Neutral Citation Number: [2017] EWHC 1047 (Admin)

Case No: CO/5130/2016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/05/2017

Before:

MR JUSTICE GILBART

- -

Between:

MOULTON PARISH COUNCIL	
and	
THE RT HON THE EARL OF DERBY, DL	**Joint Claimants**
- and -	
SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	**Defendant**
and	
FOREST HEATH DISTRICT COUNCIL	**First Interested Party**
and	
NEWMARKET HORSEMEN'S GROUP	**Second Interested Party**

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Christopher Boyle QC and Andrew Parkinson (instructed by **Boodle Hatfield LLP**) for the **Joint Claimants**
Richard Moules (instructed by **Government Legal Department)** for the **Defendant**
The **First Interested Party** did not appear and was not represented
David Elvin QC and Luke Wilcox (instructed by **Bracher Rawlins LLP**) for the **Second Interested Party**

Hearing date: 4th April 2017

Judgment Approved

MR JUSTICE GILBART :

ACRONYMS USED IN JUDGMENT

TCPA 1990 Town and Country Planning Act 1990

PCPA 2004 Planning and Compulsory Purchase Act 2004

NPPF	National Planning Policy Framework
JDMPD	Joint Development Management Policies Document
FHDC	Forest Heath District Council
LPA	Local Planning Authority
SSCLG	Secretary of State for Communities and Local Government
NHG	Newmarket Horsemen's Group (Second Interested Party)
IR (1)	First Inspector's Report 22nd December 2011 (first application)
DL (1)	Decision Letter of SSCLG 22nd March 2012 (first application)
IR (2)	Inspector's Report 9th July 2015 (current application)
DL (2)	Decision Letter of SSCLG 31st August 2016 (current application)

1. If the Claimants' case in this matter is well founded, the Secretary of State has performed a complete and unexplained volte face in his assessment of the highways impacts of a housing development in Newmarket, and has also failed to apply his own National Planning Policy Framework, which should lead to the quashing of his refusal to grant planning permission for the development. The Secretary of State, supported by those representing some of the horse racing industry, who oppose the development, deny those claims. The question in this litigation is whether he has done so.

2. These proceedings, made after a grant of permission by Dove J, relates to an application by the Claimants under s 288 *TCPA 1990* to quash the decision letter (DL (2)) of the Defendant SSCLG of 31st August 2016 whereby he refused outline permission for the construction of up to 400 dwellings plus associated infrastructure at Hatchfield Farm, Fordham Road Newmarket. He did so against the recommendation of his Inspector, who had held a public inquiry over 11 days during the course of April and May 2015, and had reported to the SSCLG by 9th July 2015. The decision letter thus emerged after the matter had been with the SSCLG for over a year.

3. The claim is not resisted by FHDC, the local planning authority for the area.

4. In short terms, Newmarket is the largest town in the FHDC area. There is on any view a requirement for more land for housing and other economic development in the Forest Heath District. The local Parish Councils (of which Moulton is one) have for some time argued that growth should not be dispersed amongst the rural parishes, but should be concentrated in Newmarket. The NHG and some others are concerned that that may have an adverse effect on the horseracing industry that is based there. That is the background to this litigation.

5. The Claimants contend that the SSCLG has

i) failed to apply his own policies in NPPF;

ii) failed to have regard to his own previous Decision DL (1) where he had reached conflicting conclusions to those he now holds on matters relating to highway safety, or has reached a conclusion on safety without evidence, or which is irrational;

iii) misinterpreted relevant Development Plan policy as it relates to the horseracing industry.

6. The SSCLG and the NHG deny all those claims. FHDC do not oppose the claim. The second head of claim requires consideration of the two Inspector's Reports and Decision Letters of the SSCLG: both that under challenge, and that issued in 2012 on a larger scheme of development within whose application site the current application site lies.

7. I shall deal with the matter as follows

i) History of the proposal and of Development Plan allocations;

ii) NPPF policy;

iii) The Decision Letter (DL (1)) and first Inspectors Report (IR (1)), insofar as they may affect the issues in the current claim;

iv) The current proposal, including the case advanced at the inquiry;

v) The case for the LPA;

vi) The objections to the current proposal by NHG;

vii) The Inspector's Report (IR (2));

viii) The current Decision Letter (DL (2));

ix) The case for the Claimants;

x) The case for the SSCLG;

xi) The case for NHG;

xii) Discussion and Conclusions.

(i) History of the proposal and of Development Plan allocations

8. In May 2010, the LPA adopted a Core Strategy, which forms part of the Development Plan for the area. It included proposals for strategic growth allocations, including an urban extension for 1200 dwellings north east of Newmarket, which extension included the appeal site. A challenge was made in the High Court to the inclusion of those allocations (See *Save Historic Newmarket Ltd & Ors v Forest Heath District Council & Ors* [2011] EWHC 606 (Collins J)). The claim was made by those apparently representing the horseracing industry, represented (like the NHG here) by

Mr David Elvin QC. The effect was that those allocations, and the section of the Plan dealing with housing provision, were deleted from the Plan.

9. Of course, the absence of housing policies from the Development Plan after NPPF came into effect in March 2012 would prove very significant in policy terms, as will be described below.

10. Other policies in the Plan remained. IR (2) at [16]- [17] provides a summary. They include policies

    i) focussing development on the towns and key service centres (Vision 1);

    ii) the development of Newmarket as a tourism, leisure and cultural focus while protecting its unique character (ECO 5);

    iii) Spatial Objective H1 aims to provide enough decent homes to meet needs in the most sustainable locations;

    iv) Spatial Objective H2 addresses the mix of housing, its design and accessibility;

    v) Spatial Objective T1 looks to achieve more sustainable communities by ensuring that infrastructure, facilities and services are commensurate with development;

    vi) Spatial Objective T3 supports strategic transport improvements in the District, including along the A 14 corridor;

    vii) CS1 (CS stands for Core Strategy) sets out the spatial strategy. In Newmarket it included recognition of the importance of the horseracing industry, and also included provisions for growth in employment, retail and leisure uses, and housing on brown field land within the settlement (not forgetting that the effect of the High Court challenge had excised other parts of the allocations). Policy CS7 set a minimum of 6400 dwellings and associated infrastructure between 2001 and 20121, and a further provision of 3700 dwellings (with infrastructure) between 2012 and 2031, of which (CS9) set a target of 30% affordable dwellings on sites of 10 or more dwellings;

    viii) CS12 dealt with strategic road improvements and sustainable transport. CS 13 dealt with developers making contributions to meet site specific requirements and create sustainable communities.

11. As appears below, FHDC is working on a Single Issue Review of its Housing Policies, dealing with overall housing provision and distribution, and with site allocations. It has published a preferred options document for consultation. The application site is proposed for mixed use development, including 400 dwellings.

12. FHDC and its neighbour St Edmundsbury BC adopted a Joint Development Management Policies Document (JDMPD) in February 2015. It is silent on the topic of housing, but it includes a number of policies summarised in IR (2)) at [17]. One of its policies, DM48, is very relevant to one of the major issues at the inquiry. I shall set out its precise terms in due course. It seeks to avoid development which would have a

material adverse impact on the horseracing industry unless the benefits would significantly outweigh the harm.

13. In March 2012, the SSCLG dealt with an appeal by one of the joint Claimants (Lord Derby) against the refusal by FHDC to permit a mixed-use development for up to 1200 dwellings, 36,000 sq m of B1 employment floorspace (of which up to 10,000 sq m would be B1 office floorspace), 1000 sq m of community facilities, up to 300 sq m of retail and food and drink use, a park and ride with 100 spaces, a reservation for a two form entry primary school and new accesses. That appeal site included the current application site.

14. The inquiry was heard in December 2011 by a very experienced Inspector, J.I. Macpherson. His report (IR (1)) was full and careful. He reported that permission should be refused on one ground alone, namely that the scheme was premature and should be considered through the development plan process. I shall set out more of the issues and conclusions presently. The inquiry was held in December 2011, before the publication of NPPF. Some mention was made by inquiry participants of its draft version. Paragraph 10 of DL (1) states that regard had been had to the draft of NPPF, which was published in July 2011, but that as it was still in draft form and subject to change, he had accorded its policies little weight. It is not otherwise referred to in DL (1).

15. One aspect of IR (1) was that representatives of the horseracing industry had objected to the proposal on the grounds of adverse effects in the horse racing industry, and in particular on the grounds that the crossing of roads by horses bearing the extra traffic generated by the proposal would be unacceptable. Those objections were rejected by both Inspector and SSCLG. The SSCLG also agreed with the IR that the development would have no adverse effect on the historic character of Newmarket or on the local economy.

16. At both the first and second inquiries, concern was expressed by the horseracing interests about the prospect of horses crossing Fordham Road on the Rayes Lane horse crossing. The then Appellant proposed improvements at that crossing. IR (1) and DL (1) considered that there was no reason to refuse permission on highway safety grounds. The SSCLG considered (DL (1) [14]) that the increase of traffic

> "on the roads used or crossed by horses would be adequately mitigated in highway safety terms."

17. The second and current application was made in outline form for up to 400 dwellings plus associated open space, and infrastructure and accesses. Its site falls within the site which was the subject of the first inquiry.

18. On 20th December 2013, the SSCLG determined that it was not development requiring a screening opinion as EIA development. The Save Historic Newmarket group made an unsuccessful attempt in March 2014 to bring proceedings in judicial review to quash that decision. On 11th July 2014, the SSCLG called the application in for determination by himself under s 77 *TCPA 1990*. A pre-inquiry meeting was held on 1st December 2014. FHDC, the LPA, made it plain that it did not object to the application. NHG was given Rule 6 status and took a leading role at the subsequent public inquiry.

19. I shall in due course deal with the issues as the second Inspector defined them.

20. It is important to note that all parties agreed the effect on traffic generation of the new scheme was expected to be significantly less than that of its predecessor. It would add about 5% to the amount of traffic overall, whereas the predecessor would have added 15% ((IR (2) [368]). The increase at the Rayes Lane crossing would be 5% (ibidem [389]). I shall at a later stage explore the significance of those assessments.

21. The second inquiry and therefore the decision, were made in the knowledge of NPPF, which contains important policies on how one treats Development Plans in the context of housing proposals, as well as other matters. As will become apparent, it has a particular importance in this litigation.

22. The second inquiry was held before another very experienced Inspector, Christina Downes. Like the report of her predecessor, her report (IR (2)) is full and careful. She recommended that the SSCLG grant permission. I shall refer to her conclusions in due course.

23. That report IR (2) was submitted on 9th July 2015.However the SSCLG did not issue his decision for some little time. The reasons for that appear in the decision at DL (2) [3]. About four months after the inquiry had finished the NHG elected to make further representations in September 2015, as did the local member of Parliament the Rt Hon Matthew Hancock MP. The SSCLG circulated them for comment at the end of October 2015. He then circulated the comments he had received.

24. In February 2016, the Planning Consultants for the Claimant Lord Derby made representations, which were also circulated for comment. The responses received were also circulated. In April 2016, the SSCLG circulated the representations he had received, and also invited comment on the then recent Court of Appeal decision in *Suffolk Coastal District Council v Hopkins Homes Ltd & Anor* [2016] EWCA Civ 168, circulating the further responses on 5th May 2016.

25. The Decision Letter (DL (2)) was issued on 31st August 2016, in which permission was refused by the SSCLG. His reasons appear below. Apart from his treatment of the polices in NPPF as applied to the planning merits of the instant proposal (Ground 1), complaint is made about his refusal on the grounds of the adverse effects of extra traffic on the Rayes Lane crossing, despite his own conclusions in 2012 (Ground 2) and about his conclusion that the proposals would threaten the horseracing industry (Ground 3).

(ii) NPPF Policy

26. As noted above this was published in March 2012. The parts relevant to this matter are:

> "6. The purpose of the planning system is to contribute to the achievement of sustainable development. The policies in paragraphs 18 to 219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system.

7. There are three dimensions to sustainable development: economic, social and environmental. These dimensions give rise to the need for the planning system to perform a number of roles:

- an economic role – contributing to building a strong, responsive and competitive economy, by ensuring that sufficient land of the right type is available in the right places and at the right time to support growth and innovation; and by identifying and coordinating development requirements, including the provision of infrastructure;
- a social role – supporting strong, vibrant and healthy communities, by providing the supply of housing required to meet the needs of present and future generations; and by creating a high quality built environment, with accessible local services that reflect the community's needs and support its health, social and cultural well-being; and
- an environmental role – contributing to protecting and enhancing our natural, built and historic environment; and, as part of this, helping to improve biodiversity, use natural resources prudently, minimise waste and pollution, and mitigate and adapt to climate change including moving to a low carbon economy."

The presumption in favour of sustainable development

11. Planning law requires that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise.

12. This National Planning Policy Framework does not change the statutory status of the development plan as the starting point for decision making. Proposed development that accords with an up-to-date Local Plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise. It is highly desirable that local planning authorities should have an up-to-date plan in place.

13. The National Planning Policy Framework constitutes guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications.

14. At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.

For plan-making this means that:

- local planning authorities should positively seek opportunities to meet the
- development needs of their area;
- Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
  - any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
  - specific policies in this Framework indicate development should be restricted."

(A footnote (9) gives as examples policies relating to Habitat Directives, designated Sites of Special Scientific Interest, designated Green Belts, Areas of Outstanding Natural Beauty, Heritage Coasts, National Parks, designated heritage assets or areas at risk of flooding or coastal erosion)

For decision-taking this means: ("unless material considerations indicate otherwise" appears in a footnote)

- approving development proposals that accord with the development plan without delay; and
- where the development plan is absent, silent or relevant policies are out-of-date, granting permission unless:
  – any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole; or
  – specific policies in this Framework indicate development should be restricted." (Reference is again made to footnote (9))

27. NPPF also seeks to build a strong and competitive economy ([18]- [22]), and to deliver a wide choice of high quality homes (Chapter 6). That includes the following passages of relevance

" *Delivering a wide choice of high quality homes*

47. To boost significantly the supply of housing, local planning authorities should

- use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs for market and affordable housing in the housing market area, as far as is consistent with the policies set out in this Framework, including identifying key sites which are critical to the delivery of the housing strategy over the plan period;
- identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements with an additional buffer of 5% (moved forward from later in the plan period) to ensure choice and competition in the market for land. Where there has been a record of persistent under delivery of housing, local planning authorities should increase the buffer to 20% moved forward from later in the plan period) to provide a realistic prospect of achieving the planned supply and to ensure choice and competition in the market for land;
- identify a supply of specific, developable sites or broad locations for growth, for years 6-10 and, where possible, for years 11-15;
- for market and affordable housing, illustrate the expected rate of housing delivery through a housing trajectory for the plan period and set out a housing implementation strategy for the full range of housing describing how they will maintain delivery of a five-year supply of housing land to meet their housing target; and
- set out their own approach to housing density to reflect local circumstances

48 (windfall allowance)…….

49 Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local planning authority cannot demonstrate a five-year supply of deliverable housing sites.

50. To deliver a wide choice of high quality homes, widen opportunities for home ownership and create sustainable, inclusive and mixed communities, local planning authorities should:

- plan for a mix of housing based on current and future demographic trends, market trends and the needs of different groups in the community (such as, but not limited to, families with children, older people, people with disabilities, service families and people wishing to build their own homes);

- identify the size, type, tenure and range of housing that is required in particular locations, reflecting local demand; and

where they have identified that affordable housing is needed, set policies for meeting this need on site, unless off-site provision or a financial contribution of broadly equivalent value can be robustly justified (for example to improve or make more effective use of the existing housing stock) and the agreed approach contributes to the objective of creating mixed and balanced communities. Such policies should be sufficiently flexible to take account of changing market conditions over time."

(iii) The first Inspectors Report (IR (1)) and Decision Letter (DL (1)) insofar as they may affect the issues in the current claim.

28. I have noted already that the first proposal related to a very much larger development, with a much larger capacity for traffic generation. It preceded NPPF, and also the changes made to the Development Plan in February 2015.

29. The then Appellant put forward his proposals. He was represented by Leading and Junior Counsel and called expert evidence, including expert highways engineering evidence. All matters relating to traffic had been agreed with the Highways Authority (Suffolk County Council) and with the Highways Agency. Neither had any objection (see IR (1) [2.2.1] and [4.7.1]. FHDC had commissioned its own highways advice which reported that, with the package of mitigation measures proposed, there was no sustainable objection ([4.7.2]) although FHDC members maintained their objection relating to the effect on the horseracing industry.

