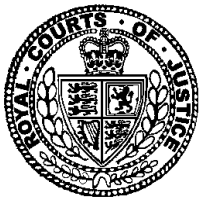

Neutral Citation Number: [2025] EWHC 1183 (Admin)

Case No: AC-2024-BHM-000287

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

Birmingham Civil and Family Justice Centre
33 Bull Street
Birmingham
B4 6DS

Date: 19/05/2025

**Before**:

**Mr Justice Eyre**

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

**Between:**

**Lynn Ross** — **Claimant**

**- and –**

**Secretary of State for Housing, Communities and Local Government** — **First Defendant**

**- and –**

**Renewable Energy Systems LTD** — **Second Defendant**

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

**Annabel Graham Paul** and **Stephanie Bruce-Smith** (instructed by **Richard Buxton Solicitors**) for the **Claimant**
**Robert Williams** and **Ruchi Parekh** (instructed by **Government Legal Department**) for the **First Defendant**
**Hereward Phillpot KC** and **Isabella Tafur** (instructed by **Burges Salmon**) for the **Second Defendant**

Hearing dates: 14th & 15th April 2025

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

# Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

**Mr Justice Eyre:**

**Introduction.**

1. By his decision of 23rd October 2024 ("the Decision") Mr John Woolcock ("the Inspector") allowed the Second Defendant's appeal against the Local Planning Authority's refusal of planning permission for the proposed Longhedge Solar Farm ("the Solar Farm"). The Claimant challenges the Decision under section 288 of the Town and Country Planning Act 1990 on six grounds pursuant to permission given by Lang J.

2. The proposed site of the Solar Farm lies to the north-east of the village of Hawksworth and to the north-west of that of Thoroton. The Claimant is a member of the Hawksworth and Thoroton Action Group ("HTAG") and that body took part in the inquiry as a rule 6 party. The Local Planning Authority has taken no part in this challenge to the Decision.

3. Although the grounds of challenge will have to be considered separately the principal issues before me can be boiled down to three questions. First, the proper interpretation of the provisions of National Policy Statement for Renewable Energy Infrastructure EN-3 ("EN-3") and in particular the interpretation of those provisions in relation to the overplanting of solar panels. Second, whether the Inspector's application of that policy statement was flawed. Third, whether the Decision was flawed by reason of the Inspector's alleged failure adequately to address all the issues raised before him.

**The Proposed Development.**

4. The proposal was for the Solar Farm to cover an area of 94.24ha (approximately 223 acres) with the built area being 63.5ha (approximately 157 acres). The number of panels had not been determined but the Second Defendant and the Inspector proceeded on the basis of an indicative number of 128,752 610w solar panels. Other numbers had been mentioned in the course of the application process. I am satisfied that it was appropriate for the Inspector to proceed on the basis of the indicative figure of 128,752 panels albeit having regard when doing so to the facts that this was an indicative figure and that the precise number of panels was not being controlled. In particular, I am satisfied that the Inspector was right to disregard the figure of 150,304 panels which had been included in the Statement of Common Ground but which the Second Defendant has explained was an error.

5. Neither the number of panels nor the density of their positioning was fixed. However, in his technical report submitted on behalf of the Second Defendant Jean-Christophe Urbani said that "there is a minimum spacing of 2m between the rows [of panels] to enable maintenance, otherwise the site is not workable. Also, if you increase density, you also increase shading losses and make the site less efficient". Mr Urbani also explained that the Second Defendant had taken account of forecast improvements in the efficiency of panels when calculating the indicative number of panels. However, in that regard it is to be remembered that this is a field where improvements are occurring rapidly. The continual evolution of this technology is referred to in section 2.10.17 of EN-3. The pace of improvement is illustrated by the fact that, as explained in the Second Defendant's answers to questions from the Inspector, improvements in technology between the time of the original submission to the Local Planning Authority and the appeal submission had led to a reduction in the indicative number of panels.

6. The solar panels were to generate electricity in direct current form. That would be converted by inverters to alternating current for transmission to the National Grid. The inverters also applied voltage to the panels and the level of voltage applied determined the power measured in watts which would be generated by the panels at any given time. The DC capacity of the Solar Farm was anticipated to be 78.54mw. However, the AC capacity to be transmitted to the National Grid was to be limited to 49.9mw. The inverters were to be pre-set to ensure that the maximum AC capacity never exceeded 49.9mw. This limitation was to be achieved by "clipping" which was to take the form of reducing the voltage applied to the panels at times of greatest potential generation. That would mean that the panels would at those times generate less electricity than they would have done if the voltage had not been so reduced. The ratio of the maximum installed generating capacity measured in MW/DC, 78.54mw, to the maximum export capacity measured in MW/AC, 49.9mw, ("the DC/MEC ratio") was, accordingly, 1.57.

7. The maximum DC capacity of 78.54mw would be the consequence of the proposed "overplanting" of panels. Overplanting is an arrangement whereby more solar panels are installed than would be needed for a solar farm with a particular maximum AC capacity. Here, more panels were to be installed than would have been needed for a solar farm with a maximum AC capacity of 49.9mw. The overplanting was in order to address three factors. The first was the fact that solar panels degrade over time with the consequence that the electricity generated from a bank of a fixed number of panels will reduce over time ("module degradation"). The second was the fact that the maximum output of a solar panel is determined in laboratory conditions ("the STC rating") but the actual output of any given panel in the field will be less than in laboratory conditions. That means that on this site panels with a total DC capacity of 56.4mw would have to be installed to achieve an export capacity of 49.9mw. The third factor was the combined effect of the configuration of the site and of fluctuations in the level of sunlight over the course of the day and of the year which meant that more panels would be needed to ensure an export capacity of 49.9mw for a greater part of the day and of the year ("site maximisation").

8. Mr Urbani's evidence before the Inspector was that even if panels with a capacity of 56.4mw were to be installed (and so addressing only the second of the factors just noted) the export capacity of 49.9mw would only be achieved for one hour in the Solar Farm's first year of operation. The proposed installation of a DC capacity of 78.54mw would still, Mr Urbani explained, only achieve the 49.9mw maximum export capacity for 3.7% of that first year of operation.

9. Mr Urbani attributed 16 – 22% of the proposed sizing to addressing module degradation; 8% to addressing the difference between the STC rating of the panels and their actual performance; and 8 – 14% to the desire for site maximization.

## The Legislative and Policy Framework.

10. The Town and Country Planning Act 1990 and the Planning Act 2008 provide different routes to permission for development. The regime under the 2008 Act was described by Holgate J (as he then was) at first instance in *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin), [2020] PTSR 1709 at [26] – [39] and at [108]. That regime provides for a development which is a Nationally Significant Infrastructure Project ("a NSIP") to be approved by way of development consent order with the relevant policy considerations being set out in

National Policy Statements ("NPS's"). The routes are not alternatives and a development which is a NSIP can only be approved under the 2008 Act.

11. The capacity threshold for a solar farm to be a NSIP is 50mw. Before the Inspector HTAG contended that the Solar Farm was a NSIP and so could not be granted planning permission under the 1990 Act. The Inspector concluded that because the farm's export capacity was to be limited to 49.9mw it was not a NSIP. However, because of the proximity of the capacity to the NSIP threshold the Inspector had regard to the NPS's which would have been applicable if it had been a NSIP.

12. The Claimant did not challenge that approach before me. However, she did say that account was to be taken of the fact that the capacity of the Solar Farm was deliberately being pitched just below the NSIP threshold. In HTAG's closing submissions to the Inspector it was said that the Second Defendant's witnesses had accepted that the Second Defendant had deliberately sought to stay outside the regime of the 2008 Act for reasons of cost. In addition, at points it was said that the regime under the 1990 Act was less rigorous than that under the 2008 Act.

13. The Claimant relied on the decision of Fordham J *in R (Galloway) v Durham CC* [2024] EWHC 367 (Admin). I will consider below the relevance of that decision to the Claimant's case on ground 2. At this point I note that Fordham J recorded, at [12], the agreement of counsel in that case that:

> "Central Government development consent is perceived as a more arduous route than planning permission from a local planning authority. If your solar farm is above the Statutory Capacity Threshold, you face a tougher approval regime"

14. There was, however, no such agreement here. For the Second Defendant Mr Phillpot KC agreed that there were differences between the approach under the 1990 Act and that under the 2008 Act. He accepted that the former was generally less expensive than the latter but did not accept that it was less rigorous. Instead, he said that in a number of respects it was easier to get development consent under the 2008 Act than planning permission under the 1990 Act.

15. It was clear that the Second Defendant saw a benefit in keeping the Solar Farm's capacity below the NSIP threshold and that the export capacity was deliberately limited so as to achieve that. There was no impropriety in that course. If there are two potential statutory regimes governing developments of different kinds there is nothing improper in an applicant so arranging matters as to ensure that a proposed development does not cross the threshold which would bring it under one of those regimes. In practice here it cannot be said that there was any material difference in the rigour of the approach taken in considering the application. The Decision was taken by the Inspector after extensive submissions and having regard to the NPS's which would have been applicable if the Solar Farm had been a NSIP.

16. Two NPS's were relevant here: the Overarching National Policy Statement for Energy (EN-1) and the National Policy Statement for Renewable Energy Infrastructure (EN-3).

17. The following parts of EN-1 are relevant.

18. First, at section 3.3.24 the 50mw threshold for solar farms was noted after the preceding sections had adverted to the important role which solar energy would be likely to play in the future generation of electricity.

19. Then at section 4.2.21 EN-1 said that the Secretary of State was to start from the position that "energy security and decarbonising the power sector to combat climate change" required a "significant number of deliverable locations for CNP infrastructure and for each location to maximise its capacity".

20. Sections 4.3.10 – 4.3.12 provided that:

> "4.3.10 The applicant must provide information proportionate to the scale of the project, ensuring the information is sufficient to meet the requirements of the EIA Regulations.
>
> 4.3.11 In some instances, it may not be possible at the time of the application for development consent for all aspects of the proposal to have been settled in precise detail. Where this is the case, the applicant should explain in its application which elements of the proposal have yet to be finalised, and the reasons why this is the case.
>
> 4.3.12 Where some details are still to be finalised, the ES should, to the best of the applicant's knowledge, assess the likely worst-case environmental, social and economic effects of the proposed development to ensure that the impacts of the project as it may be constructed have been properly assessed."

21. EN-3 began at section 1.1.1 by identifying the "urgent need for new electricity generating capacity to meet our energy objectives". At sections 2.10.9 and 2.10.10 solar power was said to be a "key part" of the government's strategy for low-cost decarbonisation and as having "an important role in delivering the government's goals for greater energy independence". Section 2.10.11 then said:

> "The Powering Up Britain: Energy Security Plan81 states that government seeks large scale ground-mount solar deployment across the UK, looking for development mainly on brownfield, industrial and low and medium grade agricultural land. It sets out that solar and farming can be complementary, supporting each other financially, environmentally and through shared use of land, and encourages deployment of solar technology that delivers environmental benefits, with consideration for ongoing food production or environmental improvement."

22. Section 2.10.17 said:

> "Along with associated infrastructure, a solar farm requires between 2 to 4 acres for each MW of output. A typical 50MW solar farm will consist of around 100,000 to 150,000 panels and cover between 125 to 200 acres. However, this will vary significantly depending on the site, with some being larger and some being smaller. This is also expected to change over time as the technology continues to evolve to become more efficient. Nevertheless, this scale of development will inevitably have impacts, particularly if sited in rural areas."

