

AGENDA
COMMITTEENAME
MeetingTitle

Start Date: MeetingDate

Time: meetingtime

Venue: MeetingLocation

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Court Judgements

Neutral Citation Number: [2015] EWHC 827 (Admin)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 March 2015

Before:

Mr Justice Lindblom

Between:

Phides Estates (Overseas) Limited

Claimant

- and -

**Secretary of State for Communities and
Local Government**

First Defendant

- and -

Shepway District Council

Second Defendant

- and -

David Plumstead

Third Defendant

Mr Douglas Edwards Q.C. (instructed by **Wedlake Bell**) for the **Claimant**
Mr Richard Moules (instructed by **the Treasury Solicitor**) for the **First Defendant**
Mr Paul Brown Q.C. (instructed by **Richard Buxton**) for the **Third Defendant**

Hearing date: 17 February 2015

Judgment

Mr Justice Lindblom:

Introduction

1. Proposals for housing development are sometimes rejected even when there is not, at the time of the decision, the five-year supply of housing land required by government policy. That is what happened in this case. Whether the decision was right or wrong is not for the court to say. The question for the court is whether it was lawfully made.
2. By an application under section 288 of the Town and Country Planning Act 1990 the claimant, Phides Estates (Overseas) Ltd., seeks an order to quash the decision of the inspector, Ms Christina Downes, appointed by the first defendant, the Secretary of State for Communities and Local Government, in which she dismissed its appeal against the refusal by the second defendant, Shepway District Council, of its application for outline planning permission for a development of housing on land at the former Lympne Airfield in Kent. The inspector's decision letter is dated 8 September 2014. Phides' application is opposed both by the Secretary of State and by the third defendant, Mr David Plumstead, a local resident and a member of the Friends of Lympne Airfield Association, which objected to the proposed development.

The issues for the court

3. The application raises two main issues for the court:
 - (1) whether the inspector misunderstood and misapplied Policy SS2 of the Shepway Core Strategy, adopted by the council in 2013, and thus failed to identify the relevant "housing requirements" under paragraph 47 of the National Planning Policy Framework ("the NPPF"), or at least failed to provide intelligible and adequate reasons for her conclusions (ground 1); and
 - (2) whether the inspector failed to identify the "relevant policies for the supply of housing" within paragraph 49 of the NPPF, or reached inconsistent conclusions on that matter, or in any event failed to provide lawful reasons for those conclusions (ground 2).

Background

4. The appeal site is owned by Phides. It extends to about 18 hectares within the former airfield, whose total area is about 82 hectares. On its eastern side it adjoins the village of Lympne. To its west is the Lympne Industrial Estate, to its north a large area of land, Link Park, which will be developed for industrial and business uses. Much of the former airfield is still open land, though some of its structures and hardstandings remain. In Phides' appeal it was agreed that the site was not "previously developed land".
5. The proposal was for a development of 250 dwellings, a village green, a local centre, public open space and playing fields. The application for outline planning permission was submitted on 16 April 2013. It was refused by the council on 25 November 2013. The council's first reason for refusal was this:

"The proposed development, being located outside the village confines of the Lympne settlement boundary, and being of such a size, scale and impact, which is disproportionate

with the settlement hierarchy, status and identified strategic role and needs of Lympe and which fails to promote the good design and distinctiveness of Lympe, is contrary to policies DSD, SS1, SS2, SS3, CSD1, CSD2 and CSD3 of the adopted Shepway Core Strategy Local Plan 2013, saved policies CO1 and HO1 of the Shepway District Local Plan Review 2006 and [the NPPF], principally paragraphs 12, 17, 49 and 70, all of which require plan-making and decision-taking to be plan-led with development proportionate and consistent with the settlement's status and identified strategic role, which deliver the social, recreational and cultural facilities and services the community needs.”

There were two further reasons for refusal, but they were later abandoned.

6. On 18 December 2013 Phides appealed against the council's decision. The inspector held an inquiry into the appeal over four days, from 22 to 25 July 2014, and made her site visit on 29 July 2014. At the inquiry Phides argued that Policy SS2 of the core strategy required the delivery of 400 dwellings a year in the period to 2025/2026, not 350 as the council contended; that the council could not demonstrate a five-year supply of housing land to meet that requirement, with a buffer of 20%; that, in the light of government policy in paragraph 49 of the NPPF, the “relevant policies for the supply of housing”, including saved Policy CO1 of the local plan, and several policies of the core strategy – Policy SS1, Policy SS2, Policy SS3, Policy CSD1, Policy CSD2 and Policy CSD3 – could not be considered “up-to-date”; that the presumption in favour of sustainable development in paragraph 14 was therefore engaged; that there were no “adverse effects” arising from the development which would “significantly and demonstrably outweigh the benefits, assessed against the policies of [the NPPF], taken as a whole”; and that there was therefore no reason why planning permission for it should be withheld.

Development plan policy

7. When the inspector made her decision on Phides' appeal the development plan comprised the core strategy and the saved policies of the Shepway District Local Plan Review.
8. The local plan review was adopted in 2006. In Chapter 12, “Countryside”, saved Policy CO1 states that the council “will protect the countryside for its own sake”. The policy defines the “countryside” as “the area outside of the settlement boundaries identified on the proposals map”. It describes the circumstances in which, subject to other plan policies, development in the “countryside” will be permitted.
9. The council began the preparation of the core strategy in 2011. On 13 April 2011 its Cabinet considered a report in which officers advised on “key decisions” to be taken in that process. The officers recommended “a housing target” for inclusion in the core strategy, which was “400 dwellings per annum over the period to 2026, to allow modest long-term growth in the population of the district”. They reminded the members (in paragraph 3.1 of their report) that the “Shepway LDF Core Strategy Preferred Options” document had referred to a required delivery “of between [6,000] and [8,000] new homes over the period 2006 to 2026 ...”. They advised (at paragraph 3.11) that “an average delivery rate of 400 dwellings per annum be supported over the 20 year period, a figure that is consistent with the annual rate of delivery over the past 20 years ...”; and (at paragraph 3.16) that “an appropriate requirement (not necessarily at 400 p.a.) be developed for a period beyond 2026/2027 for inclusion within the proposed submission document”. The Cabinet accepted the officers' recommendation. Attached to the officers' report, as Appendix 1, was a paper entitled “Strategic Requirement April 2011”. In section 12, “Conclusion”, this document put forward as its “Core recommendation”, that “a proposed

average housing target in the Shepway LDF Core Strategy (subject to final examination of sources of capacity and strategic sites, and Sustainability Appraisal process) features, for the period 2006 to 2026, in the order of 400 new dwellings per annum; this being the upper end level consulted on as a preferred option”. One of the further recommendations was that “consideration be given to a policy requirement for housing delivery extending beyond 2026”.

10. The draft core strategy was submitted for examination in January 2012. The examination was carried out by an inspector, Mr Michael Hetherington, who held hearings in May 2012 and March 2013.
11. In September 2012 the council produced its “Shepway Core Strategy Local Plan Modifications 2012 Technical Note: Windfalls, Housing Supply & Policy Update”. This document introduced itself (at paragraph 1.1) as “evidence supporting modifications” to the draft core strategy which the council considered necessary “to ensure the ‘soundness’ of the Core Strategy in light of both recent changes to national policy, and the Planning Inspector’s ‘Interim Conclusions’ dated 18th May 2012 ...”. Section 2 of the document referred to the NPPF – published six months previously in March 2012 – and in particular to paragraph 47, which, it said, “requires local plans to be based on evidence to fully meet needs for market/affordable housing ...” (paragraph 2.2). Section 4 dealt with “Housing Delivery and ‘Windfalls’ – Effects”. Paragraph 4.2 said that “[the] central requirement remains for the provision of at least 350 dwellings per year in the period 2006/7 – 2030/31 (inclusive)”. Paragraph 4.10 said that the “net implication on the housing trajectory” of the remodelling of the core strategy “housing supply” was that “the 8,750 requirement as a minimum (25 years x 350) is met some two years earlier in the plan period than before”. In its “Final Conclusions” the document said that the opportunity had been taken “to update all relevant information with regard to housing land supply to demonstrate consistency with the NPPF”. The first of the seven conclusions set out was this:

“The delivery of a minimum of 350 dwellings per annum under policy SS2 remains achievable and meets the provisions contained within paragraph 47 of the NPPF.”

12. The core strategy inspector’s report was published on 10 June 2013. He noted, in paragraph 48, that the core strategy had been prepared “in the context of an extant South East Plan (SEP)”. The evidence base had been “taken forward” in the council’s “Strategic Requirement April 2011” paper. In paragraph 49 he recorded the fact that “[growth] alternatives” had been tested in the “Preferred Options and Issues and Options stages” of the core strategy process. He went on to say that “[the] preferred option ... aims to balance the CS’s over-arching strategic needs in order to give a positive framework for delivery”, and that “[it] proposes a rate of housing development (a minimum of 350 dwellings per year to 2030/31) that markedly exceeds that set out in the SEP (290 dwellings per year to 2026)”. He was satisfied that the evidence base “represents an objective assessment of housing needs as required by [the NPPF’s] paragraph 47” (paragraph 50). In his view, “[given] the various environmental factors discussed elsewhere in this report ..., the higher growth options that have been discarded by the Council would conflict unacceptably with the Plan’s over-arching strategic need B (relating to the District’s rich natural and historic assets) and with other relevant policies of [the NPPF]” (paragraph 51). In paragraph 52 he said this:

“Indeed, a significantly higher rate of housing development would be at odds with the evidence that is available about development deliverability. The annual housing target set by policy SS2 is greater than recent building rates – a minimum requirement of 350 dwellings per year compared to a six year average completion rate of some 270 dwellings per year

(2006/7 to 2011/12). However, it is in line with delivery rates over a longer term period and does not appear to be unduly constrained by housing land supply ...”;

and in paragraph 53 this:

“In the longer term, the evidence suggests that land is available to meet the CS’s stated housing requirement. As described elsewhere, the Council’s modifications include the deletion of the Folkestone Racecourse allocation ..., reducing planned housing supply by some 820 dwellings. However, the updated (2012) Housing Evidence paper shows that supply remains in excess of the long term minimum target to 2030/31.”

13. In paragraph 63 of his report the core strategy inspector concluded that, subject to his suggested “main modifications”, the core strategy’s “proposals for the provision of new housing and economic development are deliverable, clear, sufficiently justified and consistent with the local evidence base and national policy ...”.
14. The core strategy was adopted on 18 September 2013. In section 1, its “Introduction”, paragraph 1.10 says it has “been confirmed as consistent with new national policy” in the NPPF. Paragraph 1.15 says its “general plan period” runs “from 2006 up to the end of March 2031, to ensure a long-term framework is in place”.
15. Policy SS1 of the core strategy sets out the “District Spatial Strategy”. It says that “[major] new development will be delivered with priority given to previously developed land in the Urban Area”; that “... the majority of the Urban Area’s housing development will take place in Folkestone, to enhance its role as a sub-regional centre”; that “[development] to meet strategic needs will be led through strategically allocated developments at Folkestone Seafront and Shorncliffe Garrison, Folkestone, and the delivery of strategic mixed-use development at Hythe”; that “[additional] development should be focused on the most sustainable towns and villages as set out in policy SS3”; and that “[development] in the open countryside and on the coast (defined as anywhere outside of settlements within Table 4.3 Shepway Settlement Hierarchy) will only be allowed exceptionally, where a rural/coastal location is essential (policy CSD3) ...”.
16. Policy SS2 of the core strategy deals with “Housing and the Economy Growth Strategy”. It states:

“The core long-term objective is to ensure the delivery of a minimum of 350 dwellings (Class C3) per annum on average until 2030/31 (inclusive from 2006/7). This is an achievable rate and can address strategic needs. To promote sustainable development and prioritise urban regeneration, a target is set for at least 65% of dwellings to be provided on previously developed (‘brownfield’) land by the end of 2030/31.

To support housing delivery, a target is set to provide for approximately 8,000 dwellings by the end of 2025/26. This equates to an initial target average delivery of 400 dwellings per annum. This trajectory is set out to provide impetus to the transformation of the district’s economy sought in the district spatial strategy, and to promote a good rate of delivery of new employment land and infrastructure.

Allied to this rate of housing delivery, business activity and the provision of jobs will be facilitated through supporting town centres, the protection of sufficient employment land across the district, allocations and concerted efforts to deliver rural regeneration (especially in south and west Shepway).

A balance of development will be secured, as follows ...”.

The policy continues with Table 4.1. This is divided into three columns, headed “Use”, “Target amount of additional development 2006/7 to 2025/26 (inclusive)” and “Delivery over plan period”. The column headed “Use” specifies the relevant use as “Housing (Class C3)”. The column headed “Target amount of additional development 2006/7 to 2025/26 (inclusive)” contains this reference to a target:

“Target approximately 8,000 (minimum 7,000) dwellings”.

The column headed “Delivery over plan period” indicates the council’s approach:

“How/when: In accordance with provisions set out in this policy, a rolling requirement is set that deliverable land for 1,750 dwellings and a sufficient buffer be continuously identified for the forthcoming five-year period. Completions total 1,621 dwellings in the first six years of plan period.”

17. In the text explaining Policy SS2, paragraph 4.42 says that the policy “primarily addresses Core Strategy aims under the following Strategic Need: A”. That strategic need is described in section 2.2, “Strategic Needs for Sustainable Development”, as “[the] challenge to improve employment, educational attainment and economic performance in Shepway”. Paragraph 4.43 refers to Figure 6.2 in Appendix 1 to the core strategy, which “shows the make-up of the housing requirement to 2030/31 in terms of current status of land”. It says that “[due] to the scale of strategic allocations (see policies SS6-7) and need for phasing with infrastructure, they will play a long-term role in maintaining housing supply (Table 4.2 below, row 2)”. Table 4.2, “How the housing minimum requirement will be delivered through the plan period”, shows the expected “Contribution (net dwellings)”, rounded to the nearest hundred, for each “Source”. It is based on the information in the “SDC (2012) Modifications Technical Note”. The four sources are housing development in the “first years of [the] plan period (2006/07 to 2011/12)” – a net contribution of 1,600 dwellings; housing development on “allocated development sites ...” – a net contribution of 3,300 dwellings; ““Windfall” sites” – a net contribution of 1,000 dwellings; and “[delivery] (minimum) through further Local Plan provisions and planning permissions” – a net contribution of 2,900 dwellings. The “Total 2006/07-2030/31 (minimum)” is therefore “>8,800”. Paragraph 4.45 indicates that “of the 8,750+ dwellings to 2030/31”, there will be “[at] least 7,500 ... on previously developed (“brownfield”) land”. Paragraph 4.47 says that “[the] aim of delivering 8,000 dwellings between 2006 and 2026 would result in a rate of house building in line with trends of recent decades albeit resulting in a lesser population growth (7%, averaging 0.4% p.a. to 2026)”, and that “[it] is expected to lead to a more manageable change in the social balance and labour supply and only limited decrease in the size of the labour force (-3%) with a more moderate decline in average household size to 2.03”.
18. Under the heading “Strategy for Housing Implementation” paragraph 5.174 of the core strategy says that “[the] primary housing land policy (SS2) is expressed as a minimum – and at the realistic average level of 350 [p.a.] ...”. Paragraph 5.177 says that “[subject] to sufficient infrastructure and suitable site capacity, the achievement of approximately 400 dwellings per year on average to 2030/31 ... would accord SS1 and SS2 and key plan aims”. In Appendix 1, “Housing Trajectories”, Figure 6.1, “Core Strategy Housing Trajectory 2006-2031”, shows a “minimum requirement” of 350 dwellings a year for the whole core strategy period. Figure 6.3, “Cumulative Housing Trajectory 2006-2031”, refers to that number of dwellings a year being a “policy requirement” under Policy SS2.

19. In section 4.3 of the core strategy, “Place Shaping and Sustainable Settlements Strategy”, Table 4.3, “Shepway Settlement Hierarchy”, shows Lympne as one of the “Primary Villages”. The “Strategic Role” of “Primary Villages” is “[to] contribute to strategic aims and local needs; and as settlements with the potential to grow and serve residents, visitors and neighbourhoods in the locality with rural business and community facilities”. Policy SS3, “Place-Shaping and Sustainable Settlements Strategy”, says that “[development] within Shepway is directed towards existing sustainable settlements to protect the open countryside and the coastline, in accordance with policy SS1”; that “[change] in settlements will be managed to occur in a form that contributes to their role within the Settlement Hierarchy (Table 4.3) and local place-shaping objectives, to promote the creation of sustainable, vibrant and distinct communities”; and that “[the] principle of development is likely to be acceptable on previously developed land, within defined settlements, provided it is not of high environmental value”. The policy then sets out a series of requirements, which all development must meet.
20. Policy CSD1, “Balanced Neighbourhoods for Shepway”, says that “[development] resulting in new housing ... will be allowed in line with policy SS3 (optimising distinctiveness, appeal, sustainability and accessibility of places in Shepway) where it contributes to the creation of balanced and popular neighbourhoods through high-quality design proposals which address identified affordable housing needs ...”. It also says that “[affordable] housing developments will be allowed at sustainable rural settlements as an exception to policies of rural development restraint (policy SS1) where it has been demonstrated that there is a requirement in terms of local need”. Policy CSD2, “District Residential Needs”, says that “[residential] development and new accommodation should be designed and located in line with the Spatial Strategy’s approach to managing demographic and labour market changes in Shepway and meeting the specific requirements of vulnerable or excluded groups existing within the district”; and that “[housing] supply will also be managed with an objective that at least half of new homes by 2026 will be three bedroom (or larger) dwellings ...”. Policy CSD3, “Rural and Tourism Development of Shepway”, says that “[proposals] for new development in locations outside of the Settlement Hierarchy may only be allowed if a rural or coastal location is essential, and to meet green infrastructure requirements”; and that development in these locations “will only be acceptable in principle if forming a site for” one of eight specified forms of development, including “affordable housing (rural exceptions as per CSD1, or allocated sites)”.

The NPPF

21. The NPPF was published as the Government’s planning policy for England on 27 March 2012.
22. It says in paragraph 2 that it is “a material consideration in planning decisions”, and in paragraph 212 that its “policies” are “material considerations”. Having acknowledged in paragraph 11 that, under section 38(6) of the Planning and Compulsory Purchase Act 2004 and section 70(2) of the 1990 Act that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise, it goes on to state in paragraph 17, as one of the Government’s “core land-use planning principles” that planning should be “genuinely plan-led ...”.
23. The policies for housing development are also familiar. Paragraph 47 of the NPPF says this:

“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.”

That policy is amplified in paragraphs 17 and 157 to 159. Paragraph 49 states:

“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.”

Paragraph 14 explains the “presumption in favour of sustainable development”. In the context of “plan-making” it says that local plans “should meet objectively assessed needs ...”. For “decision-taking”, it says that the presumption means:

- “
- 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 effects 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.”

The inspector’s decision letter

24. In paragraphs 6 and 7 of her decision letter the inspector described the local policy context.
25. In paragraph 6 she referred to saved Policy CO1 of the local plan review. This policy, she said, “prevents development outside settlement boundaries save for countryside purposes”. She then turned to the core strategy. In finding it sound the core strategy inspector had been “satisfied that its policies and provisions were compliant with [the NPPF]”. Policy DSD set out “the presumption in favour of sustainable development and how it will be applied in Shepway District”. Policy SS1 set out the “spatial strategy”. It gave “priority ... to the use of previously developed land in the Urban Areas of Folkestone and Hythe”. There were “strategic allocations at Folkestone Seafront, Shorncliffe Garrison and Nickolls Quarry and also broad strategic locations at Sellindge and New Romney”. Additional development was to be “focussed on the most sustainable towns and villages”. Development in the countryside was “only to be allowed exceptionally”.
26. In paragraph 7 the inspector said this:
- “In terms of the North Downs area where the appeal site is located, Policy SS1 seeks to steer development outside the Area of Outstanding Natural Beauty (the AONB) to places that would not materially impact on its setting. It also seeks to consolidate the growth of the service centre of Hawkinge and to sensitively meet the needs of communities in the AONB at better served settlements. Policy SS3 sets out a sustainable development strategy with the scale and impact of development to be proportionate and consistent with the status and strategic role of the settlement in question. Table 4.3 shows Lympne as a Primary Village which will be expected to contribute to strategic aims and local needs. The Primary Villages are said to have potential to grow. Elsewhere in the CS reference is made to “one other developable potential site” within Lympne Parish. This appears to be a reference to the former airfield land insofar as it was identified in the 2011 Strategic Housing Land Availability Assessment (the SHLAA).”
27. There were, in the inspector’s view, three main issues in the appeal, which she dealt with in turn. These were “Issue One: Whether the proposal is needed to meet the need for market and affordable housing” (paragraphs 8 to 29 of the decision letter), “Issue Two: Effect on the character of the rural settlement and its role in the settlement hierarchy” (paragraphs 30 to 40), and “Issue Three: Whether the proposal would be in a sustainable location” (paragraphs 41 to 44). There were several “Other Matters” (paragraphs 45 to 56). Finally, the inspector brought her conclusions together in seven paragraphs headed “Overall Conclusions and Planning Balance” (paragraphs 57 to 63).
28. The inspector began her consideration of the first main issue by acknowledging that the core strategy was “very recently adopted”. The core strategy inspector had concluded that “the requirement reflected objectively assessed housing needs; that the housing trajectory showed a supply over the CS period in excess of the long term target; and that the 5 year housing land supply would exceed the requirement on the basis of applying a 5% buffer and taking account of recent under-delivery”. However, the inspector acknowledged that she had to undertake her own assessment in the light of the evidence she had heard at the inquiry. Phides had contended that, far from having a supply of deliverable sites to meet housing needs over the next five years the council had “a substantial deficit” (paragraph 8 of the decision letter).
29. The inspector considered the “Housing requirement” in paragraphs 9 to 18. Her conclusions on the “baseline requirement” were these:

“9. The first matter to consider is how many houses the Council actually requires to meet its objectively assessed needs. The starting point is Policy SS2 in the recently adopted CS. The first two paragraphs indicate that whilst a minimum of 350 dwellings a year would be required over the plan period to 2031, there should be an accelerated delivery of about 8,000 dwellings by 2026. This would equate to an initial target average of 400 dwellings a year. The supporting text explains that this would address demographic evidence such as the ageing population, decline in local labour supply and increasing formation of smaller households. Indeed the provision of housing to address long term economic development is one of the aims arising out of Strategic Need A, which Policy SS2 seeks to address.

10. Table 4.1, which is also part of the policy, sets out a target of approximately 8,000 dwellings to 2026, with a minimum of 7,000 dwellings during this period. The third column of the table refers to delivery “over the plan period”, which presumably means to 2031. However it also refers to a rolling requirement of 1,750 dwellings to be continuously identified “for the forthcoming five-year period”. It seems to me that the policy is not set out in the clearest terms and there was considerable debate at the Inquiry about whether the 5 year requirement should be 350 or 400 dwellings a year. I have carefully considered the matter, taking account of the evidence base and the CS Inspector’s Report. My conclusion, on a straightforward reading of the policy as a whole, is that the requirement is for at least 1,750 dwellings over the next 5 years but that every effort should be made to achieve a higher target of around 400 dwellings a year in the first 20 years of the plan.”

30. In paragraphs 11 to 14 the inspector discussed the appropriate “buffer”. It was, she said, “difficult to reach any other conclusion on the current evidence that [sic] the record of under-delivery has been persistent and that a buffer of 20% should be added” (paragraph 14). In paragraphs 15 to 18 she considered the “shortfall”, concluding that “[on] the basis of applying a 20% buffer and spreading the shortfall over the remaining CS period, the total 5 year requirement would be about 2,390 dwellings” (paragraph 18). She dealt with “Housing supply” in paragraphs 19 to 26. The 2013 Annual Monitoring Review (“the AMR”) showed a five year supply of 2,400 dwellings. If this was correct the council “would be able to meet its short term housing requirement”. But Phides had “questioned the supply figures and contended that they were overly optimistic, mainly in respect of timing” (paragraph 19). Her own assessment was, she said, based on the information provided in the 2013 AMR and accorded with paragraph 47 of the NPPF (paragraph 25). It led her to this conclusion (in paragraph 26):

“The Council will be aware that it needs to be pro-active in encouraging expeditious delivery of its strategic sites. From the evidence I consider that there is a good prospect that the programme anticipated in the AMR is generally realistic although I am less optimistic about the future of some of the SHLAA sites in the short term. In my opinion the Council has sufficient deliverable sites for about 2,192 dwellings, including one year’s windfall allowance. This would equate to a supply of about 4.6 years.”

31. The inspector’s conclusions on the need for the proposed housing and affordable housing are in paragraphs 28 and 29 of her decision letter. In paragraph 28 she said this:

“Where a local planning authority is unable to demonstrate a five-year supply of deliverable sites, Paragraph 49 of the Framework indicates that relevant policies for the supply of housing should not be considered up-to-date. Housing applications should be considered in the context of the presumption in favour of sustainable development, bearing in mind the imperative in Paragraph 47 to boost significantly the supply of housing. The provision of 250

homes, of which 30% would be affordable dwellings, would therefore be a substantial benefit that weighs in favour of the appeal development.”

In paragraph 29 the inspector acknowledged that her conclusions on housing land supply would be “disappointing” for the council, especially as it had only recently adopted its core strategy. But she emphasized that her concern was to do with “short term delivery rather than ... the longer term housing trajectory where the large strategic sites will increasingly play a part”. The “main area of contention” had been the buffer. Her own conclusions were based on more evidence than the core strategy inspector’s.

32. On the second of her three main issues – the effect the development would have on the “rural settlement” and on its “role in the settlement hierarchy” – the inspector said in paragraph 30 that Policy SS3 of the core strategy “directs development towards sustainable settlements in accordance with their role therein in order to promote sustainable, vibrant and distinct communities”; and that, as a Primary Village, Lympne was in the “second lowest category” in the “settlement hierarchy”, and was “not seen as being suitable for strategic level development”. In paragraph 31 she noted that the core strategy inspector had “specifically rejected Lympne as either a strategic allocation or a broad location for growth ...”. In paragraph 32 she accepted that “Policy SS1 does not rule out development in AONB settlements, albeit that this needs to be sensitively undertaken”. But she went on to say that “[whilst] there is little doubt that some growth will happen in Lympne, there is no policy support for the quantum or scale of development that is currently being proposed”. In paragraph 34 she said that there was no dispute that the appeal site was outside the boundaries of the village and “within the countryside”; that “settlement boundaries inevitably constrain the supply of housing”, and that, in view of her conclusion in paragraph 28, “saved Policy CO1 in the LP can be considered out-of-date”; that “[the] fact that the appeal development would be within the countryside would not therefore be unacceptable as a matter of principle”; and that the core strategy “envisages the growth of settlements such as Lympne and it seems unlikely that this would be able to take place within its tightly drawn settlement boundary”. In paragraph 35 she said that Lympne is “a relatively small rural community which has rightly been placed towards the bottom of the settlement hierarchy”. In paragraph 36 she described the proposed development as “substantial in size”, and said it would be “clearly apparent as a major built expansion of the village”. In paragraph 39 she said “the open land that would remain between the western edge of the development and the employment area would be insufficient to prevent unacceptable visual coalescence”. In paragraph 40 she concluded that the proposed development would have a “harmful impact on the character and distinctiveness of the rural settlement and its role in the settlement hierarchy”. This, she said, “would be contrary to development plan policy, including Policies SS1, SS3 and CSD1 in the CS”.
33. On the third main issue – whether the development would be in a “sustainable location” – the inspector concluded in paragraph 44 that “[whilst] Lympne is not at the top of the accessibility spectrum ... the appeal site is in a reasonably sustainable location”.
34. None of the various “Other Matters” considered by the inspector in paragraphs 45 to 56, including the likely effects of the development on highway safety, on water resources, on the historic interest of the site, and on nature conservation, weighed against the grant of planning permission.
35. In her “Overall Conclusions and Planning Balance” the inspector said Phides had relied on the inclusion of the former airfield land as “a preferred option for 400 dwellings in the pre-submission version of the CS”. But in the submission draft of the core strategy this land had not

been put forward as a “strategic site”. The SHLAA published in 2010 had assumed that 450 dwellings would come forward on it, and the SHLAA published in 2011 had assumed 240. Although these documents considered “deliverability”, they did not “apply any policy filters, including whether that number of dwellings would be appropriate in a Primary Village such as Lympne” (paragraph 57).

36. In paragraph 58 the inspector said this:

“The Council cannot demonstrate a 5 year supply of deliverable sites. In such circumstances its housing supply policies should be considered out-of-date. Saved Policy CO1 seems to me to constrain the supply of housing and is thus not current. Whilst the Appellant contends that many of the CS policies also fall within this category, I do not agree. The policies are written in such a way that it is only Policy SS1 which refers directly to settlement boundaries. However as the Appellant comments, Lympne and other Primary Villages are envisaged in the CS to accept some growth and this is unlikely to all occur within the confines of the settlement. The primary purpose of the other relevant policies is not specifically directed to housing supply. For example Policy SS3 concerns place shaping and sustainability; Policy CSD1 relates to balanced neighbourhoods and affordable housing; Policy CSD2 addresses housing mix and need; and Policy CSD3 includes criteria applicable to development outside the settlement hierarchy but its main objective in this respect is countryside protection. In the circumstances it seems to me a moot point as to whether any of the above policies can be considered as “housing supply policies” as referred to in Paragraph 49 of the Framework.”

37. The inspector then applied the “presumption in favour of sustainable development”, weighing the “adverse impacts” against the “benefits”:

“59. The Framework states that housing proposals should be considered in the context of the presumption in favour of sustainable development, which is defined by economic, social and environmental dimensions and the interrelated roles that they perform. In this case the contribution of the site to the market and affordable housing requirements of the district is a matter of considerable importance. The scheme offers other advantages, including two new shop units and a doctor’s surgery. There would be an enhanced bus service and the works to the A20/A261/Stone Street junction would bring forward a much needed improvement to this part of the highway network. These would all mitigate adverse impacts of the development but also convey benefits to the wider population. There is no reason why the development should not be well designed and energy efficient. There would also be large areas of open space, which again would be of benefit to the existing community and comply with the CS objective of expanding such facilities in the North Downs area.

60. However the proposal would not comply with the place shaping and sustainable settlements strategy in the newly adopted development plan. This directs development in accordance with a settlement hierarchy and Lympne has been placed near the bottom in recognition of its limited facilities, relatively modest size and compact character within the rural landscape. The CS envisages change within the North Downs area but there [is] no specific apportionment in terms of housing numbers. Villages such as Lympne clearly have to play their part to accommodate growth. However the 250 dwellings proposed is of a scale that is more redolent of development envisaged for the broad strategic locations in Sellindge or New Romney, both places being higher in the settlement hierarchy than Lympne. There is no convincing evidence that the spatial strategy in itself constrains the supply of housing or that the additional development needed to make up the 5 year deficit has to all be sited in this particular location.

61. In this case the shortfall in terms of providing a 5 year supply of deliverable sites is relatively small. Whilst the Framework does not indicate that the size of the deficit should be treated differently in terms of how development management decisions are taken, it can nonetheless be a material consideration in the overall balance.

62. Paragraph 14 of the Framework is engaged, although I note that Policy DSD in the CS include the same sustainability test. Drawing together all of the above points, I consider that there is no overriding requirement for a development of this size within this location. The appeal proposal would have serious and harmful consequences, especially in terms of the environmental dimension of sustainability. Notwithstanding the substantial benefits, my overall conclusion is that they would be significantly and demonstrably outweighed by the adverse impacts, when assessed against the policies in the Framework as a whole. In the circumstances I conclude that the appeal scheme would not be a sustainable form of development.

63. I have had regard to all other matters raised, both in the oral and written representations, but have found nothing to change my conclusion that this appeal should not succeed.”

Ground 1 – Policy SS2 of the core strategy

38. For Phides, Mr Douglas Edwards Q.C. submits that the inspector misconstrued and misapplied Policy SS2 of the core strategy. She failed to understand the true extent of the council’s “housing requirements” under paragraph 47 of the NPPF, failed to grasp the true extent of the shortfall in the supply of housing land against the required five-year supply, and thus failed to give due weight to the benefit of the proposed development in increasing the supply. These errors vitiate her decision.
39. Mr Edwards says the meaning of Policy SS2 is plain. The policy distinguishes the whole period of the core strategy, which runs until 2031, from the 20 years to 2025/2026. Its “core objective” is to ensure the delivery of a minimum of 350 dwellings each year from 2006/2007 until 2030/2031. But it goes further than that. It also sets the target of providing 8,000 dwellings by the end of 2025/2026, an average delivery of 400 dwellings a year. On a straightforward reading of the policy this enhanced rate of delivery is not merely an aspiration; it is a requirement. It reflects the council’s evaluation of the “full, objectively assessed needs for market and affordable housing” in its area, under paragraph 47 of the NPPF.
40. But, says Mr Edwards, if that is not clear on the face of the policy, the court can and should look at the evidence base which underlies it. The inspector’s interpretation of Policy SS2 is “flatly contrary” to the evidence base. The assessment of long-term requirements for housing development to meet strategic needs set out in the “Strategic Requirement April 2011” paper, appended to the report submitted to the council’s Cabinet for its meeting on 13 April 2011, made the case for an average annual target of about 400 dwellings in the period from 2006 to 2026. The Cabinet accepted this. The appropriate requirement for the last five years of the core strategy period, beyond 2026, was also considered. The officers said this would “not necessarily” be 400 dwellings a year (paragraph 3.16 of their report). Again, the Cabinet agreed. This was an objective assessment of the need for new housing, such as paragraph 47 of the NPPF was later to require, which the council had to plan to meet in full. The soundness of the core strategy was considered in the light of it. The core strategy inspector seems to have found it a reliable

assessment of the “housing requirements” the council should be planning to meet (see paragraphs 48 to 55 of his report).

41. Anyway, submits Mr Edwards, the inspector’s reasons in paragraphs 9 and 10 of her decision letter fall short of the standard required. She found that Policy SS2 was “not set out in the clearest terms”. But she did not explain how, in view of the council’s evidence base, she was able to conclude that the housing requirement for the years until 2025/2026 was anything less than for 400 dwellings each year; how her understanding of the policy could be reconciled with the council’s objective assessment of need under paragraph 47 of the NPPF; or what she imagined the status of the target of 400 dwellings a year actually was if it was not the annual requirement for the delivery of new housing in the first 20 years of the core strategy period.
42. As Mr Edwards acknowledges, there is, and can be, no challenge in these proceedings to the validity of Policy SS2 as a statement of policy for the delivery of new housing in the council’s area. Phides’ application does not impugn the policy itself. It impugns a decision taken under the policy. Mr Edwards does not suggest that in preparing and formulating Policy SS2 the council fell into the kind of error which led to the partial quashing of plans in *Hunston Properties Ltd. v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1610, and *Solihull Metropolitan Borough Council v Gallagher Estates Ltd.* [2014] EWCA Civ 1610. He does not say – indeed, he could not say – that in preparing the core strategy the council had failed to do what paragraph 47 of the NPPF requires, using its evidence base to ensure that the core strategy met “the full objectively assessed needs” for housing in its area, as far as was consistent with the policies in the NPPF. What I have to consider is not whether the council performed that exercise in the core strategy process, but how the conclusion it reached when it did so is reflected in Policy SS2.
43. I cannot accept Mr Edwards’ submissions. In my view the inspector understood Policy SS2 correctly, and applied it lawfully. She was right to interpret it as imposing a requirement for an additional 350 dwellings to be delivered each year throughout the core strategy period. This is both the literal interpretation of the policy and the one that accords with its obvious intent. The interpretation Mr Edwards urges me to accept is untenable. It cannot be reconciled with the several references in the policy to a requirement for new housing which in my view can only be understood as a requirement for not less than 350 new dwellings a year. It forces one to read the word “target” as if it meant “requirement”, which is not only contrary to the plain meaning of the word in its context but would also create an obvious and wholly unnecessary inconsistency within the policy. To adopt that construction one would have to conclude that the policy does not mean what it says.
44. The approach the court must take to the interpretation of planning policy was explained by Lord Reed in his judgment in *Tesco Stores Ltd. v Dundee City Council* [2012] 2 P. & C.R. 9, with which Lord Hope, Lord Brown, Lord Kerr and Lord Dyson agreed. It is of course familiar. In paragraph 17 of his judgment Lord Reed said it had “long been established that a planning authority must proceed upon a proper understanding of the development plan”, not only because the authority is “required by statute to have regard to the provisions of the development plan” and “cannot have regard to the provisions of the plan if it fails to understand them”, but also because statute requires it to consider whether the proposed development is in accordance with the plan, and, if not, whether material considerations justify departing from the plan (see the speech of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at p.1459D-H). In paragraph 18 of his judgment Lord Reed emphasized that “in principle, ... policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context”. In paragraph 19 he warned against construing

statements of policy “as if they were statutory or contractual provisions”. A development plan is “not analogous in its nature or purpose to a statute or a contract”. Lord Hope said in paragraph 35 of his judgment that the interpretation of policy was not “primarily a matter for the decision maker”. On the contrary, this was a matter of law, which requires “reading the words used objectively in their proper context”. In *R. (on the application of Cherkley Campaign Ltd.) v Mole Valley District Council* [2014] EWCA Civ 567 Richards L.J., with whom Underhill and Floyd L.JJ. agreed, stressed the difference between the policies of a plan and their supporting text. The text, he said (in paragraph 16 of his judgment), is “plainly relevant to the interpretation of a policy to which it relates but it is not itself a policy or part of a policy, it does not have the force of policy and it cannot trump the policy” (see also paragraph 21).

45. With those well known principles in mind, I am satisfied that the inspector’s interpretation of Policy SS2 was accurate.
46. In my view the meaning of the policy is absolutely clear. There are two distinct concepts in it: the “requirement” and the “target”. The policy is entirely consistent in differentiating between those two concepts. The distinction is not hard to understand. It is the difference between a need and an aspiration. A “requirement” in this context is something which is needed, which must be provided. A “target” is more ambitious; it is a goal that is set, which may or may not be attained. The “requirement” is the requisite minimum, which must be met whether or not the “target” is achieved. This is a normal use of those words, which gives them a natural meaning.
47. As Mr Paul Brown Q.C. submits on behalf of Mr Plumstead, government policy in paragraph 49 of the NPPF makes the ability of the local planning authority to demonstrate a “five-year supply of deliverable housing sites” the test by which the decision-maker ascertains whether or not “[relevant] policies for the supply of housing” are “up-to-date”. It is the corollary of the policy in paragraph 47 that authorities must be able at all times to identify a supply of “specific deliverable sites sufficient to provide five years worth of housing against their housing requirements”, with the appropriate buffer. So the critical concept in identifying the requisite five-year supply of housing land, and thus the critical concept in judging whether relevant policies for the supply of housing are up to date, is the requirement for additional housing.
48. The column headed “Delivery over plan period” in Table 4.1, which is part of Policy SS2, is clearly concerned with the five-year supply of housing land required under the NPPF. In language similar to that of paragraphs 47 and 49 of the NPPF, it identifies a rolling “requirement” for “deliverable” land, sufficient for the specified number of dwellings – namely 1,750 – to be “continuously” identified for “the forthcoming five-year period”. This is plainly the basis on which Policy SS2 intends the five-year supply of housing land to be calculated under the policy in paragraphs 47 and 49 of the NPPF, and the status of the relevant policies for the supply of housing determined under the policy in paragraph 49. All of the references in Policy SS2 and its text to the “requirement” and the “minimum” fit with that understanding.
49. I accept the submission of Mr Richard Moules for the Secretary of State that it is neither necessary nor possible to read Policy SS2 as creating different annual and five-year requirements for the first 20 years of the core strategy period from its requirements for the final five years, or two different requirements which apply simultaneously for the first 20 years. If the council had meant there to be a higher requirement in the first 20 years of the core strategy period it should and would have said so.
50. Both the policy and its accompanying text use the words “requirement” and “minimum” synonymously. Nowhere in the policy or in the text is that concept confused with the “target”.

The first paragraph of the policy, which identifies its “core long-term objective”, refers to the delivery of “a minimum of 350 dwellings ... per annum on average until 2030/31 (inclusive from 2006/7)” – that is from the beginning of the core strategy period to its end. This initial reference to a “minimum” of 350 dwellings a year corresponds to the “minimum of 7,000” dwellings for the 20 years between 2006/2007 and 2025/2026 specified in Table 4.1. It also corresponds to the “rolling requirement” of 1,750 dwellings for “the forthcoming five-year period” referred to in the column of the same table headed “Delivery over plan period”. This means each continuous period of five years, not just in the 20 years from 2006 to 2026 but for the whole life of the core strategy. There is no scope for arguing that the heading “Delivery over plan period” should be taken to mean “Delivery over the last five years of the plan period”. If any further confirmation were needed that 350 dwellings a year is the “requirement”, one finds it in Table 4.2, which explains how the “housing minimum requirement” is going to be delivered “through the plan period”. That table refers to a “minimum” total of at least 8,800 (“>8,800”) dwellings in the core strategy period, 2006/2007 to 2030/2031, which again, rounded to the nearest hundred, equates to 350 dwellings a year for those 25 years. Without rounding, the minimum total would be 8,750 (350 x 25). Paragraph 4.45 refers to “the 8,750+ dwellings to 2030/31”, of which “[at] least 7,500” will be built on “previously developed (“brownfield”) land” – corresponding to the proportion of “at least 65%” referred to in the first paragraph of the policy. And in other parts of the core strategy where the “requirement” or “minimum” is mentioned – including paragraphs 5.174 and 5.177, and Figure 6.1 and Figure 6.3 in Appendix 1 – the required level of delivery is also referred to as 350 dwellings a year (see paragraph 18 above).

51. Mr Moules submits that if the “target” of “approximately 8,000 dwellings” in the first 20 years of the core strategy period, at a rate of delivery of 400 each year, was truly the “requirement” in Policy SS2, the provisions of the policy for a “minimum” of 350 dwellings a year would be meaningless. I think that is right. What would have been the point of specifying a “minimum” of 7,000 for the same period, and an annual “minimum” of “350 dwellings ... per annum on average until 2030/31 (inclusive from 2006/7)”? As Mr Moules says, an acceptable “minimum” level of delivery of new housing could not rationally be pitched below the planned “requirement”. To do that would be to defy government policy in paragraph 47 of the NPPF, which enjoins authorities to meet “the full, objectively assessed needs” for housing, so far as this can be done without offending the policies of the NPPF. Nor could the “minimum” rationally be set above the “requirement”, for that would be to generate a false imperative beyond the need for which paragraph 47 tells authorities to plan. In this case it would mean that the core strategy had failed to identify a clear “requirement” in terms of the number of dwellings to be delivered each year, in each five-year period, and in the course of its life of 25 years. That cannot be right. The delivery of “a minimum of 350 dwellings” each year is, and must be, the annual requirement for the supply of new housing under Policy SS2 – no more and no less. It is the policy’s essential ingredient.
52. What then should one make of the “target” for a rate of housing development higher than the “requirement” in the first 20 years of the core strategy period? Again, the answer is quite clear in the policy itself and in its text. The “target” of “approximately 8,000” for those 20 years is set at about 1,000 dwellings – some 14 per cent – above the “minimum” of 7,000. The policy explains why this “target” was set. Its purpose is “[to] support housing delivery”. The “trajectory” it implies has two objectives: first, “to provide impetus to the transformation of the district’s economy sought in the district spatial strategy”, and second, “to promote a good rate of delivery of new employment land and infrastructure”. The thinking here, plainly, is that if a higher rate of housing delivery is set as a “target” it is more likely that the “requirement” will actually be met. The inspector grasped this. She recognized that the “target” for the first 20 years of the core strategy period can co-exist with the lower “requirement” current in the same 20 years and

continuing into the final five. The two are wholly compatible. Policy SS2 is not concerned merely with the supply of housing. It is about “Housing and the Economy Growth Strategy”. What the inspector referred to as the “accelerated delivery of about 8,000 dwellings by 2026”, with “an initial target average of 400 dwellings a year”, is, as she said, explained in the “supporting text”. Paragraph 4.47 mentions the “demographic evidence such as the ageing population, decline in local labour supply, and increasing formation of smaller households” to which the inspector referred. She also had in mind Strategic Need A, the strategic need that Policy SS2 seeks to address, and in particular the aim of providing housing “to address long term economic development” (paragraph 9 of the decision letter). As she saw it, this is why the policy calls for “every effort” to be made “to achieve a higher target of around 400 dwellings a year in the first 20 years of the plan” (paragraph 10 of the decision letter). I think this is clearly right.

53. Mr Moules and Mr Brown also submit, correctly, that the calculation of the five-year requirement has to be a definite exercise. There must be no uncertainty about it, nor any lack of precision. In Policy SS2 the “target” of 8,000 dwellings for the 20 years up to 2026 is not a precise figure. It is approximate, and deliberately so. The word “approximately” is used in both references to it – in the second paragraph of the policy and in Table 4.1. On the other hand, the references in that table to the “minimum” number of dwellings in the period from 2006 to 2026, and to the rate of delivery entailed in the “rolling requirement” for each five-year period are, as one would expect, exact.
54. The inspector’s interpretation of Policy SS2, as she said in paragraph 10 of the decision letter, came from a “straightforward reading of the policy as a whole”. It has the merit of giving effect to every word of the policy, without inconsistency that is simply not there. One cannot say that of the interpretation suggested by Mr Edwards.
55. The inspector thought the policy was “not set out in the clearest terms”. She said she had taken account of the evidence base and the core strategy inspector’s report. In the end, however, she came back to an uncomplicated construction of the policy as it is written. Had she found anything in the evidence base or in the core strategy inspector’s report to cast doubt on that literal construction she would surely have mentioned it.
56. I do not think it is necessary, or appropriate, to resort to other documents to help with the interpretation of Policy SS2. In the first place, the policy is neither obscure nor ambiguous. Secondly, the material on which Mr Edwards seeks to rely is not part of the core strategy. It is all extrinsic – though at least some of the documents constituting the evidence base for the core strategy are mentioned in its policies, text and appendices, and are listed in a table in Appendix 6. Thirdly, as Mr Moules and Mr Brown submit, when the court is faced with having to construe a policy in an adopted plan it cannot be expected to rove through the background documents to the plan’s preparation, delving into such of their content as might seem relevant. One would not expect a landowner or a developer or a member of the public to have to do that to gain an understanding of what the local planning authority had had in mind when it framed a particular policy in the way that it did. Unless there is a particular difficulty in construing a provision in the plan, which can only be resolved by going to another document either incorporated into the plan or explicitly referred to in it, I think one must look only to the contents of the plan itself, read fairly as a whole. To do otherwise would be to neglect what Lord Reed said in paragraph 18 of his judgment in *Tesco Stores Ltd. v Dundee City Council*: that “[the] development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it”, that the plan is “intended to guide the behaviour of developers and planning authorities”, and that “the policies which it sets out are designed to secure

consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained”. In my view, to enlarge the task of construing a policy by requiring a multitude of other documents to be explored in the pursuit of its meaning would be inimical to the interests of clarity, certainty and consistency in the “plan-led system”. As Lewison L.J. said in paragraph 14 of his judgment in *R. (on the application of TW Logistics Ltd.) v Tendring District Council* [2013] EWCA Civ 9, with which Mummery and Aikens L.JJ. agreed, “this kind of forensic archaeology is inappropriate to the interpretation of a document like a local plan ...”. The “public nature” of such a document is, as he said (at paragraph 15), “of critical importance”. The public are, in principle, entitled to rely on it “as it stands, without having to investigate its provenance and evolution”.

57. But even if it was right to use the documents on which Mr Edwards relies as aids to the interpretation of Policy SS2, I do not think they support the interpretation for which he contends. The core strategy inspector had the “Strategic Requirement April 2011” paper and the council’s Technical Note of September 2012 before him when he concluded that the proposed “rate of housing development (a minimum of 350 dwellings per year to 2030/31)” (paragraph 49 of his report) or “a minimum requirement of 350 dwellings per year” (paragraph 52) was the appropriate level of requirement to include in Policy SS2 (see paragraph 12 above). The 2012 Technical Note was prepared in the light of government policy in paragraph 47 of the NPPF. It explains and supports the annual requirement of 350 dwellings for the whole core strategy period (see paragraph 11 above). There is nothing in the core strategy inspector’s report to suggest that he thought this “requirement” incompatible with the policy in paragraph 47 of the NPPF. Indeed, he referred to that policy in the analysis on which he based his conclusion in paragraph 63 of his report that the core strategy’s proposals for the provision of new housing were, among other things, “consistent with the local evidence base and national policy” (see paragraphs 12 and 13 above). Nowhere in that analysis did he refer to the annual target of 400 dwellings for the years 2006 to 2026.
58. Finally, I reject Mr Edwards’ criticism of the inspector’s reasons. Her conclusions on the interpretation of Policy SS2, and how it should be applied to Phides’ proposal, comfortably meet the standard of intelligible and adequate reasons, showing how she had dealt with the “principal important controversial issues” between the parties (see the speech of Lord Brown in *South Bucks District Council v Porter (No.2)* [2004] UKHL 33, at paragraphs 24 to 36). Paragraphs 9 and 10 of the decision letter show very clearly what she believed Policy SS2 means, and why. Her interpretation of the policy was not only right; it was also amply explained. It is not undermined by her comment, perhaps a concession to the skill with which Phides’ case was presented at the inquiry, that the policy was “not set out in the clearest terms”. She may not have found Policy SS2 as easy to construe as it might have been. But she came to a firm conclusion on what the policy means. She did not have to revisit the core strategy inspector’s analysis under the policy in paragraph 47 of the NPPF. Policy SS2 as she construed it was not in conflict with that policy. She did not have to spell out why. In paragraphs 11 to 29 of her decision letter she explained how she applied the policy to the facts, and the conclusions she had reached on the first of her three main issues, and, specifically, on the extent of the shortfall against the required five-year supply. Mr Edwards does not criticize her reasons in those 18 paragraphs, nor could he. They are as full and as clear as one could wish.
59. In summary, the inspector both interpreted Policy SS2 correctly and applied it lawfully, and her reasons are unimpeachable.
60. It is therefore unnecessary for me to deal with Mr Brown’s submission that if the inspector did misconstrue the policy this was not an error that affected her decision. Mr Brown says it made no

difference that she had found a shortfall in the five-year supply of housing land on the basis of an annual requirement of 350 dwellings, as opposed to 400. She applied the “presumption in favour of sustainable development” in paragraph 14 of the NPPF anyway, and when she did so she recognized that the 250 dwellings in Phides’ development would be a “substantial benefit” (paragraph 28 of the decision letter) and “a matter of considerable importance” (paragraph 59). In coming to those conclusions she must have had in mind the “target” of 400 dwellings a year as well as the “requirement” of 350 on which her calculation was based. That may be so. But the fallacy in this submission of Mr Brown, in my view, is that it leaves out the question of weight. Paragraph 14 of the NPPF prescribes an approach to decision-making when relevant policies, including “[relevant] policies for the supply of housing”, are “out-of-date”. It does not, however, prescribe the weight to be given to the ability of a particular proposal to reduce a shortfall in housing land supply as a benefit to be put in the balance against “any adverse effects”. This is a matter for the decision-maker to judge, and the court will not interfere with that judgment except on *Wednesbury* grounds. Naturally, the weight given to a proposal’s benefit in increasing the supply of housing will vary from case to case. It will depend, for example, on the extent of the shortfall, how long the deficit is likely to persist, what steps the authority could readily take to reduce it, and how much of it the development would meet. So the decision-maker must establish not only whether there is a shortfall but also how big it is, and how significant. This will not be possible unless the relevant policies are correctly understood. In this case they were.

61. Ground 1 of the application therefore fails.

Ground 2 – “Relevant policies for the supply of housing”

62. Mr Edwards submits that the inspector’s conclusions on the “[relevant] policies for the supply of housing” in the development plan, in paragraph 58 of her decision letter, are inconsistent and the reasons she gave for them flawed. Either she wrongly identified the policies that were for the supply of housing and were therefore out of date or she failed to identify those policies clearly. When judging whether the “presumption in favour of sustainable development” in paragraph 14 of the NPPF is engaged, the decision-maker must consider not only whether the plan’s policies for the supply of housing are out of date, but also, specifically, which policies are out of date. In this case the parties disagreed on both questions. The inspector’s attempt to resolve the matter in paragraph 58 leaves real doubt about the conclusions she reached. It is true that she had already recognized Policy SS2 of the core strategy was not up to date. And in paragraph 58 she seems to have accepted that saved Policy CO1 of the local plan review and Policy SS1 of the core strategy were also out of date. But her conclusions on the other policies are unclear. Her view that it was a “moot point” whether they were policies “for the supply of housing” is opaque. It is also unsatisfactory, because in paragraph 60 she seems to have applied some of those policies, including Policy SS3 and Policy CSD1, in her discussion of the planning balance. At the very least, her reasons are defective. The prejudice to Phides here is substantial, because the status of these policies is bound to affect the decision on any future proposals for the site.

63. I cannot accept that argument.

64. As Lord Reed said in paragraph 19 of his judgment in *Tesco Stores Ltd. v Dundee City Council*, “... development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another”, and “many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment”. Such matters, said Lord Reed, “fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground

that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 W.L.R. 759, 780 per Lord Hoffmann)".

65. The court has on several occasions considered what paragraph 49 of the NPPF means when it refers to "policies for the supply of housing" (see, for example, the judgment of Lang J. in *William Davis Ltd. v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin), at paragraph 47; the judgment of Lewis J. in *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin), at paragraph 30; the judgment of Ouseley J. in *South Northamptonshire Council v Secretary of State for Communities and Local Government* [2014] EWHC 573 (Admin), at paragraphs 44 to 47; and the judgment of Supperstone J. in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 132 (Admin), at paragraph 38). Both a narrow view and a broader view have been favoured. I prefer the broader. As Ouseley J. said in paragraph 46 of his judgment in *South Northamptonshire Council*, the concept is "either very narrow and specific, confining itself simply to policies which deal with the numbers and distribution of housing, ignoring any other policies dealing generally with the location of development or areas of environmental restriction, or alternatively it requires a broader approach which examines the degree to which the particular policy generally affects housing numbers, distribution and location in a significant manner". Ouseley J. went on to say, at paragraph 47, that in his view the language of paragraph 49 of the NPPF "cannot sensibly be given a very narrow meaning". Otherwise, policies for the provision of housing which were not up to date might have their weight restored by "counterpart provisions in policies restrictive of where development should go". But Ouseley J. accepted, at paragraph 48, that once the decision-maker had properly directed himself on the scope of paragraph 49 of the NPPF, the question of whether a particular policy fell within it was "very much a matter for his planning judgment". I agree.
66. It seems to me that in this case what the inspector was doing in paragraph 58 of her decision letter was precisely what Ouseley J. said a decision-maker would have to do when considering whether a particular policy in a development plan was, or was not, within the ambit of paragraph 49 of the NPPF. She did not avoid that question. She dealt with it fully. She did so having properly directed herself on the scope of the policy in paragraph 49 of the NPPF, and having properly construed all six of the development plan policies she had to consider, in the light of the content and purpose of each. On every one of those six policies she exercised her own planning judgment in the way that Ouseley J. envisaged.
67. As she said at the beginning of paragraph 58, the council could not demonstrate a five-year supply of deliverable sites for housing development, and in such circumstances "its housing supply policies should be considered out-of-date". This was to say, in effect, that "the presumption in favour of sustainable development" in paragraph 14 of the NPPF was engaged. It echoed her conclusion in paragraph 28.
68. In my view it cannot sensibly be suggested that the inspector's conclusions in paragraph 58, or elsewhere in her decision letter, betray any misunderstanding of the policies to which she referred in that paragraph. Nor can it be suggested that she overlooked any policy she ought to have considered under paragraph 49 of the NPPF.
69. She clearly divided the policies to which she referred in paragraph 58 into two categories: those that were for the supply of housing, and those that were not. She accepted that saved Policy CO1 of the local plan review was a policy for the supply of housing. That policy constrained the supply of housing and was therefore, as she put it, "not current", which obviously means that in her view it was not up to date. But she did not accept Phides' assertion that "many" of the

relevant policies of the core strategy were also out of date. She made this very clear too. The only policy which referred directly to settlement boundaries was Policy SS1, but it did not preclude development beyond those boundaries. As Phides had itself pointed out, Lympne and other Primary Villages were expected to take some growth, not all of which was likely to be accommodated within the settlement. The inspector then turned to Policy SS3, Policy CSD1, Policy CSD2 and Policy CSD3 of the core strategy, considering them one by one in the light of the policy in paragraph 49 of the NPPF. She found that the “primary purpose” of each of those four policies was “not specifically directed to housing supply”. She was right. These policies are not concerned, or mainly concerned, with the restraint of housing development as such, but largely with the promotion of sustainable development in the district of Shepway and with the considerations on which proposals for development should be judged. The inspector did not see them as counterparts to Policy SS2. Neither Policy SS3 nor Policy CSD1 prevents development outside the particular areas in which land has been allocated for housing. Both promote sustainable development. Policy SS3 is intended to reinforce the settlement hierarchy. Its purpose, as the inspector said in paragraph 7 of the decision letter, is to protect “the status and strategic role of the settlement in question”. Policy CSD1, as she said in paragraph 58, is concerned with the creation of “balanced neighbourhoods” and the provision of affordable housing. As Mr Brown points out, she found no conflict with either Policy CSD2 or Policy CSD3, and in this sense the status of those two policies under paragraph 49 of the NPPF did not matter. But in any event her understanding of them was in my view correct. Overall, her reasons for disagreeing with Phides’ contention that Policy SS3, Policy CSD1, Policy CSD2 and Policy CSD3 were policies for the supply of housing were not only entirely clear; they were also demonstrably right.