30. The then Appellant's case on traffic and highways, including that relating to the horse crossings is set out at [4.7.1- 24], and at [4.8.1-20]. It set out its case that there would not be adverse effects on the horseracing industry at [4.9.1-31]. That included its case that the case advanced by the horseracing interests about conflicts between drivers and horses was exaggerated. It included a specific section on the "spooking" of horses

(apparently a technical term), and addressed the safety record and driver and rider behaviour.

31. At the inquiry, the horseracing industry was represented, albeit in two ways; by the Tattersalls Group, and by Save Historic Newmarket Limited. The former, represented by Leading Counsel, called among other witnesses two racehorse trainers, a veterinary surgeon and a consulting engineer (IR (1) page 245). Its case (IR (1) section 6) was very fully argued. It included sections on the effects of development on growth in the horseracing industry (ibid [6.2.6] , the importance of the horse racing industry to Newmarket (ibid [6.3.1- 10], the movements of horses through Newmarket ([6.4.1-6.4.9], what were called "existing traffic problems in Newmarket 2 ([6.5.1-25]), traffic assessment of the proposals ([6.6.1-42) which included detailed consideration of traffic flows, traffic growth, and the effects of the proposals both generally and in terms of the effects on the horseracing industry, the growth in the number of horses ([[6.7.1-8]) traffic effects of the development on Fordham Road, including the Rayes Lane crossing and the then Appellant's proposed mitigation measures (6.8.1-42).

32. Save Historic Newmarket Limited also ran a substantial case. It was represented by Leading and Junior Counsel and called 5 witnesses including a trainer. It made a case on the effects on the horseracing industry ([7.2.1-14] and [7.4.1- 7.5.10]). Given some submissions made to me during the hearing by Mr Elvin QC for NHG, who then appeared for Save Historic Newmarket Limited, it is worth noting this passage in the case it put as recorded by the first Inspector at [7.4.1]

> "the horseracing industry witnesses were best placed to consider the likely effect of the additional traffic from the Appeal Scheme on the industry. Between them, they had decades of experience of training horses and other associated activities in Newmarket. They have unparalleled experience of the relationship between horses and traffic in Newmarket and know very well the demands and concerns of the industry's clients; particularly the key overseas investors……."

33. That case laid some emphasis of the effects of traffic on horses by "spooking" [7.4.6]. It also addressed highways issues, accidents, the risks to horses and riders and the records of accidents and the fact that some went unreported. ([7.4.10]). The Rayes Lane crossing was also addressed particularly ([7.4.20- 24]). The future growth of the horseracing industry was addressed, as well as effects upon it from the proposal (7.5.1- 10]). The claimed effects included the risks of conflict between horses and vehicles under the prosed mitigation ([7.5.5]), the effects on owners' concerns and perceptions ([7.5.6]) foreign competition ([7.5.8]) and the argument that perception of harm by owners amounted to actual harm ([7.5.9]).

34. This objection addressed many other issues including housing land supply and ecology. It is unnecessary to refer to all of the several points taken.

35. The first Inspector's report (IR 1) had many issues to address. I shall refer only to those which affect the current case, after setting out the relevant parts of the Decision Letter DL (1), which largely adopted them. The Inspector's conclusions take no fewer than 33 pages of fully reasoned and referenced discussion. He identified the main considerations in determining the appeal ([12.2.1]) which included

i) the ability of the highway network to safely accommodate the traffic from this development;

ii) the impact of the development on the horseracing industry in Newmarket and any consequential effects on the local economy or the historic environment;

iii) …….

iv) the need for, and the location of, new housing and employment development in the District;

v) ……..

vi) ……

vii) compliance with the Development Plan, and

viii) other material considerations, including national policy and prematurity.

36. He recommended that the appeal be dismissed. As noted above, he did so on grounds of prematurity, and concern over the supply of water. [12.15.1-13.1.3]

37. The SSCLG agreed (DL (1) [11]) that those were the main issues in the case, together with the adequacy of the environmental information. At [3] the SSCLG stated that he

> "had carefully considered the Inspector's report and for the reasons given below,…agrees with the Inspector's conclusions and his recommendation."

38. I shall now set out the parts of that Decision Letter which relate to the issues before me, and the conclusions of the Inspector which informed them. I shall not include the passages on housing land supply, as the effect of the new NPPF, which forms the subject of the Claimants' first ground, was not felt until the current application.

39. At paragraph 7 of DL (1) the SSCLG identified the test in s 38(6) *PCPA 2004*, and at [8] considered the then Development Plan. At [13] he addressed the topic of Highways, as follows

Highways

> "13. The Secretary of State agrees with the Inspector's reasoning and conclusions, at IR 12.3.1 - 12.3.46, with regard to the ability of the highway network to safely accommodate the traffic from the proposed development. He does not doubt that there is already considerable traffic congestion in Newmarket on many days and that the additional traffic from the development can only add to the congestion (IR 12.3.45). However, he agrees that, when assessed in the usual way, the road safety impact of the proposals would not amount to a reason to dismiss the appeal and that even if the generated traffic did turn out to be a little higher than allowed for in the Transport Assessment, it is clear that the normally assessed highway safety impacts would still not amount to a sound reason for refusal (IR 12.3.46).

40. The Inspector had, in the paragraphs referred to, assessed the traffic and highways effects of the then proposed development in considerable detail. His assessment included the effect of the proposal at Rayes Lane ([12.3.36-46]. He reached these conclusions at [12.3.41] and [12.3.45-46]

> "12.3.41. From observations during the Inquiry site visits, and from the evidence given at the Inquiry, there is no doubt that the Rayes Lane crossing already delays traffic travelling up and down Fordham Road (1.4.1, 12.3.3) and that the increased traffic from the development would add to those delays. The proposed mitigation measures at the horse crossing, such as the proposal to build out the kerb line to the south, and the new road markings and surfacing (4.8.17, 6.8.40, 7.5.5, 8.9.12), would not materially affect the delays, but would instead be aimed at the safety of horses and their riders, together with that of other road users (See 12.4.18)
>
> "Conclusions on Highways Impact
> 12.3.45. There is no doubt that there is already considerable traffic congestion in Newmarket on many days, and that race days and A14 closures make this worse (12.3.4, 12.3.5). The additional traffic from the development can only add to the congestion.
> 12.3.46. However, taking into account the Appellant's Transport Assessment and their subsequent discussions, the relevant Highway Authorities and the Council (5.7.2, 9.2.3, 9.3.1) do not consider that, when assessed in the usual way, the road safety impact of the Proposals would amount to a reason to dismiss the Appeal. Even if the generated traffic did turn out to be a little higher than allowed for in the TA, it is clear that the normally assessed highway safety impacts would still not amount to a sound reason for refusal."

41. The SSCLG then dealt with the effect on the horse racing industry at DL (1) [14] as follows

> "Impact on the Horseracing Industry in Newmarket
>
> 14. With regard to the impact of the development on the horseracing industry in Newmarket and any consequential effects on the local economy or the historic environment, the Secretary of State agrees with the Inspector's reasoning and conclusions at lR12.4.1 - 12.4.40. The Secretary of State has had regard to Newmarket's role as the centre of horseracing in the UK and a very important equine centre on the world stage (1R12.3.38). He agrees that the appeal proposals would result in some more traffic on the roads which are used or crossed by horses but that the overall effect would be adequately mitigated in highway safety terms (1R12.4.39). When weighed against the advantages of Newmarket, he agrees that the actual traffic conditions are most unlikely to make owners send their horses for training elsewhere and that, if there is no reduction in the number of horses in the town, there would be no effect upon the local economy or upon the historic character of Newmarket (1R12.4.40)."

42. That section of the IR, which the SSCLG adopted in the first sentence above, requires setting out in full in the light of what occurred later.

> "12.4. The Horseracing Industry (HRI) in Newmarket : Background
>
> 12.4.1. There was no dispute that Newmarket is the focal centre of horseracing in the United Kingdom and probably in Europe, if not the World, and it has an unrivalled concentration of training, racing, sales and breeding establishments, as well as many ancillary services such as specialist equine vets, saddlers and farriers (2.1.13, 4.9.5, 6.3.5, 7.2.1, 8.1.2, 8.4.2, 8.5.2, 8.9.13).
> 12.4.2. Newmarket provides the headquarters for the global thoroughbred breeding and training industry. British racing employs some 18,600 people and, in 2008, it made a contribution of some £3.39 billion to the national economy through direct, indirect and induced expenditure. This puts it on a par with the UK film industry in terms of economic importance (6.3.2, 7.2.5). Much of the investment in the very valuable horses comes from international sources, with owners from the Middle and Far East, Australia, America, Ireland and South Africa (6.3.7, 7.2.2).
> 12.4.3. Some 15% of all UK trainers are located in Newmarket and about 19% of all horses are trained in the town. The surrounding studs represent approximately 20% of the UK bloodstock industry (6.3.2).
>
> Horse Movements throughout the Town
> 12.4.4. There are about 80 training yards around Newmarket where, at peak times, some 2,500 to 3,000 horses may be in training (2.1.10, 6.4.2, 7.2.1). Practically all of these horses travel through the town on a daily basis to access the approximately 80 km of turf gallops (6.3.5, 7.2.2) which are set within the 1,820 ha of world class training facilities (7.2.1) on the Racecourse side, to the west, or on the Bury Hill side, to the east of the town (1.1.11).
> 12.4.5. The public training grounds are administered by the Jockey Club Estates and are available to all licensed trainers (6.3.5, 6.3.6) who may run large or small training yards. Some can have as many as 150 or more horses in training at any time (6.4.1).
> 12.4.6. Trainers send out their lots in separate strings of up to about 20 horses a time, which go to the most appropriate training ground for the horses in question. In some cases they may go via the Severals warm-up ring (6.4.3,
> 6.4.5). This generates a mass movement of horses across the town throughout the morning training period, which generally lasts from about 06.00 hrs to 11.00 hrs, six days a week (6.4.3). Whilst some horses have to walk along sections of trafficked roads, there are also specially designated horsewalks in many places in the town. These horsewalks cross the roads at horse crossings (2.1.12); two of the busiest being at Rayes Lane on Fordham Road, and Bury Road, close to the Severals warm-up ring (2.1.12, 7.4.20).
> Safety of Horses and Riders
> 12.4.7. There was no dispute that thoroughbred racehorses are, by their very nature, highly strung and skittish and, when spooked, they can be a danger

to both themselves and others. Furthermore, they enter training at just two years old and have a short racing career, which results in about 40% of all the horses crossing the town being young and inexperienced (6.5.3, 7.4.3).

12.4.8. Even though precautions can be taken, such as putting the most skittish horses in the middle of a string (7.4.18), any racehorse can be spooked by badly driven cars, and also by many other aspects of traffic such as the revving of engines, the sounding of horns, slamming doors, vehicles travelling over speed humps or sunlight reflected from a windscreen (6.5.3, 7.4.6, 7.4.16, 8.9.5). They can even be spooked by prams, pedestrians, birds or a plastic bag or twig blowing in the wind (4.9.16).

12.4.9. Bearing in mind that in the order of 2,500 horses are likely to cross the town and back again six days a week, the possibilities of traffic-related incidents must have run into many millions over the accident recording period, and yet there are only a handful of reported accidents (4.9.18, 4.9.19, 6.5.5, 7.4.15, 7.4.20).

12.4.10. The very few 'personal injury' traffic accidents that do occur are of course recorded by the Highway Authority (4.9.21) and the necessary statutory records are kept by the trainers (7.4.18). But the HRI particularly emphasised the number of unrecorded 'incidents', of which they gave some examples. They argued that many near-miss incidents took place on a regular basis, but were not generally publicised (6.5.6, 7.4.8, 7.4.15, 8.1.3, 8.5.3, 8.9.4).

12.4.11. The report into horse safety commissioned by the Jockey Club acknowledged the possibility of more accidents occurring than had been reported (4.9.24). The Appellant also accepted that 'incidents', in the sense of horses reacting adversely to external stimuli, can be observed at any time all over Newmarket (4.9.22). The Local Plan identified traffic problems for the HRI as far back as 1995 (7.4.15) and it is remarkable that there are not many more serious recorded accidents. However, the test must be to consider what difference the Appeal Scheme would make (4.9.25).

12.4.12. Tattersalls estimated that there would be an increase of some 372 vehicles in the peak hour on Fordham Road of which about half would be due to the proposed development (6.6.42). The Appellant estimated an increase of some 82 vehicles in the peak hour (about 13%, or one every 45 seconds) on Fordham Road in the morning peak hour (4.9.27). In either case, this would increase the queuing a little both to the north and south of the Rayes Lane horse crossing (12.3.42) but, with significant queuing already, there would be little difference from the point of view of a horse that was crossing at Rayes Lane, or walking along the Fordham Road horsewalk (4.9.26). This horsewalk is not wide enough for two strings to pass (6.8.3, 8.9.5) but again there would be no material effect from somewhat longer traffic queues.

12.4.13. With the Jockey Club's Code of Conduct for riders, a very high level of courtesy is generally apparent between drivers and riders throughout the town (4.9.29), but there have also been instances of verbal abuse and drivers pushing through strings of horses (6.8.14, 8.9.2). There are no records of accidents that were clearly as a result of driver frustration (4.9.29) but increased delays would no doubt cause some further frustration

and to some extent add to the incidents of bad driving (6.8.14). Nevertheless, with the current number of horses, the level of increased queuing would only marginally increase the delay for drivers and therefore this effect should not be particularly significant (4.9.30).

12.4.14. There are already arrangements for the lead rider of a string to activate warning lights at the horse crossings (4.8.17). The Appellant would fund various improvements to the horse crossings and these would include better signing, road marking etc (4.8.17, 6.8.36). In addition, the work at the Rayes Lane crossing would improve visibility for riders to provide a 3 m 'x' distance. Whilst 5 m would be desirable, 3 m would be much better than at present and would therefore help to improve safety (4.8.18, 6.8.10, 6.8.40).

12.4.15. The Fordham Road/Snailwell Road Crossing is poorly located in respect of vehicle turning movements and has poor visibility, especially to the south, for horses crossing from west to east. There is also no horsewalk along Snailwell Road leading to this crossing (6.8.4). Whilst this is undoubtedly a less safe crossing than some of the others (8.9.7), the horses from a newly permitted 80 box yard have been conditioned to use this crossing. This safety issue was not therefore seen as sufficiently important to prevent the grant of planning permission (8.9.6).

12.4.16. At this crossing, the Appellant proposes comparable improvements, to those at Rayes Lane, apart from the visibility improvements (6.8.39), and would fund a survey to assess the case for a reduced speed limit on the road to the north (4.8.18). Whilst the Appellant does not consider it CIL compliant, he would also provide the funding for a horsewalk along Snailwell Road to this crossing (10.1.26).

12.4.17. As already noted, much less of the traffic from the development would pass over the St Mary's Square and Bury Road Crossings (12.3.42) where similar improvements would be made (4.8.18). The Appellant does not consider the works to the Lord Derby's Gap Crossing to be CIL compliant, but nevertheless says that funding would be available for similar improvements at this location (10.1.26).

12.4.18. As acknowledged by the Local Highways Authority, taken together, these improvements would provide sufficient mitigation for the increased traffic flow resulting from the Appeal Proposals in order to avoid any undue impact on highway safety (9.2.3, 9.3.1).

12.4.19. There would be some impact from construction traffic over a period of many years, but at least the Heavy Goods Vehicles could be routed to and from the site via the A14 (recommended Condition 32i). Consideration of construction traffic makes no difference to the conclusion that there would be no material impact upon highway safety.

Much of this growth has been underpinned by considerable international investment (7.2.2, 7.2.10, 8.2.10) but this could easily be diverted elsewhere, particularly to other countries. Some trainers anticipated that worsening traffic conditions in the town would cause owners to send their horses to centres such as Chantilly (7.5.8, 8.4.4, 8.9.3). There is higher prize money in Australia, Japan, America and France and, at Chantilly in particular there are comparable high quality training facilities and, importantly, less conflict with traffic. There, conditions are much closer to the quiet rural environment that is so desirable for training racehorses (6.5.15, 7.5.8, 8.1.5).

12.4.22. Even if there were rather more traffic from the development, for the reason given earlier (12.3.26), it is still unlikely to cause a significant increase in congestion and delays for people moving around the town.