23. The proper interpretation of section 2.10.55 and of footnote 92 will be of central importance to the determination of grounds 1 and 2. Sections 2.10.53- 2.10.56 said:

> "2.10.53 From the date of designation of this NPS, for the purposes of Section 15 of the Planning Act 2008, the maximum combined capacity of the installed inverters (measured in alternating current (AC)) should be used for the purposes of determining solar site capacity.
>
> 2.10.54 The capacity threshold is 50MW (AC) in England and 350MW (AC) in Wales.91

> 2.10.55 The installed generating capacity of a solar farm will decline over time in correlation with the reduction in panel array efficiency. There is a range of sources of degradation that developers need to consider when deciding on a solar panel technology to be used. Applicants may account for this by overplanting solar panel arrays.92
>
> 2.10.56 AC installed export capacity should not be seen as an appropriate tool to constrain the impacts of a solar farm. Applicants should use other measurements, such as panel size, total area and percentage of ground cover to set the maximum extent of development when determining the planning impacts of an application.
>
> Fn 91 The combined maximum AC capacity of the installed inverters may only exceed the aforementioned thresholds for the sole purpose of overcoming reactive power consumption within the solar farm between the inverters and the connection point.
>
> Fn 92 `Overplanting' refers to the situation in which the installed generating capacity or nameplate capacity of the facility is larger than the generator's grid connection. This allows developers to take account of degradation in panel array efficiency over time, thereby enabling the grid connection to be maximised across the lifetime of the site. Such reasonable overplanting should be considered acceptable in a planning context so long as it can be justified and the electricity export does not exceed the relevant NSIP installed capacity threshold throughout the operational lifetime of the site and the proposed development and its impacts are assessed through the planning process on the basis of its full extent, including any overplanting.."

24. In *Galloway*, at [17], Fordham J described overplanting as meaning "installing `spare' solar panels for necessary future use, as a `back-up' so as to address light-induced degradation of solar panels". At one point it seemed that the Claimant was advancing this as a judicial definition of overplanting or of the only acceptable form of overplanting and as support for its argument on ground 1. That was not the Claimant's final position and that is not how that part of the judgment is to be read. The words of Fordham J which I have just quoted were immediately followed by his quotation of section 2.48.8 and footnote 43 of a draft of EN-3. It is clear that Fordham J's description of overplanting was no more and no less than his paraphrase of those provisions. There does not appear to have been any reference in *Galloway* to other forms of overplanting and still less any consideration of the issue of whether such other forms were or were not acceptable. As a consequence, Fordham J did not address those matters. He was not purporting to set out a legal definition of overplanting nor to pronounce on which forms of overplanting were or were not permissible. The reference to spare panels being installed as a back-up but not being used initially comes directly from footnote 43. Here, however, the proposal is for all the panels to be used from the start but with clipping meaning they are not used to their full capacity all the time (which is the arrangement contemplated by section 2.10.55 and footnote 92 of the current version of EN-3). It follows that Fordham J's paraphrase of the provisions to which he was referred does not assist with the interpretation of section 2.10.55 and footnote 92 or with the issues I have to consider.

25. Under the heading "flexibility in project details" sections 2.10.70 – 2.10..72 said:

> "2.10.70 In many cases, not all aspects of the proposal may have been settled in precise detail at the point of application. Such aspects may include: • the type, number and dimensions of the panels; • layout and spacing; • the type of inverter or transformer; and • whether storage will be installed (with the option to install further panels as a substitute).

> 2.10.71 Applicants should set out a range of options based on different panel numbers, types and layout, with and without storage.
>
> 2.10.72 Guidance on how applicants should manage flexibility is set out at Section 2.6 of this NPS."

26. Under the same heading the relevant parts of section 2.6 had said:

> "2.6.1 Where details are still to be finalised, applicants should explain in the application which elements of the proposal have yet to be finalised, and the reason why this is the case.
>
> 2.6.2 Where flexibility is sought in the consent as a result, applicants should, to the best of their knowledge, assess the likely worstcase environmental, social and economic effects of the proposed development to ensure that the impacts of the project as it may be constructed have been properly assessed.
>
> 2.6.3 Full guidance on how applicants and the Secretary of State should manage flexibility is set out in Section 4.3 of EN-1."

27. On 30th April 2024 Helen Hamilton, the Claimant's planning consultant, wrote to the Secretary of State for Energy Security and Net Zero asking for guidance in respect of EN-3. In that letter she said:

> "I have a query about Energy Policy Statement EN-3 guidance on how to determine whether development capacity is below the threshold for a Nationally Significant Infrastructure Project (NSIP). The guidance has given rise to some confusion because, as solar panels become cheaper, there is an incentive for developers to overplant and rely on "clipping" to keep sites below the NSIP threshold. This does not appear to be permitted by EN-3, but it would be helpful to have more explicit guidance."

28. On 22nd May 2024 the Minister of State replied denying that there was any lack of clarity in EN-3 and emphasising that it had been approved by Parliament and had been subject to consultation. He then said:

> "In the Energy Policy Statement EN-3 guidance, overplanting is countenanced where reasonable, to address panel degradation. Unreasonable overplanting, or overplanting for any other reason, would not be supported. It will be a matter of planning judgement for the decision maker in any case to decide what the purpose of the overplanting is and whether it is reasonable.
>
> Due to the variable nature of solar projects, it would be difficult to determine a single overplanting measurement that would be appropriate in all circumstances which is why it is for decision makers to take into account the specifics of each project."

29. Initially the Claimant appeared to be arguing that the letter of 22nd May 2024 should carry weight in relation to the interpretation of EN-3 because it was an expression of the Secretary of State's views. In the course of argument it was rightly accepted that this was not so. Interpretation of EN-3 is a matter for the court and is an objective exercise. As Lewison LJ explained in *R (TW Logistics Ltd) v Tendring DC* [2013] EWCA Civ 9, [2013] P & C.R 9 at [15] "the subjective views of the author of the document about what it means are irrelevant". Similarly, the arguments that the First Defendant is now advancing against the Claimant's interpretation of EN-3 are not enhanced by the First Defendant's position.

30. The letter of 22nd May 2024 can be of assistance in the interpretation exercise only to the extent that it provides a reasoned analysis which is persuasive on its own merits. Such assistance would be a consequence of the force of the analysis and the reasoning. However, the letter does not advance matters in that regard. The comments are very briefly expressed with little by way of reasoning. The letter was a response to the query from Miss Hamilton but there is no indication of what, if any, other views were considered before giving the response. It is, moreover, far from clear what the letter is saying in relation to the issues I have to consider. The letter does say that "overplanting for any other reason would not be supported". However, the following sentence with its emphasis on the decision-maker's planning judgement and a decision being made with regard both to the purpose of the overplanting and its reasonableness suggests a wider view being taken. Similarly, the final section suggests that a flexible approach is appropriate. Whatever its effect the letter does not operate as a reasoned exposition providing support for the Claimant's case by the force of that reasoning.

31. The presentation of EN-3 to Parliament had been preceded by consultation on a draft version. In support of the Claimant's argument on the interpretation of section 2.10.55 and footnote 92 reference was made to one of the submissions in that consultation and the response thereto. Although Mrs Graham Paul did rely on this as part of the Claimant's case on interpretation it was not at the forefront of her case. That was appropriate because neither the comment made in the consultation nor the response to the consultation assist in the interpretation exercise. The response to the consultation was the Secretary of State's subjective expression of views as to the meaning of EN-3 which, as I have just noted, is irrelevant. Investigation of the consultation process amounts to "forensic archaeology" of a kind which Lewison LJ also deprecated in *TW Logistics.*

## The Issues before the Inspector.

32. There were three principal issues before the Inspector. First, whether the Solar Farm was properly to be seen as a NSIP and, therefore, as falling outside the TCPA regime. Second, the approach to be taken to questions of overplanting and of the capacity of the Solar Farm. Third, the acceptability or otherwise of the Solar Farm as an exercise of planning judgement by reference to the harms and benefits which would result from it. The Claimant's grounds 4 and 6 turn on the question of the extent to which matters potentially forming part of the third issue were in fact in issue and should have been addressed expressly by the Inspector. As a consequence, I will have to rehearse in some detail the background to the Decision and the contentions made to the Inspector.

33. It is apparent that the Inspector took particular care to ensure that he had the material needed in order to make a properly informed decision on the issues of capacity and overplanting. Thus, in April 2024 he required the Second Defendant to provide a technical note addressing capacity in light of the position which had been set out by HTAG and the decision in *Galloway*. The Inspector provided for HTAG and the Local Planning Authority to submit addenda to their Statements of Case in response. The Inquiry opened on 10th June 2024 and was adjourned on 14th June 2024. On the latter date the Inspector issued a series of without prejudice questions addressing the approach which he was to take in respect of overplanting. The agenda of items for discussion at the resumed online hearing on 1st August 2024 provided for 1¾ hours to be spent on addressing the responses to those questions. In addition, the Inspector had asked for and had been provided with a note addressing the extent of the overplanting

attributable to the different reasons for overplanting and this resulted in the provision of the breakdown I have noted at [9] above.

34. The Second Defendant's application to the Local Planning Authority had been accompanied by an Ecological Appraisal. At section 7.64 this had said:

> "…The loss of cereal cropland and modified grassland habitat may have an adverse impact on some specialist farmland birds i.e. skylark and yellowhammer however, in the local context this loss is extremely limited and therefore effects are considered to be negligible."

35. The Local Planning Authority had obtained a screening opinion for the purposes of the Town & Country Planning (Environmental Impact Assessment) Regulations 2017 which had concluded that the Solar Farm was not EIA Development.

36. The Local Planning Authority refused the application for the Solar Farm on two grounds. The first was landscape character and visual amenity. The second was the preservation or enhancement of the setting of the Hawksworth and Thoroton conservation areas and of listed buildings in those areas. In its Statement of Case in the appeal the Local Planning Authority indicated that it wished to rely on two further reasons namely the loss of Best and Most Versatile agricultural land and the absence of an assessment of the flood risk.

37. The First Defendant obtained an EIA screening opinion. This concluded that the Solar Farm was not EIA Development. In reaching that conclusion the author, David Smale, explained that:

> "Considering the nature, scale and location of the Proposed Development and nature of the receiving environment, whilst there may be some impact on the surrounding area and nearby designated sensitive areas as a result of this development, which could also include possible heritage issues, it would not be of a scale and nature likely to result in significant environmental impact."

38. In its Statement of Case HTAG said that it agreed with the Local Planning Authority's original reasons for refusal but that the fact that the development would be on Best and Most Versatile agricultural land should have been a further reason for refusal. It then stated that the Second Defendant's appeal should be dismissed for five reasons namely:

> "1. The scale, design and nature of the proposed development would have significant adverse impacts on landscape character and visual amenity, contrary to Policies 16, 22 and 34 of LPP2
>
> 2. The proposed development would harm the character and appearance of the Hawksworth and Thoroton Conservation Areas and the settings of designated heritage assets, contrary to Policies 1 and 11 of LPP1 and Policies 16 and 28 of LPP2.
>
> 3. The proposals would entail the development of significant areas of best and most versatile agricultural land, contrary to policies 1 and 16 of LPP2.
>
> 4. The Appellant has failed to investigate the nature, extent and significance of archaeological remains present on the appeal site, contrary to Policy 29 of LPP2.
>
> 5. The proposals pose a significant risk to otters and bats, species protected under the Conservation of Habitats and Species Regulations 2017."

39. The Statement of Case addressed the question of the capacity of the Solar Farm. HTAG said that the information provided had not been sufficient properly to calculate the capacity of the Solar Farm and to determine whether it was in fact a NSIP. HTAG said that on the information provided the capacity of the site would appear substantially to exceed the NSIP threshold. In the course of its submissions on capacity HTAG said:

> "If there is a cap on the connection to the grid, capacity may be `clipped', meaning that surplus energy is wasted when the site is operating at maximum capacity. Installing more panels and inverters than required would enable the site to deliver 49.9MW for more of the year."

40. In its treatment of the planning balance the HTAG's Statement of Case made reference to the report "Solar Habitat 2024". That report had included consideration of the results of surveys addressing the ecological effects of solar farms. The Statement of Case said that in the surveys "skylarks and other ground nesting birds were observed but there were no records of any birds nesting, suggesting species may have been displaced and were returning to margins to feed". Under the heading "birds" the Statement of Case quoted the passage from the Ecological Assessment which I have rehearsed at [34] above and said:

> "In the absence of surveys, there is no evidence for this conclusion. Skylark and Yellowhammer are listed under s.41 of the NERC Act as species of principal importance and Nottinghamshire's Biodiversity Action Plan records both species as in local decline."

