Neutral Citation Number: [2024] EWHC 368 (Admin)

Case No: AC-2023-LDS-000223

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
SITTING IN LEEDS

Wednesday, 21st February 2024

Before:
FORDHAM J

- -

Between:

PROJECT GENESIS LIMITED	**Claimant**
- and –	
(1) SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	
(2) DURHAM COUNTY COUNCIL	
(3) CONSETT COMMITTEE	**Defendants**

- -
- -

Andrew Tabachnik KC (instructed by Clyde & Co) for the **Claimant**
Jack Smyth (instructed by GLD) for the **First Defendant**
John Barrett (instructed by DCC) for the **Second Defendant** (by written submissions)
The **Third Defendant** did not appear and was not represented

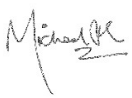
- -

Hearing date: 29.1.24
Draft judgment: 12.2.24

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



- -

FORDHAM J

FORDHAM J:

Introduction

1. This is a statutory review case about planning permission and a proposed 'energy from waste' facility in DE8. The Developer (the Claimant) seeks, by statutory review, to quash the decision of the Secretary of State (the First Defendant) on 26 June 2023, dismissing its appeal against the refusal by the Council (the Second Defendant) to grant planning permission. The planning reference for the planning application is DM/20/03267/WAS. The planning reference for the appeal is APP/X1355/W/22/3294182. By googling those references, access can be obtained to the planning and decision-making documents. That includes full and complete versions of documents from which I will draw extracts and to which I will give cross-references. As an aggrieved person, the Developer applies pursuant to s.288 of the Town and Country Planning Act 1990 on the statutory grounds that the Secretary of State's decision was not within the powers of the 1990 Act or that there was non-compliance with a relevant requirement, as a consequence of which the Developer's interests have been substantially prejudiced. The general principles of judicial review are applicable. There are four agreed issues in the case. Two relate to harm; two relate to benefits.

Context

2. The development site (DE8 7EQ) is 1.64 hectares of vacant land within the 10.8 hectare Hownsgill Industrial Park, part of the site of the former Consett Steel Works, south of Consett and west of Templetown. Within the Industrial Park are commercial premises (including the food processing business Greencore) and future development sites. Alongside the Industrial Park are a site to the south which is planning-approved for a solar farm, a site to the east which has a pending planning application for 129 dwellings (beyond which is another site with a pending application for 201 dwellings), and a site to the north which is planning-approved for a mixed-use development called the Derwent View scheme (including a hospital and a hotel).

3. The energy from waste facility main building would measure approximately 35.5m by 32.7m with a height of 22m. A fuel store would measure 25.8m by 43.5m with a height of 22m. The proposed chimney stack would have a height of 50m and external diameter of 1.4m. There would be a 25m high water tank, external silo, dry coolers, ash bins and a weigh bridge. The energy plant would process up to 60,000 tonnes per year of Refuse Derived Fuel. It would incorporate combined heat and power (CHP), allowing both electricity and heat to be exported for use in the surrounding area. It would generate up to 3.48MW of electricity. It would produce heat for supply to existing and proposed adjacent development.

4. The Developer is a company controlled and operated by the Project Genesis Trust, a charitable trust formed in 1994 to bring regeneration and renaissance to Consett and to reinvest funds in the provision of environmental, recreational and social benefits to the local community, following the closure of the Steel Works in 1980. The Trust has to date secured over 350,000 ft2 of commercial space, over 1,350 new homes, 36 acres of public open space, over 1,500 direct and indirect new jobs, £220m of construction costs, and consequential economic output of £65m a year. The County Durham Plan (CDP) says this (at §4.38): "The important role of Project Genesis in continuing to bring forward further development in the future is recognized, as are the benefits it has

[brought] to the community of Consett both socially and economically and in terms of regenerating the built and natural environment".

5. The North Pennines Area of Outstanding Natural Beauty (AONB) – now known as the North Pennines National Landscape – lies some 2.3km to the south-west of the development site. The grade II listed High Knitsley Farmhouse and Barn lie around 650m to the south-east. An Area of Higher Landscape Value (AHLV), designated in the CDP, lies approximately 500m to the south.

6. The Council had refused planning permission on 7 September 2021 for these reasons:

> ***(1) Although the development is outside of the North Pennines Area of Outstanding Natural Beauty (AONB), the proposal, due to the scale, form and massing, would cause unacceptable harm to its special qualities. The development would be visible from locations within the AONB and would therefore not accord with County Durham Plan Policies 38, 39 and 61, Paragraph 174 of the NPPF [National Planning Policy Framework] and Paragraph 7 of the NPPW [National Planning Policy for Waste].***
>
> ***(2) The proposal, due to the scale, form and massing, would cause harm to the character and quality of the landscape which would not be outweighed by benefits of the development and would therefore be unacceptable and would not accord with County Durham Plan Policies 39 and 61, Paragraph 174 of the NPPF and Paragraph 7 of the NPPW.***
>
> ***(3) The appearance of the proposed development does not conserve or enhance the special qualities of the landscape within the adjacent Area of Higher Landscape Value (AHLV) and considering other benefits of the development, would therefore not accord with County Durham Plan Policies 29 and 39, Paragraph 130 of the NPPF and Paragraph 7 of the NPPW.***
>
> ***(4) The scale, location and appearance of the development would cause harm to the setting of a designated heritage asset (the Grade II listed High Knitsley Farmhouse and Barn west of High Knitsley Farmhouse) that would not be outweighed by the public benefits of the proposal in conflict with County Durham Plan Policy 44, Paragraph 202 of the NPPF and Paragraph 7 of the NPPW.***

7. The Claimant's appeal against the Council's refusal of planning permission was pursuant to s.78 of the 1990 Act. The appeal was 'recovered' for the Secretary of State's determination on 26 May 2022, because it was assessed as involving proposals giving rise to substantial regional or national controversy. An Inspector (Stephen Normington) was appointed by the Secretary of State and held an inquiry. The inquiry sat for 8 days between 9 and 19 August 2022. There was an accompanied site visit on 15 August 2022. During the inquiry the Inspector received a s.106 Unilateral Undertaking ("UU"): see §45 below.

The Inspector's Report (IR)

8. The IR was dated 14 December 2022. Because the appeal was 'recovered', the function of the Inspector was not to decide the appeal but rather to make a reasoned recommendation. That meant the function of the IR was to explain that recommendation, and to provide details to assist the Secretary of State. The IR is full and detailed. It is a 159-page document plus annexes. Its reasoned analysis culminated in a recommendation that the appeal should be allowed, and planning permission granted, subject to the imposition of a set of identified planning conditions. The IR's opening chapters addressed procedural and background matters, the site surroundings and context, the proposed development and planning policy (chapters 1 to 4). The next

part of the IR contained a detailed description of the case advanced at the inquiry: by the Developer (chapter 5); by the Council (chapter 6); by the Consett Committee (the Third Defendant) as a so-called "Rule 6 Party" (chapter 7); by other persons appearing, and in written representations (chapters 8 and 9). Then there were chapters addressing planning conditions (chapter 10) and the planning obligation in the UU (chapter 11). The Inspector's conclusions occupied 180 paragraphs in IR chapter 12 (IR12.1 to IR12.180). The 11 paragraphs of IR chapter 13 (IR13.1 to IR13.11) described the planning balance and overall conclusions.

9. Chapter 12 opened by explaining (IR12.1) that:

> ***In determining this appeal, the Secretary of State will need to come to a view whether the proposal comprises sustainable development within the context of the Framework [NPPF] as a whole.***

Mr Tabachnik KC, for the Developer, accepts this as a working encapsulation but says a more accurate description of the Secretary of State's function is that it involved asking (a) whether there is a conflict with the development plan and, if so, (b) whether material considerations indicate that permission should be determined other than in accordance with the development plan (see s.38(6) of the Planning and Compulsory Purchase Act 2004) (2004 Act). The development plan includes CDP policies.

10. The Inspector continued, "to that end", by identifying nine "main considerations" that he considered relevant in this case (IR12.1). I am adding labels (MC1 to MC9) with square-bracketed cross-references to the detailed reasoning on each topic within Chapter 12:

> ***MC1. The principle of the development on the Hownsgill Industrial Park [IR12.2 to IR12.7].***
>
> ***MC2. Whether the proposal would comprise a waste disposal or recovery operation [IR12.8 to IR12.16]***
>
> ***MC3. The need for the proposed facility [IR12.17 to IR12.35]***
>
> ***MC4. The effect of the proposed development on the character and appearance of the surrounding area with particular regard to the North Pennines Area of Outstanding Natural Beauty [AONB] and the adjacent Area of Higher Landscape Value [AHLV]. [IR12.36 to IR12.91]***
>
> ***MC5. The effect of the proposed development on the special interest of nearby heritage assets with particular regard to the setting of the Grade II Listed High Knitsley Farmhouse and Barn to the west of High Knitsley Farmhouse. [IR12.92 to IR12.119]***
>
> ***MC6. The extent to which the proposed development is consistent with Government policies for meeting the challenge of climate change in the Framework (Part 14). [IR12.120 to IR12.135]***
>
> ***MC7. The effect of the proposed development on economic development. [IR12.136 to IR12.142]***
>
> ***MC8. Whether alternative sites and technology were appropriately considered. [IR12.143 to IR12.149]***
>
> ***MC9. Any benefits of the proposed development to be weighed in the planning balance and any implications of not proceeding with the scheme. [IR12.150 to IR12.162]***

11. Having set out detailed reasons (in those cross-referenced passages within Chapter 12) on each of MC1 to MC9, the Inspector's key conclusions were then reflected within chapter 13 (planning balance and overall conclusions). Leaving aside MC4 (effect on character and appearance of the surrounding area), to which I will return, chapter 13 dealt with the other material considerations as follows:

> ***IR13.1. For the reasons set out earlier in this Report, the proposed development would accord with CDP Policy 2. In addition, I have found that there is a demonstrable need for the proposed development. In my view, the proposal would constitute a recovery facility and this would be reinforced by the suggested planning condition which requires the scheme to demonstrate that it will achieve R1 status, thereby ensuring that it can be considered as a recovery facility. It would therefore move waste up the hierarchy and divert a significant amount of residual C&I [Commercial and Industrial] waste from landfill. It would meet a pressing need for facilities to sustainably manage C&I waste in County Durham and would be reflective of the aspirations set out in the Addendum to 2012 Study: Waste Arisings and Waste Management Capacity Model (2018) which envisaged that 848,000 tonnes per annum of residual waste would be managed at new energy from waste developments. In this regard, I find no conflict with CDP Policies 47 and 60. Therefore, I have attached significant weight to these considerations.***
>
> ***IR13.2. The proposed development would be located close to potential users of electricity and heat. Energy benefits include the availability of discounted heat and electricity produced by the facility to local homes and businesses through a [District Heat Network] and [Electricity Smart Grid] thereby providing constant and stable energy and the ability to offer of discounted heat and power to existing and prospective occupiers. The obligations contained within the UU would ensure the delivery of the necessary heat and power connections. In this regard, the proposal provides the potential to act as a catalyst to attract new employment development within the industrial park, particularly those businesses with high energy and heat requirements. I have attached significant weight to these considerations.***
>
> ***IR13.3. As a consequence of providing national grid connectivity and associated infrastructure, the proposal would address the current prohibitive costs to facilitate the completion of the extant 5MW Solar Farm. This, in turn, would deliver additional renewable energy for the benefit of the locality. However, I consider this to be an opportunistic and consequential benefit which is not directly part of the purpose of the development proposed. Consequently, I have attributed limited weight to this matter. I have also attached limited weight to the provision of the proposed safeguarded land adjacent to the site for use as a future electric vehicle charging facility.***
>
> ***IR13.4. Limited positive weight should be attached to the jobs that would be created during both construction and operational phases of the scheme, and the financial benefits to the local economy that would accrue. I have also attributed moderate weight to the proposal's positive impact on biodiversity.***
>
> ***IR13.5. In undertaking a reasonable assessment of the climate change evidence submitted in the Inquiry, this leads me to find that the proposed development would likely result in lower GHG [Greenhouse Gases] emissions compared to landfill over a 25 – 30 year lifetime and facilitate the availability of localised decarbonised power and heat generation. However, there are inherent uncertainties in the GHG emission savings calculations that are outlined earlier in this Report. These uncertainties lead me to conclude that the climate change benefits should only be afforded limited weight in the overall planning balance.***
>
> ***IR13.6. I have found that the proposed development would not cause any harm to the contribution made by the setting to the heritage value or significance of any heritage asset… [Continuation text: see below]***
>
> ***IR13.7. Subject to the imposition of appropriate planning conditions, and assuming effective pollution controls that would be imposed in the [Environmental Permit], the appeal scheme***

> ***would not have an unacceptable impact, either individually or cumulatively on health or living conditions. With appropriate planning and pollution controls, I see no impediment to the effective integration of the proposed development with existing businesses. With regard to these matters, I find no conflict with CDP Policy 31.***
>
> ***IR13.8. [see below]***
>
> ***IR13.9. I also recognise the community reservations regarding the proposed development, which are understandable. The perception of harm is a material consideration. However, for the reasons given earlier in this report, this should be afforded limited weight in the overall planning balance.***

12. Returning to MC4 (effect on character and appearance of the surrounding area), the Inspector's chapter 13 reasoning was as follows (at IR13.6 and 13.8):

> ***IR13.6 … In addition, I do not consider that there would be any adverse effect on the setting of the AONB and the proposal would not, individually or cumulatively, be harmful to the special qualities or statutory purposes of the AONB.***
>
> ***…***
>
> ***IR13.8. However, I have found that the proposed development would have a moderate adverse effect on the surrounding landscape increasing to moderate to major in respect of the impact on the AHLV, primarily as a consequence of the stack and the impact of the upper parts of the main building in some wider landscape views. In addition, there would be moderate to major significant visual effects primarily associated with views from footpaths and residential properties in closer proximity to the site. Therefore, I consider that the proposed development would cause harm to the character and quality of the landscape and would be contrary to the provisions of Policies 29, 39 and 61(a) of the CDP. These are considerations to which I have afforded significant weight.***

13. The Inspector's ultimate conclusion was then this (at IR13.10 and 13.11):

> ***IR13.10. In final conclusion, balancing all of the matters above, I consider that the adverse impacts of the proposed development would be significantly and demonstrably outweighed by the very weighty benefits related to the waste disposal hierarchy and discounted energy provision. The proposal would accord with the development plan, NPPW [National Planning Policy for Waste] and Framework when read as a whole. It would therefore constitute sustainable development, taking into account all three aspects set out in paragraph 8 of the Framework. As such, the presumption in favour of such development, as set out in paragraph 11 of the Framework, should be applied and the appeal allowed.***
>
> ***IR13.11. In coming to the above view, I have taken full and careful account of all of the representations made and the evidence provided by interested parties and the Rule 6 Party in the Inquiry. Such evidence was presented in a professional manner with clarity and relevance throughout the Inquiry. However, the views expressed and the evidence provided must be balanced against the development plan, the Framework, NPPW and other material considerations. In this case the evidence leads me to the conclusion that, on balance, the appeal should succeed.***

14. As a discrete issue within chapter 11, the Inspector had analysed the UU. One of the topics there considered related to UU Schedule 8 and alleviation of local energy poverty (see §45 below). The Inspector referred to the applicable tests under regulation 122(2) of the Community Infrastructure Levy (CIL) Regulations 2010 (SI 2010/948) (IR11.1). Reference was made to the Council's conclusions that Schedule 8 would not accord with regulation 122 (IR11.2). The Inspector had set out the Developer's case on

this issue (IR5.98 and IR5.99) and the Council's case on it (IR6.163 to IR6.167). The Inspector's own reasoning was at IR11.21 and IR11.22 (see §§45 and 48 below).

The Secretary of State's Decision Letter ("DL")

15. The DL was issued on 26 June 2023. It explained that the decision had been made on behalf of the Secretary of State by Lee Rowley (Parliamentary Under-Secretary of State). The DL is a 9-page document comprising 45 paragraphs. The Secretary of State began (DL7 to DL9) by referring to s.38(6) of the 2004 Act, to the development plan as including the CDP, to the Framework (NPPF) and to other policy and guidance.

16. Within the DL, the same 9 main considerations as seen in the IR (§10 above) were addressed as 'main issues" (DL11 to DL28). The anatomy of that section of the DL is as follows:

> ***MC1. The principle of development on the Hownsgill Industrial Park [DL11]***
>
> ***MC2. Waste disposal or recovery? [DL12]***
>
> ***MC3. Need for the proposed facility [DL13]***
>
> ***MC4. Character and appearance [DL14 to DL23]***
>
> ***MC5. Effect on heritage assets [DL24]***
>
> ***MC6. Climate change [DL25]***
>
> ***MC7. Effect on economic development [DL26]***
>
> ***MC8. Alternative sites and technology [DL27]***
>
> ***MC9. Benefits of the proposed development [DL29]***

17. Leaving aside MC4, to which I will again return, the Secretary of State's decision said this as to the other material considerations:

> ***[MC1] Principle of development on the Hownsgill Industrial Park.***
>
> ***DL11. For the reasons given at IR12.2-12.7, the Secretary of State agrees that [the] proposed development would not be inconsistent with the land use aspirations of Policy 2 of the CDP, particularly as Policy 61 supports the use of employment sites for such waste management uses (IR12.7). He further agrees that the location of the proposed development would, in principle, conform with the siting guidance provided in the National Planning Policy for Waste (IR12.5).***
>
> ***[MC2] Waste disposal or recovery?***
>
> ***DL12. For the reasons given at IR12.8-12.11, the Secretary of State agrees with the Inspector that the proposal needs to achieve R1 status in order to conclusively demonstrate that it comprises a recovery operation that would move the management of waste up the hierarchy and demonstrably meet the requirements of Policy 47 of the CDP (IR12.11). For the reasons given at IR12.12-12.15, he further agrees that Planning Condition 20 provides an appropriate mechanism to ensure that the proposed facility can only commence operations when R1 status has been achieved, and that it is appropriate to consider the proposed development as a recovery facility rather than a waste disposal facility (IR12.15). Like the Inspector at IR12.16 he finds no conflict with the waste hierarchy, which places energy recovery above disposal.***
>
> ***[MC3] Need for the proposed facility***

DL13. For the reasons given at IR12.17-12.35, IR12.151-152 and IR13.1, the Secretary of State agrees with the Inspector's conclusion at IR12.32 that the evidence presented in the inquiry demonstrates a local and regional need for more recovery capacity to divert the management of C&I waste up the hierarchy and away from landfill, and that the proposal would make a significant contribution to meeting this need. He further agrees that the proposal would be in accordance with the guidance in the Waste Management Plan for England, which recognises that 'energy from waste is generally the best management option for waste that cannot be reused or recycled in terms of environmental impact and getting value from waste as a resource' (IR12.34), and would also be in accordance with the development plan policies set out in IR12.35. In reaching his conclusions he has taken into account the Consett Committee's concerns at IR12.27 that the appeal scheme may prejudice recycling initiatives as a consequence of a need to maintain sufficient combustible products in the feedstock, but for the reasons given at IR12.27-12.29 he, like the Inspector, is not persuaded that the proposed development would lead to a demonstrable reduction in the recycling of C&I waste. Overall he agrees that the need for the facility, moving waste up the waste hierarchy, and the sustainable waste benefits it offers carries significant weight (IR12.32 and IR13.1).

