPF paragraphs 120 and 124."

30. In his "Overall conclusions on Appeal A …", the inspector found conflict with several policies of the local plan, including Policy SP2 (paragraph 118). He set against the "social benefits" of the proposed development "the strong likelihood that, notwithstanding the proposed mitigation measures, [it] would contribute to at least "moderate adverse" impacts on air quality in both the Newington and Rainham AQMAs", and thus "would be likely to have a significant adverse effect on human health". In his view "[these] effects … would

conflict with the guidance in NPPF paragraph 124" (paragraph 128). He concluded that "even after considerable weight is given to the social, economic and environmental benefits …, the substantial harm that [the developments] would cause to the character of a valued landscape and their likely significant adverse effect on human health would significantly and demonstrably outweigh those benefits" (paragraph 133). No material considerations indicated that the proposal in Appeal A should be determined otherwise than in accordance with the development plan, and that appeal therefore had to be dismissed (paragraph 134). The conclusions on Appeal B were in similar terms (in paragraphs 143, 147 and 148).

*Did the inspector misunderstand the decision in the ClientEarth proceedings, and the policy in paragraph 122 of the NPPF?*

31. For Gladman, Mr Richard Kimblin Q.C. – who did not appear at the inquiry – submitted that the inspector did not see the significance, and likely effect, of Garnham J.'s decision in *ClientEarth (No.2)*, and thus failed to approach his assessment of the likely effect of the proposed development on air quality in a lawful way.

32. Supperstone J. was unimpressed by this argument – in my view rightly so. He did not accept that the inspector misunderstood Garnham J.'s conclusions and the effect of the relief he granted. His reference in paragraph 92 of the decision letter to Garnham J.'s emphasis on the urgency of meeting the limit values for air pollutants made it clear that he understood the need for the Government to achieve compliance by the "earliest possible date" (paragraph 27 of Supperstone J.'s judgment). This was not a complete answer to the contention that Garnham J.'s decision required the Secretary of State to "choose a route to that objective which reduces exposure as quickly as possible, and … must take steps which mean meeting the value limits [sic] is not just possible, but likely (para 95(i))" (paragraph 28), but the inspector was "not required to assume that local air quality would improve by any particular amount within any particular timeframe" (paragraph 29). I agree.

33. The judge referred (in paragraph 30 of his judgment) to observations made by Dove J. at first instance in *Shirley* ([2017] EWHC 2306 (Admin)) (at paragraph 63): that "the question of air quality and exceedance of any limit values or thresholds is clearly and obviously a material consideration in the decision as to whether or not to grant planning permission", and "is also material to the determination of whether mitigation measures are required and the effect of any mitigation measures that are proposed". But as he went on to say, there was "no suggestion in *Shirley* that the duty to produce and implement an air quality plan means local planning authorities should presume that the UK will become [compliant] with [the Air Quality Directive] in the near future" (ibid.). Nor was there any such suggestion in the judgments in this court on the appeal in that case.

34. As the judge said, the inspector concentrated – as he had to – on the significance of the decision in *ClientEarth (No.2)* for Gladman's appeals, given that the latest available monitoring data, from 2015, showed the annual mean objective of 40ug/$m^3$ for $NO_2$ was exceeded in the Newington and Rainham Air Quality Management Areas. It was not known what measures the new draft national air quality plan would contain, let alone what the final version would contain following public consultation. The inspector did not know how any new national measures would relate to local measures, nor what would be "the soonest date possible" by which the new national air quality plan would aim to achieve compliance. He could not reach any view on whether the measures in the new national air quality plan were

likely to be effective in securing compliance by any particular date (paragraph 31 of the judgment). In the judge's view, the inspector had "properly engaged with the *ClientEarth (No.2)* decision"; had "understood what the judgment required"; had "carefully analysed the evidence that was presented before him (DL 99-106)"; had "formed a judgment as to what the air quality is likely to be in the future on the basis of that evidence"; and was "entitled to consider the evidence and not simply assume that the UK will soon become compliant with [the Air Quality Directive]" (paragraph 32).