70. Did the inspector err in the way Mr Edwards submits?

71. I do not think so. She very clearly accepted – in paragraphs 28, 58 and 59 – that this was a case in which the policy presumption in paragraph 14 of the NPPF applied. She did so, as I have said, on the basis of entirely reasonable conclusions about the status of all the relevant policies of the development plan – not merely core strategy Policy SS2. Having expressed the firm conclusion at the beginning of paragraph 58 that the council’s “housing supply policies should be considered out-of-date”, she could properly take the view that “[in] the circumstances” it was a “moot point” whether the policies whose “primary purpose” was “not specifically directed to housing supply” should also be regarded as policies for the supply of housing within the meaning of paragraph 49 of the NPPF. This truly was a “moot point” in the sense that it was of no practical significance to her conclusion that the paragraph 14 presumption was engaged in any event. The decision on Phides’ appeal had to be made as statute requires in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. And the presumption in paragraph 14 of the NPPF had to be applied. The inspector plainly understood this. Indeed, that is why she took care to consider the status under paragraph 49 of the NPPF of all six of the policies to which she referred in paragraph 58. To take her comment about the “moot point” as if she meant it to undo any of the conclusions she had just set out on each of those six policies makes no sense at all.

72. It is important, as always, not to isolate the passage of the decision letter which is criticized from the context to which it belongs. Here, in my view, one must keep in mind what the inspector had already said about the relevant policies, and what she went on to say in the paragraphs following paragraph 58 (see paragraphs 32 to 35 and 37 above). She had referred to saved Policy CO1 of the local plan review in paragraph 34, where she said that this policy “can be considered out-of-date”. That conclusion is consistent with what she said about this policy in the second sentence of paragraph 58. She had also concluded, in paragraph 40, that the proposal was contrary to three policies of the core strategy – Policy SS1, Policy SS3 and Policy CSD1 – because the

development would harm “the character and distinctiveness of the rural settlement and its role in the settlement hierarchy”. As she went on to acknowledge in paragraph 58, Lympne was one of those settlements in the district which the core strategy accepted was likely to grow beyond its existing “confines”. This reflected what she had already said in paragraph 32 – that “Policy SS1 does not rule out development in AONB settlements ...”, though there was “no policy support” for the amount of development Phides proposed. Nowhere did she say that the proposal was unacceptable in principle because the appeal site lay beyond the settlement boundary. She had already considered Policy SS3 in paragraph 30. She said there that this policy “directs development towards sustainable settlements in accordance with their role ... to promote sustainable, vibrant and distinct communities”. In paragraph 58 she said that the policy “concerns place shaping and sustainability”. In paragraph 60 she went on to say that the proposed development “would not comply with the place shaping and sustainable settlements strategy in the newly adopted development plan”. But in the same paragraph she concluded that there was “no convincing evidence that the spatial strategy in itself constrains the supply of housing ...”. The planning judgments involved in those conclusions were, in my view, planning judgments she was perfectly entitled to make.

73. The same may be said of all the planning judgments which informed her conclusions in paragraphs 59 to 62. To suggest that in striking the planning balance in the appeal she ought to have to put to one side Policy SS3 and Policy CSD1, or any of the other policies to which she referred in this part of her decision letter, would be misconceived. She plainly regarded those policies as relevant and necessary to her assessment of the proposal on its planning merits as she performed the decision-maker’s statutory duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. I see no error of law in that.
74. The NPPF is not a statute. It ought not to be treated as if it had the force of statute. It does not displace the statutory “presumption in favour of the development plan”, as Lord Hope described it in *City of Edinburgh* (at p.1450F-G). The inspector was well aware of that. There is nothing wrong with the way she applied the statutory presumption in section 38(6), and nothing wrong with the way she applied the policy presumption in paragraph 14 of the NPPF. Neither her conclusion that the council could not demonstrate a five-year supply of housing land to meet the requirement in Policy SS2 nor her conclusion that the “[relevant] policies for the supply of housing” she had identified in paragraph 58 were out of date compelled her to disregard the policies against which she tested the proposal in paragraphs 59 to 62. The policies on which she relied were relevant and necessary to her consideration of the sustainability and acceptability of the proposed development. The NPPF did not make them irrelevant, or dictate how much weight she should give them. She took into account the fact that Lympne was close to the bottom of the settlement hierarchy, and the conclusion she had already reached that this development would harm the character of the settlement. In applying the presumption in paragraph 14 of the NPPF she had to weigh the likely “adverse impacts” of the proposed development against its “benefits”. This is what she did in paragraph 62 – unmistakably in the language of paragraph 14 of the NPPF. She concluded, crucially, that the “substantial benefits” of the proposal were “significantly and demonstrably outweighed by the adverse impacts, when assessed against the policies in [the NPPF] as a whole”. All in all, the proposed development was not “sustainable”. The planning judgments fatal to it were twofold: that there was “no overriding requirement” for it, and that it would have “serious and harmful consequences” for the environment.
75. Mr Edwards cannot submit that those were unreasonable conclusions, or that in reaching them the inspector had regard to any consideration arising from development plan policy which was not germane to the decision she had to make, or gave unlawful weight to any of the policies she took into account, or departed from government policy in the NPPF. Such submissions would

have been hopeless. The inspector did not misinterpret or misapply any of the relevant policies of the development plan. She did not lapse into irrationality in giving them, or any other material considerations, the weight she did. She applied the presumption in paragraph 14 of the NPPF impeccably. The planning judgments upon which she based her decision are legally sound.

76. As I have said, I cannot accept the argument that the inspector's conclusions in paragraph 58 are in any way confusing, unclear or contradictory. They were not. Her reasoning in that paragraph, and in the other parts of her decision letter to which I have referred, is neither unintelligible nor inadequate. It leaves no room for doubt or dispute.

77. Ground 2 of the application therefore also fails.

Conclusion

78. For the reasons I have given this application must be dismissed.

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

Birmingham Civil Justice Centre
Priory Courts, 33 Bull Street,
Birmingham

Date: 30/04/2014

Before:

MR JUSTICE HICKINBOTTOM

Between:

(1) GALLAGHER HOMES LIMITED **Claimants**
(2) LIONCOURT HOMES LIMITED

- and -

SOLIHULL METROPOLITAN **Defendant**
BOROUGH COUNCIL

Christopher Lockhart-Mummery QC and Zack Simons (instructed by
Pinsent Masons LLP) for the **Claimants**
Ian Dove QC and Nadia Sharif (instructed by **Solihull Metropolitan District Council**)
for the **Defendant**

Hearing dates: 14-15 April 2014

Judgment

Mr Justice Hickinbottom:

Introduction

1. The Claimants have interests in two sites in the Tidbury Green area of Solihull, namely Lowbrook Farm and Tidbury Green Farm (“the Sites”), which they wish to develop with housing. Their difficulty is this. On 3 December 2013, the Defendant local planning authority (“the Council”) adopted the Solihull Local Plan (“the SLP”) which placed both sites within the Green Belt. Neither had previously been in the Green Belt. Any application for planning permission for housing will almost inevitably now be refused, on the ground that the proposed development would be inappropriate in the Green Belt and there are no “very special circumstances” that warrant such development there.

2. In this application, made under section 113(3) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”), the Claimants claim that the Council acted unlawfully in adopting the SLP, with its allocation of the Sites to the Green Belt, on three grounds:

Ground 1: The Council adopted a plan that was not supported by a figure for objectively assessed housing need, contrary to the requirements to (i) have regard to national policies issued by the Secretary of State (section 19(2)(a) of the 2004 Act), and (ii) adopt a sound plan (sections 20 and 23 of the 2004 Act).

Ground 2: The Council adopted a plan without cooperating with other local planning authorities, contrary to the duty to cooperate (section 33A of the 2004 Act).

Ground 3: The Council adopted a plan without regard to the proper test for revising Green Belt boundaries set out in the national policy, again contrary to the requirements to have regard to national policies and adopt a sound plan.

3. The Claimants seek a declaration that adoption of the SLP was unlawful, and for an order quashing various parts of the Plan. In practice, they wish ultimately to have the Sites removed from the Green Belt, which they believe will improve their chances of obtaining planning permission to develop them with housing.
4. Before adoption, in accordance with required procedure, the SLP had been submitted to the Secretary of State for examination on 14 September 2012. He appointed Mr Stephen J Pratt BA (Hons) MRTPI (“the Inspector”) to conduct the examination in public and report. Examination hearings were held between 10 January and 11 October 2013; and, on 14 November 2013, the Inspector published a report (“the Inspector’s Report”), which concluded that the SLP could not be approved as submitted, but it provided an appropriate basis for the planning of the district for the period to 2028 providing a number of modifications (all proposed by the Council itself) were made to it. The Council duly adopted the SLP with those modifications. It is the SLP thus adopted which is the subject of challenge in these proceedings; but, as the Council can only adopt a development plan document which has been approved after an examination in public in accordance with the statutory scheme, the focus of this application is on the Inspector’s Examination and Report.
5. With regard to the Sites, the current position with regard to planning applications is as follows. The First Claimant lodged an application for outline planning permission for the Lowbrook Farm site on 18 October 2012, before the Inspector had reported and before the site had been allocated to the Green Belt. The proposed development was for 200 dwellings and associated works. That application was refused by the Council on 31 January 2013. The First Claimant has appealed, and an inspector’s inquiry is on-going. The inquiry was concluded in September 2013, and the report is due. On 11 October 2013, the Second Claimant applied for outline planning permission for the Tidbury Green Farm site, for 190 dwellings and associated works. The Council refused that application on 30 January 2014, after the allocation of the site to the Green Belt and on the ground that the proposal was for inappropriate development in the Green Belt. The Second Claimant intends to appeal. For obvious reasons, the outcome of this application is highly significant for both appeals; and, of course, the Council continues to determine planning applications on the basis of the SLP now

under challenge. This application has consequently been expedited since its issue on 23 December 2013.

6. At the hearing before me, Christopher Lockhart-Mummery QC and Zack Simons appeared for the Claimants, and Ian Dove QC and Nadia Sharif for the Council. At the outset, I thank them all for their invaluable contributions.

The Sites

7. Solihull lies to the south-east of Birmingham. In the north of the borough, there is a built-up area comprising Castle Bromwich, Chelmsley Wood, Birmingham Airport and the NEC. In the west, there is another, including Elmdon and Shirley. However, most of the district – about two-thirds – is Green Belt land. That includes the Meriden Gap, an important Green Belt separating the conurbations of Birmingham and Coventry.
8. Tidbury Green is in the south-west of the borough. As a settlement, it is Green Belt “washed”. Tidbury Green Farm is immediately to the east of the settlement. To the west of Tidbury Green, there is greenfield land running to the boundary with Bromsgrove District, and then a railway line. Lowbrook Farm is situated between the settlement of Tidbury Green and that district boundary line.
9. On the other side of that line, there is the settlement of Grimes Hill. Between Grimes Hill and the boundary, on the Bromsgrove side, there are two sites that feature in this application, known as land at Selsdon Close (to the west of the railway line) and land at Norton Lane (to the east of that line).

The Statutory Framework

10. The 2004 Act introduced a scheme of strategic planning with two tiers: regional and local. Part 1 of the Act established “regional planning bodies” that were each required to draw up a “regional spatial strategy” (renamed simply “regional strategies” by the Local Democracy, Economic and Construction Act 2009) which, in replacement of earlier regional planning guidance, set out the Secretary of State’s policies in relation to the development and use of land within the region. At a local level, section 15 of the 2004 Act required each local planning authority to prepare and maintain a “local development scheme” which set out the authority’s policies in relation to the development and use of land within its area, and which had to specify (amongst other things) documents which were to be “development plan documents”. Local plans were effectively required to comply with the relevant regional strategy, because the local development scheme had to be submitted to both the relevant regional planning body and the Secretary of State – and the latter had wide powers to direct amendments. The “development plan” for an area comprised the “development plan documents” and relevant regional strategy for that area.
11. Under those provisions, strategic decisions as to future housing supply thus ultimately lay with central and regional government, and, after appropriate liaison, housing targets were effectively imposed upon local planning authorities from above.
12. Solihull fell within the West Midlands region, and, from 2004, the relevant regional document was the West Midlands Regional Spatial Strategy (“the WM RSS”). At the

time of its adoption, it was proposed to undertake further work on the regional strategy, which was divided into three phases. Phase 1 concerned the strategy for the Black County area, and the WM RSS with Phase 1 Revisions was adopted in January 2008. Phase 2 included housing. A review of the WM RSS including housing strategy was undertaken from 2007, including an examination in public in 2009.

13. However, the WM RSS with Phase 2 Revisions was never adopted. In a statement to Parliament on 6 July 2010, the Coalition Government announced an intention to revoke regional strategies, and return decisions relating to strategic housing supply to local planning authorities. This was a substantial change of direction, at national level. Section 109(3) of the Localism Act 2011 authorised the Secretary of State to revoke regional strategies; and, before any Phase 2 Revisions were adopted, the WM RSS was duly revoked on 20 May 2013, leaving housing supply strategy in the hands of local authorities, such as the Council, to be dealt with in their respective development plans.
14. That does not, of course, mean that a local authority now has a free hand. It is constrained by various national policies and procedural requirements, as follows.
15. Section 19(2) of the 2004 Act provides that, in preparing a development plan document, an authority must have regard to “national policies and advice contained in guidance issued by the Secretary of State”, i.e. now the National Planning Policy Framework (“the NPPF”) to which I return below (see paragraphs 23 and following). Sustainability of development is the NPPF’s core concept, and, by section 19(5) the local authority is required to carry out an appraisal of the sustainability of the proposals in each development plan document and prepare a report on the findings of the appraisal.
16. Furthermore, section 20 of the Act provides for independent examination of development plans by an inspector appointed by the Secretary of State, in the following terms:
 - “(1) The local planning authority must submit every development plan document to the Secretary of State for independent examination.
 - (2) But the authority must not submit such a document unless—
 - (a) they have complied with any relevant requirements contained in regulations under this Part, and
 - (b) they think the document is ready for independent examination.
 - (3) ...
 - (4) The examination must be carried out by a person appointed by the Secretary of State.

(5) The purpose of an independent examination is to determine in respect of the development plan document—

- (a) whether it satisfies the requirements of sections 19 and 24(1), regulations under section 17(7) and any regulations under section 36 relating to the preparation of development plan documents;
- (b) whether it is sound; and
- (c) whether the local planning authority complied with any duty imposed on the authority by section 33A in relation to its preparation.

(6) Any person who makes representations seeking to change a development plan document must (if he so requests) be given the opportunity to appear before and be heard by the person carrying out the examination.

(7) Where the person appointed to carry out the examination—

- (a) has carried it out, and
- (b) considers that, in all the circumstances, it would be reasonable to conclude—
 - (i) that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, and
 - (ii) that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation,

the person must recommend that the document is adopted and give reasons for the recommendation.

(7A) Where the person appointed to carry out the examination—

- (a) has carried it out, and
- (b) is not required by subsection (7) to recommend that the document is adopted,

the person must recommend non-adoption of the document and give reasons for the recommendation.

(7B) Subsection (7C) applies where the person appointed to carry out the examination—

(a) does not consider that, in all the circumstances, it would be reasonable to conclude that the document satisfies the requirements mentioned in subsection (5)(a) and is sound, but

(b) does consider that, in all the circumstances, it would be reasonable to conclude that the local planning authority complied with any duty imposed on the authority by section 33A in relation to the document's preparation.

(7C) If asked to do so by the local planning authority, the person appointed to carry out the examination must recommend modifications of the document that would make it one that—

(a) satisfies the requirements mentioned in subsection (5)(a), and

(b) is sound ...”.

17. Although, unlike section 20(7) and (7A), section 20(7C) does not expressly refer to an obligation to give reasons, where the recommendation is for modifications to be made, an inspector is nevertheless required to give reasons (University of Bristol v North Somerset Council [2013] EWHC 231 (Admin) at [72]-[73]).

18. Section 33A (to which reference is made in section 20(7)(b)(ii) and (7B)(b)) imposes upon a local planning authority a duty to cooperate, in the following terms:

“(1) Each person who is—

(a) a local planning authority,

(b) a county council in England that is not a local planning authority, or

(c) a body, or other person, that is prescribed or of a prescribed description,

must co-operate with every other person who is within paragraph (a), (b) or (c)... in maximising the effectiveness with which activities within subsection (3) are undertaken.

(2) In particular, the duty imposed on a person by subsection (1) requires the person—

(a) to engage constructively, actively and on an ongoing basis in any process by means of which activities within subsection (3) are undertaken...

...

(3) The activities within this subsection are—

(a) the preparation of development plan documents

...

(d) activities that can reasonably be considered to prepare the way for activities within any of paragraphs (a) to (c) that are, or could be, contemplated, and

(e) activities that support activities within any of paragraphs (a) to (c),

so far as relating to a strategic matter.

(4) For the purposes of subsection (3), each of the following is a “strategic matter”—

(a) sustainable development or use of land that has or would have a significant impact on at least two planning areas, including (in particular) sustainable development or use of land for or in connection with infrastructure that is strategic and has or would have a significant impact on at least two planning areas...

(5) In subsection (4)... “planning area” means—

(a) the area of—

(i) a district council (including a metropolitan district council)...

(6) The engagement required of a person by subsection (2)(a) includes, in particular—

(a) considering whether to consult on and prepare, and enter into and publish, agreements on joint approaches to the undertaking of activities within subsection (3), and

(b) if the person is a local planning authority, considering whether to agree under section 28 to prepare joint local development documents.

(7) A person subject to the duty under subsection (1) must have regard to any guidance given by the Secretary of State about how the duty is to be complied with.

...”

19. Once the section 20 examination is complete, section 23 of the 2004 Act provides, so far as relevant to this application:

“(2) If the person appointed to carry out the independent examination of a development plan document recommends that it is adopted, the authority may adopt the document—

- (a) as it is, or
- (b) with modifications that (taken together) do not materially affect the policies set out in it.

(2A) Subsection (3) applies if the person appointed to carry out the independent examination of a development plan document—

- (a) recommends non-adoption, and
- (b) under section 20(7C) recommends modifications (“the main modifications”).

(3) The authority may adopt the document—

- (a) with the main modifications, or
- (b) with the main modifications and additional modifications if the additional modifications (taken together) do not materially affect the policies that would be set out in the document if it was adopted with the main modifications but no other modifications.

(4) The authority must not adopt a development plan document unless they do so in accordance with subsection (2) or (3).

(5) A document is adopted for the purposes of this section if it is adopted by resolution of the authority.”

20. In summary, these provisions mean that each development plan document is subject to an examination in public by an independent inspector appointed by the Secretary of State, who determines (i) whether the plan complies with various procedural requirements, (ii) whether the plan is “sound” (a concept to which I shall return: see paragraphs 33 and following below), and (iii) whether it is reasonable to conclude that the local planning authority has complied with any duty to cooperate. Having done so, there are three courses open to the inspector:

- i) If he is satisfied that the plan meets the procedural and “soundness” requirements, he must recommend adoption of the plan and the authority may adopt the plan.
- ii) If he is not satisfied as to these two matters, and is not satisfied that the authority has complied with its duty to cooperate, he must recommend non-adoption and the authority must not adopt the plan.

- iii) If he is not satisfied as to these two matters, but is satisfied that the authority has complied with its duty to cooperate, he must recommend non-adoption; but, on the authority's request, he must also recommend modifications to the plan that would make it satisfy those two requirements. The authority may then adopt the plan with those modifications.
21. Where a development plan is adopted or revised, section 113 of the 2004 Act makes provision for it to be challenged in this court, on the basis of conventional public law principles (Blyth Valley Borough Council v Persimmon Homes (North East) Limited [2008] EWCA Civ 861 at [8] per Keene LJ).
22. So far as relevant to this application, section 113 provides:
- “(3) A person aggrieved by a relevant document may make an application to the High Court on the ground that—
 - (a) the document is not within the appropriate power;
 - (b) a procedural requirement has not been complied with....
 - (6) Subsection (7) applies if the High Court is satisfied—
 - (a) that a relevant document is to any extent outside the appropriate power;
 - (b) that the interests of the applicant have been substantially prejudiced by a failure to comply with a procedural requirement.
 - (7) The High Court may—
 - (a) quash the relevant document;
 - (b) remit the relevant document to a person or body with a function relating to its preparation, publication, adoption or approval.
 - (7A) If the High Court remits the relevant document under subsection (7)(b) it may give directions as to the action to be taken in relation to the document.
 - (7B) Directions under subsection (7A) may in particular—
 - (a) require the relevant document to be treated (generally or for specified purposes) as not having been approved or adopted;
 - (b) require specified steps in the process that has resulted in the approval or adoption of the relevant

document to be treated (generally or for specified purposes) as having been taken or as not having been taken;

(c) require action to be taken by a person or body with a function relating to the preparation, publication, adoption or approval of the document (whether or not the person or body to which the document is remitted);

(d) require action to be taken by one person or body to depend on what action has been taken by another person or body.

(7C) The High Court's powers under subsections (7) and (7A) are exercisable in relation to the relevant document—

(a) wholly or in part;

(b) generally or as it affects the property of the applicant.

...

(10) A procedural requirement is a requirement under the appropriate power or contained in regulations or an order made under that power which relates to the adoption, publication or approval of a relevant document...”.

The Relevant National Policies

23. Section 19(2) of the 2004 Act requires a local authority to have regard to national policy and guidance when preparing development plan documents (see paragraph 15 above). It is now well-settled that those involved in plan-making and decision-taking in a planning context must interpret relevant policy documents properly, the true interpretation of such documents being a matter of law for the court (see, e.g., Tesco Stores Ltd v Dundee City Council [2012] UKSC 13 at [17]-[23] per Lord Reed).
24. It is rightly common ground that the only extant national policy guidance and advice relevant to this application is found in the NPPF, which replaced much earlier guidance in March 2012.
25. As I have indicated (paragraph 15 above), sustainable development is at the heart of the NPPF. There is no specific definition of “sustainable development” in the NPPF, but it is to be defined in terms of development which meets the needs of the present without compromising the ability of future generations to meet their own needs. That is reflected in the very first words of the Ministerial Foreword to the NPPF, which state:

“The purpose of planning is sustainable growth.

Sustainable means ensuring that better lives for ourselves don't mean worse lives for future generations.

Development means growth. We must accommodate the new ways in which we will earn our living in a competitive world. We must house a rising population...”.

It is said in paragraph 6 of the NPPF that the policies set out in paragraphs 18-219, taken as a whole, constitute the Government’s view of what sustainable development means in practice for the planning system. “Sustainability” therefore inherently requires a balance to be made of the factors that favour any proposed development, and those that favour refusing it, in accordance with the relevant national and local policies. However, policy may give a factor particular weight, or may require a particular approach to be adopted towards a specific factor; and, where it does so, that weighting or approach is itself a material consideration that must be taken into account.

26. Paragraph 14 provides:

“At the heart of the [NPPF] 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...”.

27. Part 6 of the NPPF deals with, “Delivering a wide choice of high quality homes”. It replaced Planning Policy Statement 3: Housing (“PPS3”) which, in 2006, itself replaced Planning Policy Guidance 3: Housing (“PPG3”).

28. In PPS3, under the heading, “Assessing an appropriate level of housing”, the advice (written, of course, at a time when planning strategy was considered at a regional, as well as local, level) was as follows:

“32. The level of housing provision should be determined taking a strategic, evidence-based approach that takes into account relevant local, sub-regional, regional and national policies and strategies achieved through widespread collaboration with stakeholders.

33. In determining the local, sub-regional and regional level of housing provision, Local Planning Authorities and Regional Planning Bodies, working together, should take into account:

- Evidence of current and future levels of need and demand for housing and affordability levels based upon:
 - Local and sub-regional evidence of need and demand, set out in Strategic Housing Market Assessments [“SHMAs”] and other relevant market information such as long term house prices.
 - Advice from the National Housing and Planning Advice Unit on the impact of the proposals for affordability in the region.
 - The Government’s latest published household projections and the needs of the regional economy, having regard to economic growth forecasts.
- Local and sub-regional evidence of the availability of suitable land for housing using Strategic Housing Land Availability Assessments [“SHLAAs”] and drawing on other relevant information....
- The Government’s overall ambitions for affordability across the housing market, including the need to improve affordability and increase housing supply.
- A Sustainability Appraisal of the environmental, social and economic implications, including costs, benefits and risks of development. This will include considering the most sustainable pattern of housing, including in urban and rural areas.
- An assessment of the impact of development upon existing or planned infrastructure and of any new infrastructure required.

34. Regional Spatial Strategies should set out the level of overall housing provision for the region [expressed as net additional dwellings (and gross if appropriate)], broadly illustrated in a housing delivery trajectory, for a sufficient period to enable Local Planning Authorities to plan for housing over a period of at least 15 years. This should be distributed amongst constituent housing market and Local Planning Authority areas.

35. Regional Spatial Strategies should also set out the approach to coordinating housing provisions across the region....”

29. Therefore, under PPS3, in a classic planning exercise of balancing all material factors, the regional authority had to arrive at a housing provision figure for each area, taking into account evidence of need and demand (including household projections, SHMAs, SHLAAs and other relevant market information) and policy matters such as the most sustainable pattern of housing.

30. Paragraph 47 of the NPPF – the opening paragraph of Part 6 – now provides:

“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...”.

31. Thus, the NPPF departed from the previous national guidance in two important ways.

- i) In line with the Localism Act 2011, the NPPF abandoned the regional, top down, approach to housing strategy in favour of localism with a duty to cooperate with neighbouring authorities. The burden of developing housing strategy now falls on local planning authorities.
- ii) Whilst clearly subject to a requirement that both plan-making and decision-taking must be consistent with other NPPF policies – including those designed to protect the environment – the NPPF put considerable new emphasis on the policy imperative of increasing the supply of housing. As reflected in the first words of the Ministerial Foreword quoted above (paragraph 25), in relation to dwellings, there was a policy objective to achieve a significant increase in supply. Therefore, the NPPF imposed the policy goal on a local authority of meeting its full, objectively assessed needs for market and affordable housing, unless and only to the extent that other policies were inconsistent with that goal. Thus, paragraph 47 makes full objectively assessed housing needs, not just a material consideration, but a consideration of particular standing.

32. “Plan-making” is specifically dealt with in the NPPF in paragraphs 150 and following. Under the heading, “Using a proportionate evidence base”, and sub-heading “Housing”, paragraph 159 states:

“Local planning authorities should have a clear understanding of housing needs in their area. They should:

- prepare a [SMHA] to assess their full housing needs, working with neighbouring authorities where housing market areas cross administrative boundaries. The [SMHA] should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period which:
 - meets household and population projections, taking account of migration and demographic change;
 - addresses the need for all types of housing, including affordable housing 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); and
 - caters for housing demand and the scale of housing supply necessary to meet this demand...”
- prepare a [SHLAA] to establish realistic assumptions about the availability, suitability and the likely economic viability of land to meet the identified need for housing over the plan period.”

Therefore, the NPPF supposes that full, objective assessment of housing needs referred to in paragraph 14 will be informed by a SHMA.

33. Paragraph 182 of the NPPF gives advice as to what is meant, in section 20 of the 2004 Act, by a local plan being “sound”:

“The Local Plan will be examined by an independent inspector whose role is to assess whether the plan has been prepared in accordance with the Duty to Cooperate, legal and procedural requirements, and whether it is sound. A local planning authority should submit a plan for examination which it considers is “sound” – namely that it is:

- **Positively prepared** – the plan should be prepared based on a strategy which seeks to meet objectively assessed development and infrastructure requirements, including unmet requirements from neighbouring authorities where it is reasonable to do so and consistent with achieving sustainable development;

- **Justified** – the plan should be the most appropriate strategy, when considered against the reasonable alternatives, based on proportionate evidence;
- **Effective** – the plan should be deliverable over its period and based on effective joint working on cross-boundary strategic priorities; and
- **Consistent with national policy** – the plan should enable the delivery of sustainable development in accordance with the policies in the Framework.”

34. In Barratt Developments Plc v City of Wakefield Metropolitan Borough Council [2010] EWCA Civ 897, Carnwath LJ (as he then was) considered “soundness”, then found in a similar context in the pre-NPPF Planning Policy Statements. His guidance remains apposite (see Zurich Assurance Limited v Winchester City Council [2014] EWHC 758 (Admin) at [114] per Sales J). Carnwath LJ said:

“11. I would emphasise that this guidance, useful though it may be, is advisory only. Generally it appears to indicate the Department’s view of what is required to make a strategy ‘sound’, as required by the statute. Authorities and inspectors must have regard to it, but it is not prescriptive. Ultimately it is they, not the Department, who are the judges of ‘soundness’. Provided that they reach a conclusion which is not ‘irrational’ (meaning ‘perverse’), their decision cannot be questioned in the courts. The mere fact that they may not have followed the policy guidance in every respect does not make the conclusion unlawful.

....

33. ... As I have said, ‘soundness’ was a matter to be judged by the inspector and the Council, and raises no issue of law, unless their decision is shown to have been ‘irrational’, or they are shown to have ignored the relevant guidance or other considerations which were necessarily material in law.”

In other words, whether a plan is “sound” for the purposes of Section 20(5) of the 2004 Act is a matter of planning judgment for the inspector, and is subject to challenge only on normal public law grounds. This court is not concerned with the merits, which are a matter entirely for the inspector. However, in accordance with those principles, an inspector errs in law if he fails to take relevant guidance into account, or fails to deal with a “material controversy” (see Barratt at [45]).

Ground 1

Introduction

35. The SLP submitted for examination proposed a housing provision of 11,000 new dwellings in the period 2006-28, and the Inspector agreed that that was an appropriate provision.
36. As his first ground of challenge, Mr Lockhart-Mummery submits that that provision was not supported by any figure for objectively assessed housing need – as the NPPF required it to be – and, as such, in adopting the SLP, the Council acted ultra vires, and contrary to the statutory procedural and statutory soundness requirements.
37. As a preliminary point, it will be helpful to deal briefly with the different concepts and terms in play.
 - i) Household projections: These are demographic, trend-based projections indicating the likely number and type of future households if the underlying trends and demographic assumptions are realised. They provide useful long-term trajectories, in terms of growth averages throughout the projection period. However, they are not reliable as household growth estimates for particular years: they are subject to the uncertainties inherent in demographic behaviour, and sensitive to factors (such as changing economic and social circumstances) that may affect that behaviour. Those limitations on household projections are made clear in the projections published by the Department of Communities and Local Government (“DCLG”) from time-to-time (notably, in the section headed “Accuracy”).
 - ii) Full Objective Assessment of Need for Housing: This is the objectively assessed need for housing in an area, leaving aside policy considerations. It is therefore closely linked to the relevant household projection; but is not necessarily the same. An objective assessment of housing need may result in a different figure from that based on purely demographics if, e.g., the assessor considers that the household projection fails properly to take into account the effects of a major downturn (or upturn) in the economy that will affect future housing needs in an area. Nevertheless, where there are no such factors, objective assessment of need may be – and sometimes is – taken as being the same as the relevant household projection.
 - iii) Housing Requirement: This is the figure which reflects, not only the assessed need for housing, but also any policy considerations that might require that figure to be manipulated to determine the actual housing target for an area. For example, built development in an area might be constrained by the extent of land which is the subject of policy protection, such as Green Belt or Areas of Outstanding Natural Beauty. Or it might be decided, as a matter of policy, to encourage or discourage particular migration reflected in demographic trends. Once these policy considerations have been applied to the figure for full objectively assessed need for housing in an area, the result is a “policy on” figure for housing requirement. Subject to it being determined by a proper process, the housing requirement figure will be the target against which housing supply will normally be measured.

Housing Provision: Background

38. The WM RSS, adopted in 2004, was based on a number of principles, identified to guide development plans within the region, including (in Chapter 4) the need to counter outward movement of people and jobs from the urban areas which had been facilitated by earlier strategies, but which by 2004 was regarded as unsustainable. The policy of “urban renaissance” therefore broadly sought to discourage migration from the urban areas to the rural areas. Parts of Solihull fell within a major urban area but, as I have indicated, most of the borough comprised greenfield land. Because of the policy effect on restraining population movement out of Birmingham, the net effect of the policy was to reduce the number of new dwellings in Solihull that would otherwise have been required.
39. The WM RSS did not specifically identify objectively assessed housing need. Policy CF2 dealt with housing beyond the major urban areas, by providing that, outside identified towns, housing development should generally be restricted to meeting local needs only, i.e. it should not accommodate migration. Policy CF3, having taken into account relevant policies (including urban renaissance), simply provided that development plans should make provision for additional dwellings at annual rates set out in Table 1. Notably, the regional figures showed a significant movement of housing to major urban areas from other (i.e. non-major) urban areas, the ratio shifting from 1:1.6 to 1:0.7 over the period. The rate for Solihull was 400 dwellings per annum (“dpa”) to 2011, and 470 dpa in the ten year period 2011-21 as a contribution to a post-2011 annual regional target of 14,650 dpa.
40. These figures were reviewed as part of the WM RSS Phase 2 Review. By this time, in March 2009, the DCLG had published 2006-based housing projections for 2006-26, which, on the basis of purely demographic trends, projected a growth for Solihull of 16,000 dwellings at 800 dpa. At the examination in public held as part of the review, the Council argued that Solihull should not be meeting all of its DCLG projection figure on policy grounds, notably because of the implications this would have for the quality of the environment in the borough and for the strategically important Meriden Gap. On the basis of the DCLG projection and these factors, the Council submitted that provision for new housing in the borough for that period should be restricted, on policy grounds, to 10,000. The WM RSS Phase 2 Revision Panel Draft Report in the event recommended a housing requirement figure for Solihull of 10,500 for the 20 year period 2006-26 (i.e. a net figure of 525 dpa). As I have explained, that Revision was never adopted because it was overtaken by the move towards localism.
41. The preparation of the SLP began in 2007, still in the era of regional planning strategy and thus on the basis that the SLP would have to be in conformity with the WM RSS (which, as I have described, was itself then the subject of the Phase 2 Review, which particularly focused on housing). Policy 4 of the Emerging Core Strategy of the Council, published for consultation in September 2010, adopted the WM RSS Revision Panel Draft figure of 10,500 at 525 dpa.
42. By the time the SLP Pre-Submission Draft was published in January 2012 – still pre-NPPF – the DCLG had published 2008-based household projections. These showed a projected increase in dwellings for Solihull for the period 2006-2028 of 14,000 at 636 dpa, a significant reduction compared with the earlier projections on the basis of 2006 figures. The SLP Pre-Submission Draft noted that new projection (paragraph 8.1.4), but went on as follows (at paragraph 8.4.1):

“The Council has assessed housing land supply taking a ‘bottom-up’ approach through detailed site assessment and the [SHLAA]. It is considered that 11,000 (net) additional homes can be delivered towards meeting projected household growth of 14,000 households (2006-2028). This is the level of housing provision that the Council considers can be provided without adverse impact on the Meriden Gap, without an unsustainable short-term urban extension south of Shirley and without risking any more generalised threat to Solihull’s high quality environment. This level of growth supports the West Midlands Urban Renaissance Strategy to develop urban areas in such a way that they can increasingly meet their own economic and social needs in order to counter the unsustainable movement of people and jobs facilitated by previous strategies, including the need to direct development to those parts of the West Midlands Region needing housing.”

43. As I understand it, the 10,500 figure from the WM RSS Revision was amended to 11,000 as a result of two factors:
- i) a reduction to 10,000 (500 dpa) because town centre capacity had fallen due to the recession and sufficient town centre housing capacity could not be found; and
 - ii) because the SLP period was not the 20-year period 2006-26 but rather the 22-year period 2006-28 (to ensure the development plan covered at least 15 years from the date of its adoption), an extra two-years at 500 dpa (i.e. 1,000) was added.

Thus, an aggregate figure of 11,000 was proposed, at 500 dpa.

44. There were two further sources of housing data available to the Inspector by the time of his November 2013 report. First, in addition to the 2006-based and 2008-based DCLG household projection figures, in April 2013 the DCLG interim 2011-based housing projection figures were published. These covered only a ten-year period, 2011-21. The projection for Solihull was a dwelling increase of 6,326 in that period, at a rate of 633 dpa. That was not significantly different from the earlier 2008-based figure of 636 dpa.
45. Second, there were SHMAs. A joint SHMA covering Birmingham, Lichfield and Tamworth as well as Solihull was prepared in 2007-8. That was updated for Solihull in 2009 (“the 2009 SHMA”). The 2009 SHMA notes that the draft WM RSS Phase 2 Revision Draft called for a 10,500 increase in dwellings up to 2006 (page (iii)); and then it continues (at page 4):

“The (draft) West Midlands Phase 2 Revision, containing housing provision targets per authority, concluded its Examination in Public stage at the end of June [2009] with the Panel report published on 28 September. This [SHMA] and the housing needs analysis it includes will therefore not have a bearing on the allocation of new build housing target numbers

for the Authority. Instead, its primary function is to inform those parts of the housing policy framework which are to be determined through local policy setting, most notably the determination of housing need, the type and tenure of new build, the requirement for affordable housing to meet that need and inform decisions on the spatial aspect of new development.”

The 2009 SHMA therefore provided considerable data on housing market trends and by reference to various characteristics including (in section 5) affordable housing. However, the data on future housing need were deliberately limited: on pages (iii) and (iv) there were figures for “total demand” for housing, and estimated social rented housing need and intermediate need for 2006-11. Other than the references to the WM RSS Revision figures, there do not appear to any longer-range estimates of housing needs.

A Technical Issue

46. There was an issue before the Inspector as to the correct application of the DCLG projections to Solihull.
47. The Council said that it was appropriate to use the figures taken from the various tables in those projections, which had been rounded to the nearest thousand – which (the projection notes themselves said) had been used “to facilitate onward processing”. Objectors contended that a more informed decision could be made using unrounded figures, which could be extrapolated from the tables themselves. It seems uncontentious that such extrapolation can be done, and the figures extrapolated by the objectors were not (and are not) in issue. The issue concerned the appropriate approach.
48. As a matter of mathematics, the difference between the two methods seems to have resulted primarily from the interim 2011-based aggregate projection figure for 2021 being 92,424 rounded to 92,000. There were also some differences in the assumptions made by the two parties, but these appear to have been relatively minor. These differences as a whole resulted in the Council calculating the projection for the borough for the period 2011-21 at 533 dpa (or, when that rate is projected through to 2028, an aggregate number of new dwellings of 11,731 which the Council rounded to 11,700), and the objectors calculating it to be 633 dpa for that period and 605 dpa for the period through to 2028 (an aggregate of 13,311 new dwellings to 2028).
49. On the basis of these figures, the Council contended before the Inspector that the 2011-based figures were similar to the figures derived from the WM RSS Phase 2 Revision Panel Draft target (525 dpa amended down to 500 dpa); whilst the objectors submitted that, far from suggesting that the rate of growth was declining to the point where it was converging with the figure of 500 dpa in the draft SLP, the 2011-based projection was consistent with the 2008-based projection of 636 dpa.

The Abandoned Justifications

50. Before turning to how the Inspector dealt with the housing provision issue, it would be helpful to clear the decks. The Council’s case on housing need – and its

justification for the figure of 11,000 as the provision for housing – has not been consistent. In addition to the manner in which the Inspector dealt with the issue – which, the Council contends before me, was appropriate and lawful – the Council has sought to justify the SLP figure on at least two other bases, no longer pursued.

51. First, the Council sought to justify its housing provision figure of 11,000 in what it described as a “bottom up” approach, i.e. it began with available housing supply.
52. As I have indicated (paragraph 42 above), in the January 2012 Pre-Submission Draft (paragraph 8.1.4), there is reference to the 14,000 increase in households projected by the DCLG on the basis of the 2008 data; then, as justification for the provision of housing target, it said that, on the basis of a detailed assessment of land availability, it considered that 11,000 net additional homes could be delivered towards that projected figure. It went on to say that the Council considered that this was the level – presumably the maximum level – of housing that could be delivered without risk to the Meriden Gap, without unsustainable urban extension to the south of Shirley and “without risking any more generalised threat to Solihull’s high quality environment”. It was also considered that this level of growth supported the urban renaissance policy.
53. Insofar as that was intended to justify the housing requirement, it clearly falls very far short of the approach advocated and required by the NPPF, which involves starting with housing need and requiring justification for any requirement falling short of full and objectively assessed need. This “bottom-up” approach appears to start with the number of homes that, in the light of relevant policies, can be delivered during the period. That is the wrong way round.
54. That justification was removed as part of the modifications to the SLP. It is, as I have said, no longer pursued by the Council as justifying the figure.
55. Second, the Council contended that, in determining the full objectively assessed housing need, it was necessary to take into account inconsistency with other policies, i.e. it was a policy on assessment.
56. The Council’s approach evolved from the first justification to which I have referred, the focus turning to the WM RSS Phase 2 Revision which, although never adopted for the reasons I have given, was examined by a panel which recommended a housing allocation to Solihull of 10,500 for the period 2006-2026 (or the amended figure of 11,000 for the plan period 2006-2028 at 500 dpa: see paragraph 43 above). The Council contended before the Inspector that, in determining the full objectively assessed housing need, it was necessary to take into account inconsistency with other policies; and this policy on figure was in itself the figure for full, objectively assessed need for housing which the Council adopted. For example, in the Council’s Supplementary Statement for the Examination dated 18 January 2013, the Council said (at paragraph 1):

“The level of housing need in Solihull has been objectively assessed (considering all evidence and consistency with other policy) through the [WM RSS] Phase II Revision and was examined by the Panel. The Panel examined household and population projections, taking account of migration and

demographic change and made recommendations to cater for housing demand and the scale of housing supply necessary to meet this demand. Sub-regional and local Strategic Housing Market Assessments address the need by type and tenure. Evidence of housing land availability was also considered by the Panel to establish realistic assumptions about availability, suitability and the likely economic viability of land in the region and each sub-region. This meets with the requirements of NPPF paragraph 159.”

Then, after referring to various housing projection models, it continued (at paragraph 15):

“Such predictions are nothing more than a theoretical, mathematical calculation providing an indication of how housing need could change in the future. *Objectively assessing need involves a more sophisticated policy analysis of both needs and what level of growth an area can realistically sustain. In Solihull, the [WM] RSS Phase II Panel Report is the latest assessment of housing need.*” (emphasis added).

57. The Council’s response of 7 March 2013 to further representations on behalf of the Claimants similarly relied upon the approach of another inspector in respect of another site on a section 78 appeal, which, of the WM RSS Phase 2 Revision Draft figure for Stafford, said (at paragraph 10): “These are the most recent objectively assessed figures available”. The Council’s response went on (at paragraph 17) to say, explicitly:

“... [I]t is asserted that the Council has decided ‘that it is not going to meet its own objectively assessed need’. That is again at best a misconception. *The figure of 11,000 which informs the housing requirement is the objectively assessed need for the borough for which it is planning.* Paragraph 8.4.1 of the [SLP] quotes projected household growth and thus the objectors have confused that with the objectively assessed need which the plan seeks to meet. The objectively assessed need is one which has been derived through the Phase 2 RSS process on a ‘policy on’ basis...”. (emphasis added).

It contended, in terms, that the WM RSS Phase 2 Revision “engaged with and discharged the functions of a SHMA set out in paragraph 159 of the [NPPF]” (paragraph 8).

58. On this basis, full, objective assessment of housing need would involve taking into account policy constraints on housing, and the assessment of the WM RSS Revision Draft performed that assessment, coming up with the figure of 10,500, from which the figure of 11,000 for the plan period is derived. But that, too, is clearly wrong: for the reasons I have given, full, objective assessment of housing need is a “policy off” figure, in respect of which constraining policies might give a lower “policy on” housing requirement figure.

59. However – rightly – the Council no longer rely on this second justification, either.
60. Although the Council no longer seek to justify the housing provision in either of these ways, it is noteworthy that the Council appeared to arrive at – and sought to justify – its housing provision figure of 11,000 for the period 2006-28 in a manner clearly inconsistent with the NPPF. Of course, that was not surprising at the Pre-submission Draft stage in January 2012 – two months before the NPPF was published in March 2012 – but it is more surprising that such justifications continued in the document submitted for examination in September 2012, and indeed during the course of the examination.
61. However, if that figure of 11,000 for housing provision was in fact justifiable and justified by the Inspector as in accordance with the NPPF and sound, any earlier defective thinking by the Council would be irrelevant. It was open to the Inspector to cure such defects.

The Approach of the Inspector

62. It is therefore to the Inspector’s Examination and Report I now turn. It is trite law that such a report must be read fairly as a whole, it being inappropriate to subject it to the close textual analysis that might be required when construing statutory provisions.
63. The Inspector, of course, had to consider a number of issues in respect of the SLP. His report is over 150 paragraphs long: the focus of this ground, housing provision, occupies only 15 paragraphs (i.e. paragraphs 50-64). However, he fully understood that the housing provision issues, including “the basis for the overall number of houses to be provided in terms of housing requirements”, were “the most contentious” (paragraph 50). The Council and those objecting to the proposed housing provision repeatedly submitted voluminous responses to representations made to the Inspector by the other. There was no doubt that this was a material and main issue with which the Inspector had to deal.
64. The Inspector set out the Council’s approach in paragraph 10 (which closely followed paragraph 8 of his interim conclusions) and paragraph 24 of his report:

“10. ... [The Council has adopted a consistent approach, basing the SLP on the most recent independent objective assessment of housing requirements undertaken for the WM RSS Phase 2 Revision, including policy elements relating to the urban renaissance strategy and its associated distribution of development; the level of housing provision proposed in the SLP fully accords with this assessment. [The Council] has also considered the implications of more recent 2008 & 2011 household projections and undertaken further work to ensure that the proposed housing provision figure remains sound and robust. There is insufficient evidence to demonstrate that Solihull does not intend to full meet its objectively assessed housing requirements and has thus failed to meet the requirements of the Duty to Cooperate. [In paragraph 8 of the interim conclusions, he put that point thus: ‘It cannot therefore be assumed that Solihull does not intend to fully meet its

objectively assessed housing requirements and has thus failed to meet the requirements of the Duty to Cooperate.’] Detailed concerns about the overall housing provision level, including the [SHMA], are dealt with under the housing issues, later in this report.”

“24. The Spatial Strategy is based on two main elements: firstly, the former WM RSS Phase 2 Revision, which established the overall scale and pattern of development in the Borough; and, secondly, the needs and opportunities identified in more recent studies through the process of preparing the SLP....”

In other words, in respect of the housing provision figure of 11,000, the Council relied upon the WM RSS Phase 2 Revision Draft figure as amended, together with the more recent DCLG projections and the 2009 SHMA.

65. The general approach taken by the Inspector is apparent from paragraph 51 of his report (the first substantive paragraph of his report specifically devoted to this issue):

“51. Dealing first with the overall level of housing provision, the NPPF (¶ 14/47) indicates that local plans should meet the full, objectively assessed needs for market and affordable housing in the housing market area, unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF, including development constraint policies such as the Green Belt. Although household projections are the starting point in assessing overall housing needs, they are only one element; they are a snapshot in time and, being based on demographic trends, do not model other aspects of housing need or the effective demand for homes. In establishing the appropriate level of housing provision for the area, the key drivers of housing need and demand related to demographic, economic and social factors have to be balanced alongside supply-side factors and wider national/local objectives and strategic priorities relating to sustainability, deliverability, infrastructure, viability, land availability and environmental capacity. Evidence should be relevant, robust, proportionate and up-to-date.”

66. He then proceeded to take the Council’s justification for the figure, and test it, as follows:

- i) He noted that paragraph 218 of the NPPF allows authorities to continue to draw on evidence that informed the preparation of regional strategies in support of local strategies, supplemented as needed by up-to-date, robust local evidence (paragraph 52). That is correct. Paragraph 218 provides:

“Where it would be appropriate and assist the process of preparing or amending Local Plans, regional strategy

policies can be reflected in Local Plans by undertaking a partial review focusing on the specific issues involved. Local planning authorities may also continue to draw on evidence that informed the preparation of regional strategies to support Local Plan policies, supplemented as needed by up-to-date, robust local evidence.”

- ii) He noted that the SLP proposal of 11,000 dwellings in the period 2006-28 reflected the figure recommended in the WM RSS Phase 2 Revision Panel Draft. Although that had never been approved by the Secretary of State and the regional strategy had now been revoked, “the Panel’s assessment represents the most recent independently examined assessment of housing requirements in the West Midlands, taking account of cross-boundary housing issues and market areas, environmental capacity and the strategic housing distribution policy elements related to the urban renaissance strategy” (paragraph 52).
- iii) He noted that, in addition to the WM RSS Phase 2 Revision Draft recommendation, the SLP relied upon further work and evidence, including the household projections from the more recent 2008-based and 2011-based household projections, and the 2009 SHMA (paragraph 52). With regard to the CLG household projections, he noted that the 2006-based projections were for 16,000 new households in Solihull in the period 2006-26; and the 2008-based projections were for 14,000 in the period 2006-28 (paragraph 53). He noted (in paragraph 55) that some had argued that the plan should make minimum provision of 14,000 new dwellings on the basis of this projection: but this was only one projection and did not represent the objectively assessed need for housing in the borough. Finally, he noted that the latest 2011-based projections were for 6,000 households in the period 2006-21 at 533 dpa (paragraph 52), an apparent reference to the Council’s calculation, based on the 2011-based DCLG projection (see paragraphs 42-44 above). He concluded:

“52. ... This work confirms that the underlying housing requirement proposed in the SLP remains valid, robust and sound...

53. ... Even though the former WMRSS EiP Panel report figure did not fully meet all the housing needs of Solihull at that time, more recent projections confirm that the number of new households anticipated in Solihull between 2006-28 has significantly reduced since then, and that the annual need may only be slightly above that planned for the submitted SLP.”

The last reference appears to be to the Council’s calculation, based on the 2011-based DCLG projection, that the projected need for Solihull was 533 dpa, compared with the 500 dpa in the SLP.

- iv) With regard to the SHMA, the Inspector said this:

“57. There is also some concern about the adequacy of the SHMA. However, a joint SHMA, covering Birmingham, Solihull, Lichfield and Tamworth was undertaken and was updated specifically for Solihull in 2009, using 2006-based projections, in line with the emerging former WMRSS Phase 2 Revision and national guidance at the time, which supports the proposed level of housing provision. It assessed the likely need for market and affordable housing over the plan period and, taken together with the more recent work on housing need produced for the examination of the SLP and that of the former WMRSS Phase 2 Revision and EiP Panel, this meets the requirements of the NPPF (¶ 159; 178-181)

58. [The Council] recognises that the existing SHMA will need to be reviewed and updated in 2014, to take account of more recent and forthcoming household projections and the needs of the wider housing market. This review will also need to update the original assessment of housing requirements undertaken for the former WMRSS Phase 2 Revision insofar as it relates to the relevant housing market area, and may necessitate a review of the SLP. The firm commitment to undertake this review is to be confirmed in the SLP, to ensure that the plan remains up-to-date and soundly based, as required by the NPPF (¶ 158).”

- v) He noted that some had questioned the continuing relevance of the urban renaissance strategy; but he found it “continues to be relevant and significant in the planning of the sub-region”, as illustrated by the adopted Black Country Core Strategy (paragraph 58).
- vi) He noted (at paragraph 8) that:

“... [T]here are no specific or agreed requirements for Solihull to meet the housing or other needs of adjoining authorities, or for any neighbouring authorities to meet any of Solihull’s housing or other needs”;

and it would be unreasonable to delay its work on the SLP to await the results of further work on the housing needs of Birmingham (which might result in unmet need there, which Solihull might be asked to meet), particularly as Solihull currently lacked a 5 year housing supply (paragraphs 9, and 59-61)

67. The Inspector summed up the issue, and his conclusions on it, as follows:

“62. [The Council] maintains that the SLP is fully meeting the identified housing needs of the Borough, but has considered higher levels of housing at the option stage. In considering the possibility of higher housing figures, it is important to bear in mind the significant policy constraints in Solihull, particularly

the Green belt, including the strategically important Meriden Gap, and the implications of higher levels of development on the recognised environmental quality of the Borough. [The Council] proposes to amend the SLP to explain the adverse implications of higher levels of housing provision on the quality of the environment and the Green belt, particularly the Meriden Gap. This is supported by evidence, including the SHLAA and site assessments.

63. In terms of the overall housing requirement, [the Council] has taken a consistent and pragmatic approach, having produced a positively prepared and effective plan, of cross-boundary housing requirements undertaken for the former WMRSS Phase 2 Revision, and backed up with more up-to-date, robust and reliable evidence, projections and studies. The commitment to review the SLP if it becomes necessary to address the issue of Birmingham's shortfall in future housing provision will ensure that cross-boundary housing issues are addressed when the results of these studies are finalised, reflecting the guidance of the NPPF (¶ 179). The commitment to early review of the SHMA will ensure that Solihull's housing needs are kept up-to-date, including reviewing the SLP, if necessary.

64. Taking account of all the evidence and having examined all the elements that go into making an objective assessment of housing requirements, a total level of 11,000 dwellings or 500 dwellings/year represents an effective, justified and soundly based figure which would meet the current identified housing needs of the district over the plan period and, with the agreed amendments, is consistent with the overall requirements of national policy in the NPPF.”

68. Thus, Policy P5 of the adopted SLP (which assumed all of the modifications recommended by the Inspector) provides that the Council will allocate land to sufficient housing supply to deliver 11,000 additional homes in the period 2006-28, with an annual housing land provision target of 500 net additional homes per year.
69. The justification for this policy – and the linked policies concerning housing supply – was given in the accompanying notes as follows:

“8.4.1 The housing land provision target of 11,000 net additional dwellings (2006-2028) reflects the requirement recommended by the [WM RSS] Phase II Revision Panel Report which objectively assessed housing need. Around 65% of growth is projected to emerge from net immigration into Solihull on the basis of past trends. The projected level of growth may reduce with the successful continued implementation of the West Midlands Urban Renaissance Strategy which seek to develop urban areas in such a way that they can increasingly meet their own economic and social

needs in order to counter the unsustainable movement of people and jobs facilitated by previous strategies, including the need to direct development to those parts of the West Midlands Region needing housing. The Panel's assessment of housing need took the 2006-based household projections into account. Subsequent 2008-based and interim 2011-based household projections project a lower level of household growth for Solihull, providing further confidence that the provision target will meet need

8.4.2. Solihull is recognised for its high quality environment which attracts residents and investors to the Region. The key Regional objective of stemming out migration can be best served by preserving and enhancing Solihull's environment. The Council is assessing housing land supply throughout the development of the West Midlands Regional Spatial Strategy taking a 'bottom-up' approach through detailed assessment and the [SHLAA]. It is considered that 11,000 (net) additional homes can be delivered towards meeting projected household growth of 14,000 households (2006-28). This is the level of housing provision that the Council considers can be provided without adverse impact on the Meriden gap, without an unsustainable short-term urban extension south of Shirley and without risking any more generalised threat to Solihull's high quality environment...".

Housing Provision: The Parties' Respective Cases

70. Mr Dove for the Council accepted that neither the SLP nor the Inspector's Report identified, in terms, a specific figure for objectively assessed housing need over the period; but, he submitted, it was not necessary for a plan to identify such a figure and, on a proper analysis of the Inspector's Report, the substantive requirements of the NPPF (including those of paragraphs 47 and 159) were satisfied in this case.
71. He relied upon the guidance from the Secretary of State when, in July 2010, he announced the revocation of the regional strategies. The advice was in question and answer form. Mr Dove particularly relied upon the following (italicised emphasis added):

“9. Will data and research currently held by Regional Authority Leaders' Boards still be available?”

Yes. The regional planning function of Regional LA Leaders' Boards – the previous Regional Assemblies – is being wound up and their central government funding will end after September of this year. *The planning and research they currently hold will still be available to local authorities for the preparation of their local plans whilst they put their own alternative arrangements in place for the collection and analysis of evidence....*

10. Who will determine housing numbers in the absence of Regional Strategy targets?

Local planning authorities will be responsible for establishing the right level of local housing provision in their area, and identifying long term supply of housing land without the burden of regional housing targets. *Some authorities may decide to retain their existing housing targets that were set out in the revoked Regional Strategies.* Others may decide to review their housing targets. We would expect that those authorities should quickly signal their intention to undertake an early review so that communities and land owners know where they stand.

11. Will we still need to justify the housing numbers in our plans?

Yes – it is important for the planning process to be transparent, and for people to be able to understand why decisions have been taken. Local authorities should continue to collect and use reliable information to justify their housing supply policies and defend them during the LDF examination process. They should do this in line with the current policy in PPS3.

12. Can I replace Regional Strategy targets with “option 1 numbers” [i.e. the policy on figures submitted by local authorities to the regional authorities as part of the regional process of fixing housing provision]?

Yes, if that is the right thing to do for your area. *Authorities may base revised housing targets on the level of provision submitted to the original Regional Spatial Strategy Examination (Option 1 targets), supplemented by more recent information as appropriate.* These figures are based on assessments undertaken by local authorities. However, any target selected may be tested during the examination process especially if challenged and authorities will need to be ready to defend them.”

Mr Dove also relied upon paragraph 218 of the NPPF (quoted at paragraph 66(i) above).