41. The Second Defendant's response to HTAG's Statement of Case was drawn up by Thomas Hill. In that document Mr Hill quoted that passage from the Statement of Case and said:

> "The evidence for the conclusion is based upon the readily apparent suitability of surrounding habitat within the local area, and the absence of any cumulative effects of the Proposed Development in combination with other developments in the local area which may impact specialist farmland birds in a regional context. Furthermore, the statement above is quoted only in the context of assessing potential impacts and does not include the subsequently described benefit of ecological enhancement measures and new habitat creation that not only negates any losses but will provide an overall net gain in the biodiversity value of the Application Site resulting from the Proposed Development."

42. In his questions to the parties the Inspector invited comment on the issue of whether the proposed overplanting would cause more harm than there would otherwise be. In response the Second Defendant said:

> "4.16. If the DC capacity in excess of the 49.9 AC were removed from the scheme this would result in a scheme which is between 8% and 22% smaller. Should any element of this additional DC capacity be removed, there are a multitude of permutations as to how this could be achieved. The reduction in the size of the scheme may not necessarily only result in a reduction in area of land take but could result in part from a different configuration of panels within the existing redline area. Equally, any reduction in the size of the scheme from a reduced area of land take could take many forms, from the removal of entire fields, to a 'shrinking' of the scheme from the edges.
>
> 4.17. The assessments undertaken on behalf of the Appellant on the whole current scheme find that all impacts are acceptable and the planning benefits outweigh harms. A reduction of the scale of the nature suggested above would make no material difference in planning balance.

> 4.18. In terms of quantifying this non material reduction, whilst there may be localised variations on different disciplines, in absence of any specific reduced scheme it is not possible to undertake a detailed assessment.
>
> 4.19. The Appellant remains firmly of the view that the adverse impacts of the current scheme are limited and substantially outweighed by the benefits and that it would not be possible to achieve the same energy generation and benefits on a reduced area."

43. In summarising its response to the Inspector's questions HTAG said:

> "Up to 58% of the Appellant's overplanting is for a purpose other than to account for degradation and is therefore in breach of what is permitted by EN-3. Additionally, this excessive overplanting leads to a variety of planning harms. These are both material considerations for the Inspector."

44. Two points in the Local Planning Authority's response to the Inspector's questions are of note. The first is that in responding to the question of whether the overplanting should be taken into account in considering the planning merits of the proposal it said:

> "The LPA does not take a point on this matter as they do not have the resources to assess in such detail, but the LPA does consider overplanting should be taken into account because it results in landscape, heritage and character impacts, making the scheme larger in area than perhaps it would otherwise need to, to generate the same capacity."

The second is that in response to being asked to comment on the interrelation between the assessment of the effect of the overplanting and the terms of EN-3 footnote 92 it said:

> "Inspector to decide if scale of overplanting proposed is `reasonable' as per footnote and whether the appeal development is `considered acceptable in a planning context so long as it can be justified'. There must be threshold point of providing more than is reasonable for what is required to generate the 49.9MW. It is the LPA's case that the harm is disproportionately large for the unquantified benefit that the overplanting would provide."

45. HTAG began its closing statement by reiterating that its position throughout had been that the Solar Farm was a NSIP and so not capable of being given permission under the TCPA regime.

46. At [14] of the closing statement HTAG said that the only justification for overplanting permissible under EN-3 was module degradation. It went on to say that the condition agreed between the Local Planning Authority and the Second Defendant would only control the capacity of the inverters and that there would nonetheless be "significant overplanting well in excess of that required to compensate for degradation". It then said:

> "18. The Appellant's proposal to generate 49.9MW for longer periods, is not permitted by EN-3 and would necessitate the wastage of a large proportion of the energy generated.
>
> 19. While the R6P's proposed condition would enable the Inspector to ensure the development remains below the NSIP threshold, this would not represent best use of the land. The site could deliver more energy without the need for clipping and wastage if it were to obtain a development consent order."

47. At [30] HTAG said:

> "Given the flexibility of the proposed planning conditions, the panels, inverters and other infrastructure may be larger or otherwise more prominent than assessed and the site more densely planted, with different potential adverse landscape, visual, glint and glare, ecology, and recreational impacts. The amount of energy generated and the level of clipping required remains undetermined. The Appellant cannot be said to have carried out a `worst-case scenario' assessment of the proposed development."

48. Section 5 of HTAG's closing statement addressed ecology. At [71] HTAG reminded the Inspector that it had raised concerns about the potential impact of the Solar Farm on protected species. The bulk of the following paragraphs dealt with the potential impact on bats and otters. There was no further express reference to skylarks and yellowhammers. At [81] and [82] HTAG did refer to the effect of the Solar Farm on birds but this was in the context of contending that the Second Defendant's proposed Bird Hazard Management Plan would outweigh any benefit to birds from the hedges which the Second Defendant proposed should be planted.

## The Inspector's Decision.

49. At [9] and [10] the Inspector described the proposed development and explained as follows why he believed he had sufficient information to assess the proposal on a worst-case basis:

> "9. Both the Infrastructure Layout and Landscape Masterplan revised drawings identify areas within the appeal site for an `Indicative Solar PV Array'. However, the layout of other features of the proposed development, such as access tracks, inverters and associated hardstanding, substation and construction compounds, fence line, and permissive paths are not indicative. Siting for these elements of the proposal is a matter for determination. The scheme proposes 26 inverter substations and 95 CCTV posts, along with two temporary construction compounds. A new vehicular entrance to the site is proposed off Thoroton Road by removing 17 m of existing hedgerow. Two options are shown for grid connection to the 132 kV overhead line within the appeal site. Option 1 Fig12A provides for a lattice tower 23 m high, whereas Option 2 Fig12B depicts wooden poles 9 m high.
>
> 10. The application drawings indicate typical details for panels, inverters, security CCTV, fencing and access tracks. These indicate bi-facial panels 2.8 m high at the top and 0.8 m above the ground at the bottom, inverter substation units 3 m high, substation electrical equipment 3.85 m high, with a 15 m high communications tower. Palisade fencing around the substation is shown as3 m high, with deer fencing 2.4 m high around the site and the bridleway, and CCTV towers 3.5 m high. These details are illustrative. However, the appellant's landscape evidence is based upon panels with a maximum height of 2.8 m. Inverters and the substation would be sited on raised ground for flood risk reasons. The Statement of Common Ground (SoCG) submitted in May records that the proposed development would include 150,304 modules or PV panels. Throughout the Inquiry the appellant referred to the appeal scheme with an indicative number of 128,752 panels sitting across a buildable area of 157 acres (63.5 ha). I have dealt with the appeal on the basis that no specific details about the number, power rating, size and spacing of panels, or specification for the inverters, are included in the application. However, the `Indicative Solar PV Array' would be sited within the defined fence line on the Infrastructure Layout. I am satisfied that there is sufficient evidence about the appeal scheme to properly assess the proposal on a worst-case basis."

50. At [26] the Inspector explained that because the capacity of the Solar Farm was so close to the 50mw threshold for a NSIP he considered that EN-1 and EN-3 were material considerations. It followed that he was to regard consistency with those policies as a

material consideration in favour of the Second Defendant's appeal while inconsistency would be a material consideration against the grant of permission.

51. At [27] the Inspector set out his understanding of the main issues in the appeal saying:

> "The main issues in this appeal are:
>
> (a) The effect of the proposed development on the character and appearance of the area.
>
> (b) The effect on heritage assets.
>
> (c) The effect on agricultural land and food production.
>
> (d) Flood risk and flood policy.
>
> (e) Consideration of local and national planning policy and whether the benefits of the proposal would outweigh any harm.
>
> HTAG questions whether the capacity of the appeal scheme would mean that it was a NSIP, and I deal with this first. It is also necessary to clarify, procedurally, how the appeal should deal with matters concerning a grid connection."

52. At [28] the Inspector explained that a suitably worded condition could ensure that the Solar Farm's capacity did not exceed the NSIP threshold. He noted that "there is a dispute about the likely degree of overplanting". The Inspector then addressed the question of overplanting saying:

> "29. The installed generating capacity of the solar farm would decline over time in correlation with the reduction in panel array efficiency. EN-3 notes that there is a range of sources of degradation that developers need to consider when deciding on a solar panel technology to be used and that account for this can be made by overplanting solar panel arrays. Footnote 92 adds that; `…this allows developers to take account of degradation in panel array efficiency over time, thereby enabling the grid connection to be maximised across the lifetime of the site. Such reasonable overplanting should be considered acceptable in a planning context so long as it can be justified and the electricity export does not exceed the relevant NSIP installed capacity threshold throughout the operational lifetime of the site and the proposed development and its impacts are assessed through the planning process on the basis of its full extent, including any overplanting'.
>
> 30. If overplanting is acceptable to address degradation to enable the grid connection to be maximised for the duration of the development, there would seem to be similar advantage in permitting additional overplanting to maximise utilisation of the available grid connection by exporting at the maximum export capacity permitted for the optimal proportion of time for that particular scheme. I do not read Footnote 92 as a policy limitation restricting overplanting solely to compensation for the degradation of panels over time. Such an interpretation would be at odds with the overall policy support for the generation of renewable energy. The Government has committed to sustained growth in solar capacity to ensure that it is on a pathway to meeting net zero emissions by 2050, and solar is a key part of the Government's strategy for low-cost decarbonisation of the energy sector. The letter to HTAG from the then Minister of State for Energy Security and Net Zero, dated 22 May, cannot be considered determinative of policy interpretation, which is ultimately a matter for the Courts.
>
> 31. In respect of overplanting I asked the appellant to provide further details about the contribution of the dc elements of the proposed solar farm regarding; (a) the difference between the output power defined under the Standard Test Conditions and the actual meteorological conditions of the site, (b) performance degradation of the panels over time, and (c) the maximisation of energy production from inverters with a combined

> capacity of 49.9 MWac. In summary, this note identified 8% of the panel area for (a), 16-22% of the panel area for (b), with 8-14% of the panel area for (c). HTAG challenges these estimates. ID40 is based on a number of assumptions, but it does indicate the likelihood that a significant proportion of the overplanting would be intended to maximise electricity output from the proposed solar farm. HTAG argues that taking this into account would conflict with EN-3. However, I concur with the appellant that there is nothing in EN-3 or any other policy statement that precludes the design of a scheme to maximise energy generation to account for the factors set out in (a), (b) and (c) above.
>
> 32. HTAG considers that leaving illustrative matters for subsequent approval by discharge of conditions may mean that infrastructure would be more prominent than assessed and the site more densely planted with different impacts on the character and appearance of the area, glint and glare, ecology and recreation. However, the approach adopted by the appellant is consistent with EN-1 and EN-3 concerning flexibility in project details. In determining this appeal, I have considered the area defined by the fence line on the Infrastructure Layout, within which the Indicative Solar PV Array would be contained, to set the maximum extent of the proposed solar PV array for the purposes of assessing the planning impacts of the appeal scheme. I have not used ac installed export capacity to constrain the impacts of the proposed solar farm.
>
> 33. Given the extent of the area defined by the fence line containing the Indicative Solar PV Array, along with the likely number and power rating of the panels, it would be likely that the proposed solar farm would have a high ratio for MWdc Capacity / Maximum Export Capacity MECac. HTAG are correct that the amount of energy generated and the level of clipping that would be likely to be required remain undetermined. However, it seems to me that the optimal level of clipping for the scheme would be a commercial decision for the developer. It is not necessary to know in advance the precise MWh that the appeal scheme would be likely to generate, particularly as this would depend upon a number of factors, including the weather. Overplanting to optimise renewable energy generation from the proposed solar farm would not result in any conflict with relevant policy.
>
> 34. Taking all the above into account, I find that the proposed development, subject to the imposition of appropriate planning conditions, is not a NSIP, and that it is appropriate to determine the appeal under section 78 of the 1990 Act. Given this finding, HTAG's conditional costs application falls away. Furthermore, in my judgement, the likely degree of overplanting in this case would not justify dismissing the appeal."