35. I can see no error in any of those conclusions of the judge. In my view, as was submitted to us by Mr Richard Moules on behalf of the Secretary of State and Dr Ashley Bowes for CPRE Kent, the inspector did see the true significance and effect of Garnham J.'s judgment in *ClientEarth (No.2)*. In deciding Gladman's appeals, he had to consider the evidence before him, in the particular circumstances of the local area, including local air quality. That is plainly what he did. He was not obliged to embark on predictive judgments about the timing and likely effectiveness of the Government's response to the decision in *ClientEarth (No.2)*, and the requirement to produce a national air quality plan compliant with the Air Quality Directive.

36. There is nothing in the decision letter to suggest that the inspector failed to understand Garnham J.'s reasoning, or the effect of the relief he ordered. As is clear from paragraph 91 of the decision letter, he recognized that, in practice, compliance with the limit values for air pollutants in the Air Quality Directive and the 2010 regulations, though ultimately the responsibility of the Government, lay in the hands of local authorities. In paragraph 92 he acknowledged that "[added] emphasis" had been given to the "urgency of meeting limit values for air pollutants" by Garnham J.'s decision, and the finding that the Government's 2015 Air Quality Plan was defective because it had failed to seek compliance by the earliest possible date, rather than selecting 2020 as a target date. This shows that he did understand Garnham J.'s reasoning, and the practical consequences of his decision. He recognized that that decision was intended to require the Government to act to achieve compliance with limit values by the earliest possible date.

37. It was with this recognition of the Government's and local authorities' responsibilities for securing compliance with limit values, and the urgent need for the Government to take the action required, that the inspector considered the evidence the parties put before him on local air quality. In my opinion his consideration of the evidence in that context, and the conclusions he reached, cannot be criticized.

38. The salient features of the evidence were that local monitoring showed exceedances of the annual mean objective for $NO_2$ in both the Newington and Rainham Air Quality Management Areas, as the inspector recognized in paragraph 93, and that the proposed development would be likely to bring about a worsening of those exceedances through increased vehicle emissions, though the extent of that worsening was a matter for debate – as he explained in paragraphs 94 to 104. As he said in paragraph 102, "moderate adverse" and "substantial adverse" impacts could be expected to have "a significant effect on human health …". He therefore took a cautious approach, concluding that the financial contributions put forward "may well not reflect the true impacts of the developments" (paragraph 103), and that the adequacy of the proposed mitigation had not been satisfactorily demonstrated (paragraph 104). His ultimate conclusion, in paragraph 105, was that it was "more probable than not" that each of these developments would have "at least a moderate adverse impact on air quality in the Newington and Rainham AQMAs, and thus a

significant effect on human health", and that the proposed mitigation had not been shown to be effective by "clear evidence".

39. He had to form his own judgment on these questions without knowing what measures the Government's new national air quality plan would contain – where, for example, clean air zones would be introduced – or when compliance with limit values would be secured. Nor did he know how measures taken at the national level would translate into local measures. There was no sensitivity evidence before him to reflect the possible consequences of the decision in *ClientEarth (No.2)* in annual mean $NO_2$ concentrations at the local level.

40. In the circumstances he cannot be criticized for not speculating about unknown measures to improve air quality, at either national or local level, or for not venturing an opinion on any improvement in local air quality. He was entitled to rely, as he did, on the evidence before him, rather than evidence that might have been produced but was not. There is, in my view, nothing unreasonable in his conclusion, in paragraph 99, that "it would be unsafe to rely on emission levels falling between 2015 and 2020 to the extent that informed the modelling of original Scenarios 2 to 5"; or in his conclusions, in paragraph 100, that "[without] further modelling" it would be "unwise" to try to assess the impacts of the proposed developments "too precisely", but that the possibility of "substantial adverse" impacts on receptors at Newington could not be ruled out, and that "moderate adverse" impacts in both Newington and Rainham were "almost certain". These conclusions were well within the range of reasonable planning judgment, and they are not flawed by a failure to heed the possible consequences of the decision in *ClientEarth (No.2)*.