72. He submitted that the 11,000 figure reflected the WM RSS Phase 2 Revision Panel Draft target, which had taken into account the evidence of housing need (including the DCLG projections and the 2009 SHMA) as well as constraining policy factors (including, in particular, policies relating to urban renaissance policy, the Green Belt and the wish to maintain the high quality environment in Solihull which was important for the maintenance of the infrastructure which sustains the area). That Revision Draft housing provision figure was set only after a full review including an examination in public. Since then, there had been no significant change in demographic trends or other factors that went to housing need (as evidenced by the

2008-based and the interim 2011-based DCLG projections, and the 2009 SHMA). Nor had there been any significant change in policy; notably, the urban renaissance policy was still extant, as were the other policies which led to the constraint to the WM RSS Revision Panel Draft target, namely the Green Belt policy and the policy of protecting the quality of the living environment in Solihull. In those circumstances, the SLP was justified in using the housing requirement figure of 11,000 which directly reflected the WM RSS Phase 2 Revision Draft target.

73. Mr Lockhart-Mummery's primary submission was that the Council and the Inspector had simply failed to understand and apply the stepped approach to housing strategy in a local development plan required by the NPPF. The vital first step in the process is to assess, fully and objectively, the need for market and affordable housing in a SHMA, in accordance with the requirements of paragraph 159 of the NPPF. Only once that assessment has been made can the other steps be taken, namely:
- i) considering whether there are policies in the NPPF which are consistent/inconsistent with those full needs;
 - ii) constraining the figure which represents the full objectively assessed needs where any adverse impacts of meeting those needs "would significantly and demonstrably outweigh the benefits, when assessed against the policies in [the NPPF] taken as a whole or specific policies in [the NPPF] indicate development should be restricted" (paragraph 14 of the NPPF); and
 - iii) where the result is a constrained figure (i.e. a figure which, on policy grounds, is less than the full objectively assessed figure for housing need in that area), cooperating with adjoining or other near-by local planning authorities on the strategic matter of meeting that otherwise unmet need (section 33A of the 2004 Act).
74. That first, mandatory step of assessing housing need, fully and objectively, was not performed in this case, with the result that the SLP was ultra vires the Council and in breach of the procedural and soundness requirements for such a plan. That view was consistently taken by the Claimants in their representations to the Inspector during the Examination in Public (see, e.g., paragraph 11 of their response to the Inspector's Interim Conclusions). He erred in law in rejecting it.
75. As a separate but linked issue, Mr Lockhart-Mummery submitted that the NPPF requires the specific assessment of affordable housing needs. The evidence (recorded in the Inspector's Report, at paragraph 105) was that there was a need for 1,652 dpa affordable housing; but the SLP only provides for 2,457 affordable homes throughout the period of the plan. He accepts that quantified need for affordable housing does not simply translate into an equivalent need for new homes – and that affordable housing can only sensibly be expressed as a percentage of aggregate housing development – but he criticises the SLP and the Inspector for nowhere assessing the full objective need for affordable housing, as required by the NPPF.

Discussion

76. Mr Dove's submissions were, as ever, coherent, forceful and enticing. However, I am unpersuaded by them: in my firm view, with regard to his approach to the housing

provision, the Inspector did err in law. Mr Lockhart-Mummery put the matter in a variety of ways, including that the Inspector failed to have regard to the key requirements of the NPPF, particularly the requirement to base housing provision targets on an objective assessment of full housing needs as identified through a SHMA; he misdirected himself as to the requirements of the NPPF; he misunderstood documents such as the 2009 SHMA; and he failed to give adequate reasons for the housing provision he approved as compliant with the statutory requirements. Each of those reflects, to some extent, the substantive error which was, in my judgment, made by the Inspector, namely a failure to grapple with the issue of full objectively assessed housing need, with which the NPPF required him, in some way, to deal.

77. In coming to that conclusion, I have had particular regard to the following.
78. There was no doubt that the full objectively assessed housing need was in issue: the parties to the examination made voluminous representations to the Inspector on that issue, including submissions in relation to how projections informed that issue. The technical issue to which I have referred (paragraphs 46-49 above) was simply one aspect of those submissions.
79. Although the NPPF is mere policy – and a plan-maker, including an inspector, may therefore depart from it, if there is good reason to do so – the Inspector in this case purportedly dealt with the issue of housing provision by applying the policies of the NPPF, not going outside them.
80. As Barratt emphasises, whether a plan is “sound” is essentially a matter of planning judgement for the Inspector (see paragraph 34 above). However, “soundness” requires a plan to be “positively prepared” (i.e. based on a strategy which seeks to meet objectively assessed development requirements) and consistent with national policy (paragraph 182 of the NPPF, quoted at paragraph 33 above). Relevant national policy here includes paragraphs 14 and 47 of the NPPF. For a plan to be sound, it therefore needs to address and seek to meet full, objectively assessed housing needs for market and affordable housing in the housing market area, unless (and only to the extent that) any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole.
81. Although in paragraph 51 of his report (quoted at paragraph 65 above), the Inspector adequately summarised those requirements of paragraph 14 and 47 – more or less in the terms I have set out – looking at the report as a whole, and following similar confusion which appeared at times in the Council’s submissions to him (see paragraphs 50-61 above), the Inspector appears to have confused policy off “housing needs” with policy on housing requirement targets. I make that comment well aware of the need to avoid exegetical analysis of Inspector’s reports, and the requirement to consider such reports fairly and as a whole.
82. However, for example, the Inspector says (in paragraph 62):

“[The Council] maintains that the SLP is fully meeting the identified housing needs of the Borough, but has considered higher levels of housing at the option stage.”

That can only be explained by “housing needs” being used in a policy on sense. Leaving aside any obligation to meet unmet need from an adjacent authority (not in play here, because the Inspector throughout worked on the basis that there was no such need), the Council of course need not – and would not – consider meeting levels of housing higher than the full objectively assessed need.

83. Further, the Inspector found that 11,000 new dwellings over the period of the plan (i.e. 500 dpa) “represents an effective, justified and soundly based figure which would meet the current identified housing needs of the district over the plan period...” (paragraph 64 of his report, quoted at paragraph 67 above). Mr Dove submitted that “the current identified housing needs” was a tacit reference to the interim 2011-based projection of 533 dpa; but, reading the report as a whole (as I must), I cannot accept that proposition, because (i) the interim 2011-based projection of 533 dpa was only for the period to 2021, not for the plan period (to 2028); (ii) the Inspector (rightly) made clear that a single household projection does not represent objectively assessed need for housing (paragraph 55); and (iii) as Mr Dove properly conceded, nowhere in either the Inspector’s Report or the WM RSS Phase 2 Revision Panel Report, by reference to the interim 2011-based projection or otherwise, is any full, objectively assessed need for housing in Solihull “identified”. The reference in paragraph 53 of the report to “the annual need may only be slightly above that planned for in the submitted SLP” cannot be stretched to amount to an identification of housing need of 11,700 in aggregate or 533 dpa. Again, the Inspector appears to use the term “housing need” here to mean a policy on figure for housing requirement.
84. In any event, whether or not the Inspector confused policy on housing need with policy on housing requirement, nowhere in the report does he objectively assess full housing need, a matter to which I shall shortly return.
85. The importance of the difference between full objectively assessed housing need and any policy on figure was recently emphasised in City and District Council of St Albans v Hunston Properties Limited and the Secretary of State for Communities and Local Government [2013] EWCA Civ 1610 (“Hunston”), upon which Mr Lockhart-Mummery relied for his proposition that, in plan-making, an authority must, as a first step, fully and objectively assess housing need.
86. The case itself concerned, not the preparation of a development plan, but a development control application for planning permission for housing within the Metropolitan Green Belt, in circumstances in which no local plan existed so that there was a “policy vacuum” in terms of the housing delivery target. Planning permission was refused by the local planning authority, and by an inspector on appeal. However, this court (His Honour Judge Pelling QC) quashed that decision ([2013] EWHC 2678 (Admin)), a determination upheld by Sir David Keene giving the only substantive judgment in the Court of Appeal ([2013] EWCA Civ 1610).
87. An issue in the case was the proper interpretation of paragraph 47 of the NPPF: indeed, in granting permission to appeal, Sullivan LJ considered that the local authority did not have a real prospect of success of overturning Judge Pelling, but in his view there was a compelling reason for the appeal to be heard namely to enable the Court of Appeal to give a “definitive answer to the proper interpretation of paragraph 47” and, in particular the interrelationship between the first and second bullet points in that paragraph, quoted at paragraph 27 above (see Hunston at [3]).

88. I respectfully agree with Sir David Keene (at [4] of Hunston): the drafting of paragraph 47 is less than clear to me, and the interpretative task is therefore far from easy. However, a number of points are now, following Hunston, clear. Two relate to development control decision-taking.
- i) Although the first bullet point of paragraph 47 directly concerns plan-making, it is implicit that a local planning authority must ensure that it meets the full, objectively assessed needs for market and affordable housing in the housing market, as far as consistent with the policies set out in the NPPF, even when considering development control decisions.
 - ii) Where there is no Local Plan, then the housing requirement for a local authority for the purposes of paragraph 47 is the full, objectively assessed need.
89. As I have said, those matters – the ratio of the decision of the Court of Appeal – go to development control decision-taking. To that extent, Mr Dove was correct in pointing out that both Judge Pelling (at [11]) and Sir David Keene (at [21]) emphasised that the case before them did not concern plan-making, but decision-taking where there was no plan.
90. However, reflecting comments made by Judge Pelling at first instance, Sir David Keene also made some important observations about the construction of paragraph 47 in the context of plan-making. Consequently, the Inspector’s Report in this case (published on 14 November 2013, between the judgments of Judge Pelling and the Court of Appeal in Hunston) was not in the event entirely correct when it said (at paragraph 55) that Hunston was not relevant to his inquiry because “this case relates to the process of determining planning applications rather than plan-making”; nor was the submission of Mr Dove that “[Hunston] is solely concerned with the development control process where there is a policy vacuum in relation to housing requirement” (skeleton argument, footnote 10).
91. Sir David Keene, at [25]-[26], drew the very clear distinction between the full objectively assessed needs figure; and the policy on, housing requirement figure fixed by the Local Plan. In considering the first bullet point in paragraph 47 of the NPPF, which of course expressly concerns plan-making, he said:
- “... The words in [the first bullet point of paragraph 47], ‘as far as consistent with the policies set out in the Framework’ remind one that the Framework is to be read as a whole, but their specific role in that sub-paragraph seems to me to be related to the approach to be adopted in producing the Local Plan. If one looks at what is said in that sub-paragraph, it is advising local planning authorities:
- ‘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.’

That qualification contained in the last clause quoted is not qualifying housing needs. It is qualifying the extent to which the Local Plan should go to meet those needs. The needs assessment, objectively arrived at, is not affected in advance of the production of the Local Plan, which will then set the requirement figure.”

That makes clear that, in the context of the first bullet point in paragraph 47, policy matters and other constraining factors qualify, not the full objectively assessed housing needs, but rather the extent to which the authority should meet those needs on the basis of other NPPF policies that may, significantly and demonstrably, outweigh the benefits of such housing provision. It confirms that, in plan-making, full objectively assessed housing needs are not only a material consideration, but a consideration of particular standing with a particular role to play.

92. I was also referred to the recent case of South Northamptonshire Council v Secretary of State for Communities and Local Government [2014] EWHC 573 (Admin), in which Hunston was considered. Mr Dove particularly relied upon the emphasis Ouseley J gave in that case to the fact that Hunston “did not decide that [a] revoked RSS was expunged”. However, that case was very different from this. It was a section 288 challenge to two refusals of planning permission for housing development, on the basis that the approach the planning authority adopted to the calculation of the 5 year housing supply was unlawful in the light of the NPPF. In addition to the revoked regional strategy, there was a new core strategy, but that had not been adopted and was still subject to examination. There was no issue as to the housing requirement over the relevant plan period (see [8]), the issue being how the shortfall of 626 homes by 2012 was to be dealt with for the purposes of assessing whether there was a 5 year supply. The case is of little consequence to this application because, it appears, the regional strategy figure for housing provision was (unlike in the case of Hunston and here) not constrained (see [29]), nor inflated over objectively assessed need because of a regional growth strategy for the area (see [36]). The regional strategy figures were very similar to the figures from the emerging core strategy. In those circumstances, Ouseley J held, unsurprisingly, that, in considering how the shortfall should be made up (i.e. whether the future supply should be front- or end-loaded), it was relevant to see how supply had fared against the regional strategy requirement when it was in force, as the inspector in that case had done (see [37]). Importantly, the judge emphasised the need for caution in using figures from revoked regional strategies: he considered that, by treating the regional strategy figure as relevant, “there [was] potential for an error of law”, but he was satisfied that there was no error in that case on its specific facts. This case does not give Mr Dove any assistance. Indeed, in my view, it gives Mr Lockhart-Mummery some support.
93. As I have said, neither the SLP nor the Inspector made any objective assessment of full housing need, in terms of numbers of dwellings. Mr Lockhart-Mummery submitted that, if the plan-makers have to assess whether the full objectively assessed housing need is outweighed by other policy factors and cooperate with adjacent authorities with regard to any shortfall between full objectively assessed housing need and any constrained housing requirement target (as they do), they must, first, determine a figure for the full objectively assessed need by preparing a SHMA in accordance with paragraph 159 of the NPPF. Paragraph 159 requires local planning

authorities to have a clear understanding of housing needs in their area and, specifically, to prepare a SHMA to assess their full housing needs.

94. Those submissions have considerable force. Whilst I do not need to endorse Mr Lockhart-Mummery's precise propositions for the determination of this application – for example, I see that, in practice, full housing needs might be objectively assessed using data other than a SHMA – it is clear that paragraph 47 of the NPPF requires full housing needs to be assessed in some way. It is insufficient, for NPPF purposes, for all material considerations (including need, demand and other relevant policies) simply to be weighed together. Nor is it sufficient simply to determine the maximum housing supply available, and constrain housing provision targets to that figure. Paragraph 47 requires full housing needs to be objectively assessed, and then a distinct assessment made as to whether (and, if so, to what extent) other policies dictate or justify constraint. Here, numbers matter; because the larger the need, the more pressure will or might be applied to infringe on other inconsistent policies. The balancing exercise required by paragraph 47 cannot be performed without being informed by the actual full housing need.
95. Nor can an assessment of whether a planning authority has complied with its duty to cooperate under section 33A of the 2004 Act, which may be triggered by an unmet housing need in one area resulting from a shortfall between full housing need and a housing target based on policy on requirements.
96. Mr Dove submitted that paragraph 218 of the NPPF encouraged – or at least allowed – the use of regional strategy policies and evidence that informed the preparation of regional strategy in the preparation of Local Plans. It was therefore open to the Inspector to take the policy on figure derived from the WM RSS Phase 2 Revision process, into which relevant demographic and other housing need evidence had gone, together with the relevant policy considerations, and which had been tested at an examination in public; and then see whether any more recent housing need evidence (e.g. later projections and SHMAs), or change in policy, undermined the Panel's figure. That there had been no material alteration in circumstances was a matter for the planning judgment of the Inspector. The conclusion he reached had a clear evidential foundation, and was unimpeachable in law.
97. However, that fails to acknowledge the major policy changes in relation to housing supply brought into play by the NPPF. As I have emphasised, in terms of housing strategy, unlike its predecessor (which required a balancing exercise involving all material considerations, including need, demand and relevant policy factors), the NPPF requires plan-makers to focus on full objectively assessed need for housing, and to meet that need unless (and only to the extent that) other policy factors within the NPPF dictate otherwise. That, too, requires a balancing exercise – to see whether other policy factors significantly and demonstrably outweigh the benefits of such housing provision – but that is a very different exercise from that required pre-NPPF. The change of emphasis in the NPPF clearly intended that paragraph 47 should, on occasions, yield different results from earlier policy scheme; and it is clear that it may do so.
98. Where housing data survive from an earlier regional strategy exercise, they can of course be used in the exercise of making a local plan now – paragraph 218 of the NPPF makes that clear – but where, as in this case, the plan-maker uses a policy on

figure from an earlier regional strategy, even as a starting point, he can only do so with extreme caution – because of the radical policy change in respect of housing provision effected by the NPPF. In this case, I accept that it was open to the Inspector to decide that the urban renaissance policy continued to be potent, and even (possibly) that the evidence of housing need had not significantly changed since the WM RSS Phase 2 Revision Draft target was set – those were matters of planning judgment, for him. However, in my judgment, in his approach, he failed to acknowledge the new, NPPF world, with its greater policy emphasis on housing provision; and its approach to start with full objectively assessed housing need and then proceed to determine whether other NPPF policies require that, in a particular area, less than the housing needed be provided. The WM RSS Phase 2 Revision Panel did not, of course, adopt that approach. Nor did the guidance provided by the Secretary of State on the revocation of regional strategies in 2010 (see paragraph 71 above) take the new policy into account. Both were pre-March 2012, when the NPPF was published.

99. The Inspector did not acknowledge, or take into account, that change. I accept that the Inspector might have taken that change into account in a number of ways. However, in one way or another, he was required to assess, fully and objectively, the housing need in the area. In the event, he made no attempt to do so. Mr Dove conceded – as he had to do – that neither the SLP nor the Inspector provided any full and objective assessment of housing need. Nor is there any evidence that the WM RSS Phase 2 Revision Panel made such an assessment, either: they had evidence of need before them, but there is no evidence that, as required by the NPPF, they assessed the full and objective housing need before considering constraints on meeting that need. Indeed, the evidence is that they went straight to policy on figures for the region in a conventional planning balancing exercise, with all material factors in play – as they were entitled to do under the pre-NPPF regime – and then proceeded to carve up that policy on requirement between the various areas within the region. Even as a surrogate, that did not comply with the NPPF requirements, properly construed. The further projections and 2009 SHMA did nothing to assist in this regard.
100. This is not a reasons case, because the approach adopted by the Inspector is in my view clear from his report: indeed, the fact that the Inspector unfortunately failed to grapple with this important issue of housing need is, in my view, betrayed in the report. When the report is read as a whole, far from full objectively assessed housing need being a driver in terms of the housing requirement target – as the NPPF requires – it is at best a back-seat passenger. Nowhere is the full housing need in fact objectively assessed. As I have said, the reference to the work done by the WM RSS Phase 2 Revision Panel does not assist, because there is no evidence that they assessed such need either. In any event, the Inspector appears to accept that the WM RSS Phase 2 Revision Panel target did not fully meet all housing needs (paragraph 53). Further, in paragraph 10 (quoted at paragraph 64 above), he says:

“There is insufficient evidence to demonstrate that Solihull does not intend to full meet its objectively assessed housing requirements ...”.

All of this makes clear, in my view, that the Inspector erred in his approach to this issue: he failed to have proper regard to the policy requirements of the NPPF.

101. For those reasons, I do not consider that the Inspector's approach to the policy requirements of the NPPF in relation to housing provision was correct or lawful. As a result, he failed to comply with the relevant procedural requirements; and the SLP with modifications, which he endorsed and the Council adopted, is not sound because it is not based on a strategy which seeks to meet objectively assessed development requirements nor is it consistent with the NPPF.
102. Therefore, on this ground, the Claimants succeed.

Ground 2

103. I have already set out the relevant provisions of section 33A, which provides for a duty to cooperate between local planning authorities (paragraph 18 above). Section 33A(7) provides that any person subject to that duty must have regard to any national guidance. Paragraph 179 of the NPPF states:

“... Joint working should enable local planning authorities to work together to meet requirements which cannot wholly be met within their own areas – for instance, because of lack of physical capacity or because to do so would cause significant harm to the principles and policies of this Framework...”.

104. Before me, Mr Lockhart-Mummery restricted his second ground. He simply submitted that, for reasons explored in Ground 1, with a provision of 11,000, the Council will not meet its own objectively assessed housing needs; but it failed to cooperate with neighbouring authorities to devise a strategy whereby its unmet need would be met by adjoining authorities. He relied particularly upon the sentence in paragraph 8.4.2 of the adopted SLP:

“It is considered that 11,000 (net) additional homes can be delivered towards meeting projected household growth of 14,000 (2006-2028).”

That (he submitted) accepts that there is a shortfall of 3,000 between housing needs and housing requirement; and there is no evidence of any attempts to cooperate between the Council and its neighbours to work out how and where this unmet need will in fact be met.

105. As Mr Dove submitted – and Sales J recently emphasised in Zurich Assurance (cited at paragraph 34 above) at [110]-[120] – section 33A imposes a duty to make efforts to address issues in a cooperative way, and the question of whether there has been compliance with the section 33A duty is a matter of planning judgment for the inspector.
106. Mr Lockhart-Mummery's submission is dependent upon the proposition that the Inspector found a shortfall of housing provision compared with full objectively assessed need of 3,000, i.e. 11,000 in the SLP compared with 14,000. However, the Inspector found no such shortfall. For the reasons I have given, the 14,000 figure is not a figure which represents full objectively assessed housing need: indeed, the Inspector makes clear that he did not take it as such (paragraph 55 of his report). As I have explained, he simply failed to grapple with the issue of what that need was, and

there is no figure for it given or derivable from his report and/or the SLP. On the basis of the Inspector's Report, although it may be likely that, had the Inspector addressed his mind to full objectively assessed housing need, he would have found a shortfall between it and 11,000 dwellings in the plan period, he did not in the event address his mind to that issue.

107. As the Inspector did not apply himself to the prior questions of whether there is any shortfall between that need and the provision made and, if there is, the amount of that shortfall, it is impossible to say whether or not there was any breach of the duty to cooperate. Certainly, if and insofar as there is a shortfall, there does not appear to be any evidence of any attempts to cooperate with adjacent authorities, as might be required by section 33A – unsurprising, given that the Council at the time apparently considered the amended WM RSS Phase 2 Revision Draft policy on target to be the relevant need figure. Whether there was a breach of section 33A, would be a matter of planning judgment. In any event, as things stand, I cannot say that there was such a breach.
108. For those reasons, the adoption of the SLP fails to survive Ground 1; and I need not, and cannot appropriately, make any findings in relation to Ground 2.

Ground 3

Introduction

109. Mr Lockhart-Mummery submitted that the Inspector adopted the incorrect legal test for revising Green Belt boundaries as set out the national policy, namely paragraph 83 of the NPPF which provides:

“Local planning authorities with Green Belts in their area should establish Green Belt boundaries in their Local Plans which set the framework for Green Belt and settlement policy. *Once established, Green Belt boundaries should only be altered in exceptional circumstances*, through the preparation or review of the Local Plan. At that time, authorities should consider the Green Belt boundaries having regard to their intended permanence in the long term, so that they should be capable of enduring beyond the plan period.” (emphasis added)

Policy and Factual Background

110. Green belts are designed to provide a reserve supply of public open space and recreational areas, by establishing “a girdle of open space” around built up areas. They are established through development plans. The Green Belt policy outside London was codified in a number of Ministerial guidance documents, the first being in 1955. The guidance is now of course found in the NPPF. Its immediate predecessor was Planning Policy Guidance 2: Green Belts (“PPG2”).
111. PPG2 emphasised that “the essential characteristic of Green Belts is their permanence” (paragraph 2.1). It set out the consequences of that characteristic as follows:

“2.4 Many detailed Green Belt boundaries have been set in local plans and in old development plans, but in some areas detailed boundaries have not yet been defined. Up-to-date approved boundaries are essential, to provide certainty as to where Green Belt policies do and do not apply and to enable the proper consideration of future development options. The mandatory requirement for district-wide local plans, introduced by the Planning and Compensation Act 1991, will ensure that the definition of detailed boundaries is completed.

...

2.6 Once the extent of a Green Belt has been approved it should only be altered in exceptional circumstances. If such an alteration is proposed the Secretary of State will wish to be satisfied that the authority has considered opportunities for development within the urban areas contained by and beyond the Green Belt. Similarly, detailed Green Belt boundaries defined in adopted local plans or earlier approved development plans should be altered only exceptionally....

2.7 Where existing local plans are being revised and updated, existing Green Belt boundaries should not be changed unless alterations to the structure plan have been approved, or other exceptional circumstances exist, which necessitate such revision.

2.8 Where detailed Green Belt boundaries have not yet been defined, it is necessary to establish boundaries that will endure...”.

112. The long-term nature of Green Belts was also reflected in provisions for “safeguarded land”. Paragraph 2.12 provided:

“When local authorities prepare new or revised structure and local plans, any proposals affecting Green Belts should be related to a time-scale which is longer than that normally adopted for other aspects of the plan. They should satisfy themselves that Green Belt boundaries will not need to be altered at the end of the plan period. In order to ensure protection of Green Belts within this timescale, this will in some cases mean safeguarding land between the urban area and the Green Belt which may be required to meet longer-term development needs.... In preparing and reviewing their development plans authorities should address the possible need to provide safeguarded land. They should consider the broad location of anticipated development beyond the plan period, its effects on urban areas contained by the Green Belt and on areas beyond it, and its implication for sustainable development...”

113. Annex B gave further advice on safeguarded or “white” land:

“B2. Safeguarded land comprises areas and sites which may be required to serve development needs in the longer term, i.e. well beyond the plan period. It should be genuinely capable of development when needed.

B3. Safeguarded land should be located where future development would be an efficient use of land, well integrated with existing development, and well related to public transport and other existing and planned infrastructure, so promoting sustainable development.

B4. In identifying safeguarded land local planning authorities should take account of the advice on housing in PPG3 and on transport in PPG13....

B5. Development plans should clearly state the policies applying to safeguarded land over the period covered by the plan. They should make clear that the land is not allocated for development at the present time, and keep it free to fulfil its purpose of meeting possible longer-term development needs....

B6. Development plan policies should provide that planning permission for the permanent development of safeguarded land should only be granted following a local plan or UDP review which proposes the development of particular areas of safeguarded land. Making safeguarded land available for permanent development in other circumstances would thus be a departure from the plan.”

114. In line with that guidance, following inquiries in 1991 and 1995, in the 1997 Solihull Unitary Development Plan (“the UDP”), the Council took 12 sites totalling 77 hectares, including the Sites at Lowbrook Farm and Tidbury Green Farm, out of the interim Green Belt, and reserved them as safeguarded land.
115. In 2004-5, the UDP was the subject of a review inquiry, also conducted by the Inspector, Mr Pratt. The review period was until 2011. In his 2005 UDP Review Report, the Inspector (at paragraphs 3.124-3.128) noted that (i) none of the safeguarded sites had been developed; (ii) the concept of sustainability had developed since the sites were identified as safeguarded; (iii) the Council considered the allocation of some of the sites would conflict with PPG3 and the latest regional strategy, which represented a fundamental change to policy especially in moving away from development around smaller Green Belt settlements; and (iv) the Council confirmed that, in the absence of exceptional circumstances, none of these sites could be brought forward for development without a change in regional strategy. He consequently recommended as follows (at paragraph 3.128):

“Bearing in mind the apparent conflict between the possible allocation of these sites for housing in the future and the latest regional strategy, I consider an urgent review of their suitability as long-term housing sites should be undertaken. This should

not delay the adoption of the [UDP Revision], but should inform its next review under the new... regime...”.

116. His overall conclusion was as follows (at paragraph 3.130):

“Given the current adequacy of housing land supply, both within the Plan period and beyond, and bearing in mind the permanent nature of the established Green Belt boundaries, I cannot see any general justification for identifying further safeguarded land. This would require amendments to existing Green Belt boundaries which, in the absence of any exceptional circumstances, could not be justified in terms of current national policy or the latest regional strategy. Similarly, since these sites have been removed from the Green Belt relatively recently, after a thorough debate at two UDP inquiries, there would have to be some very special circumstances to justify their re-inclusion in the Green Belt. In the absence of exceptional circumstances, ad hoc amendments to the Green belt boundary to either allocate additional or alternative long-term housing sites, to remove existing safeguarded sites, would undermine the integrity and enduring nature of the existing Green Belt boundary established in the adopted UDP. Furthermore, any loss of the Green Belt land without directly supporting urban regeneration would be contrary to the latest regional spatial strategy. Consequently, I can see no general justification for any changes to existing Green Belt boundaries, and these matters are best addressed on a site-by-site basis.”

117. He went on say (paragraph 3.132):

“If further housing land is needed, during or beyond the current Plan period, safeguarded greenfield land may not necessarily be the first choice, particularly since most identified sites lie outside the [Major Urban Areas] where new housing development is to be focused, and both PPG3 and RPG11 give priority to *previously developed land*. Such a policy could also prejudice the release of other more suitable sites that may come forward in the future...”.

118. His recommendations included modifications to the UDP as follows (paragraph 3.140):

“... amending the text accompanying Policy H2 to confirm that, although these sites have been removed from the Green Belt and safeguarded to meet longer term housing needs, no decision has yet been taken on the positive allocation of any of these sites for housing, and that they are not intended as ‘reserve’ housing sites in the event of shortfalls in housing land supply;”

and

... subject to the Council's priorities in undertaking a review of this UDP Review..., priority be given to assessing the suitability of safeguarded land for housing against current national policy and the latest regional strategy, along with an assessment of longer term housing land supply, housing strategies and potential housing sites, to inform the next review of this UDP."

119. In the event, Policy H2 of the 2005 UDP provided as follows:

"The Council will identify sites to help to meet long-term (i.e. post-2011) housing needs. In areas excluded from the Green Belt for this purpose, strong development control measures will apply limiting any development on the land only to uses which would:

- (i) Be allowed in the Green Belt under Policy C2;
- (ii) Not prejudice the long-term use of the site for housing.

The possible future designation of the land for housing will be determined through subsequent reviews of the [UDP]."

The Sites – with the other 15 sites previously identified – were again identified as safeguarded land.

The Inspector's Report

120. The SLP allocated the Sites to the Green Belt, whilst removing other sites (particularly in the north of the borough) as the most appropriate means of providing land sufficient to meet the housing requirement which it of course set at 11,000 new dwellings by 2028. There were strong objections to the reallocation of the Sites, on the basis that a reallocation could only be made in exceptional circumstances – and no such circumstances existed in this case.

121. The Inspector dealt with the issue in paragraph 137 of his Report:

"There is also serious concern about the proposed return to the Green belt of some Safeguarded land previously identified in the [UPD]. However, when the [UDP] was examined, it was made clear that the status of this land should be reviewed in the context of the approved and emerging WM RSS strategy for urban renaissance. [The Council] undertook this review, and rejected the future development of sites at Tidbury Green because this settlement lacks the range of facilities necessary for further strategic housing growth, the scale of development envisaged would also be far too large to meet local housing needs and would threaten the coalescence with other settlements, including Grimes Hill. National policy enables reviews of the Green Belt to be undertaken (NPPF ¶ 84),

including considering the need to promote sustainable development, and it is clear from [the Council's] evidence that these sites would not meet this objective. These factors constitute legitimate reasons and represent the exceptional circumstances necessary to justify returning these sites to the Green Belt.”

122. The evidence the Council relied upon, and to which the Inspector referred, is largely set out in paragraphs 31 and following of the Statement of David Simpson dated 15 January 2014, prepared for this application. At the relevant time, Mr Simpson managed the Council's planning team. The preparation of the SLP was one of the team's main responsibilities.
123. The Council's decision to return the Sites to the Green Belt was based on the following:
- i) The risk of coalescence between Tidbury Green and Grimes Hill, in a gap already narrowed since 2005 by the grant of planning permission by the adjacent authority for housing on land at Selsdon Close in Grimes Hill (see paragraph 9 above), which would undermine the integrity and function of this part of the Green Belt.
 - ii) Planning permission had been refused for the land at Norton Lane in the adjacent Bromsgrove District (again, see paragraph 9 above), on Green Belt grounds.
 - iii) Planning permission had been refused for the Lowbrook Farm site in January 2013, before it had been allocated to the Green Belt, as it conflicted with the SLP spatial strategy, the land not being within a village identified for strategic housing growth.
 - iv) The development of the Sites was out of proportion with the existing settlement, and would completely dominate it.
 - v) As envisaged in the 2005 review, the suitability of the Sites for housing was assessed through the SHLAA, which concluded that they did not meet the minimum criteria for access to key services and were unsuitable to meet identified local housing needs. The Tidbury Green Farm was also considered to have “unacceptable impact on green belt functions and openness”.

Those reasons were reflected in the Council's written submissions to the Inspector dated 20 December 2012, to which I was also referred.

The Legal Background

124. There is a considerable amount of case law on the meaning of “exceptional circumstances” in this context. I was particularly referred to Carpets of Worth Limited v Wyre Forest District Council (1991) 62 P & CR 334 (“Carpets of Worth”), Laing Homes Limited v Avon County Council (1993) 67 P & CR 34 (“Laing Homes”), COPAS v Royal Borough of Windsor and Maidenhead [2001] EWCA Civ

180; [2002] P & CR 16 (“COPAS”), and R (Hague) v Warwick District Council [2008] EWHC 3252 (Admin) (“Hague”).

125. From these authorities, a number of propositions are clear and uncontroversial.

- i) Planning guidance is a material consideration for planning plan-making and decision-taking. However, it does not have statutory force: the only statutory obligation is to have regard to relevant policies.
- ii) The test for redefining a Green Belt boundary has not been changed by the NPPF (nor did Mr Dove suggest otherwise).

- a) In Hunston, Sir David Keene said (at [6]) that the NPPF “seems to envisage some review in detail of Green Belt boundaries through the new Local Plan process, but states that ‘the general extent of Green belts across the country is already established’”. That appears to be a reference to paragraphs 83 and 84 of the NPPF. Paragraph 83 is quoted above (paragraph 109). Paragraph 84 provides:

“When drawing up or reviewing Green Belt boundaries local planning authorities should take account of the need to promote sustainable patterns of development...”.

However, it is not arguable that the mere process of preparing a new local plan could itself be regarded as an exceptional circumstance justifying an alteration to a Green Belt boundary. National guidance has always dealt with revisions of the Green Belt in the context of reviews of local plans (e.g. paragraph 2.7 of PPG2: paragraph 83 above), and has always required “exceptional circumstances” to justify a revision. The NPPF makes no change to this.

- b) For redefinition of a Green Belt, paragraph 2.7 of PPG2 required exceptional circumstances which “necessitated” a revision of the existing boundary. However, this is a single composite test; because, for these purposes, circumstances are not exceptional unless they do necessitate a revision of the boundary (COPAS at [23] per Simon Brown LJ). Therefore, although the words requiring necessity for a boundary revision have been omitted from paragraph 83 of the NPPF, the test remains the same. Mr Dove expressly accepted that interpretation. He was right to do so.
- iii) Exceptional circumstances are required for any revision of the boundary, whether the proposal is to extend or diminish the Green Belt. That is the ratio of Carpets of Worth.
- iv) Whilst each case is fact-sensitive and the question of whether circumstances are exceptional for these purposes requires an exercise of planning judgment, what is capable of amounting to exceptional circumstances is a matter of law, and a plan-maker may err in law if he fails to adopt a lawful approach to exceptional circumstances. Once a Green Belt has been established and

approved, it requires more than general planning concepts to justify an alteration.

The Parties' Contentions

126. The parties agreed the above propositions: but there they diverged.
127. Mr Dove submitted that whether there were exceptional circumstances was a matter of planning judgment for the Inspector, who was entitled to conclude, as he did, that in this case exceptional circumstances existed that warranted the reallocation of the Sites into the Green Belt. He clearly had the exceptional circumstances test in mind – he expressly referred to it – and there was an evidential basis, provided by the Council, upon which he could conclude that the test had been met in this case.
128. Mr Dove relied upon Laing Homes – a relatively early case, but one which was decided after and in the light of Carpets of Worth – in which Brooke J considered the alteration of a Green Belt boundary to include white land previously unallocated. Having considered two authorities which had been cited to him, he continued (at page 54):

“I do not find in either of these decisions any clearcut ruling that if a council making a new green belt local plan is concerned with white unallocated land on the edge of the green belt in an earlier plan it must find that exceptional circumstances exist before it can alter the green belt boundary at this point. The decision of the Court of Appeal in the Carpets of Worth case shows that a local authority must have regard to Government green belt policies in... PPG2, but if it concerned with white unallocated land I can see no reason why in the exercise of its discretion it should not make a very clear finding, on green belt policy grounds, why the uncertainties which had existed when the previous plan was made have now been resolved, and why it should not in those circumstances determine to bring the land into green belt now without being out into the strait jacket of having to decide whether circumstances which can properly be described as exceptional exist. The duty of a council pursuant to section 36 of the 1990 Act is to have regard to Government policy. Provided that it has regard to it it is entitled to depart from it so long as it gives adequate reasons for doing so: see Carpets of Worth.”

Mr Dove submits that that covers this case.

129. Mr Lockhart-Mummery submitted that the Inspector's approach was wrong in law; and there was nothing here that could amount to exceptional circumstances properly considered.

Discussion

130. Mr Lockhart-Mummery particularly relied on COPAS, in which Simon Brown LJ, after confirming (at [20]) that, “Certainly the test is a very stringent one”, said this (at [40]):

“I would hold that the requisite necessity in a PPG 2 paragraph 2.7 case like the present – where the revision proposed is to *increase* the Green Belt – cannot be adjudged to arise unless some fundamental assumption which caused the land initially to be excluded from the Green Belt is thereafter clearly and permanently falsified by a later event. Only then could the continuing exclusion of the land from the Green Belt properly be described as ‘an incongruous anomaly’”.

In other words, something must have occurred subsequent to the definition of the Green Belt boundary that justifies a change. The fact that, after the definition of the Green Belt boundary, the local authority or an inspector may form a different view on where the boundary should lie, however cogent that view on planning grounds, that cannot of itself constitute an exceptional circumstance which necessitates and therefore justifies a change and so the inclusion of the land in the Green Belt (see Hague at [32] per Collins J. Collins J in Hague held that, in addition to the undoing of an assumption on which the original decision was made, a clear error in excluding land from the Green Belt is sufficient, no such error is suggested here; and I need not consider that aspect of Hague further.)

131. COPAS is, of course, binding upon me. Mr Dove said that these cases are fact-sensitive, and the facts of that case were very different from this. That is true; but, in the passage I have just quoted from Simon Brown LJ’s judgment, he was clearly and deliberately determining, as a matter of principle, what “exceptional circumstances” required, as a matter of law, in a case such as this. It is expressly a holding, with which the whole court agreed. I am consequently bound by it. In any event, it seems to have been consistently applied for over ten years; and, in my respectful view, is right.
132. In this case, following two inquiries, the 1997 UDP defined the Green Belt to exclude the Sites. Although there were uncertainties as to when and even if either site would be brought forward for housing development, the Green Belt boundary then determined and approved through the statutory machinery was not in any way provisional or uncertain. Mr Dove was wrong to describe the Green Belt boundary – as opposed to development of the sites – as “contingent”. As the Inspector found in 2005, despite the change in policy that meant that it was unlikely that these sites would be brought forward unless and until there was a change in (then) regional strategic policy, there was no justification for any change to the Green Belt boundary. That reflected the fact that Green Belt boundaries are intended to be enduring, and not to be altered simply because the current policy means that development of those sites is unlikely or even impossible. Indeed, where the current policy is to that effect, the amenity interests identified in the sites will be protected by those very policies as part of the general planning balance exercise. A prime character of Green Belts is their ability to endure through changes of such policies. For the reasons set out in Carpets of Worth (at page 346 per Purchas LJ) it is important that a proposal to extend a Green Belt is subject to the same, stringent regime as a proposal to diminish it,

because whichever way the boundary is altered “there must be serious prejudice one way or the other to the parties involved”.

133. Those are the principles. Applying them to this case, what (if anything has occurred since the Green Belt boundary was set in 1997 that necessitates and therefore justifies a change to that boundary now, to include the Sites?
134. Dealing with the reasons relied on by the Council (and effectively adopted by the Inspector), set out in paragraph 123 above, in turn:
- i) I have referred to two sites beyond the Bromsgrove district boundary, namely land at Selsdon Close and land at Norton Lane (paragraph 9 above). In 2005, the former was allocated, not to the Green Belt, but as an Area of Development Restraint. Since 2005, planning permission for housing development has been granted. In the SLP examination, the Council submitted to the Inspector that there was the risk of coalescence between Tidbury Green and Grimes Hill, in a gap already narrowed since 2005 by the grant of planning permission for housing on the Selsdon Close site. However:
 - a) In paragraph 3.149 of his 2005 report, the Inspector found that:

“... Both sites are well-contained and the Green Belt boundary remains firm and well-defined. There is no erosion of the gap between Solihull and Redditch and, given the retention of Green Belt around Grimes Hill in Bromsgrove DC, no risk of coalescence with this settlement...”.
 - b) Selsdon Close was not in the Green Belt, and possible future development must have been contemplated in 2005.
 - c) The grant of planning permission for Selsdon Close was not referred to by the Inspector in his SLP report as a change in circumstances sufficient to support the justification of a change in Green Belt boundary (or, indeed, referred to at all).

In short, there has been no change in circumstances since 2005: the Inspector – the same inspector – appears simply to have taken a different planning view of the adverse impact of coalescence between Tidbury Hill and Grimes Hill.

- ii) The land at Norton Lane was in the Green Belt in 2005, and, since then, housing development on that site has been refused on Green Belt grounds. That is unsurprising. That development control decision was presumably made in the knowledge that the Sites are white unallocated land. Again, no reference to the Norton Lane site is made by the Inspector in his SLP Report; but, in any event, it is difficult to see how the refusal of planning permission for that Green Belt site could support justification for a change in the Green Belt boundary. The reasons for the refusal of permission merely stressed the importance of the Green Belt in this area. That does not support a contention that the allocation of further land into the Green Belt is justified on grounds of exceptional circumstances.

- iii) Planning permission had been refused for the Lowbrook Farm site in January 2013, as it conflicted with the SLP spatial strategy, the land not being within a village identified for strategic housing growth. I do not see how this can possibly justify a change in the Green Belt boundary. Planning permission was refused on the basis of a conventional planning balance, the land being white unallocated land with the policy restrictions in Policy HS5 I have described (see paragraph 119 above), and the policy factors from the spatial strategy being sufficient to outweigh the factors in favour of development. This simply shows the planning system functioning as it should.
 - iv) The development of the Sites would be out of proportion to the existing settlement, and would completely dominate it. This is the only point relied upon by the Council that concerns Green Belt factors. However, the position with regard to the sites and the settlement of Tidbury simply has not materially changed since 1997.
 - v) The Council also rely on the fact that, as envisaged in the 2005 review, the suitability of the Sites for housing was assessed through the SHLAA, which concluded that they did not meet the minimum criteria for access to key services and were unsuitable to meet identified local housing needs. The Tidbury Green Farm was also considered to have “unacceptable impact on green belt functions and openness”. However, these conclusions were drawn on the basis of the conventional planning balanced exercise, and on the basis that the Sites were unallocated land. The SHLAA conclusions merely emphasise that, as policy currently stands, it may be unlikely that either of the Sites will be developed even if they remain as unallocated land.
135. I am persuaded by Mr Lockhart-Mummery that the Inspector, unfortunately, did not adopt the correct approach to the proposed revision of the Green Belt boundary to include the Sites, which had previously been white, unallocated land. He performed an exercise of simply balancing the various current policy factors, and, using his planning judgement, concluding that it was unlikely that either of these two sites would, under current policies, likely to be found suitable for development. That, in his judgment, may now be so: but that falls very far short of the stringent test for exceptional circumstances that any revision of the Green Belt boundary must satisfy. There is nothing in this case that suggests that any of the assumptions upon which the Green Belt boundary was set has proved unfounded, nor has anything occurred since the Green Belt boundary was set that might justify the redefinition of the boundary.
136. In my view, the Inspector’s substantive error is reflected in the adopted SLP, paragraph 11.6.6 of which states, simply:
- “... Following assessment in the [SHLAA], this land is no longer considered suitable for development and is proposed to be returned to the Green Belt.”
137. For those reasons, Ground 3 also succeeds.

Conclusion

138. For the reasons I have given, the application succeeds.

139. Given the breadth of available powers I have in that result (see paragraph 22 above), it was agreed that, if I found the application successful, I would give the parties an opportunity to attempt to agree an order or, failing agreement, to make written representations of the appropriate order. In the circumstances, I shall give the parties 7 days from the hand down of this judgment to lodge a consent order on the basis of this judgment or, alternatively, submissions on any outstanding consequential matters.

IN THE MANCHESTER CIVIL JUSTICE CENTRE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester,
Greater Manchester,
M60 9DJ

Date: 25/03/2013

Before:

THE HONOURABLE MR JUSTICE STUART-SMITH

Between:

**WAINHOMES (SOUTH WEST) HOLDINGS
LIMITED**

Claimant

- and -

**(1) THE SECRETARY OF STATE FOR
COMMUNITIES AND LOCAL GOVERNMENT**

Defendant

**(1) WILTSHIRE COUNCIL
(2) CHRISTOPHER RALPH CORNELL AND SARAH CECILIA CORNELL**

Interested Parties

David Manley Q.C. (instructed by **Ashfords LLP**) for the **Claimant**
Lisa Busch (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 11 March 2013

Judgment

Mr Justice Stuart-Smith:

Introduction

1. This is a claim under s.288 of the Town and Country Planning Act 1990. The Claimant (“Wainhomes”) challenges a decision dated 5 October 2012 by which inspector Mike Robins dismissed an appeal against the non-determination by Wiltshire Council (“the Council”) of a proposal to build up to 50 houses on land at Widham Farm, Widham Grove, Station Road, Purton, in Wiltshire. The inquiry was undertaken on the appeal of Mr and Mrs Cornell, who are now interested parties in these proceedings, against the Council’s non-determination of their application for planning permission. Wainhomes has an interest in the land the subject of the challenge by reason of an option agreement dated 13 November 2012.

2. The inspector indentified as one of the main issues in the case, whether or not there were material considerations that would outweigh the development plan presumption against development in the countryside. Central to that issue was whether or not there was a supply of specific deliverable sites sufficient to provide five years worth of housing against the Council's relevant housing requirements with an additional buffer of five per cent to ensure choice and competition in the market for land, as required by paragraph 47 of the National Planning Policy Framework ("NPPF"). As discussed in greater detail below, that issue involved consideration of whether the strategic sites included in Wiltshire's draft Core Strategy and AMR should be included by the inspector when determining the supply of deliverable sites over the next five years. The Council contended that they should be included; the appellants said that they should be excluded. After the hearing of the inquiry two decisions by another inspector (Inspector Papworth) were promulgated in relation to sites in Calne, which is also in Wiltshire. Those decisions decided, in materially identical terms, that strategic sites should be excluded from consideration of the supply of deliverable sites. Those decisions were sent promptly to the inspectorate by those who were at that time advising Mr and Mrs Cornell; but they were not considered by Inspector Robins. When he made his decision on 5 October 2012 he found against the appellants and included the strategic sites. Having done so he concluded that a five year housing supply had been shown.
3. By these proceedings Wainhomes advances five grounds of appeal, namely:
 - i) The inspector failed to have regard to a material consideration namely the two decisions at Calne or give reasons for not following the approach taken in those cases to the five year housing land supply;
 - ii) The inspector failed correctly to interpret the NPPF;
 - iii) The inspector gave inadequate reasons for the inclusion of strategic sites in the five year housing land supply and/ or the inclusion of the site was irrational;
 - iv) The inspector failed to take into account material considerations; gave inadequate reasons for concluding a five year housing land supply existed or otherwise behaved irrationally in so concluding;
 - v) The inspector made a mistake or otherwise reached a conclusion based on no evidence.
4. In summary, this judgment concludes that:
 - i) Ground 1 of the challenge is established. The inspector failed properly to exercise his discretion in deciding whether or not to admit the Calne decisions for consideration and failed to give proper reasons for his decision;
 - ii) The other grounds of challenge fail because when the Decision Letter is read fairly and with the reasonable latitude appropriate to a review of such decisions, it appears that the inspector made no material error of law, reached conclusions that it was open to him to reach on the material he considered, and gave adequate reasons for his decision.

The applicable principles

5. The principles applicable to a challenge under s.228 of the Town and Country Planning Act 1990 have been set out frequently and repeatedly in many decisions including decisions of the highest authority. It is neither necessary nor desirable to provide a comprehensive review in this case, and I merely highlight principles that are directly in point for this challenge.
6. In *Wiltshire Council v Secretary of State for Communities and Local Government and Robert Hitchins Limited* [2010] EWHC 1009 (Admin) Simon J provided a useful summary of the applicable principles at [7-8] which I gratefully adopt without setting it out again. I bear in mind at all times that:
 - a) Where an expert tribunal (such as a planning inspector) is the fact finding body, the *Wednesbury* unreasonable test will be “a difficult obstacle” and poses a “particularly daunting task” for an applicant under s.288;
 - b) A decision letter must be read in good faith and as a whole. It should be construed in a practical manner and not as if it were a contract or statute.
7. The scope and extent of an inspector’s obligation to provide reasons were explained in *South Buckinghamshire DC v Porter (no.2)* [2004] 1 WLR 1953 by Lord Brown of Eaton-Under- Heywood at [36]:

“The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the “principal important controversial issues”, disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.”

8. A decision maker ought to take into account all matters which might cause him to reach a different conclusion to that which he would reach if he did not take it into account. That includes considerations where there is a real possibility that the decision maker would reach a different conclusion if he did take that consideration into account. If a matter is excluded from consideration and it is clear that there is a real possibility that the consideration of the matter would have made a difference to the decision, a Judge is able to hold that the decision was not validly made. But if the Judge is uncertain whether the matter would have this effect or was of such importance in the decision-making process then he does not have before him the material necessary for him to conclude that the decision was invalid: see *Bolton MBC v SoSE* [1991] P&CR 343, 352-353. This obligation derives from s.70 (2) of the Town and Country Planning Act 1990 which applies to the determination of appeals by virtue of s.79 (4) of the Act: and see *R (on the application of Kides) v South Cambridgeshire DC* [2002] EWCA Civ 1370 at [122-127]. *Kides* establishes that the obligation to have regard to material considerations continues up to the time that the decision maker (in this case the inspector) makes his decision.
9. It is common ground that a previous inspector's planning decision is capable of being a material consideration, though the importance to be attached to a previous decision will depend upon the extent to which the issues in the previous decision and the current decision overlap. In *North Wiltshire DC v SoSE and Clover* [1992] 605 P&CR 137 Mann J addressed the limits of the inspector's obligation to have regard to previous decisions. At page 145 he said that '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'. Mann J provided what he called 'a practical test for the inspector' which was to ask '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?' This guidance cannot simply be applied by rote. S.38(6) of the Planning and Compulsory Purchase Act 2004 requires applications for planning permission to be determined in accordance with the development plan, unless material considerations indicate otherwise; and this requirement is reflected and reiterated. The development plan may itself be in a state of flux and development. That being so, previous decisions that were made when the planning regime or development plan were significantly different are likely to be of less materiality than recent decisions made in the same or a closely similar planning context.
10. The Town and Country Planning Appeals (Determination by Inspectors) (Enquiries Procedure) (England) Rules 2000 provides the procedural framework for the conducting of inquiries. They include rules that are intended to ensure that all relevant materials upon which the inspector will make his decision are available both to the inspector and to other parties according to an orderly timetable. The rationale for this procedural framework is self evident: the late submission of additional materials is liable to produce inefficiency, delay, increased expense and, at worst, injustice. However, it is inevitable that there will be occasions when information that is material to an inspector's decision will become available for the first time at a date which prevents compliance with the normal framework and rules. Against that eventuality the inspector has a discretion to admit materials which have not been provided in accordance with the normal procedural timetable. That discretion continues up to the

time that he makes his decision. Rule 18 makes express provision for the admission of material after the inquiry has been held and before he has made his decision as follows:

“(2) When making his decision the inspector may disregard any written representations or evidence or any other document received after the close of the inquiry.

(3) If, after the close of an inquiry, an inspector proposes to take into consideration any new evidence or any new matter of fact (not being a matter of government policy) which was not raised at the inquiry and which he considers to be material to his decision, he shall not come to a decision without first (a) Notifying [in writing] the persons entitled to appear at the inquiry who appeared at the matter in question; and (b) affording them an opportunity of making written representations to him or of asking for the re-opening of the inquiry. And they shall ensure that such written representations or requests to re-open the inquiry are received by the Secretary of State within three weeks of the date of notification.

(4) An inspector may, as he thinks fit, cause an inquiry to be re-opened and he shall do so if asked by the appellant or the local planning authority in the circumstances and within the period mentioned within paragraph (3): and where an inquiry is re-opened – (a) The inspector shall send to the persons entitled to appear at the inquiry who appeared at it a written statement of the matters with respect to which further evidence is invited;...”

11. The inspector’s power to admit material after an inquiry and the basis upon which he should exercise his discretion when asked to consider further material is the subject of Planning Inspectorate Good Practice Advice Notes. Advice Note 07 says at [67]:

“At any point before deciding the appeal the inspector may exercise his/her powers to seek further information from the parties if it is considered necessary to enable a properly informed, and reasoned, decision to be made.”

Advice note 10 says (at [7]) that, if new matters arise which are considered likely to be material to the inspector’s consideration of the case, the relevant material should be submitted at the earliest possible stage. At [9] the note says:

“The Secretary of State and Inspectors have discretion as to how to treat new materials submitted with or during the consideration of an appeal. They will apply their discretion on the basis of the relevance of the material to the appeal proposal, whether it simply repeats something that is already before the Inspector (for example, rebuttal evidence which adds nothing to what is already recovered in a proof of evidence) and whether it

would be procedurally fair to all parties “including interested persons” if the material were taken into account...”

12. These being principles that are relevant to apply in this case, I turn to consider the grounds of challenge.

Ground 1: The inspector failed to have regard to a material consideration namely the two decisions at Calne or to give reasons for not following the approach taken in those cases to the five year housing land supply

13. It is necessary to examine the factual background in more detail to put this ground of challenge in context. For convenient reference, the relevant passages of the Decision Letter are reproduced at Annexe A and are not set out again in the body of this judgment.

Factual background

14. The NPPF was introduced in March 2012. Under the heading “Delivering a wide choice of high quality homes”, [47] of the NPPF provides:

“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 planned periods;
- Identify and update annually a supply of specific deliverable sites sufficient to provide 5 years worth of housing against their housing requirements with an additional buffer of five per cent (moved forward from later in the planned period) to ensure choice and competition in the market for land...”

15. A footnote attached to the word “deliverable” in the second bullet point (“Footnote 11”) defines what that word means in [47] as follows:

“To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within 5 years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans.”

16. It was central to the appellants' case before the inspector that there was an insufficient supply of deliverable sites and that insufficiency was a material consideration in favour of the appellant's proposal. The importance of the existence or otherwise of deliverable sites sufficient to provide 5.25 years worth of housing against the identified housing requirements was made clear by Tracy Smith, the Council's Area Team Leader, who expressly accepted in evidence that if it were to be concluded that there was a shortfall in the 5 year housing land supply and if it were to be concluded (as the inspector did conclude in the Decision Letter) that prematurity was not a legitimate basis on which to reject the appeal then development of the appeal site would be permissible in principle subject to satisfactory s 106 contributions being made. She also accepted that the Council was not suggesting that any more sustainable sites existed within the settlement boundaries of Purton, that the site had no constraints that would preclude its development, and that the development of up to 50 units could not be characterised as "large scale". Accordingly, given the inspector's conclusion on prematurity, the sufficiency of the housing land supply was of primary importance.
17. Various different sources of data relating to land supply were available. The appellants favoured the evidence base that had underpinned the dRSS while the Council favoured the approach adopted in the emerging Core Strategy for Wiltshire ("eWCS"). A number of reasons were put forward by the parties in support of their respective positions, which were encapsulated in the witness statements of Mr Stephen Harris, a Chartered Town Planner who gave evidence for the appellants, and Mr Neil Tiley, who gave evidence for the Council and who was the Council's Manager of Monitoring and Evidence within Economy and Regeneration.
18. The inspector set out the competing positions at [11-14] of the Decision Letter. In summary, both parties accepted that the date and projections found in the adopted development plan were out of date. Revised housing requirements were promoted during the development of the dRSS, which was subject to Examination in Public and revision for the version that was published for consultation in 2008. However, because of the Coalition Government's antipathy towards RSSs, it was recognised that although the dRSS had reached an advanced stage it was extremely unlikely to be adopted. In response to this state of affairs, the Council reconsidered the housing requirements for Wiltshire and its reconsideration informed the eWCS. The eWCS had reached the stage of being submitted for Examination in Public but that examination had not taken place. The Council preferred to rely on the eWCS evidence base because extensive consultation had already taken place; but the outcome of the EIP was as yet unknown and uncertain, not least because it was subject to objections to proposed housing numbers and because concerns had been raised which suggested a need for the Council to re-consult.
19. A discrete but important argument related to what sites could properly be regarded as "deliverable" within the meaning of Footnote 11. The Council had included in its calculations 1,657 units from sites identified as "strategic sites" in the eWCS. None of these sites had planning permission. Mr Tiley did not know which, if any, were objected to. Mr Harris gave unchallenged evidence that, to the best of his knowledge, all were subject to objection. Mr Tiley was unable to identify any case in which the Secretary of State had deemed it appropriate to include emerging Core Strategy "strategic sites" in a calculation of the 5 year housing land supply where such sites

were subject to objection. At the present hearing, the Court was informed that no such decision of the Secretary of State had been identified but that there are decisions of the Secretary of State going the other way (i.e. excluding strategic sites which were subject to objection from inclusion in the calculation of the 5 year housing land supply). No further details about these decisions have been provided¹.