At footnote 50 the Inspector explained his understanding of the clipping of power production and its relation to overplanting thus:

> "Clipping occurs when power production from solar panels exceeds the capacity of inverters. This results in 'clipping' of the daily energy curve at times of peak radiation, usually around midday, and represents potential energy forgone, but overplanting enables more of the energy curve to be utilised in the morning and evening."

53. Grounds 1 and 2 are based on the Claimant's challenge to the reasoning which the Inspector set out in those passages.

54. From [40] – [95] the Inspector addressed various aspects of the proposal under the heading of "character and appearance".

    i) At [45] the Inspector described the Solar Farm and concluded that it "would introduce a discordant element into the local landscape" which would not be ameliorated by mitigation planting. He took account of some beneficial aspects

of the proposal but concluded that there would be "an adverse effect on the landscape resource of moderate significance".

ii) In addressing the visual effects of the Solar Farm the Inspector identified a number of adverse impacts but explained that these could be reduced to some extent by the imposition of suitable conditions and landscaping requirements. He nonetheless concluded, at [59], that there would initially be harm of major significance which would reduce to "an adverse effect of moderate significance for the remainder of the duration of the solar farm". The Inspector regarded this harm as a factor in the planning balance weighing against approval.

iii) In addressing the harm to heritage assets the Inspector emphasised the substantial public benefits flowing from the renewable energy which the Solar Farm would be capable of generating saying, at [69]:

> "The harm to three heritage assets would be temporary and reversible. However, the NPPF provides that great weight should be given to the conservation of these assets. In the NPPF paragraph 208 balancing exercise, I consider that the less than substantial harm I have identified to the significance of the designated heritage assets here is outweighed by the substantial public benefits that would be attributable to the renewable energy generated by the proposed solar farm. …"

iv) At [76] the Inspector said that there would be an adverse effect of minor significance in terms of the impact on agriculture but found that there was no policy conflict in that respect.

v) The Inspector addressed biodiversity thus:

> "89 HTAG referred to research about the effects of solar farms on bats and is particularly concerned about the loss of foraging from existing arable areas. However, intensively farmed arable land is not ideal foraging habitat for bats, whereas the proposed additional hedgerow and tree planting, along with controls on land management, would be beneficial for bats. Hedgerow and land management could incorporate features to encourage wildlife while discouraging large birds that might pose a risk of bird strike for aviation. This is a matter that could be addressed in an approved landscape and ecological management plan.
>
> 90. The appeal scheme proposes six watercourse crossings. The details about the design and construction of any culverts could be a matter for consideration in discharging planning conditions. I am satisfied that these crossings could be designed to minimise the loss of feeding habitat for bats and to take into account the likelihood of drowning risk for otters.
>
> 91. HTAG and others disputes the appellant's evidence about a biodiversity net gain of 187.60% for habitat units, 83.04% for hedgerow units and 11.85% for watercourse units from the appeal scheme. However, the replacement of arable fields with solar panels and grazing, the additional hedgerows and trees proposed, along with an enforceable ecological management plan, would deliver a significant biodiversity gain. This is a consideration that weighs in favour of the scheme."

vi) At [95] the Inspector said the "significant renewable energy generation" from the Solar Farm would "add substantially" to meeting national targets for the move to renewable energy generation adding that this consideration weighed significantly in favour of the proposal.

55. At [101] the Inspector explained his conclusion that the planning balance fell in favour of approval saying:

> "In the planning balance that applies in this case moderate weight should be given to the harm that would result to the character and appearance of the area. The harm I have identified to designated heritage assets attracts considerable importance and weight but would be outweighed by the public benefits of the development. Against this overall harm must be weighed the benefits of the proposed development. Chief amongst these is the significant contribution of the appeal scheme towards the generation of renewable energy, the resultant reduction in greenhouse gas emissions and energy security benefits, which warrant substantial weight. This, along with moderate weight to be given to biodiversity gain and limited weight for the benefits to the local economy would, in my judgement, outweigh the harm I have identified."

56. At [102] – [107] the Inspector explained why he had concluded that the Solar Farm accorded with the National Planning Policy Framework and with the applicable development plan (considering the latter as a whole).

57. Having adverted to the appropriate conditions the Inspector concluded thus at [115]:

> "In my judgement the planning balance here falls in favour of the appeal scheme. I consider that the proposal accords with the development plan taken as a whole and is consistent with the NPPF. I have taken into account all other matters raised in evidence, but I have found nothing of sufficient weight to alter my conclusions. For the reasons given above the appeal should be allowed."

58. By condition 8 the export capacity of the Solar Farm was limited to 49.9mwAC. Conditions 13, 16, and 17 made provision respectively for a landscape scheme, a biodiversity management plan, and a landscape and ecological management plan. Condition 2 provided for the development to be carried out in accordance with specified approved drawings. That was followed by condition 3 which provided that:

> "Notwithstanding Condition 2, prior to their erection on site, details of the development indicated on the following plans, including siting, dimensions, materials, colour and finish, subject to the following limits for (c), (d), (e) and (g), shall be submitted to and approved in writing by the local planning authority:
>
> …
>
> (c) 04668-RES-SOL-DR-PT-001 Rev 3 – Typical PV Module and Rack Detail. The top of all PV Modules and Racks shall not exceed 2.8 m above the existing ground level.
>
> …
>
> The development shall be carried out in accordance with the approved details and retained as such for the duration of the development hereby permitted."

59. Before me the parties differed in respect of the effect of condition 3 and advanced competing contentions as to the extent to which that condition would be effective to control the density at which the photovoltaic panels could be placed.

## The Grounds of Challenge and the Parties' Cases in Summary.

60. In ground 1 the Claimant asserts that the Inspector misinterpreted the effect of section 2.10.55 and footnote 92 of EN-3. She says that the Inspector was wrong to reject HTAG's contention that in light of those that National Policy Statement should have been interpreted as permitting overplanting only for the purpose of addressing module

degradation. Overplanting for other purposes was not prohibited (in the sense of being incapable of being approved) but was to be seen as contrary to EN-3 with the consequence that a proposed development involving such overplanting (such as the Solar Farm) was to be seen as not in accordance with the policy. It would follow that such a development would only be permissible to the extent that there were material considerations sufficient to overcome the factor of the inconsistency with the policy (or at least that it would be seen as inconsistent with the policy and this inconsistency would operate as a material consideration against approval). The Claimant accepts that EN-3 does not expressly state that overplanting other than to address module degradation is not permissible. However, she contends that such an indication arises by necessary implication from a natural reading of section 2.10.55 and footnote 92.

61. The Defendants say that the Inspector was right in his interpretation of EN-3. In particular he was right, they say, to conclude that the fact that the Solar Farm included overplanting to address the consequences of the STC rating and site maximization did not bring the proposal into conflict with EN-3. They reject the contention that the policy statement is to read as impliedly characterizing such overplanting as impermissible. On the contrary, they say, the Inspector was right to conclude that the proposal including such overplanting was consistent with EN-3. The Second Defendant (but not the First Defendant) advances a fallback argument invoking the principles articulated in *Simplex (GE) Holdings Ltd v Secretary of State for the Environment* [2017] PTSR 1041. It contends that relief should be refused on the footing that even if the Inspector's interpretation was wrong the appeal would necessarily have succeeded even on the correct interpretation.

62. The first element in ground 2 was an assertion that the Inspector should have regarded the reasonableness or otherwise of the degree of overplanting as a requirement which had to be satisfied and which was separate and distinct from the overall assessment of the planning balance. The First Defendant accepted in terms (as did the Second Defendant implicitly) that if the Inspector was required to consider the reasonableness of the overplanting separately from the planning merits he had failed to do so. Resolution of this part of ground 2 depends on the correct interpretation of footnote 92. The Claimant contends that this imposed a requirement that the degree of overplanting be reasonable and says that determination of this issue was distinct from and logically prior to consideration of the planning merits. The Inspector did not have to consider the questions in particular stages but he did have to approach the matter on the footing that reasonableness was a separate issue and he failed to do so. The Defendants contend that, properly interpreted, footnote 92 does not impose a separate requirement of reasonableness and it follows, they say, that the Inspector's approach was correct.

63. The next element in ground 2 was effectively an alternative to the argument based on the interpretation of footnote 92. It was a contention that the reasonableness of the extent of the overplanting was a material consideration which should have been but which was not addressed. The Defendants deny that the reasonableness or otherwise of the degree of overplanting was a material consideration which should have been taken into account by the Inspector in addition to his assessment of the planning balance or the question of the justification for the overplanting.

64. Finally, the Claimant contended that the Inspector failed to form a judgment as to whether the degree of overplanting was reasonable and justified. This was combined with the argument that the Inspector had not been in a position to form a judgment on

this because the final extent of the overplanting was unknown. The Defendants say that when the Decision is read properly it is clear that the Inspector formed and expressed a judgment as to whether the degree of overplanting was justified and that he had sufficient information to be able to form such a judgment.

65. The second and third elements of this ground as they were argued went beyond the ground as set out in the Statement of Facts and Grounds but no issue was taken with this and the points were fully argued.

66. Turning to ground 3 the Claimant says that the Inspector failed to control the density of the solar panels or to assess the application on a proper worst-case basis. The contention is that because the Inspector did not definitively know the density of the panels (in the sense of how closely together they were to be positioned) and did not impose an upper limit in the Decision he was not able to know what the worse-case scenario would be. The Claimant contends that the requirement in condition 3 that details of the siting of the panels be submitted for the approval of the Local Planning Authority before erection was not effective to control the density. This, she says, was because it was in too general terms and because by the time the approval of the Local Planning Authority was being sought the determination of the planning balance would already have been made in the Decision. The Claimant says that the density of the panels was an important element in determining the worst-case effect of the Solar Farm because of its relevance to the visual impact (especially by way of glare from the panels) and to the practicability of grazing by sheep under or amongst the panels.

67. The Defendants contend that condition 3 was effective to control the density of the panels. They say that, in any event, the density of the panels and the use of the site were constrained by the other conditions and by practical considerations with the consequence that the Inspector was properly able to conclude that he could form a proper view of the worst-case scenario.

68. As formulated in the Statement of Facts and Grounds there were two aspects to ground 4. The first was that the Inspector had failed to consider the environmental consequences of the heat which would be the result of electricity which was being generated which would not be transferred to the grid. The second was that the fact that clipping caused energy which would otherwise have been generated to be foregone was a material consideration which the Inspector failed to take into account. The former of those was at the forefront of the ground as formulated. However, the Claimant now accepts that the clipping of the panels will prevent the generation of heat and that the first aspect of the ground cannot be pursued. The Defendants say that the Inspector was aware of and referred to the potential energy loss and that he was not required to give it any further consideration than he did.

69. Ground 5 is based on a challenge to the EIA screening opinion obtained for the First Defendant. The Inspector proceeded on the basis of the screening opinion. The Claimant says that in reaching his opinion Mr Smale was not rationally able to be satisfied that he was approaching the issue on the worst-case basis. That meant, the Claimant says, that Mr Smale was not rationally able to be satisfied that the Solar Farm was not a EIA development. That meant that the opinion was flawed and this, in turn, vitiated the Inspector's approach. As articulated in the Statement of Facts and Grounds the Claimant's case pointed to two respects in which it was said that Mr Smale had insufficient information. The first was that he was not aware of the extent of the

overplanting in the sense of not knowing what proportion of the indicative number of panels represented overplanting. The second was that he did not know what final form the Solar Farm would take. Sensibly, in her submissions to me Mrs Graham Paul concentrated on the second of those points. The Defendants pointed to the deference to be accorded to the judgement of the author of a screening opinion and contended that the conclusion reached was rationally open to him.