41. It was not within the inspector's duty as decision-maker to resolve the "tension", as Mr Kimblin put it, between the Government's responsibility to comply swiftly with the limit values for air pollutants and the remaining uncertainty over the means by which, and when, the relevant targets would be met. In different circumstances, and on different evidence, an inspector might be able to assess the impact of a particular development on local air quality by taking into account the content of a national air quality plan, compliant with the Air Quality Directive, which puts specific measures in place and thus enables a clear conclusion to be reached on the effect of those measures. But that was not so here. This was a submission made by Mr Moules, and in my view it is right.

42. In my view, therefore, Mr Moules was right to submit that in this case, on the evidence as it was at the time of the inspector's decision, he drew reasonable and lawful conclusions on the future "air quality baseline".

43. Supperstone J. also rejected the submission, which Mr Kimblin sought to base on government policy in paragraph 122 of the NPPF, that the inspector failed to apply the principle that the planning system assumes other schemes of regulatory control will operate effectively. This policy, in his view, was directed at a situation where there is a parallel system of control, such as that operated by H.M.'s Inspectorate of Pollution (see *Gateshead Metropolitan Borough Council v Secretary of State for the Environment* [1995] Env. L.R. 37), or the "licensing or permitting regime for nuclear power stations" (see *R. (on the application of An Taisce) v Secretary of State for Energy and Climate Change* [2013] EWHC 4161 (Admin)), the essential principle being that the planning system should not duplicate those other regulatory controls, but should generally assume they will operate effectively. As the judge saw it, the Air Quality Directive was "not a parallel consenting regime to which paragraph 122 is directed". There was "no separate licensing or permitting

decision that will address the specific air quality impacts of [Gladman's] proposed development" (paragraph 39 of the judgment).

44. Again, I agree with the judge. If it were right to regard the regime for the protection of human health and the environment against the adverse effects of air pollutants, under the Air Quality Directive and the 2010 regulations, as a regime to which the policy in paragraph 122 of the NPPF related, I do not think the inspector failed to assume it would "operate effectively". He manifestly had regard to it. And he did not doubt that, with the added urgency imparted by Garnham J.'s decision in *ClientEarth (No.2)*, the United Kingdom would discharge its responsibility under the Air Quality Directive to comply with the relevant limit values. But this broad assumption did not negate the conclusions he reached, in the light of the evidence before him, on the likely effects of the proposed development on local air quality in Newington and Rainham.

45. In my view, however, Supperstone J. was right to conclude that the policy in paragraph 122 was not engaged here. The policy was directed to situations where some proposed process or operation liable to cause pollution is subject to control under another regulatory regime. As the judge recognized, its purpose was to avoid needless duplication between two schemes of statutory control. It was concerned with "the control of processes or emissions … where these are subject to approval under pollution control regimes" and with "permitting regimes operated by pollution control authorities" (my emphasis). Such regulatory regimes would include those to which the judge referred, and also, for example, the regime for the issuing of environmental permits under the Environmental Protection Act 1990, which operates in parallel to the land use planning system.

46. As Mr Moules and Dr Bowes submitted, the Air Quality Directive and the 2010 regulations are not a licensing or permitting regime of that kind. The Air Quality Directive is "programmatic in nature". It imposes obligations on the state to comply with the relevant limit values within the shortest possible time, and by the means chosen to achieve compliance. In the United Kingdom the approach adopted by the Government is to promulgate an air quality plan for the relevant zones or agglomerations. Paragraph 122 of the NPPF, properly understood, did not contemplate any assumption being made about that process. It does not require a planning decision-maker to assume that the Government will have acted expeditiously to take the action required to discharge its own responsibilities under the legislative scheme for air quality.

47. Government planning policy did engage with air quality, explicitly, in paragraph 124 of the NPPF. The policy in that paragraph was not qualified or expanded by the policy in paragraph 122. It was directed both to planning policies – which were expected to "sustain compliance with and contribute towards EU limit values or national objectives for pollutants …" – and to individual planning decisions – which were expected to "ensure that any new development in Air Quality Management Areas is consistent with the local Air Quality Action Plan". But there was no requirement to assume the Government would have complied with the Air Quality Directive by the time the development was carried out.