Future Growth in the Industry

12.4.23. As noted above, the HRI in Newmarket has seen growth over the last few years (12.4.21), and the recent planning permission for another 80 box yard (8.9.6) may be taken to indicate the prospect of more growth in the future Alternatively, the Appellant pointed to the yards for sale and to surveys that showed a prospective decline (4.8.15). The industry itself acknowledged the difficulties with the current economic conditions and the reorganisation of betting in the UK (7.2.9).

12.4.24. Whilst there may well be nearly 1,200 spare boxes in the town (6.7.4), that should not be taken to indicate that the industry could easily accommodate that number of additional horses because yards usually operate with a proportion of empty boxes (4.8.14). It would be possible to project the p growth and assume that this would continue in the future (6.7.5, 6.7.6), 1: that would assume the same economic conditions which may, or may not, be the case. There are also indications that the industry might decline (4.8.14). All that can reasonably be said is that there is at least a prospect of further growth in the industry.

12.4.25. As indicated above, if it occurred, further growth would most likely manifest itself in more strings of horses crossing the roads rather than the longer strings considered by the Appellant (12.3.38). If so, they would further delay the traffic and could well cause just the increased level of congestion so feared by the industry. Even though there is Development Plan policy support for the HRI in Newmarket (6.10.2, 6.10.4, 7.3.1, 7.3.2, 8.9.14), that does not automatically mean that the available highway capacity should be reserved exclusively for that purpose. This is a matter that would be much better resolved through the development plan process than through an appeal decision (6.7.2).

Perception and Actual Harm

12.4.26. The HRI argued that the owners' perception of harm from the traffic congestion due to the proposed development would cause them to send their horses elsewhere for training, as happened at Epsom (8.1.5, 8.9.1 9.8.4). If so, this would harm the industry, with consequent harmful eff, on the local economy and the character of the town (6.5.15, 7.5.6, 7.5. This case is therefore distinct from one in which, for example, there is simply a fear of crime without any discernible reason for that fear (5.7.6, 7.5.9).

12.4.27. The development would increase the traffic congestion to some extent, but the HRI in Newmarket has shown considerable resilience in the current economic climate (12.4.13, 12.4.21). There was very little definitive evidence that owners would decide to move their horses, although there were reports that some were considering doing so (7.5.6). It may also be that those with substantial investments in the town, such as the Maktoun family with their Darley and Godolphin organisations and their private training grounds (2.1.9, 7.5.6), would be more reluctant to move, as inferred by their Chief Operating Officer (4.9.3).

12.4.28. Given the reputation of Newmarket as possibly the best place in the world to train racehorses (12.4.1), the owners' delight to see their horses traversing the town on their way to and from the gallops (8.4.3) and the apparent resilience of the industry during the recession (6.7.5, 7.2.7), it seems unlikely that owners would logically choose to move their horses away before the development took place. They would then be able to judge for themselves the result of the limited traffic impacts, rather than being swayed by a public campaign against the scheme (4.9.12). The conclusion must be that the risk to the horseracing industry is very small.

The Local Economy

12.4.29. It was variously said that the HRI generates about 3,000 or 5,000 of Newmarket's 11,000 jobs (6.3.4, 9.7.1). Other figures quoted the industry as directly employing 33% of the economically active people in the town (7.2.11). Regardless of the exact figure, it is clear that a very large proportion of the town depends on the HRI for their living (4.4.7): almost on a par with the proportion of jobs in the City of London that are directly dependent on the financial sector (7.2.11). People may be employed in the direct training of horses, their health and welfare, their acquisition and sale, or the promotion of British racing (6.3.4). This is a true cluster of economic activity with a direct spend of some £150m a year; £78m of which being on training, and an indirect spend of about £l00m a year (4.4.5, 6.3.3).

12.4.30. From the above assessment of the owners' perceptions, it seems most unlikely that the Appeal Development would cause a material decline in horse numbers. If it did however, that could clearly have a considerable effect on the prosperity of the HRI and, as a consequence, on the local economy and character of Newmarket (7.5.9, 8.9.13).

Newmarket's Historic Environment Visual Impact

12.4.31. Much of the centre of Newmarket is within the town's Conservation Area (CA), but the Appeal Site is separated from it by the studland and other development to the south of the site, and the development would have no direct impact on even the setting of the CA (4.12.1).

12.4.32. Some of the horse crossings are within the CA, or at least within its setting (7.6.5), and the proposed improvements would introduce elements that are

intended to attract drivers' attention, such as flashing LED signs, high visibility road markings and contrasting road surfacing (7.6.6). They would therefore have rather more than just the modest visual effect envisaged by the Appellant (7.6.5).

12.4.33. National and local guidance advises the general use of inconspicuous colours and designs in order to protect the character and appearance of conservation areas (7.6.6 - 7.6.9). However the proposed measures fall into the category of being the minimum necessary for highway safety purposes and therefore in accordance with the advice in Streets for All (7.6.7). Some of the contrasting road surfaces had already been laid by the County Council by the end of the Inquiry and there were no objections to the Appeal Proposals from the Council's Conservation Area

Officer (4.12.5). There can be no serious objection with regard to the appearance of the Conservation Area.

Conservation Area Character

12.4.34. The Council's Appraisal document notes the growing volume of traffic as a factor causing intrusion or damage to the CA (7.6.4) and, as concluded above (12.3.26), there would be some more traffic from the development.

12.4.35. The Appraisal and the Core Strategy also note that the spirit and character of Newmarket are largely derived from the interplay between the historic environment and the operation of the horseracing industry on a daily basis (6.3.8).

12.4.36. If the Appeal Proposals caused the number of horses in training in the town to be significantly reduced, then the interplay between the historic environment and the HRI would undoubtedly be harmed. Furthermore, if the land and buildings presently occupied by the HRI were to be put to other uses that would most likely further alter the character of the area.

12.4.37. However, the conclusion has already been reached that the Appeal Proposals are most unlikely to cause material harm to the prosperity of the HRI in Newmarket (12.4.28) and therefore there should be no harm to the character or appearance of the Conservation Area.

Summary of HRI Conclusions

12.4.38. Newmarket is the centre of horseracing in the UK and a very important equine centre on the World stage (12.4.1). Large numbers of racehorses traverse the town on a daily basis on their way to and from training (12.4.4) where they interact with the traffic, particularly at horse crossings (12.4.6). Many of these horses are young and inexperienced and, as thoroughbred racehorses, they are highly strung, skittish and easily spooked by seemingly ordinary stimuli (12.4.7, 12.4.8). In the light of the number of potential conflicts, the recorded accidents/incidents is surprisingly low, but there are more that are not generally publicised (12.4.9 - 12.4.11).

12.4. 39. The Appeal Proposals would result in some more traffic on the roads which are used or crossed by horses, the most affected being at the Rayes Lane crossing (12.4.12), but the overall effect would be adequately mitigated in highway safety terms (12.4. 18).

12.4.40. The increased traffic would have some effect on trainers, owners and others travelling around the town (12.4.20). Despite the worsening traffic conditions over recent years, the HRI has continued to grow (12.4.21, 12.4.23) and further growth in the industry may take place (12.4.24). Any resulting highway conflicts from this growth should however be addressed through the Development Plan process (12.4.25). When weighed against the advantages of Newmarket, the actual traffic conditions are most unlikely to make owners send their horses for training elsewhere (12.4.28). If there is no material reduction in the number of horses in the town, there would be no effect upon the local economy or upon the historic character of Newmarket (12.4.29 - 12.4.37).”

43. What emerges from the above is that the case advanced by the horse racing interests against the larger proposals then put forward had been analysed with care by the first Inspector, and had failed in every principal respect, not least with regard to the safety of the crossing at Rayes Lane. That robust conclusion was accepted and adopted by the SSCLG in DL (1), and for the reasons given by the Inspector.

(iv) The current proposal, including the case advanced at the inquiry

44. It is convenient to identify the differences from the proposal considered at the first inquiry.

45. The current proposal, as noted above, was for a significantly smaller development. The number of dwellings reduced by two thirds, and the employment, parking and school elements were omitted. It lay within the same application site. I shall deal first with the changes in the highways proposals, and then set out the Claimants' case as put to the Inspector on the effect of NPPF and on the Development Plan.

46. The reduction in the scale of the scheme led to a consequent reduction in the expected levels of traffic generation. There was also a significant difference in the traffic mitigation measures put forward at Rayes Lane. It will be appreciated that the trip distribution of the various elements may be different. As will become apparent, the projected increase in traffic flows at the Rayes Lane crossing attributable to the development would be reduced by two thirds from 15% of the whole to 5% of the whole. Although not spelled out as such in the case for the Claimant at the inquiry one can put that another way. The changed overall flow would be reduced from 115% to 105% of the level it would otherwise take. The extra peak hour flow was put at 48 vehicles (see IR (2) [56]). At 5% that gives 960 vph in the no scheme world, and 1008 vph with the scheme, or 1104 vph with its predecessor. In other words, the first scheme would have added about 2 ½ vehicles per minute, and the second scheme a little under an extra vehicle per minute.

47. The scheme included provision (by means of a planning obligation under s 106 *TCPA 1990* and a "Grampian" condition.) for a crossing at Rayes Lane (IR (2) [49]). A scheme of improvements was now put forward which had been designed by the Highway Authority (Suffolk CC), described as the SCC scheme. It provided for more than the previous scheme (called the "WSP" scheme. The SCC scheme produced an improvement in safety conditions ([50]). Although the crossing was not signalised in the proposals, it could be ([53-54]). The new proposals met required sightlines and presented greater benefits than the previous scheme ([58-60]). The NHG case was based on the risk of accidents occurring, although there were no records of any injuries being caused at Rayes Lane ([56], [60]).

48. The Claimants argued that the NHG expert evidence on the skittish behaviour of horses was covered in the previous appeal, including the issue of thoroughbreds being skittish and being "spooked." [62]. The evidence for the objectors NHG showed a 20% saving in incidents as a result of the SCC scheme [63], as opposed to 10% for the WSP scheme. The Inspector thus noted ([9] footnote 9) that the NHG traffic and highways witness agreed that there would be a reduction of 1-2 incidents per day as a result of the SCC scheme, although what he wanted to see was either signalisation or an underpass. The effect of the increase in traffic would be to increase the number of incidents by 0.48 incidents per day, to be set against a saving of 2.23 incidents per day

on the SCC scheme [63]. The existing crossing was safe and the improvements to be provided would make it safer [65].

49. I turn now to the case on the effect of NPPF. The Claimants argued that the settlement boundaries drawn up in 1995 were out of date, as agreed by all parties. The policies on settlement hierarchy and spatial strategy (Visions 1 and 2 and CS1) remained unscathed after the High Court challenge. Newmarket is the largest and most sustainable settlement in terms of population, public transport, employment facilities and services. The Core Strategy and the JDPMD provide for the protection of the important horse racing industry. The effect of the Court Order was to remove any allocations or distribution of housing from the development plan, subject to the still extant spatial hierarchy, but that made it "silent" in NPPF terms, and FHDC accepted that the Core Strategy was now out of date because it was not based on an objective assessment of need as required by NPPF. All the main parties agreed that this was a case falling under the decision making part of NPPF [14]. There was also a housing land supply of less than 5 years (4.9), so that NPPF [49] was also engaged. [25]

50. The compliance with the spatial strategy and settlement hierarchy, and the absence of conflict with the horse racing and ecological polices in JDPMD made the proposal in material accordance with the Development Plan, so should be permitted without delay per NPPF [14]. If there was a breach, then the second part of NPPF [14] would apply. ([26])

51. So far as the new policy DM48 of the JDPMD is concerned, the case for the Claimants was that it protected the horseracing industry but did not preclude development even if there is some harm, where the benefits significantly outweigh the harm. But that involves a finding that the development "*would*" not "*might"* or "*may*" threaten the horse racing industry. The burden of showing that lay on the objectors, who had to demonstrate a threat to the long term viability of the industry as a whole. It was wrong to adopt a precautionary approach of getting the developer to show that there would be no harm. [29]. The Inspector recorded ([29] fn 2) that all of those matters were accepted in cross examination by the NHG planning witness Mr Parsons.

52. The NHG case on the effect on the industry was substantially the same as at the first inquiry. The SSCLG had made clear findings [47-8]

53. The Claimants laid emphasis on the previous decision, and put it that the SSCLG would have to ask himself whether there were new considerations which would justify him reaching a different conclusion on the issues of highway safety and the effect on the horse racing industry (and others which do not require recital here) when he was considering a scheme for 400 houses instead of 1200 ([30-31]).

54. The Claimants addressed the contribution that the provision of 400 houses would make ([40-43]). There was no 5 year supply, and affordable housing in the FHDC area was a pressing need ([40]). There was less than 5 years' supply overall, but whether that was true or not, housing provision still carried significant weight, and NPPF [14] applied because the housing policies were variously absent, silent and out of date ([43]).

55. The Claimants advanced arguments on the three dimensions in NPPF [7]. The scheme would produce benefits in terms of investment in construction, with related job creation, expenditure within the local economy and Council revenue ([114]- [119]). There would be other benefits, including the Rayes Lane crossing improvement ([118], [121]) and the provision of affordable as well as market housing in a variety of dwelling types and sizes ([119]). By contrast the NHG contemplated the provision of no additional housing in Newmarket ([123]).

56. There would be a development outside the out of date settlement boundary. The FHDC strategic housing land availability assessment includes green field sites beyond those boundaries. ([127]).

57. There was no sustainable prematurity objection ([128] – 134])

(v) The case for the Local Planning Authority

58. FHDC supported the proposal. So far as the matters relevant to this claim are concerned, it considered that the Strategic Housing Market Assessment was now out of date, and that the annual requirement for housing 350 units per annum [145]. However, the effect of the High Court challenge was that there was no distribution policy (ibidem).

59. There was a shortfall in the 5 year land supply depending on the figures one used [149]. However the supply position was fragile, and the annual target of 350 dwellings p.a had not been met for three years. There was a need to identify more housing land, and significant weight should be given to the need to provide additional land for housing [149]. The application site is the most advanced site and can meet the existing and emerging demand and make a very important contribution to the necessary market and affordable housing needs of the District [150].

60. It considered that the development was acceptable in highways terms ([151]) and considered that weight should be given to the highways improvements put forward, including that at Rayes Lane [152]. As to the effect on the horseracing industry, it generally supported the Claimants' interpretation of policy DM48 and rejected the "precautionary" approach [155]. The additional vehicles (48 vph) would not cause an unacceptable situation, and there would be a net gain with the crossing improvement [156]. There would be no material effect on the horseracing industry, which had been able to expand alongside increases in traffic. There was no incentive for it to leave Newmarket given the extensive infrastructure provided. [159]

(vi) The objections to the current proposal by Newmarket Horsemen's Group

61. I shall again confine this summary to matters relevant to this claim.

62. While the 2012 DL was a material consideration, there were changes in circumstance which warranted a fresh appraisal. They included ([168]):

    i) an increase in traffic and in the numbers of horses;

    ii) the final version of NPPF;

iii) the adoption of JDPMD and the effect of policies DM48 and 50. A precautionary approach was required;

iv) the Rayes Lane crossing had been surveyed and the number of incidents assessed;

v) expert equine behavioural evidence was now available about the behaviour of thoroughbred horses;

vi) new evidence was adduced to explain the economic importance of the horseracing industry;

vii) evidence had been obtained of the views of owners, and of evidence from Australia, which was said to show that the previous Inspector had not correctly or fully understood the evidence at the previous inquiry.

63. As to the effect on the horse racing industry, NHG 's case was that Newmarket was unique in terms of its character, its place as the focus of the industry in both the UK and worldwide, with a considerable economic importance to Newmarket and the locality. It was also of national significance in attracting foreign investment. A high level of protection and a risk based approach was appropriate [169]. Footnote 23 [169] states that the Claimant's planning witness accepted that DM48 gave a high level of protection to the horseracing industry and that account should be taken of risk to the industry and evidence of that risk.

64. The economic cluster was dependent on a few major players who brought investment in the 1980s [171].

65. There were many incidents noted at the crossings. The absence of any actual accidents was not a reason for complacency [171]. The case of the Hunter Valley Australia, although not comparable showed that a negative perception can affect investors [174][1].