[MC4. DL14-DL23: see below]

[MC5] Effect on heritage assets

DL24.For the reasons given at IR12.92-12.106 and IR13.6, the Secretary of State agrees with the Inspector that there would be no harm to or loss of the heritage value of the Grade II listed High Knitsley Farmhouse and Grade II listed Barn (IR12.106). The Secretary of State has further considered the other assets raised by the Consett Committee. For the reasons given at IR12.107-12.119 he agrees that the proposed development would not cause any harm to the contribution made by the setting to the heritage value or significance of any heritage asset (IR12.119 and IR13.6). He further agrees that there is no conflict with advice in Part 16 of the Framework or Policy 44 of the CDP or Appendix B to the NPPW in this respect (IR12.119).

[MC6] Climate change.

DL25. For the reasons given at IR12.120-12.135 and IR13.5, the Secretary of State agrees with the Inspector that a reasonable assessment of the evidence submitted in the inquiry suggests that the proposed development would likely result in lower GHG emissions compared to landfill over a 25-30 year lifetime, during which period it would also facilitate the availability of localised decarbonised power and heat (IR12.134). He further agrees that there are inherent uncertainties, particularly regarding the biogenic carbon content of the waste and hence the extent of emissions savings, the extent to which the available heat and power would be taken up by existing and new businesses/residential developments and whether CCS may be installed; therefore while there would be some savings on CO2 emissions over landfill, the extent of this cannot be determined with any degree of precision (IR12.135). Therefore, while he agrees that in this respect the proposal would be consistent with Policy 61 of the CDP and paragraphs 154 and 155 of the Framework, he further agrees that the climate change benefits should only be afforded limited weight in the overall planning balance (IR12.135).

[MC7] Effect on economic development

DL26.For the reasons given at IR12.136-12.142, the Secretary of State agrees with the Inspector that in the absence of substantive evidence to the contrary, there would be no material harm to the future economic development of the site, and that the proposed development is more likely to be a catalyst for the attraction of further development (IR2.142).

[MC8] Alternative sites and technology

DL27.The Secretary of State has taken into account the Inspector's assessment of matters set out at IR12.143-12.149. He notes the conclusion in the Environmental Statement [ES] that the proposed development fulfils an established need and that there are not more suitable locations, technologies or layouts of the proposed buildings and plant. He further notes and agrees with the Inspector's conclusion that in the absence of any substantive evidence to the

contrary, the ES has appropriately considered reasonable alternatives which are relevant to the proposed development (IR12.149).

[MC9] Benefits of proposed development

DL28.The Secretary of State has considered the Inspector's analysis at IR12.150-12.162 of the benefits of the proposed development and the implications of not proceeding. He agrees with the Inspector for the reasons given at IR12.142, IR12.153 and IR13.2 that the proposal would provide energy benefits associated with the availability of discounted heat and electricity, and that the proposal provides the potential to act as a catalyst to attract new employment development within the industrial park, particularly those businesses with high energy and heat requirements. He further agrees that this carries significant weight (IR13.2). He agrees with the Inspector's assessment of the economic benefits of the proposal as set out at IR12.157-12.158 and IR13.4, and further agrees that these should carry limited weight (IR13.4). He agrees with the Inspector at IR12.156 and IR13.3 that the safeguarding of land for use as an Electric Vehicle Charging Facility carries limited weight, and further agrees for the reasons given at IR12.159-12.161 and IR13.4 that moderate weight should attach to the biodiversity net gain. The Secretary of State further considers, for the reasons given at IR11.19-11.20 and 12.156 (but not IR13.3, as set out in paragraph 36 below), that the benefits of completion of Hownsgill Solar Farm carry moderate weight.

18. Returning to MC4, the Secretary of State's decision reasoned as followed (at DL14-23):

[MC4] Character and appearance

DL14. The Secretary of State has noted the landscape background and baseline set out in IR12.36-12.43. For the reasons set out in IR12.44-12.54, he agrees with the Inspector's conclusions on the significance of the plume (IR12.51) and further agrees that the proposed development would not create unacceptable light pollution and would be in accordance with local and national policy in this respect (IR12.54).

DL15. The Secretary of State agrees with the Inspector at IR12.55 that views of the proposed development would potentially be more widespread to the south and west, and further agrees at IR12.56 that the 'significance of the impact' of the proposed development on landscape receptors is a function of the 'sensitivity of the receptor' to the particular type of development, and the 'magnitude of change' resulting from the proposed development.

DL16. For the reasons given at IR12.55-12.60, the Secretary of State agrees with the Inspector that while over time the industrial park may become more developed, the height of the proposal would be significantly greater than any existing buildings (IR12.57), and that in the current context it would retain a degree of prominence in the context of the industrial park (IR12.60).

DL17. For the reasons given at IR12.61-12.63, he agrees with the Inspector at IR12.61 that the non-designated landscape has a medium sensitivity to change, and at IR12.62 that the magnitude of landscape effect would be medium, and at IR12.63 that there would be a moderate adverse landscape effect. For the reasons given at IR12.64-65, the Secretary of State agrees that the particular characteristics of the AHLV give it a high sensitivity to change (IR12.64). Taking into account the medium nature of the magnitude of landscape effect, he agrees that the residual landscape effect on the AHLV would be in the range of moderate to significant and adverse (IR12.65).

DL18. For the reasons given at IR12.66-12.76, the Secretary of State agrees that there would be some moderate to major adverse visual impacts, particularly in views closer to the site, but that the effect on longer distance views would be neutral or, at worst, minor adverse (IR12.76). He agrees that the most adverse impact would be from the public footpath to the south of the site, looking across part of the AHLV, where there would be a noticeable deterioration in the existing view, and the visual effect would likely be in the range of moderate to major and adverse (IR12.70).

DL19. Overall the Secretary of State agrees with the Inspector that the proposed development would have a moderate adverse effect on the surrounding landscape, increasing to moderate to major in respect of the impact on the AHLV (IR12.90), primarily as a consequence of the stack and the impact of the upper parts of the main building in some wider landscape views (IR13.8). For the reasons given at IR12.66-12.76 he further agrees that there would be moderate to major significant visual effects primarily associated with views from the footpaths and residential properties in closer proximity to the site (IR12.90, IR13.8).

DL20. He therefore agrees at IR12.91 and IR13.8 that the proposed development would cause harm to the character and quality of the landscape and would not conserve the special qualities of the AHLV. Taking into account the sensitivity of the AHLV, the wide area affected, and the magnitude of the landscape and visual effects identified, in the Secretary of State's judgement this matter carries very significant weight against the proposal.

DL21. The Secretary of State has gone on to consider whether there is accordance with the relevant development plan policies. Taking into account the Inspector's conclusions at IR12.91, he considers that the proposal would be contrary to the provisions of Policy 29 of the CDP, which states that all development proposals will be required to contribute positively to an area's character, identity, heritage significance, townscape and landscape features, helping to create and reinforce locally distinctive and sustainable communities. He further agrees that it would be contrary to the provisions of Policy 61(a) of the CDP, which states that proposals for new waste management facilities will be permitted where they are located outside and do not adversely impact upon the setting or integrity of internationally, nationally and locally designated sites and areas.

DL22. Policy 39 provides that development affecting AHLV 'will only be permitted where it conserves, and where appropriate enhances, the special qualities of the landscape, unless the benefits of the development in that location clearly outweigh the harm'. The Secretary of State agrees with the Inspector at IR12.91 that the proposed development would not conserve the special qualities of the AHLV. He has gone on to consider whether the test set out in Policy 39 is met. He agrees with the Inspector that the proposed development would be contrary to Policy 39. He has taken into account the benefits of the scheme, as set out in this decision letter and summarised in paragraph 39 below. He has found at paragraph 11 above that the principle of this development on this site is acceptable. However, he finds conflict with Policy 39, and further finds that under the terms of the policy, the development should not be permitted.

DL23. The Secretary of State has carefully considered the effect of the proposal on the North Pennines AONB. For the reasons given at IR12.77-12.89, IR12.90-12.1 and IR13.6, he agrees with the Inspector at IR12.85 that the proposal would not appear as being overly dominant or overbearing within the setting, although it will be seen; and that it would not comprise a visually intrusive feature or a distraction within the landscape in views from the AONB. He has taken into account that Natural England raised no objection to the planning application (IR12.86). Like the Inspector he is satisfied that there would not be any adverse effect on the setting on the AONB, and the proposal would not, individually or cumulatively, be harmful to the special qualities or statutory purposes of the AONB (IR12.90). He therefore agrees at IR12.89 and IR13.6 that there would be no conflict with the provisions of paragraphs 174 and 176 of the Framework, or Policies 38, 39 or 61(a) of the CDP in this respect.

19. The Secretary of State then addressed the planning balance and overall conclusion at DL38 to DL42, as follows:

Planning balance and overall conclusion

DL38. For the reasons given above, the Secretary of State considers that the appeal scheme is not in accordance with the provisions of Policies 29, 39 and 61(a) of the CDP which together seek to protect the character of the existing landscape. Taking into account the centrality of this issue to the case as a whole and the specific terms of Policy 39, along with his findings on it (paragraph 22 above), he considers that the proposal is not in accordance with the development plan overall. He has gone on to consider whether there are material

> ***considerations which indicate that the proposal should be determined other than in line with the development plan.***
>
> ***DL39. The need for the facility, moving waste up the waste hierarchy and the sustainable waste benefits it offers together carry significant weight in favour of the proposal, while the energy benefits of the scheme and its potential to act as a catalyst for further development together carry significant weight. Moderate weight attaches to each of the biodiversity net gain and the completion of Hownsgill Solar Farm, while the climate change benefits, the safeguarding of land for use as an Electric Vehicle Charging Facility, and the economic benefits of the proposal each carry limited weight.***
>
> ***DL40. Harm to the character and appearance of the landscape carries very significant weight against the proposal, while the perception of harm to public health and the effect on housing demand carries limited weight.***
>
> ***DL41. Overall, the Secretary of State considers that there is conflict with the development plan and the material considerations in this case do not indicate that permission should be determined other than in accordance with the development plan.***
>
> ***DL42. The Secretary of State therefore concludes that the appeal should be dismissed and planning permission should be refused.***

Mr Tabachnik KC accepts that DL41 reflects the Secretary of State asking the right question (§9 above). In relation to UU Schedule 8 and alleviation of local energy poverty, the Secretary of State's decision was reasoned at DL37 (see §49 below).