48. It follows in my view that the NPPF did not compel the inspector to assume that the requirements of the Air Quality Directive would have been complied with soon enough, and in such a way, as to make the effects of the proposed development on air quality acceptable. He was not obliged by any such policy to disregard the Government's failure to comply with the Air Quality Directive, as found by the court in *ClientEarth (No.2)*, or to assume that it

would comply within any given time. In submissions both before us and in the court below, effectively on behalf of the Government, this was accepted by Mr Moules.

*Did the inspector fail to deal properly with the proposed mitigation and to consider a "Grampian" condition, and was his decision flawed by procedural unfairness?*

49. Mr Kimblin submitted that the inspector, in finding Gladman's financial contribution to mitigation was unlikely to be effective, failed to grapple properly with its approach to mitigation, which was based on DEFRA's "damage cost analysis".

50. Supperstone J. rejected this submission, and again I think he was right. He referred to the evidence of Mr Walton for Gladman in his first witness statement (at paragraphs 9 to 13), explaining how he had calculated the sum required to mitigate the effects of the proposed development on air quality using the DEFRA "Cost Damage Calculation", which the local planning authorities had accepted as a suitable approach (paragraph 41 of the judgment). Gladman's complaint was that the inspector found the calculation was not robust in the absence of supporting evidence, without getting to grips with the calculations in Gladman's "Air Quality Addendum Assessment" of September 2016. This was unacceptable, Mr Kimblin had submitted, given that the financial contributions were based on the methodology favoured by the Government (paragraph 42).

51. The judge went on to consider the content of the "Air Quality Addendum Assessment", the evidence given to the inspector by Mr Walton and Professor Peckham, and the relevant submissions made on behalf of CPRE Kent in closing (paragraphs 43 to 49). He referred to answers given by Mr Walton in his evidence-in-chief, and in response to the inspector's own questions, in which he acknowledged the difficulty in predicting the effectiveness of the mitigation. The likely effectiveness of that mitigation was a "live issue" at the inquiry. The inspector had to reach his own conclusion on the matter, exercising his planning judgment – as did the Secretary of State in *Shirley* and the inspector in *Secretary of State for Communities and Local Government v Wealden District Council* [2017] EWCA Civ 39 (paragraph 50 of the judgment). In paragraphs 104 to 106 of his decision letter he had reached a conclusion on the evidence that he was entitled to reach, and he had explained what was wrong with the proposed mitigation. As the judge put it, the "contributions had not been shown to translate into actual measures likely to reduce the use of private petrol and diesel vehicles and hence reduce the forecast $NO_2$ emissions …" (paragraph 51).

52. I agree. This was not a case of the inspector doubting the soundness of the methodology adopted by Mr Walton in the cost damage calculation. It was not the methodology that was in contention. It was the likely effectiveness of the financial contributions themselves when translated into practical measures. The thrust of the objection by CPRE Kent, which the inspector accepted, was that it could not be demonstrated that the financial contributions would produce practical mitigation sufficient to overcome the likely effects of the development on local air quality.

53. This was a classic matter of planning judgment. The inspector did not have to accept that because an appropriate arithmetical method had been used in calculating the level of financial contributions, the mitigation measures themselves would be effective. It was for him to consider, in the exercise of his planning judgment, whether the mitigation would be effective. He was not confident that it would. Disagreement with this conclusion is not a

proper basis for complaint in proceedings such as these. The conclusion was not irrational. It was not the outcome of an unduly stringent test of certainty being applied. It was not inadequately explained. It was, as the inspector said in paragraph 104, a conclusion reached in the absence of "specific evidence … to show how effective [the proposed mitigation measures] are likely to be in reducing the use of private petrol and diesel vehicles and hence in reducing forecast $NO_2$ emissions".