66. A loss of investment in training would be critical. 60-70% of the horses are owned by 8-10 owners and the loss of the horses of even one or two would have a significant adverse effect on the economic benefits of the equine cluster both nationally and locally [175]. A precautionary approach must be adopted, which the Claimants had failed to do [176], and DM 48 had the objective of avoiding harm occurring, as can be seen from the word "threaten" [177].

67. The previous appeal decision misunderstood the nature of the horse racing industry in Newmarket [178]. The reasons given by NHG are those summarised in the preceding paragraphs of this judgement.

68. So far as Rayes Lane is concerned, there are incidents on a daily basis [179]. The Rayes Lane crossing is inherently unsafe. Additional traffic will enhance the risk of conflicts and danger occurring. That will have an adverse effect on perception [180-

[1] As noted by the Inspector at [398] the Hunter Valley is a longstanding centre for racehorses where a proposal was made for opencast mining within 500 metres of a stud farm, and although that proposal was refused permission, others decided not to invest due to a real or perceived fear of mining operations. I shall refer in due course to the Inspector's comments on this suggested comparable.

1]. The current mix of traffic is unsatisfactory due to the mix of horses, pedestrians and traffic at peak times. The risks are already unacceptably high [184] and no sufficient or countervailing expert evidence was provided by the Claimants, who relied on the 2012 decision [185]. The NHG traffic witness' concession that the mitigation would produce safety improvements was predicated on an assumption that a pro rata method could be adopted [186].

69. The design of the proposed crossing did not have regard to expert equine advice. Rayes Lane was the busiest horse crossing in the UK, if not in Europe. The risks are magnified by the fact that thoroughbreds are more reactive than other horses. [190]. Criticisms were made of the detailed design and the choice of *x* and *y* distances (used in the calculation of visibility splays); [196-201]. It was wrong to include a zebra crossing or ramps [202-3]. A greater contribution was required to pay for the scheme proposed by NHG [204].

70. Further submissions were made on the topic of the impact on the horse racing industry ([206-208]). The confidence of owners had to be maintained. The horse racing industry was genuinely concerned, and the previous Inspector and the SSCLG had misunderstood the position [208]. NHG was concerned about the urbanisation of Newmarket, and owners could not tailor their decisions according to a "planning based approach" [209-210].

71. The housing benefits had been overstated [259]. The housing could be put elsewhere [260]. In the absence of assessment of travel distances one could not assume that it was more sustainable for the development to be placed in Newmarket [260].

72. The economic benefits claimed by the Claimants were challenged [263]. The effect on the horse racing industry was downplayed [264].

73. The proposal was premature pending the SIR (Single Issue Review and Site Allocations Process) [266- 276]

(vii) The Inspector's Report (IR (2))

74. The Inspector's conclusions and recommendations occupy 35 pages and 145 paragraphs. I shall confine myself to the passages where she dealt with issues relating to the claim. It follows that the important passages relate to:

    a) the application of the policies in NPPF;

    b) the traffic and highways issues generally;

    c) the effect on Rayes Lane crossing;

    d) the arguments concerning impact on the horse racing industry.

75. Common to all of them, but perhaps especially so to issues (b) and (c), is her approach to the previous decision DL (1).

76. She started her conclusions and recommendations by identifying eight main considerations [355],

> "Taking account of the oral and written evidence and my site observations, the main considerations in this appeal are as follows:
>
> - Consideration One: Housing land supply and the contribution that the proposal would make to the market and affordable housing needs of the District.
>
> - Consideration Two: Whether the traffic generated by the proposed development can be accommodated on the network without severe residual highway impact.
>
> - Consideration Three: The effect on the horse racing industry in Newmarket.
>
> - Consideration Four: The effect of the proposed development on nearby sites of nature conservation importance and whether Habitats Regulation Assessment is necessary
>
> - Consideration Five: Whether the proposed development would be premature
>
> - Consideration Six: Other matters
>
> - Consideration Seven: Whether any conditions and obligations are necessary to make the development acceptable.
>
> - Consideration Eight: Overall conclusions and planning balance to determine whether the proposal would be a sustainable form of development taking account of the three dimensions in the Framework."

77. She dealt with the *First Consideration* at [356-364]. She concluded that the FHDC figure of 350 dwellings per annum did not represent the full objectively assessed need for market and affordable housing [357]. The Sedgefield approach to backlog should be adopted [358]. The Council had done its best to demonstrate a supply of 4.9 years, but she thought was too optimistic. The situation was, as FHDC said "fragile" with a production rate of less than 350 dwellings pa in the last 3 years. There was no evidence of any alternative sites. Newmarket was the largest town, which complied with Vision 1 and Vison 2 of the Core Strategy. NPPF wanted to see a boost to housing. Given the fact that a significant number of houses could be built on the site within 5 years, the delivery of the houses would be a significant benefit of the scheme [360].

78. The 1995 Local Plan is out of date, and therefore the site's designation as countryside does not necessarily mean that the principle of development would be unacceptable [361]. The Council's position is "precarious" in terms of housing policy. The Core Strategy housing requirement is out of date, and apart from the spatial hierarchy, there are no policies on distribution as the result of the Court Order. The SIR is still at a nascent pre-submission stage [362].

79. The proposal would provide 30% affordable housing in accordance with Spatial Objective H2 and Policy C9 in the Core Strategy. There was an undisputed pressing need for affordable housing in Newmarket. Meeting affordable housing needs is an important objective of NPPF, and this aspect of the development was a substantial benefit [363].

80. The proposal would therefore contribute to meeting the Council's land supply deficit and accord with NPPF in this respect. It would not accord with Policy CS7, but that is out of date.DM5 in the JDPMD is a permissive policy not relevant to the supply of housing [364].

81. She then dealt with her *Second Consideration*, relating to traffic impact. She gave weight to the lack of objection from the Highways Agency and Highway Authority, to which matter she gave considerable weight [365]. She noted the Statements of Common Ground agreed with both, and that the SSCLG had agreed with the previous Inspector that the larger 1200 dwelling scheme would not have an adverse impact on the safety or capacity of the highway network [365]. She noted that it was Government Policy in NPPF at [32] that development should only be refused permission on transport grounds where the residual cumulative impacts are severe. While there was congestion at peaks, the question to be answered was whether the addition of the development traffic would make matters materially worse [366].

82. The development traffic would not make the congestion in Newmarket materially worse [368]. The 5% increase in traffic overall was to be compared to the previous scheme's 15% [368]. There would therefore be no unacceptable increase in congestion or harm to highway safety, without severe residual transport impact. It would comply with relevant Development Plan policy in this respect [369].

83. She then turned to her *Third Consideration*, relating to the effect on the horse racing industry in Newmarket. It is worth setting out the three paragraphs [370-372] in which she sets out her view of the approach of NHG at the inquiry:

> "370. There is no dispute from anyone about the importance of the horse racing industry to Newmarket. It is a pre-eminent centre for the breeding, training, racing and sale of thoroughbreds. The stables, stud farms, training grounds and two racecourses all give Newmarket a special and unique quality that is greatly valued by those that live, work and visit it. Racehorses are moved around the town from their stables to the training grounds along specially constructed horse walks. This happens from early in the morning until about 1300 hours and the sight of the strings of these fine animals being taken for exercise is a very impressive spectacle. This was covered in considerable detail in the Report of the previous Inspector and I do not intend to repeat the same points again here [48; 169; 170].
>
> 371. It was made quite clear at the Pre-Inquiry meeting that the important matter was what has changed since the earlier appeal and that repetition of the previous evidence would not be helpful. In 2012, the Secretary of State recognised the importance of the industry both in local terms and also to the national economy and in the global context. The conclusion that was reached was that the additional traffic from the development, which was a much larger mixed use scheme, would not have an unacceptable impact on the safety of racehorses or the horse racing industry overall [30; 31; 48; 49; 62].

372. The NHG response to this conclusion, which it should be noted has not been challenged through the Courts, was basically that the Inspector and thus the Secretary of State had got it wrong. In particular they were said to have misunderstood the situation regarding horse behaviour and the motivations of wealthy racehorse owners. Indeed this was a recurring theme throughout the Inquiry and the impression was given by some participants that only those connected to the industry were able to understand it sufficiently well to make informed judgements. This attitude discourages reasoned challenge and is not particularly helpful, in my opinion [168; 178; 185; 190; 208]."

84. In fairness to NHG one must point out that no challenge could have been made in the Courts to the previous decision, as the appeal had been dismissed. But it is noteworthy that an experienced Inspector formed that view of the reasonableness of the NHG approach. But I draw attention also to the fact that the NHG case involved a full scale attack on the previous decision letter DL (1) and would involve the Inspector and SSCLG in determining if those criticisms were justified.

85. She then addressed planning policy, referring to the relevant policies which addressed the horseracing industry [373]. In the case of DM48 she deferred to the courts so far as the interpretation of DM 48 was concerned, but expressed her view, which was that one had to consider what *would* be the effect rather what the effect *might* be (her emphasis), finding support for that in the supporting text. But she accepted that risk was relevant, and was a material consideration of importance [374].

86. On the topic of the Rayes Lane crossing, having recorded that it was probably the busiest crossing in the UK or even Europe, noted that Fordham Road was a busy main traffic route. She noted that since the last inquiry the nearby junction with Snailwell Road had been signalised with an equestrian phase, and that in the last 3 years there had been growth in traffic and in the number of racehorses [375]. She had herself observed the crossing, which she noted to be informal, but with flashing advance warning signs operated by riders as they approach. She saw strings of horses crossing, and referred to the Jockey Club Code of Conduct, with its advice concerning the crossing of roads by strings of horses [376]. From her observations riders and drivers cooperated harmoniously. She observed the skittish behaviour of thoroughbreds. She noted that video clips submitted by both the Claimant and NHG showed that not all road users were thoughtful, and that horses sometimes reacted adversely to external stimuli [377].

87. She noted that some incidents could be caused by thoroughbreds being "spooked" by all sorts of things including a twig, loud noise, or a plastic bag blowing in the wind. However the majority of incidents were caused by poor driving. If a horse is spooked it can become a danger to itself, the rider or other road users. [378]

88. The expert evidence was that the mix of thoroughbreds, traffic and pedestrians at peak times resulted in the potential for danger and conflict. However, there was no record that any incidents had actually been translated into injury to the horses or to people. She gave weight to that and concluded that the situation was kept under control primarily through the skill of the riders, but also the reasonable behaviour of the majority of road users [379].

89. The evidence from the behavioural equine expert was that, due to the specific characteristics of thoroughbred racehorses, the risk of accidents occurring was high. and set out the reasons why [380]. However she went on:

> "381. When considering how the application proposal fits in to this context it is important not to forget an underlying planning principle. That is whether the proposal in question would make a material difference to the existing situation. As already noted the incidents at and around the Rayes Lane crossing are not all caused by traffic. Those caused by other stimuli would occur with or without the proposed development, albeit that a driver from the site may be affected by the consequences. However, it should be noted that if a thoroughbred racehorse has a bad experience with traffic this can be retained to memory and cause anxiety. On a future occasion an adverse reaction may occur even though there is seemingly no apparent link to vehicular movement. So when considering risk arising from increased traffic, it is not necessarily only the traffic related incidents that need to be taken into account [49; 188]
>
> 382. Nevertheless, it is logical to surmise that the risk of accident or injury at the Rayes Lane crossing is directly related to the number of incidents. These in turn are caused, in main part, by the interaction between horses and traffic. If either the number of vehicles or the number of horses increases then the potential risk from accident or injury would also rise. As has already been noted there has been a growth in horse numbers and it is probable that this will continue. However that would happen regardless of the outcome of the planning application. In such circumstances it would be entirely reasonable to expect horse owners and the Jockey Club Estates to fund improvements to the Rayes Lane crossing to mitigate any increased risk. During the Inquiry the high value of the thoroughbred horses was emphasised time and again and it would be expected that those involved would want to protect their investment when travelling through the town and using the horse crossings [51; 61; 189;300].
>
> 383. The application scheme proposes improvements to the Rayes Lane crossing. There are 2 alternatives, the WSP Scheme and the SCC Scheme, both of which would enhance visibility but retain the informal nature of the crossing. The WSP Scheme would be similar to that advanced at the previous appeal for this crossing and was found acceptable by the Secretary of State to mitigate the impact of the traffic generated by the larger development. The SCC Scheme is favoured by the Highway Authority and would include an enhanced package of measures. These include kerb build-outs to improve visibility, better warning signs about 50 m from the crossing, a raised crossing platform, a ramp onto Rayes Lane, road markings and a pedestrian crossing [49].
>
> 384. The mitigation offered by the Applicant is in the form of a £60,000 financial contribution and would either pay fully for the WSP Scheme or contribute to the SCC Scheme. The latter has already been part funded by the Tesco development further along Fordham Road and the money from the application proposal would make up the difference. As the SCC Scheme is preferred by the Highway Authority it seems likely that it would to be the option that would be implemented [52; 54].

90. After considering the SCC scheme and the technical discussions that had transpired ([385-6]) she continued in [386] as follows:

> "…….It is acknowledged that the improvements would not result in a perfect solution. It is appreciated that many do not observe the current discretionary 20 mph speed restriction outside the schools. However the proposed road markings and ramps would be likely to reduce average speeds, in my opinion, although the extent to which this would happen has not been quantified. In any event the mitigation would result not only in significant improvements to the view that drivers have of horses and their riders but also to the view of riders of oncoming traffic as they approach the crossing from Rayes Lane. It is the NHG's own evidence that the SCC Scheme would have the potential to avoid 20% of the 96 observed incidents occurring at the crossing. The objectors considered this to be a "marginal" improvement but I would not agree. The benefit would be real and significant, in my judgement. It is further noted that the NHG consider that if the Code of Practice were fully observed, a further 70% of the observed incidents could also have been avoided [50; 59; 63; 200; 201;203].

91. She then considered the NHG preferred scheme for the crossing, but concluded that its cost could not be justified to deal with a scheme for 400 houses [387]. She then discounted another head of objection (about the noise of vehicles on the ramps) and turned to the fact that traffic would increase. She said this at [389-391]:

> "389. There was no dispute that the application proposal would result in a 5% rise in traffic moving through the Rayes Lane horse crossing in the morning peak period and for the reasons given above, this would be expected to increase the potential accident risk. The point at issue is therefore whether the mitigation proposed would be sufficient to counteract the increased risk. The Applicant undertook an exercise which sought to assess this by taking the total number of observed incidents and the daily traffic flows and working out, on a pro rata basis, the number of incidents per vehicle per day. This was then assigned to the generated development traffic and compared with the potential incident savings of the mitigation proposals. The conclusion was that the SCC scheme would result in a net saving of just over 2 incidents a day. On this basis it could be concluded that the proposed development, with its mitigation scheme in place, would not increase the risk of accident or injury at the Rayes Lane horse crossing [61-63].
>
> 390. However, the analysis was criticised by the NHG on the basis that the behaviour of thoroughbred racehorses is unpredictable and that a pro-rata approach to assigning an incident to a vehicle was therefore flawed. However the exercise included all horse crossing incidents whether traffic related or not. As already mentioned some, but by no means all, of the non traffic related incidents would be affected by increased traffic by virtue of the memory associations of the racehorses. The number of incidents in the analysis is therefore likely to be too high. Furthermore, the total number of observed incidents was 96 and so there could not be a greater number of incidents per vehicle than in the pro rata assignment. If anything the Applicant's analysis is therefore likely to be on the conservative side. It is accepted that on some days there would be less or no

> savings and on other days more. The relationship would not be a linear one as the mathematical exercise assumes. However overall the analysis has validity in terms of a quantification of the improvement that would ensue through incident savings. Furthermore, there is no alternative evidence that the 5% increase in traffic arising from the application proposal would give rise to 20% more incidents, whether traffic related or not [64; 186-188].
>
> 391. In the circumstances it seems to me that on the available evidence the Secretary of State can have sufficient confidence to conclude that whatever the existing risk, the SCC Scheme would result in a net safety improvement with the application development in place. There was some discussion about whether the reference to a severe transport impact in Paragraph 32 of the Framework" (NPPF) "concerned the capacity or the safety of the network. It seems to me that in the circumstances of this case the improvements to the Rayes Lane horse crossing would provide an improvement to the network and a safety benefit and that whether or not safety is the relevant consideration, Paragraph 32 would not be offended [65; 183]."