20. The potential impact of this dispute about strategic sites on the raw figures as found by the inspector emerges clearly from the evidence of Mr Harris for the present proceedings. Inspector Robins included strategic sites in his calculations, which led him to produce a table at [52] of the decision letter as follows:

Plan/Policy	Housing Requirement	5 year Housing Requirement	Housing Supply	Assessment (years)
dRSS Rest of Wiltshire	3,024	1,008	1522	7.5
dRSS North Wiltshire	10,684	3,549	3052	4.3
eWCS North and West HMA	15,249	5,083	6292	6.2

In other words, adopting the Appellant’s favoured approach by reference to the dRSS North Wiltshire would support the conclusion that there was a shortfall in supply but adopting the Council’s favoured approach by reference to the eWCS North and West HMA would support the conclusion that there was not.

21. Mr Harris, whose evidence is not contradicted, says that “for North Wiltshire the total supply from [strategic sites] in the next 5 years was 990 dwellings ... and 1,657 dwellings for the North and West HMA ...” The effect of excluding these dwellings upon the inspector’s table is shown in the right hand column of the adjusted table below:

Plan/Policy	Housing Requirement	5 year Housing Requirement	Housing Supply	Inspector Robins’ Assessment (years)	Adjusted assessment excluding strategic sites
dRSS Rest of Wiltshire	3,024	1,008	1522	7.5	7.5
dRSS North Wiltshire	10,684	3,549	3052	4.3	2.9
eWCS North and West HMA	15,249	5,083	6292	6.2	4.6

¹ Save possibly for a reference to one decision in the Calne Decision letters: see [26] below.

In other words, if the strategic sites are excluded there is a much greater shortfall by reference to the dRSS for North Wiltshire and there is also a shortfall by reference to the eWCS North and West HMA.

22. During the inquiry the inspector was referred to three previous decisions which touched on the issue of inclusion or exclusion of strategic sites. The decisions predated the introduction of the NPPF and were referred to at [22-23] of the Decision Letter. The decisions were:

i) The decision of Inspector Youle relating to land at Meadow Lane, Ruands, in Northamptonshire dated 18 January 2010. At [41] of his decision the inspector referred to “impending consents and DPD allocation” which the Council had brought into account in its calculation of the housing land supply. The inspector said:

“This includes a number of sites which are proposed as housing allocations in the Preferred Options versions of the TTP and the RAP. However, these Plans have not been subject to independent testing through an examination and several of the sites do not appear to have planning permission or to be allocated for housing in the Local Plan. In addition, some sites appear to have constraints which could impede deliverability. Consequently I have not been given sufficient evidence to indicate that these sites can be regarded as being available, suitable and achievable as required by PPS3. Therefore, it has not been demonstrated that a five year supply exists.”;

ii) The decision of Inspector Graham relating to land at Moat House Farm, Marston Green, in the area of Solihull MBC dated 21 February 2012. At [11] of her decision she addressed the question of Draft Local Plan sites, which the Council had brought into account in its calculation of the housing land supply. The inspector said:

“The draft Local Plan identifies proposed sites for 1,445 net additional dwellings, and the Council maintains that these should be taken into account when calculating the 5 years supply position. However, it is important to bear in my mind that this emerging Local Plan is still only a draft, which has yet to be the subject of further consultation, representations, and Examination in Public. Paragraph 54 of PPS3 explains that to be considered deliverable, sites should be available, suitable and achievable at the point of adoption of the relevant Local Development Document. There can be no guarantee that sites included in the current draft will remain in the finished version of the Local Plan, which in any event will not be adopted before 2013. As the situation stands at present, I consider that these sites should not be included when calculating the current five year land supply position”

iii) The later decision of Inspector Graham relating to land at Park Road, Malmesbury, Wiltshire dated 15 March 2012. At [18] of her decision she

accepted that “the Council’s 2010/2011 Annual Monitoring Report (AMR) provides the logical starting point for assessing the supply of deliverable housing sites.” She then considered specific sites, and at [23] she addressed the inclusion of three strategic sites at Chippenham which the Council had brought into account in its calculation of the housing land supply. The inspector said:

“It is fair to note that all three sites have physical, environmental and infrastructure constraints that will need to be addressed. However, the council has liaised with the developers of each, and obtained delivery trajectories which update the information provided in AMR. I see no convincing reason to doubt these revised figures, which indicate that within the five year period an additional 420 dwellings will be provided at the north Chippenham site, and a further 110 at the East Chippenham site. ”

23. Certain points may immediately be noted:

- i) Each inspector was prepared in principle to treat sites which did not yet have planning permission as potentially satisfying the PPS3 requirements;
- ii) The inspectors at Meadow Lane and Moat House Farm identified the fact that the Plans in those cases had not been subjected to Examination in Public as a feature weighing against the inclusion of the sites there listed;
- iii) In the Malmesbury decision, the inspector’s reservations about the status of two of the sites² were resolved by the calling of site specific evidence about their availability and deliverability. By contrast, no such evidence had been called in the other two appeals.

24. In the present case it was not suggested before the inspector and is not suggested now that strategic sites which did not yet have planning permission were necessarily to be excluded from the calculation of the housing land supply. The case advanced before the inspector (relying upon the previous decisions from Meadow Lane and Moat House Farm) was that because the eWCS had not been adopted, sites could not be regarded as available by virtue of their inclusion in the eWCS since their deliverability would be assessed through the Core Strategy process³. Inspector Robins dealt with the previous decisions specifically at [22-23] of the Decision Letter. He accepted that he should not prejudge the outcome of the eWCS Examination in Public and that the weight to be ascribed to the eWCS depended upon “the specific stage of preparation of the evidence base and the evidence supporting deliverability.” In contrast to what had happened at Malmesbury, no site specific evidence of deliverability was presented to Inspector Robins. Referring to that decision he said that “the Inspector in that case also accepted the principle of including strategic sites.”

² The reference to “the North Chippenham site, and ... the East Chippenham Site” suggests that they were two of the three strategic sites being considered in [23], with the third site not being named or included. However, it makes no difference to the argument if the North Chippenham and East Chippenham Sites in fact comprised all three sites: whether two or three strategic sites were included by the inspector, they were included after the provision of site-specific evidence.

³ See Mr Harris’ Witness Statement to the inquiry at [7.24-25]

It is evident that he saw the Malmesbury decision as supporting the conclusion (which he ultimately reached) that the strategic sites in the present case should be included.

25. Before Inspector Robins made his decision, two potentially relevant events occurred. First, on 3 September 2012 Mr Harris sent to the inspector a copy of a letter to the Council dated 29 August 2012 from Mr Andrew Seaman, the Senior Housing and Planning Inspector who was to conduct the Examination in Public of the eWCS. That letter raised a number of concerns about the eWCS and its prospects when submitted to the EIP. There were concerns relating to the soundness of the evidence base underpinning the housing chapter and the quality of the sustainability appraisal that had been carried out. Mr Seaman noted that the Council was “undertaking further consultation on its proposed pre-submission changes which will include details of the revised Sustainability Appraisal and an opportunity to comment upon the implications of the [NPPF] and Government Policy for Gypsies and Travellers.” He foresaw that the Examination would certainly extend into 2013. This further information was admitted by Inspector Robins. It seems likely that he had it in mind when he said, at [12] of his Decision Letter, that “the Council’s ambitions for this plan to be adopted by the end of 2012 or early 2013 may, however, be questioned in light of recent concerns and a need to re-consult.”
26. The second potentially relevant event was that Inspector Papworth made two decisions on 18 September 2012. Each decision related to land at Calne, in Wiltshire. Each considered in some depth (and in identical terms) the principles of development to be applied, at and from [9]. At [13-15] Inspector Papworth considered the housing requirement side of the equation established by [47] of the NPPF. He regarded the Malmesbury decision as “an anomaly” and contrasted it with a decision of the Secretary of State at Salisbury which “expressed a different view on a more advanced core strategy.” Turning to the state of development of the eWCS he said that it was “advanced inasmuch as an Examination is imminent, but in view of the extent of unresolved objections, including to the adequacy of the provisions for housing, there must remain doubts over the outcome and the consistency with Framework policies on increasing the supply of housing.” He held that the assumption that the Regional Strategy will not now be taken further does not materially alter the weight that can be attached to that evidence base relative to that presently informing the emerging Core Strategy”; and he concluded that, having regard to the first bullet point of Framework [47] “it is appropriate to regard the figures derived from the evidence for the Regional Strategy as a robust basis for determining the requirement.”
27. Turning to the supply side of the equation at [16], Inspector Papworth took the view that “to ensure a robust appraisal it is necessary to look further at the list of sites as discussed at the hearing.” It is apparent that site specific evidence had been presented in relation to some but not all sites, and that no site specific evidence had been submitted in relation to strategic sites, because Inspector Papworth said at [17-18]:

“17. Of the large permitted areas, there does appear to be doubt over the delivery of the former Bath and Portland Stoneworks site given its past history, not being in the 2009/10 Annual Monitoring Report, and little evidence that matters have moved on substantially since. Similarly with the Blue Hills Site, this appears to have been subject to persistent delays and to being put back in time in the successive Annual Monitoring Reports.

The delivery timescale for land adjacent to the scrap yard at Trowbridge also appears to be receding and reduction here is appropriate.

18. Other sites with permissions that had been previously dismissed have been brought back into the list, but it is apparent that even with the acceptance of these sites in total, a shortfall is possible. The Council has added 183 units in this category where none were previously included. Footnote 11 of the framework does provide for live permissions to be counted unless there is clear evidence that the schemes will not be implemented within 5 years, for example, they will not be viable, there is no longer a demand for the type of units or sites or sites have long term phasing plans. Clearly those where the permission has expired should not be included and where land was bought at or near the height of the market, doubts over viability would be legitimate. The prospect of new permissions on new land being required to replace such stalled schemes was discussed. Windfalls have also been significantly increased and that is provided for in paragraph 48 of the framework subject to certain requirements on historic evidence. There appears to be good reason to reduce the figure on that basis as suggested, *Vision and strategic sites are disputed in their entirety, and given the process to be gone through and the doubts over delivery, a degree of caution is appropriate. The requirement is to identify a supply of specific deliverable sites and to be considered deliverable, sites should be available now. These sites cannot truly be described as being available now.*” [Emphasis added]

28. Inspector Papworth concluded that there were sufficient doubts remaining over a number of included sites and supply provisions to increase further the shortfall which he had already found to have existed by reference to the various evidence bases even if those sites were included.
29. On 26 September 2012 Mr Harris had a conversation with someone at the relevant PINS team who advised him to send the Calne decisions together with a brief note. As a result of that conversation he sent the Calne decisions by email times at 10:35 that day. In that email he provided the suggested note in the following terms:

“Following our conversation earlier, I understand that the Council has not commented on the letter from Wiltshire Core Strategy Inspector and therefore you do not require any further comment from the Appellant.

We also discussed two appeal decisions which were issued last week for the two sites in Calne, Wiltshire. As they are in the same policy area of North Wiltshire we consider that they are relevant to our appeal as they deal with similar issues. However we are conscious that the Inquiry closed a number of weeks ago. Therefore you requested that we send the decisions to you

and you would decide whether or not they can be taken into account on this appeal.

Both of the attached appeals were heard at the same hearing in July this year. The first (APP/Y3940/A/12/2171106/NWF) was for some 154 dwellings and the second (APP/Y3940/A/12/2169716) was for up to 200 dwellings. Therefore both appeals (some 354 dwellings) would meet the 370 dwellings that remain to be planned for in the emerging Core Strategy for Calne. These decisions conclude that:

- The housing requirement to be used is the RSS Proposed Changes;
- The geographical area to determine the supply is the former North Wiltshire;
- Limited weight can be given to the emerging Core Strategy due to the stage it has reached;
- There are concerns on the deliverability of commitments and emerging allocations;
- The appeals would not result in prematurity against the emerging Core Strategy and neighbourhood plan.

Should you require any further information please do not hesitate to contact me”

30. Receipt of Mr Harris’ email was acknowledged at 15:50 on 26 September 2012. The only additional comment made by the person acknowledging receipt was the accurate but inconsequential statement that “The Appeals referred to have now been decided and the Decisions issued on 18 September”, which Mr Harris obviously knew already.
31. No further response was sent until 14:11 on Tuesday 2 October 2012 when a Case Officer from the relevant team at PINS emailed Mr Harris above a copy of the email with which he had sent the Calne decisions:

“Thank you for your email below. Unfortunately it was received too late to be considered by the Inspector.”
32. Inspector Robins’ decision was made on 5 October 2012. No reference was made in the Decision Letter to the Calne decisions; nor has any further information or reason been given to explain why Mr Harris’ email of 26 September 2012 and the Calne decision he had attached to it were not considered by the inspector.
33. The relevant passages in the Decision Letter are set out in Annexe A. The following features may conveniently be highlighted here:
 - i) The Decision Letter addresses the issue of “deliverable” sites and whether strategic sites should be included specifically at [21-24] and [51-54];

- ii) At [21] the inspector's acceptance that allocated sites, including those within emerging plans, could be included was subject to two provisos:
 - a) Acceptance would be "subject to the weight that can be given to that plan and its evidence base"; and
 - b) Acceptance would be "subject to ... the submission of information indicating a reasonable likelihood of them progressing within the five year period."
- iii) At [22] and [24] the inspector accepted that the existence of outstanding objections to sites meant that housing supply from such sites could not be guaranteed; and that he could not prejudge the outcome of the eWCS Examination. He treated these as matters going to the weight that he was able to attach to the Council's assertion that such allocations should be included;
- iv) At [23] he identified the evidential factors supporting his conclusion that exclusion of all the draft allocations was not appropriate, including that the Malmesbury inspector had "accepted the principle of including strategic sites.";
- v) He referred to the Moat House Farm and Meadow Lane decisions at [22]. There was no discussion of the basis or reasoning supporting either of those decisions or the Malmesbury decision. In particular, the Decision Letter does not evidence an appreciation that there was site specific evidence in the Malmesbury decision (but not in the other two) or that this might be a significant factor, despite his statement in [21] that acceptance would be subject to the submission of evidence indicating a reasonable likelihood of sites progressing within the five year period;
- vi) He accepted at [24] that, although exclusion of all the draft allocations was not appropriate, "full weight cannot be given to the precise numbers put forward by the Council"; but he concluded that it was "reasonable to include these sites in absence of specific evidence that they cannot be delivered.";
- vii) At [53], reviewing the contents of his table, he concluded that the Council had shown a 5-year housing supply relative to the dRSS Rest of North Wiltshire figures and the eWCS North and West HMA figures but had failed to demonstrate adequate supply for the dRSS North Wiltshire Area. He concluded that the weight to be given both to the dRSS figures and the eWCS figures was "somewhat lessened", to a similar degree in each case;
- viii) At [54] he stated that he did not rely upon the exact (or raw) figures in his table, but regarded the figures (taken broadly) to demonstrate a 5 year housing supply except in relation to the former North Wiltshire District, where he considered that the 4.3 years, set against an expectation of 5.25 years, did not represent a serious shortfall. As a result, he did not consider that there was an "overwhelming need for development to meet" the specific demand in the former North Wiltshire District. He therefore considered that a 5-year housing supply had been shown.

Discussion

34. The issue for the inspector was whether the strategic sites were “deliverable” as defined by Footnote 11 so that they fell within the meaning of [47] and should have been included in the assessment of housing land supply. Footnote 11 is not entirely straightforward, but the following points are relevant to its interpretation:
- i) It is common ground that planning permission is not a necessary prerequisite to a site being “deliverable”. This must be so because of the second sentence of Footnote 11 and because it would be quite unrealistic and unworkable to suggest that all of the housing land supply for the following five year period will have achieved planning permission at the start of the period;
 - ii) The parties are agreed that a site which is, for example, occupied by a factory which has not been derequisitioned, or which is contaminated so that housing could not be placed upon it, is not “available now” within the meaning of the first sentence of Footnote 11. However, what is meant by “available now” is not explained in Footnote 11 or elsewhere. It is to be read in the context that there are other requirements, which should be assumed to be distinct from the requirement of being “available now”, though there may be a degree of overlap in their application. This suggests that being available now is not a function of (a) being a suitable location for development now or (b) being achievable with a realistic prospect that housing will be delivered on the site within five years and that development of the site is viable. Given the presence of those additional requirements, I would accept Ms Busch’s submission for the Secretary of State: “available now” connotes that, if the site had planning permission now, there would be no other legal or physical impediment integral to the site that would prevent immediate development;
 - iii) Questions as to the viability of the proposed development or, for example, whether a developer had been identified or was in a position immediately to start work, would go to the question whether there was a realistic prospect of delivery within five years, but not to the question whether the site was available now. For the same reason, the fact that a site does not “offer a suitable location” does not affect whether or not it is “available now”, suitability of the location being a separate requirement;
 - iv) Where sites without planning permission are subject to objection, the nature and substance of the objections may go to the question whether the site offers a suitable location; and they may also determine whether the development is achievable with a realistic prospect that housing will be delivered on the site within five years. Even if detailed information is available about the site and the objections, prediction of the planning outcome is necessarily uncertain. All that probably need be said in most cases is that where sites do not have planning permission and are known to be subject to objections, the outcome cannot be guaranteed. Accordingly, where there is a body of sites which are known to be subject to objections, significant site specific evidence is likely to be required in order to justify a conclusion that 100% of all those sites offer suitable locations and are achievable with a realistic prospect that they will be delivered within five years;

- v) For similar reasons, where sites are in contemplation because of being included in an emerging policy document such as the eWCS, and the document is still subject to public examination, that must increase the lack of certainty as to outcome. That is implicitly recognised by [216] of NPPF which requires decision-takers to “give weight to relevant policies in emerging plans according to: the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given)” and to “the extent to which there are unresolved objections to relevant policies (the less significant the unresolved objections, the greater the weight that may be given)... .” As Inspector Graham pointed out in the Moat House Farm decision, there can be no guarantee that sites included in the current draft will remain in the finished version of the Local Plan. The approach taken by the various inspectors whose decisions have been considered in this case (including Inspector Robins at [22]) is therefore correct: the stage of preparation of the evidence base and the progress of the draft document are important considerations going to the prospects of housing being delivered within five years and therefore being “deliverable” within the meaning of Footnote 11.
35. I would accept as a starting point that inclusion of a site in the eWCS or the AMR is some evidence that the site is deliverable, since it should normally be assumed that inclusion in the AMR is the result of the planning authority’s responsible attempt to comply with the requirement of [47] of the NPPF to identify sites that are deliverable. However, the points identified in [34] above lead to the conclusion that inclusion in the eWCS or the AMR is only a starting point. More importantly, in the absence of site specific evidence, it cannot be either assumed or guaranteed that sites so included are deliverable when they do not have planning permission and are known to be subject to objections. To the contrary, in the absence of site specific evidence, the only safe assumption is that not all such sites are deliverable. Whether they are or are not in fact deliverable within the meaning of [47] is fact sensitive in each case; and it seems unlikely that evidence available to an inspector will enable him to arrive at an exact determination of the numbers of sites included in a draft plan that are as a matter of fact deliverable or not. Although inclusion by the planning authority is some evidence that they are deliverable, the weight to be attached to that inclusion can only be determined by reference to the quality of the evidence base, the stage of progress that the draft document has reached, and knowledge of the number and nature of objections that may be outstanding. What cannot be assumed simply on the basis of inclusion by the authority in a draft plan is that all such sites are deliverable. Subject to that, the weight to be attached to the quality of the authority’s evidence base is a matter of planning judgment for the inspector, and should be afforded all proper respect by the Court.
36. The first limb of the challenge under Ground 1 is that the inspector failed to have regard to the two decisions at Calne. While it is common ground that the inspector had a discretion whether to admit or to refuse to admit the late-submitted material, this limb raises the following questions:
- i) Whether the Calne decisions were material that might have caused him to reach a different conclusion to that he in fact reached without taking them into account; and, if they were

- ii) Whether the inspector's decision not to consider them was a lawful exercise of his discretion. This second question raises two sub-questions:
 - a) Whether the decision not to consider them could be and was a proper exercise of discretion in the circumstances prevailing; and
 - b) Whether the inspector was obliged to give any or proper reasons for his decision and, if so, whether he did so.
37. The Secretary of State accepts that it would have been open to him to submit evidence providing information about the circumstances in which the inspector decided not to consider the Calne decisions. Ms Busch correctly points out that the submission of such evidence could give rise to a risk of retrospective and unreliable justifications being advanced. That point is well made. However, once the risk is recognised, it can be addressed by the witness and should not be exaggerated; and the decision not to submit evidence covers not merely evidence about any reasoning that may have informed the inspector's decision but also primary factual evidence that may have been relevant. As it is, in the absence of such evidence, nothing is known save that the Calne decisions were submitted and received after the inquiry but nine days before the inspector made his decision on 5 October 2012.
38. Turning to the first question, there can be no real doubt that the Calne decisions were material that might have caused the inspector to reach a different conclusion to that he in fact reached without taking them into account. Ms Busch did not argue the contrary. It is, however, important to identify the features of the Calne decisions that gave them particular significance:
- i) While Inspector Robins already had before him three other decisions that were said to be relevant, they all pre-dated the introduction of the NPPF. The Calne decisions directly addressed the requirements of [47] of the NPPF, as Inspector Robins was required to do. It was therefore a previous decision that was directly in point;
 - ii) Inspector Papworth's Decision Letter identified the possibility of site specific evidence and that there had been none submitted in relation to the strategic sites in his case. His conclusion was that Malmesbury (where there had been site specific evidence) was "an anomaly" and he referred to a decision of the Secretary of State in relation to land at Salisbury going the other way, which does not appear to have featured in the material considered by Inspector Robins in his decision letter;
 - iii) Given its timing and the fact that Calne was also in Wiltshire, Inspector Papworth's decision was doubly relevant. It was relevant geographically since it addressed the same eWCS and other aspects of the Development Plan as applied to the Purton appeal; and it addressed them at the same stage of their progress as applied to the Purton appeal;
 - iv) Inspector Papworth had concluded that there were sufficient doubts remaining over a number of included sites and supply provisions to reduce the number of such sites that should be regarded as deliverable.

39. In these circumstances, there must have been (at least) a real possibility that considering the Calne decisions would have led Inspector Robins to a different conclusion. Although it would have been his decision and he would have been entitled to disagree with Inspector Papworth's conclusion, before doing so he would have been obliged to have regard to the importance of consistency and to give his reasons for departure from Inspector Papworth's decision. Given the features identified above, the result of applying Mann J's practical test would have been that he was disagreeing with a critical aspect of Inspector Papworth's decision, namely the conclusion that, there being no site specific evidence, the stage of progress of the development plan and the Council's evidence base did not justify the inclusion of the strategic sites as deliverable.
40. It would have been obvious to anyone receiving and reading the email (even without reading the attached Calne decisions themselves) that the decisions dealt with the same issues as were central to the Purton inquiry, that the decisions had been issued the previous week (and so could not have been provided earlier), and that, as very recent decisions, they were likely to address the same issues as arose in the Purton inquiry by reference to Wiltshire's Development Plan in its current state of development. Even a cursory review of the Calne decisions would have confirmed that this was so. In particular it would have confirmed that Inspector Papworth had produced a very recent assessment of whether, in the absence of site specific evidence, strategic sites included in the eWCS should be regarded as deliverable within the meaning of [47] of the NPPF.
41. That being so, the principle that a decision maker ought to take into account all matters which might cause him to reach a different conclusion and the obligation to have regard to material considerations up to the time that the decision is made weighed heavily in favour of Inspector Robins exercising his discretion in favour of admitting the Calne decisions for consideration.
42. In support of her opposition to Ground 1 Ms Busch submitted that the late submission of the Calne decisions was a breach of the 2000 Rules. That submission is rejected. No sensible interpretation of the rules can require the submission of information before it is in existence. Furthermore, Rule 18(2)-(4) of the 2000 Rules expressly contemplates the submission of late information and that it may be admitted by the inspector in accordance with the rules. Reference to The Good Practice Advice Note 10 also weighed in favour of admitting the decisions for consideration. It provided that the inspector would apply his discretion on the basis of:
- i) The relevance of the material to the appeal proposal: the material was highly relevant and potentially decisive in persuading Inspector Robins to find in the appellants' favour on the issue of strategic sites. Had he done so the balance of evidence in favour of a finding that the existence of a 5-year land supply was not shown would shift markedly, as Mr Harris' evidence and the revised tables set out above show;
 - ii) Whether it simply repeats something that is already before the inspector: it did not; and
 - iii) Whether it would have been procedurally fair to all parties if the material were taken into account: even if some modest delay were to be incurred in bringing

out the decision (as to which, see below) the admission of the Calne decisions could be handled in a way that was procedurally fair. The Secretary of State has not submitted to the contrary, which is realistic and correct.

43. I would accept that in some cases where information is submitted late there may be a tension between the need for finality and proportionate expense on the one hand and a willingness to admit evidence which has not been submitted in accordance with the normal procedural timetable under the Rules. However, there is no material available to the Court to suggest that there was any significant tension in this case. In particular, there is no evidence to suggest that the Calne decisions, though highly material, would open up any new issues or indicate the need for further evidence or hearings. On the evidence that is available to the Court, it would have been possible for any supplementary submissions to have been made shortly and in writing. It is not realistic to suggest, and it has not been suggested, that it would have been necessary to re-open the inquiry or that significant delay would have been caused by taking the Calne decisions into account. There is therefore no evidential basis upon which it could be said that it was disproportionate or contrary to the wider interests of justice for the Calne decisions to be taken into account.
44. In her oral submissions Ms Busch submitted that there was no obligation upon the inspector to state a reason for his decision not to take the Calne decisions into account because the Rules do not expressly require him to give reasons when exercising his discretion in these circumstances. That submission is rejected. No such implication can be deduced from the silence of the rules. On the contrary, the obligation on a decision maker to give reasons for his decisions (including exercises of discretion) which will or may affect the rights and obligations of parties to legal proceedings over which he is presiding is a general one which covers the exercise of Inspector Robins' discretion in this case. Reasons were required in accordance with the guidance in *South Buckinghamshire DC*: see [7] above.
45. To the extent that any reason can be said to have been given at all, it was the statement in the email of 2 October 2012: "Thank you for your email below. Unfortunately it was received too late to be considered by the Inspector." Taken at face value this says that not merely the Calne decisions but Mr Harris' email were not considered at all by the inspector, but it is plain that the email was read, at least by one or more case-workers. What is neither self-evident nor the subject of evidence is whether the inspector (or anyone to whom he reasonably delegated the task) looked at the Calne decisions themselves before deciding that they would not be taken into account by the inspector for the purposes of reaching his decision.
46. The position confronting the Court when considering this limb of Ground 1 is that there is no evidence to suggest that the inspector (or anyone on his behalf) carried out a reasoned assessment of the materiality of the Calne decisions or whether, applying the approach advocated by Good Practice Advice Note 10 or any other reasonable balancing exercise, the decisions should be admitted and taken into account. For completeness I record that it was not submitted by Ms Busch that he had done so. While she submitted that there was material which could have justified him in reaching a reasoned decision to reject the late submission of the Calne decisions, she did not (and could not in the absence of any reasons being given by the inspector) submit that he in fact did take such a reasoned decision. She concentrated upon the fact that the submission that the information was submitted late and that, as she

submitted, no one with knowledge of planning practice would be surprised to see the submission of the Calne decisions rejected on the basis that it was “just too late”.

47. Whether or not competent practitioners in the field would be surprised to see a late submission of information being knocked back on the basis that it is too late should depend upon the circumstances of the particular case, for two reasons. First, lateness is not of itself necessarily or even probably the determinative consideration. Secondly, the determinative considerations should be those that go into the mix of a reasoned assessment which balances those factors that tend in favour admission or rejection on the facts of a particular case. That assessment may be relatively simple or it may be complex; but in either event, the parties concerned are entitled to reasons that are intelligible and adequate to enable the reader to understand why the matter was decided as it was.
48. On the facts of this case, there is no information to support the suggestion that the Calne decisions were received too late to be considered by Inspector Robins and all the available information contradicts the assertion. The decisions were submitted promptly and were received 9 days before he made his decision on 5 October 2012. There is no evidence to suggest that he required that length of time to take them into account, or that his decision had in fact been taken by 29 September 2012, or that 5 October 2012 was an immutable deadline, or that reasonable accommodation could not have been made to ensure procedural fairness if the decisions were taken into account. In the absence of any reason or other material to explain why the date of the receipt of information trumped all other relevant considerations I am driven to the conclusion that the reason given is unsupportable. At its lowest, there was a failure to give adequate reasons so that the reader could know why, if any reasoned balancing exercise was in fact carried out, it led to the exclusion of the Calne decisions.
49. For these reasons, I therefore uphold Ground 1 of the challenge. In summary, his decision to exclude the Calne decisions from consideration should be set aside because:
 - i) The inspector failed to exercise his discretion properly. A proper exercise of his discretion would have involved a balancing exercise either in accordance with or similar to that advocated by Good Practice Advice Note 10. Had he carried out such an exercise, he should have concluded that the considerations that weighed in favour of admitting the Calne decisions outweighed those that weighed in favour of excluding them;
 - ii) The reason given by the inspector, namely that the material was submitted too late to be considered by the inspector, was unsustainable;
 - iii) The inspector failed to give adequate reasons for his decision not to take the Calne decisions into account.
50. Given that he did not take the Calne decisions into account, it is somewhat academic to advance as a separate head of challenge that the inspector failed to give reasons for not following the approach taken in them. That said, in accordance with the principles established in *North Wiltshire DC v SoSE and Clover*, if he had taken them into account and decided not to follow them, he should have given his reasons for

doing so. This would have been particularly important given the geographical and temporal overlap between the Calne and the Purton decisions.

Ground 2: The inspector failed to correctly interpret the NPPF.

Ground 3: The inspector gave inadequate reasons for the inclusion of strategic sites in the five year housing land supply and/ or the inclusion of the site was irrational.

Ground 4: The inspector failed to take into account material considerations; gave inadequate reasons for concluding a five year housing land supply existed or otherwise behaved irrationally in so concluding.

51. Although these are separate and distinct grounds of challenge, they overlap to the extent that they may be seen as different facets of the same argument, and I shall address them together. These Grounds fall to be considered by reference to the material actually considered by the inspector, without reference to the excluded Calne decisions.
52. Ground 2 is based upon an alleged disparity between the terms of [21] and [24] of the decision letter. In [21] the inspector wrote:

“In order for strategic plans to be put in place to address the housing supply, I consider that allocated sites can be included, including those within emerging plans, subject to the weight that can be given to that plan and its evidence base and the submission of information indicating a reasonable likelihood of them progressing within the five year period.”

In [24] he wrote:

“While full weight cannot be given to the precise numbers put forward by the Council, I consider it reasonable to include these sites in absence of specific evidence that they cannot be delivered.”

53. The Claimant submits that this shows that the inspector failed to apply the test required by [47] of NPPF. It is common ground that the correct test for sites not having planning permission, such as the strategic sites, is that set out in the first sentence of Footnote 11. The Claimant submits that the inspector failed to apply that test. It submits that the inspector has applied a presumption in favour of including sites in the absence of specific evidence that they cannot be delivered and that this is only appropriate in the case of sites having planning permission, where the approach is permitted and mandated by the second sentence of Footnote 11.
54. I have discussed Footnote 11 at [34-35] above. I accept that, for sites which fall to be considered under the first sentence of Footnote 11 to be taken as deliverable, it must be shown that they satisfy the requirements there set out. There is no a priori assumption that sites not having planning permission are deliverable. However, the fact that sites have been included in an emerging policy document or evidence base

may (and often will) be a starting point. In other words, inclusion may be evidence in support of a conclusion that the sites so included are deliverable. Once that is accepted, there is no reason in principle or on the proper interpretation of Footnote 11 why the fact that sites are included in the eWCS or the AMR may not be taken as sufficient evidence that they are deliverable in the absence of evidence (specific or otherwise) that they are not. The weight to be attached to the evidence that they are deliverable will vary from case to case and is a matter of planning judgment for the inspector: see [35] above. So too will be the weight to be attached to any evidence that they are not. Evidence that they cannot be delivered can in principle be specific (e.g. site specific evidence that a site is contaminated or in delay) or general (e.g. evidence that all sites are subject to objection, though this evidence may be refined to the extent that the objections to particular sites are identified and capable of being considered).

55. Once [24] is read in its entirety and in context, it appears that the inspector was adopting this approach. Having set out the Footnote 11 test at the commencement of [21], he acknowledged the existence of objections at [22] and identified that it was for him to decide what weight he should attach to the sites having been allocated. At [23] he identified as a reason for including the sites that they had been identified by the Council in the course of the development of the eWCS. He acknowledged the weakness inherent in that process at the start of [24] but came to a planning judgment that sufficient weight could be given to the evidence in favour of inclusion so that the sites could be included in the absence of other, specific, evidence that they could not be included. Seen in this light, it is apparent that he did not misinterpret Footnote 11 in the way suggested by the Claimant. While other inspectors may have given different weight to particular aspects of the evidence, that does not cast doubt on the interpretation adopted.
56. Two further questions need to be considered. The first is the significance or otherwise of the cited passage from [21] of the Decision Letter. Bearing in mind the obligation on the Court to read the Decision Letter in good faith and as a whole, construing it in a practical manner, the cited passage does not subvert the conclusion that the inspector did not misinterpret Footnote 11. If anything it states too demanding a test, since it suggests that the plan and evidence base can never be enough to support a finding that sites are deliverable in the absence of additional information indicating a reasonable likelihood of them progressing within the five year period. However, the passage should not be taken in isolation and, viewed overall, it appears that the inspector applied the correct test.
57. The second question is how an inspector should deal with the fact that, as Inspector Robins acknowledged, the housing supply from the sites could not be guaranteed. The logical consequence of this lack of certainty at first blush appears to be that the raw numbers should be discounted for the probability or certainty that not all included sites are in fact deliverable. Inspector Robins dealt with this in terms of weight, both at [21]-[24] and when tying his findings together at [51-54]. On a fair reading, at [54] he carried out a balancing exercise which started with the express recognition that “the exact numbers cannot be relied upon.” Prudently, in my judgment, he did not try to apply a precise numerical discount to reflect the uncertainty that he had identified. Instead, having acknowledged the uncertainty and after rehearsing the context in which the raw figures were generated, he reached the conclusion that the Council had

demonstrated a 5-year housing supply. On a detailed semantic analysis, his reference to 4.3 years set against an expectation of 5.25 years not representing a serious shortfall may be criticised on two grounds. First, it suggests that, despite his balancing exercise, he is still adhering to the raw and exact figure of 4.3 years. Second, it may fairly be pointed out that the issue was whether there was adequate provision and, on the basis of a finding of 4.3 years supply, there was not. However, while it might have been preferable for the inspector to have inserted a qualification to show that he was not “sticking” at 4.3 years, a fair reading of the relevant paragraphs as a whole shows that he did in fact recognise the weakness of the raw figures and was not committed to them; and the thrust of the sentence was that no overwhelming need for development had been shown, which was a conclusion that was open to him on his findings.

58. In summary, I would accept that the inspector could have included an additional sentence or two which would have made [54] more transparent; but in my judgment, fair reflection upon [54] shows that he has carried out a balancing exercise to reflect the lack of certainty he had identified.
59. In support of Ground 3 of the challenge, the Claimant criticises [23] of the Decision Letter. The first criticism, as advanced in the Claimant’s skeleton argument, is that the inspector failed to engage with the issue whether Malmesbury inspector’s approach was still valid in the light of the NFFP and the fact that it was designed to address economic stagnation and boost the housing land supply. At the hearing, however, although the Claimant again pointed out the broad economic purpose of the NPPF, its focus on the Malmesbury decision was different: it is now alleged that the significance of the Malmesbury decision is that there was site specific evidence justifying the inclusion of the sites. That observation is correct, but does not advance the criticism that had been advanced in the Skeleton Argument. In my judgment, while there is no sign that Inspector Robins identified the distinguishing feature that there had been site specific evidence available to the Malmesbury inspector in relation to strategic sites, that does not vitiate his decision. Furthermore, there is substance in the Secretary of State’s submission that the thrust of the second half of [23], including the reference to the Malmesbury decision, was to support the undoubtedly correct view that the weight to be attached to an emerging plan and its evidence base depended upon the stage of progress it had achieved.
60. The Claimant’s second criticism under Ground 3 is that [24] is opaque. If the Decision Letter had been a statute, it might have been profitable to observe that it could have been more detailed and precise; but it is not a statute. Having had the opportunity to reflect again upon the Decision Letter as a whole, I conclude that the inspector gave adequate reasons which were well capable of being understood by the parties. His reasons were not irrational, though other inspectors may have given different weight to the materials which he considered. On the contrary, having interpreted Footnote 11 correctly, he was entitled to reach the conclusions he did on the materials he considered and for the reasons he gave. The Court should in those circumstances be slow to interfere and I am not persuaded to do so.
61. Ground 4 is supported by a direct challenge to [54], which is said to be opaque. I reject that criticism. The Claimant points specifically to the words “...within the context of a strategic approach focussing sites on larger settlements or a housing market area that responds to the existing settlement pattern rather than political

boundaries ...”. When read fairly and in context those words are identifying the source and provenance of the “exact” figures that the inspector had set out in his table at [52] and which he had just acknowledged could not be relied on as such. Identifying the source and provenance of the figures served a useful and not unduly opaque purpose by giving some qualitative colour to the figures that he was balancing in that paragraph. Once again, the Court should be slow to interfere, and I am not persuaded to do so.

62. For these reasons I reject Grounds 2, 3 and 4 of the challenge. In summary, when read fairly, it appears that the inspector did not misinterpret Footnote 11, his reasons were adequate and rational and, on the basis of the materials that he considered, reflected planning judgments with which the Court should not interfere.

Ground 5: The inspector failed to take into account material considerations; gave inadequate reasons for concluding a five year housing land supply existed or otherwise behaved irrationally in so concluding.

63. This challenge relates to [58] of the Decision Letter where the inspector stated that the appropriateness of Purton’s settlement boundaries had been considered as part of the eWCS. He therefore concluded that the boundaries were up to date. On the evidence of Mr Harris, this was not based on any evidence and was wrong. It is alleged that this caused him to place more than limited weight on Policy H4 of the Local Plan which provided that New Dwellings in the Countryside outside the Framework boundaries will be permitted in strictly limited circumstances w were not applicable to the Purton proposals.
64. In my judgment there is no substance in this ground of challenge. Although his belief that the settlement boundaries had been considered as part of the eWCS was incorrect, the central fact was that the boundaries remained and were not changed by the eWCS. He was therefore entitled to conclude that the Policy H4 was not out of date and conformed to the Framework.
65. Ground 5 of the challenge is therefore rejected.

Conclusion

66. For the reasons set out above, Ground 1 of the grounds of challenge is established. Grounds 2, 3, 4, and 5 are rejected.

Annexe A
RELEVANT EXTRACTS FROM DECISION
LETTER
DATED 5 OCTOBER 2012

Background

...

11. In terms of housing supply both main parties accepted that the data and projections found in the adopted development plan are out of date. In this respect

revised housing requirements were promoted during the development of the draft Regional Spatial Strategy, (dRSS). This was subject to Examination in Public, incorporation of proposed changes and a version was published for consultation in July 2008. Although reaching an advanced stage, the likelihood of this plan being adopted is considered extremely low in light of the Secretary of State's avowed intention to revoke Regional Strategies, and the enactment of the Localism Act, which prevents further Regional Strategies from being created.

12. In response to the Government's position on Regional Strategies, the Council indicated that they moved to reconsider the housing requirements for Wiltshire to inform an emerging Core Strategy, (eWCS). This document has now reached a relatively advanced stage with a resolution by the Council and its submission for examination. The Council's ambitions for this plan to be adopted by the end of 2012 or early 2013 may, however, be questioned in light of recent concerns and a need to re-consult.

13. Notwithstanding this the Council point to an extensive consultation process involved in the development of evidence base and suggest that the eWCS is preferable, both in terms of the housing requirement and the strategic approach to delivery, to either the out of date WSSP or the figures promotes in the dRSS.

14. The appellant raised concerns over the weight that should be afforded to the eWCS in light of the objections to the proposed housing numbers, declaring a preference for the publicly tested dRSS. However, the appellant goes further, suggesting an additional proposition that irrespective of the housing land supply position, the proposal represents a sustainable development. As such it would benefit from the Frameworks' presumption in its favour, in light of a contention that the development plan policies are out of date.

...

Sites

...

19. Thus the appellant suggests a difference between the Council's housing supply and their own of some 4,045 dwellings, made up in part by site specific differences and in part by a disagreement over which elements should be included. Some 80% of the difference relates to the strategic sites, the Vision Sites, windfalls and previously discounted sites.

20. The Council refer to paragraph 47 of the Framework and its footnote regarding the inclusion of strategic sites, specifically allocations in the eWCS. This paragraph seeks to significantly boost the supply of housing and requires that 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". It specifically includes "key sites critical to the delivery of the strategy over the plan period".

21. The footnote sets out a definition for specific, deliverable sites: that they should be available now, offer a stable location for development now, and be achievable with a realistic prospect of delivery within five years. While on the face of it the requirement for sites to be available now would appear to preclude

sites without permission, the definition continues by addressing permitted sites directly. In order for strategic plans to be put in place to address the housing supply, I consider that allocated sites can be included, including those within emerging plans, subject to the weight that can be given to that plan and its evidence base and the submission of information indicating a reasonable likelihood of them progressing within the five year period.

22. I accept that where there are outstanding objections to sites, such matters need to be addressed and resolved, however, it is not for me to prejudge the outcome of the eWCS examination. I must decide on what weight I can give to the Council's assertion that these allocations should be included. In doing this it is necessary to separate the weight that can be given to the emerging plan from that associated with the evidence base associated with that plan. While I have been given examples from East Northampton and from Preston where draft allocations have not been included, the relevant weight must be ascribed based on the specific stage of preparation of the evidence base and the evidence supporting deliverability.

23. In this case I consider that exclusion of all the draft allocations is not appropriate. The Council have identified the sites following public consultation and they report that they have been subject to a Sustainability Appraisal. The sites are included within the AMR. While I note the appellant's concern over the recent appeal decision in Malmesbury the Inspector in that case also accepted the principle of including strategic sites. The Council relied on this decision to support their position that the sites were available and deliverable. The appellant referred me to a slightly earlier decision by the same Inspector which discounted draft Local Plan sites, however, it strikes me that this differs in the progress of the emerging plan and the evidence therefore available to the Inspector. The decision clearly refers to the need for consultation and representations on the emerging plan.

24. I accept that until planning permission is secured and the sites are built out, the housing supply from the sites cannot be guaranteed. Nonetheless to exclude such sites risks Councils having to plan to meet housing supply in a dynamic market on the basis of only sites with planning permission or from relatively old plans. This would risk devaluing the process of strategic planning. While full weight cannot be given to the precise numbers put forward by the Council, I consider it reasonable to include these sites in absence of specific evidence that they cannot be delivered.

25. Turning to Vision Sites similar arguments apply, albeit that they are not formally proposed as allocations. They are included in the AMR and the eWCS sets out a specific policy for their delivery. The Council presented evidence that two sites, Foundary Lane and Hygrade Factory, while not currently having permission, are likely to be delivered within the five year period. While there may be some matters to be resolved on these sites, and the appellant points to part of the Foundary Lane site and the Hygrade site as being still partly occupied, this does not mean they cannot be delivered. On balance I consider that the dwellings associated with these sites can be included.

...

Housing Requirements

39. This is not therefore, as the Council set out, a simple case of “a stark choice” between the dRSS and the eWCS. Although I favour the RSS figures at this stage, which furthermore provide a conservative approach to ensuring adequate provision of housing, I must give some weight to the emerging evidence base in light of its more up to date projections and the extent of more local engagement in assessment of needs.

...

Conclusions on the 5-Year Housing Supply

51. It has been necessary to carefully consider the housing requirement and supply situation in Wiltshire as a result of the changes being introduced at both national and local level. My conclusions are by necessity based on the evidence put before me and can in no way prejudice the outcome of the eWCS Examination in Public which may take place later in this year or early 2013.

52. I consider that the principal assessment should be made between the housing requirement for the RoNW and the housing supply presented by the Council, amended in response to the evidence provided at the Inquiry. This must be further considered in light of the housing demand across North Wiltshire and the emerging strategic approach for the North and West HMA. I have summarised this in the following table:

Plan/Policy	Housing Requirement	5-year Housing Requirement	Housing Supply	Assessment (years)*
dRSS Rest of North Wiltshire	3,024	1,008	1,522	7.5
dRSS North Wiltshire	10,684	3,549	3,052	4.3
eWCS North and West HMA	15,249	5,083	6,292	6.2

*5.25 years required to meet the 5% buffer

53. This indicates that the appellant’s proposition that even using the eWCS figures the Council cannot demonstrate a 5-year housing supply is not well founded. The Council have shown a 5-year housing supply relative to the RoNW dRSS figures and the eWCS North and West HMA, but have failed to demonstrate adequate supply for the dRSS North Wiltshire area. As set out above, I consider that the weight that can be given to the dRSS figures is somewhat lessened by the length of time since their preparation and examination, but also that the weight I can give to the emerging figures is similarly limited.

54. Nonetheless, although the exact numbers cannot be relied on, I am satisfied that the resulting figures indicate that within the context of a strategic approach focussing sites on larger settlements or a housing market area that responds to

the existing settlement pattern rather than political boundaries, the Council have demonstrated a 5-year housing supply. Furthermore I do not consider that the 4.3 years, set against an expectation of 5.25 years, represent a serious shortfall in the former North Wiltshire District, such that there is an overwhelming need for development to meet the specific demand.

55. In such circumstances I consider that there is sufficient evidence to support that, for this location, a 5-year housing supply has been shown.

...

58. My reading of the previous appeal decision on this site suggests that the boundaries were considered in both the preparation and Examination of the Local Plan in 2006, and while they do not appear to have been assessed against the significant increase in supply sought by the dRSS, they have been against the large increase currently promoted in the eWCS. This process has not led to a redrawing of the boundaries, consequently I do not consider that Policy H4, which they inform, is out of date or fails to conform with the Framework.



**Easter Term
[2017] UKSC 37**

*On appeals from: [2016] EWCA Civ 168, [2015] EWHC 132 (Admin) and
[2015] EWHC 410 (Admin)*

JUDGMENT

**Suffolk Coastal District Council (Appellant) v
Hopkins Homes Ltd and another (Respondents)
Richborough Estates Partnership LLP and another
(Respondents) v Cheshire East Borough Council
(Appellant)**

before

**Lord Neuberger, President
Lord Clarke
Lord Carnwath
Lord Hodge
Lord Gill**

JUDGMENT GIVEN ON

10 May 2017

Heard on 22 and 23 February 2017

*Appellants (Cheshire and
Suffolk)*

Martin Kingston QC
Hugh Richards
Jonathan Clay
Dr Ashley Bowes
(Instructed by Sharpe
Pritchard LLP)

Respondent (Hopkins)

Christopher Lockhart-
Mummery QC
Zack Simons

(Instructed by DLA Piper
UK LLP (Birmingham))

Respondent (Richborough)

Christopher Young
James Corbet Burcher
(Instructed by Town Legal
LLP)

Respondent (SSCLG)

Hereward Phillpot QC
Richard Honey
(Instructed by The
Government Legal
Department)

LORD CARNWATH: (with whom Lord Neuberger, Lord Clarke, Lord Hodge and Lord Gill agree)

Introduction

1. The appeals relate to the proper interpretation of paragraph 49 of the National Planning Policy Framework (“NPPF”), which is in these terms:

“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.”

2. The Court of Appeal observed that the interpretation of this paragraph had been considered by the Administrative Court on seven separate occasions between October 2013 and April 2015 with varying results. The court had been urged by all counsel “to bring much needed clarity to the meaning of the policy”. Notwithstanding the clarification provided by the impressive judgment of the court (given by Lindblom LJ), controversy remains. The appeals provide the opportunity for this court not only to consider the narrow issues of interpretation of para 49, but to look more broadly at issues concerning the legal status of the NPPF and its relationship with the statutory development plan.

3. Both appeals relate to applications for housing development, one at Yoxford in the administrative area of the Suffolk Coastal District Council (“the Yoxford site”), and the other near Willaston in the area of Cheshire East Borough Council (“the Willaston site”). In the first the council’s refusal of permission was upheld by the inspector on appeal, but his refusal was quashed in the High Court (Supperstone J), and that decision was confirmed by the Court of Appeal. In the second, the council failed to determine the application, and the appeal was allowed by the inspector. The council’s challenge succeeded in the High Court (Lang J), but that decision was reversed by the Court of Appeal, the judgment of the court being given by Lindblom LJ. Both councils appeal to this court.

The statutory provisions

4. The relevant statutory provisions are found in the Town and Country Planning Act 1990 (“the 1990 Act”) and the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”).

Plan-making

5. Part 2 of the 2004 Act deals with “local development”. Each local planning authority in England is required to “keep under review the matters which may be expected to affect the development of their area or the planning of its development” (2004 Act section 13), and to prepare a “local development scheme”, which (inter alia) specifies the local development documents which are to be “development plan documents” (section 15). The authority’s local development documents “must (taken as a whole) set out the authority’s policies (however expressed) relating to the development and use of land in their area” (section 17). “Local development documents” are defined by regulations made under section 17(7). In short they are documents which contain statements as to the development and use of land which the authority wishes to encourage, the allocation of sites for particular types of development, and development management and site allocations policies intended to guide determination of planning applications. Together they comprise the “development plan” or “local plan” for the area (Town and Country Planning (Local Planning) (England) Regulations (SI 2012/767) regulations 5 and 6).

6. In preparing such documents, the authority must have regard (inter alia) to “national policies and advice contained in guidance issued by the Secretary of State” (section 19(2)). Every development plan document must be submitted to the Secretary of State for “independent examination”, one of the purposes being to determine whether it complies with the relevant statutory requirements, including section 19 (section 20(1)(5)(a)). The Secretary of State may, if he thinks that a local development document is “unsatisfactory”, direct the local planning authority to modify the document (section 21). Section 39 gives statutory force to the concept of “sustainable development” (undefined). Any person or body exercising any function under Part 2 in relation to local development documents must exercise it “with the objective of contributing to the achievement of sustainable development”, and for that purpose must have regard to “national policies and advice contained in guidance issued by the Secretary of State ...” An adopted plan may be challenged on legal grounds by application to the High Court made within six weeks of the date of adoption, but not otherwise (section 113). Schedule 8 contained transitional provisions providing generally for a transitional period of three years, after which the plans produced under the previous system ceased to have effect subject to the power of the Secretary of State to “save” specified policies by direction.

Planning applications

7. Provision is made in the 1990 and 2004 Acts for the development plan to be taken into account in the handling of planning applications:

1990 Act section 70(2)

“In dealing with such an application the authority shall have regard to -

- (a) the provisions of the development plan, so far as material to the application,
- (b) any local finance considerations, so far as material to the application, and
- (c) any other material considerations.”

2004 Act section 38(6)

“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”

Unlike the development plan provisions, these sections contain no specific requirement to have regard to national policy statements issued by the Secretary of State, although it is common ground that such policy statements may where relevant amount to “material considerations”.

8. The principle that the decision-maker should have regard to the development plan so far as material and “any other material considerations” has been part of the planning law since the Town and Country Planning Act 1947. The additional weight given to the development plan by section 38(6) reproduces the effect of a provision first seen in the Planning and Compensation Act 1991 section 54A. In *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, the equivalent provision (section 18A of the Town and Country Planning (Scotland) Act 1972) was described by Lord Hope (p 1450B) as designed to “enhance the status”

of the development plan in the exercise of the planning authority's judgment. Lord Clyde spoke of it as creating "a presumption" that the development plan is to govern the decision, subject to "material considerations", as for example where "a particular policy in the plan can be seen to be outdated and superseded by more recent guidance". However, the section had not touched the well-established distinction between the respective roles of the decision-maker and the court:

"It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker ..." (p 1458)

9. An appeal against a refusal of planning permission lies to the Secretary of State, who is subject to the same duty in respect of the development plan (1990 Act sections 78, 79(4)). Regulations under section 79(6) and Schedule 6 now provide for most categories of appeals, including those here in issue, to be determined, not by the Secretary of State, but by an "appointed person" (normally referred to as a planning inspector). The decision on appeal may be challenged on legal grounds in the High Court (section 288).

The National Planning Policy Framework

10. The Framework (or "NPPF") was published on 27 March 2012. One purpose, in the words of the foreword, was to "(replace) over a thousand pages of national policy with around 50, written simply and clearly", thus "allowing people and communities back into planning". The "Introduction" explains its status under the planning law:

"Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. The National Planning Policy Framework must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions. ..."

11. NPPF is divided into three main parts: “Achieving sustainable development” (paragraphs 6 to 149), “Plan-making” (paragraphs 150 to 185) and “Decision-taking” (paragraphs 186 to 207). Paragraph 7 refers to the “three dimensions to sustainable development: economic, social and environmental”. Paragraph 11 begins a group of paragraphs under the heading “the presumption in favour of sustainable development”. Paragraph 12 makes clear that the NPPF “does not change the statutory status of the development plan as the starting point for decision making”. Paragraph 13 describes the NPPF as “guidance for local planning authorities and decision-takers both in drawing up plans and as a material consideration in determining applications”.

12. Paragraph 14, which is important in the present appeals, deals with the “presumption in favour of sustainable development”, which is said to be “at the heart of” the NPPF and which should be seen as “a golden thread running through both plan-making and decision-taking”. It continues:

“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.

For **decision-taking** this means:

- 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.”

We were told that the penultimate point (“any adverse impacts ...”) is referred to by practitioners as “the tilted balance”. I am content for convenience to adopt that rubric.

13. Footnote 9 (in the same terms for both parts) gives examples of the “specific policies” referred to:

“For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.”

14. These are said to be examples. Thus the list is not exhaustive. Further, although the footnote refers in terms only to policies in the Framework itself, it is clear in my view that the list is to be read as including the related development plan policies. Paragraph 14 cannot, and is clearly not intended to, detract from the priority given by statute to the development plan, as emphasised in the preceding paragraphs. Indeed, some of the references only make sense on that basis. For example, the reference to “Local Green Space” needs to be read with paragraph 76 dealing with that subject, which envisages local communities being able “through local and neighbourhood plans” to identify for “special protection green areas of particular importance to them”, and so “rule out new development other than in very special circumstances ...”

15. Section 6 (paragraphs 47 to 55) is entitled “Delivering a wide choice of high quality homes”. Paragraph 47 states the primary objective of the section:

“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 [the NPPF], 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% ... to ensure choice and competition in the market for land. ...;
- identify a supply of specific, developable sites or broad locations for growth, for years six to ten 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.”

16. This group of provisions provides the context for paragraph 49, central to these appeals and quoted at the beginning of this judgment; and in particular for the advice that “relevant policies for the supply of housing” should not be considered “up-to-date”, unless the authority can demonstrate a five-year supply of deliverable housing sites.

17. Section 12 is headed “Conserving and enhancing the historic environment” (paragraphs 126 to 141). It includes policies for “designated” and “non-designated” heritage assets, as defined in the glossary. The former cover such assets as World Heritage Sites, Scheduled Monuments and others designated under relevant legislation. A non-designated asset is one “identified as having a degree of significance meriting consideration in planning decisions because of its heritage interest”. Paragraph 135 states:

“The effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that affect directly or indirectly non-designated heritage assets, a balanced judgment will be required having regard to the scale of any harm or loss and the significance of the heritage asset.”

“Significance” in this context is defined by the glossary in Annex 2 as meaning “the value of a heritage asset to this and future generations because of its heritage interest”, which may be derived “not only from a heritage asset’s physical presence, but also from its setting”.

18. Annex 1 (“Implementation”) states that policies in the Framework “are material considerations which local planning authorities should take into account from the day of its publication” (paragraph 212); and that, where necessary, plans, should be revised as quickly as possible to take account of the policies “through a partial review or by preparing a new plan” (paragraph 213). However, it also provides that for a transitional period of a year decision-takers “may continue to give full weight to relevant policies adopted since 2004, even if there is a limited degree of conflict with this Framework” (paragraph 214); but that thereafter

“... due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in [the NPPF], the greater the weight that may be given).” (paragraph 215)

NPPF - Legal status and Interpretation

19. The court heard some discussion about the source of the Secretary of State’s power to issue national policy guidance of this kind. The agreed Statement of Facts quoted without comment a statement by Laws LJ (*R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] 1 WLR 3923, para 12) that the Secretary of State’s power to formulate and adopt national planning policy is not given by statute, but is “an exercise of the Crown’s common law powers conferred by the royal prerogative.” In the event, following a query from the court, this explanation was not supported by any of the parties at the hearing. Instead it was suggested that his powers derived, expressly or by implication, from the planning Acts which give him overall responsibility for oversight of the planning system (see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 140-143 per Lord Clyde). This is reflected both in specific

requirements (such as in section 19(2) of the 2004 Act relating to plan-preparation) and more generally in his power to intervene in many aspects of the planning process, including (by way of call-in) the determination of appeals.

20. In my view this is clearly correct. The modern system of town and country planning is the creature of statute (see *Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132, 140-141). Even if there had been a pre-existing prerogative power relating to the same subject-matter, it would have been superseded (see *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] 2 WLR 583, para 48). (It may be of interest to note that the great *Case of Proclamations* (1610) 12 Co Rep 74, which was one of the earliest judicial affirmations of the limits of the prerogative (see *Miller* para 44) was in one sense a planning case; the court rejected the proposition that “the King by his proclamation may prohibit new buildings in and about London ...”.)