54. Mr Kimblin's alternative argument was this. First, it was incumbent on the inspector – exercising the Secretary of State's power under section 79(1) of the 1990 Act to deal with the application before him on appeal "as if it had been made to him in the first instance" – to consider whether his concerns could be overcome by a suitably worded "Grampian" condition. And secondly, the perceived shortcomings of the measures in the section 106 obligations were not squarely raised by any party in evidence at the inquiry, the possibility of their being overcome by a condition was not ventilated, and it was unfair of the inspector not to raise this point with the parties before he made his decision.

55. Supperstone J. did not accept that the inspector had to consider the appropriateness of a "Grampian" condition, or give Gladman an opportunity to tackle this question. Gladman had never suggested it would agree to be bound by any such condition (paragraph 53). The inspector was not under a duty to ask himself whether he should impose a condition precluding development until a scheme to overcome the impact on air quality had been approved – a reasonable condition, it was said, in the light of the House of Lords' decision in *British Railways Board v Secretary of State for the Environment* [1993] 3 P.L.R. 125 (see the speech of Lord Keith of Kinkel, at pp.128 and 132). He was under no obligation to "cast about for conditions … not suggested to him" – as was emphasized by Mann L.J. in his judgment in *Top Deck Holdings v Secretary of State for the Environment* [1991] J.P.L. 961 (at pp.964 and 965). He was entitled to take the two unilateral undertakings as Gladman's "settled position" on mitigation. And given his finding that the effectiveness of the proposed mitigation had not been demonstrated by evidence, the reasonableness of the condition now suggested was in any case "questionable" (paragraph 54). What the Court of Appeal had said in *Top Deck Holdings* was not confined to the particular facts of that case; it was a statement of general principle (paragraph 56).

56. In the light of the decision of this court in *Hopkins Developments Ltd. v Secretary of State for Communities and Local Government* [2014] P.T.S.R. 1145 (in particular, the judgment of Jackson L.J. at paragraph 62, and that of Beatson L.J. at paragraph 90), the judge also rejected the contention that the principles of procedural fairness had been offended. Gladman knew the case it had to meet and had an opportunity to adduce evidence and make submissions on the mitigation measures, which included suggesting a "Grampian" condition if it had wished to do so (paragraph 61).

57. I think the judge's analysis here is cogent. When the inquiry began, the likely effect of the proposed development on air quality in the Newington and Rainham Air Quality Management Areas, "including any proposed mitigation measures", was identified by the inspector as one of the main issues in the appeals. None of the parties could have been in any doubt that this was a matter on which he was expecting to hear such evidence and submissions as they chose to put before him. Though the council did not oppose the development on the grounds that it would likely bring about a worsening in air quality, CPRE Kent firmly did. As one might expect, the effectiveness of the proposed mitigation was explicitly part of the issue. Both Gladman and CPRE Kent sought to confront this

question. Gladman saw the need to call its own expert witness, Mr Walton. In his evidence he accepted that the effect of the proposed mitigation measures was difficult to quantify. And the efficacy of Gladman's approach to mitigation, including the utility of the proposed financial contributions was also doubted by Professor Peckham in his evidence for CPRE Kent. Whether this was so was ultimately a matter of planning judgment for the inspector. But there can be no dispute that the adequacy of the proposed mitigation was a contentious issue between Gladman and CPRE Kent.

58. I cannot see how it could be said that in this case the inspector acted in any way contrary to the principles of procedural fairness.

59. The basic principles are not complicated or surprising (see *Hopkins Developments Ltd.*, at paragraphs 47 to 50 in the judgment of Jackson L.J., and paragraphs 87 to 92 in the judgment of Beatson L.J.; *Secretary of State for Communities and Local Government v Engbers* [2016] EWCA Civ 1183, at paragraphs 5 to 9 in the judgment of Lewison L.J.; and *Preston New Road Action Group v Secretary of State for Communities and Local Government* [2018] EWCA Civ 9, at paragraph 47 of my judgment). In *Hopkins Developments Ltd.* Beatson L.J. (in paragraph 87 of his judgment) referred to the "right to be heard" as a principle of "natural justice" or "procedural fairness", which required "an opportunity to be heard, an opportunity to participate in the procedure in which the decision is made". As he recognized (at paragraph 88), the court must consider whether the party complaining of procedural unfairness had "a reasonable opportunity" to put its case on the matters in issue. The emphasis is on the "opportunity to be heard". As Beatson L.J. went on to say (at paragraph 90), and illustrate (in paragraphs 91 and 92), "[the] authorities on planning inquiries … show that in this context what is needed is knowledge of the issues in fact before the decision-maker, the Inspector, and an opportunity to adduce evidence and make submissions on those issues …".