(1) The AHLV Issue

20. The first agreed issue is whether the Secretary of State misinterpreted Policy 39 of the CDP. This is an issue relating to harm. Its focus is on the reasoning at DL22.

21. CDP Policy 39 is part of the development plan. It says this (the numbering is mine):

> ***Policy 39 Landscape***
>
> ***[1] Proposals for new development will be permitted where they would not cause unacceptable harm to the character, quality or distinctiveness of the landscape, or to important features or views.***
>
> ***[2] Proposals will be expected to incorporate appropriate measures to mitigate adverse landscape and visual effects.***
>
> ***[3] Development affecting Areas of Higher Landscape Value [AHLVs] defined on Map H, will only be permitted where it conserves, and where appropriate enhances, the special qualities of the landscape, unless the benefits of development in that location clearly outweigh the harm.***
>
> ***[4] Development proposals should have regard to the County Durham Landscape Character Assessment and County Durham Landscape Strategy and contribute, where possible, to the conservation or enhancement of the local landscape.***

22. I will place the AHLV Issue in its setting. The AHLV had featured as ground (3) for the Council's refusal of planning permission (§6 above). The Inspector identified Policy 39 (IR4.4) and recorded the Council's position: the Council, recognising that the development site is "not within the AHLV" (IR6.34), had identified "harm to the AHLV" (IR5.23), the impact of the development "on" and "upon" the AHLV (IR6.40, IR6.63), harm "to the setting of" the AHLV (IR6.111) and harm "to" the AHLV (IR6.112). The Council specifically relied on Policy 39 sentence [3] (IR6.108), drawing

attention to the question whether the development "conserves" or "enhances" the "special qualities" of the AHLV (IR6.109). The Inspector's reasoned conclusions included that the AHLV had a high sensitivity to change (IR12.64); that "the residual landscape effect [of the development] on the AHLV would be in the range of moderate to significant and adverse" (IR12.65); that agreed viewpoint 5 (for considering visual impact of the proposed development) was a view from the public footpath to the south of the site "looking across part of the AHLV", where there would be a noticeable deterioration in the existing view which would cause a medium magnitude of effect, with a visual effect likely to be in the range of moderate to major and adverse (IR12.70); that the proposed development would have a moderate adverse effect on the surrounding landscape increasing to moderate to major in respect of the impact on the AHLV (IR12.90); and that the proposed development would cause harm to the character and quality of the landscape, would not "conserve the special qualities of the AHLV", and would be "contrary" to the provisions of policy 39 (IR12.91). In Chapter 13, the Inspector recorded the moderate to major impact on the AHLV, and the harm contrary to Policy 39, which was one of the impacts he afforded "significant weight" (IR13.8).

23. Here is DL22 again:

> ***DL22. Policy 39 provides that development affecting AHLV 'will only be permitted where it conserves, and where appropriate enhances, the special qualities of the landscape, unless the benefits of the development in that location clearly outweigh the harm'. The Secretary of State agrees with the Inspector at IR12.91 that the proposed development would not conserve the special qualities of the AHLV. He has gone on to consider whether the test set out in Policy 39 is met. He agrees with the Inspector that the proposed development would be contrary to Policy 39. He has taken into account the benefits of the scheme, as set out in this decision letter and summarised in paragraph 39 below. He has found at paragraph 11 above that the principle of this development on this site is acceptable. However, he finds conflict with Policy 39, and further finds that under the terms of the policy, the development should not be permitted.***

24. This is the essence, as I saw it, of Mr Tabachnik KC's argument on the AHLV Issue. Policy 39 [3] was materially misinterpreted by the Secretary of State at DL22. The objectively correct interpretation is as follows. Policy 39 [1] is broad and would be engaged by a development, at any site, within the setting of an AHLV. Policy 39 [3] is a heightened level of protection, engaged only by development taking place at a site within the AHLV as defined on Map H. This is the straightforward reading of the words used. Policy 39 [3] has to be read as a whole. The phrase "in that location" is specific and "location" means the AHLV as defined on Map H. "Location" cannot sensibly mean the development site. The phrase "in that location" would become superfluous if it did. There is a parallel with the protection of an AONB (see NPPF §§176-177), where there is a higher test for development "within" an AONB, than for development "within" its "setting". There is also a parallel with the "clearly outweighed" language familiar for Green Belt protection (see NPPF §148). The "clearly outweigh" test in [3] is therefore inapplicable in the present case, because the development is not within the AHLV. Treating [3] as applicable was an error of law. This was not a material vitiating flaw within the Inspector's analysis, since the Inspector's reasoned recommendation found benefits which did clearly outweigh effects on the AHLV (IR13.10). But it was highly material to the Secretary of State's conclusions (DL20), on an issue of centrality (DL38).

25. I am unable to accept these submissions. I accept the submissions of Mr Smyth for the Secretary of State and the written submissions of Mr Barrett for the Council. The ordinary and natural meaning of the words used in Policy 39 [3] is that the policy is engaged by a development "affecting" an AHLV. The word "affecting" is clear and unambiguous. It would have been very easy to draft the policy by reference to "within" or "in". The reference to other policies with other wording only serves to emphasise that other policies do use the language of "within" or "in", where that is intended. The phrase "in that location" in Policy 39 [3] is not a reference to the development being located in the AHLV. It would have been very easy to say "in that Area". The ordinary and natural meaning of "location" is the place proposed for the development. The development, taking place there, would be "affecting" the AHLV and producing the "harm". The development, taking place there, would bring the "benefits". A development, albeit outside the AHLV but "affecting" it, can in principle be one which "conserves" or "enhances" the special qualities of the landscape. All of this makes perfectly good sense as to underlying aims, where the AHLV is being protected. All of this was well illustrated in the present case. As the Inspector emphasised in IR chapter 12, agreed viewpoint 5 was one which "looks across part of the AHLV", where visible parts of the building and stack at a distance of 1.7 km would occupy views across the landscape (IR12.70). The Inspector had earlier described the AHLV as particularly distinctive and valued for its scenic quality with a high sensitivity to change, describing the degree of intervisibility between the AHLV and the appeal site, and identifying the residual landscape effect on the AHLV of the development as being in the range of moderate to significant and adverse (IR12.64 and IR12.65). The development would not be within the AHLV. But it would affect the AHLV. The Inspector and the Secretary of State concluded (IR12.91 and DL22) that the proposed development would not conserve the special qualities of the AHLV. Ultimately, the Secretary of State did not consider that the benefits of the development did clearly outweigh this harm. This was a disagreement in planning judgment terms with the Inspector, who considered the adverse impacts to be significantly and demonstrably outweighed by very weighty benefits (IR13.10). There was no misinterpretation of Policy 39. The policy straightforwardly means what it says (see Corbett v Cornwall Council [2022] EWCA Civ 1069 at §19; and Mansell v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314 at §41).

26. There is a footnote to this issue. During the inquiry and until this claim for statutory review, Policy 39 [3] was approached and understood in this same straightforward way, by the Developer and its team. The Developer's closing submissions (19 August 2022) countered the Council's claimed harm "to the AHLV", including that the development "will be seen above the wooded areas comprising the AHLV", arguing that the impacts "are outweighed by the benefits of the Appeal Scheme … in accordance with the terms of Local Plan Policy 39" (pp.6-7 §7). Mr Beswick's proof of evidence for the Developer (April 2022) adopted that same approach (p.34 §§7.2.30-7.2.31). Nobody said that Policy 39 [3] was engaged only by effects of developments "within" the AHLV. The Council had invoked Policy 39 [3] from the start, including in its statement of case for the inquiry. It arose in relation to one of the grounds for refusing planning permission in the first place. None of this precludes the Developer from taking this point now, as a point of objective interpretation. But – given that policies are to be interpreted straightforwardly – it is not a bad cross-check that nobody, even on the Developer's side, was reading Policy 39 [3] in the way now said to be its correct meaning.

(2) The Process Issue

27. The second agreed issue is whether the Secretary of State's approach regarding the weight afforded to certain landscape/visual impacts was unlawful and/or unfair. This too is an issue relating to harm. At its heart are two questions about the manner and mode of the process (and enquiry) by which the Secretary of State's decision came to be made.

28. To put this issue in its setting, I need to describe the viewpoints. These were used to help assess the impacts of the development on the different range of views towards the site. There was a list of 20 viewpoints (IR12.41). As the papers before the Court illustrate, you can do various things using a viewpoint. One is that photos can be taken, to depict what is currently seen at the viewpoint. Another is that a visit can be made, to see that for yourself. A third is that a photomontage can be created, using a photo and superimposing a structure (whether shaded-in or a 'wireline' outline) to depict the view including the proposed development if constructed. A fourth is that you can fix a helium balloon at the development site, before then taking a photograph from the viewpoint, so that the balloon gives an indication of how the height of the development would look. The Inspector had the benefit of all of this. There were photos and photomontages. There was a one-day accompanied site visit (15 August 2022). The IR contained an analysis which described the assessed impacts from each viewpoint.