21. Although planning inspectors, as persons appointed by the Secretary of State to determine appeals, are not acting as his delegates in any legal sense, but are required to exercise their own independent judgement, they are doing so within the framework of national policy as set by government. It is important, however, in assessing the effect of the Framework, not to overstate the scope of this policy-making role. The Framework itself makes clear that as respects the determination of planning applications (by contrast with plan-making in which it has statutory recognition), it is no more than “guidance” and as such a “material consideration” for the purposes of section 70(2) of the 1990 Act (see *R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2011] EWHC 97 (Admin); [2011] 1 P & CR 22, para 50 per Lindblom J). It cannot, and does not purport to, displace the primacy given by the statute and policy to the statutory development plan. It must be exercised consistently with, and not so as to displace or distort, the statutory scheme.

Law and policy

22. The correct approach to the interpretation of a statutory development plan was discussed by this court in *Tesco Stores Ltd v Dundee City Council (ASDA Stores Ltd intervening)* [2012] UKSC 13; 2012 SLT 739. Lord Reed rejected a submission that the meaning of the development plan was a matter to be determined solely by the planning authority, subject to rationality. He said:

“The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it.

It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others ... policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.” (para 18)

He added, however, that such statements should not be construed as if they were statutory or contractual provisions:

“Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann) ...” (para 19)

23. In the present appeal these statements were rightly taken as the starting point for consideration of the issues in the case. It was also common ground that policies in the Framework should be approached in the same way as those in a development plan. However, some concerns were expressed by the experienced counsel before us about the over-legalisation of the planning process, as illustrated by the proliferation of case law on paragraph 49 itself (see paras 27ff below). This is particularly unfortunate for what was intended as a simplification of national policy guidance, designed for the lay-reader. Some further comment from this court may therefore be appropriate.

24. In the first place, it is important that the role of the court is not overstated. Lord Reed’s application of the principles in the particular case (para 18) needs to be

read in the context of the relatively specific policy there under consideration. Policy 45 of the local plan provided that new retail developments outside locations already identified in the plan would only be acceptable in accordance with five defined criteria, one of which depended on the absence of any “suitable site” within or linked to the existing centres (para 5). The short point was the meaning of the word “suitable” (para 13): suitable for the development proposed by the applicant, or for meeting the retail deficiencies in the area? It was that question which Lord Reed identified as one of textual interpretation, “logically prior” to the exercise of planning judgment (para 21). As he recognised (see para 19), some policies in the development plan may be expressed in much broader terms, and may not require, nor lend themselves to, the same level of legal analysis.

25. It must be remembered that, whether in a development plan or in a non-statutory statement such as the NPPF, these are statements of policy, not statutory texts, and must be read in that light. Even where there are disputes over interpretation, they may well not be determinative of the outcome. (As will appear, the present can be seen as such a case.) Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the Planning Inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692; [2009] PTSR 19, para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence (see *Secretary of State for the Home Department v AH (Sudan)* [2007] UKHL 49; [2008] 1 AC 678, para 30 per Lady Hale.)

26. Recourse to the courts may sometimes be needed to resolve distinct issues of law, or to ensure consistency of interpretation in relation to specific policies, as in the *Tesco* case. In that exercise the specialist judges of the Planning Court have an important role. However, the judges are entitled to look to applicants, seeking to rely on matters of planning policy in applications to quash planning decisions (at local or appellate level), to distinguish clearly between issues of interpretation of policy, appropriate for judicial analysis, and issues of judgement in the application of that policy; and not to elide the two.

The two appeals

Evolving judicial guidance

27. To understand the reasoning of the two inspectors in the instant cases, it is necessary to set it in the context of the evolving High Court jurisprudence. The decisions in the two appeals were given in July and August 2014 respectively, after inquiries which ended in both cases in June. It is not entirely clear what information was available to the inspectors as to the current state of the High Court jurisprudence on this topic. The Yoxford inspector referred only to *William Davis v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin) (Lang J, 11 October 2013). This seems to have been the first case in which this issue had arisen. One of the grounds of refusal was based on a policy E20 the effect of which was generally to exclude development in a so-called “green wedge” area defined on the proposals map. Lang J recorded an argument for the developer that the policy should have been regarded as a “relevant policy for the supply of housing” under paragraph 49 because “the restriction on development potentially affects housing development”. The judge rejected this argument summarily, saying “policy E20 does not relate to the *supply* of housing and therefore is not covered by paragraph 49” (her emphasis).

28. By the time the two inquiries in the present case ended (June 2014), and at the time of the decisions, it seems that the most recent judicial guidance then available on the interpretation of paragraph 49 was that of Ouseley J in *South Northamptonshire Council v Secretary of State for Communities and Local Government and Barwood Land* [2014] EWHC 573 (Admin) (10 March 2014) (“the *Barwood Land* case”). Ouseley J favoured a wider reading which “examines the degree to which a particular policy generally affects housing numbers, distribution and location in a significant manner”. He thought that the language could not sensibly be given a very narrow meaning because

“This would mean that policies for the provision of housing which were regarded as out of date, nonetheless would be given weight, indirectly but effectively through the operation of their counterpart provisions in policies restrictive of where development should go ...”

He contrasted general policies, such as those protecting “the countryside”, with policies designed to protect specific areas or features “such as gaps between settlements, the particular character of villages or a specific landscape designation, all of which could sensibly exist regardless of the distribution and location of housing or other development.”

29. At that time, it seems to have been assumed that if a policy were deemed to be “out-of-date” under paragraph 49, it was in practice to be given minimal weight, in effect “disapplied” (see eg *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin), para 72 per Lewis J). In other words, it was treated for the purposes of paragraph 14 as non-policy, in the same way as if the development plan were “absent” or “silent”. On that view, it was clearly important to establish which policies were or were not to be treated as out-of-date in that sense. Later cases (after the date of the present decisions) introduced a greater degree of flexibility, by suggesting that paragraph 14 did not take away the ordinary discretion of the decision-maker to determine the weight to be given even to an “out-of-date” policy; depending, for example, on the extent of the shortfall and the prospect of development coming forward to make it up (see eg *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin), para 71 per Lindblom J). As will be seen, this idea was further developed in Lindblom LJ’s judgment in the present case.

The Yoxford site

30. In September 2013 Suffolk Coastal District Council refused planning permission for a development of 26 houses on land at Old High Road in Yoxford. The applicant, Hopkins Homes Ltd (“Hopkins”), appealed to an inspector appointed by the Secretary of State. He dismissed the appeal in a decision letter dated 15 July 2014, following an inquiry which began in February and ended in June 2014.

31. The statutory development plan for the area comprised the Suffolk Coastal District Local Plan (“SCDLP”) adopted in July 2013, and certain “saved” policies from the previous local plan (“the old Local Plan”) adopted in December 1994. Chapter 3 SCDLP set out a number of “strategic policies”, including:

i) Under the heading “Housing”, Policy SP2 (“Housing numbers and Distribution”) proposed as its “core strategy” to make provision for 7,900 new homes across the district in the period 2010-2027. In addition, “an early review” to be commenced by 2015 was to identify “the full, objectively assessed housing needs” for the district, with proposals to ensure that these were met so far as consistent with the NPPF. A table showed the proposed locations across the district to make up the total of 7,900 homes.

ii) Under the heading “The Spatial Strategy”, Policy SP19 (“Settlement Policy”) identified Yoxford as one of a number of Key Service Centres, which provide “an extensive range of specified facilities”, and where “modest estate-scale development” may be appropriate “within the defined physical limits” (under policy SP27 - “Key and Local Service Centres”). Outside these

settlements (under policy SP 29 - “The Countryside”) there was to be “no development other than in special circumstances”.

iii) The commentary to SP19 (para 4.05) explained that “physical limits boundaries” or “village envelopes” would be drawn up for the larger settlements, but that these limits are “a policy tool” and that where allocations are proposed outside the envelopes, the envelopes would be redrawn to include them.

32. In his report on the examination of the draft SCDLP, the inspector had commented on the adequacy of the housing provision (paras 31-51). He had noted how the proposed figure of 7,590 homes fell short of what was later agreed to be the requirement for the plan period of 11,000 extra homes. He had considered whether to suspend the examination to enable the council to assess the options. He decided not to do so, recognising that there were other sites which might come forward to boost supply, and the advantages of enabling these to be considered “in the context of an up-to-date suite of local development management policies that are consistent with the Framework ...”

33. The “saved” policies from the old plan included:

AP4 (“Parks and gardens of historic or landscape interest”)

“The District Council will encourage the preservation and/or enhancement of parks and gardens of historic and landscape interest and their surroundings. Planning permission for any proposed development will not be granted if it would have a materially adverse impact on their character, features or immediate setting.”

AP13 (“Special Landscape Areas”)

“The valleys and tributaries of (named rivers) and the Parks and Gardens of Historic or Landscape Interest are designated as Special Landscape Areas and shown on the Proposals Map. The District Council will ensure that no development will take place which would be to the material detriment of, or materially detract from, the special landscape quality.”

The appeal site formed part of an area of Historic Parkland (related to an 18th century house known as “Grove Park”) identified by the council in its Supplementary Planning Guidance 6 “Historic Parks and Gardens” (SPG) dated December 1995.

34. In his decision-letter on the planning appeal, the inspector identified the main issues as including: consideration of a five years’ supply of housing land, the principle of development outside the defined village, and the effects of the proposal on the local historic parkland and landscape (para 4). He referred to paragraphs 14 and 49 of the NPPF, which he approached on the basis that it was “very unlikely that a five years’ supply of housing land could now be demonstrated” (paras 5-6). There had been a debate before him whether the recent adoption of the local plan meant that its policies are “automatically up-to-date”, but he read the comments of the examining Inspector on the need for an early review of housing delivery as indicating the advantages of “considering development in the light of other up-to-date policies”, whilst accepting that pending the review “relevant policies for the supply of housing may be considered not to be up-to-date” (para 7).

35. He then considered which policies were “relevant policies for the supply of housing” within the meaning of paragraph 49 (paras 8-9). Policy SP2 “which sets out housing provision for the District” was one such policy and “cannot be considered as up-to-date”. Policy SP15 relating to landscape and townscape “and not specifically to the supply of housing” was not a relevant policy “and so is up-to-date”. For the same reason, policy SP19, which set the settlement hierarchy and showed percentages of total proposed housing for “broad categories of settlements”, but did not suggest figures or percentages for individual settlements, was also seen as up-to-date; as was SP27, which related specifically to Key and Local Service Centres, and sought, among other things, to reinforce their individual character.

36. Of the saved policy AP4 he noted “a degree of conflict” with paragraph 215 of the Framework “due to the absence of a balancing judgement in Policy AP4”, but thought its “broad aim” consistent with the aims of the Framework. He said: “these matters reduce the weight that I attach to Policy AP4, although I shall attach some weight to it”. Similarly, he thought Policy AP13 consistent with the aims of the Framework to “recognise the intrinsic quality of the countryside and promote policies for the conservation and enhancement of the natural environment” (para 10).

37. In relation to the proposal for development outside the defined village limits, he observed that the appeal site was outside the physical limits boundary “as defined in the very recently adopted Local Plan”. He regarded the policy directing development to within the physical limits of the settlement to be “in accordance with

one of the core principles of the Framework, recognising the intrinsic character and beauty of the countryside”. On this aspect he concluded:

“I consider that the appeal site occupies an important position adjacent to the settlement, where Old High Road marks the end of the village and the start to the open countryside. The proposed development would be unacceptable in principle, contrary to the provisions of Policies SP27 and SP29 and contrary to one of the core principles of the Framework.” (paras 13-14)

38. As to its location within a historic parkland, he discussed the quality of the landscape and the impact of the proposal, and concluded:

“20. In relation to the built character and layout of Yoxford and its setting, Old High Road forms a strong and definite boundary to the built development of the village here. I do not agree that the proposal forms an appropriate development site in this respect, but would be seen as an ad-hoc expansion across what would otherwise be seen as the village/countryside boundary and the development site would not be contained to the west by any existing logical boundary.

21. In respect of these matters, the historic parkland forms a non-designated heritage asset, as defined in the Framework and I conclude that the proposal would have an unacceptable effect on the significance of this asset. In relation to local policies, I find that the proposal would be in conflict with the aims of Policies AP4 and AP13 of the old Local Plan ...”

39. Finally, under the heading “The planning balance”, he acknowledged the advantage that the proposal would bring “additional homes, including some affordable, within a District where the supply of homes is a concern”, but said:

“However, I have found significant conflict with policies in the recently adopted Local Plan. I have also found conflict with some saved policies of the old Local Plan and I have sought to balance these negative aspects of the proposal against its benefits. In doing so, I consider that the unacceptable effects of the development are not outweighed by any benefits and means that it cannot be considered as a sustainable form of

development, taking account of its three dimensions as set out at paragraph 7 of the Framework. Therefore, the proposal conflicts with the aims of the Framework.” (paras 31-32)

40. Hopkins challenged the decision in the High Court on the grounds that the inspector had misdirected himself in three respects: in short, as to the interpretation of NPPF paragraph 49; as to the status of the limits boundary to Yoxford; and as to the status of Policy AP4. The Secretary of State conceded that the inspector had misapplied the policy in paragraph 49. Supperstone J referred to the approach of Ouseley J in the *Barwood Land* case, with which he agreed, preferring it to that of Lang J in the *William Davis* case. He accepted the submission for Hopkins that the inspector had erred in thinking that paragraph 49 only applied to “policies dealing with the positive provision of housing”, with the result that his decision had to be quashed (paras 33, 38-41). He held in addition that this inspector had wrongly proceeded on the basis that the village boundary had been defined in the recent local plan, rather than in the earlier plan (para 46); and that he had failed properly to assess the significance of the heritage asset as required by paragraph 135 of the Framework (para 53). On 30 January 2015 Supperstone J quashed the decision. The council’s appeal to the Court of Appeal failed. It now appeals to this court.

The Willaston site

41. The Crewe and Nantwich Replacement Local Plan, adopted on 17 February 2005 (“the adopted RLP”) sought to address the development needs of the Crewe and Nantwich area for the period from 1996 to 2011. Under the 2004 Act, it should have been replaced by a Local Development Framework by 2008. This did not happen. As a consequence, the policies were saved by the Secretary of State by Direction (dated 14 February 2008).

42. Crewe is identified as a location for new housing growth in the emerging Local Plan, which is the subject of an ongoing examination in public and subject to objections, as are some of the proposed housing allocations. At the time of the public inquiry in June 2014, the emerging Local Plan was understood to be over two years from being adopted. Richborough Estates Partnership LLP (“Richborough”) in August 2013 applied to Cheshire East Borough Council for permission for a development of up to 170 houses on land north of Moorfields in Willaston. The council having failed to determine the application within the prescribed period, Richborough appealed. Willaston is a settlement within the defined urban area of Crewe, but for the most part is physically separate from the town. As a consequence there is open land between Willaston and the main built up area of Crewe, within which open land the appeal site lies.

43. In the appeal Cheshire East relied on the adopted RLP, in particular policies NE.2, NE.4, and RES.5:

i) Policy NE.2 (“Open Countryside”) seeks to protect the open countryside from new build development for its own sake, permitting only a very limited amount of small scale development mainly for agricultural, forestry or recreational purposes.

ii) Policy NE.4 (“Green Gap”) relates to areas of open land around Crewe (including the area of the appeal site) identified as needing additional protection “in order to maintain the definition and separation of existing communities”. The policy provides that permission will not be granted for new development, including housing, save for limited exceptions. It has the same inner boundary as NE.2.

iii) Policy RES.5 (“Housing in the open countryside”) permits only very limited forms of residential development in the open countryside, such as agricultural workers’ dwellings.

44. In his decision letter dated 1 August 2014 the inspector allowed the appeal and granted planning permission for up to 146 dwellings. He concluded that Cheshire East was unable to demonstrate the minimum five year supply of housing land required under paragraph 47 of the NPPF. The council appears to have accepted at the inquiry that policy NE.2 was a policy “for the supply of housing”. The inspector thought that the same considerations applied to the other two policies relied on by the council, all of which were therefore relevant policies within paragraph 49, although he acknowledged that policy NE.4 also performed strategic functions in maintaining the separation and definition of settlements and in landscape protection. He noted also that two of the housing sites in the emerging local plan were in designated “green gaps”, which led him to give policy NE.4 reduced weight (paras 31-35).

45. He concluded on this aspect (para 94):

“94. I have concluded that there is not a demonstrable five-year supply of deliverable housing sites (issue (i)). In the light of that, the weight of policies in the extant RLP relevant to the supply of housing is reduced (issue (ii)). That applies in particular to policies NE.2, NE.4 and RES.5 in so far as their extent derives from settlement boundaries that in turn reflect

out-of-date housing requirements, though policy NE.4 also has a wider purpose in maintaining gaps between settlements.”

46. He considered the application of the Green Gap policy, concluding that there would be “no significant harm to the wider functions of the gap in maintaining the definition and separation of these two settlements” (para 95). His overall conclusion was as follows:

“101. I conclude that the proposed development would be sustainable overall, and that the adverse effects of it would not significantly and demonstrably outweigh the benefits when assessed against the policies in the Framework as a whole. There are no specific policies in the NPPF that indicate that this development should be restricted. In such circumstances, and where relevant development plan policies are out-of-date, the NPPF indicates that permission should be granted unless material considerations indicate otherwise. There are no further material considerations that do so.”

47. The council’s challenge succeeded before Lang J, who quashed the inspector’s decision by an order dated 25 February 2015. In short, she concluded that the inspector had erred in treating policy NE.4 as a relevant policy under paragraph 49, and in seeking “to divide the policy, so as to apply it in part only” (para 63). Richborough’s appeal was allowed by the Court of Appeal with the result that the permission was restored. The council appeals to this court.

The Court of Appeal’s interpretation

48. Giving the judgment of the court, Lindblom LJ referred to the relevant parts of the NPPF and (at para 21) the three competing interpretations of paragraph 49:

i) *Narrow*: limited to policies dealing only with the numbers and distribution of new housing, and excluding any other policies of the development plan dealing generally with the disposition or restriction of new development in the authority’s area.

ii) *Wider*: including both policies providing positively for the supply of new housing and other policies, or “counterpart” policies, whose effect is to restrain the supply by restricting housing development in certain parts of the authority’s area.

iii) *Intermediate*: as under (ii), but excluding policies designed to protect specific areas or features, such as gaps between settlements, the particular character of villages or a specific landscape designation (as suggested by Ouseley J in the *Barwood Land* case).

49. He discussed the connection between paragraph 49 and the presumption in favour of sustainable development in paragraph 14, which lay in the concept of relevant policies being not “up-to-date” under paragraph 49, and therefore “out-of-date” for the purposes of paragraph 14 (para 30). He explained the court’s reasons for preferring the wider view of paragraph 49. He read the words “for the supply of housing” as meaning “affecting the supply of housing”, which he regarded as not only the “literal interpretation” of the policy, but “the only interpretation consistent with the obvious purpose of the policy when read in its context”. He continued:

“33. Our interpretation of the policy does not confine the concept of ‘policies for the supply of housing’ merely to policies in the development plan that provide positively for the delivery of new housing in terms of numbers and distribution or the allocation of sites. It recognizes that the concept extends to plan policies whose effect is to influence the supply of housing land by restricting the locations where new housing may be developed - including, for example, policies for the Green Belt, policies for the general protection of the countryside, policies for conserving the landscape of Areas of Outstanding Natural Beauty and National Parks, policies for the conservation of wildlife or cultural heritage, and various policies whose purpose is to protect the local environment in one way or another by preventing or limiting development. It reflects the reality that policies may serve to form the supply of housing land either by creating it or by constraining it - that policies of both kinds make the supply what it is.” (para 33)

50. The court rejected the “narrow” interpretation, advocated by the councils, which it thought “plainly wrong”:

“It is both unrealistic and inconsistent with the context in which the policy takes its place. It ignores the fact that in every development plan there will be policies that complement or support each other. Some will promote development of one type or another in a particular location, or by allocating sites for particular land uses, including the development of housing. Others will reinforce the policies of promotion or the site allocations by restricting development in parts of the plan area,

either in a general way - for example, by preventing development in the countryside or outside defined settlement boundaries - or with a more specific planning purpose - such as protecting the character of the landscape or maintaining the separation between settlements.” (para 34)

51. Whether a particular policy of a plan was a relevant policy in that sense was a matter for the decision-maker, not the court (para 45). Furthermore

“46. We must emphasize here that the policies in paragraphs 14 and 49 of the NPPF do not make ‘out-of-date’ policies for the supply of housing irrelevant in the determination of a planning application or appeal. Nor do they prescribe how much weight should be given to such policies in the decision. Weight is, as ever, a matter for the decision-maker ... Neither of those paragraphs of the NPPF says that a development plan policy for the supply of housing that is ‘out-of-date’ should be given no weight, or minimal weight, or, indeed, any specific amount of weight. They do not say that such a policy should simply be ignored or disapplied ...”

52. In relation to the Yoxford site, the court agreed with Supperstone J that the inspector had wrongly applied the erroneous “narrow” interpretation. Policies SP 19, 27 and 29, were all relevant policies in that they all “affect the supply of housing land in a real way by restraining it” (paras 51-52). The court also agreed with the judge that the inspector had been mistaken in assuming that the physical limits of the village had been established in the 2013 plan (para 58); and also that he had misapplied paragraph 135 relating to heritage assets (para 65). In that respect there could be no criticism of his treatment of the impact of the development on the local landscape, but what was lacking was

“... a distinct and clearly reasoned assessment of the effect the development would have upon the significance of the parkland as a ‘heritage asset’, and, crucially, the ‘balanced judgment’ called for by paragraph 135, ‘having regard to the scale of any harm or loss and the significance of the heritage asset’.” (para 65)

53. In respect of the Willaston site, the court disagreed with Lang J’s conclusion that policy NE.4 was not a relevant policy for the supply of housing. The inspector had made no error of law in that respect, and his decision should be restored (paras 69-71).

Discussion

Interpretation of paragraph 14

54. The argument, here and below, has concentrated on the meaning of paragraph 49, rather than paragraph 14 and the interaction between the two. However, since the primary purpose of paragraph 49 is simply to act as a trigger to the operation of the “tilted balance” under paragraph 14, it is important to understand how that is intended to work in practice. The general effect is reasonably clear. In the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission, except where the benefits are “significantly and demonstrably” outweighed by the adverse effects, or where “specific policies” indicate otherwise. (See also the helpful discussion by Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), paras 42ff)

55. It has to be borne in mind also that paragraph 14 is not concerned solely with housing policy. It needs to work for other forms of development covered by the development plan, for example employment or transport. Thus, for example, there may be a relevant policy for the supply of employment land, but it may become out-of-date, perhaps because of the arrival of a major new source of employment in the area. Whether that is so, and with what consequence, is a matter of planning judgement, unrelated of course to paragraph 49 which deals only with housing supply. This may in turn have an effect on other related policies, for example for transport. The pressure for new land may mean in turn that other competing policies will need to be given less weight in accordance with the tilted balance. But again that is a matter of pure planning judgement, not dependent on issues of legal interpretation.

56. If that is the right reading of paragraph 14 in general, it should also apply to housing policies deemed “out-of-date” under paragraph 49, which must accordingly be read in that light. It also shows why it is not necessary to label other policies as “out-of-date” merely in order to determine the weight to be given to them under paragraph 14. As the Court of Appeal recognised, that will remain a matter of planning judgement for the decision-maker. Restrictive policies in the development plan (specific or not) are relevant, but their weight will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the “tilted balance”.

Paragraph 49

57. Unaided by the legal arguments, I would have regarded the meaning of paragraph 49 itself, taken in context, as reasonably clear, and not susceptible to much legal analysis. It comes within a group of paragraphs dealing with delivery of housing. The context is given by paragraph 47 which sets the objective of boosting the supply of housing. In that context the words “policies for the supply of housing” appear to do no more than indicate the category of policies with which we are concerned, in other words “housing supply policies”. The word “for” simply indicates the purpose of the policies in question, so distinguishing them from other familiar categories, such as policies for the supply of employment land, or for the protection of the countryside. I do not see any justification for substituting the word “affecting”, which has a different emphasis. It is true that other groups of policies, positive or restrictive, may interact with the housing policies, and so *affect* their operation. But that does not make them policies *for* the supply of housing in the ordinary sense of that expression.

58. In so far as the paragraph 47 objectives are not met by the housing supply policies as they stand, it is quite natural to describe those policies as “out-of-date” to that extent. As already discussed, other categories of policies, for example those for employment land or transport, may also be found to be out-of-date for other reasons, so as to trigger the paragraph 14 presumption. The only difference is that in those cases there is no equivalent test to that of the five-year supply for housing. In neither case is there any reason to treat the shortfall in the particular policies as rendering out-of-date other parts of the plan which serve a different purpose.

59. This may be regarded as adopting the “narrow” meaning, contrary to the conclusion of the Court of Appeal. However, this should not be seen as leading, as the lower courts seem to have thought, to the need for a legalistic exercise to decide whether individual policies do or do not come within the expression. The important question is not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47. If there is a failure in that respect, it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies. The shortfall is enough to trigger the operation of the second part of paragraph 14. As the Court of Appeal recognised, it is that paragraph, not paragraph 49, which provides the substantive advice by reference to which the development plan policies and other material considerations relevant to the application are expected to be assessed.

60. The Court of Appeal was therefore right to look for an approach which shifted the emphasis to the exercise of planning judgement under paragraph 14. However, it was wrong, with respect, to think that to do so it was necessary to adopt a reading

of paragraph 49 which not only changes its language, but in doing so creates a form of non-statutory fiction. On that reading, a non-housing policy which may objectively be entirely up-to-date, in the sense of being recently adopted and in itself consistent with the Framework, may have to be treated as notionally “out-of-date” solely for the purpose of the operation of paragraph 14.

61. There is nothing in the statute which enables the Secretary of State to create such a fiction, nor to distort what would otherwise be the ordinary consideration of the policies in the statutory development plan; nor is there anything in the NPPF which suggests an intention to do so. Such an approach seems particularly inappropriate as applied to fundamental policies like those in relation to the Green Belt or Areas of Outstanding Natural Beauty. No-one would naturally describe a recently approved Green Belt policy in a local plan as “out of date”, merely because the housing policies in another part of the plan fail to meet the NPPF objectives. Nor does it serve any purpose to do so, given that it is to be brought back into paragraph 14 as a specific policy under footnote 9. It is not “out of date”, but the weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles.

The two appeals

62. Against this background I can deal relatively shortly with the two individual appeals. On both I arrive ultimately at the same conclusion as the Court of Appeal.

63. It is convenient to begin with the Willaston appeal, where the issues are relatively straightforward. On any view, quite apart from paragraph 49, the current statutory development plan was out of date, in that its period extended only to 2011. On my understanding of paragraph 49, the council and the inspector both erred in treating policy NE.2 (“Countryside”) as “a policy for the supply of housing”. But that did not detract materially from the force of his reasoning (see the summary in paras 44-45 above). He was clearly entitled to conclude that the weight to be given to the restrictive policies was reduced to the extent that they derived from “settlement boundaries that in turn reflect out-of-date housing requirements” (para 94). He recognised that policy NE.4 had a more specific purpose in maintaining the gap between settlements, but he considered that the proposal would not cause significant harm in this context (para 95). His final conclusion (para 101) reflected the language of paragraph 14 (the tilted balance). There is no reason to question the validity of the permission.

64. The Yoxford appeal provides an interesting contrast, in that there was an up-to-date development plan, adopted in the previous year; but its housing supply

policies failed to meet the objectives set by paragraph 47 of the NPPF. The inspector rightly recognised that they should be regarded as “out-of-date” for the purposes of paragraph 14. At the same time, it provides a useful illustration of the unreality of attempting to distinguish between policies for the supply of housing and policies for other purposes. Had it mattered, I would have been inclined to place in the housing category policy SP2, the principal policy for housing allocations. SP 19 (settlement policy) would be more difficult to place, since, though not specifically related to housing, it was seen (as the commentary indicated) as a “planning tool” designed to differentiate between developed areas and the countryside.

65. Understandably, in the light of the judicial guidance then available to him, the inspector thought it necessary to make the distinction, and to reflect it in the planning balance. He categorised both SP 19 and SP 27 as non-housing policies, and for that reason to be regarded as “up-to-date” (see para 35 above). Under the Court of Appeal’s interpretation this was an erroneous approach, because each of these policies “affected” the supply of housing, and should have been considered out-of-date for that reason. On my preferred approach his categorisation was not so much erroneous in itself, as inappropriate and unnecessary. It only gave rise to an error in law in so far as it may have distorted his approach to the application of paragraph 14.

66. As to that I agree with the courts below that his approach (through no fault of his own) was open to criticism. Having found that the settlement policy was up-to-date, and that the boundary had been approved in the recent plan, he seems to have attached particular weight to the fact that it had been defined in “the very recently adopted Local Plan” (para 37 above). I would not criticise him for failing to record that it had been carried forward from the previous plan. In some circumstances that could be a sign of robustness in the policy. But in this case it was clear from the plan itself that the settlement boundary was, to an extent at least, no more than the counterpart of the housing policies, and that, under the paragraph 14 balance, its weight might need to be reduced if the housing objectives were to be fulfilled. He should not have allowed its supposed status as an “up-to-date” policy under paragraph 49 to give it added weight. It is true that he also considered the merits of the site (quite apart from the plan) as providing a “strong and definite boundary” to the village (para 20). But I am not persuaded that this is sufficient to make it clear that the decision would have been the same in any event.

67. I do not, however, agree with the Court of Appeal’s criticisms of his treatment of the Heritage Asset policy. Paragraph 10 of his letter (summarised at para 36 above) is in my view a faithful application of the guidance in paragraph 215 of the Framework. That does not, and could not, suggest that even “saved” development plan policies are simply replaced by the policies in the Framework. What it does is to indicate that the weight to be given to the saved policies should be assessed by reference to their degree of consistency with the Framework. That is what the

inspector did. Having done so he was entitled to be guided by the policies as stated in the saved plans, and not treat them as replaced by paragraph 135.

68. In any event, in so far as there needs to be a “balanced judgement”, which the Court of Appeal regarded as “crucial” (para 65), that seems to me provided by the last section of his letter, headed appropriately “the planning balance”. Overall the letter seems to me an admirably clear and carefully constructed appraisal of the relevant planning issues, in the light of the judicial guidance then available. It is with some reluctance therefore that I feel bound to agree with the Court of Appeal that the decision must be quashed, albeit on narrower grounds. The result, is that the order of Supperstone J will be affirmed, and the planning appeal will fall to be re-determined.

Conclusion

69. For these reasons I would dismiss both appeals.

LORD GILL: (with whom Lord Neuberger, Lord Clarke and Lord Hodge agree)

70. I agree with Lord Carnwath’s conclusions on the decision that is appealed against and with his views as to the disposal of these appeals. I only add some comments on the approach that should be taken in the application of the National Planning Policy Framework (the Framework) in planning applications for housing development.

71. These appeals raise a question as to the respective roles of the courts and of the planning authorities and the inspectors in relation to guidance of this kind; and a specific question of interpretation arising from paragraph 49 of the Framework.

72. In *Tesco Stores Ltd v Dundee City Council*, (*ASDA Stores Ltd intervening*) ([2012] UKSC 13) Lord Reed considered the former question in relation to development plan policies. He expressed the view, as a general principle of administrative law, that policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context (at para 18). The proper context, in my view, is provided by the over-riding objectives of the development plan and the specific objectives to which the policy statement in question is directed. Taking a similar approach to that of Lord Reed, I consider that it is the proper role of the courts to interpret a policy where the meaning of it is contested, while that of the planning authority is to apply the policy to the facts of the individual case.

73. In my opinion, the same distinction falls to be made in relation to guidance documents such as the Framework. In both cases the issue of interpretation is the same. It is about the meaning of words. That is a question for the courts. The application of the guidance, as so interpreted, to the individual case is exclusively a planning judgment for the planning authority and the inspectors.

74. The guidance given by the Framework is not to be interpreted as if it were a statute. Its purpose is to express general principles on which decision-makers are to proceed in pursuit of sustainable development (paras 6-10) and to apply those principles by more specific prescriptions such as those that are in issue in these appeals.

75. In my view, such prescriptions must always be interpreted in the overall context of the guidance document. That context involves the broad purpose of the guidance and the particular planning problems to which it is directed. Where the guidance relates to decision-making in planning applications, it must be interpreted in all cases in the context of section 70(2) of the Town and Country Planning Act 1990 and section 38(6) of the Planning and Compulsory Purchase Act 2004, to which the guidance is subordinate. While the Secretary of State must observe these statutory requirements, he may reasonably and appropriately give guidance to decision-makers who have to apply them where the planning system is failing to satisfy an unmet need. He may do so by highlighting material considerations to which greater or less weight may be given with the over-riding objective of the guidance in mind. It is common ground that such guidance constitutes a material consideration (Framework, para 2).

76. In relation to housing, the objective of the Framework is clear. Section 6, “Delivering a wide choice of high quality homes”, deals with the national problem of the unmet demand for housing. The purpose of paragraph 47 is “to boost significantly the supply of housing”. To that end it requires planning authorities (a) to ensure *inter alia* that plans meet 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 the Framework, including the identification of key sites that are critical to the delivery of the housing strategy over the plan period; (b) to 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% to ensure choice and competition in the market for the land; and (c) in the longer term to identify a supply of specific, developable sites or broad locations for growth for years six to ten and, where possible, for years 11-15.

77. The importance that the guidance places on boosting the supply of housing is further demonstrated in the same paragraph by the requirements that for market and affordable housing planning authorities should 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-years supply of housing land to meet their housing target; and that they should set out their own approach to housing density to reflect local circumstances. The message to planning authorities is unmistakeable.

78. These requirements, and the insistence on the provision of “deliverable” sites sufficient to provide the five years’ worth of housing, reflect the futility of authorities’ relying in development plans on the allocation of sites that have no realistic prospect of being developed within the five-year period.

79. Among the obvious constraints on housing development are development plan policies for the preservation of the greenbelt, and environmental and amenity policies and designations such as those referred to in footnote 9 of paragraph 14. The rigid enforcement of such policies may prevent a planning authority from meeting its requirement to provide a five-years supply.

80. This is the background to the interpretation of paragraph 49. The paragraph applies where the planning authority has failed to demonstrate a five-years supply of deliverable sites and is therefore failing properly to contribute to the national housing requirement. In my view, paragraph 49 derives its content from paragraph 47 and must be applied in decision-making by reference to the general prescriptions of paragraph 14.

81. To some extent the issue in these cases has been obscured by the doctrinal controversy which has preoccupied the courts hitherto between the narrow and the wider interpretation of the words “relevant policies for the supply of housing”. I think that the controversy results from too narrow a focus on the wording of that paragraph. I agree with the view taken by Lindblom LJ in his lucid judgement that the task of the court is not to try to reconcile the various first instance judgments on the point, but to interpret the policy of paragraph 49 correctly (at para 23). In interpreting that paragraph, in my opinion, the court must read it in the policy context to which I have referred, having in view the planning objective that the Framework seeks to achieve.

82. I regret to say that I do not agree with the interpretation of the words “relevant policies for the supply of housing” that Lindblom LJ has favoured. In my view, the straightforward interpretation is that these words refer to the policies by which acceptable housing sites are to be identified and the five-years supply target is to be achieved. That is the narrow view. The real issue is what follows from that.

83. If a planning authority that was in default of the requirement of a five-years supply were to continue to apply its environmental and amenity policies with full rigour, the objective of the Framework could be frustrated. The purpose of paragraph 49 is to indicate a way in which the lack of a five-years supply of sites can be put right. It is reasonable for the guidance to suggest that in such cases the development plan policies for the supply of housing, however recent they may be, should not be considered as being up to date.

84. If the policies for the supply of housing are not to be considered as being up to date, they retain their statutory force, but the focus shifts to other material considerations. That is the point at which the wider view of the development plan policies has to be taken.

85. Paragraph 49 merely prescribes how the relevant policies for the supply of housing are to be treated where the planning authority has failed to deliver the supply. The decision-maker must next turn to the general provisions in the second branch of paragraph 14. That takes as the starting point the presumption in favour of sustainable development, that being the “golden thread” that runs through the Framework in respect of both the drafting of plans and the making of decisions on individual applications. The decision-maker should therefore be disposed to grant the application unless the presumption can be displaced. It can be displaced on only two grounds both of which involve a planning judgment that is critically dependent on the facts. The first is that the adverse impacts of a grant of permission, such as encroachment on the greenbelt, will “significantly and demonstrably” outweigh the benefits of the proposal. Whether the adverse impacts of a grant of permission will have that effect is a matter to be “assessed against the policies in the Framework, taken as a whole”. That clearly implies that the assessment is not confined to environmental or amenity considerations. The second ground is that specific policies in the Framework, such as those described in footnote 9 to the paragraph, indicate that development should be restricted. From the terms of footnote 9 it is reasonably clear that the reference to “specific policies in the Framework” cannot mean only policies originating in the Framework itself. It must also mean the development plan policies to which the Framework refers. Green belt policies are an obvious example.

86. Although my interpretation of the guidance differs from that of the Court of Appeal, I have come to the same conclusions in relation to the disposal of these cases. I agree with Lord Carnwath that in the Willaston decision, notwithstanding an erroneous interpretation of policy NE.2 as being a policy for the supply of housing, the Inspector got the substance of the matter right and accurately applied paragraph 14. I agree too with Lord Carnwath, for the reasons that he gives (at para 68), that in the Yoxford decision the Inspector made a material, but understandable, error. I would therefore dismiss both appeals.

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 March 2014

Before :

Mr Justice Lindblom

Between :

Bloor Homes East Midlands Limited

Claimant

- and -

**Secretary of State for Communities and Local
Government**

First Defendant

- and -

Hinckley and Bosworth Borough Council

Second Defendant

Mr Jeremy Cahill Q.C. and Mr Satnam Choong (instructed by **Bloor Homes East Midlands Limited**) for the **Claimant**

Mr James Maurici Q.C. (instructed by **the Treasury Solicitor's Department**) for the **First Defendant**

Mr Timothy Leader (instructed by **Michael Rice, Solicitor, Hinckley and Bosworth Borough Council**) for the **Second Defendant**

Hearing date: 16 December 2013

Judgment

Mr Justice Lindblom:

Introduction

1. Next to the cemetery in the village of Groby in Leicestershire, on the open land between Groby and the neighbouring village of Ratby, is a site that has been put forward several times for the development of housing. Every attempt so far has failed. This case is about the latest.
2. By an application made under section 288 of the Town and Country Planning Act 1990 (“the 1990 Act”) the claimant, Bloor Homes East Midlands Limited (“Bloor”), challenges the decision of the inspector appointed by the first defendant, the Secretary of State for Communities and Local Government (“the Secretary of State”), to dismiss its appeal against the refusal by the second defendant, Hinckley and Bosworth Borough Council (“the Council”), of its application for planning permission to build 91 houses on the site. The inspector’s decision letter was issued on 22 January 2013. He had held an inquiry into Bloor’s appeal in December 2012.

The inspector’s decision letter

3. In paragraph 2 of his decision letter the inspector identified two main issues in the appeal. The first was “the adequacy of the supply of housing in the [borough of Hinckley and Bosworth]”, and the second “the effect of the proposed development on the character and appearance of the Rothley Brook Meadow Green Wedge [“the Green Wedge”]”. He also identified “a further consideration” in each of these two main issues was “the impact of the appeal proposals on the emerging Site Allocations and Generic Development Control Policies Development Plan Document [“the Site Allocations DPD”]”.

4. In paragraph 3 the inspector described the site, its location and its recent planning history:

“The 4.4ha appeal site is in the Green Wedge that separates the villages of Groby and Ratby. Although within Ratby Parish, it borders residential development in Groby and there is open land between the site and Ratby village. There have been several unsuccessful planning applications for housing on the site, the most recent resulting in a dismissed appeal in 2011. The Appellants have also sought to promote the site for housing at the local Inquiries into the Local Plan and Core Strategy.”

5. In paragraphs 4 to 15 of his letter the inspector considered the issue of housing supply.
6. In paragraph 4 he noted that the Hinckley and Bosworth Core Strategy (“the core strategy”), which was adopted in December 2009, envisaged that most of the housing development in the borough would be provided “in the urban area or through sustainable amendments to the settlement boundary and in two Sustainable Urban Extensions (SUEs), with a proportion distributed around rural areas in order to meet local needs”. The core strategy required 9,000 homes to be provided between 2006 and 2026, at an average of 450 a year. In paragraph 5 the inspector referred to Policy 8 of the core strategy, which identified Groby as one of the Key Rural Centres, where the Council would aim to allocate land for housing. The Council and Bloor had agreed that at least 110 new dwellings would be needed in Groby, and that this would require land outside the existing settlement boundary. That land was going to be identified in the Site Allocations DPD. The consultation draft of the Site Allocations DPD referred to the appeal site as one of the preferred options.

7. The inspector then considered the Council’s five-year supply of housing land:

“6. The 2011 appeal was decided in the light of the 2009 Core Strategy and at a time when the Council did not have a five year supply of housing land. Since then, in March 2012, the National Planning Policy Framework [“the NPPF”] has been issued. The Appellants have drawn attention to paragraph 49 of the NPPF, which says that housing supply policies should not be considered up to date if the local planning authority [cannot] demonstrate a 5 year supply of deliverable housing sites.

7. The calculation of housing land supply is not an exact science. The dispute between the parties relates largely to the choice of predictive models. The Council prefers the “Liverpool” method, which

spreads any shortfall in a given year over the remainder of the Plan period and is appropriate where there is not a severe shortage. On that basis the Council can show a supply of housing land extending to 5.27 years or 5.02 years if a 5% buffer is applied.

8. The Appellants prefer the “Sedgefield” model, which seeks to meet any shortfall earlier in the Plan period, on the basis that this approach accords with the views of the government, as set out in paragraph 47 of the NPPF with regard to boosting housing supply. They draw attention to a number of appeal decisions where this approach has been adopted. They also suggest that the 5% buffer is insufficient and that a 10% or 20% buffer would be more appropriate. This approach has some force given that the Council can only show a supply marginally in excess of five years.

9. Nonetheless, the Liverpool model is a recognised way of calculating housing supply. The Core Strategy Inspector anticipated that there would be shortfalls in housing land supply in the early years and that these would be made up later in the Plan period when, for example, the [Sustainable Urban Extensions] came on stream. It is clear from the Council’s evidence that progress has been made with the Earl Shilton and Barwell [Sustainable Urban Extensions] and that planning permission for the Barwell [Sustainable Urban Extension] is likely to be granted in the spring of this year.

10. The Appellants point out that the Core Strategy Inspector’s conclusions were based on the expectation that sites would be brought forward in the [Site Allocations DPD], the production of which has been delayed by several years. That situation was, however, known to the Inspector dealing with the 2011 appeal.

11. Given the inherent uncertainties in any predication of future supply and the fact that it is a method that chimes with the approach in the Core Strategy, I consider that it does provide a reasonable basis for assessing future supply. On that basis I conclude that the Council has shown that it has a five year supply of housing land. Furthermore, it is clear that the Council is not averse to boosting the supply of housing. Specifically, it is proposing to allocate land for housing in Groby. In the context of this appeal, it is not the amount of housing that is in dispute but its location.”

8. The inspector then referred to the policy in the NPPF for the operation of the planning system (paragraph 12 of the decision letter) He reminded himself that paragraph 12 of the NPPF says that it does not change the statutory status of the development plan as the starting point for decision making and that development proposals in conflict with an up to date plan should be refused unless other material considerations indicate otherwise. He mentioned the principles set out for the planning system in paragraph 17 of the NPPF, one of which is that planning should be “genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans setting out a positive vision for the future of the area”, and providing “a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency”.

9. The inspector went on to consider the Site Allocations DPD process and its bearing on the appeal before him:

“13. The consultation period for the [Site Allocations DPD] Preferred Options Report ended in April 2009 and the document is in the process of being amended in the light of the responses received. A pre-submission draft is due to be published in August of this year, followed by submission to the Secretary of State at the beginning of 2014. The fact that the Council has identified the appeal site as a preferred option for housing development is clearly a factor that lends support to the Appellants’ position. Nevertheless, as in 2011, the weight to be attached to it is limited by the fact that the document in question is a consultation draft.

14. The local community, both as individuals and through the Parish Councils, have been actively involved in the consultation process. It may be that this process will result in the appeal site being allocated for housing development. To grant planning permission at this time, however, would pre-empt a decision that should properly be made through the development plan process. It would render futile the work done by the Council and the contributions made by the local community, thereby reducing public confidence in the planning process and would be contrary to the spirit of paragraphs 12 and 17 of the ... NPPF.”

10. That analysis led the inspector to his conclusion on the issue of housing supply:

“15. In conclusion I consider that the Council has an up to date development plan in the form of the 2009 Core Strategy, that it has shown the existence of a five year supply of housing land and that it would be premature to grant planning permission for the development of the appeal site in advance of the adoption of the [Site Allocations DPD].”

11. The inspector dealt with the second main issue, relating to the Green Wedge, in paragraphs 16 to 24 of his decision letter. He referred in paragraph 16 to the provenance of development plan policy for the Green Wedge in the Leicestershire Structure Plan of 1987. The relevant policy now was Policy 9 of the core strategy, which, said the inspector, “seeks to protect the Green Wedges and lists various uses that would be acceptable within them”. Since housing was not one of those acceptable uses, he said, “the appeal proposal conflicts with [Policy 9]”.
12. In paragraph 17 the inspector acknowledged that Policy 9 required a review of the Green Wedge. This, together the Council’s Strategic Housing Land Availability Assessment, would inform the Site Allocations DPD. The four objectives for Green Wedges, which would inform the review, were, in the inspector’s words, “to prevent the merging of settlements, guide urban form, provide a “green lung” and act as a recreation resource”. As the inspector observed in paragraph 18, the review was “currently in progress and will establish how much land should be released from different parts of the Green Wedge and allocated for development”.
13. The inspector said in paragraph 19 of his letter that the appeal site had been considered at three inquiries – a local plan inquiry in 1996 and 1997, the inquiry into the core strategy and the appeal inquiry in 2011 – and on each occasion it had been concluded by the inspector that development “would detract from the open character and appearance of the area” and would conflict with relevant policy. The policy to which the inspector referred in particular was Policy 9 of the core strategy.
14. In paragraphs 20 to 22 of his letter the inspector considered the contribution made by the appeal site to the amenity and function of the Green Wedge:

“20. The appeal site is bounded to the east by a stream, beyond which is a public footpath that runs along the embankment of a disused railway line and currently marks the edge of the built up area of the village. To the south is a strip of open land lying between the site and [Sacheverell] Way. The northern boundary is formed by a stream, beyond which is a terrace of three houses, known as Brookvale Cottages. To the west is the road linking Ratby and Groby, a large single house, Ashdale, and the Groby Village cemetery. A public footpath runs between the cemetery and the appeal site.

21. In purely physical terms the proposed development would reduce the gap between Ratby and Groby. Although the site adjoins an extensive area of suburban housing, this is effectively screened by the railway embankment, which forms a logical boundary to the built up area. The Appellants point out, with reference to the 2011 appeal decision, that openness for its own sake is not one of the four objectives of the Green Wedge. However, the character of the land in question clearly has a bearing on its contribution to those objectives. The appeal site has an open and rural character while the cemetery and nearby school playing fields, though less rural in character, also have an open aspect that helps to emphasise the separation of the two villages.

22. The Appellants draw attention to the fact that the public do not have a right of access onto the site and say that it can not, therefore, have any recreational value. I see no reason, however, to restrict the definition of recreation to sporting or other activities taking place on the land itself. Recreation can also include walking and general enjoyment of the countryside. There are well used public footpaths along two of the site boundaries and the site provides an attractive complement to their use. In my view the site is, in that respect, a valuable informal recreation resource, the importance of which is enhanced by its proximity to the built up area.”

15. As the inspector recognized in paragraph 23 of his decision letter, the fact that the Council had included the site as one of the preferred options for housing development in Groby was “clearly a material consideration and is one that favours the Appellants’ proposals”. But he said the weight to be attached to this consideration was “reduced by the fact that the [Site Allocations DPD] and Green Wedge Review are still at draft stage”. “It may well be”, he said, “that the outcome of the process will be to amend the Green Wedge boundary in the area and allocate the site for housing” But he added that this was “far from being a foregone conclusion”.
16. Bringing these considerations together in paragraph 24 of his letter, the inspector took account of “the possible future changes to the boundary of the Green Wedge in this area”, but said that he “must consider the appeal proposal in the light of the development plan as it stands at present”. He said that in his view “the proposed development would detract from the character and appearance of the area and would conflict with Policy 9 of the Core Strategy”. The core strategy was “up to date, having been adopted in 2009”, and he could see “no reason to disagree with the conclusion reached in the 2011 appeal decision.”
17. The inspector’s final conclusion is in paragraphs 29 and 30 of his letter:

“29. Having regard to all of the above, I consider that the appeal proposal would harm the character and appearance of the Green Wedge and would conflict with Policy 9 of the 2009 Core Strategy. While taking account of the possible changes to the Green Wedge boundary resulting from consideration of the [Site Allocations DPD], I concur with the Council’s view that the appeal proposal is premature. I do not accept that the housing supply situation is such as to require the granting of planning permission on this site in advance of decisions on the draft [Site Allocations DPD] and the Green Wedge Review, both of which are well advanced. To do so would effectively pre-empt those decisions, overriding the public consultation process and contravening the aims of the ... NPPF.

30. For the reasons given above and having regard to all other matters raised, I conclude that the appeal should be dismissed.”

The issues for the court

18. The application raises five principal issues:
 - (1) whether the inspector either failed to apply or to explain how he had applied to Bloor’s proposal the principles of government policy in paragraph 14 of the NPPF for decision-making where the development plan is “absent” or “silent” (ground 1 of the application);
 - (2) whether the inspector failed to understand and consider the evidence and submissions presented to him by Bloor on the five-year supply of land for the development of housing, and whether the reasons he gave for his conclusion on this matter are adequate (ground 2);
 - (3) whether the inspector failed to apply the Government’s policy on the prematurity of proposals for development, or to explain why he had not applied that policy (ground 3);
 - (4) whether, in reaching his conclusions on the likely effect of the proposed development on the Green Wedge, and in considering the weight that ought to be given to Policy 9 of the core strategy, the inspector failed to have regard to material considerations and had regard to considerations that were immaterial (ground 4); and
 - (5) whether the inspector failed to address Bloor’s contention that the proposed development would be “sustainable development” within the meaning of government policy, that Policy 9 of the core strategy was out of date, and that there was therefore a presumption in favour of planning permission being granted under the policy in paragraphs 14 and 49 of the NPPF (ground 5).

Relevant legal principles

19. The relevant law is not controversial. It comprises seven familiar principles:

- (1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to “rehearse every argument relating to each matter in every paragraph” (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).
- (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the “principal important controversial issues”. An inspector’s reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).
- (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, “provided that it does not lapse into *Wednesbury* irrationality” to give material considerations “whatever weight [it] thinks fit or no weight at all” (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector’s decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for* [2001] EWHC Admin 74, at paragraph 6).
- (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).
- (5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).
- (6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

- (7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145).

Issue (1) – paragraph 14 of the NPPF

The NPPF – sustainable development

20. The NPPF was published by the Government on 27 March 2012. It contains the Government’s policy for planning in England.
21. In a section headed “Achieving sustainable development” paragraph 6 says that 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”. Paragraph 7 says there are three dimensions to sustainable development: “an economic role”, “a social role” and “an environmental role”. Paragraph 8 explains that “[these] roles should not be undertaken in isolation, because they are mutually dependent”.
22. Paragraph 14 says that the “presumption in favour of sustainable development” should be seen as “a golden thread running through both plan-making and decision-taking”. It goes on to say that for “decision-taking” this means, unless material considerations indicate otherwise:
- “
- 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 planning 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.”
23. Under the heading “Determining applications” paragraph 197 says that “[in] assessing and determining development proposals, local planning authorities should apply the presumption in favour of sustainable development.”

The NPPF – the plan-led system

24. Paragraph 11 of the NPPF refers to the requirement in section 38(6) of the Planning and Compulsory Purchase Act 2004 (“the 2004 Act”) that applications for planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. Paragraph 12 says that the NPPF “does not change the statutory status of the development plan as the starting point for decision making”, and emphasizes the importance of local planning authorities having “an up-to-date plan in place”. Under the heading “Core planning principles” paragraph 17 identifies as one of these principles that “planning should be genuinely plan-led, empowering local people to shape their surroundings”.
25. Paragraph 157 in the section of the NPPF dealing with “Plan-making”, states:

“Crucially, Local Plans should... be drawn up over an appropriate timescale, preferably a 15-year time horizon, take account of longer term requirements, and be kept up to date.”

As Males J. said in *Tewkesbury Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 286 (Admin) (in paragraph 13 of his judgment):

“... The weight to be given to a development plan will depend on the extent to which it is up to date. A plan which is based on outdated information, or which has expired without being replaced, is likely to command relatively little weight.”

26. In the context of development control, paragraph 196 of the NPPF says this:

“The planning system is plan-led. Planning law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise. This Framework is a material consideration in planning decisions.”

27. In Annex 1 to the NPPF, which deals with “Implementation”, paragraph 214 says that “[for] 12 months from the date of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004 even if there is a limited degree of conflict with this Framework.” Paragraph 215 says that “[in] other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)”.

Policy 8 of the core strategy

28. Policy 8 of the core strategy is entitled “Key Rural Centres Relating to Leicester”. It refers to four settlements – Desford, Groby, Ratby and Markfield. It is preceded by two paragraphs of explanatory text, paragraphs 4.36 and 4.37. Paragraph 4.36 says that those four settlements are “located on the edge of the Leicester Principal Urban Area, which due to their proximity, relate primarily to Leicester”. Paragraph 4.37 says that the “focus for these villages will be on maintaining existing services, maintaining the separate village identities of these settlements and improving the linkages between these villages and Leicester”, that “... the scale and type of development in these villages is based on supporting local needs, rather than encouraging larger scale development, which, due to the close relationship with Leicester, could encourage increased levels of commuting”, and that “[their] role as ‘gateway’ villages to the National Forest will also be promoted”.

29. Policy 8 sets out a series of provisions for each of the four villages. As for Groby, and so far as is relevant in these proceedings, it says this:

“To support the local services in Groby and ensure local people have access to a range of housing the council will:

- Allocate land for the development of a minimum of 110 new homes. Developers will be expected to demonstrate that the number, type and mix of housing proposed will meet the needs of Groby, taking into account the latest Housing Market Assessment and local housing needs surveys where they exist in line with Policy 15 and Policy 16.

...”.

Policy 9 of the core strategy

30. Policy 9 relates to the Green Wedge. It is introduced by paragraph 4.38, which says that the Green Wedge “protects the green infrastructure of the borough, and considerable work has already been carried out along the Rothley Brook corridor to improve its recreational and biodiversity function”, but that there are “still opportunities within the green wedge for enhancement to further increase its amenity as well as ecological value and its value as a functional floodplain”. It goes on to say that a “review of the boundary of the green wedge will take place through [the Site Allocations DPD]”. Policy 9 itself says that “[within] the Rothley Brook Meadow Green Wedge uses will be encouraged that provide appropriate recreational facilities within easy reach of urban residents and promote the positive management of land to ensure that the Green Wedge remains or is enhanced as an attractive contribution to the quality of life of nearby urban residents”. The policy lists six land uses that “will be acceptable in the Green Wedge, provided the operational development associated with such uses does not damage the function of the Green Wedge”. These are “(a) Agriculture, including allotments and horticulture not accompanied by retail development”, “(b) Recreation”, “(c) Forestry”, “(d) Footpaths, bridleways and cycleways”, “(e) Burial grounds”, and “(f) Use for nature conservation”. The policy also requires “[any] land use or associated development in the Green Wedge” to do several things, including “(a) [retain] the function of the Green Wedge”, “(b) [retain] and create green networks between the countryside and open spaces within the urban areas”, “(c) [retain] and enhance public access to the Green Wedge, especially for recreation”, and “(e) [retain] the visual appearance of the area”.

Bloor’s case at the inquiry

31. In the Statement of Common Ground provided to the inspector by the parties before the inquiry they agreed (in paragraph 6.1) that the development plan for the purposes of the appeal was composed of the East Midlands Regional Plan of March 2009, the core strategy – which, as I have said, was adopted by the Council in December 2009 – and those policies of the Hinckley and Bosworth Local Plan that had been saved beyond September 2007 and not superseded by the core strategy. The “potentially relevant policies” of the development plan were listed (in paragraph 6.2). It was agreed that there were several such policies in the regional strategy and in the saved provisions of the local plan. And there were eight in the core strategy – Policy 7 (“Key Rural Centres”), Policy 8 (“Key Rural Centres Relating to Leicester”), Policy 9 (“Rothley Brook Meadow Green Wedge”), Policy 15 (“Affordable Housing”), Policy 16 (“Housing Density, Mix and Design”), Policy 19 (“Green Space and Play Provision”), Policy 20 (“Green Infrastructure”) and Policy 24 (“Sustainable Design and Technology”).
32. At the inquiry Bloor contended that the “presumption in favour of sustainable development” in paragraph 14 of the NPPF was engaged, for several reasons. It said that the development plan was “absent” or “silent” in the sense of paragraph 14 of the NPPF. The core strategy required a minimum of 110 houses to be provided at Groby in the plan period (from 2006 to 2026). But there was no adopted development plan document allocating the land on which those houses were to be built. In that respect the development plan was either “absent” or “silent”.
33. This part of Bloor’s case was advanced both in the proof of evidence of its planning witness, Mr Anthony Bateman, and in the closing submissions of Mr Jeremy Cahill Q.C., who appeared at the inquiry – as he has in these proceedings.
34. The relevant passages in Mr Bateman’s proof of evidence included these three paragraphs:
- “6.29 It is also relevant in the context of Policy 8 to consider that whilst the Core Strategy is clear over the need for housing at Groby it is silent about the location of the proposed dwellings. On that basis the development falls clearly to be considered against Paragraph 14 of the NPPF which deals with circumstances where the plan is silent and states that permission should be granted subject to the caveats that then follow. This view is also the view of the Policy officer in his response to the appeal application.”;

“10.13 The proposals also accord with Policy 8 of the Core Strategy, which seeks a minimum of 110 dwellings to be allocated at Groby. The policy is silent on the specific location of this allocation. The proposals also accord with the emerging [Site Allocations DPD] which identifies the appeal site as a suitable location for part of this allocation.”;

and

“10.16 In respect of the NPPF the proposed development falls to be considered under paragraph 49 which sets out that where there is less than a five year supply the relevant housing policies are to be considered to be out of date. In addition the development plan is silent on where the minimum 110 dwellings allocated at Groby are to be located. The development therefore also falls to be considered against Paragraph 14 and the second bullet point relating to decision making. The development accords with the requirements of this paragraph. The development also meets the three dimensions of sustainable development set out in the NPPF.”