92. She then addressed the effect on investment and the impact on the economy and character of Newmarket and elsewhere. She noted the importance of Newmarket as an equine cluster, its international excellence, and the training establishments and stud farms at its core. She noted the interdependency of the different parts of the industry [392]

93. She described it as a thriving success, which had grown despite difficulties in the national economy. She went on [393]:

> "It seems to me that the advantages of the cluster and the importance of the horse racing industry to Newmarket, Europe and the world was understood by the previous Inspector and taken into account by the Secretary of State in his decision."

94. She noted NHG's case that the previous Inspector, the FHDC and the Claimant had all failed properly to understand that there were inherent weaknesses which threaten the future prosperity and growth of the horse racing industry [394]. They had referred to the aspects of their case about there being a few owners who could withdraw their investment, and that a precautionary approach was required [394].

95. She was unimpressed by this argument, noting that owners were likely to base their decisions on a shrewd and rational consideration of whether or not Newmarket will continue to offer the advantages that attracted the investment in the first place. Trainers would be an important conduit of advice. She went on at [395] to say

> "It is inconceivable that a pessimistic picture would be painted if, on an assessment of the evidence, the Secretary of State considers that the application proposal would not be harmful to horse racing interests and decides to grant planning permission."

She then continued at [396]- [401]

> 396. Owners will also form their own opinions as they travel round the town to visit their horses and watch them in training. There were various points that were made by the objectors as negative factors that may reduce their confidence in the town. The first was increased congestion and getting held up in traffic. However this is an existing issue and is particularly bad on race days. There is no convincing evidence that the application proposal would make a material difference and indeed the Secretary of State did not consider that the traffic from the much larger scheme would delay movement about the town, It is also noted that this was not a matter to which the NHG highway witness subscribed. Increased urbanisation was a second point but the application site is adjacent to the A14 junction on the northern edge of the town and opposite a residential estate and commercial area. It is well away from those training establishments that stand in leafy, green, semi-rural locations and it is hard to see how this situation would change. A third point was that by recommending that planning permission should be granted the Council was no longer supporting the horse racing industry. However it carefully considered the application on its merits and within the context of the policies that are protective of the horse racing industry. These include policies in the JDPMD, which was adopted as recently as February 2015 and leave no doubt about the high protection that the Council considers is merited. In the circumstances I find no substance in support of these three allegations [66; 67; 71; 72,156; 158; 208; 209; 210; 290; 297].
>
> 397. The point that was made several times was that the 8-10 wealthy owners in question, including the Maktoum family who own the Godolphin and Darley racing and breeding operations, do not make decisions based on planning legislation. However for the reasons given above it is not considered that a reasonable and rational individual would make an adverse investment decision on the grounds that the application development had been granted planning permission. Many of those who objected to the proposal did so on the basis that it would inevitably lead to more houses on the Hatchfield Farm land. However that is not a part of the present proposal and any such scheme would be subject to consideration through the planning process. This is no doubt a point that would be explained by trainers and others in the horse racing establishment who understand the way in which the English planning system works. It is noted that there was no direct written or oral submission from any wealthy foreign investor on the matter of the application proposal or whether it would cause them to move their investment. Conversely evidence was given by an owner of a training yard and 2 stud farms that he would not be moving his investment and did not believe that others would either [66-68;157; 208;209; 291; 300].
>
> 398. The Hunter Valley in New South Wales, Australia is a longstanding and internationally important centre for breeding thoroughbred racehorses as well as being well known for its wineries and tourism. It is also an area of opencast mining and in 2011 a proposal was made for a mine within 500 m of the Darley stud. In recognition of the importance of the equine industry and the threat to future investment, the Government refused permission on a precautionary basis. Even so, some have decided not to invest in the area due to the real or perceived risk from mining operations. This appears to suggest that the support of the

> decision maker was immaterial as investment suffered anyway. However the comparability to the present situation is tenuous. It is difficult to compare perceived risk from a proximate industrial operation, with all that this would entail, with the proposed housing development [174;178;210].
>
> 399. In the case of Epsom it appears that the damage resulted from redevelopment of training yards for residential use resulting in increased urbanisation and traffic. There are specific policies in the JDMPD to prevent this happening [201].
>
> Conclusions
> 400. The application proposal would not result in an adverse effect on or an undue risk to the existing economic importance, potential for future growth and continuing success of the horse racing industry. There would be associated improvements to the Rayes Lane horse crossing which would at the very least mitigate the impact of the additional traffic generated but also result in a material safety benefit.
> 401. The proposal would accord with the objective of Vision 2 in the CS, which aims to preserve and enhance the position of Newmarket as the international home of horse racing and Spatial Objective ECO 5, which aims to protect its unique character. It would conform to the spatial strategy in Policy CS 1, which seeks to protect and conserve the importance of the horse racing industry and Newmarket's associated local heritage and character. It would conform with Policy DM48 in the JDMPD as it would not threaten the long term viability of the horse racing industry as a whole. It would also meet the requirements of Policy DM50 through the improvement of the existing Rayes Lane road crossing, which is part of the system of horse walks through the town [16; 17]."

96. She then considered matters relating to her *Fourth Consideration*. She then concluded ([455]- [464] that the development would not be premature. She saw a clear distinction between the larger scheme and the current scheme [457].

97. Under the *Sixth Consideration*, she noted that the development would result in the loss of about 20 hectares of best and most versatile agricultural land, stating that the loss of countryside and agricultural land was an adverse factor weighing against the proposal [468-9].

98. She then addressed her *Seventh Consideration*, which dealt with conditions and obligations. She endorsed the proposed obligation whereby a contribution of £60,000 was to be made to the Rayes Lane crossing [482] and the Grampian condition (number 23) requiring that the mitigation measures at Rayes Lane were in place before any house was occupied [470].

99. She then addressed her *Eighth Consideration*, relating to her overall conclusions and the planning balance to determine whether it would be a sustainable form of development taking account of the three dimensions in NPPF. She then set out her approach to NPPF (referred to by her as "The Framework") and its application to the proposal before her:

"485. The Framework establishes that sustainable development should be seen as a golden thread running through both plan-making and decision-taking. The district has a short term deficit of deliverable housing sites. Although this may be relatively small at the present time, the Council itself considers its situation in terms of housing land supply as "fragile". Paragraph 49 of the Framework does not make a distinction in terms of the size of the shortfall and indicates that relevant policies for the supply of housing should not be considered up to date in such circumstances. The Framework requires that housing applications should be considered in the context of the presumption in favour of sustainable development as set out in Paragraph 14 of that document. Policy DM1 in the JDMPD has a similar objective.

486. Not only are the relevant policies for the supply of housing out of date but also the development plan is silent about housing distribution by virtue of the Court Order quashing this aspect of the CS. In such circumstances Paragraph 14 indicates how the presumption should be applied to a development proposal, unless there are specific policies to indicate development should be restricted. The relevant policy in this case relates to sites protected by European legislation. However it has been concluded that this is not development requiring appropriate assessment and therefore the exclusion under Paragraph 119 of the Framework would not apply. Paragraph 118 of the Framework has also been raised as a restrictive policy. Insofar as this is the case it has been concluded that there would be no harm to biodiversity or an SSSI.

487. If the Secretary of State agrees with my conclusions on these matters, the presumption in favour of sustainable development would apply. Paragraph 14 of the Framework makes clear what this means and that planning permission should be granted unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.

488. In considering this matter it is important to have in mind the three interdependent dimensions to sustainable development set out in Paragraph 7 of the Framework. I have already highlighted the important contribution that the scheme would make to the Council's housing land supply position. Whilst the deficit may be relatively small at the moment, time does not stand still and
there is an ongoing requirement for housing delivery. Whilst the 400 dwellings would not be built out in the next 5 years a number of them are likely to be. The scheme would provide a mix of house types and sizes as well as making a significant, and policy compliant, contribution to affordable housing. The mix of affordable rent and shared ownership homes would be in accordance with identified needs. These matters are, in my judgement, of substantial weight in favour of the application scheme.

489. There is no reason why the development should not provide a high quality built environment. Although this is an outline application, the DAS establishes the design strategy and these principles would be carried forward through a detailed Design Code for the whole site. Conditions and planning obligations would also control the provision and future management of open spaces and green infrastructure to provide an attractive residential environment for those who live there. Whilst many of the biodiversity measures provide mitigation for ecological impacts, there is the potential

for enhancement through the creation of new habitats. The translocation of the fine leaved fumitory to a safer area of land not subject to damage through deleterious farming regimes, is just one example.

490. The economic advantages of the application scheme were subject to dispute. There would undoubtedly be benefits during the construction phase, through the provision of employment and increased spending in the local economy. The extent to which employment would be generated in the longer term to counter a reduction in the working age population was not agreed. This was because the Applicant's analysis is based on Newmarket and the NHG contended this was too small an area for statistical reliability. It also considered that many of the new occupiers would travel out to the Cambridge
area, where there is a high level of employment growth. Whilst the extent of
this benefit is not agreed I have no doubt that some new residents would contribute to the local workforce and perhaps as importantly they would spend
money within the town thus supporting local shops and services. In the circumstances the matter can be afforded some weight [114; 115; 117; 261-
265].

491. Whilst the consideration of this application should make no judgements about how houses are to be distributed across the district, it is proper to note the settlement hierarchy has not been quashed and that the site is adjacent to the largest town in the district with its array of shops, facilities and services.There are thus opportunities for travel by modes other than the car and it can be concluded that this is a sustainable location. Furthermore the scheme would offer benefits to the wider population. These include the improvements to the Yellow Brick Road, which is a popular and attractive route for walking and cycling. The improvements to the signage of the footpath network and to he surfacing of Bridleway 2 would help reduce recreational pressure on local sites of importance for nature conservation. Perhaps most importantly, the contribution to the Rayes Lane horse crossing would result in a significant improvement that would not only mitigate the impact of the development but also be likely to result in a material safety benefit to horses and riders cross Fordham Road at this point. This has significant weight in view of the importance of the horse racing industry to Newmarket and its economy.

492. The application proposal would provide the opportunity for Suffolk County Council to obtain land for a new primary school. This benefit is however reduced to the extent that it has not yet been decided whether the school would be built here or on another site in the town.

493. The appeal scheme would result in the loss of good quality agricultural land and an area of countryside. It is appreciated that the site is valued by existing local residents but it has no protective designation and there are few open views due to the wide band of tree planting along the Fordham Road boundary. The Council relies on greenfield land for its housing supply and the settlement boundaries were drawn up many years ago to accommodate a completely different housing requirement. In the circumstances this environmental disbenefit should therefore be given limited weight, in my opinion.

494. There is no dispute about the importance of the horse racing industry and its strengths and weaknesses have been dealt with under Consideration Three. However, it has been concluded that the proposal would not be contrary to development plan policy in this respect and that there would be no threat to its long term viability.

495. There would be additional traffic generation arising from the development scheme and this would lead to a small increase in queuing in peak periods. Nevertheless, with the mitigation proposed the scheme would not adversely impact on the safety of either the local or strategic highway network. Congestion is already an issue in the town and the application proposal would not result in this becoming materially worse. Conversely the improvements to the A14/ A142 junction would result in wider benefits to those travelling on this part of the road network in peak periods. There would be a significant improvement to southbound queues along this part of Fordham Road and also a reduction in rat running along Snailwell Road. These matters are also of significant weight in favour of the application development.

496. Drawing all of the above points together it is concluded that the application scheme would accord with the economic, social and environmental dimensions of sustainable development. The adverse impacts of granting planning permission would not significantly and demonstrably outweigh the many benefits of the proposal, when assessed against the policies of the Framework as a whole. The presumption in favour of sustainable development would apply and, in accordance with Policy DM1 in the JDMPD and Paragraph 14 of the Framework, in my judgement planning permission should be granted. In the circumstances it is not considered that an objection on the grounds of prematurity could be sustained.

497. If, however, the Secretary of State disagrees with my conclusions regarding the impact on European designations but agrees with my finding in Paragraph 496 above, he would have to undertake an appropriate assessment. He would need to consult with Natural England and other parties as he considered necessary. Whilst it is considered that there is sufficient information available to undertake the appropriate assessment, the Secretary of State may not agree and he may have to consider calling for more information and maybe reopening the Inquiry [35; 39; 103; 109].

498. If the Secretary of State does decide an appropriate assessment is required and carries it out, there are two alternative outcomes. If the scheme does not pass and a significant impact is found then permission must be refused. However, if such impact is not found, taking a precautionary approach and including other plans and projects, then permission can be granted. Bearing in mind Paragraph 119 of the Framework the presumption in favour of sustainable development would not apply in such circumstances. A normal balancing exercise would be required but in my opinion the considerable benefits of the scheme would still outweigh the very small disadvantages that would ensue.

499. If an appropriate assessment were to be required the Secretary of State will wish to consider whether to reconsider his Screening Direction regarding the need for Environmental Impact Assessment [***251***].”

100. She recommended that planning permission be granted, subject to conditions.

(viii) The current Decision Letter

101. As noted above, this took some little time to emerge, as a result of the various representations being made. It reads as follows in the parts relevant to this claim (here too, "The Framework" is a reference to NPPF):

> "1. I am directed by the Secretary of State to say that consideration has been given to the report of the Inspector, Christina Downes BSc, DipTP, MRTPI who held a public local inquiry from 14 April – 1 May 2015 into your client's application for outline planning permission for up to 400 dwellings plus associated open space (including areas of habitat enhancement) foul and surface water infrastructure, two accesses onto the A142, internal footpaths, cycle routes and estate roads at Hatchfield Farm,
> Fordham Road, Newmarket in accordance with application reference DC/13/0408/OUT dated 2 October 2013.
>
> **Inspector's recommendation and summary of the decision**
> 2. The Inspector recommended that outline planning permission be granted. For the reasons set out below, the Secretary of State disagrees with the Inspector's recommendation and he has decided to refuse outline planning permission. A copy of the Inspector's report (IR) is enclosed. All references to paragraph numbers are to that report.
>
> **Matters arising since the inquiry**
> 3. ……
>
> 4……..
>
> 5……..
>
> 6……
>
> **Policy and statutory considerations**
> 7. In deciding this application, the Secretary of State has had regard to section 38(6) of the Planning and Compulsory Purchase Act 2004 which requires that proposals be determined in accordance with the development plan unless material considerations indicate otherwise.
> 8. In this case, the development plan consists of the saved policies of the Forest Heath Local Plan (1995), the Forest Heath Core Strategy Development Plan Document (2010) (CS) and the Forest Heath and St Edmundsbury Councils Joint Development Management Policies Document (2015) (JDMPD). The Secretary of State considers that the development plan policies of most relevance to this application are those set out by the Inspector at IR16.1-16.4 and IR17.1-17.4.
> 9. Other material considerations which the Secretary of State has taken into account include: the National Planning Policy Framework (the Framework); the Planning Practice Guidance (the Guidance); and the Community Infrastructure Levy (CIL) Regulations 2010, as amended.

Emerging plan

10. In terms of emerging policy, the Single Issue Review (SIR) of Core Strategy Policy CS7 – Overall Housing Provision and Distribution, and the Site Allocations Local Plan – Preferred Options were published for consultation on 4 April 2016. The Secretary of State considers that the most relevant policies include: Policy N1 (Housing and Mixed Use Development in Newmarket); Distribution Option 1 (Higher growth at Mildenhall and Red Lodge and Primary Villages and lower growth at
Newmarket); and Distribution Option 2 (Higher growth at Newmarket, enabling lower growth at Mildenhall, Red Lodge and Primary Villages). Distribution Option 1 is the Council's preferred option. Policy N1 allocates Hatchfield Farm for mixed use development, including 400 dwellings, while stating that the policy will be reviewed, if necessary, following the Secretary of State's decision on this case.

11. Paragraph 216 of the Framework states that decision makers may give weight to relevant policies in emerging plans according to: (1) the stage of preparation of the emerging plan; (2) the extent to which there are unresolved objections to relevant policies in the emerging plan; and (3) the degree of consistency of relevant policies to the policies in the Framework.

12. The Secretary of State has taken into account the early stage of the emerging plan, which has not yet gone through an independent examination. With regard to the second limb, he has taken into account that there are unresolved objections relating to development at Hatchfield Farm. With regard to the third limb, the Secretary of State considers that at this stage the relevant policies do not contain inconsistencies with the Framework, but are still subject to change. On balance he considers that little weight can be afforded to the relevant policies in the emerging plan.