29. Mr Tabachnik KC's submissions on this part of the case were, in essence as I saw it, as follows.

i) On the important topic (MC4) of character and appearance (DL14 to DL23), the Secretary of State was considering the Inspector's detailed analysis in IR12.36 to IR12.91, reflected in IR13.6 and IR13.8 (§12 above). What the Secretary of State did, on this vital part of the analysis, was to weigh certain landscape and visual impacts differently from the way in which the Inspector had weighed them. In the discussion of landscape and visual impacts, the Secretary of State's assessment adopted an evaluative judgment which gave the negative impacts "very significant weight" against the proposal (DL20 and DL40). The Inspector had carefully assessed those impacts in an analysis culminating in this reasoned conclusion: that the impacts were to be afforded "significant weight" (IR13.8). The Secretary of State's word "very" is clearly deliberate and important. This was a 'recalibration' of weight, plainly material to the decision to reject the Inspector's recommendation. In relation to the planning balance and overall conclusions (IR chapter 13), the Inspector had assessed the benefits of the development, including very weighty benefits, to arrive at the assessment that these significantly and demonstrably outweighed the adverse impacts (IR13.10). The Secretary of State disagreed as to that planning balance and overall conclusion (DL38 to DL41). The positives did not, for the Secretary of State, outweigh the negatives. Again, what the Secretary of State was doing was according a different, 'recalibrated', weight to certain landscape and visual impacts.

ii) What made that 'recalibration' of weight unlawful and/or unfair were two basic flaws in the way in which the decision-making took place. The first basic flaw concerns the selected documents provided to Mr Rowley as the decision-maker, drawn from those documents which had been before the Inspector and considered

by the Inspector. So far as landscape impacts and visual impacts are concerned, the selection of those materials was skewed. They included various maps, plans and photomontages. They included photomontages referable to the various viewpoints. These included sources derived from the Developer, who was seeking planning permission. They included sources derived from the Council, and the Consett Committee, who were each opposing planning permission. The documents supplied included photos and photomontages supplied by Steve Newcombe on behalf of the Consett Committee and his accompanying proof of evidence describing his method. But they did not include the proof of evidence of Mr Beswick, filed on behalf of the Developer, in which the virtues of the Developer's photomontage method and the shortcomings of Mr Newcombe's photomontage method had been described. Moreover, for one important viewpoint (viewpoint 6), the selection of documents inexplicably omitted the Developer's photomontage with the 'wireline' outline. It was essential for the Secretary of State to have a fair, balanced and complete picture. Especially if the Secretary of State was minded to 'recalibrate' the weight of visual landscape and impacts. It was unfair, unreasonable and materially misleading for the selection of documents to have been skewed and one-sided. That was the first basic and vitiating flaw.

iii) The second basic flaw is this. The Inspector had undertaken a site visit on an accompanied basis on 15 August 2022, following an extensive and comprehensive itinerary prepared by the parties, as he explained (IR1.2). The Inspector's assessment was therefore informed – not only by a comprehensive and balanced set of materials – but also by a significant and valuable source of first-hand experience. A site visit can be of crucial importance and photos or photomontages are no substitute for it (see Newsmith Stainless Ltd v Environment Secretary [2001] EWHC 74 (Admin) [2017] PTSR 1126 at §§6-7, 10). The Secretary of State ought not to have 'recalibrated' the weight afforded to landscape impacts and visual impacts, while being deprived of such an obvious advantage. Duties of basic fairness, reasonableness and reasonably adequate enquiry required that – unless the Inspector's assessment as to landscape impacts and visual impacts were being accepted – the decision-maker needed to visit the important locations and viewpoints and see the position for himself, before making up his mind. That is the second basic and vitiating flaw. Either is sufficient. Collectively, they are unanswerable. They undermine the public law legality of the Secretary of State's approach and decision.

30. I am unable to accept this argument. Before I explain why, I will deal with a passage (§28) in a document dated 16 December 2021 entitled "Guidance on Planning Propriety: Planning Casework Decisions". I agree with Mr Tabachnik KC that this passage does not caution against site visits by planning ministers to inform decision-making. It cautions against planning ministers accepting a site visit invitation relating to a planning application which may subsequently come to the Secretary of State for a decision; it then refers to site visits undertaken by planning inspectors in recovered appeals; and it cautions against unaccompanied site visits by planning ministers. The focus of all this is on planning propriety. The previous paragraph (§27) speaks of the importance of the Secretary of State considering all the evidence at the relevant time with an open mind before reaching a decision. In the event, Mr Smyth accepts that a decision-making planning minister could conduct a site visit. There is no evidence of

the Secretary of State deciding against a site visit by misappreciating the December 2021 Guidance, and the Developer does not say there was any public law error of that species.

31. These are the reasons why, in agreement on this part of the case with Mr Smyth and Mr Barrett, I do not accept Mr Tabachnik KC's submissions.

i) It is true that the Secretary of State 'saw it differently', in terms of visual landscape and visual impacts. But it is important to understand in what way. The Inspector had carefully addressed the relevant landscape and visual impacts. Those impacts were identified by the Inspector, in terms of a quantified nature and degree of harm. These were identified for each viewpoint. The Inspector used language, to identify with clarity, what was the nature of each assessed impact. Mr Tabachnik KC's skeleton argument gave this accurate description:

> ***The Inspector found: (i) Moderate to significant adverse impact on the AHLV (IR12.64, 12.65) and otherwise moderate adverse landscape impact in the vicinity of the Site (IR12.63). (ii) Moderate to major adverse impact on viewpoint 5 (VP5), a footpath which looks across part of the AHLV from c1.7km to the south (IR12.70). (iii) Moderate adverse impact on four other viewpoints -- VPs 1, 2, 6 and 7 (IR12.67-12.71). (iv) Impacts on other viewpoints were either minor or neutral. (v) The considerations at (i) – (iv) were together afforded "significant weight" against the Appeal Scheme (IR13.8).***

The Secretary of State in the DL went through each of Mr Tabachnik KC's (i) to (iv). Having considered each one, he recorded express agreement with each individual characterisation and quantification. There was no 'recalibration' of any of the individual assessments.

ii) The difference came at Mr Tabachnik KC's (v). The considerations at (i) – (v) were, together, afforded "very significant weight". The Secretary of State was not disagreeing with the nature of the impact, or the degree of seriousness, from each or any viewpoint. If the Secretary of State had considered that there was any understatement of any impact from any viewpoint, the DL would have been expressed differently. Yes, the Secretary of State 'saw it differently'. But that does not mean he was picturing something different from what the Inspector was picturing at any viewpoint. Instead, the Secretary of State was 'seeing differently' the overall weight to be attributed to these already-calibrated impacts, having accepted and agreed with the 'calibration' for each one.

iii) There was in my judgment no duty, in fairness or reasonableness or to ensure a reasonable sufficiency of enquiry (R (Suffolk Energy Action Solutions SPV Ltd) v Energy Security Secretary [2023] EWHC 1796 (Admin) at §§65-66), to go and see the view from the viewpoints. The Secretary of State knew that the Inspector had taken that step, and read and considered the IR and the materials knowing the Inspector had that advantage. Each careful characterisation of each impact from each viewpoint was being accepted and endorsed. The decision not to conduct a site visit – as would more cogently be said to be necessary if the Secretary of State were proposing to 'second-guess' any individual quantification – fell squarely within the decision-maker's latitude as to reasonable sufficiency of enquiry. Three footnotes are worth adding. First, the planning decision had been 'recovered' and the Inspector was making a recommendation, not taking a decision. Part of the function of the IR was to provide information for the

decision-maker. If measuring a visual impact had called for or been susceptible to more precise language, the Inspector would have used it. Secondly, a site visit was and is very valuable, but you cannot see the development. Thirdly, Mr Smyth is right to say that this would not – in reality – be the decision-maker getting in a car and driving or looking around. There are reasons why site visits are structured, with routes and precision and accompaniment. If it were needed, it needed to be done properly.

iv) I turn to the photos, plans and photomontages. It was entirely appropriate that the decision-maker should have a selection of materials. The selection of those materials had to be made from the entirety of the body of evidence and submissions considered by the Inspector. The IR was full of cross-references and footnoted document numbers. So far as materials relating to visual impacts and the viewpoints were concerned – including photos, plans and photomontages – the Secretary of State has disclosed in these proceedings the materials which were provided and considered. There are some 120 pages. Within them, there are 19 pages of photomontages from the Developer (viewpoints 1-19), and a further 2 pages (viewpoints 1-4 and 7). These all came from the Environment Statement. Later, there are 21 pages of photomontages from the Consett Committee (viewpoints 1-19). These were an appendix to a proof of evidence from Mr Newcombe for the Consett Committee, also included in the Secretary of State's materials, whose main body is 28 pages and which contains embedded photographs. Then there are 15 pages of further photomontages (viewpoints 2-7, 10-14, 16-19). Some of this material derives from an appendix to the proof of evidence from Mr Beswick for the Developer. Also included was an extract from that Beswick proof of evidence, focusing on the AHLV and the most relevant viewpoints (3-6, 9, 11, 18 and 20). The main body of the Beswick proof of evidence was 49 pages and a 3-page appendix (appendix D) addressed photography and photomontage methodology. These were not included for the Secretary of State.

v) There was clearly a conscientious exercise in extracting a workable volume of materials for the decision-maker. It was an exercise which falls squarely within the latitude (see R (Save Stonehenge WHS Ltd) v Transport Secretary [2021] EWHC 2161 (Admin) [2022] PTSR 74 at §65) of gathering a sufficiency of material for a reasonable sufficiency of enquiry. Mr Tabachnik KC points out that the Developer's 'wireline' photomontage for viewpoint 6 is absent. Some of the Developer's photomontages from the Environment Statement (eg. viewpoint 2) included a superimposed depiction of the facility. The Developer's photomontage for viewpoint 6 in the Environment Statement did not. Instead, it had red dotted lines to show the width of the approximate extent of the site. That was included. A different page from Mr Beswick's appendix B would have shown a photomontage with the 'wireline', to depict the development itself, for viewpoint 6. But that does not establish an unfairness or unreasonableness vitiating the Secretary of State's decision. Nothing in public law terms can turn on the difference between the red dotted lines (present) and the blue wireline (absent) in the photomontages included for viewpoint 6. Especially when it is remembered that the Secretary of State was expressly agreeing with the Inspector's evaluative assessment of quantification for viewpoint 6, and for each other viewpoint.