70. Finally, in ground 6 the Claimant says that the impact which the Solar Farm would have on skylarks and yellowhammers was a principal controversial issue between the parties. She says that the Inspector should have addressed this in the Decision and should have set out his reasons for not regarding this as a factor against the appeal. He did not do so and the Claimant contends that this was either because he failed to address the issue or because he failed to give reasons for the conclusion he had reached each of which is a public law failing. In the Reply the Claimant went further saying, at [13], because these were protected species "the Inspector was bound to consider the impact on them and give proper reasons" and was required to do so "irrespective of whether any party raised them". The Defendants say that by the time the Inspector came to make the Decision the potential impact on these species was not a principal controversial issue. Consequently, the Inspector was not obliged to address the question.

## Ground 1: The Interpretation of EN-3.

71. Was the Inspector correct in the approach he took in [30]? Should he, as the Claimant contends, have concluded that overplanting other than to address degradation is inconsistent with EN-3 such that it is only to be permitted if there are material considerations sufficient to outweigh the fact of that inconsistency? In order to determine whether there is such inconsistency it is necessary to have regard to the correct interpretation of EN-3 read as a whole and to the nature, purpose, and effect of the overplanting.

### The Approach to Interpretation of the Policy.

72. The applicable principles are well-established and were not in dispute before me although there were differences of emphasis.

73. I have had regard to the principles articulated by Lord Reed in *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13, [2012] PTSR 983 at [17] – [22]; by Lord Carnwath in *Lambeth LBC v Secretary of State for Housing, Communities and Local Government* [2019] UKSC 33, [2019] 1 WLR 4317 at [15] – [19]; and by Holgate J in *Mead Realisations Ltd v Secretary of State for Levelling Up, Housing and Communities* [2024] EWHC 279 (Admin), [2024] PTSR 1093 at [72] – [92].

74. I need not rehearse those principles at length. The starting point is that the interpretation of policy is a matter for the court. In that exercise policy statements are to be interpreted objectively having regard to the language used read in context. The court is endeavouring to find the natural and ordinary meaning of that language. In doing so it is to have regard to the fact that the document being interpreted is a statement of policy and is to be interpreted as such rather than as if it were a statutory provision or a contractual term. In that context the court is to be conscious that the language of statements of national policy "does not always attain perfection. The language of policy is usually less precise, and interpretation relies less on linguistic rigour [than is the case in statutory interpretation]" (per Sir Keith Lindblom SPT in *R (Asda Stores Ltd) v Leeds*

*City Council* [2021] EWCA Civ 32, [2021] PTSR 1382 at [35]). Over-legalisation is to be avoided as is "forensic archaeology" exploring the drafting history of the policy (see per Lewison LJ in *TW Logistics* at [12] – [15]). The role of policy in providing guidance forms part of the context in which the language is to be interpreted as do the objectives at which the policy is directed (see per Lindblom LJ in *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] EWCA Civ 669, [2019] PTSR 1714 at [22]). Ascertaining the natural and ordinary meaning of the language of a policy may lead the court to conclude that a particular meaning is implicit in the policy. However, the court must exercise "great restraint" before implying a term into a policy (see *Lambeth* at [17]). As Holgate J explained in *Mead Realisations* at [80] "an implicit meaning would at least have to be necessary, clear, and consistent with the language used in the policy and appropriate, having regard to the range of circumstances in which the policy may fall to be applied."

Discussion.

75. The Inspector approached the question of the interpretation of EN-3 in the correct manner. He looked at EN-3 as a whole with particular regard to its purpose and considered the nature, effect, and purpose of overplanting. I have concluded that not only did the Inspector adopt the correct approach but that he also arrived at the correct interpretation of the policy. He was correct to conclude that overplanting which went beyond that necessary to address module degradation was not inconsistent with EN-3. In particular, he was right to reject the argument that section 2.10.55 and footnote 92 were to be interpreted as meaning that the only permissible overplanting was that which addressed module degradation. I reach that conclusion for the following reasons no one of which is determinative by itself but which taken together indicate the natural and ordinary meaning of the words used when properly read in context.

76. The first factor is that neither overplanting to achieve site maximization nor overplanting to counter the effect of the STC rating are expressly addressed in EN-3. It is, therefore, necessary to consider whether an indication that they are not permissible (in the sense of being inconsistent with the policy) is to be implied into the policy remembering the need for considerable caution before finding such an implication. Mrs Graham Paul for the Claimant was right in her submission that an express provision that a particular form of development is acceptable can be read as impliedly providing that other forms are not acceptable. However, that is not the inevitable consequence of such a provision. An express statement in a policy that a particular form of development is acceptable does not necessarily lead to the consequence that other related forms of development are not acceptable. All will depend on the context; the structure of the provision in question; and the language used. Here section 2.10.55 and footnote 92 do not expressly purport to address all forms of overplanting. Those parts of EN-3 do not contain words along the lines of "overplanting is permissible provided that conditions (a), (b), and (c) are satisfied". Similarly, they do not say expressly "overplanting is permissible provided that it is shown to be for the purpose of addressing module degradation". The use of such language would have tended to support the Claimant's argument but the language of section 2.10.55 and footnote 92 is not in such clear or stark terms. Those provisions address a particular form of overplanting but are not naturally read as purporting to cover all forms of overplanting. An implied characterization of overplanting other than for the purposes of addressing module degradation as impermissible does not arise by a natural implication from the language of these parts of EN-3 and still less is it a necessary implication.

77. The Claimant's argument places considerable weight on the words "such reasonable overplanting should be considered acceptable" at the beginning of the final sentence of footnote 92. Mrs Graham Paul submitted that "such" is a reference to overplanting addressing module degradation and that, read naturally, these words indicate that other forms of overplanting are not acceptable. I accept that the word "such" refers back to overplanting which addresses module degradation, but I do not accept that the words can properly be seen as indicating that other forms of overplanting are unacceptable. The Claimant places considerable emphasis on a close reading of part of a single sentence in a footnote in the policy. However, the policy must be read as a whole and in context. This is particularly important given that the characterization of the other forms of overplanting as unacceptable is said to arise by implication. If EN-3 had contained an express statement that the other forms of overplanting were unacceptable then that could have been stated shortly. In those circumstances reference to the policy as a whole would have been unlikely to have assisted in interpreting the effect of such a statement. However, that is not the position here and instead it is necessary to have regard to the policy as a whole in considering whether such a characterization arose by implication. It is also necessary to bear in mind the repeated warnings against over-legalisation and against treating the policy as if it were a legislative provision. The distinction between the language and style of the policy and that of a statute is demonstrated by the terms of section 2.10.55 and of footnote 92. A footnote would be out of place in a statute. Moreover, the language of the footnote is in terms which are consistent with the intention of giving an explanation and guidance to those applying the policy rather than laying down strict rules covering every circumstance.

78. In addition, the purpose and context of EN-3 are very relevant. Part of the context is that the development of renewable energy technologies is a rapidly changing field. This is adverted to in section 2.10.17 of EN-3 and was apparent in the circumstances of this proposal (see at [5] above). In those circumstances it is not surprising that EN-3 does not purport to lay down detailed rules for all the potential ways in which the technology might be applied. On the contrary, it would have been surprising if the policy had purported to be comprehensive. This is a factor operating strongly against the argument that the express reference to the acceptability of one form of overplanting (namely to address module degradation) is to be read as impliedly characterizing other forms as unacceptable. The express reference to overplanting to address module degradation is not surprising. Degradation over time is inherent in solar panels and it follows that the need to address its effects will be present in almost every proposal for a large-scale installation of panels. The need to address the consequences of the STC rating and the need to site maximization are, indeed, likely to be also present in most such cases but they do not have the same degree of inevitability.

79. Overplanting for the purposes of site maximization and of addressing the consequences of the STC rating is clearly consistent with the objective of maximizing the generation of renewable energy. Such overplanting has the effect that a particular solar farm will be operating at capacity for a greater proportion of the day. Accordingly, there will be an increased use of the solar farm's connection to the grid. That is clearly desirable in a context where grid connections are not readily available. It is of note that section 4.2.21 of EN-1 expressly provides that energy security and decarbonising the power sector require "each location to maximise its capacity". The evidence in this case demonstrated the contribution which overplanting can make to achieving that objective. In the absence of overplanting the time during which the Solar Farm would be operating

at its maximum capacity would be markedly less than with the proposed overplanting. In addition, the maximising of the capacity of each site is clearly desirable when regard is had to protection of the environment and to minimising the loss of agricultural land. The consequence of acceptance of the Claimant's argument would be that a greater number of solar farms would be needed to produce the same quantity of renewable energy.

80. The Claimant sought to counter the force of this point by contending that it was inherent in the nature of renewable energy, whether in the form of solar or wind power, that it would not operate at its maximum capacity for all the time. That is clearly correct: the sun does not shine all the time and nor does the wind blow all the time. However, it does not mean that it is not desirable to increase the period for which a solar farm is operating at its maximum capacity and still less does it mean that seeking to achieve that is inconsistent with EN-3. Section 2.10.55 and footnote 92 explain that it is appropriate for there to be overplanting to address module degradation so as to maintain the capacity of a solar farm over its lifetime. There is no logical reason why maintaining capacity over the course of a day should not also be legitimate and appropriate.

81. The Claimant contended that overplanting to address module degradation is fundamentally different from overplanting to address the effects of the STC rating and to achieve site maximisation. I do not accept this. There are differences but they are neither fundamental nor are they differences of principle. Each form of overplanting is to address a consequence of the fact that a solar panel of a given tested capacity will not operate at that capacity all the time and throughout the lifetime of a solar farm.

82. Adoption of the Claimant's interpretation of EN-3 is not needed to ensure that there is proper protection against the potential impacts of a solar farm on the environment. Even if overplanting to address factors other than module degradation is regarded as consistent with and permissible under the policy it remains necessary to consider whether the adverse impacts of a proposed development are justified by the benefits. If the impacts outweigh the benefits this will be a potent factor in the planning balance and the balance is likely to be against permission in such circumstances. This is the approach envisaged in the last sentence of footnote 92 and is consistent, as I will explain shortly, with section 2.10.56. Such an approach is rational in that it will enable an assessment of whether the benefits of the proposal as a whole outweigh the adverse impacts. The arbitrary exclusion of overplanting (other than for module degradation) before that exercise is undertaken would have no rational basis. In this context the terms of section 2.10.56 are significant. That section explains that export capacity is not an appropriate tool for assessing the impacts of a proposed solar farm. The section makes it clear that, instead, attention is to be focused on factors relevant to the physical impact of the development on the ground. The Claimant's interpretation with its focus on the laboratory capacity of the panels and on the maximum capacity regardless of the period for which that is achieved is contrary to the practical approach set out in section 2.10.56.

83. I have also taken account of the potential consequences of acceptance of the Claimant's interpretation. It would mean that overplanting to address the STC rating or to achieve site maximization would cause a proposal to be treated as inconsistent with EN-3 even if the planning balance would otherwise be firmly in favour of approval with the benefits outweighing the adverse impacts. Such inconsistency would, at the least, be a potent factor against approval. In those circumstances there would be scope for debate as to whether the benefits from the overplanting could be prayed in aid as a material

consideration in favour of approval. That is because it would be at least arguable that EN-3, on the Claimant's interpretation, ruled them out as material considerations. In addition, adoption of the Claimant's interpretation could result in artificial and irrational distinctions being made. On that interpretation, overplanting to address module degradation by installing more 610w panels than would otherwise be required would be consistent with the policy. Conversely, overplanting to achieve site maximisation by installing a smaller number of 750w panels but then "clipping" those panels to keep below the export capacity threshold would not be consistent. Such a distinction would make no sense either in terms of the planning balance nor in terms of energy generation. If the natural and ordinary meaning of EN-3 has those consequences then the court must not avoid them by adopting a strained or unnatural interpretation. However, in circumstances where the Claimant's interpretation is based on a meaning which is said to be implicit it is relevant to look at the consequences of adopting the interpretation and to consider whether it would further the objectives of the policy. Here, adoption of the Claimant's interpretation would not further the objective of maximising the generation of renewable energy and would have consequences for which a rational justification is lacking.