60. There was no lack of such opportunity in this case. Gladman cannot justly complain that it was unaware of the issue in dispute – the likely effect of the development on air quality, and the effectiveness of its proposed mitigation; or that the issue arose late or unheralded, or only as a minor point referred to in passing in the course of the inquiry, or as a concern of the inspector that occurred to him only after the inquiry was over. Nor can it say that this was merely a matter on which the inspector was seeking the parties' help, as opposed to a squarely contested issue between itself and a rule 6 party, though not an issue between itself and the council. Nor can it complain that the case it had to meet was obscure; or that it did not have a reasonable opportunity to meet that case with evidence and submissions, and in the light of the decision of the court in *ClientEarth (No.2)*. It had the opportunity to counter Professor Peckham's evidence with evidence of its own, and in cross-examination, and, at the end of the inquiry, in closing submissions. It cannot now raise, as if it were a complaint of procedural unfairness, the fact that it did not call different or further evidence to convince the inspector that its proposed mitigation could be relied on to reduce emissions of $NO_2$ sufficiently. Nor, therefore, can it complain that it suffered any material prejudice. In short, there was no procedural unfairness at all.

61. The likely effect of the development on air quality was an issue to which the inspector ultimately had to apply his own planning judgment in the light of all the relevant evidence and submissions before him. That is what he did. But it is no part of the principles of procedural fairness that he was necessarily obliged to share with the parties his own

thinking, or provisional views, on any of the contentious issues while the inquiry was still in progress, and give them the opportunity to address any concerns he had.

62. I also reject the contention, as did the judge, that the inspector should have considered the possibility of his concerns about the proposed mitigation being overcome by the imposition of a "Grampian" condition, or should have given the parties the opportunity to address him on that question.

63. There is no statutory requirement, or principle of law, to the effect that in determining an appeal under section 78 of the 1990 Act, the Secretary of State, or his inspector, must always – and even if entirely unprompted by any of the parties – seek to make an unacceptable proposal acceptable by imposing a planning condition in "Grampian" form to prevent the development going ahead until a particular objection to it is overcome.

64. Nor is there any statement of national planning policy creating such a requirement. Paragraph 203 of the NPPF – now paragraph 54 of the replacement version published in February 2019 – said that "[local] planning authorities should consider whether otherwise unacceptable development could be made acceptable through the use of conditions or planning obligations", and that "[planning] obligations should only be used where it is not possible to address unacceptable impacts through a planning condition". And in the Planning Practice Guidance, issued by the Government in March 2014, paragraph 16-049-20140306, headed "What type of behaviour may give rise to a substantive award [of costs] against a local planning authority?", giving examples of unreasonable behaviour by a local planning authority, says that "refusing planning permission on a planning ground capable of being dealt with by conditions risks an award of costs, where it is concluded that suitable conditions would enable the proposed development to go ahead". But neither government policy nor government guidance requires an inspector always to undertake his own quest for conditions that might render an unacceptable proposal acceptable, so that he can allow an appeal he would otherwise have dismissed.

65. There may of course be cases where an inspector finds it appropriate to consider imposing such a condition even if none of the parties has suggested it. And when this happens he may think it sensible, or it may be necessary, to seek their comments or submissions. To do this is not contrary to any provision of the statutory scheme or any principle of law, nor is it discouraged in government policy or guidance. There is, however, no statutory requirement or principle of law that, generally, he must take that course.