vi) Mr Tabachnik KC points to what he characterises as a hot controversy between the Developer and the Consett Committee as to the reliability of Mr Newcombe's method, alongside the reliability of Mr Beswick's method. This is about the way photomontages are generated and presented, with the superimposed depiction of the development on the photographed landscape. It is right that the 3-page Appendix D to the Beswick proof of evidence would have given the decision-maker Mr Beswick's description of the virtues of the Developer's photomontage method. Chapter 7 of Mr Beswick's proof of evidence would have provided Mr Beswick's response to the Consett Committee and (at pp.42-43 §§7.4.3 to 7.4.8) his views about why the Newcombe photomontages had "not been undertaken using the industry standard guidance" and ought to be "given little weight" (§7.4.8). But this does not establish an unfairness or unreasonableness vitiating the decision of the Secretary of State. The IR set out a full summary of the Consett Committee's case based on the Newcombe evidence (IR7.35 to IR7.47) including the concerns raised about the Developer's own photomontages (IR7.37, IR7.40, IR7.47). The IR also set out a full summary of the Developer's case (IR5.1 to IR5.102). Mr Tabachnik KC accepts that the 'battle of the photomontage methodologies' did not feature in his closing submissions because – he says – the Inspector 'had the point' from the evidence and cross-examination. This 'battle' was not, for the Inspector, a principal controversial issue requiring resolution, in order to evaluate and quantify visual impact. Had it been, the Inspector would have said so, would have resolved it, and would have explained in what way and why. Especially where he was writing a report to explain his assessment and recommendation, and to assist the Secretary of State. The Inspector did not characterise the Newcombe depictions as worthy of "little weight". He said (IR12.66) he had "taken into account the photographs provided by Mr Newcombe in coming to my conclusions". If there were a material point about flawed methodology, to flag up and resolve, the Inspector would have done so. If there were an important point to flag up for the Secretary of State, he would have identified it. This was the context for the exercise of judgment in deciding what materials to gather for the decision-maker. There is no public law error or flaw in the Secretary of State not being provided with more of the Beswick proof of evidence or – as Mr Tabachnik KC put it when I pressed him as to what should have happened – all 257 pages including appendices.

vii) The Secretary of State as decision-maker, in my judgment reasonably and fairly, concluded that the various aspects of harm to the character and appearance of the landscape carried "very" significant weight against the proposal (DL40), before going on to ask and answer the legally correct question (DL41), in line with what had been foreshadowed by the Inspector (IR12.1), in the context of the contraventions of Policies 29, 39 and 61, which the Inspector had identified (IR12.91 and DL13.8) and with which the Secretary of State agreed (DL21, DL22 and DL38). I can see no vitiating flaw in the process or lack of reasonable sufficiency in the enquiry.

(3) The Aggregated-Benefits Issue

32. The third agreed issue is whether the Secretary of State disregarded and/or departed without explanation from Government policies on the weight to be attributed to certain benefits of the appeal scheme. This is an issue relating to benefits. Its focus is on DL39.

33. The Inspector recorded that the Developer's case in the inquiry had identified a series of benefits of the development (IR5.34 to IR5.77). The headings were: (i) the provision of new, much-needed waste management resources; (ii) the generation of heat and electricity in particular to local users; (iii) operating as a catalyst for further regenerative economic and sustainability benefits both within the industrial park and in the wider local area; (iv) the alleviation of fuel poverty; and (v) delivering substantial reductions of carbon dioxide emissions as against the landfill baseline.

34. This third issue refers to 'Government policies on the weight to be attributed to certain benefits of the appeal scheme'. Reliance is placed by the Developer on two. The first is EN-1. That is the Department of Energy and Climate Change's July 2011 "Overarching National Policy Statement for Energy". The Inspector listed this as a relevant policy (IR4.5) and the Secretary of State agreed (DL9). At §4.6.8, EN-1 describes the virtues of combined heat and power (CHP) and the approach of the Infrastructure Planning Commission (IPC). It was common ground before me that this statement of policy is applicable not just to the IPC but also to the Council, the Inspector and the Secretary of State in their planning decision-making functions. EN-1 §4.6.8 includes this:

> ***Utilisation of useful heat that displaces conventional heat generation from fossil fuel sources is to be encouraged where, as will often be the case, it is more efficient than the alternative electricity/heat generation mix. To encourage proper consideration of CHP, substantial additional positive weight should therefore be given by the IPC to applications incorporating CHP…***

35. The second policy is the NPPF. Again, the Inspector listed it as a relevant policy (IR4.5) and the Secretary of State agreed (DL9). NPPF §81 includes this:

> ***Planning policies and decisions should help create the conditions in which businesses can invest, expand and adapt. Significant weight should be placed on the need to support economic growth and productivity, taking into account both local business needs and wider opportunities for development…***

36. Here is DL39 again (emphasis added):

> ***DL39. The need for the facility, moving waste up the waste hierarchy and the sustainable waste benefits it offers together carry significant weight in favour of the proposal, while the energy benefits of the scheme and its potential to act as a catalyst for further development <u>together carry significant weight</u>. Moderate weight attaches to each of the biodiversity net gain and the completion of Hownsgill Solar Farm, while the climate change benefits, the safeguarding of land for use as an Electric Vehicle Charging Facility, and the economic benefits of the proposal each carry limited weight.***

37. The essence of Mr Tabachnik KC's submissions on this issue, as I saw it, is as follows. This was a development incorporating CHP. It was also development operating as a catalyst for further development. These are distinct benefits, as reflected in headings (ii) and (iii) (§33 above). They are addressed in distinct policies: EN-1 §4.6.8 and NPPF §81. These policies require attribution, to each of these benefits, of "substantial weight" and (its synonym phrase) "significant weight". EN-1 §4.6.8 reinforces this by using the word "additional". In the all-important planning balance – where the attribution of weight was so important – the Secretary of State made a basic error. These two benefits were weighed in the balance as a single composite item, with a single composite "significant weight". This is unmistakeable from the word "together" in DL39. The Secretary of State identified the combination of the benefits – "together" – as carrying significant weight in aggregate. The Secretary of State misappreciated that "each" of

these benefits, separately, carried "significant weight". That is how they should have featured. The Secretary of State did not say, and did not mean, "each". In consequence, the Secretary of State disregarded – or departed without explanation – from these two Government policies on the weight to be attributed to these benefits.

38. I pause to identify a further point in support of the argument. It is the Secretary of State's deliberate use of the word "each", twice, in the final sentence within DL39. First, as to the list of benefits to which "moderate weight" attached. Secondly, as to the list of benefits carrying "limited weight". These get "each". That is in sharp contradistinction to earlier features which get "together" (itself used twice).

39. I am unable to accept these submissions, notwithstanding this further point. DL39 needs to be read in the light of DL28, in order to ensure that the DL is being read fairly and as a whole (see Good Energy Generation Ltd v Communities Secretary [2018] EWHC 1270 (Admin) at §29). Here is the relevant passage from DL28 (emphasis added):

> ***DL28.The Secretary of State has considered the Inspector's analysis at IR12.150-12.162 of the benefits of the proposed development and the implications of not proceeding. He agrees with the Inspector for the reasons given at IR12.142, IR12.153 and IR13.2 that the proposal would provide energy benefits associated with the availability of discounted heat and electricity, and that the proposal provides the potential to act as a catalyst to attract new employment development within the industrial park, particularly those businesses with high energy and heat requirements. He further agrees that this carries significant weight (IR13.2)…***

40. The Secretary of State was there expressly agreeing with the Inspector's reasons at IR12.142, IR12.153 and IR13.2. Those reasons show what it meant to say, of "this", that it "carries significant weight". They show what it meant to say that energy benefits and potential to act as a catalyst for further development "together" serve to "carry significant weight". At IR12.142, the Inspector had recorded the catalyst for attracting further development. Here are IR12.153 and IR13.2 (emphasis added):

> ***IR12.153. The proposed development would enable the redevelopment of a long-term vacant site allocated for employment uses within an established industrial park. It would provide an ability to offer discounted heat and power to existing and prospective occupiers, both on the industrial park and in proximity to it. In this regard, it provides the potential to act as a catalyst attracting new employment development, particularly those businesses with high energy and heat requirements. These energy benefits include the availability of discounted heat and electricity produced by the facility to local homes and businesses through a District Heat Network (DHN) and electricity smart grid (ESG), providing constant and stable energy and long-term price stability. I consider that these benefits should be afforded substantial weight.***
>
> …
>
> ***IR13.2. The proposed development would be located close to potential users of electricity and heat. Energy benefits include the availability of discounted heat and electricity produced by the facility to local homes and businesses through a [District Heat Network] and [Electricity Smart Grid] thereby providing constant and stable energy and the ability to offer of discounted heat and power to existing and prospective occupiers. The obligations contained within the UU would ensure the delivery of the necessary heat and power connections. In this regard, the proposal provides the potential to act as a catalyst to attract new employment development within the industrial park, particularly those businesses with high energy and heat requirements. I have attached significant weight to these considerations.***

41. The Secretary of State was certainly taking "together" (a) the CHP and (b) the catalytic effect on development. That is what the Inspector did too (in IR12.153 and again at IR13.2). They are linked. But these were "benefits", as the Inspector had explained, to be afforded "substantial weight". There was not a single, composite "benefit". This was not a single item of aggregated "substantial weight". Neither the Inspector nor the Secretary of State were saying that the CHP and the catalytic effect carried significant weight, only as a composite feature, and not independently of each other. In my judgment, the Secretary of State's reasoning involved no disregard – and no departure – from EN-1 §4.6.8 and NPPF §81. The Inspector was saying, and the Secretary of State was agreeing, that these aspects – which were linked and could be taken together – were benefits to be afforded (and so carrying) significant weight.