84. The Claimant placed considerable weight on the argument that the interpretation adopted by the Inspector permitted overplanting which the Claimant characterized as improper. The Claimant said that the overplanting and clipping arrangements proposed by the Second Defendant were an abuse in that the capacity of the Solar Farm was being artificially constrained to keep it below the NSIP threshold. There are a number of difficulties with this argument. The first is that it moves considerably away from seeking to ascertain the natural and ordinary meaning of the words used and from considering whether further elements follow as a necessary implication from the language used. The potential consequences are of some assistance in the interpretation exercise, as appears above, but they are of secondary importance. The second is that the argument fails to take account of section 2.10.56 with its direction that the focus is to be on the impacts of the proposal and not on capacity. The third is that it overlooks the fact that the exercise is one of interpreting EN-3. That policy was relevant in this case because the Solar Farm was close to the EN-3 threshold but the question of the correct interpretation of EN-3 is to be determined by reference to proposals within its scope (because it was such proposals that it was designed to govern). The impact of application of the policy to proposals not strictly governed by it but where it is being regarded as material because of the proximity to the threshold cannot assist in the interpretation exercise. In saying that I have not overlooked the fact that footnote 92 refers to "the relevant NSIP installed capacity threshold". However, that is a reference to the capacity threshold articulated in the particular NSIP proposal and will, *ex hypothesi*, be over the 50mw NSIP threshold. In those circumstances issues of abuse are less significant and certainly cannot warrant the adoption of an interpretation which would not otherwise be justified.

85. It follows that the Inspector's interpretation of EN-3 and in particular of section 2.10.55 and of footnote 92 was correct with the consequence that ground 1 fails.

The Second Defendant's *Simplex* Argument.

86. In light of my conclusion as to the correct interpretation of EN-3 the Second Defendant's argument that the result would have been the same even if the competing interpretation had been adopted does not arise. I will, however, explain briefly why, if

I had found in favour of the Claimant's interpretation, I would have rejected the Second Defendant's argument and would not have declined relief.

87. The Second Defendant's contention is that even if the overplanting meant the proposal was inconsistent with EN-3 the benefits of the overplanting were nonetheless to be seen as material considerations in favour of the proposal and that in the absence of planning harm arising from the overplanting those benefits were such that permission would necessarily follow. I have indicated above that there is at least scope for debate as to whether the benefits of the overplanting could be said to be a material consideration in favour of the proposal if they were found to be inconsistent with EN-3. Even if they are to be treated as material considerations in favour the inconsistency with EN-3 would clearly have been a material consideration on the other side of the balance. The latter would have been a material consideration of substantial weight operating against permission and in light of that it cannot be said that the outcome would necessarily have been the same if the Inspector had taken that factor into account in the planning balance.

**Ground 2: The alleged Failure to consider whether the likely Level of Overplanting was reasonable.**

88. It will be necessary first to consider the correct interpretation of footnote 92. The approach taken by the Inspector will then have to be considered in light of the conclusion as to the correct interpretation. In the latter exercise it is to be remembered that although the interpretation of policy is a matter of law for the courts the application of policy (if properly interpreted) is a matter for the judgement of the decision-maker subject only to challenge on the ground of rationality.

The Interpretation of Footnote 92.

89. In my judgement the words "such reasonable overplanting should be considered acceptable" in footnote 92 do not impose a separate requirement that the extent of the overplanting has to be reasonable. It was, therefore, not necessary for the Inspector to determine whether the degree of overplanting here was reasonable as a logically prior step to addressing the planning balance.

90. That conclusion flows from reading the footnote in context and having regard to the natural and ordinary meaning of the words used. Read naturally and in context "reasonable" is being used as an adjective describing overplanting to address module degradation and not as imposing a separate requirement. "Reasonable" is preceded by "such" and the phrase is a reference back to the preceding description of overplanting to address module degradation and is saying that such overplanting is reasonable in the sense of being sensible or appropriate. It is of particular note that the sentence goes on to say that such overplanting is acceptable "so long as" and it then imposes three requirements. Those are that the overplanting "can be justified"; that the NSIP installed capacity threshold is not exceeded; and that the impacts of the proposal are assessed by reference to their full extent. It follows that the sentence is characterizing overplanting to address module degradation as reasonable and then saying that there are particular requirements which need to be met. Those drafting footnote 92 could have added "reasonableness" to the list of requirements following the words "so long as" but they did not do so. The Claimant's reading would mean that a single sentence was to be interpreted as imposing two separate tests and doing so in different language. Such an interpretation is not a realistic reading of the text let alone a natural one.

91. The same conclusion follows as a matter of practicality. If reasonableness covers the same ground as the requirement that the overplanting can be justified then there is no need for a separate requirement. If, however, something more than the requirement of justification is envisaged then it is not clear what would be involved in assessing the reasonableness of the overplanting. It is of note that in its response to the Inspector's question of how the approach to the overplanting was to be squared with footnote 92 the Local Planning Authority turned to the question of justification. Similarly, as the Claimant's argument on the application of the test developed the criticism was of what was said to have been the Inspector's failure to consider whether the degree of overplanting was "reasonable and justified".

92. I accordingly reject the Claimant's argument on the interpretation of footnote 92. It follows that the Inspector did not err in failing to regard reasonableness as a distinct requirement which had to be satisfied in advance of his consideration of the planning balance.

Was the Extent of the Overplanting an obviously material Consideration?

93. The Claimant contended that, regardless of the wording of footnote 92, the reasonableness or otherwise of the degree of overplanting in terms of the extent of the land occupied was a distinct material consideration. She said that the Inspector should have, but did not, consider the effect of using less land to achieve the 49.9mw maximum export capacity. It was said that he should have considered whether this could have been achieved without or with less overplanting. Miss Bruce-Smith accepted that a planning application is to be considered on its own merits and that if a proposal is acceptable on its own merits it cannot be refused because of the existence of a preferable alternative. However, she submitted that a rational assessment of the justification for the degree of overplanting necessarily required consideration of the basis for and the benefits of the overplanting. She said that such consideration, in turn, must necessarily involve an assessment of the position without the overplanting. The Claimant characterized the issue of whether the maximum export capacity could have been achieved either without any or with less overplanting as "an important and obviously material consideration" which should have been but which was not taken into account.

94. Miss Bruce-Smith invoked Fordham J's decision in *Galloway* in support of this argument. However, that decision is not authority for the proposition that the reasonableness of the overplanting (in the sense of the need for the extent of overplanting proposed) is necessarily a material consideration such that the refusal to take it into account is irrational.

95. It is correct that in *Galloway* Fordham J concluded that the grant of planning permission in that case was unlawful because of a failure to consider "whether the grant of Planning Permission was `approving more panels over a larger area than were required' for a 50mw solar farm" and the implications of that for the extent of solar panel coverage (see [82]). The judge found that this amounted to an irrational failure to have regard to an obviously material consideration. However, Fordham J was not purporting to lay down a general rule but was, instead, reaching a conclusion as to what had been obviously material and what had been required for a rational assessment of the planning application in the circumstances of that case. Fordham J made that clear at [82] – [90] where he set out the seven features of that case which had led him to that conclusion

saying expressly, at [90], that his decision was the result of the combination of those features and was based on "the very particular facts of this individual case".

96. It is right to note that two of the seven features in that case have some resonance with the issues here. Thus, the first feature was the existence of the 50mw threshold for a NSIP. The third feature was that the size of the coverage was a "principal controversial issue". However, the other features demonstrate that the circumstances considered in *Galloway* were markedly different from those with which the Inspector was concerned here. Two features of particular relevance to Fordham J's decision were the fifth and the sixth and they related to matters which do not arise here. The fifth feature was the fact that the proposed layout had been revised to reduce the spacing between the lines of solar panels from 6.3m to 2.4m. Fordham J clearly regarded this as highly significant. At [87] he said that "the all-important question" was why in light of that revision so much land covered by panels was still needed to get to capacity. The judge was influenced by the fact that this "all-important question" "was never addressed". The sixth feature was the consequence of the dispute in that case over the proper approach to the measurement of capacity. It appears that it was only on the resolution of that dispute with the adoption of the figures put forward by the Claimant that it was established that capacity properly measured was "50% over" the 50mw threshold. At [88] Fordham J explained that the issue of the surplus over the threshold "was never explored" and it is apparent that no explanation had been given for it. The position here is rather different in that, in part as a consequence of the Inspector's probing, the DC/MEC ratio was clear and an explanation for the extent of the overplanting had been provided. It is also relevant to note that in the current case part of the purpose of the overplanting was said to be to maximise the time for which the Solar Farm was operating at the maximum permitted capacity doing so by having regard to the consequences of the STC rating and to achieve site maximisation by having regard to the configuration of the site and the fluctuations in the level of sunlight. Those considerations were not aired before Fordham J.

97. It follows that Fordham J was not laying down a general rule and that his decision that there had been a failure to address a material consideration was made in the context of particular circumstances rather different from those of the current case. It is, therefore, necessary to determine whether in the circumstances of this case the Inspector was required to consider whether the capacity could have been achieved with less overplanting and/or on a smaller area. In that regard, the approach which the court is to take is well-established. The classic starting point in the planning context is the exposition of the approach by Carnwath LJ (as he then was) in *Derbyshire Dales DC v Secretary of State for Communities and Local Government* [2009] EWHC 1729 (Admin), [2010] 1 P & C.R 19 at [16] – [28]. More generally, the position was set out by Lords Hodge and Sales in *R (Friends of the Earth) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190 at [116] and following. In short, in the absence of a requirement flowing from statute or policy that account be taken of a particular consideration the question is one of rationality. Regard must be had to the decision-maker's planning judgement. The "primary evaluative judgment" is for the decision-maker who is to be "afforded considerable latitude" (see per Fordham J in *Galloway* at [81]). There is only a public law failing if the question was necessarily relevant such that it was irrational for the decision-maker not to take it into account. In particular, it is not sufficient for a successful challenge to show that the consideration in question

was potentially relevant such that the decision-maker would not have erred if he or she had taken it into account.

98. In the circumstances of this case it cannot be said that rationality required the Inspector to take further account than he did of the reasonableness of the extent of the overplanting or to have further regard to what could have been achieved with less overplanting. As I have already noted the Inspector had taken considerable care to explore the extent of the overplanting and to probe the justification for it. The Claimant's argument is that there should have been consideration of whether the maximum capacity of 49.9mw could have been achieved with a lesser degree of overplanting. There was, however, no dispute that the maximum capacity could have been achieved for a period of time with less overplanting. The overplanting was intended to maximise the period of time for which the Solar Farm was operating at that capacity. The Inspector probed the Second Defendant's case to establish that the overplanting was aimed at that objective and to identify the extent to which it would achieve it. He was not required to do more given that he went on to consider the impact of the Solar Farm as a whole in his assessment of the planning balance.

The Inspector's Assessment of the Justification for the Overplanting.

99. Was the Inspector's approach to the requirement of justification flawed? In particular, did he fail to come to a conclusion as to whether the overplanting was justified or was his conclusion irrational because the level of overplanting was not definitively fixed or because he should have considered whether the export capacity could have been reached in a less harmful way? For the following reasons I reject the Claimant's criticism of the Inspector's approach.

100. I have explained at [33] above the care which the Inspector took to explore the issues of capacity and overplanting. He required and obtained detailed material. The without prejudice questions which the Inspector asked are very significant in this context. In those questions the Inspector said:

> "The Inspector will need to decide the appropriate approach to distinguishing, on the basis of capacity, between an NSIP scheme and one which is not. The first question is whether this could be achieved by means of a suitably worded planning condition?
>
> IF the answer is no - would the proposed development then meet the criteria for an NSIP scheme that would require development consent, and if so would that preclude granting planning permission?
>
> IF the answer is yes - would it be the case that 'overplanting' would no longer be a consideration that was relevant to answering the NSIP question - irrespective of the dc/MEC ratio for a scheme?
>
> IF that is correct whether overplanting should nonetheless be taken into account in considering the planning merits of the proposal?
>
> IF so would the extent of overplanting be a consider likely to affect the area of land occupied by PV panels?
>
> IF the PV panels in the local context would be likely to result in some harm to relevant planning considerations would there be more harm with more overplanting?
>
> IF so would additional overplanting increase the quantum of harm in the planning balance?