35. In his closing speech at the inquiry Mr Cahill made a number of submissions about the relevant provisions of the development plan. He submitted (at paragraph 6) that “[there] is more to [the core strategy] than Policy 9”, that “[the] proposal accords with Policy 8 as Groby is one of the Key Rural Centres relating to Leicester”, and that the proposal also accorded with Policy 15 (“Affordable Housing”), Policy 16 (“Density, Mix and Design”) and Policy 19 (“Green Space and Play Provision”). He said (at paragraph 8) that the Council’s officer had been right in his report to committee when he described the development plan as “... currently absent in terms of the allocation of land to meet the Groby housing requirement”. As Mr Cahill pointed out (ibid.), in the same part of the report the officer had also referred to the passage in paragraph 14 of the NPPF, which refers to “the presumption that planning permission should be granted when plans are “... absent, silent or out of date””. He developed this point in paragraph 13 of his speech. He said that “[if] the view is taken that the proposal is not in accordance with the [development plan] it will be because of [core strategy] Policy 9”. But the appeal proposal had to be considered in the context of paragraph 14 of the NPPF, even though Policy 9 was “a [paragraph] 214 policy. This was so, Mr Cahill submitted, for three reasons: first, “the [development plan] is “absent” or, alternatively, “silent” as to how the [core strategy] commitment to 110 homes at Groby can be delivered”: second, “there is no [five-year] housing land supply so housing supply policies are “out of date””; and third, “Policy 9 is restricting necessary land supply – see [paragraph 6.33] of Mr Bateman’s proof of evidence] and [the] Sappcote decision.”

The Council’s case at the inquiry

36. The Council’s witness at the inquiry, Ms Erica Whettingsteel, said in her evidence that because “[housing] is not amongst the uses considered acceptable in [the Green Wedge]” Bloor’s proposal was “contrary to this policy” (paragraph 6.30 of Ms Whettingsteel’s proof of evidence). In section 9 of her proof of evidence, where she set out her conclusions, Ms Whettingsteel emphasized that the appeal site was “not allocated for development and lies outside the defined settlement boundary” (paragraph 9.2). The Council accepted “that more housing land is needed borough-wide to meet local need and that this is likely to involve the release of some greenfield sites over the short term, as a departure from policies in the development plan to complement the continued delivery of identified supply within development boundaries” (paragraph 9.3). But, said Ms Whettingsteel, “there is no compelling evidence that the appeal development is needed to such an extent as to outweigh the fundamental conflict with the development plan” (ibid.). She went on to say that “[in] the context of [section] 38(6) of the 2004 Act”, there were “no factors (including the current supply of housing in the [borough]) that out-weigh the conflicts with the development plan” (paragraph 9.4).

37. The Council’s advocate at the inquiry was Mr Timothy Leader, who has also appeared in these proceedings. In his closing submissions Mr Leader refuted Bloor’s contention that the development plan was “absent” or “silent”. He submitted:

“The 2012 Regulations do not require the Council [to] identify the precise areas of land that are to be allocated in a development plan. The [core strategy] instead identifies how many houses should be directed to each settlement. Policy 9 then provides clear guidance on where proposals for housing development will or will not be acceptable. The suggestion that the plan is silent or does not contain policies on where housing should be delivered is thus untenable. It is perfectly clear that pending the completion of the [Site Allocations DPD] development ought not to be proposed on the appeal site.”

38. Mr Leader described the approach he said the inspector should take if he concluded that the Council did not have a five-year supply of housing land and the policy in paragraph 14 of the NPPF came into play. He reminded the inspector that the policy in paragraph 14 did not override the requirements of section 38(6) of the 2004 Act and section 70 of the 1990 Act. He said it “amounts to a policy that where there is not a [five-year] supply of land for housing a proposal should be viewed favourably subject to all material considerations, but giving particular weight to the need to identify significant and demonstrable reasons for refusal”. He asked the inspector to “note the direct conflict with a fundamental policy of the development plan (which is not a “relevant policy” for the purpose of paragraph 14 [of the NPPF])” – by which he clearly meant Policy 9 of the core strategy. He also invited the inspector to find that the development would cause “significant and demonstrable harm “on the ground” to the function of the Green Wedge”, in two ways: first, because it would “result in the loss of an attractive open area of undeveloped land within the agreed urban framework of Groby defined by [Sacheverell] Way and Groby Road”, and secondly, because it would “also bring Ratby and Groby closer together in a narrow and vulnerable part of the Green Wedge”. Therefore, he submitted, the proposal “falls foul of the test in paragraph 14”.

Submissions

39. Mr Cahill submitted that this was a critical part of Bloor’s case before the inspector. If the inspector had accepted Bloor’s evidence and submissions on the silence or absence of the development plan he would have had to apply the presumption in favour of granting planning permission, which could only be overcome if “any adverse impacts ... would significantly and demonstrably outweigh the benefits, when assessed against the policies in the [NPPF] taken as a whole” (paragraph 14 of the NPPF). This would require both the “adverse impacts” and the “benefits” to be clearly identified, appropriate weight given to each, and an explanation provided of how the balance between them had been struck. Unless that balance fell decisively against the proposal, planning permission should be granted. But in any event this was one of the “principal controversial issues” between the parties. So the inspector had to explain whether he accepted or rejected the proposition that the policy in paragraph 14 of the NPPF was engaged because the development plan was either “absent” or “silent”, and, if he rejected that proposition, he had to explain why. He failed to do that. His decision is, therefore, legally flawed – either by a failure to take into account an important material consideration, or by a failure to understand and apply government policy in paragraph 14 of the NPPF, or by his failure to give any reasons – let alone adequate reasons – for rejecting this aspect of Bloor’s case on appeal.
40. Mr Leader and, for the Secretary of State, Mr James Maurici Q.C. submitted that the question of whether the core strategy was “absent” or “silent” on the location of the housing needed in Groby was not a principal controversial issue between Bloor and the Council in the appeal, prominent as it has now become in these proceedings. The inspector did not have to deal with it in his decision letter. But his reliance on Policy 8 and Policy 9 of the core strategy in his analysis of the planning merits – as paragraphs 5, 16, 19, 24 and 29 of his decision letter make plain – and his conclusion in paragraph 15 that “the Council has an up to date development plan in the form of the 2009 Core

Strategy” show that he did not think the plan was either “absent” or “silent”. And he was right. The core strategy is neither “absent” nor “silent” about the development of housing in Groby. The amount of land that will have to be allocated in the village is specified by Policy 8, and Policy 9 effectively directs new housing proposals away from the Green Wedge. The inspector saw that. The fact that the Site Allocations DPD is yet to be adopted does not leave the development plan “absent” or “silent” in the sense contemplated in paragraph 14 of the NPPF. This ground amounts to no more than a complaint that the inspector did not refer to paragraph 14 of the NPPF. He did not have to do so. He applied the relevant policy of the development plan and found the proposal to be in conflict with it.

41. Mr Leader also submitted that in view of the relevant provisions of the Town and Country Planning (Local Development) (England) (Regulations) 2004 (“the 2004 regulations”) and the Town and Country Planning (Local Planning) (England) Regulations 2012 (“the 2012 regulations”) it is impossible to regard a core strategy that does not allocate sites for a specific purpose as being “absent” or “silent” on that matter. Under regulation 6 of the 2004 regulations a core strategy was not required to contain policies applying to sites. Under the 2012 regulations a core strategy is a “local plan”, which may or may not allocate sites for a particular type of development. So a core strategy without allocations – or relevant allocations – cannot be regarded as “absent” or “silent” because of that.

Discussion

42. This ground requires the court to consider the meaning of government policy in paragraph 14 of the NPPF, which explains how the “presumption in favour of sustainable development” is to be applied, both in plan-making and in decision-taking.
43. At the inquiry Bloor argued that this presumption, an indisputably powerful theme in national planning policy in the NPPF, should have a decisive role in this case, and for several reasons. One of those reasons, as Mr Cahill submitted in his closing speech, was that in this case the development plan was “absent” or “silent” (see paragraph 35 above). But the main reason, as I see it, was the alleged absence of a five-year supply of land for housing in the borough of Hinckley and Bosworth. That undoubtedly was a main issue, a matter of vigorous dispute between Bloor and the Council. This is apparent in the evidence and submissions to which I have referred, which led the inspector to define the main issues in the way that he did (see paragraph 3 above).
44. In the context of decision-taking paragraph 14 identifies three possible shortcomings in the development plan, any one of which would require the authority to grant planning permission unless it is clear in the light of the policies of the NPPF that the benefits of doing so would be “significantly and demonstrably” outweighed by “any adverse impacts”, or there are specific policies in the NPPF indicating that “development should be restricted”. The three possible shortcomings are the absence of the plan, its silence, and its relevant policies having become out of date.
45. These are three distinct concepts. A development plan will be “absent” if none has been adopted for the relevant area and the relevant period. If there is such a plan, it may be “silent” because it lacks policy relevant to the project under consideration. And if the plan does have relevant policies these may have been overtaken by things that have happened since it was adopted, either on the ground or in some change in national policy, or for some other reason, so that they are now “out-of-date”. Absence will be a matter of fact. Silence will be either a matter of fact or a matter of construction, or both. And the question of whether relevant policies are no longer up to date will be either a matter of fact or perhaps a matter of both fact and judgment.
46. All of this, one has to remember, sits within the statutory framework for the making of decisions on applications for planning permission, in which those decisions must be made in accordance

with the development plan unless material considerations indicate otherwise. Government policy in the NPPF does not, and could not, modify that statutory framework, but operates within it – as paragraph 12 of the NPPF acknowledges. The Government has taken the opportunity in the NPPF to confirm its commitment to a system of development control decision-making that is “genuinely plan-led” (paragraph 17). But in any event, within the statutory framework, the status of policy in the NPPF, including the policy for decision-making in paragraph 14, is that of a material consideration outside the development plan. It is for the decision-maker to decide what weight should be given to the policy in paragraph 14 if it applies to the case in hand. Because it is government policy it is likely to command significant weight when it has to be taken into account. But the court will not intervene unless the weight given to it can be said to be unreasonable in the *Wednesbury* sense (see paragraph 19(3) above).

47. This case is clearly not one in which the development plan was “absent”. That is simply a matter of fact. The plan was in being. At the time of the inquiry into Bloor’s appeal it was made up of three components, the East Midlands Regional Plan of March 2009, the core strategy, and the saved policies of the local plan (see paragraph 31 above). A further component, the Site Allocations DPD, was still emerging. It was going through its statutory process towards adoption. The core strategy identified the need for 9,000 new homes to be provided in the borough between 2006 and 2026. In the Site Allocations DPD allocations would be made to fulfil that need. But the fact that that part of the development plan was yet to be adopted did not mean that the plan was absent in the sense of paragraph 14 of the NPPF. The plan was present, though not yet complete. Absence and incompleteness are not the same thing.
48. I come then to the question of whether in this case the plan could be said to be “silent”. However broad this concept may be, I do not think it can possibly be invoked in this case.
49. Whether a plan is silent – as opposed to its being absent or its relevant policies out of date – is an issue that may fall to the court to decide. Where the meaning of planning policy is contentious it is, in the end, for the court to establish which interpretation is right. As Lord Reed said in paragraph 17 of his judgment in *Tesco v Dundee City Council*, a local planning authority must proceed on “a proper understanding of the development plan”. This is a necessary corollary of the authority’s duty in section 70(2) of the 1990 Act to have regard to the plan and its duty in section 38(6) of the 2004 Act to determine applications in accordance with the plan unless material considerations indicate otherwise. As Lord Reed said (*ibid.*), the authority “cannot have regard to the provisions of the plan if it fails to understand them”. If the authority fails to see that the plan is silent, or thinks it is silent when it is not, it will have gone wrong in law. It will have misconstrued the plan.
50. The answer to the question “Is the plan silent?” will sometimes be obvious, because the plan simply fails to provide any relevant policy at all. But often it may not be quite so clear-cut. The term “silent” in this context does not convey some universal and immutable meaning. The NPPF does not itself explain what the Government had in mind when it used that word. But silence in this context must surely mean an absence of relevant policy. I do not think a plan can be regarded as “silent” if it contains a body of policy relevant to the proposal being considered and sufficient to enable the development to be judged acceptable or unacceptable in principle.
51. A plan may or may not be “silent” if it does not allocate the particular site in question for a particular use, whether on its own or as part of a larger area, or if it does not contain policy designed to guide or limit or prevent development of one kind or another on that site or in that location. In *Tesco v Dundee City Council* Lord Reed observed (at paragraph 18) that the development plan is “a carefully crafted and considered statement of policy”, whose purpose is to show how the local planning authority will approach its decisions on proposals for development unless there is a good reason not to do so. This is an essential principle of the plan-led system.

52. The provisions of the plan current at the time of the decision may represent one stage of plan-making, and they may later be amplified or refined in another. They may be strategic rather than specific to the site. But they may still provide an ample basis for decision-making on proposals submitted and determined before any addition to the plan has been made. The plan may not have as much to say of relevance to the proposed development as the developer or the local planning authority, or indeed the objectors, might wish. But whether it can properly be said to be silent is a matter for objective interpretation, not the subjective view of any of the parties involved. As Lord Reed said in paragraph 18 of his judgment in *Tesco v Dundee City Council*, “policy statements should be interpreted objectively in accordance with the language used, read ... in its proper context”.
53. Of course, as Lord Reed also remarked (at paragraph 19), “development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another”, and “many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment”. It may be that a plan does not have a specific policy for a particular type of proposal that might be put forward on a particular site. The relevant provisions of the plan may be framed in general terms. Often this will be so. But in my view a plan containing general policies for development control that will enable the authority to say whether or not the project before it ought to be approved or rejected – subject of course to other material considerations indicating a different outcome – could hardly be said to be silent.
54. In this case the development plan was not silent on the minimum number of new homes that were going to have to be provided through the allocation of land in Groby, thus enabling it to take its share of the total burden of new housing the borough will have to provide. That minimum number was specified in Policy 8 of the core strategy. It was 110. Bloor’s proposal was for 91. But it was being promoted on an unallocated site, or, as Bloor would contend, on a site yet to formally be allocated in the Site Allocations DPD.
55. The plan was not silent on the approach the Council would take to proposals for the development of housing in the Green Wedge between Groby and Ratby. The core strategy does not leave such proposals in a policy limbo. It has a policy that makes it as clear as one could wish what an applicant for planning permission for such development can expect, unless he is able to show some good reason for a different decision. That policy is Policy 9. Its meaning is plain. It tells one what kind of development will be “encouraged” in the Green Wedge, which is a use that will “provide appropriate recreational facilities within easy reach of local residents ...”. It also indicates which land uses will be “acceptable” in the Green Wedge, and, by necessary inference, which will not. The “acceptable” uses are generally those that would preserve the openness of the land within the Green Wedge. They do not include housing.
56. To any developer seeking planning permission for housing development on a site in the Green Wedge the import of those two policies of the core strategy will be unmistakable. The fact that housing is not an acceptable type of development in the Green Wedge does not mean that such development can never be permitted. There may be considerations that warrant a decision to approve it even though it is contrary to Policy 9. At this stage such a proposal might be seen as gaining some support from Policy 8 because it would help the Council to meet the identified need for at least 110 new homes to be provided in Groby in the course of the plan period, though only limited support because the site would not have the benefit of an allocation in the Site Allocations DPD.
57. In that situation, subject to the proposal’s compliance with the other relevant policies of the plan, the Council would have to judge whether or not a decision to grant planning permission for the scheme would be in accordance with the development plan. In determining the application it would have to have regard to all other material considerations, including the relevant parts of the NPPF and, if there was a shortfall in the available supply of land for housing, the provisions of the

NPPF that govern the making of decisions when that is so. If the proposal was found to be in conflict with the development plan it might still be permitted if those other material considerations were strong enough to outweigh the statutory presumption in favour of the plan – “considerations of such weight as to indicate that the development plan should not be accorded the priority which the statute has given it” (see the speech of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447, at p.1459D-H). The important point, however, is that the Council’s decision in that hypothetical case would not have to be made in a development plan policy vacuum. There is no vacuum.

58. On that analysis it is impossible to conclude that the circumstances of this case were such as to trigger the policy in paragraph 14 of the NPPF for decision-taking in cases where the development plan is absent or silent. The fact that allocations of land to meet the need for housing development in Groby had not yet been put in place in the Site Allocations DPD did not render the plan absent or silent.
59. In my view the inspector understood this. He grasped the meaning and significance of the two policies of the core strategy relevant to the acceptability in principle of housing development on the appeal site. He did not misunderstand or misapply either of those policies. It is clear that he regarded them as providing an adequate basis on which to make his decision, in accordance with his duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act.
60. The inspector’s reasoning is underpinned by the provisions of Policy 8 and Policy 9. He referred to Policy 8 in paragraph 5 of his decision letter as the starting point for his discussion of housing land supply. And he referred to Policy 9 throughout his discussion of the likely effect of the development on the Green Wedge, and by name in paragraphs 16, 17, 19 and 24 and then again in his “Conclusion” in paragraph 29. When one reads his decision letter fairly as a whole there can be no doubt that he was able to base his decision on those two policies. He concluded that the proposal was in conflict with Policy 9, and that the other considerations he had to take into account, including the timing of the proposal and the present supply of housing land, were not such as to justify his granting planning permission. He was well aware that the Site Allocations DPD, once it was adopted, would add to the existing provisions of the development plan, and that the appeal site might gain an allocation within it. He took this possibility into account but gave it “limited” weight (paragraph 13 of his decision letter).
61. That was a typical exercise of planning judgment in a case of this kind. The point that matters here, however, is that it was an exercise of planning judgment shaped by the relevant provisions of the development plan, just as Parliament envisaged when it enacted section 38(6) of the 2004 Act. This was a case of the kind one would expect normally to see under the plan-led system, a case in which the plan was neither absent nor silent. The inspector did not, for that reason, have to resort to the approach required by paragraph 14 of the NPPF of granting planning permission unless either the harm “significantly and demonstrably” outweighed the benefits or specific policies of the NPPF suggested refusal.
62. But in fact the inspector did nothing less than he would have had to do if he had approached his decision on the basis that the plan was absent or silent – in spite of the existence of Policy 8 and Policy 9 of the core strategy. Even then he would not have been free to ignore those policies. He would have had to have regard to them, because section 70(2) of the 1990 Act and section 38(6) of the 2004 Act compelled it. He would have had to weigh the proposal’s conflict with Policy 9 against any advantages he could see in granting planning permission. He did that. For the reasons he gave he concluded that the harm he saw in the proposed development – its conflict with Policy 9 and its prematurity to the Site Allocations DPD – was such that planning permission for it should not be granted. He did not put his conclusions in the language of paragraph 14 of the NPPF. He did not say that the “adverse impacts” of the development would “significantly and demonstrably outweigh the benefits”. But that was the effect of the conclusion he stated crisply in paragraph 29 of his decision letter.

63. Should the inspector have stated his conclusion on whether the plan was absent or silent, just as he expressed his view that the plan was up to date – in paragraph 15 of his decision letter? I do not believe so. He could have added a sentence to paragraph 29 of his letter saying he had been able to make his assessment of the planning merits of the proposed development in the light of extant development plan policy, which was not only up to date but also neither absent nor silent. But in my view that was wholly unnecessary. The only way one can read the decision letter is that the inspector did not have to contend with the absence or silence of the development plan, and that he had rejected Bloor’s argument to the contrary. He did not have to say more than he did. His reasons are not defective.
64. This ground of Bloor’s application therefore fails.

Issue (2) – the five-year supply of housing land

The NPPF – housing need and the five-year supply of housing land

65. Paragraph 159 of the NPPF says that planning authorities should have “a clear understanding of housing needs in their area”. They should “prepare a Strategic Housing Market Assessment to assess their full housing needs ...”. The Strategic Housing Market Assessment “should identify the scale and mix of housing and the range of tenures that the local population is likely to need over the plan period”, which “meets household and population projections, taking account of migration and demographic change”, “addresses the need for all types of housing”, and “caters for housing demand and the scale of housing supply necessary to meet this demand.”
66. In the part of the NPPF dealing with the delivery of sustainable development, in section 6 – “Delivering a wide choice of high quality homes” – paragraph 47 says this:

“To boost significantly the supply of housing, local planning authorities should:

- use their evidence base to ensure that their Local Plans meet 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;
- to 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.

...

- 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; ...

...”.

The footnote to the reference to “a supply of specific deliverable sites” in the first bullet point in that paragraph says this:

“To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans.”

67. In the recent decision of the Court of Appeal in *Hunston v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1610, a case in which the application of paragraph 47 of the NPPF had had to be applied in the context of housing development proposed in the Green Belt, Sir David Keene said (in paragraph 6 of his judgment) that there is “no doubt ... that in proceeding their local plans, local planning authorities are required to ensure that the “full[,] objectively assessed needs” for housing are to be met, “as far as is consistent with policies set out in this Framework””. In that case the inspector had gone wrong by adopting “a figure for housing requirements below the full objectively assessed needs figure until such time as the Local Plan process came up with a constrained figure” (paragraph 26). This had led her to find that there was no shortfall in housing land supply in the district (paragraph 27). If she had followed the correct approach, she would have found that there was such a shortfall because the supply fell below the objectively assessed five year requirement” (ibid.).

68. Paragraph 49 of the NPPF states:

“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.”

69. The policy in paragraphs 47 and 49 of the NPPF, and its relevance to the application of the policy in paragraph 14, was considered by Males J. in the *Tewkesbury* case (see paragraph 25 above). He concluded:

“20. Accordingly, both before and after the issue of the NPPF, the need to ensure a five year supply of housing land was of significant importance. Before the NPPF the absence of such a supply would result in favourable consideration of planning applications, albeit taking account also of other matters such as the spatial vision for the area concerned. After the NPPF, if such a supply could not be demonstrated, relevant policies would be regarded as out of date, and therefore of little weight, and there would be a rebuttable presumption in favour of the grant of planning permission. All of this would have been well understood by local planning authorities. An authority which was not in a position to demonstrate a five year supply of housing land would have recognised, or ought to have recognised, that on any appeal to the Secretary of State from a refusal of permission there would be at least a real risk that an appeal would succeed and permission would be granted.

21. That is not to say, however, that the absence of a five year housing land supply would be conclusive in favour of the grant of planning permission. It may be that the NPPF, with its emphasis in paragraph 47 to the need “to boost significantly the supply of housing”, placed even more importance on this factor than PPS3 had done, but whether or not that is so, in both regimes the absence of such a supply was merely one consideration required to be taken into account, albeit an important one.”

The core strategy inspector’s report

70. In his report dated 27 November 2009 the inspector who had held the examination into the core strategy offered his conclusions on the topic of “Housing Land Supply”. In those conclusions he said:

“3.42 The [core strategy] sets out the broad framework for development, and the detail of specific sites will be provided by the Site Allocations DPD which is due for Examination in 2010. I am

satisfied that the Council's LDS demonstrates that it has put in place a process which will meet the housing land supply requirements of PPS3.

3.43 The revised trajectory shows shortfalls in housing delivery against the annual apportionment of 450pa given in the EMRP in the years 2006-2008, 2009/10, and in 2012-2017. However, those shortfalls are made good in the years post-2017/18 when the major developments in the [Sustainable Urban Extensions] come on stream fully, and the trajectory shows a surplus of dwellings by the end of the Plan period.

3.44 PPS3 requires that sufficient 'deliverable' sites are identified in the first 5 years from adoption. The revised trajectory shows a cumulative provision of [2,288] dwellings in the period 2010-2015, compared with the EMRP apportionment of [2,250] dwellings. Those sites are considered by the Council to be 'deliverable' and 'developable' in the terms set out in paragraphs 54-57 of PPS3. The submission draft therefore makes sufficient provision for the first 5-years from adoption of the [core strategy], subject to detailed allocations made in the [Site Allocations DPD].

3.45 ... Data held by the Council demonstrate that about 3% of extant planning permissions have expired before development takes place over the past 3 years. However, given the current uncertainties in the development market I consider that figure could rise in the next few years, and I propose to discount the small site commitments by about 10% (i.e. to 80 dwellings pa) to reflect that situation and to ensure that the [core strategy] is based on robust evidence Consequently, the overall housing provision for the period 2010-15 would reduce to [2,258] dwellings. That figure would still provide the 5 year supply required by PPS3. Subsequent to 2014 it would be appropriate to apply a smaller discount of about 5% to any small site commitments to reflect an anticipated upturn in the housing market. A consequent revision is necessary to the Small Site Commitments shown in Table 1, which should be reduced to 400."

Bloor's case at the inquiry

71. In his proof of evidence Mr Bateman presented a table, Table 1, in which he compared actual dwelling completions with forecast completions on the basis of the data in the Annual Monitoring Reports for the borough in each year between 2006 and 2011 and the 2012 Residential Land Availability Monitoring Statement. This, he said, showed that the Council had "a persistent under delivery of housing", so that the 20% buffer referred to in paragraph 47 of the NPPF needed to be added to the requirement figure (paragraph 7.9).
72. Mr Bateman used the Sedgefield approach to the calculation of the housing land supply. He explained why (in paragraph 7.11 of his proof of evidence):

"The Sedgefield approach is utilised rather than the residual approach because it seeks to ensure housing is provided as quickly as possible and it therefore accords with the views of the government as set out in the NPPF to boost significantly the supply of housing It also accords with the view of the government in the March 2011 Ministerial Statement which refers to a "call for action on growth" and "a pressing need to ensure that the planning system does everything it can to help secure a swift return to economic growth". The approach of utilising a residual approach to dealing with the shortfall to date would in effect be compounding past under delivery directly contrary to boosting housing supply."
73. Mr Bateman sought to strengthen that part of his evidence with four appeal decisions in which the Sedgefield method had been favoured by the Secretary of State or his inspector: a decision of the Secretary of State in April 2011, dismissing an appeal and refusing planning permission for a development of 300 dwellings on a site at Moreton-in-Marsh in Gloucestershire, in which the Secretary of State had agreed with his inspector that the residual method of assessment was inappropriate, and that – in Mr Bateman's words – "the shortfall in housing should be addressed promptly rather than to be allowed to run on for potentially 20 years"; an appeal decision of the Secretary of State, in June 2011, on proposed housing development on a site in Andover in Hampshire; a decision made by an inspector in August 2012 – several months after the

publication of the NPPF – allowing an appeal and approving a proposal for development including up to 70 dwellings at Honeybourne in Worcestershire, in which the inspector said that in his view it was “inconsistent with Planning for Growth and [paragraph 47 of the NPPF] to meet any housing shortfall by spreading it over the whole plan period”, rejected the local planning authority’s use of “the residual method”, and adopted “the Sedgefield approach”; and the decision of the Secretary of State in October 2012 allowing an appeal and granting planning permission for development including up to 800 dwellings at Shottery in Warwickshire, in which he endorsed his inspector’s conclusion that the policy of the NPPF to boost significantly the supply of housing “implies dealing expeditiously with a backlog” and that “[the] backlog should therefore be added to the 5 year requirement” (paragraph 7.12).

74. Mr Bateman argued that the calculation of the future housing land requirement should be based on the latest information in the 2008 household projections and on the Chelmer model calculations (paragraphs 7.13 to 7.55). He concluded (in paragraph 7.55):

“Utilising the most up to date information available, the 2008 projections, and using the Chelmer model to forecast housing requirements ... indicates that the minimum appropriate level of house building should be 9,460 dwellings 2006 to 2026 (not including unmet need). Taking account ... of the shortfall in provision 2006 to 2012 of 575 dwellings gives a need to provide 2012 to 2017 2,940 dwellings or 588 per annum. When a 5% is added in accordance with the NPPF, the figure is raised to 3,087 dwellings. A 20% buffer increases the figure to 3,528 dwellings.”

75. To summarize the supply of housing land in the borough at April 2012 Mr Bateman presented a table – Table 5. This showed the significance of discounting the delivery of housing on large sites with planning permission by 10% and also a 10% discount on the Barwell sites, which was to reduce the Council’s total supply figure of 2,535 to the figure contended for by Mr Bateman, which was 2,337.

76. Mr Bateman said the 10% discount on large sites was made because “it is unlikely all will be built in the five year period for a variety of reasons” (paragraph 7.61 of his proof of evidence). The Council did not accept the 10% discount on large sites, though it did discount the delivery on small sites by 10% (ibid.). Mr Bateman explained some of the reasons why delivery on large sites does not always match the level of the number of dwellings for which planning permission was granted (in paragraph 7.62 of his proof):

“The NPPF requires sites to be deliverable and achievable. Sites with permission can easily move from one period into another due to market and other constraints (such as ownership, difficulty with access, problems with land conditions etc.). Sites may have gained permission purely as a valuation exercise with no intention of being built, particularly small sites. In addition, in an adverse market there can be redesigns on sites to improve their viability. This is particularly the case at present, where there is, for example, little market for apartments and redesigns are taking place to provide different forms of housing in response to the market. Such redesigns with larger housing types with gardens will reduce density. In particular the figure for permissions includes a number of dwellings on large sites and it is considered to be quite ambitious for these to be provided in the five year period, even at a level of 50 dwellings per annum. The appellants consider therefore it is reasonable to allow for a 10% discount on sites with permission. ...”

77. Mr Bateman said that the 10% discount was supported by “Housing Land Availability”, a paper published by the Department of the Environment in 1995, and had been accepted in the appeal decisions on the proposals at Moreton-in-Marsh and Honeybourne, and in the decision on proposed development at Moat House Farm at Marston Green in Solihull (ibid.).

78. A further point made by Mr Bateman in support of the 10% discount was that “often the figure to be provided on a site at outline stage can be significantly different to the reserved matters figure”. This was so, for example, in the development of a site on Leicester Road, Hinckley, “where

permission was granted on appeal for 232 dwellings but ... the reserved matters approval is for only 184 dwellings” (paragraph 7.63).

79. Mr Bateman emphasized the difference between the 10% discount figure and the buffer of 5% or 20% (in paragraph 7.64 of his proof of evidence):

“It is also important to be clear that the 10% figure here is not the same as the buffer of 5 or 20% that is brought forward from the rest of the plan period. The 10% figure relates to the inevitable difficulties in bringing all sites identified through in the time period. Sites will lapse, and viability issues will change. The buffer figure relates to the problems in under delivery in the past. In this respect it is relevant to note that in respect of using even the lowest assessment of the overall housing requirement the Authority already has a shortfall in provision from 2006 of some 437 dwellings.”

80. For the Barwell Sustainable Urban Extension Mr Bateman had taken a similar approach. Because there was a “potential for there to be problems with ... delivery over the period and therefore a 10% discount has been applied” (paragraph 7.65).

81. Mr Bateman’s conclusion of the question of whether or not there was a five-year supply of housing land was that, on his figures, there was a supply of between 2.81 and 4.35 years, which would reduce to between 2.67 and 4.14 years if a 5% buffer was included, and to between 2.49 and 3.62 years with a 20% buffer (paragraph 7.71). On the Council’s figures, there was a supply of between 3.05 and 4.72 years, which would reduce to between 2.9 years and 4.49 years with a 5% buffer, and to between 2.7 and 3.39 years with a 20% buffer (paragraph 7.72).

82. In his closing submissions Mr Cahill said that the question of whether or not there was a five-year supply of housing land turned on three contentious matters, namely “Discounts on large sites”, “Sedgefield or Liverpool”, and “5% or 20% buffer” (paragraph 17). Bloor needed to succeed on only one of these three matters for it to be shown that the Council had less than a five-year supply (ibid.).

83. A 10% discount on large sites had been adopted in the three appeal decisions to which Mr Bateman had referred – the decisions on the proposals at Moreton-in-Marsh, Honeybourne and Marston Green (paragraph 18). The Council’s planning witness, Ms Whettingsteel, had conceded that there was “a compelling logic” in the 10% deduction (paragraph 19). Mr Cahill reminded the inspector that Ms Whettingsteel had not been able to point to any appeal decision made after the publication of the NPPF in which the Liverpool method had been preferred to the Sedgefield (paragraph 20). In cross-examination she had acknowledged “the logic of the Sedgefield approach” (paragraph 21). As for the 5% or 20% buffer, Ms Whettingsteel had agreed in cross-examination that the annual target of 450 completions had been met only once in the last six years; that the average annual figure of completions over those six years was 377 – a 17% deficit, which she had conceded was “a substantial shortfall”; and that of the 2,700 dwellings required in that six year period, only 2,263 had been provided – a deficit of 437, which was, she had accepted, “a substantial deficit” (paragraph 22). In concluding this part of his speech, Mr Cahill submitted that the Council did not have a five-year supply of housing land (paragraph 24). He said the information Mr Bateman had given about the 2008 household projections and the Chelmer model calculations had been provided “in accordance with the [NPPF’s] preference [in paragraph 159] for the most up to date information” (ibid.). However, he said, “[for] the purpose of the [five-year] calculation [Bloor] is content to rely on the figures based on the [regional strategy] in the first of the three columns in the relevant [tables]” (ibid.). He submitted that under the policy in paragraphs 47 and 49 of the NPPF Bloor’s proposal “must be tested with the mechanism identified in [paragraph] 14”, and that this should result in planning permission being granted (paragraph 25).

The Council’s case at the inquiry

84. At the inquiry the Council contended that it had a five-year supply of housing land – 5.02 years – and that its “housing supply policies are therefore up-to-date” (paragraph 5.11 of Ms Whettingsteel’s proof of evidence). It was able to “demonstrate that there [was] not a persistent history of under-delivery”, and “on the contrary, [its] supply of land for housing is adequate and is steadily improving” (ibid.).
85. Ms Whettingsteel acknowledged that there were two methods that could be used to determine whether the Council had a five-year supply of housing land – “[the] Liverpool (residual) method, which spreads the shortfall from previous [years’] under provision over the remainder of the Plan period and the Sedgfield method which places the shortfall into the next five years supply” (paragraph 7.55). She compared these two methods. The Sedgfield method, she said, is designed to cure housing shortfall immediately, in circumstances where [local planning authorities] have exhibited a failure to respond positively to the NPPF’s intent to deliver economic growth with the requisite sense of urgency” (paragraph 7.56). The Liverpool method, by contrast, “takes a more measured approach allocating any shortfall over the life of the plan”, and “is appropriate where there is not a severe shortfall and the Council’s [policy] is to inject a significant supply of housing land within the plan period” – for example, “through the designation of a Sustainable Urban Extension ...” (paragraph 7.57). The Council considered the Liverpool method “more appropriate”, because it could demonstrate a five-year supply of housing “(5.02 years)”, did not have “a persistent history of under-delivery” and “the current supply of land for housing is adequate and is steadily improving” (paragraph 7.58). Ms Whettingsteel said the inclusion of the Sustainable Urban Extensions in the five-year housing supply was justified because they had been included in the core strategy (paragraph 7.59). Area action plans for those two sites were being prepared (ibid.).
86. Ms Whettingsteel used the Liverpool method in her calculation of the Council’s housing land supply. In her Table R1 – “Residual Method with no buffer” she showed a housing land supply of 5.27 years. She acknowledged that the NPPF requires local planning authorities to “boost significantly” the supply of housing “and recommends a buffer of 5% against their housing requirements” (paragraph 7.62). She therefore produced another table, Table R2 – “Residual Method with 5% buffer ([the] Council’s preferred method as at April 2002)”, which showed a supply of 5.02 years. She said it was only when a local planning authority had “a persistent record of under-delivery of housing that an increase of 20% is required” (paragraph 7.63). She pointed out that in the 11 years since 2011 the Council had met the relevant annual housing delivery target four times, and that in the last three years since the adoption of the core strategy “the annual target has not been met due to the recent housing market downturn, rather than a lack of a suitable strategy for housing delivery”(ibid.). Nevertheless, “[for] completeness”, she had calculated the housing land supply using a 20% buffer. She presented this alternative calculation in her Table R3 – “Residual Method with 20% buffer”. It showed a supply of 4.39 years. Even if this was the appropriate calculation there would not be “a short supply sufficient to outweigh the need to protect the open and undeveloped character of the [Green Wedge] between Ratby and Groby” (paragraph 7.69). To provide “a robust assessment” she had calculated the housing land supply using the Sedgfield method, both with and without buffers of 5% and 20% (paragraphs 7.70 to 7.72). With no buffer the supply would then be 4.72 years (Table S1 – “Sedgfield Method with no buffer”), or 4.49 years (Table S2 – “Sedgfield Method with 5% buffer”), or 3.94 years (Table S3 – “Sedgfield Method with 20% buffer”). Ms Whettingsteel ended this part of her proof of evidence with this observation (in paragraph 7.72):

“Whichever method is accepted as being correct, the Council’s view is that any shortfall in the supply of housing is, in the case of the appeal site, in any event outweighed by the development plan policies, which militate against its development.”

87. In his closing speech Mr Leader referred to the three main strands in Bloor’s argument that the housing land supply was less than five years. Bloor had tried to prove this, he said, by arguing

that, even if housing need was defined by the regional spatial strategy and the core strategy, the supply was less than five years if :

- “(i) a 10 per cent discount is applied to the stock of planning permissions; and (or),
- (ii) ... the existing shortfall in the number of completions is required to be made up over the next five years – the Liverpool v Sedgefield debate;
- (iii) a 20 per cent rather than a 5 per cent buffer is applied.”

Mr Leader submitted that Bloor’s approach to the calculation of the supply of housing land was “wrong”.

88. In his submissions on the 10% deduction for larger sites contended for by Bloor Mr Leader referred to the appeal decisions on the proposals at Moreton-in-Marsh, Honeybourne and Marston Green on which Mr Bateman had relied in his evidence. He submitted that “[the] assistance ... to be drawn from appeal decisions turns on the similarity of their context compared with the appeal proposal”, that the “circumstances of the decisions referred to by Mr Bateman bear no similarity to those in Groby”. In each of those cases the regional spatial strategy had been subject to a formal review. So the inspectors “felt compelled to adopt the housing allocations set out in each draft [regional spatial strategy] and test each party’s assessment of need in relation to those in each review”. In each case a live issue was the extent to which the stock of planning permissions was likely to be deliverable, and each inspector had to consider whether the stock of planning permissions be discounted by 10%. The situation here was different. In the borough of Hinckley and Bosworth the regional spatial strategy and the core strategy were up to date. So there was “no need to reassess housing need”. That was set out in the core strategy. Nor was there any need to estimate “the attrition of the stock of planning permissions by applying a rule of thumb”. Mr Leader then said this:

“Instead, the Council discusses the number of dwellings that each consent will deliver. That having been done in the [Annual Monitoring Review] that forms the basis of the parties’ assessment of the five year [housing land supply. There] is no need to guess what the discount ought to be; it might reasonably be assumed that each developer would have a good idea about the number of homes they will deliver. In the circumstances, the application of a 10 per cent discount would be to apply a double discount. That would plainly be inappropriate.”

89. On the question “Liverpool or Sedgefield?” Mr Leader made five main points. First, he said that the NPPF does not specify a particular method for “the treatment of any existing shortfall in the delivery of new homes”. The Andover appeal decision indicated that the approach was “a matter of judgment, which will turn on the circumstances of each case”. Secondly, in the circumstances of this case it was “reasonable to make up the shortfall over a longer period”. The core strategy inspector had “anticipated that there would be a shortfall in housing delivery in 2006-2008, 2009/2010 and 2012-2017”, because of the likely delay in bringing forward the two Sustainable Urban Extensions, but had “accepted that this shortfall would be made good after 2017/2018 and that a surplus would be delivered by the end of the plan period”. He had therefore found the core strategy’s proposals for housing “justified and effective”. Bloor had not disputed the ability of the Sustainable Urban Extensions to “make good the planned shortfall in delivery”. Thirdly, in the last two years house builders had not been able to match the recent increase in supply with completions. This “may well be a result of the recession”, as the core strategy inspector had foreseen. Fourthly, “[in] the particular circumstances of Hinckley and Bosworth there can ... be a high degree of confidence that sufficient land will come forward for development in the near future”. So the “issue is more one of whether house builders can respond”. Fifthly, therefore, there was “no merit in departing from the planned approach set out in the up-to-date [core strategy]”, and “[in] this case the Liverpool approach is thus a reasonable methodology for dealing with the shortfall in housing land supply”.

90. Mr Leader submitted that a 20% buffer was “only required where there is a record of persistent under-delivery”, a concept not defined in the NPPF. He referred to the appeal decisions produced by Mr Bateman, which, he said, “illuminate some helpful principles”. He mentioned the appeal decision on the proposal at Shottery, in which, he said, “the inspector found that a moratorium on the grant of planning permission because of a period of over-supply meant that a “significant shortfall against the Council target between 2008 and 2012 did not warrant a 20% buffer”. In this case too the shortfall in housing land supply was “planned”, and it should be treated in the same way as in the Shottery case. A planned shortfall was not the only reason for applying a 5% buffer. Mr Leader referred to other appeals, at Torbay and Stratford-upon-Avon, in which a buffer of 5% had been accepted because “under-delivery was ascribed to the current economic crisis”. In Hinckley and Bosworth “under-delivery” was “probably attributable to the economic downturn”. Bloor had not produced any evidence to the contrary. In this case, therefore, it was “appropriate to attach a 5% buffer”. If the market could not respond there would be “little purpose in bringing forward land from later in the plan period; it plainly cannot be developed now but it may be [that] conditions will improve in later years when the balance of 15% may be utilised.”

Submissions

91. Mr Cahill submitted that paragraph 49 of the NPPF is clear. 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. A failure to demonstrate this means that the presumption in favour of sustainable development set out in paragraph 14 of the NPPF is triggered. As the Court of Appeal’s decision in *Hunston* shows, an authority must identify what paragraph 47 of the NPPF calls the “full, objectively assessed housing needs” for its area. In this case the Council’s claimed supply of housing land would fall below five years if Bloor had made good any one of the several arguments on which it relied. The inspector had to understand each of those arguments and deal with them all. But he did not. He failed to see that the Council did not have a five-year supply of deliverable housing sites, or, at least, that there could be no confidence that it did, and that the presumption in favour of planning permission in paragraph 14 of the NPPF had to be applied.
92. The inspector called the Sedgefield and Liverpool methods of assessment “predictive models” (in paragraph 7 of his letter). That is not what they are. They determine how one should deal with past shortfalls in housing supply. The inspector’s reference to “predictive models” shows that he failed to understand Mr Bateman’s evidence on a different aspect of the five-year supply calculation, namely the use of the 2008 household projections and the Chelmer model calculations, both of which are truly concerned with “predictive” assessment. The use of the Liverpool method in this case found no support in the core strategy inspector’s report. The core strategy inspector had been assured by the Council that the Site Allocations DPD making site allocations would be examined by 2010 (paragraph 3.42 of his report). He had clearly expected a five-year supply to be maintained throughout the core strategy period by allocations being made in the Site Allocations DPD. In Bloor’s appeal the inspector was told that there were no decisions since the publication of the NPPF in which the Liverpool method had been used. He was shown several decision letters in which the Sedgefield method had been preferred (see paragraph 73 above). His choice of the Liverpool method was inconsistent with those decisions. If he was not going to follow them he had to explain why.
93. The inspector failed to address the argument put forward by Mr Bateman (in paragraphs 7.13 to 7.55 of his proof of evidence), and supported by government policy in paragraphs 50 and 159 of the NPPF, that the figures for housing land provision in the core strategy should be updated in the light of the 2008 household projections and by the use of the Chelmer model calculations. This exercise showed that the housing land supply fell well below the required five-year supply (columns 2 and 3 of Table 5 in Mr Bateman’s proof of evidence).

94. The inspector said (in paragraph 8 of his letter) that Bloor had suggested “that the 5% buffer is insufficient and that a 10% or 20% buffer would be more appropriate”. The inspector saw “some force” in this suggestion, acknowledging that “the Council can only show a supply marginally in excess of five years”. But he seems to have rejected the “10% or 20% buffer” in favour of the Liverpool method. Bloor did not argue for a buffer of between 10% and 20%. A 10% buffer has nothing to do with the Government’s policy in paragraph 47 of the NPPF. Bloor was arguing for a 20% buffer, which is supported by paragraph 47 “[where] there has been a record of persistent under delivery of housing”.
95. Bloor was also arguing for a 10% discount to be applied to the identified supply of housing from larger sites to reflect the fact that, for various reasons, such sites do not yield housing at the predicted rate. The inspector’s approach was muddled. What is clear, however, is that he confused the buffer and the discount, despite Mr Bateman explaining the distinction between them (in paragraph 7.64 of his proof of evidence). He took no account of the 10% discount. Had he done so he could not have concluded that there was a five year supply of housing land.
96. Mr Leader and Mr Maurici submitted that Mr Cahill’s argument here is an attempt to repeat Bloor’s case on housing land supply in the appeal, in the hope of a different outcome. The various contentions made by Mr Bateman in his evidence on the supply of housing land, on which Mr Cahill now relied in his submissions to the court, were all clearly rejected by the inspector – either explicitly or implicitly. But it should be remembered that the disputes at inquiry – about the appropriate method for assessment, whether a buffer ought to be added to the requisite supply and, if so, how large a buffer, and the need for a discount to be applied to the number of new homes in prospect on larger sites – were not principal controversial issues in their own right. They were subsidiary to the first of the two main issues identified by the inspector, the adequacy of the supply of housing in the borough, on which he reached a clear conclusion (in paragraph 11 of his letter). Mr Cahill’s various criticisms of the inspector’s analysis amount to no more than a disagreement with that conclusion.
97. The inspector identified the main dispute between the parties as being between the two methods of assessment (paragraph 7 of his letter). He gave clear reasons for preferring the Liverpool method, which he described as a “recognised way of calculating housing supply” (paragraph 9) and, in this case, “a reasonable basis for assessing future supply” (paragraph 11) – the core strategy inspector’s conclusion that the initial shortfall would eventually be overcome when the Sustainable Urban Extensions at Shilton and Barwell were developed (ibid.), the progress that had been made with those projects (ibid.), the Council’s willingness to boost the supply of housing and its intention to allocate land in Groby (ibid.). The inspector had obviously accepted the evidence given by Ms Whettingsteel and rejected Mr Bateman’s. It was open to him to do that. His description of the alternative methods as “predictive models” in paragraph 7 of his letter was apt. It does not betray any misunderstanding of what those methods are and what they are for. They are predictive. Their purpose is to assess today how much land will be available for house building over the next five years. The criticism of what the inspector said about the core strategy inspector’s conclusions is wrong. As is clear from what he said in paragraphs 3.42 and 3.44 of his report, the core strategy inspector did expect that there would be shortfalls in housing land supply in the early years of the core strategy period, but he also expected these shortfalls to be overcome (see paragraph 70 above). The inspector acknowledged that the preparation of the Site Allocations DPD had been delayed, and took this into account (in paragraph 10 of his letter). He referred to the appeal decisions in which the Sedgfield approach has been adopted (paragraph 8). He did not have to say more than he did to explain why he thought it right, in this case, to use the Liverpool method. The cases relied on by Bloor relied on were obviously distinguishable. They related to different local planning authorities, operating different policies on different sites in different circumstances.
98. Bloor did not in the end rely on the 2008 population projections and the Chelmer model calculations in arguing that the Council lacked a five-year supply of housing land. Mr Leader said

that Ms Whettingsteel had not been cross-examined on the 2008 household projections or on the Chelmer model calculations and Mr Bateman confirmed when he was cross-examined that he was content to rely on the level of housing need identified in the Regional Strategy, which the Council had used in the preparation of the core strategy. This explains why Mr Cahill said what he did in paragraph 24 of his closing submissions (see paragraph 83 above).

99. Although the inspector referred to “a 10% or 20% buffer” in paragraph 8 of his letter, rather than a buffer of 5% or 20%, this does not matter. What is clear is that he found the Council was able to show more than a five-year supply of housing land – 5.02 years – if a 5% buffer was applied (paragraph 7). He recognized that this was only “marginally in excess of five years”, and he took note of Bloor’s argument that a 5% buffer was therefore insufficient (paragraph 8). But he was not persuaded by it.
100. One cannot infer from what the inspector said in paragraphs 7 and 8 of his letter that he must have confused the 10% discount with the 5% or 20% buffer, or that he must have ignored what had been said on either side about the 10% discount. In the submissions made for the Council in closing he had a sound basis on which to conclude that no discount was needed (see paragraph 88 above). If he had thought it necessary to apply a discount to the assumed delivery of housing on larger sites, as well as adding what he regarded as a sufficient buffer, he would have said so.

Discussion

101. Mr Cahill’s argument on this issue draws the court towards areas of planning judgment that were squarely within the remit of the inspector. Only in one respect do I think there is force in his submissions. Otherwise, the argument is mostly a rehearsal of Bloor’s case on the supply of housing land in its appeal, a case that was fully ventilated before the inspector and which he rejected.
102. There are four main areas of complaint in this ground: first, the inspector’s choice of the Liverpool method, rather than the Sedgefield, for calculating the supply of housing land, despite the appeal decisions presented in evidence at the inquiry, in which the Sedgefield method had been preferred; secondly, the inspector’s alleged failure to deal with evidence and submissions inviting him to base his consideration of the need for housing land on the information in the 2008 household projections and the Chelmer model calculations; thirdly, his use of a 5% rather than a 20% buffer, which it is said was unreasonable in the circumstances of this case; and fourthly, his alleged failure to include in his assessment a discount of 10% for the delivery of housing on larger sites.
103. Mr Maurici and Mr Leader said that all of these four matters were secondary issues, lying behind the primary issue, which was whether the Council could show a five-year supply of housing land. That is plainly right. But I do not accept, nor indeed did Mr Maurici and Mr Leader submit, that the inspector could confine the explanation he gave for his conclusions on housing land supply to a broadly stated conclusion that there was or was not a supply of that level.
104. I also acknowledge that, as the inspector himself said, “[the] calculation of housing land supply is not an exact science” (paragraph 7 of his decision letter). Ascertaining how much land is truly available for housing development is not simply an arithmetical process. It requires assumptions to be made and judgment to be exercised. As Harrison J. said in *R. (on the application of Spelthorne Borough Council) v Secretary of State for the Environment, Transport and the Regions* [2001] 82 P. & C.R. 10 (in paragraph 39 of his judgment), “[predictions] for the future necessarily involve assumptions which are made as the result of judgment and experience”. And as Hickinbottom J. said in *Stratford-upon-Avon District Council v Secretary of State for Communities and Local Government* [2013] EWHC 2074 (Admin) (at paragraph 25 of his judgment), the calculation of housing need “is not the product of a mathematical exercise alone; it

involves a series of planning judgments weighing a complex of material factors on the basis of all available evidence, including (where available) projections from different models”.

105. Because the business of calculating the supply of housing land involves assumptions and judgment there will sometimes not be a single right answer to the question “Can the local planning authority demonstrate a five-year supply?” Often it will be perfectly clear what the answer is, even if there is a margin of dispute between applicant and authority. But since this question has considerable significance for the application of government policy in the NPPF, a robust calculation is essential. And in cases such as this, where the local planning authority’s ability to show a five-year supply depends on several variables, any one of which could make a decisive difference to the outcome if an assumption or judgment contrary to the authority’s were accepted, the need for clarity and precision will be vital.
106. With those comments in mind I come to the specific criticisms made by Mr Cahill of the inspector’s handling of this issue.
107. I do not see any force in Mr Cahill’s submissions about the inspector’s choice of the Liverpool method of assessment in preference to the Sedgefield. Both methods were well established as means of assessing the supply of housing land. The inspector knew that. He had evidence from either side urging him to accept one method or the other, for reasons that were fully explained, the Council contending for the Liverpool method, Bloor for the Sedgefield. I have referred to relevant passages in the evidence and submissions at the inquiry, which show how the argument was put on either side (see paragraphs 72, 73, 82 and 83 above).
108. Neither method is prescribed, or said to be preferable to the other, in government policy in the NPPF. In my view the inspector was free to come to his own judgment on this question. In paragraphs 7 and 8 of his decision letter he referred to the essential characteristics of each method. In paragraph 7 he said the Liverpool method spreads any shortfall in supply in a given year over the remainder of the plan period, and is an appropriate method to adopt where there is not a severe shortage in supply. In paragraph 8 he described the Sedgefield approach as one that seeks to meet any shortfall earlier in the plan period. And he acknowledged Bloor’s assertion that this approach accords with the imperative of significantly boosting the supply of housing, stated in paragraph 47 of the NPPF.
109. It seems clear therefore that the inspector understood the essential differences between the two approaches and was able to reach his own view on the method that was more appropriate in the circumstances of this case.
110. Having referred in paragraphs 7 and 8 of his letter to the characteristics of the two methods, the inspector went on to say, in paragraph 9, that “the Liverpool model is a recognised way of calculating housing supply”. That observation, in itself, is not in dispute in these proceedings. The inspector based his choice of the Liverpool method on his consideration of the relevant facts, including the pattern and pace of housing provision planned for the borough in the core strategy. That was the context here. The inspector plainly took the view that, in the circumstances of this case at the time of his decision, the Liverpool method was the better way to establish what the level of supply really was.
111. The inspector gave significant weight to the core strategy inspector’s relevant conclusions, and, in particular, to his expectation that shortfalls in housing land supply in the early years of the core strategy period would later be overcome when the Sustainable Urban Extensions were developed. I do not accept that this was a misreading of the core strategy inspector’s conclusions in paragraphs 3.42 to 3.45 of his report (see paragraph 70 above). It was in effect, what he had said. But the inspector did not merely recite his colleague’s conclusion. He noted the progress that had been made with the Sustainable Urban Extensions at Shilton and Barwell (in paragraph 9 of his letter). And he expressly dealt with Bloor’s contention that the core strategy inspector’s

conclusions were based on a promise that had now proved to be false – that sites would swiftly be brought forward by way of allocations in the Site Allocations DPD, which had now been delayed (paragraph 10 of the decision letter). He did not reject that contention out of hand, but noted that the inspector who had dismissed Bloor’s appeal in 2011 was himself aware of the delay that had occurred in the preparation of the Site Allocations DPD.

112. The inspector explained why he shared the view of the core strategy inspector about early shortfalls in supply being corrected by large-scale housing development later in the core strategy period. He plainly had in mind the policy in paragraph 47 of the NPPF, which is cast in terms of a need “[to] boost significantly the supply of housing” and says that authorities should “use their evidence base to ensure that their Local Plan meets the full, objectively assessed needs” for housing in the relevant area, and identify a supply of sites “sufficient for provide five years worth of housing against their housing requirements ...”. He referred to that policy explicitly in paragraph 8, and came back to it in paragraph 11, where he referred to the Council not being “averse to boosting the supply of housing”.
113. Having set out the considerations weighing for and against either approach, the inspector went on, in paragraph 11 of his letter, to conclude that the Liverpool method provided “a reasonable basis for assessing future supply”. It was, in his opinion, a method congruent with the approach in the core strategy, and consistent with the aim of fulfilling the housing requirements identified there. That was a matter of judgment for him.
114. I cannot say that this was an unreasonable judgment for the inspector to make. Other inspectors might have taken a different view in the same circumstances. There might have been good reasons for doing so. But that is not enough to sustain a challenge before the court. It lies within the territory of planning judgment, and the court will not go there.
115. The inspector’s reasons on this matter are succinct, but that in itself is no criticism. Indeed, it is difficult to see what more he might have been expected to say.
116. I should add that I see nothing beyond semantics in the criticism of the inspector’s description of the two methods of assessment as “predictive models” (in paragraph 7 of his letter). Whether that is an infelicitous description of them is neither here nor there. The inspector plainly knew what they were and the purpose for which they were used. If he had described them as “assessment methods” rather than “predictive models” that might have been more accurate. But the fact that he described them in the way he did does not go to the substance of his conclusions, nor does it leave his reasons obscure.
117. Mr Cahill does not succeed in showing that the inspector’s choice of the Liverpool method was bad as a matter of law by pointing to other appeal decisions, which were before the inspector, showing that elsewhere in England, in the particular circumstances of those particular cases, the Secretary of State or his inspector had preferred the Sedgefield approach. The inspector did not ignore those decisions. He referred to them in paragraph 8 of his letter. In each of those decisions the inspector or the Secretary of State judged what the appropriate method of assessment would be. As Mr Maurici submitted, however, in none of them does one see the inspector or the Secretary of State exclude the Liverpool method as a potentially appropriate means of assessment, which could sensibly be adopted in another case if it was appropriate to do so. None of the decisions relied on by Mr Bateman dictated what the approach in another case should be. Each of those appeals, unsurprisingly, turned on its own particular facts as they were at the time of decision. Mr Maurici pointed out, for example, that in the appeal at Shottery, where the Secretary of State found, as the parties agreed, that there was a significant shortage in the supply of housing land, the inspector had noted (in paragraph 497 of her report) that there was no firm policy guidance on the correct approach to the assessment of housing land supply. She noted that the emphasis of the NPPF was on a significant boost in the supply of housing. She said that any

backlog should be dealt with quickly. And she took the view that in the case before her there was no strong local reason for doing otherwise.