66. The relevant principle is apparent in the judgment of Mann L.J. in *Top Deck Holdings*. The facts in that case were somewhat different from this. The applicant for planning permission proposed the erection of two buildings with a total floorspace of 652 square metres, which would necessarily require the demolition of buildings with a floorspace of 568 square metres. It was common ground that the removal of other buildings on the site, to eliminate the difference of 84 square metres, could only have been achieved by a planning condition, and it was argued that the inspector should have considered imposing such a condition. Had he done so, it was submitted, his view on the planning balance might have been different. But neither side had put forward such a condition. And in his judgment (at p.964) Mann L.J. posed the question: "What was the Inspector to do in regard to a condition which was neither requested nor, more significantly, offered?". He referred, with approval, to the reasoning of Forbes J. in *Marie Finlay v Secretary of State for the Environment* [1983] J.P.L. 802, including this passage:

> "If a party to an appeal wanted the appeal to be considered on the basis that some condition could cure the planning objection put forward, then it was incumbent on the appellant to deal with that condition at the inquiry. Unless such a condition has been canvassed the Secretary of State was not at fault in not imposing such a condition. …".

67. Mann L.J. is reported to have endorsed that view (at p.965):

> "He (Mann L.J.) respectfully agreed with the view expressed by Forbes J. Such an approach had to work sensibly in practice. An Inspector should not have imposed on him an obligation to cast about for conditions not suggested before him. He emphasised "obligation." If, of his own motion, he wished to impose a condition, then, as Forbes J. suggested, different considerations would arise, including perhaps the reopening of the appeal. He (Mann L.J.) expressed no view upon such a situation. In his judgment, in this case the Inspector was under no obligation, such as [counsel] had suggested he was … ."

68. I think Mann L.J. was there stating a basic proposition, not merely the view he had reached in the circumstances of that particular case. The basic proposition is not that there will never be a case in which an inspector, on his own initiative, may properly raise with the parties the possibility of imposing a particular condition, which the parties themselves have not thought of or suggested. It is that, as a general rule, there is no legal onus on an inspector to formulate conditions that might make the proposed development acceptable, but which none of the parties has suggested to him.

69. Sometimes, I would accept, it might be unreasonable, in the "Wednesbury" sense, for an inspector not to impose a condition even though none of the parties has suggested it, because the need for that condition and the appropriateness of imposing it are perfectly obvious. Such a possibility was recognized, for example, by Collins J. in *National Anti-Vivisection Society v First Secretary of State* [2004] EWHC 2074 (Admin) (at paragraphs 32 to 35) – though in the particular circumstances of that case the judge was "wholly satisfied" that the condition in question, which would have limited the use of the proposed medical research building to animal research, "could not conceivably be regarded as a condition which was obviously needed …" (paragraph 35).

70. In this case too I cannot accept that the inspector was obliged to frame a "Grampian" condition to overcome the inadequacy, as he saw it, of Gladman's proposed mitigation. Nor was it irrational or otherwise unlawful for him not to do that. Recognizing the need to address the effects of the proposed development on air quality as an important issue on which evidence and submissions would be required, the need to counter CPRE Kent's case that the financial contributions would not translate into effective mitigation, and the need to put forward measures that were legally enforceable, Gladman presented the inspector with the expert evidence of Mr Walton, took the opportunity to test Professor Peckham's evidence by cross-examination, relied on the submissions of its leading counsel, and proffered its section 106 obligations. At no stage, however, did it mention the possibility of a "Grampian" condition being imposed if its case on air quality was rejected, or its mitigation measures found wanting.

71. In these circumstances the inspector was, in my view, reasonably entitled to assume that Gladman had advanced the best case it could on air quality, and had not left anything out – indeed, that this was its only case on that issue, and, in particular, on mitigation (see the judgment of Richards J. in *West v First Secretary of State* [2005] EWHC 729 (Admin), at paragraphs 42 to 54). It was not unreasonable to think that the section 106 obligations represented the basis on which he was being invited to conclude that the financial contributions and proposed mitigation measures were adequate and would be effective. His conclusions show very clearly that he was unconvinced by both parts of the mitigation strategy – the financial contributions and the mitigation measures themselves. There was nothing to suggest that Gladman was willing to increase those contributions or strengthen the mitigation or to advance some alternative mitigation strategy, and no evidence of what such an alternative mitigation strategy might involve. Having rejected Gladman's case on air quality, as he did, the inspector could not be expected to grant planning permission with a "Grampian" condition making the development depend on materially different – and unknown – mitigation measures coming forward at some later stage.