13. A Neighbourhood Plan for Newmarket is in preparation, and a Neighbourhood Plan Designated Area Application has been submitted to the Council. The Neighbourhood Plan is at an extremely early stage of preparation. There are not yet any relevant policies, but draft objectives have been published and are consistent with the Framework. Overall the Secretary of State considers that very little weight attaches to the emerging Neighbourhood Plan.

Main issues

14. The Secretary of State agrees with the Inspector that the main considerations in this case are those set out at IR355.

Housing land supply and the contribution that the proposal would make to the market and affordable housing needs of the District

15. The Secretary of State has given careful consideration to the Inspector's analysis at IR356–364, and has also taken into account representations on housing land supply following the inquiry.

16. He notes that on 10 February 2016 the Council published an updated 'Assessment of a five year supply of housing land'. This sets out that under the Sedgefield approach, Forest Heath has a 6.2 year supply of housing land, and that

if this application is refused by the Secretary of State, there is a 5.2 year supply. Sellwood Planning, on behalf of Lord Derby, indicated in its letter of 19 February 2016 that given the uncertain nature of some of the sites relied on, it is considered that the land supply situation is, at best, only around 5 years. The Secretary of State has taken account of representations on this matter, and considers that the Council has demonstrated it has a 5 year supply of housing land and therefore relevant policies for the supply of housing should not be considered out of date through the operation of paragraph 49 of the Framework.

17. The Secretary of State has considered the weight that should attach to the provision of housing. He agrees with the Inspector that the proposed 30% affordable housing is in accordance with Spatial Objective H 2 and Policy CS 9 in the CS, and that meeting affordable housing needs is an important objective in the Framework (IR363). He has also taken into account paragraph 47 of the Framework, which seeks to boost housing delivery significantly. Overall, he considers that the proposed provision of market and affordable housing is a substantial benefit and carries substantial weight in favour of the scheme.

Whether the traffic generated by the proposed development can be accommodated on the network without severe residual highway impact, and effect on the Rayes Lane horse crossing

18. For the reasons given by the Inspector at IR366–368, the Secretary of State does not consider that the application development would result in an unacceptable increase in congestion, and that the residual transport impact of the development would not be severe (IR369). He also agrees with the Inspector that the scheme would comply with development plan policy in this respect, in particular Spatial Objective T3 and Policy DM45 in the JDMPD (IR369). He agrees with the Inspector at IR495 that the improvements to the A14/A142 junction would result in wider benefits to those travelling on this part of the road network in peak periods, and that
the significant improvement to southbound queues along this part of Fordham Road, and the reduction in rat running along Snailwell Road carry significant weight in favour of the proposal.

19. Notwithstanding the above conclusions, the Secretary of State notes that there would be an increase in traffic of about 5% (IR368). He has carefully considered the Inspector's analysis of highway safety issues, in particular in relation to the Rayes Lane horse crossing (IR375-391), and her conclusion that there would be associated improvements to the Rayes Lane horse crossing which would at the very least mitigate the impact of the additional traffic generated but also result in a material safety benefit (IR400). However, he has also taken into account the particular nature of the thoroughbred horses that would be using the crossing, and the evidence that was put forward that even the most skilled and experienced riders can lose control as a result of the unpredictable and extreme behaviour of their mount. He shares the concern expressed at IR380 that these behavioural traits coupled with the inevitable interaction with traffic at the road crossings has the potential for danger that could escalate to a serious injury to the rider, horse or road user. He therefore considers that material safety benefits which the Inspector cites are not certain. Overall he considers that the additional risks arising from the

increased traffic are a material consideration which carries moderate weight against the proposal.

The effect on the horse racing industry in Newmarket

20. The Secretary of State has considered very carefully the arguments which were put forward in relation to the potential effect of this proposal on the horse racing industry and the Inspector's analysis at IR370–399. He has taken into account the unique nature and structure of the industry, the global context in which owners make their decisions, and the huge economic importance of the continuing success of the horse racing industry at Newmarket.

21. His conclusions on the risks associated with increased traffic are set out above. Policy DM48 seeks, amongst other things, to prevent development that would threaten the long term viability of the industry as a whole, unless the benefits would significantly outweigh the harm. The Secretary of State notes that the policy takes a precautionary approach, by requiring consideration of whether development would 'threaten' the long-term viability of the industry – it does not require a finding that there would be specific and identifiable adverse impacts on the industry arising from this development. He considers that the question of risk is highly relevant, and that there is a substantial risk that the potential adverse consequences of increased traffic at the Rayes Lane horse crossing will create perceptions among owners and others in the industry of a more negative context for the industry in Newmarket. The Secretary of State considers that this would threaten the long-term viability of the horse racing industry, and that the benefits of the scheme would not significantly outweigh the harm to the industry. The proposals are therefore in conflict with policy DM48 of the JDMPD, and also with Vision 2 of the CS, which seeks to preserve and enhance Newmarket's position as the international home of horse racing; with Spatial Objective ECO 5, which aims to protect its unique character; and with Policy CS1, which seeks to protect and conserve the importance of the horse racing industry and Newmarket's associated local heritage and character. In the light of the economic importance of the horse racing industry in Newmarket, the Secretary of State considers that the threat to its continuing success carries substantial weight against the proposal.

The effect of the proposed development on nearby sites of nature conservation importance and whether Habitats Regulation Assessment is necessary

22- 25…….

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26. The Secretary of State is therefore satisfied that the application proposal would not give rise to conflict with Spatial Objective ENV 1 or Policy CS 2 in the CS or Policies DM10, DM11 and DM12 in the JDMPD. He also concludes that the proposal would comply with Paragraph 118 of the Framework.

Whether the proposed development would be premature

27. The Secretary of State has taken into account the progress that has been made on the SIR since the inquiry, but has concluded (paragraphs 10-12 above) that the emerging plan carries little weight. He has considered the Inspector's analysis at IR455-464, and taken into account that there is now a 5 year housing land supply. He has also taken into account the Council's statement in their representation of

20 March, that the RAF Mildenhall site is not expected to come forward until 2020, and that should the position change fundamentally, the Council will undertake a review of their Local Plan. The Secretary of State agrees with the Inspector at IR462 that he proposed development would not constrain decisions on the timing, location and amount of development to be allocated in the SIR (IR462), and does not consider that the proposed development would be premature.

Loss of countryside and agricultural land

28. The Secretary of State has taken account of the Inspector's remarks that the proposal would result in the loss of about 20 hectares of best and most versatile agricultural land and that it would involve development in the countryside (IR468).

Like the Inspector (IR469) he considers that the loss of countryside and best and most versatile agricultural land would not accord with local and national policies. The Secretary of State considers that the proposal would be in conflict with policy DM5 in the JDMPD, which seeks to protect the countryside from unsustainable development, and with policy DM27, which permits small scale housing developments in the country (IR468). He considers that this would be an adverse effect that carries moderate weight against the application proposal.

Other matters

29. For the reasons given by the Inspector, the Secretary of State agrees with her conclusion that the character and appearance of the Newmarket Conservation Area would be preserved and that there would be no conflict with Policy DM17 in the JDMPD (IR467)

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30. For the reasons given by the Inspector at IR490, the Secretary of State considers that the economic benefits of the proposal carry moderate weight in favour of the proposal.

Whether any conditions and obligations are necessary to make the development acceptable

31……..He agrees with the Inspector (IR471) that the proposed conditions are reasonable, necessary and otherwise comply with the provisions of paragraph 206 of the Framework. However, he does not consider that the imposition of these conditions would overcome his reasons for refusing outline planning permission.

32. The Secretary of State ……(also) concludes that the obligations provided are in accordance with Regulation 122 of the CIL Regulations and paragraph 204 of the Framework. He agrees with the Inspector that at the time of the inquiry the provisions of Regulation 123 were not offended. Given his reasons for refusing outline planning permission, which do not relate to the obligations and would not be overcome by them, he has not considered it necessary to seek an update from the Council on this point.

Overall conclusions and planning balance

33. Section 38(6) of the Planning and Compulsory Purchase Act 2004 requires that proposals be determined in accordance with the development plan unless

material considerations indicate otherwise. For the reasons given above, the Secretary of State concludes that the proposal is not in accordance with development plan Policies DM5, DM27, DM48, Vision 2 of the CS, Spatial Objective ECO 5 or CS1, and is not in accordance with the development plan as a whole. He has therefore gone on to consider whether material considerations indicate that this application should be determined otherwise than in accordance with the development plan.

34. The Secretary of State considers that the proposal is in accordance with the emerging development plan. However, the emerging plan carries little weight, and the Secretary of State considers that the proposal's accordance with the emerging plan carries little weight in the planning balance. The emerging Neighbourhood Plan carries very little weight, and the Secretary of State considers that the proposal's accordance with the draft objectives of the emerging Neighbourhood Plan carries very little weight in the planning balance.

35. He considers that the provision of market and affordable housing in this case carries substantial weight in favour of the development, and that the economic benefits of the development carry moderate weight in favour. The road improvements referred to in paragraph 18 above carry significant weight in favour of the proposal.

36. However, he considers that the threat to the horse racing industry carries substantial weight against the proposal. He further considers that the risks arising from increased traffic at the Rayes Lane horse crossing carry moderate weight. He considers that the loss of countryside and best and most versatile agricultural land also carries moderate weight against the proposal.

37. The Secretary of State agrees with the Inspector's conclusions at IR452 that there would not be a significant impact on nature conservation interests, and that there would be no significant impact on European sites, and that an appropriate assessment would not be required. He considers that these matters do not weigh against the scheme.

38. Overall, he concludes that there are no material considerations which indicate that he should determine the case other than in accordance with the development plan.

Formal decision

39. Accordingly, for the reasons given above, the Secretary of State disagrees with the Inspector's recommendation. He hereby refuses outline planning permission for up to 400 dwellings plus associated open space (including areas of habitat enhancement) foul and surface water infrastructure, two accesses onto the A142, internal footpaths, cycle routes and estate roads at Hatchfield Farm, Fordham Road, Newmarket."

(x) The case for the Claimants

102. The Claimants argue four grounds

i) That the SSCLG failed to consider or apply his own policy in NPPF at paragraph [14](2);

ii) That the SSCLG failed to give any reasons why he was reaching a conclusion about the Rayes Lane crossing which was inconsistent with his first Decision Letter (DL (1)), or take his previous decision into account;

iii) The SSCLG's conclusion that there would be an increased risk from increased traffic at the Rayes Lane crossing had no evidential, relevant to rational foundation;

iv) The SSCLG has misinterpreted and therefore misapplied Policy DM48.

103. As to the first ground Mr Boyle argued that the SSCLG had to take his own policy into account, and unless he gave reasons for not doing so, had to apply it. The Decision letter, while addressing the effect of NPPF [49] never addressed the effect of NPPF [14] on the effect of the absence or silence of relevant and up to date Development Plan policies. Here, the effect of NPPF [14] part 2, which all parties accept was engaged because of the silence or absence of policies on housing, was that there was what all parties described as the "tilted balance." The conclusion of that exercise had then to be taken into account as a material consideration for the purposes of the exercise in s 38(6) *PCPA 2004.* Paragraph 14 of NPPF did not supplant s 38(6), but unless the SSCLG gave reasons for not applying its policy, he had to address it en route to reaching his conclusion under s 38(6).

104. There was nothing in the Decision Letter DL (2) which showed that he had undertaken that exercise. This was a case in which it was an issue of particular importance, and patently relevant.

105. On his second ground Mr Boyle QC argued that the issue about the risks relating to the crossing at Rayes Lane was the same at both inquiries. Unlike his Inspector in IR (2) who did address what the previous Decision Letter had held, the SSCLG never mentioned or addressed it.

106. Given the clear conclusions of the SSCLG in the first Decision letter that the effect of a 15% increase in traffic at Rayes Lane could be accommodated, he was bound to address the patent inconsistency between that conclusion in 2012 and his conclusion that a 5% increase in 2017 would be unacceptable. A long line of authority showed that the importance of consistency in decision making required him to do so (*N Wiltshire DC v SSE* [1993] 65 P & CR 137 (CA) *JJ Gallagher v SSE* [2002] 4 PLR 32, *Dunster Properties Ltd v First SSE* [2007] EWCA Civ 236 [2007] 2 P &CR 26 (CA) and *Fox Strategic etc v SSCLG* [2012] EWCA Civ 1998 [2013] 1 P &CR 5 (CA)).

107. While it is true that at the second inquiry the NHG called more evidence on equine behaviour, which explained why thoroughbred racehorses could be skittish, the fact that they were had been before the first Inspector, supported by evidence from experts (the trainers of horses) and was not a new point. The fact that horses can be skittish was blindingly obvious, and was not in any sense a new point. In any event, that

cannot be enough to justify the silence of the SSCLG on the topic of the first decision letter's conclusions. He never explained why he accepted the importance of the risk in the second decision, having not done so in the first decision.

108. As to his Third ground, Mr Boyle submitted that the proper question to ask, as the Inspector had at IR (2) [389], was what the effect of the scheme would be through an increase in incidents. The effect of the scheme at Rayes Lane would be, on the NHG evidence at IR (2) [386], a reduction in the number of incidents of 20%.

109. There was no rational basis to conclude that, if the first scheme was acceptable, then the second one was not, or that there would be an increase of traffic leading to an increase in incidents.

110. As to his fourth ground Mr Boyle argued that, for a finding that there was a breach of policy DM 48, the SSCLG had to find that the proposal *would* as opposed to *might* threaten the horse racing industry as a whole.

111. Attention was drawn to the fact that policy DM 48(a) uses a test of likelihood. He also referred to DM 48(b) where the tests are whether benefits *would* outweigh harm.

112. The reading he put forward (which was that used by the Inspector) accorded with the proper objective of the policy. Otherwise the planning authority will be required to accept claims of harm without being able to determine whether they are likely to come about.

113. The SSCLG's conclusions on this issue were based on the idea that the Rayes Lane crossing would create an adverse perception among owners, and thus threaten the long term viability of the horse racing industry.

(x) The case for the SSCLG

114. On the first ground, Mr Moules submitted that the SSCLG was not required to refer to or follow the language in NPPF [14] part 2. It is a matter for the judgement of the decision maker what weight he gives to it: *Suffolk Coastal DC v Hopkins Homes Ltd* Anor [2016] EWCA Civ 168 [2016] 2 P & CR 1 at [43]- [44]. The Inspector does not have to spell out whether the "adverse impacts …….significantly and demonstrably outweigh the benefits" if that is the effect of his conclusion: in *Bloor Homes (E Midlands) Ltd v SSCLG* [2014] EWHC 754 at [62] per Lindblom J.

115. It was common ground that NPPF [14] part 2 was engaged. It was accepted that it was a different test from that in s 38(6) *PCPA 2004.*

116. The fact that a policy is not mentioned in a Decision Letter does not mean that it has been ignored (see *Bloor* at [19(6)]). As NPPF was a material consideration, the SSCLG was entitled to structure his Decision Letter around s 38(6) of *PCPA 2004.*The SSCLG was, by virtue of DL(2) [8] and [10] and the cross references to IR(2) [16.1- 16.4] and [17.1-17.4], aware of the terms of the various Development Plan polices, and must have been aware of the fact that there was an absence of housing distribution policies, and that the emerging Core Strategy policy review and

proposed housing allocations document proposed the allocation of the site for development, including 400 dwellings.

117. The submission was that the Decision Letter did in substance what the paragraph requires. If this Ground was established it was not suggested that the decision would have been the same so that the claim could be dismissed on the basis of the principle set out in *Simplex GE (Holdings) Ltd v. Secretary of State for the Environment* [1988] 57 P & CR 306.

118. On the second ground Mr Moules submitted that the principle of achieving consistency in decision making was not a new issue, because there had been policy changes since the 2012 decision, and new expert evidence had been advanced on equine behaviour. The SSCLG was therefore neither agreeing or disagreeing with the 2012 Decision Letter in any critical respect.

119. In oral submissions, he submitted that the Decision Letter at [19] takes into account the problem of horses having retained memory of incidents. The SSCLG had considered the proposed mitigation measures at the crossing but concluded that it was insufficient. He was also entitled to rely at paragraph [21] on the terms of the new policy DM 48 in this context.

120. Mr Moules accepted that the broad point of the importance of the horseracing industry was not a new one, and had been addressed in the first decision letter (see DL (1) at [14]).