118. I do not accept that the jurisprudence on consistency in decision-making suggests that in this case the inspector ought to have explained why he had differed in his approach from the inspectors and the Secretary of State in those other cases. This was not an instance of like cases having to be decided alike unless there was some explicit and cogent reason for deciding them differently. This was not, in truth, a case of an inspector departing from a previous decision, and having to explain why he was doing so. It was not a case of the facts and circumstances being indistinguishable from those in other appeals concerning other proposals on other sites where other facts and circumstances applied. If one takes the “practical test” referred to by Mann L.J. in the North Wiltshire case (see paragraph 19(7) above), which poses for a decision-maker the question “[Am] I necessarily agreeing or disagreeing with some critical aspect in the previous case?”, the response the inspector would have been entitled to give would have been that he was not. What he was doing was taking his own view in the circumstances of the case before him of how the supply of housing land ought to be assessed. This is the kind of issue described by Mann L.J. (ibid.) as being an area for “possible agreement or disagreement”, analogous, in my view, to one of the examples he gave, namely the “assessment of need”. In any event, I do not accept that the inspector was under the burden of explaining why he was not persuaded that in this case he should prefer, on the evidence and submissions he heard in the appeal, the same approach to assessment as had commended itself to the inspectors and the Secretary of State in those other cases.
119. The next of Mr Cahill’s points concerns the inspector’s alleged failure to deal with the evidence on the 2008 household projections and the Chelmer model calculations. In my view this is not a good point. The 2008 household projections and the Chelmer model calculations provided in Mr Bateman’s evidence were, according to Mr Cahill’s submissions in closing at the inquiry, provided so as to satisfy the “preference [in the NPPF] for the most up to date information” (see paragraph 83 above). But Mr Cahill went on to make it clear that for the purpose of the calculation of housing land supply Bloor was content to rely on the figures in the column of the relevant tables in Mr Bateman’s evidence – Table 4 (“Housing requirements using the Sedgefield approach”) and Table 5 (“Five year supply figures based on the Sedgefield approach”). Those figures were based on the total requirement of 9,000 new homes for the period 2006 to 2026 in the core strategy, a requirement derived from the regional strategy, rather than the 2008 household projections and the Chelmer model calculations.
120. In view of that submission the inspector did not need to reach a conclusion on the 2008 household projections and the Chelmer model calculations. He could confine his consideration of the rival arguments on housing land supply to the figures on which Bloor was content to rely. He did that. In doing so he did not commit any error of law. It was not incumbent on him to go further than he did. Bloor may now have had second thoughts about the value of the 2008 household projections and the Chelmer model calculations. In its appeal, however, Bloor did not base its argument on the supply of housing land upon that material. And I do not think the inspector’s failure to deal with it is a proper complaint to raise in these proceedings.
121. I turn to the inspector’s consideration of the appropriate buffer. Again, I cannot accept Mr Cahill’s submissions. The relevant passage in the NPPF is in paragraph 47, which advocates the use of either a buffer of 5% “to ensure choice and competition in the market for land” or a buffer of 20%, if there has been “a record of persistent under delivery of housing” in the local planning authority’s area. The purpose of adding a 20% buffer in those circumstances is not only to ensure choice and competition in the land market but also “to provide a realistic prospect of achieving the planned supply”. The NPPF does not go further than that in what it says about the choice of the appropriate buffer. It does not preclude the use of a buffer of less than 5% or more than 20% or somewhere between those two levels. It leaves that to the discretion of the decision-maker.

122. Adding a buffer of 20% or more will make a substantial difference to the required supply of housing land. A 5% buffer will make a difference, though much more modest. The question for the decision-maker in choosing the appropriate buffer, if there is dispute about that, will be the size of the buffer needed to ensure that the planned supply of housing land will be achieved. The focus will be on the concept of “persistent under delivery of housing”. The NPPF does not elaborate on that concept. This too is left for the decision-maker to judge. The word “persistent” seems to imply a failure to deliver the required amount of housing that has continued or occurred for a long time, though not necessarily through an authority’s deliberate default. Whether there has been a persistent under-delivery of housing will no doubt be contentious in many appeals by house builders and landowners against the refusal of planning permission by authorities naturally keen to defend their record in planning for housing development. Resolving that issue will be a matter for the planning judgment of the inspector who hears the appeal.
123. In this case the inspector found that the Council could show a supply of housing land of more than five years, though only slightly more, if a 5% buffer was applied (paragraphs 7 and 8 of his decision letter). He acknowledged that Bloor had argued that a 5% buffer was not enough, and, as he put it, that “a 10% or 20% buffer would be more appropriate”. He saw “some force” in that argument because, as he accepted, the Council could “only show a supply marginally in excess of five years” (paragraph 8). He evidently did not see the need for a buffer of more than 5%, because he accepted that the Council’s use of the Liverpool method of assessment was reasonable and that, on that basis, there would still be more than a five-year supply of housing land if a 5% buffer was applied. This is clear from what he said on this matter in paragraphs 7, 8 and 9 of his decision letter. Leaving aside for the moment his reference to “a 10% or 20% buffer” in paragraph 8, I think this was a judgment he could properly make. It is in no way vulnerable in law. And the reasons given for it, subject to what I shall say about the inspector having introduced the idea of a 10% buffer, do not fall short of being both adequate and intelligible.
124. The point that troubles me, however, is the inspector’s evident failure to deal with Bloor’s evidence and submissions, and the Council’s response to them, on the need to make a 10% discount from the notional delivery of housing on larger sites.
125. In their closing speeches at the inquiry both Mr Cahill and Mr Leader made submissions on this as a point meriting consideration in its own right (see paragraphs 82, 83, 87 and 88 above). It was, in truth, one of the main controversial aspects of the housing land supply issue. It was not merely a subordinate point. As both sides recognized, it was a matter of some significance in the calculation of the housing land supply, and in the crucial question in the first of the inspector’s two main issues, which was whether the Council was able to demonstrate that there was a five-year supply.
126. Mr Bateman took care in his proof of evidence (in paragraph 7.64) to emphasize that the 10% discount had nothing to do with the buffer, be it 5% or 20%, that had to be included in the land supply (see paragraph 79 above). In his evidence the 10% discount was a quite discrete factor. He may or may not have been right in pressing for it to be made. That is not for the court to decide. But there was nothing opaque in the way he described it. He firmly distinguished it from the buffer. He presented it as an additional and indispensable part of the assessment. The Council did not accept that. Ms Whettingsteel did not allow for the discount in her evidence, and in closing Mr Leader argued against it (see paragraph 88 above).
127. As Mr Maurici acknowledged, however, the inspector did not grapple with this point anywhere in his consideration of the issue of housing supply in his decision letter. There is simply no explanation of what he thought about it. Whether his reference to “a 10% or 20% buffer” reflects some confusion in his mind about Mr Bateman’s evidence on the 10% discount I cannot tell. Mr Maurici could not explain what it meant. What is clear, however, is that if the inspector intended his reference to “10%” to relate to the buffer, which is what he said, it could not also relate to the discount. And if he was intending to refer to the discount he would surely have said so. But he did

not. So he either confused the discount with the buffer or he simply neglected to deal with it at all. Either way, he fell into error. He failed to address the evidence and submissions on the 10% discount in a satisfactory way.

128. Mr Maurici submitted that the evidence given by Mr Bateman on the 10% discount in paragraphs 7.61 and 7.62 of his proof of evidence was of a general nature, a “rule of thumb”, rather than directed to the particular circumstances of large housing sites in the borough of Hinckley and Bosworth. He pointed to the footnote to paragraph 47 of the NPPF, which says that “[sites] with planning permission should be considered deliverable until permission expires ...” (see paragraph 66 above). This, he said, creates a presumption of deliverability, rebuttable only by clear evidence to the contrary. And he said that in this case there was no such evidence. He also referred to Mr Leader’s submission in his closing speech at the inquiry – that the Council could gauge the amount of housing that would come forward on particular sites each year through the Annual Monitoring Report, and that to incorporate a 10% discount in the land supply calculation would be double discounting (see paragraph 88 above). He said one could infer from the inspector’s acceptance of the Council’s land supply calculations, at the end of paragraph 7 of his letter, that he must have been unimpressed by Bloor’s case on the 10% discount.
129. Mr Cahill’s response to these submissions was that the inspector did not adopt that reasoning, and even if he had adopted it he would have had to explain why he did so in the light of the evidence given by Mr Bateman that both generally and in Hinckley and Bosworth there has been a history of large sites not yielding as much housing as is approved in planning permissions. For example, Mr Bateman had referred, in paragraph 7.63 of his proof, to the fact that although planning permission had been granted for 232 dwellings on the site on Leicester Road in Hinckley, reserved matters approval had been sought for only 184 (see paragraph 78 above). As Lewis J. said in *Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (in paragraph 71 of his judgment), the question of whether the “10% lapse rate” was reasonable was “essentially a matter for judgment of the inspector”, a judgment that in that case the inspector had made. Mr Cahill said that an inspector who had been presented with evidence about the appropriateness of discounting the delivery of housing permitted on large sites had to exercise his judgment on that evidence and, having done so, had to share that judgment with the parties in his decision letter. In this case the inspector did not do that.
130. Here, I think, Mr Cahill was right. I accept that the submissions made by Mr Leader in his closing speech at the inquiry might have given the inspector a solid basis for rejecting what Mr Bateman had said about the 10% discount in his evidence. But that, as I have said, is not a question that can be answered in these proceedings. It was a question for the inspector. And he did not come to grips with it, or at least he did not do so explicitly. In other cases this might not matter, if the presence or absence of a five-year supply of housing land is clear, regardless of any discount being made for the delivery of housing on larger sites with planning permission. This, however, was not such a case. Even on the most favourable view for the Council the five-year supply was tight. In the circumstances the contested 10% discount on large sites was a matter that required specific treatment in the inspector’s decision, leaving no doubt about his view, the reasons for it, and the consequence of it for the supply of housing land in the borough at the time of his decision – in particular whether it took the supply below the critical level of five years, and the extent of any surplus or deficit. It was not a matter the inspector could afford to ignore or on which his view could properly be left for the parties to read into his general conclusion on the question of the five-year supply. It was something he had to address. Unfortunately, he did not.
131. If the inspector had accepted Mr Bateman’s evidence on the 10% discount, and even if all of his other conclusions on the supply of housing land had stayed the same, the effect on his consideration of this main issue in the appeal, and indeed on the outcome of the appeal itself, might have been significant. It would almost certainly have had some consequence for the operation of relevant policy in the NPPF. On the Council’s case the housing land supply was, the inspector said, only “marginally in excess of five years” (paragraph 8 of his letter), without any

discount on the larger sites. In the calculations presented at the inquiry on behalf of the Council by Ms Whettingsteel the inclusion of a discount of 10% on the larger sites and on the Barwell Sustainable Urban Extension would have reduced the supply of housing land to less than the requisite five years.

132. If this had been the inspector's conclusion it would have had several possible repercussions in the appeal. The inspector would then have had to look at the implications for this appeal of the policy in paragraph 49 of the NPPF, which says that policies for the supply of housing are not to be considered up to date if the authority is unable to demonstrate a five-year supply of deliverable housing sites (see paragraph 68 above). The conclusion that there was less than a five-year supply of housing land might also have affected his conclusion on prematurity (in paragraph 15 of his decision letter). And it might have made a difference to his final conclusion on the merits of the proposal (in paragraph 29), in which he balanced the "housing supply situation" against the harm the development would cause to the Green Wedge and the conflict with Policy 9. In all of these respects the balance of advantage against disadvantage in the appeal might then have shifted in a significant way.
133. In short, it would be unsafe to conclude that if the inspector had taken account of the 10% discount contended for by Bloor the result of the appeal would inevitably have been the same as it was. It might well have been, but I cannot be sure that it would.
134. If, however, I am wrong in my view that the inspector failed to take into account the 10% discount, I would have to say that his reasons for rejecting it are entirely obscure. And because in my view this is, or might be, such a significant point, I could not conclude that his failure to give adequate reasons caused no prejudice to Bloor or that the prejudice was not substantial.
135. This ground of the application therefore succeeds, though only to the extent that I have indicated.

Issue (3) – prematurity

Government policy on prematurity

136. The Government provided guidance on the prematurity of proposals for development in "The Planning System: General Principles", published in 2005. That guidance survived the publication of the NPPF and the consequent replacement of numerous national planning policy documents extant until then, and it was current at the time of the inspector's decision on Bloor's appeal. The relevant passage of the document is in paragraphs 17 to 19:

"17. In some circumstances, it may be justifiable to refuse planning permission on grounds of prematurity where a DPD is being prepared or is under review, but it has not yet been adopted. This may be appropriate where a proposed development is so substantial, or where the cumulative effect would be so significant, that granting permission could prejudice the DPD by pre-determining decisions about the scale, location or phasing of new development which are being addressed in the policy in the DPD. A proposal for development which has an impact on only a small area would rarely come into this category. Where there is a phasing policy, it may be necessary to refuse planning permission on grounds of prematurity if the policy is to have effect.

18. Otherwise, refusal of planning permission on grounds of prematurity will not usually be justified. Planning applications should continue to be considered in the light of current policies. However, account can also be taken of policies in emerging DPDs. The weight to be attached to such policies depends upon the stage of preparation or review, increasing as successive stages are reached. For example:

- Where a DPD is at consultation stage, with no early prospect of submission for examination, then a refusal on prematurity grounds would seldom be justified because of the delay which this would impose in determining the future use of the land in question.

...

19. Where planning permission is refused on grounds of prematurity, the planning authority will need to demonstrate clearly how the grant of permission for the development concerned would prejudice the outcome of the DPD process.”

137. Policy relevant to the issue of prematurity appears in paragraph 216 of the NPPF, which says that “[from] the day of publication, decision-takers may also give weight to relevant policies in emerging plans”. The weight to be given to such policies will depend on “the stage of preparation of the emerging plan (the more advanced the preparation, the greater the weight that may be given)”, “the extent to which there are unresolved objections to relevant policies ...”, and “the degree of consistency of the relevant policies ... to the [policies of the NPPF] ...”.

Bloor’s case at the inquiry

138. At the inquiry Bloor relied on the advice in paragraphs 17 to 19 of the Government’s guidance document. Mr Bateman pointed out that the Site Allocations DPD was “still some way from being submitted and considered at an EiP or being adopted”, and was therefore “of only little weight at present” (paragraph 6.86 of his proof of evidence). He went on to say that the appeal proposal “at only 91 dwellings” could not be regarded as being “so significant” that to grant planning permission would prejudice the plan-making process, “when it is only 1% of the total dwellings to be provided in the period 2006 to 2026” (ibid.). He said that, in the light of what is said in paragraph 216 of the NPPF, “the emerging DPD is only of little weight” (paragraph 6.87). This, therefore, was one of those cases in which a refusal in the grounds of prematurity “would seldom be justified”, as paragraph 18 of the Government’s guidance document made clear (ibid.). Mr Bateman also relied in this context on the lack of a five-year supply of housing land and there being no allocation of land for housing in Groby. He said that in these circumstances, under the policy in paragraph 14 of the NPPF, a prematurity point could not be raised “unless the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the NPPF taken as a whole” (paragraph 6.88), and the Council’s recent grant of planning permission for development on a site at Market Bosworth that had been identified as a preferred site in the draft Site Allocations DPD (paragraph 6.89). These points were repeated by Mr Cahill in his closing submissions (at paragraph 16).

The Council’s case at the inquiry

139. The Council contended that Bloor’s proposal was premature. Ms Whettingsteel said that it “would result in a commitment for housing development and an amendment of the Green Wedge boundary outside ... the [Site Allocations DPD]”, and that this would be at odds with the plan led philosophy of the [NPPF]” (paragraph 1.8 of her proof). She explained the work that had so far been done on the preparation of the Site Allocations DPD and the likely timetable for the remaining stages of the process. The Preferred Options Report had been consulted upon between February and April 2009. Amendments to this document were being prepared. A pre-submission draft of the Site Allocations DPD was due to be published for consultation in August 2013. In final draft form it would be submitted to the Secretary of State in January 2014. This would be followed by a public examination “to allow the public to bring forward evidence to confirm whether or not the sites identified within the draft plan are the best sites for development” (paragraph 6.46). Ms Whettingsteel said it had been acknowledged in the draft Site Allocations DPD that there were “limited sites within Groby due to the nature of the settlement with major roads bordering it on three sides and, therefore, in order to provide sufficient housing within Groby it may be necessary to allocate greenfield sites” (paragraph 6.48). She added that Bloor “should not take great comfort from the appeal site’s identification as one of the Council’s

preferred options”, because “[the] site may not survive the remaining stages of the plan making process” (paragraph 6.49). In a later passage of her proof of evidence, when dealing with “Prematurity” as a distinct issue in the appeal, she said that “[ad hoc] decision making outside ... the plan process ... tends to inhibit the proper and full participation of the public in the decision making process” and “is thus at odds with the Government’s emphasis on localism and increasing public involvement and democratic accountability in planning” (paragraph 7.28).

140. Mr Leader based his closing submissions on prematurity on Ms Whettingsteel’s evidence. In view of government policy in the NPPF and the relevant guidance in “The Planning System: General Principles” he said that in each case the question of whether it would be right to refuse planning permission on the grounds of prematurity would turn on the particular facts. Policy 8 of the core strategy called for at least 110 new homes to be provided in Groby. The inspector in the 2011 appeal had found that there has been “97 net completions” since the beginning of the core strategy period, and had therefore concluded that “the [core strategy] allocation can ... carry little additional weight in favour of development”. Since his decision three more dwellings had been added to the stock of housing in Groby. It followed, submitted Mr Leader, that “there continues to be no pressing need to allocate land for development in the village ahead of [a public examination of] the [Site Allocations DPD] that is being prepared”. The Council had identified more than one site that might be suitable for development in Groby. The “process of open consultation” in the preparation of the Site Allocations DPD was “particularly important in this case because of the very recent appeal decision which determined the site is unsuitable for development on Green Wedge grounds”. In these circumstances, Mr Leader submitted, especially the absence of any pressing need for new homes in Groby, and the three recent decisions of inspectors in which the site and its surroundings had been found to perform a valuable Green Wedge function, it was “entirely proper to defer bringing the site forward for development until it has been determined [that] less sensitive land ought not to be developed”.

Submissions

141. Mr Cahill submitted that the inspector failed to apply, or even acknowledge, the Government’s advice on prematurity in paragraphs 17 to 19 of the guidance document. He ought to have applied it. He had recognized (in paragraph 13 of his decision letter) that the emerging DPD in which site allocations would be made could carry no more than “limited” weight because it was still at the consultation stage. This, therefore, was a case in which, under the Government’s guidance, the refusal of planning permission on prematurity grounds would rarely be justified. There is no sign that the inspector was conscious of the policy, or that he had brought it to bear on his decision. He referred to the importance of public consultation (in paragraph 14), and the importance of local people having the chance to influence decisions made in the preparation of local and neighbourhood plans (in paragraph 12). But he failed to weigh against those considerations the need to ensure a five-year supply of housing land and the duty of local planning authorities to produce up-to-date development plans without delay – a point emphasized by the Secretary of State in the Shottery decision. He ought to have set against his concern as to the prematurity of Bloor’s proposal the fact that the Council had not got on with the preparations of its Site Allocations DPD. At the very least he ought to have explained why his approach to the issue of prematurity diverged from government policy and from relevant decisions of the Secretary of State.
142. Mr Leader and Mr Maurici said Mr Cahill’s argument starts from a false premise – that the inspector saw the question of prematurity as one of the main issues in the appeal. He did not. He saw it as a part, and only a subordinate part, of the first main issue. He dealt with it in the context of the supply of housing land, when considering relevant policy in the NPPF and the development plan and the progress of the Site Allocations DPD towards its adoption. He reached a judgment on it in the light of the evidence and submissions he heard on the timing of the proposal. That judgment was reasonable, and the reasons the inspector gave for it were adequate. He did not need

to give reasons for departing from government policy on the prematurity of proposals for development, because he did not depart from that policy. The policy does not preclude a refusal on the grounds of prematurity when there is, as the inspector found, an up to date core strategy, a five-year supply of housing land, and a statutory plan-making process – the Site Allocations DPD process – well under way. In these circumstances the inspector was entitled to conclude, as he did, that it was not necessary to grant planning permission for the proposed development at this stage, and that to do so would “pre-empt a decision that should properly be made through the development plan process” (paragraph 14) and would be “premature ... in advance of the adoption of the [Site Allocations DPD]” (paragraph 15).

Discussion

143. I see nothing in Mr Cahill’s argument on this ground. The answer to it, in my view, is that it seeks to attack the inspector’s conclusions on an issue that was simply a matter of planning judgment exercised in accordance with well settled policy. It goes outside the scope of the court’s jurisdiction in proceedings such as these.
144. In *William Davis v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin) Lang J. said (in paragraph 64 of her judgment) that the Secretary of State’s conclusion on prematurity in that case was “a planning judgment, which can only be challenged on the basis of an error of law, not because the [claimants] disagree with it on its merits” (see also the judgment of Foskett J. in *Murphy v Secretary of State for Communities and Local Government* [2012] EWHC 1198 (Admin), at paragraph 90). As was observed by H.H.J. Sycamore, sitting as a deputy judge of the High Court in *R. (on the application of Save Our Parkland Appeal Ltd.) v East Devon District Council* [2013] EWHC 22 (Admin) (in paragraph 32 of his judgment), “... the putting in place of a new development plan is a complex and time consuming exercise which can take several years from commencement to final approval”. On the facts of that case the plan-making process was at an early stage, and the deputy judge concluded (at paragraph 38) that “a refusal on the basis of prematurity would not have been consistent with national planning policy and would have been in breach of central government guidance”. On different facts, and in different circumstances, the court has held a refusal on prematurity grounds to have been consistent with national policy, and sound in law (see the judgment of H.H.J. Gilbert Q.C., the Honorary Recorder of Manchester, sitting as a deputy High Court judge, in *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2012] EWHC 444 (Admin), at paragraphs 47 to 49).
145. In this case the inspector did not refuse planning permission solely on the ground of prematurity. His conclusions on that issue rest within an assessment of the planning merits in the course of which he also concluded that the proposed development was not supported by any immediate need to increase the supply of housing land, that it would damage the character and appearance of the Green Wedge, that it was contrary to Policy 9 of the core strategy, and thus, at least to this extent, that it was not in accord with the development plan. I do not think it matters whether prematurity was a separate issue or part of the inspector’s first main issue, on housing land supply. Either way, it was a matter he had to consider, because the timing of the proposal was clearly relevant to its merit.
146. As always, the context is important. Here the context was this. Bloor’s proposal was for 91 dwellings on an unallocated site in the Green Wedge between Groby and Ratby. Policy 8 of the core strategy looked to the Site Allocations DPD to allocate land for at least 110 new dwellings in Groby. If one were to assume that all of those dwellings will have to be built on land in the Green Wedge, Bloor’s proposal for 91 would represent a large proportion of them, more than 80%. The Site Allocations DPD was well on its way in its statutory process. In that process, however strong the case for allocating Bloor’s site may be, there will be a discussion of the relative merits of

competing sites, in which the local community will have the chance to take part. The outcome is, or was, far from a foregone conclusion.

147. That is to paraphrase what the inspector was saying in the four paragraphs of his decision letter that deal with prematurity, paragraphs 12 to 15, and in paragraph 23 (see paragraphs 8, 9 and 15 above). In paragraph 12 he referred to the 12 core principles in paragraph 17 of the NPPF, which include the principle that planning in England should be “genuinely plan-led” (see paragraph 24 above). If planning is to be plan-led the process of plan-making, in which local people can participate, should be maintained. This principle is, in my view, compatible with the need for decisions on development proposals to be made promptly in the development control process unless there is a good reason for the decision to await the next appropriate stage of plan-making. But it recognizes, as did the inspector in paragraph 12 of his letter, that there will be occasions when the suitability of a site for a particular form of development ought, in the public interest, to be considered in a plan-making process rather than when the landowner or a developer chooses to make a planning application. The purpose of the Government’s policy on prematurity is to protect a plan-making process from decisions on individual planning applications pre-empting decisions that should properly be made in the process of plan-making. That the inspector was aware of this is clear from what he said in paragraph 14.
148. In “The Planning System: General Principles” the Government made clear (in paragraph 17) that a refusal on the grounds of prematurity would only usually be justified either when the proposed development was “so substantial” or when its “cumulative effect would be so significant” that to grant planning permission for it could prejudice an emerging development plan document “by predetermining decisions about the scale, location or phasing of new developments which are being addressed in the policy in the DPD” (paragraphs 17 and 18). The question of whether a proposed development is “substantial” enough to justify a refusal on prematurity grounds will always depend on the context. The scale of the development must be viewed in the context of the particular need being planned for in the development plan document. The guidance in “The Planning System: General Principles” is for the decision-maker to apply flexibly according to the circumstances that arise on the application or appeal. It must always be applied having regard to the nature and scale of the proposed development, its location, and the stage the draft development plan document has reached.
149. The inspector did not refer to that guidance in his decision letter. But in my view he did not have to. He clearly had it in mind, and his conclusions on the prematurity of Bloor’s proposal were consistent with it.
150. Paragraphs 12 to 15 of the decision letter appear in the section headed “Housing Supply”, where the inspector dealt with the first main issue, the adequacy of the supply of housing land in the borough. In the paragraphs preceding his consideration of prematurity he had concluded that the Council was able to show a five-year supply of land for housing. This was clearly a significant factor in his conclusions on prematurity. It is not hard to see why. What he had to consider here was whether he ought to grant planning permission for the proposed development in spite of its not being allocated for housing in the development plan, and in spite of its not being needed, at least at this stage, to remedy any shortfall in the supply of housing land. He knew, however, that the Council had identified the appeal site as a preferred option for housing development in the draft Site Allocations DPD. He referred to this in paragraph 13 of his letter and said it was a factor that lent to support to Bloor’s appeal. But although, as he said in paragraph 14 of his letter, the appeal site might be allocated for housing development in the Site Allocations DPD, granting planning permission for it “at this time” would, he said, “pre-empt a decision that should properly be made through the development plan process”, and “render futile the work done by the Council and the contributions made by the local community” in that process. This, he said, would have the effect of “reducing public confidence in the planning process and would be contrary to the spirit of paragraphs 12 and 17 of the ... NPPF”.

151. After his consideration of the second main issue, the effect of the proposed development on the Green Wedge, the inspector also said that a decision to grant planning permission would not only pre-empt decisions being made in the Site Allocations DPD process but also the review of the Green Wedge, both of which were “well advanced” (paragraph 29). Taken together, those conclusions are, in my view, a paradigm of the exercise of planning judgment called for in the Government’s policy and guidance on prematurity extant at the time of the inspector’s decision.
152. It cannot be suggested that the inspector’s reasons on this issue are unclear or incomplete. They are very fully explained. And they do not expose any misunderstanding or misapplication of relevant policy.
153. This ground of the application therefore fails.

Issue (4) – the Green Wedge

The core strategy inspector’s report

154. In paragraph 3.168 of his report the core strategy inspector said the Green Wedge “provides separation between Groby, Ratby, Kirby Muxloe and the suburbs of Leicester”, and as providing “a valuable function in retaining the identities of the individual settlements”.

The 2011 appeal decision

155. In the decision letter of 24 February 2011 on Bloor’s previous proposal for development on this site the inspector had acknowledged the general observation about the function of the Green Wedge in paragraph 3.168 of his report (paragraph 19). He had said that the development would be “in direct conflict” with Policy 9 of the core strategy (paragraph 22). But he had noted that a review of the boundary of the Green Wedge was going to take place (ibid.), and that the site had been included in the Site Allocations DPD as “one of three preferred options for residential development in Groby”, which in his view, “along with the difficulties in identifying sufficient additional and appropriate housing land within Groby and the delay in producing the [Site Allocations DPD], carry weight in favour of the proposal” (paragraph 23). However, he concluded that “any weight ascribed to the allocation of the site in the draft [Site Allocations DPD] must be tempered by the fact that the [Site Allocations DPD] is at a very early stage in its preparation and consultation is ongoing” (ibid.).

Bloor’s case at the inquiry

156. In his evidence at the inquiry Mr Bateman referred to the review of the Green Wedge in September 2011, subsequently revisited in December 2011, which was “an evidence base for the review of boundaries in the [Site Allocations DPD]” (paragraph 6.48 of his proof). The appeal site was part of “Area F” in the review. The September 2011 version of the review had this land did not achieve the objectives of the Green Wedge, and had said that, “when looking at the [Green Wedge] strategically and considering the development pressures around Groby and the [core strategy] housing requirement in comparison to other areas of the [Green Wedge] this plot of land would have a more limited impact on the overall functioning of the [Green Wedge than] other more sensitive areas” (paragraph 6.53). It also said that Area F did not achieve the objectives of the Green Wedge, that its development would have the least impact on the functioning of the Green Wedge, and that it should be considered the least sensitive area of the Green Wedge abutting Groby (paragraph 6.54). Mr Bateman said that the appeal site was “the best location

around Groby to be developed ...” and that in the circumstances the weight to be attached to Policy 9 of the core strategy was reduced (paragraph 6.56). He said that in his view the appeal site “does not perform a critical role in [Green Wedge] terms and the development can be accommodated without significant harm to the immediate locality or to the wider [Green Wedge], resulting only in the loss of some 0.32% of the overall area” (paragraph 6.75).

157. In his closing submissions (at paragraphs 9 to 11) Mr Cahill invited the inspector to accept that the appeal site was “the best site to select in Groby”, given that the Council’s Preferred Options document had identified it as one of the Council’s preferred sites for development, that in the review of the Green Wedge undertaken in September 2011 it had been concluded that the appeal site “should be considered as the least sensitive area of the [Green Wedge] abutting Groby”. The site was “the best candidate” to satisfy the requirement of Policy 8 of the core strategy for housing development. Thus the admitted breach of Policy 9 was “technical only”. Bloor’s main point here was that the circumstances were now different to what had been before the inspector in the 2011 appeal. In particular, the considerations that had persuaded the inspector in that appeal to give only limited weight to the potential of the site for housing development no longer applied. The “evidence base” was now quite different.

The Council’s case at the inquiry

158. Ms Whettingsteel said in her evidence that because housing was not one of the uses of land considered acceptable in the Green Wedge, Bloor’s proposal was contrary to Policy 9 (paragraph 6.30 of her proof).
159. Ms Whettingsteel described the Council’s review of the Green Wedge as “a provisional assessment comprising a desk top and limited site review of a range of sites, which could conceivably be allocated for development in due course” (paragraph 6.45). But there was not a “settled view” that these sites would be suitable for development in the future. They would “still have to pass through further technical and democratic ‘sieves’ before they can be allocated for development” (ibid.). On the possibility of changes being made to the boundary of the Green Wedge, Ms Whettingsteel said this (in paragraph 7.14):

“I cannot ... emphasise too much that such adjustments are to be made as part of the plan making process. The [Green Wedge] is not to be eroded through [ad hoc] planning applications and appeals. This is especially the case where there is an adequate supply of land for housing and a well advanced DPD that will deliver more land in the near future.”

160. When considering the effect the development would have on the Green Wedge Ms Whettingsteel said it “would extend housing outside ... the settlement boundary”, which in her view was “a defensible boundary not only in policy terms, but created by natural features on the ground” (paragraph 7.21). So “the loss of this section of the [Green Wedge] would diminish its ability to guide development form and reduce the important separation between the settlements of Groby and Ratby” (ibid.). She said that “the [Green Wedge] policy function of preventing the merging of settlements would be severely compromised by the proposal” (ibid.). The development “would cause harm to the landscape and the character of Groby and would impinge on the [Green Wedge] and the separation it provides between Ratby and Groby” (paragraph 9.3).
161. On the appeal site’s contribution to the Green Wedge, Mr Leader submitted in closing that Policy 9 of the core strategy “restricts housing and other forms of development in the Green Wedge”. The site, he said, “occupies a narrow neck of open land between Ratby and Groby”. Development here would be “likely to contribute coalescence”. Nothing had changed on the ground since the last inspector’s decision, in February 2011. But the “vulnerability and significance of this part of the Green Wedge is ... increased by the grant of planning permission for substantial development at Glenfield”. Not only did the appeal site “contribute to the maintenance of separate identity” between settlements; it also enhanced the “quality of life of Groby’s residents” because it was “an area of undeveloped land within the confines of the village”. The proposed development would

“cause real harm to the Green Wedge”. It would “erode the gap between the two villages”, and it would “harm the quality of life of local residents”. As in February 2011, Bloor’s proposal was thus “in direct conflict with Policy 9 of the core strategy” – a policy that “mediates the balance that is to be struck on the one hand between the need for housing, and on the other, the need to protect the environment and the setting of towns and villages”.

Submissions

162. Mr Cahill submitted that the inspector failed to consider whether circumstances had changed since the previous appeal decision in 2011. Circumstances had changed. A different conclusion on the effect that development on the appeal site would have on the Green Wedge was now justified. The inspector ignored the new facts. Or if he had them in mind he did not explain why they were not such as to lead him to a different conclusion to the inspector in the 2011 appeal. He simply said that he saw no reason to disagree with the conclusion reached in the 2011 appeal decision (paragraph 24 of his decision letter). He also took into account an immaterial consideration – his mistaken assumption that the appeal site itself, as opposed to the Green Wedge as a whole, had been considered by the core strategy inspector in his report. The core strategy inspector’s observations in paragraph 3.168 of his report were general, and not specific to the appeal site.
163. Mr Maurici and Mr Leader submitted that this is really nothing more than a disagreement with the inspector’s assessment of the planning merits. The inspector concluded that Bloor’s development would harm the Green Wedge. His judgment on that issue was consistent with that of the inspector in the 2011 appeal. He noted (in paragraph 19 of his decision letter) that the consistent view of inspectors was that development in the Green Wedge would detract from its open character and appearance, and would conflict with development plan policy. He knew perfectly well that the core strategy inspector had considered the whole of the Green Wedge, rather than the appeal site on its own as a part of the Green Wedge. Had his own judgment been different from those other inspectors he would have had to explain why. The weight to be attached to the review of the Green Wedge was a matter for him. He acknowledged that the review was under way, but had not yet been completed. He obviously took it into account. But this did not stop him applying Policy 9 of the core strategy and concluding when he did that the proposed development would conflict with it. The result of his consideration of this issue, with the benefit of his site visit, was that the development “would detract from the character and appearance of the area and would conflict with Policy 9 of the Core Strategy”, and thus he saw “no reason to disagree with the conclusion reached in the 2011 appeal decision” (paragraph 24).

Discussion

164. On this issue I think Mr Cahill’s submissions cross the line that divides the court’s jurisdiction from the realm of planning judgment. I reject them.
165. Both of Mr Cahill’s points concern the way in which the inspector treated the planning history of the appeal site and the Green Wedge – and, in particular, a single paragraph in the core strategy inspector’s report, the decision in the 2011 appeal, and the review of the Green Wedge now under way. They do not concern the substance of the inspector’s judgment on the question he had to face in the second main issue in the appeal, which was whether the development would harm the character and appearance of the Green Wedge.
166. In paragraphs 20 to 24 of his decision letter the inspector considered the effect the proposed development was likely to have on the Green Wedge. He did this by describing the topography of the appeal site and its surroundings (in paragraph 20), the effect he thought the development would have in reducing the gap between the villages of Groby and Ratby (paragraph 21), and the value of the site as an area of open land enjoyed by those walking on the public footpaths that run

along two of the site's boundaries (paragraph 22). None of the inspector's findings and conclusions in those three paragraphs is attacked in these proceedings.

167. The inspector went on to conclude that the proposed development "would detract from the character and appearance of the area" (paragraph 24). There is no criticism of that conclusion either. It was largely a visual judgment, the most difficult kind to fault in a public law challenge. The only basis on which it could be questioned in these proceedings would be an allegation of perversity. That has not been suggested, nor could it be.
168. In matters of visual or aesthetic judgment views will often diverge. Here the inspector clearly formed a judgment of his own on the likely effects of the development on the Green Wedge. This was a necessary part of his evaluation of the merits of Bloor's proposal. It went to one of the two main issues in the appeal. The inspector concluded that the development would damage both the character and the appearance of the Green Wedge. In paragraph 19 of his decision letter he noted the consistent view of previous inspectors – "that development would detract from the open character and appearance of the area ..." – and in paragraph 24 he said he saw no reason to disagree with the conclusions of the inspector who had dismissed the previous appeal. He did not, however, simply adopt those conclusions. He did not have to agree with them. He could have come to a different view. But he did not. His view was consistent with the other inspectors'. If he had disagreed with them he would have had to explain why. And it is not suggested that in doing so he could have pointed to any change on the ground since the previous appeal.
169. Bloor argued in the appeal that the "evidence base" had changed since the 2011 appeal, because the appeal site had come to be a preferred option for housing development during the Site Allocations DPD process and because the review of the Green Wedge had now been undertaken, with the aim of identifying the land that ought to be removed from the Green Wedge and allocated for development. These two considerations featured in the inspector's assessment, in paragraphs 18, 23 and 24 of his decision letter. The previous appeal inspector had noted that the appeal site was "one of three preferred options for residential development in Groby" but that at that stage the Council's review of the Green Wedge had not reached its consultation stage, and he had therefore given the review little weight. The inspector knew that. He was also well aware, because Bloor's evidence and submissions had stressed it, that since the previous appeal was heard public consultation had taken place in March 2011, that in the Green Wedge review the Council had looked at all of the sites on which the requirement for at least 110 new homes in Groby might be met, concluding in September 2011 that the appeal site was in "the least sensitive area of the Green Wedge abutting Groby", and that the site was no longer just on a shortlist of three but was now the favoured location.
170. Those points were all made in Bloor's evidence and submissions at the inquiry. I do not accept that on a fair reading of the decision letter it can be said that the inspector overlooked them. He had them in mind. He acknowledged in paragraph 23 of his letter, echoing what had said in paragraph 13, that "[it] may well be that the outcome of the [Site Allocations DPD and Green Wedge review] process will be to amend the Green Wedge boundary in the area and allocate the site for housing", though he judged this to be "far from being a foregone conclusion". But this did not deflect him from his view that the development would harm the character and appearance of the Green Wedge, and his conclusion that to permit it would offend Policy 9 of the core strategy. The suggestion that he failed to consider whether there had been material changes since the 2011 appeal decision is wrong in fact. He did consider those changes, and the weight he attached to them was for him to decide.
171. Mr Cahill's second point is, I think, no more convincing. In the first sentence of paragraph 19 of his letter the inspector referred to the site having been considered at three inquiries, including the examination into the core strategy. In the second sentence of that paragraph he said that the approach taken by the inspectors "that development would detract from the open character and appearance of the area ..." had been "consistent". I do not accept that he misinterpreted the core

strategy inspector's conclusion in paragraph 3.168 of his report. What the core strategy inspector had said was in very general terms, relating to the function of the core strategy's two green wedges in providing separation between settlements, rather than specific to the appeal site. But it applied to the appeal site as well as to the Green Wedge as a whole. I do not accept that the inspector misunderstood this, or that he failed to notice how the inspector in the previous appeal had understood it in paragraph 19 of his decision letter. There was nothing inconsistent between what the core strategy inspector said in that single paragraph of his report and the proposition that development on the appeal site itself would detract from the open character and appearance of the Green Wedge. And in any case, as I have said, the inspector went on to make his own assessment of the likely effects of this proposed development on the Green Wedge. It is inconceivable that that assessment would have been any different if he had omitted the core strategy inspector from the consensus to which he referred in paragraph 19.

172. I therefore reject this ground.

Issue (5) – sustainable development

Bloor's case at the inquiry

173. At the inquiry Bloor contended that the proposed development was sustainable development within the meaning of that concept in the NPPF, and that, under paragraph 14 of the NPPF, there was therefore a presumption in favour of planning permission being granted for it. In his proof of evidence Mr Bateman said that the proposal was consistent with the three identified roles of sustainable development – the economic role, the social role and the environmental role (paragraphs 6.91 to 6.94, and 10.16). He argued that Policy 9 of the core strategy was out of date. He said (in paragraph 6.33 of his proof):

“Policy 9 has of course to be seen in the light of Policy 8 which requires a minimum of 110 dwellings to be provided and the emerging DPD which sets the appeal site out as one of three preferred sites to meet this figure. The policy also has to be seen in the light of paragraph 49 of the NPPF which states that where there is a lack of a five year supply then policies that restrict housing supply are also to be considered to be out of date. This policy clearly seeks to restrict housing land supply and therefore this policy is covered by paragraph 49 (see the Sapcote appeal decision ...). In those circumstances paragraph 14 of the NPPF sets out the presumption that permission should be granted unless certain caveats are met.”

and (in paragraph 6.56):

“In essence, ... whilst the appeal proposals do constitute development in the [Green Wedge], [Policy 9 of the core strategy] is a policy which is supposed to accommodate and shape future development requirements. The Local Plan is now 11 years old and does not make any provision for development requirements beyond 2006. There is a clear need for additional development to take place in the District as noted in the Core Strategy and this will require the release of greenfield land adjacent to ... Groby to meet sustainable development requirements. ...”.

The Council's case at the inquiry

174. The Council did not accept that the proposed development was sustainable development. Ms Whettingsteel said in her proof of evidence that the proposal was in conflict with Policy 9, and the core strategy's “wider strategy for sustainable development” (paragraph 1.7). Her conclusion on the on the question of whether the development would be sustainable development was that “the positive aspects in relation to the delivery of housing and economic development are outweighed by the environmental shortcomings of the scheme in relation to its impact on the [Green Wedge]”,

and therefore that “on balance the scheme does not represent a sustainable development as required by the NPPF” (paragraph 7.27). I have already referred to Mr Leader’s submission in his closing speech that Bloor’s proposal was in conflict with “a fundamental policy of the development plan”, namely Policy 9 of the core strategy, and that Policy 9 was not a “relevant policy” for the purpose of paragraph 14 of the NPPF.

Submissions

175. Mr Cahill submitted that the inspector failed to address Bloor’s argument that the proposed development would be “sustainable development”, failed to consider whether there was therefore a policy presumption in favour of planning permission being granted, and failed to confront the question of what weight, if any, he should give to the breach of Policy 9 of the core strategy. This was a policy that, as Cahill put it in paragraph 97 of his skeleton argument, “prohibited all residential development in the Green Wedge without regard to any cost/benefit analysis”, and was therefore inconsistent with the NPPF and in this sense “out-of-date”. It was the kind of policy to which Kenneth Parker J. had referred in *Colman v Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin) (in paragraphs 22 and 23) as being inconsistent with the “cost/benefit approach” of the NPPF. Mr Cahill also relied on Lewis J.’s observations in paragraph 72 of his judgment in *Cotswold District Council* to the effect that a policy restricting housing development could be a policy “for the supply of housing” under paragraph 49 of the NPPF. Policy 9 was such a policy. The inspector thus avoided a crucial question in the appeal, which was whether Bloor’s proposal found support in the Government’s policy in paragraphs 14 and 49 of the NPPF.
176. Mr Maurici and Mr Leader submitted that on a fair reading of the decision letter the inspector clearly saw no need to apply the approach to decision-making when the development plan is out of date that is indicated in paragraph 14 of the NPPF. He plainly found that the development plan was up to date. He said so in paragraph 15 of his letter. And he was right. There was an adopted policy governing proposals in the Green Wedge – Policy 9 of the core strategy. The inspector applied that policy, and saw that the proposal was in conflict with it. If he had thought the development plan was out of date for any reason – such as the absence of any allocation for housing development in Groby, or the current review of the Green Wedge – he would have said so. But that was obviously not what he thought. His conclusion that the development would harm the Green Wedge was, in effect, a conclusion that it was not “sustainable development”.

Discussion

177. I cannot accept Mr Cahill’s argument on this issue.
178. I think he exaggerated the significance of the question of whether Bloor’s proposal was for “sustainable development” when he described it in paragraph 93 of his skeleton argument as “the key controversial issue between the parties”. It would be more accurate to say that this was a question inherent in the second of the inspector’s two main issues, the likely effect of the development on the Green Wedge.
179. On any sensible view, if the development would harm the Green Wedge by damaging its character and appearance or its function in separating the villages of Groby and Ratby, or by spoiling its amenity for people walking on public footpaths nearby, it would not be sustainable development within the wide scope drawn for that concept in paragraphs 18 to 219 of the NPPF.
180. The inspector’s judgment, firmly stated in paragraph 24, and again in his “Conclusion” in paragraph 29, was that the development would indeed harm the character and the appearance of the Green Wedge, and would conflict with the policy of the development plan aimed at protecting

the Green Wedge from such harm – Policy 9 of the core strategy. I do not think he had to spell out that in this very obvious sense the development would be unsustainable. He could have added that, but in my view his decision is not deficient because he did not.

181. I need not repeat what I have already said about the policy in paragraph 14 of the NPPF. This ground raises a different aspect of the policy in that paragraph, which is the concept of the development plan being “out of date”. The suggestion here is that the plan was out of date essentially because of the lack of a five-year supply of housing land. The policy in paragraph 49 of the NPPF, it is said, was thus engaged. Policy 9 of the core strategy, if relevant to the supply of housing land in the borough, was itself out of date. Under the policy in paragraph 214 of the NPPF this was a policy whose inconsistency with the NPPF was more than “limited”. Mr Cahill criticized it as a policy – to borrow Kenneth Parker J.’s words in *Colman* (in paragraph 22 of his judgment) – as “on [its] own express terms very far removed from the “cost/benefit” approach of the NPPF”. He said Policy 9 was clearly at odds with the NPPF, because it precluded a “cost/benefit” approach of the kind advocated in paragraph 14 of the NPPF. The complaint is that the inspector failed to deal with this point.
182. There is a simple answer to those submissions.
183. First, the inspector did not accept the basic premise of Mr Cahill’s argument. He did not accept that there was less than a five-year supply of housing land. He found that there was a sufficient supply. That was a conclusion reached at the time when it had to be made, which was before any part of the Green Wedge protected for the time being by Policy 9 had to be released for development. It followed, therefore, that Policy 9 was not in this respect out of date. It was up to date. It was not, at least on the inspector’s analysis, prohibiting any residential development required to fulfil the five-year supply. Although the inspector did not articulate his conclusions in this way, it is the clear effect of them.
184. Secondly, in any event, the inspector did not sidestep the question of whether the development plan was up to date. He concluded, in paragraph 15 of his decision letter, that “the Council has an up to date development plan in the form of the 2009 [core strategy]”. This conclusion was not only explicit; it was also unqualified. It plainly included Policy 9, the central policy of relevance in the appeal. The inspector did not find Policy 9 to be out of date, or inconsistent with government policy in the NPPF, even to a limited extent. None of this, in my view, went outside the range of reasonable planning judgment. Whether the same conclusion could reasonably have been reached if the Council was unable to demonstrate a five-year supply of housing land, and whether the inspector’s assessment of the housing land supply was sound, are not questions that arise on this ground of Bloor’s application. I have discussed those questions already.
185. The inspector did not need to lengthen his decision letter by tackling an argument whose premise, in the light of his conclusion on the supply of housing land, was false. This was not a case in which the decision-maker had to confront an out of date development plan and all that follows from that – including the operation of the policy for decision-making in such circumstances in paragraphs 14 and 49 of the NPPF.
186. I do not think Mr Cahill’s argument gains anything from Kenneth Parker J.’s analysis of the particular policies of the development plan that he had to consider in *Colman*, in which he compared of those policies with government policy in the NPPF. In any event I do not read Kenneth Parker J.’s judgment in that case as authority for the proposition that every development plan policy restricting development of one kind or another in a particular location will be incompatible with policy for sustainable development in the NPPF, and thus out of date, if it does not in its own terms qualify that restriction by saying it can be overcome by the benefits of a particular proposal. That is more than I can see in what Kenneth Parker J. said, and more than I think one take from the NPPF itself. The question of whether a particular policy of the relevant development plan is or is not consistent with the NPPF will depend on the specific terms of that

policy and of the corresponding parts of the NPPF when both are read in their full context. When this is done it may be obvious that there is an inconsistency between the relevant policies of the plan and the NPPF. But in my view that was not so in this case.

187. Lewis J.'s judgment in *Cotswold District Council* does not help Mr Cahill either. In paragraph 72 of his judgment in that case Lewis J. was considering a development plan policy that restricted development, including housing development. He was able to endorse the approach of the inspector, who had concluded, as did the Secretary of State in his decision letter, that the policy should be disregarded to the extent that it sought to restrict the supply of housing. But this conclusion was founded on the policy in paragraph 49 of the NPPF – that 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”. In that case the inspector and the Secretary of State had found that there was very serious shortfall in the supply of housing land (see paragraph 29 of Lewis J.'s judgment).
188. This ground of the application therefore fails.

Conclusion

189. The application succeeds to the extent I have indicated. The inspector's decision will therefore be quashed and Bloor's appeal remitted to the Secretary of State for redetermination.

IN THE HIGH COURT OF JUSTICE

Claim No. CO/917/2020

QUEEN'S BENCH DIVISION

PLANNING COURT

BETWEEN

EAST NORTHAMPTONSHIRE COUNCIL

Claimant

-and-

SECRETARY OF STATE FOR HOUSING COMMUNITIES AND LOCAL GOVERNMENT

Defendant

- and -

LOURETT DEVELOPMENTS LTD

Interested Party



=====

CONSENT ORDER

=====

UPON the parties agreeing to the terms hereof

BY CONSENT IT IS ORDERED THAT:

1. Permission is granted and the decisions of the Defendant, dated 24 January 2020 and carrying reference number APP/G2815/W/193232099, to allow the Interested Party's appeal under s.78

of the Town and Country Planning Act 1990, and to make a partial award of costs in favour of the Interested Party, are quashed pursuant to s.288 of the same Act.

2. The appeal is remitted to be determined de novo.

3. The Defendant pay the Claimant's costs in the amount of £8616.66

Dated: This 7th Day of May 2020

PARTICULARS

- A. These proceedings concern an application brought under section 288 of the 1990 Act by the Claimant against (1) the decision of the Defendant to allow the Interested Party's appeal against the decision of the Claimant to refuse planning permission for residential development at land to the west of numbers 7-12 The Willows, Thrapston, NN14 4LY and (2) the decision to make a partial award of costs against the Claimant in respect of that appeal.

- B. The Defendant has carefully considered the Inspector's decision and the Claimant's Statement of Facts and Grounds and Reply, and the evidence served in support. He concedes that he erred in his interpretation of the definition of deliverable within the glossary of the National Planning Policy Framework ("NPPF") as a 'closed list'. It is not. The proper interpretation of the definition is that any site which can be shown to be 'available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years' will meet the definition; and that the examples given in categories (a) and (b) are not exhaustive of all the categories of site which are capable of meeting that definition. Whether a site does or does not meet the definition is a matter of planning judgment on the evidence available.

- C. The Defendant therefore considers that it is appropriate for the Court to make an Order quashing the decisions and remitting the appeal to be determined de novo.

- D. The Interested Party agrees that the decisions should be quashed and the appeal remitted to be determined de novo.



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Neutral Citation Number: [2016] EWCA Civ 1146

Case No: C1/2015/4315

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT (QUEEN'S BENCH)
THE HON. MRS JUSTICE LANG
CO/3447/2015

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2016

Before:

LORD JUSTICE PATTEN
LORD JUSTICE SALES
and
LORD JUSTICE DAVID RICHARDS

Between:

Gladman Developments Limited	<u>Appellant</u>
- and -	
Daventry District Council	<u>Respondent</u>
-and-	
The Secretary of State for Communities and Local Government	<u>Interested Party</u>

Richard Kimblin QC (instructed by **Irwin Mitchell LLP**) for the **Appellant**
Thomas Hill QC and **Christiaan Zwart** (instructed by **District Law**) for the **Respondent**

Hearing date: 10 November 2016

Approved Judgment

Lord Justice Sales:

1. This case concerns an application by Daventry District Council (“the Council”) under section 288 of the Town and Country Planning Act 1990 to quash the decision of a Planning Inspector (David Nicholson RIBA IHBC) on behalf of the Secretary of State dated 12 June 2015, in which the Inspector allowed an appeal by the appellant developers (“Gladman”) against refusal by the Council of planning permission for construction of 121 dwellings on an open field site adjoining the village of Weedon Bec in Northamptonshire. Lang J upheld the Council’s application and quashed the Inspector’s decision. The effect of Lang J’s order is that Gladman’s appeal against refusal of planning permission will have to be reheard before a different inspector. Gladman, however, appeals to this court against Lang J’s decision, with permission granted by Lindblom LJ.
2. At the hearing before Lang J, the Secretary of State conceded that the Inspector’s decision ought to be quashed and did not attend. Gladman, however, appeared by counsel to resist the Council’s application. On this appeal the Secretary of State has again not appeared by counsel, but did put in some written submissions to explain his position in relation to certain issues in the case.

Statutory and policy context

3. The determination of an application for planning permission is to be made in accordance with the development plan unless material considerations indicate otherwise. Section 70(2) of the 1990 Act provides that the decision-maker shall have regard to the provisions of the development plan, so far as material to the application. Section 38(6) of the Planning and Compulsory Purchase Act 2004 provides:

“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts, the determination must be made in accordance with the plan unless material considerations indicate otherwise.”
4. The development plan in this case included a range of policies which were saved, on the direction of the Secretary of State dated 21 September 2007, from the Council’s Local Plan which had been adopted in 1997. The Local Plan had been prepared by reference to an evidence base compiled in the 1990s. The period for which the Local Plan had been prepared was 1991-2006. By the time of the decision by the Inspector in 2015, the saved policies were old and the evidence base which underlay them had been established well in the past.
5. Nonetheless, in 2007 the Secretary of State had chosen a set of policies in the Local Plan which he considered should be preserved as having continuing suitability to be included in the current development plan for the Council’s area. In the covering letter dated 21 September 2007 which accompanied the formal direction to preserve the chosen policies as saved policies in the development plan, the Secretary of State explained that the extension of the saved policies was “intended to ensure continuity in the plan-led system and a stable planning framework locally, and in particular, a continual supply of land for development.”

6. The priority given to the plan-led system of planning control is a familiar and longstanding feature of English planning law, as reflected in both section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. Its importance is also emphasised in the National Planning Policy Framework 2012 (“NPPF”). For example, para. 150 of the NPPF states, “Local Plans are the key to delivering sustainable development that reflects the vision and aspirations of local communities.” A plan-led system of planning control promotes the coherent development of a planning authority’s area, allowing for development to be directed to the most appropriate places within that area, and enables land-owners, developers and the general public to have notice of the policies to be applied by the planning authority to achieve those objectives. It is not in the public interest that planning control should be the product of an unstructured free-for-all based on piecemeal consideration of individual applications for planning permission.
7. The Council’s Local Plan was originally adopted in 1997 in the context of an overall planning regime rather different from the one which applies now. In 1997 there was a requirement that the Local Plan should be compatible with the strategy set out in the Northamptonshire County Structure Plan, which related to the period 1983 to 2001 and was adopted in February 1989 (“the Structure Plan”). Paragraph 1.22 of the Local Plan explained that the Structure Plan contained no specific requirements in respect of residential development at Daventry, and that

“[The Council] has therefore developed its own policy in respect of the general location of development in the Daventry District. In line with current government advice, this policy is urban oriented and the continuing expansion of Daventry Town is provided for in this Local Plan.”

8. The Local Plan also sought to focus other residential development on four designated villages. At the same time, residential development at other villages in the Council’s area was to be restricted to infilling within existing village perimeters. These were called Restricted Infill Villages. Weedon Bec is listed as one of them. In addition, and as part of the general planning co-ordination for residential development in the Council’s area focused on Daventry Town and the four designated villages, in the saved parts of the Local Plan there was to be policy protection for the open countryside in the Council’s area.
9. Saved Local Plan policy HS 22 applies in relation to Restricted Infill Villages. It provides:

"RESTRICTED INFILL VILLAGES

POLICY HS22

PLANNING PERMISSION WILL NORMALLY BE GRANTED FOR RESIDENTIAL DEVELOPMENT IN THE RESTRICTED INFILL VILLAGES PROVIDED THAT:

A. IT IS ON A SMALL SCALE, AND

B. IT IS WITHIN THE EXISTING CONFINES OF THE VILLAGE, AND

C. IT DOES NOT AFFECT OPEN LAND WHICH IS OF PARTICULAR SIGNIFICANCE TO THE FORM AND CHARACTER OF THE VILLAGE, OR

D. IT COMPRISES THE RENOVATION OR CONVERSION OF EXISTING BUILDINGS FOR RESIDENTIAL PURPOSES PROVIDED THAT THE PROPOSAL IS IN KEEPING WITH THE CHARACTER AND QUALITY OF THE VILLAGE ENVIRONMENT."