*Did the inspector fail to explain how Gladman's approach to mitigation departed from the air quality action plans?*

72. The contention here is that the decision letter contains no proper reasons to explain a finding of conflict with the air quality action plans for Newington and Rainham, which, contrary to the inspector's approach, did not require the effects of the development on air quality to be fully mitigated. Indeed, it was "entirely silent" on this point.

73. The judge rejected this complaint. The inspector had found the proposed development would be likely to have an adverse effect on air quality in the Air Quality Management Areas in those two settlements. It was "obvious", therefore, why he had concluded it was inconsistent with the local air quality action plans, which sought to ensure development did not harm air quality. From the decision letter it was "clear to the parties … that the inspector followed national policy, found there to be a breach of the air quality action plans, and accordingly concluded that both proposals would conflict with the guidance in NPPF paragraph 124" (paragraph 67 of the judgment).

74. Once again, I think the judge was right. As he knew, to establish whether the reasons given by an inspector are clear, adequate and intelligible – in accordance with the principles stated by Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33, [2004] 1 W.L.R. 1953 (at paragraph 36) – one must read the decision letter fairly as a whole, bearing in mind that it is written, principally, for the parties to the appeal, who will be familiar with the contentious issues and the evidence and submissions directed to those issues. When that is done here, there can, I think, be no doubt that the inspector's relevant reasons were sufficient, and lawful.

75. The inspector's conclusions, amply explained in paragraphs 99 to 106 of his decision letter, were that the effectiveness of the mitigation measures put forward by Gladman had not been satisfactorily demonstrated (paragraphs 104 and 105), that the proposed development would have "at least a moderately adverse impact on air quality in the Newington and Rainham AQMAs, and thus a significant effect on human health" (paragraph 105), and that it would "thereby conflict" with the policy in paragraphs 120 and 124 of the NPPF (paragraph 106). He had earlier (in paragraph 90) directed himself accurately on the policies in those two

paragraphs of the NPPF, including, specifically, the policy in paragraph 124 that "[planning] decisions should ensure that any new development in Air Quality Management Areas is consistent with the local air quality action plan".

76. Having gone on to find that, despite the proposed mitigation, the development would harm air quality in the two relevant Air Quality Management Areas for which air quality action plans had been published, and having expressly connected that conclusion to a finding of conflict with national planning policy in paragraphs 120 and 124 of the NPPF, the inspector was not, in my view, obliged to spell out and elaborate the conclusion that the proposals were in conflict with the air quality action plans. This conclusion was inherent in the conclusion that the proposals were in conflict with the policy in paragraph 124 of the NPPF. It was, as the judge said, obvious.

77. Since the inspector's conclusion on the likely harmful effects on air quality in the Air Quality Management Areas and on human health, and his finding of conflict with government policy in paragraph 124 of the NPPF, rested on his conclusion that the effectiveness of the proposed mitigation was unproven, which plainly it did, there was no need for him to spell out the conclusion that Gladman's approach to mitigation was inconsistent with the air quality action plans. As Dr Bowes submitted, an essential purpose of the air quality action plans was to improve air quality in the Air Quality Management Areas, which, as the air quality action plan for Newington made quite clear, might require planning permission to be refused where effective mitigation could not be secured. Proposed development such as this, judged likely to worsen air quality in a material way because the proposed mitigation had not been shown to be effective, was inevitably inconsistent with the air quality action plans. This too was obvious. The inspector's reasons were not deficient for his not having said it. There was no need for him to do so.

*Conclusion*

78. For the reasons I have given, I would dismiss the appeal.

**Lord Justice Peter Jackson**

79. I agree.

**Lord Justice McCombe**

80. I also agree.