(4) The Regulation 122(2) Issue

42. The fourth agreed issue is whether the Secretary of State's disregarding of Schedule 8 of the UU (s.106 obligation), on Community Infrastructure Levy (CIL) regulation 122(2) grounds, was unlawful. This is another issue relating to benefits.

43. Regulation 122(2) of the 2010 Regulations provides as follows:

> ***… a planning obligation may only constitute a reason for granting planning permission for the development if the obligation is: (a) necessary to make the development acceptable in planning terms; (b) directly related to the development; and (c) fairly and reasonably related in scale and kind to the development.***

As a shorthand, these three requirements have in this case been called: (a) the necessity test; (b) the direct relationship test; and (c) the proportionality test.

44. As has been seen (§33 above), the Developer's identified series of benefits of the development (IR5.34 to IR5.77) included both: (ii) the generation of heat and electricity in particular to local users; and (iv) the alleviation of fuel poverty. So far as (iv) was concerned, by UU Schedule 8 the Developer proposed a fund, to alleviate local fuel poverty, emphasising the fuel poverty in the local area (IR5.64, IR6.163, IR11.21). The Developer recognised the need to meet the 3 tests in regulation 122(2) (IR5.81), and recognised that these were 'essentially a matter of planning judgment' (IR5.86). The Developer explained the basis on which it said it could meet 3 tests (IR5.99). The Council had explained why it did not regard the UU Schedule 8 scheme as CIL-compliant (IR6.164 to IR6.167). The Inspector (§48 below) explained that he agreed. The Secretary of State agreed with the Council and the Inspector (§49 below).

45. This is the description of the UU Schedule 8 scheme in IR11.21:

> ***IR11.21. Schedule 8 of the UU prohibits the occupation of the development until a trust agreement has been entered into between the Appellant and Project Genesis Trust for the receipt and distribution of a financial contribution (0.5p per KW of electricity generated at the appeal scheme). The sum, estimated by the Appellant to be approximately £120,000 per annum, would be distributed to qualifying households that satisfy eligibility criteria for the purposes of subsidising their energy costs or implementing measures that are designed to reduce future energy costs. It would essentially be distributed to those households that can demonstrate that they are experiencing fuel poverty.***

46. Here is the Inspector's summary of the Developer's position on regulation 122(2) compliance (IR5.99) (I have revised references to Schedule 9 to say Schedule 8):

> ***IR5.99. On the CIL issues:***
>
> ***a) Direct Relationship. The Schedule 8 scheme has a direct relationship/ "sufficient connection" (in the language of relevant case-law) with the appeal scheme because it seeks to provide benefits in the form of discounts to heat/power costs to a certain category of local persons (those in fuel poverty) in respect of whose homes a direct physical connection is not achievable. Qualifying persons are, in terms of enjoying the benefits of discounted heat/power, treated "as if" they have a direct physical connection with the appeal scheme. As a matter of planning judgment, there is no good reason why this "virtual" equivalence is not a sufficient connection for purposes of the "direct relationship" test.***
>
> ***b) Proportionality. Contrary to the Council's desire for a sum certain, the fund will reflect actual electricity generated at the appeal scheme (hence the charge per kW), further establishing the "sufficient connection" test. The sum to be generated (estimated by the Appellant at around £120k pa) cannot remotely be suggested to be disproportionate so as to amount to some illicit attempt to "buy" a planning permission. The obligation is based on 0.5p per kW of electricity exported, which is around 2% of the current price of electricity in the North East (and takes no account of heat export from the appeal scheme). No further science is required to justify the basis on which the 0.5p per kW is calculated. It would have been equally compliant with the proportionality test for the Appellant to have identified a slightly higher or lower amount. A total estimated fund of £120k pa gets nowhere near the sort of territory where the fund is disproportionate given the size of the problem or the scale of the likely turnover of the appeal scheme when operational.***
>
> ***c) Necessity. As above, while it is accepted that if the appeal scheme were deemed acceptable without Schedule 8, it would be open to the planning decision-maker to grant consent without taking these benefits into account, it does not follow that the planning decision-maker is constrained to adopt that approach. It would be an entirely lawful approach to consider the basket of relevant and directly related benefits set out in these Submissions when assessing (as part of the overall planning balance) whether advantages outweigh harm/impact, separating out only any claimed benefits which are found to carry no weight at all.***

47. Here is the Inspector's summary of the Council's position on alleviation of local energy poverty (IR6.164 to IR6.167):

> ***IR6.164. The Council regards this obligation as not CIL compliant. It fails the necessity test because fuel poverty is an existing situation which the appeal proposal neither creates or exacerbates. Fuel poverty is unrelated to and has no association with the EfW proposal. It does not therefore fall to this proposal to address this issue. In addition, it offends the principle that planning permissions should not be bought or sold.***
>
> ***IR6.165. It would be manifestly unreasonable for the Council to require an applicant for an EfW proposal to set up a trust fund to provide for the fuel costs of persons in need without there being some causal link between the two. It would be tantamount to a tax on the development.***
>
> ***IR6.166. It also fails the direct relationship test because any link to the development is a result of the contrived way in which this obligation is drafted (by way of a figure per KW of energy recovered).***
>
> ***IR6.167. The Council also considers that this obligation fails the reasonableness and proportionality tests. The Appellant has not put forward an evidence base for the figure of 0.5p per KW of energy, or £120k per annum, because they represent a commercial decision made by the Appellant. Nor is the Trust Contribution obligation an equivalence measure which puts residential occupiers in the same position as those who will benefit from the discounted heat and electricity network because: [i] the contribution is to be calculated by reference to KW of electricity generated only; [ii] it does not provide any energy from the development at a discounted rate to residential occupiers – it provides a trust fund from which the Trust can***

> ***allocate grant funding to those in need; and [iii] there are eligibility criteria set around those in fuel poverty. Fuel poverty is not an impact of the appeal proposal.***

48. Here is IR11.22:

> ***IR11.22. I share the Council's view that this obligation is not CIL compliant. The existence of fuel poverty is an existing situation unrelated to, and having no association with, the proposed development. There is no causal link between the two. Furthermore, the amount of the financial contribution proposed represents an arbitrary financial decision by the Appellant that has no calculation basis in planning policy, notwithstanding the fact that there is also no planning policy basis for the establishment of such scheme. In addition, a financial payment could be made to households some distance away from the appeal site. Furthermore, its implementation may be disproportionate as funds would be allocated only to those households who make a successful application to the scheme whilst others, equally experiencing fuel poverty, may choose not to make such application. Therefore, I have attached no weight to the provisions of Schedule 8 of the UU in my consideration of the planning issues in this appeal.***

49. And here is DL37:

> ***DL37. For the reasons given at IR11.21-11.22, the Secretary of State agrees that the obligations set out in Schedule 8 are not CIL compliant. Under the 'blue pencil clause' at paragraphs 6.11-6.12 of the UU, this obligation falls away. Overall the Secretary of State agrees that with the exception of the obligation at Schedule 8, the obligations comply with Regulation 122 of the CIL Regulations and the tests at paragraph 57 of the Framework (IR11.23-11.24). However, the Secretary of State does not consider that the obligation overcomes his reasons for dismissing this appeal and refusing planning permission.***

50. Mr Tabachnik KC submits, in essence as I saw it, as follows.

i) Starting with the direct relationship test (reg.122(2)(b)), the Secretary of State's adoption of the Inspector's reasoning cannot stand and the only reasonable response (the sole justifiable outcome) was that this test is met. The UU Schedule 8 mechanism for the alleviation of fuel poverty was plainly directly related to the development. Three features combine to establish that direct relationship. First, the fund is derived from the use of the site to generate energy. The amount is 0.5p per KW of electricity generated. Secondly, the off-site benefits – funds distributed to subsidise energy costs or for measures designed to reduce future energy costs – are energy-related. Thirdly, the continued use of the site as an energy from waste facility depends on ongoing compliance with the requirements of Schedule 8. All of this constitutes "some connection" which is "not de minimis" (cf. Tesco Stores Ltd v Environment Secretary [1995] 1 WLR 759 at 770B). There is a "virtual" equivalence, between benefits of heat and power through a direct "physical" connection with the facility, and the benefits of the fund through financial assistance. It is irrelevant that fuel poverty exists irrespective of the development. It is no bar that beneficiaries of the fund would need to apply for it.

ii) Turning to the proportionality test (reg.122(2)(c)), the Secretary of State's adoption of the Inspector's reasoning cannot stand and what is needed is remittal and reconsideration afresh. There is an overlap with features relevant to the direct relationship test. Payments to eligible local households to alleviate fuel poverty are fairly and reasonably related, in "kind", to an energy facility which will generate heat and electricity for local users. The fund, based on 0.5p per KW of electricity, is fairly and reasonably related in "scale" to the development. No

antecedent benchmark for the rate of money raised is needed. This is a £45m facility and 0.5p per KW – around 2% of the then electricity price – is fairly and reasonably related in scale. No reasonable basis has been identified for finding this test unmet.

iii) Turning finally to the necessity test (reg.122(2)(a)), this is essentially parasitic. It has no independent bite against the developer's interests. If the other two tests are met, this test serves only to exclude a benefit which could make no difference anyway. Either because the benefit would not tip the planning balance in favour of the development. Or because the balance already favours the development in planning acceptability terms. So, if the other tests are met and the benefit matters, the necessity test is also met. This is what is meant by a "counterbalancing benefit to set against [any] disadvantage of the [development]": Working Title Films v Westminster City Council [2016] EWHC 1855 (Admin) [2017] JPL 173 at §25. In any event, the necessity test was met here. Not for the Inspector's analysis, since the development was otherwise acceptable in planning terms. But for the Secretary of State's analysis, since the development was not. The Secretary of State made no finding that, even if included, this benefit made no difference.

iv) Standing back, the answer to the helpful question – whether UU Schedule 8 could lawfully have been required of the Developer as a planning condition or s.106 obligation – is "yes". The UU Schedule 8 fund is not a general 'good causes' fund. It involves a clear criterion as to the amount of the fund to be created, and clear requirements of a criteria-led distribution, with nothing vague or nebulous or risking arbitrariness (cf. Good Energy §82). These are energy-related benefits from an energy facility. The eligible households would be local people from the local areas in and around Consett, in a coverage area which the Council had requested.

v) For all these reasons, and those summarised by the Inspector (IR5.99), the tests were met. The Inspector's reasons (IR11.22), like those advanced by the Council (IR6.164 to IR6.167), cannot withstand scrutiny. Nor, therefore, can the decision of the Secretary of State (DL37).