121. He submitted that the SSCLG was entitled to give his reasons in the context that the NHG was saying that there had been misunderstandings about the horse racing industry in Newmarket, and that his duty was to give reasons that addressed the issues in the context that that misunderstanding was advanced. One can infer from the Decision letter at [19] and [21] that that is why he took a different approach.

122. As to Ground 3 Mr Moules submitted that there was evidence upon which the SSCLG could base his conclusions. The Rayes Lane was said to be the busiest horse crossing in Europe [IR (2) [375]). Read fairly, the Decision Letter accepted that the effect of the additional traffic flow of 5% would be to add to the risks, and he was entitled to reach the planning judgement that it was uncertain then the Inspector that the mitigation measures would avoid the additional risks.

123. As to Ground 4, Mr Moules contended that the SSCLG had interpreted the policy DM48 properly. The use of the word "threaten" justified a precautionary approach to risk. The existence of adverse perceptions being harmful to the industry in Newmarket was a central part of the NHG case. Such owners and investors could make rapid decisions to withdraw their capital from the UK and take it elsewhere. The conclusions at [21] of the Decision Letter were that the conditions at the Rayes Lane crossing could create adverse perceptions on the part of owners.

124. The SSCLG was correct to find that DM 48 did not require a finding that there would be specific and identifiable adverse impacts on the industry arising from the development. He was entitled to consider that that harm would outweigh the benefits.

125. The claim should be dismissed.

(xi) The case for the NHG

126. Mr Elvin QC adopted what Mr Moules had argued. He cited the same authorities as Mr Boyle QC and Mr Moules, with the addition of references to *R (Newsmith Stainless Ltd) v Secretary of State* [2001] EWHC Admin 74 per Sullivan J (that s 288 challenges are not excuses for a challenge on the merits), and to *R v Birmingham City Council ex p Sale* [1984] 48 P & CR 270, 284 (one should not subject decision letters to the analytical attention of a medieval schoolman)

127. As to Ground 1 the NHG had identified NPPF as a new policy since the 2012 DL (1) – see IR (2) at [168.2]. But there was no disagreement that NPPF [14] part 2 applied. It did not form part of a principal controversial issue at the inquiry. The SSCLG did not have to address it specifically.

128. It was accepted that its effect was to create a "tilted balance." It was a material consideration for the purposes of the exercise in s 38(6) *PCPA 2004.* Development Plan policy DM48 (where his interpretation differed from the Inspector's) had to go into the exercise as well. It gave new weight to the significance of the horse racing industry in the context of both NPPF [14] part 2 and s 38(6) *PCPA 2004.*

129. He had not disagreed with the Inspector's conclusions at IR (2) [485] [487] on the Development Plan's silence. He was not required to spell it out. He followed the approach of Lindblom J in *Bloor Homes* where the effect of the silence in the Plan was the same. Had he been required to spell out the NPPF [14] part 2 process it would have made the decision letter unwieldy. There was no error of law.

130. On Ground 2 Mr Elvin's central point was that the principle of the *North Wiltshire* line of authority was that like cases had to be treated alike. But these two cases (the first and second decision letters) were not alike. There were material differences in the evidence base and the policy context.

131. The cases were different;

    i) The new policies DM 48 and DM 50 had to be addressed. They justified a precautionary approach;

    ii) Although it was accepted that the issue of the behaviour of horses had been raised at the first inquiry, on this occasion, NHG called an equine behavioural expert in support of their case, which made a substantial difference;

    iii) New evidence was called by NHG on the economic importance of the horse racing industry to Newmarket;

    iv) NHG called evidence on the importance of perception to owners of horses.

132. It was the expert evidence of Professor Waran that the SSCLG took into account- see DL (2) [19] and the reference to IR (2) [380]. His cross references in DL [19] to the IR (2) referred to [375]- [391], where the Inspector referred to such evidence. He therefore proceeded on the basis that the two cases were different.

133. Thus to the informed reader the SSCLG gave his reasons for differing from his previous decision. It was plain that he had formed a different view.

134. As to Grounds 3 and 4 Mr Elvin's case was essentially the same as that of Mr Moules.

(xii) Discussion and Conclusions

135. I start by setting out the relevant legal principles on decision making. I shall refer to some other authorities during the course of the following paragraphs.

136. In determining a planning application, the SSCLG must

i) have regard to the statutory Development Plan (see s 70(2) *TCPA 1990);*

ii) have regard to material considerations (s 70(2) *TCPA 1990*);

iii) apply national policy unless he gives reasons for not doing so- see Nolan LJ in *Horsham District Council v Secretary of State for the Environment and Margram Plc* [1993] 1 PLR 81 following Woolf J in *E. C. Gransden & Co. Ltd. v. Secretary of State for the Environment [1987]* 54 P & CR 86 and see Lindblom J in *Cala Homes (South) Ltd v Secretary of State for Communities & Local Government* [2011] EWHC 97 (Admin), [2011] JPL 887 at [50];

iv) consider the nature and extent of any conflict with the Development Plan: *Tesco Stores Ltd v Dundee City Council* [2012] UKSC 13 at [22] per Lord Reed;

v) consider whether the development accords with the Development Plan, looking at it as a whole- see *R(Milne) v Rochdale MBC (No 2)* [2000] EWHC 650 (Admin), [2001] JPL 470, [2001] Env LR 22, (2001) 81 P & CR 27 per Sullivan J at [46]- [48]. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. It must assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it; per Lord Clyde in *City of Edinburgh Council v. the Secretary of State for Scotland* [1997] UKHL 38, [1997] 1 WLR 1447, 1998 SC (HL) 33 cited by Sullivan J in *R(Milne) v Rochdale MBC (No 2)* at [48];

vi) determine the proposal in accordance with the Development Plan unless material considerations indicate otherwise (s 38(6) *PCPA 2004*);

vii) give reasons for his decision (*The Town and Country Planning (Inquiries Procedure) (England) Rules 2000 Regulation 18*). His reasons must be proper adequate and intelligible reasons for his decision, which explain his conclusions on the principal important controversial issues in the appeal. The degree of particularity depends on the nature of the issues falling for decision, and need not refer to every material consideration but to the main issues in dispute. A reasons challenge will only be sustained if the party aggrieved can satisfy the court that he has been genuinely prejudiced by the failure to provide

an adequately reasoned decision: see *S Bucks DC v Porter (No 2*) [2004] 1 WLR 1953 at [36];

viii) that point (on the degree of particularity and the need to show prejudice) applies also to the application of NPPF and other national policy. The decision maker is not required to set out, or even to refer expressly to all relevant passages, provided that, on a reasonable reading of the decision, it is apparent that the relevant material parts of the policy which could affect the outcome of the decision have been had regard to and (if he chooses to do so) applied, or if he chooses not do so, he has given reasons for not doing so;

ix) if he is dealing with an issue where he has already reached a conclusion in another decision with which the conclusion he is now minded to reach is in conflict, he must follow the approach set out by Mann LJ in *North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137 at 145 (followed by the Court of Appeal in *Dunster Properties Ltd v The First Secretary of State & Anor* [2007] EWCA Civ 236) and *Fox Strategic etc v SSCLG* [2012] Civ 1198 [2013] 1 P & CR 6

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

x) the law was elegantly summarised by Lindblom J (as he then was) in *Pertemps Investments Ltd v Secretary of State for Communities And Local Government & Anor* [2015] EWHC 2308 at [54], where he drew on the judgement of Holgate J in *St Albans City and District Council v Secretary of State for*

Communities And Local Government & Ors [2015] EWHC 655. Having cited Mann LJ in *North Wiltshire*, Lindblom J went on at [54]:

> "Those general principles have since been applied by the courts in various circumstances where the principle of consistency is said to arise (see, for example, the decisions of the Court of Appeal in *Dunster Properties Ltd. v First Secretary of State* [2007] EWCA Civ 236 and *R. (on the application of Fox Strategic Land and Property Ltd.) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1198, and, in the context of a licensing decision, *R. (on the application of Thompson) v Oxford City Council* [2014] EWCA Civ 94). In *R. v Secretary of State, ex parte Baber* [1996] the Court of Appeal found the requirement for the two cases be "indistinguishable" too onerous a test of materiality, at least in the particular circumstances of that case, Glidewell L.J. preferring (at p.1041) the formulation "sufficiently closely related", and Morritt L.J. (at p.1041) "sufficiently related" (see Holgate J.'s illuminating analysis of the relevant case law in his recent judgment in *St Albans District Council Secretary of State for Communities and Local Government* [2015] EWHC 655 (Admin), at paragraphs 66 to 126). In *Fox* the Secretary of State had rejected a proposal for major residential development, giving "no weight" to his own previous decision on development on a similar scale nearby, in which he had taken a materially different view of the "spatial vision" for the area. Pill L.J., with whom Rimer and Black L.JJ. agreed on this point, referred (at paragraph 14 of his judgment) to the observation of George Bartlett Q.C., sitting as a deputy High Court judge, in *J.J. Gallagher Ltd. v Secretary of State for Local Government, Transport and the Regions* [2002] EWHC 1812 (Admin) (at paragraph 58) that where the inconsistency between two decisions is "stark and fundamental" it will usually not be enough to leave the explanation for the inconsistency to be inferred by the reader, because "unless the decision-maker deals expressly with the earlier decision and gives reasons that are directed at explaining the apparent inconsistency, there is likely to be a doubt as to whether he has truly taken the earlier decision into account". Pill L.J. found a "serious inconsistency" between the two decisions in the approach taken by the Secretary of State to the spatial vision (paragraph 30). The Secretary of State could not properly ignore the first decision when making the second (paragraphs 31 and 34). The "inconsistencies against which the *North Wiltshire* principles guard" were present, and had led to an unlawful decision (paragraph 35)."

xi) it is to be noted that the importance of consistency in decision making also requires that he gives proper reasons for departure from his previous conclusion. That was emphasised by the Court of Appeal in *Fox Strategic* in the references to the judgement in *JJ Gallagher Ltd v SSE* [2002] EWHC 1812 [2002] 4 PLR 32 by HH Judge George Bartlett QC sitting as a deputy High Court Judge (and of course a judge with great specialist experience in this field, who was President of the Lands Tribunal), referred to above by Lindblom J;

xii) if it is shown that the decision maker had regard to an immaterial consideration, or failed to have regard to a material one, the decision will be

quashed unless the Court is satisfied that the decision would necessarily have been the same: see *Simplex GE (Holdings) Ltd v. Secretary of State for the Environment* [1988] 57 P & CR 306.

137. I start with identifying the context in which this decision was being made. It related to a site for housing, proposed in an area where the Development Plan had no policy on housing distribution or allocations, but where emerging policy proposed housing development, and on a site where previous claims of the dangers of extra traffic generated by a much larger scheme had been rejected by the Secretary of State in the recent past. Against that, some members of the horse racing industry contended that it would harm the industry, and in particular that the extra traffic would be incompatible with safe use of a horse crossing. The effect of NPPF was to apply the "tilted balance" as a material consideration when the final s 38(6) *PCPA 2004* was addressed. That "tilted balance" concept has been well established in recent authorities, and was accepted in terms by all parties before me.

138. The SSCLG had received a very thorough Inspector's Report, which had set out the competing arguments with care, and identified the eight critical issues for the SSCLG, which list he said he adopted.

139. I turn then to the issues relating to Ground 1. Applying the well known legal principles (from *Horsham DC* and from *Gransden*) that he must apply his own policy unless he gives reasons for not doing so, one looks at this Decision Letter. I do so bearing in mind the judgment of Lindblom J (as he then was) in *Bloor Homes*, and the point which I have made above about the particularity required. One must be astute not to misapply what was said by Lindblom J. In a case where it is not suggested that there is to be a departure from national policy (as here), the Secretary of State has to apply it, and do so in the context relevant to the decision in question and to the particularity required. In some cases, its being addressed and applied will require an explanation, however succinct. In some others, the issues may be such that it can simply be implied. In some, its relevance to the material issues will be unimportant enough not to require exposition or implied consideration. If the Secretary of State can address it by implication (as in *Bloor Homes)* then no criticism can be made. But Lindblom J was not in any sense seeking to endorse a failure to address the policy where it was not implicit in the Decision Letter and where it went to the material issues. His judgement was not an exercise in undermining the duty to give adequate reasons, nor did it set out to justify or excuse a breach of the duty to apply relevant and significant parts of national policy in the absence of reasons: rather it is one which seeks to discourage challenges based on a mechanistic application of those duties, and encourages a fair interpretation of decision letters in their context.

140. There is no indication given by the SSCLG in DL (2) that he has chosen not to apply this section of NPPF. If it was an important matter requiring his consideration in the context of the case, and he has failed to apply it, that would amount in the context of this decision letter to a failure to take into account a material consideration, and potentially one of weight, although its degree is a matter for him. There was no dispute between the parties on the approach which had to be adopted here. It was agreed that

i) this was a case of silence/absence which brought NPPF [14] in to play, which did not depend on the finding of a shortfall relevant to the policy in NPPF [49];

ii) the "tilted balance" therefore applied;

iii) at the final stage under s 38(6) *PCPA 2004* the outcome of the tilted balance had to be taken into account as a material consideration.

141. I agree with counsel for all parties that that is the correct approach. For completeness, I would want to add some observations of my own, which go also to whether this is an important part of the policy.

142. The reason for the "tilted balance" is clear within NPPF. It is intended to promote development unless there are reasons of substance to refuse permission – see NPPF at [12]. It has even adopted the phrase much used in jury trials of the "golden thread" to emphasise the importance of promoting sustainable development, and in the second part of [14] applies that approach to decision taking. The Court of Appeal noted in *Solihull Metropolitan Borough Council v Gallagher Estates Ltd & Anor* [2014] EWCA Civ 1610 at [14] to [16] the emphasis placed by NPPF on encouraging housing development. The matter was well described by Jay J in *Cheshire East Borough Council v Secretary of State for Communities and Local Government & Anor* [2016] EWHC 571 (Admin) at [20]-[22]

> 20 "In the absence of paragraph 14, decision makers would be unable to decide how tensions between the competing *desiderata* should be reconciled. If, for example, the economic and social merits only slightly outweighed the environmental, what then? The answer is not to be found in paragraphs 6-8. The framers of the NPPF rightly thought that guidance in this regard was necessary. The guidance they have provided in the form of paragraph 14 is to say that the proposal should be approved as sustainable development unless the adverse impacts clearly and significantly outweighed the benefits.
> 21 On this approach, the effect of paragraph 14 is that proposals which would otherwise have been refused because their planning merits were finely balanced should be approved – subject to the first indent of the second bullet point being made out. Another way of putting the matter is that the scales, or the balance, is weighted, loaded or tilted in favour of the proposal. This is what the presumption in favour of sustainable development means: it is a rebuttable presumption, although will only yield in the face of significant and demonstrable adverse impacts.
> 22 In practice, there will be questions of fact and degree. If, for example, the planning advantages are assessed to be non-existent, the presumption is likely to be easily displaced. The stronger the planning benefits are assessed to be, the more tenaciously the presumption will operate and the harder it will be to displace it."

143. In the *Cheshire East* decision Jay J also, at [18] ff, described the importance of the *process* involved in applying NPPF [14] part 2. That cannot be divorced from the emphasis which NPPF places on permitting development unless there are weighty adverse impacts. Thus it is that part of that process involves considering whether the

adverse impacts of the development would significantly and demonstrably outweigh the benefits when assessed against NPPF as a whole. The policy that that process is to be followed is so that the policy tests thus brought to bear are applied by the decision maker. That principle applies, inter alia, to housing development, which NPPF seeks to encourage whether or not a 5 year shortfall is shown. So, one may either operate the presumption and its process if policies relating to housing in a Development Plan are absent, silent or out of date, or do so even if it is not silent, and otherwise up to date, but there is less than 5 years' supply (see NPPF at [49]). There is nothing in NPPF which says that the latter reason to apply the presumption in paragraph [14] part 2 is more important than the former.

144. The weight to be given to the outcome of the NPPF [14] part 2 policies in any particular decision is of course for the SSCLG, but in the context of a major housing proposal, where the Inspector had gone to the trouble of identifying it as one of the eight main issues ([355]) and that was accepted by him as one the main issues ([DL (2) at [14])) it merited consideration and either its application, or a stated reason for its not being applied. There was no dispute before me about that as a matter of principle. The issue was about whether he had done so on a fair reading of the Decision Letter.