> IF overplanting would be likely to utilise the available grid connection more effectively by exporting at the MEC for a greater proportion of the time, would that increase the MWhr / year of renewably generated electricity exported to the grid above that which would be exported from a scheme with less overplanting?
>
> IF so would that increase the quantum of benefit in the planning balance?
>
> In that scenario would the appropriate planning balance weigh any overall harm from the scheme over the duration of the development, along with any legacy harm, against the overall benefits of the scheme, including the addition to the grid of x MWhr / year of renewably generated electricity for the duration of the development, along with any legacy benefit?
>
> IF so how would that approach to the assessment of overplanting square with Footnote 92 of EN-3?"

101. It is to be noted that in those questions the Inspector expressly addressed the issues of the additional benefits and the additional harm flowing from the overplanting and referred in terms to footnote 92.

102. The Inspector's express treatment of overplanting in the Decision began with a recital of footnote 92. The Inspector clearly intended the following part of the Decision to be seen as his treatment of the issues raised in footnote 92. At [31] he accepted that the overplanting would maximise the output of the Solar Farm and explained why he had accepted that. Then, at [34], he concluded this part of the Decision by saying that the degree of overplanting would not justify dismissing the appeal. Although attention has focused on paragraphs [28] – [34] of the Decision they are not to be read in isolation. They are to be read in the light of the preceding passages where the Inspector summarized the material he had received and set out briefly his understanding of the effect of that. Account is also to be taken of the subsequent parts of the Decision. The Inspector's analysis of matters going to the planning balance demonstrates the depth of his understanding of the material which had been provided.

103. The Claimant's challenge is on the footing that the Inspector failed to grapple with the question of whether the degree of overplanting was reasonable and justified (I have already explained that it is the latter which is the significant element). When considering whether the Inspector can be said to have addressed that issue and reached a conclusion it is important to keep in mind the approach to be taken to the adequacy and analysis of reasons set out by Lord Brown in *South Bucks DC v Porter* [UKHL] 33, [2004] 1 WLR 1953 at [36]. Read properly and as a whole the Decision makes it clear that the Inspector had considered whether the extent of overplanting was justified; had concluded that it was; and had explained why he had reached that conclusion. The Inspector's treatment of the question was somewhat condensed. Moreover, he combined his assessment of whether the degree of overplanting was justified with his explanation of why he was rejecting the argument that the only permissible form of overplanting was that to address module degradation. Nonetheless, the position is that the Inspector had required the degree of overplanting to be justified; he indicated in the Decision that he had accepted that it had been justified; and he explained there that he accepted that it was justified for the purpose of maximizing the electricity generated by the Solar Farm. The Inspector's treatment of the point was brief. However, it is clear that is because he regarded the more important question as being that of whether the Solar Farm seen as a whole including the overplanting was justifiable by reference to the planning balance. That approach was consistent with footnote 92 which although requiring the

overplanting to be justified placed the emphasis on the assessment of the impact of the proposal.

104. The Claimant took issue with the fact that the Inspector said that in his judgement "the likely degree of overplanting in this case would not justify dismissing the appeal". It was said that a finding that overplanting would not justify dismissal was different from a finding that the degree of overplanting was justified. That is an unrealistic and over-legalistic reading of the Decision of a kind which the courts have repeatedly said is inappropriate. Those words were the culmination of the passage in which the Inspector had been expressly addressing overplanting by reference to footnote 92 and to the matters which had been advanced as justification for the overplanting. When the Decision is read realistically it is sufficiently clear that the Inspector was stating that he found the overplanting to be justified.

105. Accordingly, I reject the contention that the Inspector failed to address the question of justification.

106. I will address more fully in the context of ground 3 the argument that the Inspector did not have sufficient information (or that there was insufficient certainty as to the final level of overplanting) properly to assess the position on a reasonable worst-case basis. It suffices to say here that for the reasons I will expand on below I am satisfied that the Inspector had sufficient information as to the likely degree of overplanting to be able to assess on a worst-case basis whether it was justified.

107. The rationality of the Inspector's conclusion on justification and of the absence of a detailed analysis of whether the same objective could have been achieved with a lesser impact are supported by the terms of EN-3 section 2.10.17. The Solar Farm with a maximum export capacity of 49.9mw was comparable to the description in that section of the typical size of a 50mw solar farm. That section said that to generate that level of power a farm of 100,000 – 150,000 panels covering 125 – 200 acres would be required. Here, the indicative figure was one of 128,752 panels and the built area was to cover 157 acres (albeit the total area was to be 223 acres). This is a potent indication that the Solar Farm was in broad terms to be seen as being of an appropriate scale for the level of capacity being generated.

108. In her evidence Miss Hamilton said that the rapid increases in the capacity of solar panels meant that the figures in section 2.10.17 "may well be … already out of date". In a development of that argument it was said that the Inspector should have had regard to the prospect of further developments in the capacity of solar panels. Neither of those contentions advances matters.

109. It was not open to the Claimant to argue that EN-3 was out of date. As was explained by Holgate J in *Client Earth* it is not open to a party to say that a change of circumstances since the adoption of a NPS means that the weight to be given to the policy should be reduced. The rigour of that prohibition is modified to some extent in respect of section 2.10.17 because that was setting out illustrative figures rather than itself enunciating policy and because it expressly contemplated that the position was likely to change over time. Nonetheless, in circumstances where the Inspector was addressing matters less than a year after that iteration of EN-3 had been adopted the illustrative figures there were at the very lowest the starting point and to be taken as

properly illustrating in broad terms the scale of development needed to generate a particular quantity of renewable energy.

110. Similarly, the Inspector is not to be criticized for failing to have greater regard to the scope for improvement in the performance of solar panels. In his technical report Mr Urbani had said that the indicative number of panels had been calculated having regard to foreseen improvements in the efficiency of solar panels. In light of that it is artificial and unrealistic to contend that the Inspector should have assumed that some, as yet unforeseen, improvement would lead to a reduction in the number of panels needed let alone that he should have speculated as to the extent to which this would happen.

111. The explanation given by Mr Urbani in the technical note is also relevant here. Mr Urbani had addressed the question of whether it would be possible to achieve an equivalent yearly production of energy on a smaller land area by increasing the ratio of module area to land area or by using a higher rated solar panel. He explained why the Second Defendant believed that would not be possible. Mr Urbani said that the Second Defendant believed that the ratio identified was an efficient one for the site and that any increase would lead to "higher levels of shading" with a consequent energy loss. He added that "any scope for further changes to [the ratio] or panel rating to affect site area to achieve similar performance to the … appeal layout would be of marginal effect and unlikely to result in changes noticeable to the public". The Inspector was entitled to have regard to this as helping provide justification for the degree of overplanting.

112. In light of those matters I am satisfied that the Inspector did address the issue of the justification for the overplanting and that the conclusion he reached was well within the range of conclusions rationally open to him.

113. Ground 2, therefore, fails.

**Ground 3: The alleged Failure to control the Density of Panels or to assess the proposed Development on a proper worst-case Basis.**

114. This ground also fails for the following reasons.

115. The debate about the effect of condition 3 does not ultimately resolve matters. The Inspector's assessment of the effect of the Solar Farm was based on the matters which he summarised in [9] and [10] of the Decision. He concluded that the information which he had about those matters gave him "sufficient evidence … to properly assess the proposal on a worst-case basis". He did not refer there to the possibility of controlling the density of the solar panels by condition and nor did that possibility play any part in his assessment of the effects of the Solar Farm later in the Decision. It follows that the condition has, at most, a peripheral relevance to the rationality of the Inspector's conclusion that he had sufficient material to assess matters on a worst-case basis.

116. If it were necessary to determine the debate about the effect of condition 3 I would accept the Defendants' analysis. The limited effect which the Claimant attributes to the reference to siting in that condition is unduly narrow in that it fails, in my judgement, to read condition 3 as a whole. It is also artificial in that control over the siting of the panels when seen in context and realistically connotes control over the spacing between the rows of panels. It is not, however, necessary to make that determination and I will proceed on the basis that there remains scope for debate as to the effect of the reference to siting in condition 3. The question, therefore, is whether the other matters which the

Inspector summarised at [9] and [10] were such that he was properly able to assess the proposal on a worst-case basis.

117. That question is again one of rationality in which regard is to be had to the Inspector's planning judgement. The challenge will only succeed on this ground if the Inspector's conclusion that he had sufficient information was not rationally open to him when account is taken of the wide ambit accorded to his judgement. It is, moreover, to be noted that the assessment was to be on a reasonable worst-case basis in which the Inspector was entitled to have regard to practical considerations. In considering the rationality of the Inspector's conclusion I have taken account of the steps which the Inspector took to obtain information about the Solar Farm. As already explained, he repeatedly pressed for and obtained further information. He was doing so in order to be able to come to a proper conclusion on the appeal. The fact that he took those steps increases the deference to be paid to his judgement and to his conclusion at the end of that process that he was able properly to assess the worst-case effects of the proposal.

118. It is relevant to note that both EN-1 and EN-3 expressly contemplate that not all the details of a renewable energy proposal will be available when a decision on approval is being made. This is, in part, a consequence of the developing nature of the ways of generating renewable energy. It follows that the Inspector's readiness to make an assessment without every detail having been finalised was in accord with the tenor of the NPS's. However, the force of this point must not be overstated. Both EN-1and EN-3 refer to the fact that all details may not have been settled in detail at the time of the application for consent but the Inspector was considering the position at a somewhat later stage. Moreover, both NPS's emphasise that an applicant is to give as much detail as possible. The need for flexibility is not to be seen as an excuse for a failure to provide such details as can be obtained.

119. The comparison with the figures in section 2.10.17 of EN-3 is relevant not only to the rationality of the Inspector's conclusion that the degree of overplanting was justified but also to the rationality of his conclusion that he had sufficient information to assess the matter on a reasonable worst-case basis. The fact that the indicative number of panels and the area occupied were comparable to the number and area which EN-3 envisaged would be needed for generation of 50mw is a potent indication that the indicative number put forward by the Second Defendant was broadly correct and that the final number would be unlikely to be markedly different.

120. In the Reply it was said, at [10], that although it was appropriate for there to be a degree of flexibility "that does not give carte blanche for a developer to create a speculative indicative scheme with the only parameter being a fence line". The material before the Inspector was not, however, limited to that. The Inspector was not approaching matters solely on the basis of the fence line and the indicative number of panels. A number of features were known and/or were to be controlled by conditions. Those included the maximum height and minimum ground clearance of the panels and the location of a number of key structures and features on the site (including the inverters, the substation, and the construction compounds together with the access tracks). As already noted the conditions made provision for a landscape scheme, a biodiversity management plan, and a landscape and ecological management plan. For the First Defendant Mr Williams rightly pointed out the fact that the precise numbers and spacing of the panels were unknown did not mean that those were uncontrolled. There were a number of controls

(physical and by way of condition) which would constrain both the numbers and the spacing of the panels.

121. In addition, the Inspector had before him evidence as to the practicalities of operating the Solar Farm. This was highly relevant to the question of whether he was in a position to assess the reasonable worst-case scenario. As a matter of common sense it can be anticipated that those installing solar panels will position them in such a way as to avoid some panels casting shadows on others. This was confirmed in the material before the Inspector. As I noted at [5] above Mr Urbani had explained in the technical report that a minimum spacing of 2m between rows was necessary for maintenance and that without such a gap the site would not be workable. He had also confirmed that an increase in density would increase shading and make the site less efficient.