51. I am unable to accept these submissions. Like Mr Tabachnik KC (and like Working Title at §24), I start with the direct relationship and proportionality tests. The first point is that I can see no hard-edged question of statutory interpretation. No misdirection is identified. We are in the area, not of interpretation, but of application. As Mr Tabachnik KC had accepted in his closing submissions to the Inspector: "All three tests import matters of planning judgment for the decision-maker". Soft review standards of reasonableness apply. That does not immunise the evaluative judgments from judicial scrutiny, but it does set an exacting standard of secondary review, for well-known principled reasons.

52. Next, I find it helpful to remember what can be derived from the wording and structure of the provision. The direct relationship test and the proportionality test are each about the 'relationship' between the planning obligation and the development (reflected in the repeated phrase "related to"). The idea is of a planning obligation which can make the difference in giving the development planning-acceptability, ie. overcoming some legitimate planning objection (under the necessity test). But that is prohibited, unless the 'relationship' between the planning obligation and the development has the

requisite characteristics. One requisite characteristic is directness (reflected in the word "direct"), so that an 'indirect' relationship is insufficient. The other requisite characteristics are "scale" and "kind", as to which a fair and reasonable relationship is required. All of this is no more than what the wording and structure of regulation 122(2) tell us.

53. This 'relationship' between planning obligation and development – with its requisite characteristics as to directness, scale and kind – may be consequential. By consequential, I mean that the relationship has to do with addressing the impact or implications of the proposed development. Mr Smyth gave me the helpful examples of planning obligations relating to a nearby school or bus stop. The obligation can have its 'relationship' with the development because of the consequences (impact or implications) of the development, here in terms of the school or public transport system. Pausing there, no such 'consequential' relationship arises here. Fuel poverty is an existing situation. It is unrelated to the proposed development. There is no association with, or causal link between, the two. This was emphasised by the Inspector (IR11.22). It had been emphasised, in the context of the necessity test, by the Council: that the development neither "created" nor "exacerbated" fuel poverty (IR6.164). These were fair and relevant points, concerning one of the key ways (consequential) in which a relationship between planning obligation and development can arise.

54. The 'relationship' between planning obligation and development – with its requisite characteristics as to directness, scale and kind – may be functional. By functional, I mean that the relationship has to do with the land-use nature of the development and the nature of the obligation. Mr Smyth gave me the helpful example of a development to build residential housing, and a planning obligation on the developer also to provide affordable residential housing (cf. R (Wright) v Forest of Dean District Council [2019] UKSC 53 at §§53-54). The claims made for the Developer by Mr Tabachnik KC in this case, as I see them, ultimately argue for this functional type of suggested relationship. This links to the idea of "sufficient connection with the proposed use of the land" (Wright at §§39, 44). The discipline, in the evaluative planning judgment applying the direct relationship test and the proportionality test, was to ask about directness of this functional relationship; and to ask about its sufficiency (as fair and reasonable) as to both scale and kind. I agree with all Counsel that the considerations are capable of overlapping and, provided that the legal tests are applied and the right questions are being asked, it may be possible to consider the position ultimately 'in the round'. I remind myself that there is no allegation of any misdirection in law or failure to ask the right question. Nor, as Mr Smyth points out, is there any 'reasons challenge' alleging that the Secretary of State's adoption of the Inspector's reasons fails the basic public law test of legally adequate reasons (as to which, see Good Energy at §§32-33, 94).

55. It was an emphasised benefit of the development (see §33 above) that it would generate heat and electricity in particular to local users. As the Secretary of State recorded (DL28), the benefits of the proposed development included that the proposal would provide energy benefits associated with the availability of discounted heat and electricity; and the benefits included that the proposal had the potential to act as a catalyst new employment development within the industrial park, particularly those businesses with high energy and heat requirements (being attracted to the discounted heat and electricity). UU Schedule 8 was a planning obligation relating to the alleviation of fuel poverty, being put forward as having a sufficient 'relationship' to

meet the requisite characteristics (directness and proportionality), because of a substantive equivalence as a proxy for discounted heat and power costs to local persons. The Developer's case was that these eligible beneficiaries would be enjoying the benefits of discounted heat or power and treated "as if" they had a direct "physical" connection with the scheme, constituting a 'virtual equivalence' (IR5.99[a]). The challenge, in relationship terms, was that all this was several steps removed from the land-use, and from the actual supply line of discounted energy to adjoining businesses or residences. A helpful reference-point is that, when courts discuss material considerations and "sufficient connection" (Wright at §§28, 39), they have spoken about whether "off-site benefits … are related to or are connected with the development", asking whether there is "a real, rather than a fanciful or remote, connection" (see Good Energy §§70, 82). I note the word "remote". The regulation 122(2) direct relationship test uses language which straightforwardly requires "directly related". The UU Schedule 8 scheme involved no direct supply of electricity or heat. It involved no discount for electricity or heat actually supplied. The households were not neighbouring to the development site; nor even in the close vicinity. They were not joining as a household would. Rather, they were to be making applications tested through the prism of fuel poverty eligibility criteria. This was in essence a self-levy (described as an arbitrary financial decision with no calculation basis in planning policy), to create a fund, distributed through a trust, with an application mechanism. It was a construct. The Council's view, with which the inspector expressly agreed (IR11.22), described the link to the development as "contrived". The Inspector spoke of the financial contribution as an arbitrary financial decision and spoke of the planning obligation scheme as one without a planning policy basis, emphasising that households could be some distance away, and emphasising the implementation through the fuel poverty criteria and application mechanism (IR11.22). As a matter of planning judgment, and remembering that the 'relationship' between planning obligation and development must be "directly" related – and not therefore simply "indirectly" related – this planning obligation was, in my judgment, reasonably assessed as failing to meet the direct relationship test. I cannot see this evaluative judgment as unreasonable in a public law sense.

56. That is fatal to the argument. But it also clear that the Secretary of State, adopting the reasoning of the Inspector, did not consider that the planning obligation was fairly and reasonably related – in scale and kind – to the development. There was plainly, and properly, an overlap in the features being addressed. The "scale" problem included that the amount of the financial contribution was an arbitrary financial decision with no calculation basis in planning policy (IR11.22). It lacked any evidence base and represented a commercial decision (IR6.167, IR11.22). The "kind" problem included the artificiality of treating fuel poverty based support for qualifying and applying households, some distance away, as being comparable in nature to the provision of electricity and heat, and the provision to businesses and residences nearby and connected to the facility with discounted electricity and heat. As a matter of planning judgment this planning obligation was, in my judgment, also reasonably assessed as also failing to meet the proportionality test. That, independently, is also fatal to the argument.

57. Asking the question which Mr Tabachnik KC and Mr Smyth recognised can be a helpful way of testing the position, UU Schedule 8 would not – on the basis of this evaluation and these features – be an obligation which the planning decision-maker

could require of the applicant as a planning condition or obligation. That was a point which had been made (IR6.165). Thus, the argument fails. Nothing distinct turns, in my judgment, on the necessity test, which I see as a test of necessity to overcome legitimate planning objections. In this case, that test cannot be satisfied in light of the position regarding the 'relationship' between the development and the obligation – in terms of the requisite characteristics of directness, scale and kind – when the position is viewed in the round.

Conclusion

58. In all the circumstances and for all these reasons, I have not been persuaded by the Developer's claim, on any of the four issues, and I will dismiss the claim for statutory review. Having circulated this judgment in draft, I can deal here with any contested consequential matter and the appropriate Order. The parties were agreed that I should order, as I do, that: (1) the claim is dismissed; and (2) the Developer shall pay the Secretary of State's costs, to be assessed if not agreed. That left one contested issue.

Costs of the Council's AOS

59. Mr Barrett submits that the Developer should pay the Council's costs of its acknowledgment of service (AOS) and accompanying summary grounds of resistance (£6,714). That is because: (a) the Council had little choice but to file an AOS if it wanted to participate; (b) the Council's written submissions contributed; and (c) these costs are reasonable and proportionate. I have not been persuaded by these submissions and decline to make the order sought. An AOS was not required for participation at the substantive hearing (CPRPD54D §4.19(b)). Although the Council's summary grounds were adopted to good effect at the substantive hearing, and although it was wise not to expend resources on an essentially duplicative attendance, these facts remain: the summary grounds were written as a failed attempt to persuade the Court that the claim was unarguable; and their contents overlapped with the Secretary of State's grounds.

60. In light of what is said about reasonableness and proportionality, I add this. A party 'in a supporting role' who wants the best chance of securing their reasonable and proportionate costs after a failed substantive claim, could: (1) not resist permission where the claim is arguable (see Judicial Review Guide 2023 §8.3.5); (2) seek an arrangement, or directions, for a sequential filing of detailed grounds (CPRPD54D §4.35); so that (3) having seen the defendant's detailed grounds, they can then file a document which does no more than (a) focus in on points which really add something and/or (b) shine a light on what really matters.