145. That leads one to the fact that he has cast his decision at DL (2) [33]-[38] in terms of considering matters in the context of s 38(6) *PCPA 2004.* The NPPF "tilted balance" exercise is not the same exercise as that in s 38(6) *PCPA 2004* nor a substitute for it, as made clear by Lindblom LJ in *Suffolk Coastal District Council v Hopkins Homes Ltd & Anor* [2016] EWCA Civ 168 [2016] 2 P & CR 1 [2016] JPL 890 at [42]-[48]). In this decision, it was relevant as a material consideration for the purposes of s 70(2) *TCPA 1990*, but of course the principle remained under s 38(6) of the *Planning and Compulsory Purchase Act 2004* ("*PCPA 2004")* that applications must be determined in accordance with the Development Plan unless material considerations indicate otherwise. But the corollary of that is that where the NPPF [14] tilted balance does apply, the decision maker must put the result into the exercise under section 38(6) and, if it supports the proposal, do so as a material consideration weighing in favour of the development in that statutory balance. The weight the decision maker then gives at that stage to the statutory development plan or the various material considerations will of course be for the decision maker.

146. In this particular decision, it is plain that the effect of the tilted balance in NPPF [14] was of considerable importance. It was one of the eight main issues identified by the Inspector, and much debate between the parties. While the effect of the change in the housing supply position after the Inspector's report had been received could have affected the weight to be given to the arguments about the 5 year supply, the issue relating to the important absence of housing policies remained. One of its particular contexts was that this site would meet important objectives of policy in terms of sustainability, as well as the fact that it was best and most versatile agricultural land. This is a local authority area where more land has to be found for housing, as suggested by the emerging local plan allocations.

147. I reiterate that I of course accept the point made by Lindblom J in *Bloor Homes* that it may not be necessary for the NPPF [14] exercise to be spelled out. That was a case where the application of the NPPF [14] tilted balance would have led to the same result- see *Bloor Homes* at [61]. But that was not intended or meant as a justification

for a failure to have regard to it at all, nor to leave it unmentioned when it is an issue of importance to be addressed by the decision maker.

148. Here, the Inspector had addressed the question of whether the presumption should be applied, and held that it did both on the grounds of the small housing shortfall, and in any event because of the absence of relevant policies. She identified why the presumption applied and then applied it (IR (2) [485-496]). She then went on to consider the other considerations which were advantages or disadvantages of the proposal. She applied the test in paragraph [14] part 2 of NPPF at [496] where she concluded that the adverse impacts did not significantly or demonstrably outweigh the benefits when assessed against the policies in NPPF taken as a whole.

149. With those matters in mind, one turns to the reasoning of the SSCLG in the Decision Letter. It is to be noted that the SSCLG's heading to his paragraphs [33] to [38] does not cite the identified issue completely or accurately. He has finished the heading at "balance" whereas the issue he agrees should be addressed actually added the words *"to determine whether the proposal would be a sustainable form of development taking account of the three dimensions in the Framework."* That was a proper description of the NPPF tilted balance, and it was perhaps a significant start to his deliberations that he missed those words off the citation of the defined issue.

150. In my judgement, despite the Inspector having spent some time addressing the NPPF [14] presumption, this Decision Letter never mentions it, nor on a fair reading even deals with it by implication. What the SSCLG did was something different. He ascribed weights to the various factors for and against the proposal, and then applied the s 38(6) balance. But that is not what he had to address before he got to that stage, if he was to apply his own policy. It is remarkable that not a single mention is made of NPPF, nor even any implicit reference made, in paragraphs [33] – [38] where he is purporting to address the eighth consideration identified by the Inspector, which demanded the SSCLG's own application of the NPPF process. I find myself quite unable to accept that this important policy issue was ever addressed by the SSCLG. Nor can I conclude that, had it been taken into account, it would have had no effect on the striking of the balance under s 38(6).

151. There is nothing unusual about Decision Letters of the SSCLG dealing with the matter in the manner suggested above, before addressing the overall balance under s 38(6). That approach conforms with the policy importance given to the process by which decisions are made (as pointed out by Jay J in *Cheshire East* (supra)). That is not done as a mere exercise in national policy in instructing decision makers on the mechanics of reasoning. By its choice of the presumptive approach, it is intended to give weight to the advantages of permitting development over the disadvantages of doing so, in those cases outside the specific classes of breaches of policy referred to in NPPF [14].

152. Some cases where policies are not referred to, but their application is implied, or would have made no difference (as in *Bloor)* fall on one side of the line, as do those where the omitted application is immaterial. Some cases are close to or on the line, where there can be reasonable argument about whether the necessary policy is dealt with by implication. This case falls well beyond the line. This was a clear case of the policy being important in the context of the decision, as described by his Inspector and identified in the eighth issue which the SSCLG claimed to accept as appropriate.

Having failed to cite the eighth issue accurately or completely, he never referred to the policy, nor to the issue of whether to disapply it, and then having failed to do that, failed to apply it despite the Inspector's full and careful report and conclusions. He was not bound by her conclusions on the outcome of the balance, nor of the weighting of that outcome in the s 38(6) balance, but what he was bound in law to do, and did not, was to address the point.

153. Ground 1 therefore succeeds.

154. As to Ground 2, the principle established in the line of authority cited above is unquestioned. If a decision maker is minded to depart from a previous decision on an issue, it is not simply a question of the previous decision being a material consideration. It is also that as a matter of proper reasoning, he must give his reasons for doing so, subject of course to the degree of particularity required in the case in question. But one notes here that it is not even listed by the SSCLG as one of the material considerations he has taken into account.

155. The SSCLG had his attention drawn by the Inspector in her Report to the fact that the previous decision DL (1) and the Inspector's conclusions (IR (1) had rejected the highway objections taken to a much larger scheme generating much more traffic, and had also rejected the case against the proposal on the basis of safety concerns at the Rayes Lane crossing. That issue was referred to throughout the report's account of the case for the Claimants and the NHG. The Inspector drew express attention to it in her conclusions. The NHG case was, as the second Inspector pointed out, an attempt to mount an attack on the conclusions reached in the first decision, on the basis that the first Inspector and the SSCLG had misunderstood the evidence and reached the wrong conclusions. (IR (2) [371]-[372])

156. There could thus be no suggestion that the previous Decision Letter addressed some different issue, or was not of relevance. The Secretary of State was thus faced by one party asking him to follow his previous decision, and another seeking to argue that he had reached the wrong conclusions. Under those circumstances, no reasonable Secretary of State could have thought that he did not have to deal with the first decision, and address its significance in this decision making process, where he had to weigh the arguments for and against its being adhered to.

157. None of the submissions made to me argued that the previous decision was not material. Mr Moules accepted that it was material, but also accepted that no reference was made to it. He and Mr Elvin QC both sought to persuade me that the SSCLG did not have to perform the *North Wiltshire* exercise because he was relying on new evidence about equine behaviour, and because of the effect of the new policy DM 48.

158. This is not a case where the potential for conflicting decisions related to more refined arguments about policy (like *Fox Strategic*) or about its application to different sites. Nothing in the other cases comes close to the degree of inconsistency this case reveals. In 2012 the SSCLG decided that the Rayes Lane crossing would function safely with over 1100 vehicles per hour passing over it, but in 2016 he considered that a flow of almost 100 vph fewer would be so unsafe as to justify refusal. The stark conflict between the two decisions relating to the two development proposals called out for explanation. This second smaller scheme was a development within the same site, with the extra traffic generated affecting the same road, but in quantities now

reduced by two-thirds. That demanded an explanation as to how that which had concluded in 2012 was a safe arrangement (with three times as much additional traffic) was now to be regarded as unsafe. All parties before me accepted that it did so require. It was Mr Moules' and Mr Elvin's case that he had done so on a fair reading of the Decision Letter.

159. One starts by looking at the Decision Letter itself in its treatment of this issue. There is not a single reference by the SSCLG to the previous decision, let alone to the previous Inspector's Report. In my judgement, the very least that was required of the SSCLG was to acknowledge the fact of the previous conclusions, and face up to the fact that he was being asked to reach conclusions which on any view were entirely at odds with the those he had reached in 2012. NHG had not held back in its case at inquiry that the first decision was wrong on this issue, with which contention the Claimants (and FHDC) disagreed, as did the Second Inspector. But despite that, it received no mention or consideration at all in the Decision Letter.

160. But I am also quite unprepared to accept the reasons suggested to me by Mr Moules and Mr Elvin for his not doing so. Decision Letters must be read on their face, and reasons suggested by Counsel which go beyond those confines, unless they arise on a proper reading of the document, are not matters to be taken into account. While I accept the submissions by Mr Moules and Mr Elvin that he was relying on the evidence about the 5% increase in traffic, and his being less than certain of the safety of the improvements, I do not accept that that explains or justifies his failure to mention the previous decision. Indeed, a fair analysis of the evidence upon which he based his decision had to deal with the fact that the previous decision strongly supported the acceptability of the new scheme, and that the acceptability of a 15% increase in traffic at the Rayes Lane crossing was quite inconsistent with a conclusion that a 5% increase would be unacceptable.

161. The more Mr Moules and Mr Elvin sought to persuade me that the previous decision either had been addressed implicitly, or could be distinguished, or did not require a reference, the more obvious it became that the SSCLG had simply not addressed it. In my judgement, this decision letter is wholly deficient of any discussion of the reasons for the stark disagreement with the previous decision.

162. It is worth recalling what was said in *J J Gallagher v SSE* [2002] 4 PLR 32, cited with approval by the Court of Appeal in *Fox Strategic* and referred to by Lindblom J in *Pertemps*. They are in the characteristically efficient, experienced and measured words of Judge Bartlett QC sitting as a deputy High Court Judge:

> "If the explanation of the inconsistency is obvious, a formal statement of it will be unnecessary. Where the inconsistency is stark and fundamental, as it seems to me it is in the present case, it will in my judgment usually be insufficient to leave it to the reader to infer the explanation for the inconsistent decisions. The reason for this is that unless the decision-maker deals expressly with the earlier decision and gives reasons that are directed at explaining the apparent inconsistency, there is likely to be a doubt as to whether he has truly taken the earlier decision into account. In the present case, moreover, the inspector has thought it appropriate to place reliance on the earlier decision and had referred to it no less than 33 times in the course of his report. The claimant was entitled in these circumstances to an express explanation on the

> Secretary of State's part, and it has been substantially prejudiced by the lack of such an explanation."

Applying that principle here, this approach by the SSCLG is plainly deficient.

163. I then ask myself whether the effect of his addressing his previous decision would have made a difference.

164. In my view, it could well have done. The first IR and DL had addressed this issue in the context of a greater traffic impact. Although the matter was argued in submissions before me on the basis that there was important new evidence, it is far from clear that the evidence about equine behaviour at the second inquiry raised any new issues. It was undoubtedly evidence from a witness new to the inquiry who was important in her field. But that does not make it important new evidence in the context of the case.

165. While that new evidence seems to have considered the reasons why their diets or genetics make thoroughbreds skittish, and susceptible to "spooking," the question was not why they are, but whether the fact that they are would lead to a risk to safety that was unacceptable. To anyone raised or living rurally, the idea that one needs expert evidence to demonstrate the commonplace knowledge that care should be taken when driving near horses, let alone thoroughbreds, because they can be skittish would be remarkable. It would be even more remarkable to those trainers of thoroughbreds who gave evidence to exactly the same effect at the first inquiry. The first Inspector had had the case put to him that thoroughbreds are skittish and could be "spooked" as noted above. As also noted above at paragraph 32, it was (very properly) urged on him by Mr Elvin QC that the trainers whose evidence he was relying on had "unparalleled experience" of their behaviour. In my judgement the case about the skittishness of thoroughbred horses was simply dressed up before me as being a new point at the second inquiry. It was not: it was the same point as taken at the first inquiry, but this time supported by different, albeit more academic, evidence. The case at the second inquiry was in truth the same tune played by much the same orchestra, albeit now with the help of a new soloist.

166. Although unnecessary to my decision, it is also plain on the findings of the Inspector that the conclusion she reached about the safety of the crossing was robust. The extra amount of traffic passing over the crossing was 5% above the flow otherwise to be expected. It is helpful to reflect on what that actually means in real terms. At the flows discussed here (and noted above), that meant (across both directions of flow) that the development would generate less than an extra vehicle a minute - in fact 0.8 vehicles- being added to the traffic flow in peak hours, and less than that at other times. In round numbers, instead of a two way flow of 16 vehicles per minute in the peak hour, it would rise to not quite 17 vehicles per minute, or on average of one every 3.75 seconds instead of one every 3.5 seconds[2]. If split across the directions, even at 75/25 %, the higher flow would rise to just one vehicle every 4.7 seconds instead of one every 5 seconds[3]. These are differences in flow which would be very hard indeed to detect, and even less so if the vehicles arrive irregularly. Once one puts it that way it is very hard to see how an argument that the additional traffic would have any

[2] 1min= 60 secs. 60/16= 3.75 secs; 60/17= 3.50 secs

[3] (960+48) = 1008 vph x 75% = 756 vph one way flow. 756/60= 12.6 vpm. 60/12.6 = one vehicle per 4.7 secs. Compare to result at 960 x 75% vph = 720 vph = one vehicle per 5 secs

material impact on the conditions at the Rayes Lane crossing, whether or not improved in association with the scheme, could be sustained. It is even more difficult to see how it would affect the perception of extra conflicts.

167. It is also fair to observe, as the Second Inspector did, that there was an inherent inconsistency in the case being advanced by NHG. On the one hand, it urged that increased traffic levels imperilled the future of the industry, said that traffic levels had increased, yet also sought to argue that the industry was very successful, having attracted more horses since 2012. It is difficult to reconcile those arguments.

168. Ground 2 therefore succeeds.

169. I turn now to Ground 3. It is a very difficult task for a Claimant to overturn a planning judgement of the decision maker on the grounds that it was irrational**,** or wrong on the merits, and I have well in mind what was said by Sullivan J in *R (Newsmith Stainless Ltd) v Secretary of State* [2001] EWHC Admin 74, referred to by Mr Moules in his submissions.

170. I do not consider that this ground takes Mr Boyle further than he achieved under Ground 2. While I readily accept that the case against this scheme on highway safety grounds (including the effects at the Rayes Lane crossing) was far from robust, or even very weak, that is not enough to conclude that the SSCLG's decision was irrational and thus unlawful, although the NHG case on this, accepted by the SSCLG, was so weak that it came very close.

171. Ground 3 therefore fails.

172. As to Ground 4, it is important to remember that while the *interpretation* of policy is for the court to determine, its *application* is a matter for the decision maker. The SSCLG has determined at (DL(2) [21]) that the perceived adverse impacts of the extra traffic passing the Rayes Lane crossing would threaten the long term viability of the horseracing industry in Newmarket. It was the only basis upon which he does so. That claimed perception may be a difficult concept to accept (the Inspector plainly found it so) but if Grounds 2 and 3 fail, then, albeit resting on weak foundations, it was a conclusion open to the SSCLG as a planning judgement if he has interpreted Policy DM 48 properly. If Ground 2 succeeds, the issue of the traffic impact there has been addressed improperly in any event.

173. But if Ground 2 fails, what of this ground? The issue here is simply this. If the perception of investors were to be adversely affected by the extra traffic at the Rayes Lane crossing, could that amount to a threat to the long term viability of the horse racing industry as a whole?

174. I accept Mr Moules' submission that the creation of a risk of adverse perception can be relied on as a threat in the terms described by the policy. I therefore reject this ground if it stands without the support of Ground 2. The Inspector, unsurprisingly given her conclusions, and the levels of traffic involved, took the view having heard the evidence that the claims of adverse perception were without substance. I am just persuaded that the SSCLG was entitled legally to take a different view. However, if it is correct that his approach to the Rayes Lane crossing was quite deficient anyway, and correct that the development would produce, at worst, barely perceptible

increases in traffic flow, it might be thought very difficult to sustain this as a matter of objection.

175. Ground 4 therefore fails.

Conclusion

176. The claim therefore succeeds on Grounds 1 and 2. The Claimants' case outlined at paragraph 1 above was made out. The Secretary of State has performed a complete and unexplained volte face in his assessment of the highways impacts of two proposals for development on the same site in Newmarket, and has also failed to apply his own National Planning Policy Framework. There is no reason to think that the decision would have been the same had he not failed in those two respects.

177. This decision must therefore be quashed. I will hear submissions from Counsel on any ancillary orders.