122. In the technical report Mr Urbani had been explaining why it would not be possible, save to a marginal extent, to achieve the same power generation on a smaller area by using a higher ratio of module area to land area. However, this material also explains why, as a matter of practicality, those creating the Solar Farm would be unlikely to install the panels at a higher density than indicated. The Claimant now says that the Inspector was not in a position to assess the proposal on a worst-case basis because he could not exclude the possibility that the panels would be installed at a greater density than indicated but this material showed that the risk of this happening was theoretical rather than real.

123. The combination of the matters which were being determined and the practicalities of operating the Solar Farm meant the Inspector was in a position to make an informed decision about what was to happen inside the fence line of the Solar Farm. He was justified in approaching matters on the footing that if the appeal succeeded the ultimate development would not be materially different from that which he was considering. The conclusion that he was able to make an assessment of the reasonable worst-case scenario was well within those rationally open to him.

124. Ground 3, therefore, also fails.

**Ground 4: The alleged Failure to consider the wasted Energy and its Environmental Consequences.**

125. The issue on this ground is now whether the potential loss of energy as a consequence of clipping was an obviously material consideration which the Inspector should have but failed to take into account.

126. I have set out my understanding of the relevant principles at [97] above. In addition it is to be remembered that a challenge under section 288 is not an opportunity to review the planning merits of an inspector's decision and that if a particular consideration has been taken into account then the weight to be attached to it is a matter of planning judgement for the decision-maker subject only to challenge on the ground of rationality (see per Lindblom LJ in *St Modwen Ltd v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, [2018] PTSR 746 at [6]).

127. There are a number of factors which combine to lead to the conclusion that it cannot be said that the Inspector's treatment of this question amounted to a failure to take account of an obviously material consideration.

128. The first is the fact that the Inspector expressly made mention of this issue. At footnote 50 he summarised the effect of clipping saying that it meant that there would be "potential energy foregone at times of peak radiation". Not only was he aware of this but he went on to explain that the countervailing benefit of overplanting was that it "enables more of the energy curve to be utilized in the morning and evening". It follows that the Inspector can be seen to have understood the nature and effects of clipping. He is to be taken to have applied his mind to the point and was not approaching his task on the basis of any misunderstanding or in circumstances where he could be said to have overlooked it by inadvertence.

129. Next, the potential energy foregone is an inherent consequence of clipping (although there are ways to address it – for example by battery storage) which is an integral aspect of overplanting. It is not to be seen as a consideration distinct from the merits or otherwise of overplanting. At most it is an aspect of the issue of whether the overplanting is justified but it is not readily seen as a consideration needing to be addressed separately from that question. It is of note here that the Inspector's summary of the effect of clipping and the countervailing benefit of maximising energy generation formed part of his consideration of whether overplanting was compatible with EN-3 and other relevant policies. That was an appropriate point at which to take it into account.

130. Further, I have already noted that clipping is inherent in overplanting (or at least in overplanting of the kind envisaged here). It is highly debateable whether, having concluded that the overplanting was justified, it would have been open to the Inspector then to have regard to the potential energy foregone as a freestanding and separate consideration operating against the Solar Farm in the planning balance. I am very far from being persuaded that, even if it would have been open to the Inspector to do that, this limited adverse factor was an obviously material consideration of which the Inspector was required to take account in order to avoid *Wednesbury* irrationality. If the Inspector was required to take account of the potential energy foregone as an adverse factor then he would have to take account of the benefits of overplanting as a factor on the other side of the balance. I note that in footnote 50 the Inspector was saying that overplanting had benefits and disadvantages. He was not required to do more.

131. If the potential loss of energy was an obviously material consideration operating against the appeal it could have been expected to have been advanced clearly as such a consideration before the Inspector. That was not the approach which HTAG took. There was a reference to clipping and the wastage of surplus energy in HTAG's Statement of Case at page 4. That was in the context of the submissions about site capacity and the argument that the development was a NSIP. The potential wastage of energy was also mentioned in HTAG's closing submissions at [19] and [20]. It was said there that in light of that keeping the capacity below 50mw would not represent best use of the land. However, that was again in the context of the argument that the development was to be seen as a NSIP and as part of the submissions in relation to the application of EN-3. The potential wastage of energy was not being put forward there as a separate material consideration forming part of the planning balance.

132. It follows that ground 4 fails.

## Ground 5: The Adequacy of the EIA Screening Opinion.

133. The issue here is whether Mr Smale's conclusion that the Solar Farm was not an EIA development was rationally open to him. That turns on the question of whether he was entitled to proceed on the footing that he had sufficient information to come to that conclusion.

134. The test is that of rationality. The questions of whether there is sufficient information to determine whether a proposed development is an EIA development and whether it is such a development are for the authority (or in this case Mr Smale). In considering challenges to such decisions the court is to have regard to "the paramount importance of the judgment of the decision-maker" (per Coulson LJ in *Kenyon v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 302, [2021] Env LR 8 at [10]). Account is to be taken of "the breadth of the discretion" given to those compiling screening opinions and the "range of judgment" is not to be fixed "more tightly than is necessary" (per Lords Hodge and Sales in *R (Friends of the Earth Ltd) v Secretary of State for Transport* [2020] UKSC 52, [2021] PTSR 190 at [143] – [145]). The court is, moreover, to remember that the decision will necessarily be made on the basis of incomplete information. As Thornton J explained in *R (Clarke-Holland) v. Secretary of State for the Home Department* [2023] EWHC 3140 (Admin) at [72] the screening opinion:

> "is necessarily based on less than complete information. It is not intended to involve a detailed assessment of factors relevant to the grant of planning permission, nor a full assessment of any identifiable environmental effects."

135. At sections 4.3.10 – 12 EN-1 expressly recognised that in the context of renewable energy schemes an applicant may not be able to give precise details of all aspects of the proposed development. However, the force of that recognition must not be overstated because the NPS emphasises the need for as much detail as possible to be provided and for the matter to be approached on the basis of the likely worst-case effects.

136. The fact that Mr Smale was not aware of the extent to which the proposal included overplanting does not advance matters at all. His task was to assess whether the proposed development was of a scale which was likely to result in a significant environmental impact such as to trigger the need for a full EIA assessment. The issue of what proportion of the proposed panels was attributable to overplanting was wholly irrelevant to that question.

137. I turn to the Claimant's principal argument which was that Mr Smale was not in a position to form a proper judgement. The fact that the screening opinion prepared for the Local Planning Authority had come to the same conclusion as that later reached by Mr Smale is a point of limited weight. It does, however, indicate that Mr Smale was not alone in his view. The significance of the point is increased by the fact that the Claimant's contention that Mr Smale was not in a position to reach a proper assessment came close to mere assertion depending as it did almost entirely on the point that the final position was not fixed. Nonetheless, the earlier screening opinion remains a factor of only limited weight. However, there are two further factors against the Claimant's argument which do have considerable force. The first is the extent of the information which Mr Smale did have. He knew the fence line and the indicative number of solar panels together with some elements of the structures which would be included in the Solar Farm. He is to be taken to have been aware of the nature of a solar farm and of the environmental consequences which might flow from such a development in general

terms. In addition, as was apparent from the screening opinion, Mr Smale was aware of the views which others in positions of expertise had expressed on the proposed development. Thus, he noted the comments of the Local Planning Authority's landscape and conservation officers and the absence of objections from Natural England, the Environment Agency, and the Local Planning Authority's Ecology officers. Mr Smale did not know the precise final number of panels which would be installed nor their precise final locations but he did have a quantity of information and was not acting solely on the basis of a fence line and an indicative number of panels. The second factor is a related one, namely the nature of the opinion which Mr Smale provided. That was in the required standard matrix format but contained detailed information with many of the screening criteria questions being addressed at some length. Those factors combine to provide support for the assessment implicitly made by Mr Smale that he had sufficient information properly to form the screening opinion. In light of those matters I am satisfied that it was rationally open to him to reach that conclusion and it follows that ground 5 fails.

**Ground 6: The Inspector's alleged Failure to consider the Impact of the proposed Development on Skylarks and Yellowhammers.**

138. The starting point is the position as set out by Lord Brown in *South Bucks DC* at [36]. A decision must address the "principal controversial issues" explaining the conclusions reached on such issues and the reasons for them. However, "the reasons need refer only to the main issues in dispute, not to every material consideration". As Holgate J explained in *Mead Realisations* at [179] an inspector "cannot be criticised for acting irrationally or for failing to give reasons" in respect of a matter which "was not raised as a substantial issue between the parties". The question of whether an issue was or was not in dispute and whether it was a "main" or "principal" issue is to be answered by reference to the state of matters immediately before the decision under challenge has to be made. In the context of an appeal there is no need for an inspector to include in his or her decision consideration of matters which have been resolved in the course of the appeal and which are no longer in issue.

139. I have set out the history of the submissions made to the Inspector at [38] – [48] above**.** In summary the position was as follows. The Second Defendant's Ecological Assessment had said that the effect on skylarks and yellowhammers would be negligible. HTAG had not relied on any such impact as a reason for refusal of the appeal (although it had put forward the effect on otters and bats as a such a reason). HTAG had said that there was "no evidence" for the conclusion in the Ecological Assessment. It is of note that even at that stage HTAG was not putting forward a positive case as to the impact on those species save to say that Nottinghamshire's Biodiversity Plan recorded both as being in local decline. Instead, it was questioning the evidential basis for the conclusion in the Ecological Assessment. This is to be contrasted with HTAG's position in relation to the point also made in the Ecological Assessment that the Solar Farm would enhance bird populations. HTAG responded to that point with short but reasoned submissions contending to the contrary. The Second Defendant provided a response explaining the basis for the assessment made in the Ecological Assessment. HTAG did not respond to that either by way of evidence or by way of submissions in its Closing Statement. In her Reply the Claimant says that this was because HTAG did not have an ecology witness and that this was due to limited funds. The position was, nonetheless, that there had been no response to the explanation which the Second

Defendant had given and no further submission about these species in HTAG's Closing Statement.

140. In light of that history the impact which the Solar Farm might have on skylarks and yellowhammers was not a principal controversial issue by the time the Inspector came to make the Decision. To the extent that it had been raised at an earlier stage it had been a peripheral issue. Moreover, the Inspector had been entitled to conclude that in light of the explanation given by the Second Defendant and the lack of subsequent challenge it was no longer in issue. It follows that he is not to be criticized for failing to address it in the Decision.

141. I can deal briefly with two subsidiary arguments advanced on behalf of the Claimant.

142. The first appears in the closing part of [3(v)] of the Reply. There it is said that "It is understood that the Inspector observed such birds during the accompanied site visits and so ought to have been aware of them". This does not take matters any further. Even if the Inspector had seen the birds (which is not stated in terms) and had been told that they were skylarks and yellowhammers (which is again not stated and without which it cannot be assumed that the Inspector would know what they were) he was in light of the history I have just noted entitled to proceed on the footing that there was no challenge to the assessment that the effect on them would be negligible.

143. The second argument is advanced by reference to the protected status of these species. Mrs Graham Paul contended that the protected status of skylarks and yellowhammers meant that once any question of the potential effect on them was raised it was necessary for the Inspector to address the question even if it was not pushed forward by any party. I do not accept this argument. The requirement was that the Inspector address the principal controversial issues in the Decision. The protected status of these birds did not mean that the potential issue of the impact of the development them was a principal controversial question in the absence of an actual dispute about that impact at the time the Inspector came to make his decision.

144. In considering this ground the contrast between the arguments HTAG advanced about the impact on bats and otters and its position in respect of skylarks and yellowhammers is revealing. HTAG advanced the risk to bats and otters as a reason for refusing the appeal in the Statement of Case and in doing so it referred to their protected status. It returned to that question in its Closing Submission where it also reverted to the issue of whether the hedges to be planted would in fact enhance the bird population setting out its case in some detail. In light of that the Inspector treated those as controversial issues addressing them in terms in the Decision and explaining the reasons for his conclusion. Having chosen not to advance a case about the impact on skylarks and yellowhammers in the same way HTAG cannot now criticise the Inspector for not having dealt with that impact in the Decision.

145. Accordingly, ground 6 also fails.

## Conclusion.

146. As a consequence the claim is to be dismissed.