10. The accompanying explanatory text in the Local Plan includes the following:

"4.88. The objectives of the District Council's planning policies in respect of these villages are as follows:

a. to ensure that new development does not bring about the extension of the village into open countryside,

b. to ensure that existing buildings are retained as far as possible,

c. to ensure that the scale, character, design and density of new development and redevelopment within the village is sympathetic to the existing built environment, and

d. to ensure that such important open spaces as now remain in these villages do not become the subject of unsuitable infill development.

Small Scale

4.89. In determining what constitutes "small scale" for the purposes of this policy, the District Council will not attempt to impose arbitrary upper limits on the number of dwelling units included in any application but will rather judge each case on its merits with particular regard to:

a. the scale of the proposal in relation to the character of the immediately adjoining area,

b. the scale of the proposal in relation to the size of the village as a whole, bearing in mind the need to maintain a balanced housing stock and assist in the social integration of new residents.

c. the scale of the proposal relative to other current and recent infill proposals, bearing in mind the need to ensure that the cumulative effects of successive developments do not damage the character and amenity of established residential areas.

d. the impact of the proposal on local services.

The Existing Confines

4.90. For the purposes of this policy, "existing confines of the village" will be taken to mean that area of the village defined by the existing main built-up area but excluding those peripheral buildings such as free-standing individual or groups of dwellings, nearby farm buildings or other structures which are not closely related thereto. Gardens, or former gardens, within the curtilages of dwelling houses, will not necessarily be assumed to fall within the existing confines of the village. The construction of a bypass around a Restricted Infill Village will not be regarded as an extension to the confines of the village and land between the existing built up area and the new Road will be considered as open countryside.

Important Open Land

4.91. Such sites will normally comprise large open frontages whose contribution to the character of the village is of acknowledged importance. However, private gardens and orchards can also make significant contributions to the local environment, both within and on the edge of the village, and the development of these will be resisted under this policy where appropriate. The development of private gardens which do not make an immediate contribution to the character of the local environment will also be resisted where they form important settings for listed buildings or other buildings of quality."

11. Saved Local Plan policy HS24 applies in relation to proposals for residential development in the open countryside. It provides:

"OPEN COUNTRYSIDE

POLICY HS24

PLANNING PERMISSION WILL NOT BE GRANTED FOR RESIDENTIAL DEVELOPMENT IN THE OPEN COUNTRYSIDE OTHER THAN:

A. DEVELOPMENT, INCLUDING THE RE-USE OR CONVERSION OF EXISTING BUILDINGS, ESSENTIAL FOR THE PURPOSES OF AGRICULTURE OR FORESTRY

B. THE REPLACEMENT OF AN EXISTING DWELLING PROVIDED IT RETAINS ITS LAWFUL EXISTING USE AS A DWELLING HOUSE PROVIDED THAT THE DWELLING IS NORMALLY OF THE SAME GENERAL SIZE, MASSING AND BULK AS THE ORIGINAL

DWELLING SITED ON THE SAME FOOTPRINT AND RESPECTS THE DISTINCTIVE NATURE OF ITS RURAL SURROUNDINGS."

12. The explanatory text in the Local Plan for this policy includes para. 4.97, as follows:

"The County Structure Plan seeks to restrain development in the open Countryside and this policy seeks to prevent residential development unless there is there is a requirement for accommodation for agriculture or forestry workers or the dwelling is direct replacement."
13. By the time policy HS24 was saved pursuant to the direction of the Secretary of State in 2007 the Structure Plan referred to had ceased to be a relevant planning document.
14. For the purposes of the discussion which follows, it is also relevant to note two other saved Local Plan Policies: policy EN1, for the protection of Special Landscape Areas, and policy GN2, which also includes express protection for Special Landscape Areas. Special Landscape Areas were concepts created by the now defunct Structure Plan.
15. In 2012 national planning policies were gathered together in the NPPF as a single comprehensive statement.
16. Paragraph 14 of the NPPF sets out a presumption in favour of sustainable development applicable in the context of plan-making and also in the context of decision-taking (i.e. when decisions are made whether to grant applications for planning permission). It provides in the relevant part in relation to decision-taking as follows:

"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 **decision-taking** this means:

 - 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."

17. Certain policies regarding implementation of national policy are set out in Annex 1 to the NPPF. Paragraphs 209 to 215 in Annex 1 provide as follows:

“209. The National Planning Policy Framework aims to strengthen local decision making and reinforce the importance of up-to-date plans.

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

211. For the purposes of decision-taking, the policies in the Local Plan (and the London Plan) should not be considered out-of-date simply because they were adopted prior to the publication of this Framework.

212. However, the policies contained in this Framework are material considerations which local planning authorities should take into account from the day of its publication. The Framework must also be taken into account in the preparation of plans.

213. Plans may, therefore, need to be revised to take into account the policies in this Framework. This should be progressed as quickly as possible, either through a partial review or by preparing a new plan.

214. For 12 months from the day of publication, decision-takers may continue to give full weight to relevant policies adopted since 2004 even if there is a limited degree of conflict with this Framework.

215. In other cases and following this 12-month period, due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).”

18. The NPPF contains a range of policies with a variety of objectives, including promoting sustainable transport and conserving and enhancing the natural environment.

19. Paragraphs 47 and 49 of the NPPF, in the section entitled “Delivering a wide choice of high quality homes”, are also relevant in this case:

“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 [footnote 11] 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 [footnote 12] 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.

[Footnote 11 To be considered deliverable, sites should be available now, offer a suitable location for development now, and be achievable with a realistic prospect that housing will be delivered on the site within five years and in particular that development of the site is viable. Sites with planning permission should be considered deliverable until permission expires, unless there is clear evidence that schemes will not be implemented within five years, for example they will not be viable, there is no longer a demand for the type of units or sites have long term phasing plans.

Footnote 12 To be considered developable, sites should be in a suitable location for housing development and there should be a reasonable prospect that the site is available and could be viably developed at the point envisaged.

...

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.”

Factual background and the Inspector’s decision

20. This case concerns an application by Gladman in May 2014 for planning permission for residential development of up to 121 dwellings on two open fields adjoining Weedon Bec village. This was not in-fill development of the village. The application was directly in conflict with saved Local Plan policies HS22 and HS24.

21. The Council refused planning permission, relying in particular on those saved policies. The reasons it gave included the following:

"1. The proposed development would be contrary to saved local plan policies GN1 (b and f), HS22, HS24 and GN2(g) and policy S1 of the emerging JCS [Joint Core Strategy], by reason of it being large scale development outside the confines of the restricted infill village, affecting open land of significance of the character and form of the village, within the open countryside and adjacent to the SLA. Therefore applying paragraph 12 of the NPPF, permission should be refused unless other material considerations indicate otherwise. Applying the fall-back position within paragraph 14 of the NPPF, it is considered that the adverse impacts of the proposed development would significantly and demonstrably outweigh the benefits when assessed against the policies in the NPPF taken as a whole. Specifically, the proposal would not constitute sustainable development due to the following elements of conflict with the NPPF and local policies:

a) The development would be a peripheral cul-de-sac estate that suburbanise this rural village location, would erode the local, character and historic form of the settlement, would not integrate well with the existing village and would facilitate social interaction or health, inclusive communities (contrary to paragraphs 55, 58, 61 and 69 of NPPF and saved policy GN2(a) of the Daventry Local Plan).

b) The development would not be well connected to local facilities (both within and outside Weedon) and accessibility by means other than the private car would be limited in terms of both practicality and attractiveness (contrary to paragraphs 35, 36, 58, 61 and 69 of NPPF and policy S10 of the emerging JCS).

c) The development would result in loss and harm to a valued local landscape, and would diminish the recreational value of the rural right of way that runs adjacent to and through the site ... (contrary to paragraphs 69 and 110 of NPPF).

d) The development would cause harm to the setting of designated heritage assets ..."

22. Gladman appealed to the Secretary of State, who appointed the Inspector. The Inspector conducted a planning inquiry lasting five days in May 2015 and set out his decision in a decision letter dated 12 June 2015 ("the DL"). He allowed the appeal and granted outline planning permission for the development.
23. At the planning inquiry Gladman contended that reduced or no weight should be given to policies HS22 and HS24 on the grounds that they were out of date. Gladman put forward two principal arguments for this conclusion: (i) the Local Plan related to

the period 1991-2006, and reflected an evidence base prepared in respect of that period, which was now long out of date, and the Structure Plan, which has been superseded and no longer has status as a statement of current planning policy; and (ii) these policies relate to housing supply and the Council could not show that it had a five year supply of deliverable sites for residential development, so they were deemed to be out of date by virtue of para. 49 of the NPPF.

24. The Council, on the other hand, submitted that it could show that it had a five year supply of deliverable sites for residential development and also that policies HS22 and HS24 reflected a high degree of consistency with a range of policies in the NPPF, not just housing policies, and therefore they should be given considerable weight despite the length of time they had been in place.
25. The Inspector upheld the Council's submission that it could show the requisite five year supply of deliverable sites for residential development and accordingly rejected Gladman's case that it was entitled to rely on para. 49 of the NPPF to say that policies HS22 and HS24 should be deemed to be out of date. That left for consideration the wider contentions of Gladman and the Council regarding the weight to be given the policies in light of their age.
26. The Inspector dealt with this in a very short passage at DL 68:

"68. The Council acknowledged, as it must, that saved LP policies HS22 and HS24 are both policies for the supply of housing. However, given that the Council can demonstrate a 5 year [Housing Land Supply], albeit only just, these policies are not excluded by NPPF 49. Nevertheless, given the age of the policies and their lack of consistency with the thrust of NPPF 47 towards boosting significantly the supply of housing, I give the conflict with these policies and GN1(E) and (F), reduced weight."

At DL71 he said this:

"71. For the above reasons, I find that only moderate weight should be given to the conflict with some policies in the LP and JCS. Conversely, substantial weight should be given to the scheme's contribution to meet housing targets and provide AH in particular. Taken together, I find that the proposals would accord with the development plan as a whole. Moreover, the fact that the proposals would amount to sustainable development, as defined in the NPPF, amounts to a material consideration of substantial weight which outweighs any conflict with the development plan in any event."

27. Although in the end nothing turns on this, I should mention that I find DL71 rather confusing. It is opaque how the Inspector can say that the proposals would accord with the development plan as a whole, when they conflict directly with policies HS22 and HS24. My confusion deepens when I read the Inspector's overall conclusion at DL86 to the effect that "as the Council can demonstrate a 5 year [Housing Land Supply] the weighted presumption in favour of sustainable development (NPPF 14

[i.e. the second bullet point in relation to decision-making in para. 14 of the NPPF, as set out above]) does not apply and the appeal should be determined on the normal planning balance.” If it were really true that the proposals accord with the development plan, however, the Inspector should have applied the first bullet point in relation to decision-making in para. 14 of the NPPF and approved the development proposals “without delay”. I do not think that Mr Kimblin QC, for Gladman, was able to provide any convincing explanation for this.

28. But it does not matter, because it is clear that even if the Inspector did find that the proposals were in accordance with the development plan as a whole, that was on the basis that any conflict with policies HS22 and HS24 ought to be given reduced weight as explained by him at DL68. The point therefore adds nothing to the main submission made by Mr Kimblin, that the Inspector was entitled to find that those policies were out of date and, in the exercise called for by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, should be treated as outweighed by statements in the NPPF, particularly in para. 47 of the NPPF.
29. In view of its relevance to some of the submissions in the case I should also set out DL15, under the heading “Special landscape area (SLA)”, where the Inspector said this:

“15. Much of Daventry district lies within a SLA defined in saved LP Policy EN1 and sets criteria for development in these areas. Policy GN2(G) normally grants permission for development providing that it would not adversely affect a SLA. Two points arise. First, the appeal site adjoins the SLA, but is not itself within it, and so Policy EN1 does not apply and Policy GN2(G) does not apply directly. Secondly, these are very old policies being based on a Structure Plan which predated the 1990 Act. Under the [NPPF] paragraph 215 ... policies relating to landscape areas should be criteria based whereas Policy GN2(g) is not. This policy should therefore be given limited weight.”

It is common ground that the reference to para. 215 of the NPPF here is a slip: the reference is really to para. 113 of the NPPF.

The judgment

30. The judge allowed the application by the Council under section 288 of the 1990 Act and quashed the Inspector’s grant of planning permission. The principal reason given by the judge was that the Inspector had been required by para. 215 of the NPPF to analyse in what way and to what extent policies HS22 and HS24 were or were not consistent with the policies set out in the NPPF, but he had failed to do this: [39]-[52].
31. This meant that the Inspector’s analysis at DL68 could be criticised in various respects. The judge accepted the Council’s submission that policies HS22 and HS24 were not necessarily inconsistent with the NPPF, just because they were adopted years earlier against the background of a now superseded Structure Plan, and its submission that there were important points of consistency between those policies (and the general approach in the saved parts of the Local Plan, of which those policies

formed an important part, to guiding the location of residential development in a coherent way in the Council's area) and policies in the NPPF, at [42]-[45], as follows:

“42. The LP policy was to locate housing allocation in urban areas, particularly Daventry, as it was the major employer and service centre in the district, and Government policy in 1997 advised that new development should be guided to locations which reduced the need for travel, especially by car. In rural areas, the LP policy was to identify specific villages suitable for development – the four Limited Development Villages. Elsewhere in rural areas, development would be restricted to within the confines of the existing settlements – the Restricted Infill Villages. Lastly, the LP protected the open countryside by restraining non-essential new housing development.

43. I accept Mr Zwart's submission [for the Council] that policies such as these are not necessarily inconsistent with the NPPF, just because they were adopted years earlier, against the background of a Structure Plan which has been superseded. The reason is that some planning policies by their very nature continue and are not "time-limited", as they are re-stated in each iteration of planning policy, at both national and local levels.

44. For example, the NPPF promotes development in locations where travel can be minimised and the use of sustainable transport modes maximised (NPPF 34). It encourages the use of existing buildings for housing development (NPPF 51). In rural areas, it advises that new housing should be located in existing settlements, avoiding open countryside save in special circumstances such as housing needs for rural workers and using heritage assets or redundant buildings (NPPF 55). Section 11 is dedicated to "Conserving and enhancing the natural environment" and provides that valued landscapes should be protected and enhanced and brownfield land and land with the least environmental or amenity value should be allocated to meet development needs (NPPF 109, 110, 111). The saved housing policies in the Local Plan are consistent with many of these NPPF policies.

45. At local level, it is pertinent to note that the very recently examined and adopted JCS, based upon the NPPF, also favours development in the towns, as sustainable locations. Whilst recognising the need for limited development in rural areas, to meet local needs, the JCS expressly protects rural areas which are prized for their tranquillity, and recreational and amenity value.”

32. The judge also held that the Inspector in DL68 improperly concentrated exclusively on paras. 47 and 49 of the NPPF and failed to take into account the broader ambit of the inquiry required under para. 215 of the NPPF, “which requires assessment of the

extent to which the saved policies are consistent with all NPPF policies, including policies for the protection of the natural environment and policies favouring development in settlements, brownfield sites, sustainable locations etc and not in the countryside”: [47]-[49].

33. The judge then made a subsidiary ruling at [51]:

“51. I accept Mr Zwart's submission that NPPF 47 sets out policy for a local authority's plan-making, not decision-taking. The two functions are clearly distinguished throughout the NPPF, and appear to have been confused by the Inspector in DL 68, when he referred to the *“lack of consistency with the thrust of NPPF [47] towards boosting significantly the supply of housing”*. I also accept Mr Zwart's point that use of the inapt word *“thrust”* perhaps reflects the Inspector's lack of clarity about the way in which NPPF 215 was to be applied. However, I consider that older policies which restrict housing supply can in principle be inconsistent with the key NPPF objective of *“providing the supply of housing required to meet the needs of present and future generations”* which is identified in NPPF 7 as a function of the social dimension of sustainable development. This applies to both plan-making and decision-taking, and so falls to be considered under NPPF 215.”

34. At paras. [54]-[55] the judge rejected a submission by Mr Kimblin that the Inspector's observations at DL15 showed that he had in fact adopted the proper approach to application of para. 215 of the NPPF in the critical paragraph of his reasoning, at DL68. In particular, she observed that DL15 was dealing with a different issue (effect on landscape) and different policies and it was not clear how the reasoning in relation to reduction of the weight to be given to policies EN1 and GH2(G) set out in DL15 could be carried across to the discussion of policies HS22 and HS24 at DL68.

Discussion

35. In my view, the judge was correct in her reasoning as highlighted above. Even reading the DL benevolently, as is appropriate for planning decisions of this kind; adopting the proper approach of avoiding nit-picking analysis of a decision letter with a view to trying to identify errors when in substance there are none; and also bearing in mind the expertise of the Inspector and his likely familiarity with the NPPF, it is clear that the Inspector has failed to grapple as he should have done with the issue posed by para. 215 of the NPPF.
36. This is not just a matter of a failure to give reasons. It is clear from the DL read as a whole that the Inspector has not sought to assess the issue of the weight to be accorded to policies HS22 and HS24 under the approach mandated by para. 215 at all. As the judge correctly identified, this appears from the deficiencies of the Inspector's reasoning at DL68 and his excessively narrow focus on paras. 47 and 49 of the NPPF, to the exclusion of other relevant policies in the NPPF which ought to have been brought into account in any proper analysis of the consistency of policies HS22 and HS24 with the policies in the NPPF. I add that it is a notable feature of the DL that, after making the necessary correction for the Inspector's slip in DL15 in referring to

para. 215 of the NPPF when he meant para. 113, the DL makes no reference at all to para. 215, even though that was the provision in the NPPF which set out the approach which the Inspector ought to have followed.

37. I agree with the judge that, contrary to the submission of Mr Kimblin, this criticism of the Inspector's reasoning cannot be met by reference to DL15. The topic dealt with there – the special landscape area – and the policies referred to were very different from the subject matter and policies dealt with at DL68. Moreover, the reasoning in DL15 is not applicable in relation to policies HS22 and HS24, which are dealt with in DL68. The first reason given in DL15 clearly has no application at all in the context of DL68. Nor does the second, which is a composite of two points: (a) saved policies EN1 and GN2(G) referred to in DL15 cross-refer to the SLA which was only of planning relevance because used as a concept in the Structure Plan, which has now fallen away, and (b) the new policy approach set out in para. 113 of the NPPF is in conflict with the approach adopted in those saved policies. Point (b) has no application in relation to policies HS22 and HS24, and point (a) is very different from anything which could be said about those policies. Clearly, the fact that policies EN1 and GN2(G) referred to a SLA concept which had effectively disappeared now that the Structure Plan had been superseded substantially undermined them in a way which does not apply in relation to policies HS22 and HS24. Put shortly, DL15 in no way indicates that the Inspector in fact had para. 215 of the NPPF in mind when he considered those policies in DL68.
38. This is sufficient to indicate that the appeal must be dismissed. However, Mr Kimblin made some additional points which I think I should address, since the case is to be remitted to another planning inspector.
39. There was a measure of agreement between the parties regarding the general approach to be adopted to consideration of development plan policies which are old, as policies HS22 and HS24 are here. Both sides referred to written submissions helpfully put in by the Secretary of State for consideration on the appeal.
40. I would formulate the position in this way:
 - i) Since old policies of the kind illustrated by policies HS22 and HS24 in this case are part of the development plan, the starting point, for the purposes of decision-making, remains section 38(6) of the 2004 Act. This requires that decisions must be made in accordance with the development plan - and, therefore, in accordance with those policies and any others contained in the plan - unless material considerations indicate otherwise. The mere age of a policy does not cause it to cease to be part of the development plan; see also para. 211 of the NPPF, set out above. The policy continues to be entitled to have priority given to it in the manner explained by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447, HL, at 1458C-1459G.
 - ii) The weight to be given to particular policies in a development plan, and hence the ease with which it may be possible to find that they are outweighed by other material considerations, may vary as circumstances change over time, in particular if there is a significant change in other relevant planning policies or guidance dealing with the same topic. As Lord Clyde explained:

“If the application does not accord with the development plan it will be refused unless there are material considerations indicating that it should be granted. One example of such a case may be where a particular policy in the plan can be seen to be outdated and superseded by more recent guidance” (p. 1458E).

- iii) The NPPF and the policies it sets out may, depending on the subject-matter and context, constitute significant material considerations. Paragraph 215 sets out the approach to be adopted in relation to old policies such as policies HS22 and HS24 in this case, and as explained above requires an assessment to be made regarding their consistency with the policies in the NPPF. The fact that a particular development plan policy may be chronologically old is, in itself, irrelevant for the purposes of assessing its consistency with policies in the NPPF.
 - iv) Since an important set of policies in the NPPF is to encourage plan-led decision-making in the interests of coherent and properly targeted sustainable development in a local planning authority’s area (see in particular the section on Plan-making in the NPPF, at paras. 150ff), significant weight should be given to the general public interest in having plan-led planning decisions even if particular policies in a development plan might be old. There may still be a considerable benefit in directing decision-making according to a coherent set of plan policies, even though they are old, rather than having no coherent plan-led approach at all. In the present case, it is of significance that the Secretary of State himself decided to save the Local Plan policies in 2007 because he thought that continuity and coherence of approach remained important considerations pending development of appropriate up-to-date policies.
 - v) Paragraph 49 of the NPPF creates a special category of deemed out-of-date policies, i.e. relevant policies for the supply of housing where a local planning authority cannot demonstrate a five-year supply of deliverable housing sites. The mere fact that housing policies are not *deemed* to be out of date under para. 49 does not mean that they cannot be out of date according to the general approach referred to above.
41. In the particular circumstances of this case Mr Kimblin submitted (i) that the facts that policies HS22 and HS24 appeared in a Local Plan for the period 1991-2006, long in the past, and were tied into the Structure Plan (in particular, in relation to policy HS24, as set out in the explanatory text at para. 4.97 of the Local Plan), which is now defunct, meant that very reduced weight should be accorded to them; (ii) that the Local Plan policies in relation to housing supply, which include policies HS22 and HS24, are “broken” and so again should be accorded little weight; and (iii) that policies HS22 and HS24 have been superseded by more recent guidance, in the form of para. 47 of the NPPF, and so should be regarded as being outdated in the manner explained by Lord Clyde in *City of Edinburgh Council*. I do not accept these submissions.
42. As to (i), policies HS22 and HS24 were saved in 2007 as part of a coherent set of Local Plan policies judged to be appropriate for the Council’s area pending work to develop new and up-to-date policies. There was nothing odd or new-fangled in the inclusion of those policies in the Local Plan as originally adopted in 1997. It is a

regular feature of development plans to seek to encourage residential development in appropriate centres and to preserve the openness of the countryside, and policies HS22 and HS24 were adopted to promote those objectives. Those objectives remained relevant and appropriate when the policies were saved in 2007 and in general terms one would expect that they remain relevant and appropriate today. At any rate, that is something which needs to be considered by the planning inspector when the case is remitted, along with the question of the consistency of those policies with the range of policies in the NPPF under the exercise required by para. 215 of the NPPF. The fact that the explanatory text for policy HS24 refers to the Structure Plan does not detract from this. It is likely that the Structure Plan itself was formulated to promote those underlying general objectives and the fact that it has now been superseded does not mean that those underlying objectives have suddenly ceased to exist. As the judge observed at [49], “some planning policies by their very nature continue and are not ‘time-limited’, as they are re-stated in each iteration of planning policy, at both national and local levels.”

43. As to (ii), the metaphor of a plan being “broken” is not a helpful one. It is a distraction from examination of the issues regarding the continuing relevance of policies HS22 and HS24 and their consistency with the policies in the NPPF. As Mr Kimblin developed this submission, it emerged that what he meant was that it appears that the Council has granted planning permission for some other residential developments in open countryside, i.e. treating policy HS24 as outweighed by other material circumstances in those cases, and that it relies on those sites with planning permission, among others, in order to show that it has a five year supply of deliverable residential sites for the purposes of para. 47 (second bullet point) and para. 49 of the NPPF. Mr Kimblin says that this shows that the saved policies of the Local Plan, if applied with full rigour and without exceptions, would lead the Council to fail properly to meet housing need in its area, according to the standard laid down in paras. 47 and 49 of the NPPF. Therefore, he says, no or very reduced weight should be accorded to policies HS22 and HS24.
44. In my view, this argument is unsustainable. We were shown nothing by Mr Kimblin to enable us to understand why the Council had decided to grant planning permission for development of these other sites. So far as I can tell, the Council granted planning permission in these other cases in an entirely conventional way, being persuaded on the particular facts that it would be appropriate to treat material considerations as sufficiently strong to outweigh policy HS24 in those specific cases. Having done so, there is no reason why the Council should not bring the contribution from those sites into account to show that it has the requisite five year supply of sites for housing when examining whether planning permission should be granted on Gladman’s application for the site in the present case. The fact that the Council is able to show that with current saved housing policies in place it has the requisite five year supply tends to show that there is no compelling pressure by reason of unmet housing need which requires those policies to be overridden in the present case; or – to use Mr Kimblin’s metaphor – it tends positively to indicate that the current policies are *not* “broken” as things stand at the moment, since they can be applied in this case without jeopardising the five year housing supply objective. In any event, an assessment of the extent of the consistency of policies HS22 and HS24 with the range of policies in the NPPF is required, as set out in para. 215 of the NPPF, before any conclusion can be drawn whether those policies should be departed from in the present case.

45. Finally, as to point (iii), the judge dismissed this contention at [51] by ruling that para. 47 of the NPPF sets out policy for a planning authority's plan-making, not decision-taking. There is conflicting authority on this point at first instance, since Hickinbottom J ruled in *Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 892 (Admin), at [52], that although the first bullet point of para. 47 relates to an authority's plan-making function, the rest of the paragraph is not so restricted and applies also to decision-making; and see, to similar effect, the observation in passing of Coulson J in *Wychavon District Council v Secretary of State for Communities and Local Government* [2016] EWHC 592 (Admin), at [46].
46. In the context of the present case, nothing really turns on this point, not least because the judge also said in [51] that "older policies which restrict housing supply can in principle be inconsistent with the key NPPF objective of '*providing the supply of housing required to meet the needs of present and future generations*' which is identified in NPPF 7 as a function of the social dimension of sustainable development. This applies to both plan-making and decision-taking, and so falls to be considered under NPPF 215". I agree with this. However, we had the benefit of submissions on the significance of para. 47 and in view of the different opinions on this it is desirable that we say something about it.
47. I agree with Lindblom LJ's statement in *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040, at [34], that
- "The policy in paragraph 47 of the NPPF relates principally to the business of plan-making. The policy in paragraph 49 relates principally to applications for planning permission; it deals with the way in which "[housing] applications" should be considered. But it must of course be read in the light of the policy requirement in paragraph 47 for local planning authorities to plan for a continuous and deliverable five-year supply of housing land ..."
48. Paragraph 47 of the NPPF deals with a mixture of topics. Mr Kimblin accepted that the first, fourth and fifth bullet points relate solely to plan-making and not to decision-taking. In my view, that is also true of the third bullet point: I think that the references to "years 6-10" and "years 11-15" make this clear, since these are references to the time periods to be dealt with when a development plan is prepared.
49. The second bullet point of para. 47, however, is not confined to plan-making. The fact that it imposes an obligation to "update annually" the five year housing supply means that it is looking in part at an activity of a local planning authority outside its plan-making function. The second bullet point is tied to the deeming provision in para. 49. The second bullet point of para. 47 creates a continuing obligation on a local planning authority to check that its housing supply is in fact in accordance with the standard there set out, and if it is not then I consider that the bullet point has similar force for decision-making that the judge was prepared to accord para. 7 of the NPPF. But if the standard set out in the second bullet point of para. 47 is being complied with by a local planning authority, as it was in this case, then in my view para. 47 has no implications for decision-taking by a planning authority. Thus, in the circumstances of

this case, para. 47 does not qualify as “more recent guidance” of the kind discussed by Lord Clyde in *City of Edinburgh Council*, such as might justify a planning inspector in treating policies HS22 and HS24 as being out of date or inconsistent with para. 47 of the NPPF for the purposes of the assessment required under para. 215.

50. For the reasons given above, I would dismiss this appeal.

Lord Justice David Richards:

51. I agree.

Lord Justice Patten:

52. I also agree.



Neutral Citation Number: [2018] EWCA Civ 1808

Case No: C1/2017/3339

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR JUSTICE SUPPERSTONE
[2017] EWHC 2865 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2018

Before:

Lord Justice Davis
Lord Justice Lindblom
and
Lord Justice Hickinbottom

Between:

Hallam Land Management Ltd.

Appellant

- and -

**(1) Secretary of State for Communities and
Local Government**

(2) Eastleigh Borough Council

Respondents

Mr Thomas Hill Q.C. and Ms Philippa Jackson (instructed by **Irwin Mitchell LLP**)
for the **Appellant**

Mr Zack Simons (instructed by **the Government Legal Department**)
for the **First Respondent**

Mr Paul Stinchcombe Q.C. and Mr Ned Helme (instructed by **Eastleigh Borough Council**)
for the **Second Respondent**

Hearing date: 3 May 2018

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

Lord Justice Lindblom:

Introduction

1. In deciding an appeal against the refusal of planning permission for housing development, how far does the decision-maker have to go in calculating the extent of any shortfall in the five-year supply of housing land? That is the central question in this appeal.
2. With permission granted by Lewison L.J. on 6 March 2018, the appellant, Hallam Land Management Ltd., appeals against the order of Supperstone J., dated 16 November 2017, dismissing its application under section 288 of the Town and Country Planning Act 1990 by which it had challenged the decision of the first respondent, the Secretary of State for Communities and Local Government, in a decision letter dated 9 November 2016, dismissing an appeal under section 78 of the 1990 Act. The section 78 appeal was against the refusal by the second respondent, Eastleigh Borough Council, of outline planning permission for a development of up to 225 dwellings, a 60-bed care home and 40 care units, the provision of public open space and woodland, and improvements to Hamble Station, on land to the west of Hamble Lane, in Hamble.
3. The site of the proposed development is about 23 hectares of pasture, on the Hamble Peninsula, between the Hamble River and Southampton Water. It is not within any settlement, nor allocated for development in the Eastleigh Borough Local Plan Review (2001-2011), adopted in 2006. The settlements of Bursledon, Netley and Hamble lie, respectively, to the north, the west and the south. Because it is in the “countryside”, the site is protected by policy 1.CO of the local plan. And because it lies within the Bursledon, Hamble, Netley Abbey Local Gap, it also has the protection of policy 3.CO.
4. An inquiry into the section 78 appeal was held by an inspector appointed by the Secretary of State on four days in June 2015. On 24 June 2015, the second day of the inquiry, the appeal was recovered by the Secretary of State, because it involved a proposal for “residential development of over 150 units ... , which would significantly impact on the Government’s objective to secure a better balance between housing demand and supply and create high quality, sustainable, mixed and inclusive communities”. In his report, dated 26 August 2015, the inspector recommended that the appeal be dismissed. The Secretary of State subsequently received a large number of further representations, some of them in response to letters he sent to the parties on 15 April 2016 and 29 June 2016. In those representations the Secretary of State received the parties’ comments on two decisions of inspectors on appeals in which the supply of housing land in the council’s area had been assessed – first, an appeal relating to a proposed development of up to 335 dwellings on land at Bubb Lane, Hedge End, which was dismissed on 24 May 2016, and secondly, an appeal relating to a proposed development of up to 100 dwellings on land at Botley Road, West End, which was allowed on 7 October 2016. In his decision letter on Hallam Land’s appeal the Secretary of State largely agreed with the inspector’s conclusions and accepted his recommendation.
5. The challenge to the Secretary of State’s decision was made on four grounds. The first and second grounds went to his failure – unlawfully, it was said – to ascertain the extent of the shortfall against the five-year housing land supply in the council’s area, and to provide adequate reasons for his relevant conclusions. The third and fourth grounds asserted that his decision was inconsistent with the conclusions on housing land supply and the weight to be

given to policy 3.CO in an inspector's report, dated 25 August 2016, in an appeal relating to a proposed development of up to 680 dwellings on land at Winchester Road, Boorley Green. Supperstone J. rejected all four grounds.

The issues in the appeal

6. The appeal before us raises two main issues:

- (1) given that the council could not demonstrate the requisite five-year supply of housing land under government policy in the first National Planning Policy Framework ("NPPF"), published in March 2012, whether the Secretary of State established the shortfall with sufficient precision, and whether his relevant reasons were adequate; and
- (2) whether the Secretary of State erred in law in deciding Hallam Land's appeal without having regard to the inspector's report on the Boorley Green appeal.

7. These issues raise no question of law that has not already been amply dealt with in a series of cases on the meaning of relevant policies in the NPPF, and on the importance of consistency in planning decision-making.

NPPF policy

8. We are not concerned in this appeal with the policies in the revised NPPF, which was published on 24 July 2018. I shall refer only to the policies in the first NPPF, as if they were still extant.

9. Paragraph 47 of the NPPF states:

"To boost significantly the supply of housing, local planning authorities should:

...

- identify and update annually a supply of specific deliverable sites sufficient to provide five years worth of housing against their housing requirements ...

...".

Paragraph 49 states:

"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."

Paragraph 14 contains the Government's policy for the "presumption in favour of sustainable development". It explains that:

"...

For decision-taking this means:

- 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.”

The inspector’s report

10. In his report the inspector noted, under the heading “The Case for the Council”, that the council “acknowledge that they are not currently able to demonstrate a 5 year housing supply, as required by NPPF para 47” (paragraph 22). It was the council’s case, however, that “the proposal is contrary to development plan policies which are not out of date, and is not the sustainable form of development for which there is a presumption in favour”, and that “[even] if the presumption in NPPF para 14 was engaged, the negative aspects of the scheme, including the landscape impact and the loss of openness, would significantly and demonstrably outweigh the benefits” (paragraph 41).

11. Summarizing the case for Hallam Land, under the heading “The Case for the Appellants”, he referred (in paragraph 62) to the uncontested evidence of its planning witness, Mr Usher:

“62. The need for housing is demonstrated in Mr Usher’s proof ... , which has not been challenged by the Council, and which reflects the conclusions of the Local Plan Examination that the draft is unsound for failing to make adequate provision. The Council accept that they cannot demonstrate a five year supply, the level being shown by the appellants to be 2.92 years, or 1.78 years if the need for affordable housing is included.”

Because the council would “not be able to meet its housing land requirements without the loss of significant areas of countryside...”, it was “inevitable that there will be a change to the open and undeveloped character of such land”. This was “not, of itself, an adequate ground to resist the development when there is no 5 year land supply, nor an up to date development plan” (paragraph 65).

12. In his conclusions the inspector identified the “main issues” as being “i) the effect of the development on the character and appearance of the countryside and its role in separating settlements, and ii) whether any harm would be outweighed by the potential benefits of the development, including a supply of market and affordable housing, and the improvement of station facilities” (paragraph 88).

13. He said that “[the] proposal would not fall within any of the specified uses in Local Plan policy 1.CO ...”. He concluded that there was “no doubt that a development of this scale would diminish the Local Gap both physically and, to some degree, visually, contrary to policy 3.CO ...”, and that “[in] these respects it would not comply with the development plan” (paragraph 90). He went on to find that “there are grounds to conclude that policy 1.CO may be regarded as out of date, but that there is not justification for giving any substantial reduction to the weight applied to policy 3.CO” (paragraph 96).

14. Under the heading “The Benefits of the Proposal” he noted that Hallam Land had particularly emphasized “the supply of market and affordable housing to meet an acknowledged need, and

the provision of facilities for Hamble Station” (paragraph 107). He continued (in paragraph 108):

“108. The Council acknowledge that they are not able to demonstrate more than a four and a half years supply of deliverable housing land, and it is the appellants’ view that the actual level is significantly less. It is not necessary for this report to carry out a detailed analysis of the housing land supply position, which is better left to the Local Plan examination, where all the evidence is available to the inspector. However, it can be said that there is a material shortfall against the five year supply required by NPPF para 47, and that there is evidence of an existing need for affordable housing. In these circumstances, the provision of up to 225 homes, 35% of which would be affordable, would be a significant advantage arising out of the scheme. It is also the case that the new dwellings would meet sustainable construction and accommodation standards, and be of a mix to satisfy a wide range of housing needs. In these respects, the development would help meet the NPPF objectives of boosting significantly the supply of housing, and delivering a wide choice of high quality homes. ...”.

He accepted that “[the] choice of accommodation would also be boosted by the provision of 100 care and extra care spaces”, and that “such accommodation would be likely to release a supply of existing, under-used homes to meet the general housing demand” (paragraph 109).

15. Bringing his conclusions together under the heading “Sustainability and Overall Conclusions”, the inspector said (in paragraph 116):

“116. When assessed against the criteria in para 7 of the NPPF, the supply of market and affordable housing, along with care facilities, would make a significant contribution to meeting the social role of sustainability, complemented by the provision of public open space, although, in the latter case, at the expense of the loss of the rural character of the public footpath crossing the site. The additional population and employment opportunities would assist the economic life of the area, as would the supply of homes in an area with an acknowledged shortfall. There would be the environmental and community benefits arising out of the station improvements (but having regard to the Council’s alternative scheme), any spin-off advantages for traffic and pollution levels, from the off-site highway works, and the environmental and ecological aspects of the landscaping proposals.”

He accepted that “[on] balance, this is a reasonably sustainable location in terms of accessibility” (paragraph 117). His final conclusion, however, went against the proposal. He found that “the loss of the gap between the surrounding settlements, involving the physical intrusion into an area of countryside, and contributing to the coalescence of those settlements, and loss of independent identity” would be contrary to policy 3.CO of the local plan and corresponding policies in the NPPF; that “[the] countervailing benefits of the scheme, as well as compliance with other development plan policies ... would not outweigh the harm that this loss of separation would cause”; and that “[taken] as a whole, the proposal does not amount to the form of sustainable development for which there is a presumption in favour” (paragraph 118).

The decision in the Bubb Lane appeal

16. The inspector in the Bubb Lane appeal concluded (in paragraph 45 of his decision letter):

“45. The evidence before me does not support EBC’s view that it is ‘a whisker’ away from demonstrating a five year supply of deliverable housing land. Notwithstanding EBC’s considerable efforts to improve housing provision, something in the order of a four year supply at the time of this Inquiry indicates that EBC has a considerable way to go to demonstrating a five year supply of deliverable sites. There is no convincing evidence that measures currently taken have been effective in increasing the rate of housing delivery. The scale of the shortfall is a significant material consideration in determining this appeal. The contribution that the appeal scheme would make to the housing supply, and particularly to affordable housing provision in the area in accordance with EBLP Policy 74.H, would be a significant benefit of allowing the appeal.”

Under the heading “Planning balance”, the inspector concluded that “some weight can be given to the conflict with EBLP Policy 2.CO, arising from the harm that would result from the proposal to the separation of settlements ...”, but that “this weight is limited because of the significant shortfall in housing supply, and the lack of convincing evidence that EBC’s efforts to address this are proving effective” (paragraph 52). He went on to say that, “[given] the current scale of the housing shortfall, the provision of additional market and affordable housing would be a significant benefit of the proposal” (paragraph 55). But he concluded, finally that “[in] my judgement, the adverse impacts of the proposal would significantly and demonstrably outweigh the benefits, when assessed against the policies in the *Framework* taken as a whole” (paragraph 57).

The decision in the Botley Road appeal

17. In the decision letter on the Botley Road appeal, the inspector stated these conclusions on “Housing land supply” (in paragraphs 18 and 19 of his decision letter):

“18. In conclusion, the final calculation taking a requirement figure of 1,120dpa, or 5,602 dwellings over the 5 year period, there is a 4.25 years’ supply of housing land. Even on the Council’s most favourable calculations, taking the Council’s approach to the buffer and with its suggested contributions from all the disputed sites, the supply would still only be 4.71 years, but the evidence indicates that this is unlikely to be achievable.

19. There is therefore a significant shortfall in the amount of deliverable housing land, amounting to some 833 dwellings. The Leader of the Council gave evidence of the impressive efforts the Council had made to underpin housebuilding confidence following the recession, but this does not seem to have been translated into the provision of enough housing land. Net completions for the two years 2014/15 and 2015/16 amounted to less than one year’s requirement. Referring to recent outline approvals, the Council said that it was making progress towards improving housing supply; recent permissions might enable it to exceed the OAN to a degree this year. Even if that happens, it is still well short of the requirement for the year. There is a significant shortfall to be made up, and the evidence that the gap might be closing quickly enough is far from convincing. The Council is not, as it claims, on the cusp of achieving a 5 year supply of deliverable housing land.”

Under the heading “Effect on the countryside and the strategic gap”, he noted (in paragraph 27) that “planning permission has been granted for a number of sites which have included dwellings in the strategic gaps”, and went on to say:

“27. ... But the Council’s argument that present needs can be met substantially within the land outside the gaps is wholly unconvincing; even with the permissions on gap land, there is still no 5 year housing land supply and without them, even on the Council’s unduly optimistic housing land supply calculations, there would only be 3.4 years’ supply of housing land. On the contrary, the evidence is that the gaps are a factor in limiting the choice of sites available for the provision of housing, and that breaches of the strategic gap policy have proved necessary and will prove necessary to cater to meet current housing needs.”

In his “Conclusion” the inspector said (in paragraph 52):

“52. There is a significant shortfall in the supply of deliverable housing land for the next 5 years and no convincing evidence that the gap is diminishing to the extent that it will be made up within a reasonable time by identified deliverable sites. There is also severe under-delivery of affordable housing. The scheme would deliver up to 100 dwellings including up to 35% affordable homes and, although it is in the countryside and in a defined strategic gap, would cause little practical harm. In a situation where there is a pressing need for housing and affordable housing, and where both saved Policies 1.CO and 2.CO are out of date, the adverse impacts of the scheme to the landscape, the countryside and the strategic gap, and the other impacts of the scheme discussed above, would be slight and would not significantly and demonstrably outweigh the benefits. Indeed, even if saved Policy 2.CO were not accepted as being a policy relevant to the supply of housing, and not out-of-date, the considerable benefits of the scheme, weighed against the limited harm, would indicate a decision other than in accordance with that policy.”

The post-inquiry representations

18. The further representations made by Hallam Land and by the council after the inquiry largely concerned the status of policies 1.CO and 3.CO of the local plan for the purposes of NPPF policy, in the light of this court’s decision in *Suffolk Coastal District Council v Hopkins Homes Ltd.* [2016] EWCA Civ 168, which was handed down on 17 March 2016, and the weight to be given to those policies in the absence of a five-year supply of housing land.
19. In its further representations dated 15 April 2016, in response to the Secretary of State’s letter of the same date, the council asserted that it was now “able to demonstrate a 4.93 year supply” of housing land (paragraph 2.7.2(1)), and that “the action which has been taken to address the shortfall has been both considerable and effective” (paragraph 2.7.2(2)). In further representations dated 5 May 2016, Hallam Land rejected the council’s suggestion that it now had a housing land supply of 4.93 years (paragraph 5). On 11 May 2016 the council submitted additional representations, referring to the planning permissions it had granted for housing development since the inquiry (paragraph 2.8 and Appendix 5), and contending that Hallam Land had failed to recognize “the wide range of measures being taken by the Council to boost housing supply” (paragraph 2.9). Hallam Land responded to those representations with further representations of its own, dated 24 May 2016, and took issue again with the council’s argument that there was now a housing land supply of 4.93 years. That figure was “not based upon an up to date SHMA”, was “not tested”, and was “not reflective of unmet need in adjacent areas” (paragraph 8). Its case, it said, “had always been that there remains a substantial shortfall” and it “[continued] to rely upon its evidence and submissions as

submitted to the inquiry” (paragraph 10). The council was “still unable to demonstrate a 5YHLS, even against its own target (which is not accepted to be correct)”. Also on 24 May 2016, the council sent the inspector’s decision letter in the Bubb Lane appeal to the Secretary of State, drawing his attention to it as a relevant decision.

20. On 17 June 2016 the council made yet further representations, “in order that the decision can be taken upon the best and most up-to-date information ...” (paragraph 1.1). It now resiled from its previous concession that policy 3.CO was a policy “for the supply of housing”, and, in the absence of a five-year supply of housing land, “out of date” (paragraphs 2.4 and 3.1 to 3.5). It said it would shortly provide “an updated position in respect of its housing land supply reflecting further (recent) changes of circumstance, including its agreement for the purposes of another inquiry [in the Botley Road appeal] (and in the light of the conclusions of the Bubb Lane Inspector) that the full objectively assessed needs for Eastleigh should be taken to be 630 dwellings per annum” (paragraph 4.1). The council provided its promised “Update on Housing Land Supply” on 23 June 2016. This referred to the conclusion of the inspector in the Bubb Lane appeal that “the OAN for Eastleigh was 630dpa”, which had now been reflected in the statement of common ground for the imminent inquiry into the Botley Road appeal (paragraphs 2.1 and 2.2). The council’s evidence for that inquiry explained that “on its preferred approach [it] is able to demonstrate a 4.86 year supply” (paragraph 2.3). Its position therefore remained that although it could not demonstrate a five-year supply of deliverable housing sites, it was “very close to being able to do so” (paragraph 2.4).
21. In representations dated 19 July 2016, in response to the Secretary of State’s letter of 29 June 2016, Hallam Land attacked the council’s “volte face” on the status of policy 3.CO (paragraphs 4 to 12). It also made clear that it did not accept the council’s “latest attempt to revise its case on the extent of its 5YHLS ...”, and that it maintained the position it had taken in the representations it had submitted in May 2016 (paragraph 13).
22. In a letter dated 13 October 2016 to Mr Barber, the Secretary of State’s decision officer, Barton Willmore, on behalf of Hallam Land, asked him to draw to the Secretary of State’s attention the inspector’s decision in the Botley Road appeal, “in order that he is fully appraised of the recent approach of one of his senior Planning Inspectors ... in relation to a series of identical issues which he will now be considering when making a decision ...” in this case. Barton Willmore pointed out that the inspector had rejected “the proposition that [the council] can meet its housing land requirements without impinging upon land which is designated as gap”, and had concluded that policy 2.CO “is a relevant policy for the supply of housing”. They argued that an “identical conclusion” must follow for policy 3.CO in this case. They referred to “the principle often expounded by the Courts that it is desirable that there be consistency in planning decision-making”. It was therefore “highly important”, they said, that the Botley Road decision, “relating to a virtually identical issue”, was “formally before the Secretary of State” in this appeal. They also emphasized the fact that the inspector’s decision letter dealt directly with the issue of housing land supply, “exposing a significant shortfall in deliverable housing land, amounting to some 833 dwellings”. They quoted paragraph 27 of the decision letter in full, and also the inspector’s conclusion in paragraph 52 that “there is a significant shortfall in the supply of deliverable housing land for the next 5 years and no convincing evidence that the gap is diminishing to the extent that it will be made up within a reasonable time by identified deliverable sites”.
23. The council did not respond to those representations, but in an e-mail to the Secretary of State dated 3 November 2016, drew his attention to the inspector’s decision in an appeal relating to proposed housing development on a site at Hamble Lane – the Botley Road appeal – and, in

particular, what he had said about policy 2.CO, “which also applies to Saved Policy 3.CO”. But it said it did not intend to provide further submissions on this point, and was drawing the inspector’s decision to the attention of the Secretary of State “in the interests of full disclosure”.

The Secretary of State’s decision letter

24. In his decision letter the Secretary of State said that he agreed with the inspector’s conclusions, “except where stated”, and his recommendation (paragraph 3).

25. He referred to the representations he had received after the inquiry, including those made in response to his letters of 15 April 2016 and 29 June 2016, in the light of the judgment of this court in *Hopkins Homes Ltd.*. He confirmed that those representations had been circulated to the parties (paragraphs 5 and 6). He then referred (in paragraph 7) to the further representations he had received in October and November 2016:

“7. The Secretary of State has also received representations from Barton Willmore dated 13 October 2016, and from Eastleigh Borough Council dated 3 November to which he has given careful consideration. The Secretary of State has also received other representations, set out at Annex A, to which he has given careful consideration. He is satisfied that the issues raised do not affect his decision, and no other new issues were raised to warrant further investigation or necessitate additional referrals back to the parties.”

He said that, “[in] reaching his decision”, he had “taken account of all the representations and responses referred to in paragraphs 5-7” (paragraph 8).

26. When he came to “The Policy Context” he concluded that policies 1.CO and 3.CO of the local plan were both “out-of-date” (paragraphs 14 to 16). But he went on to qualify this conclusion (in paragraph 17):

“17. The Secretary of State has considered carefully the Inspector’s analysis at IR93-100 on the matter of whether Policy 3.CO would be out of date through no longer meeting the development needs of the Borough, and whether there is justification for reducing the weight applied to that policy. The Secretary of State acknowledges that its weight should be reduced because he has found it to be out-of-date, but taking into account its consistency with the Framework, its role in protecting the Local Gap and the limited shortfall in housing land supply, he concludes that he should still afford significant weight to Policy 3.CO.”

27. As for “The Benefits of the Proposal”, he said this (in paragraph 19):

“19. The Secretary of State notes the Inspector’s comment (IR108) that at the time of inquiry the Council were not able to demonstrate more than a four and a half years supply of deliverable housing land, and that there is evidence of an existing need for affordable housing. Whilst the Secretary of State notes that the Council are now of the view that they are able to demonstrate a 4.86 year supply, he agrees with the Inspector that the provision of up to 225 homes, 35% of which would be affordable, would be a significant advantage arising out of the scheme, and it would help meet the objectives of the Framework by boosting significantly the supply of housing and delivering a wide

choice of high quality homes. The Secretary of State notes too that the choice of accommodation would also be boosted by the provision of 100 care and extra care spaces (IR109).”

28. On the proposal’s “Sustainability” he said (in paragraph 25):

“25. In terms of sustainability, the Secretary of State agrees with the Inspector’s conclusion (IR116) that, when assessed against the policies in the ... Framework taken as a whole, the supply of market and affordable housing, along with care facilities, would make a significant contribution to meeting the social role of sustainability, complemented by the provision of public open space (although he acknowledges that the latter is at the expense of the loss of the rural character of the public footpath crossing the site). Furthermore, he agrees that the additional population and employment opportunities would assist the economic life of the area, as would the supply of homes in an area with an acknowledged shortfall. In addition, he recognises, like the Inspector, the environmental and community benefits arising out of the station improvements identified at paragraphs 20-21 above. For the reasons given by the Inspector at IR117, the Secretary of State concludes that, on balance, this is a reasonably sustainable location in terms of accessibility.”

29. Under the heading “Planning balance and overall conclusion” the Secretary of State said (in paragraphs 29 to 36):

“29. For the reasons given above, the Secretary of State concludes that the proposal is not in accordance with the development plan policies 1.CO and 3.CO and is not in accordance with the development plan as a whole. He has gone on to consider whether material considerations indicate that the proposal should be determined other than in accordance with the development plan.

30. The Secretary of State notes that in their letter of 23 June 2016, the Council updated their position on the supply of deliverable housing land, now claiming to be able to demonstrate a 4.86 year supply. In the absence of a 5-year housing land supply, and having concluded that policies 1.CO and 3.CO are relevant policies for the supply of housing, the presumption in favour of sustainable development is engaged, meaning that permission should be granted unless any adverse impacts of doing so significantly and demonstrably outweigh the benefits.

31. He considers that the provision of market and affordable housing in an area with an acknowledged shortfall, along with care facilities in this case carries substantial weight in favour of the development. The additional population and employment opportunities would assist the economic life of the area, as would the supply of homes in an area with an acknowledged shortfall, to which he gives moderate weight. The environmental and community benefits arising out of the station improvements carry moderate weight in favour of the proposal.

32. Set against the identified positive aspects is the environmental and social damage which would arise out of the loss of the gap between the surrounding settlements, involving the physical intrusion into an area of countryside, and contributing to the coalescence of those settlements, and loss of independent identity. The Secretary of State considers that this would be contrary to those policies of the Framework which apply the principle of recognising the different roles and character of different areas, and this

carries significant weight against the proposal. He further considers that the loss of “best and most versatile” agricultural land carries moderate weight against the proposal.

33. The Secretary of State also considers that the appeal site performs a function which is specific to its location and which would be permanently undermined by the development.
34. The Secretary of State considers overall that the adverse impacts of the proposal would significantly and demonstrably outweigh its benefits.
35. The Secretary of State has taken into account the wide range of judgments and appeal decisions referred to in the inquiry and the post-inquiry representations but, having considered all the matters raised, he concludes that none is of such weight as to alter the balance of his conclusions.
36. 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. The Secretary of State therefore concludes that your client's appeal should be dismissed.”

He therefore agreed with the inspector’s recommendation and dismissed the appeal (paragraph 37).

The Boorley Green appeal decision

30. In a decision letter dated 30 November 2016, about three weeks after he had issued his decision on Hallam Land’s appeal, the Secretary of State allowed the Boorley Green appeal. The inquiry into that appeal had taken place in May 2016. The inspector’s report, though dated 25 August 2016, was released only with the Secretary of State’s decision letter, in the normal way. Like the site in Hallam Land’s appeal, the Boorley Green site is in the “countryside”, protected by policy 1.CO of the local plan, and also within an area protected under policy 3.CO, the Botley-Boorley Green Local Gap.
31. The inspector in the Boorley Green appeal concluded that the supply of housing land in the council’s area was “very close to 4 years”, observing that this was consistent with the conclusion reached on this question by the inspector in the Bubb Lane appeal – that there was “something in the order of a four year supply” (paragraph 12.16 of the Boorley Green inspector’s report). He found that “the HLS is around 4 years”. He said that, at this level, it “falls well short of that required and has done for many years ...” (paragraph 12.45). He concluded that “the benefits of housing and AH, particularly where the supply is significantly below 5 years and the history of delivery is poor, warrant considerable weight ...” (paragraph 12.47). He described the shortfalls in land for housing and affordable housing as “substantial” (paragraph 12.55).
32. In his decision letter, under the heading “Housing supply”, the Secretary of State said (in paragraph 17):
 - “17. The Secretary of State has given very careful consideration to the Inspector’s analysis of the 5 year housing land supply position at IR12.10-12.20. He notes that it is common ground that the Council cannot demonstrate the 5 year housing land supply

expected at paragraph 47 of the Framework (IR12.10); and agrees with the Inspector's conclusions at IR12.21 that, on the basis of the information presented at the Inquiry and assuming that this decision is issued within the statutory timetable set, the housing land supply should be regarded as standing at around 4 years. The Secretary of State also agrees with the Inspector's conclusion at IR12.22 that considerable weight should be attributed to the benefits to which the scheme would bring through delivering affordable housing."

33. Under the heading "Planning balance and overall conclusion", the Secretary of State concluded that "[the] proposal would make a significant contribution in terms of helping to make up the deficit against the 5 year housing land supply and the need for affordable housing" (paragraph 24). Agreeing with the inspector's recommendation, he allowed the appeal.

Did the Secretary of State establish the extent of the shortfall against the five-year supply of housing land with sufficient precision, and were his reasons adequate?

34. Before Supperstone J., and again before us, Mr Thomas Hill Q.C., for Hallam Land, argued that, in any case where there is a dispute as to the five-year supply of housing land, the Secretary of State, or his inspector, is obliged to establish the level of supply and the extent of any shortfall. This, Mr Hill submitted, was because the local planning authority's failure to demonstrate a five-year supply of housing land will bring into play the balancing exercise provided for in paragraph 14 of the NPPF, and the extent of the shortfall, if there is one, will influence the weight given by the decision-maker to the benefits of the proposed development, and to its conflict with the relevant restrictive policies of the development plan. He sought to strengthen this submission with observations made by judges at first instance – in particular, *Phides Estates (Overseas) Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 827 (Admin) (at paragraph 60), *Shropshire Council v Secretary of State for Communities and Local Government* [2016] EWHC 2733 (Admin) (at paragraph 28), and *Jelson Ltd. v Secretary of State for Communities and Local Government* [2016] EWHC 2979 (Admin) (at paragraph 13).
35. In this case, Mr Hill submitted, the Secretary of State had failed to make the planning judgments he needed to make. He noted, in paragraph 19 of his decision letter, that the council was "now of the view that [it was] able to demonstrate a 4.86 year supply". But he did not say whether he accepted that this figure was accurate. Nor did he deal with the material before him, including the decision letters in the Bubb Lane and Botley Road appeals, showing that the council was now able to demonstrate only a supply of 4.25 years or even less than that. This could not sensibly be described as a "limited shortfall" – the expression the Secretary of State used in paragraph 17. In fact, Mr Hill submitted, the Secretary of State had failed to reach any conclusion on this question. His decision was vitiated by that failure.
36. Supperstone J. rejected those submissions. He did not accept that one can find in the authorities relied upon by Mr Hill the principle that the decision-maker is required "to determine a workable [five-year housing land supply] or range" in every case. He accepted the argument of Mr Zack Simons, for the Secretary of State, and Mr Paul Stinchcombe Q.C., for the council, that in a case such as this, where there was "inadequate housing supply on either [side's] figures", the Secretary of State was "not required to fix a figure for the extent of that inadequacy" (paragraph 22). He went on to say that "[in] making judgments on the issues of housing requirements and housing supply the decision maker was not required to fix a figure

for the precise extent of the Council’s housing shortfall”. In his view the “key question” was “whether the housing supply is above or below five years”. This was what Lord Carnwath had called the “important question” in paragraph 59 of his judgment in *Hopkins Homes Ltd. v Secretary of State for Communities and Local Government* [2017] 1 W.L.R. 1865 (paragraph 23). The tenor of relevant decisions at first instance was to the same effect – for example, the observation of Gilbert J. in *South Oxfordshire District Council v Secretary of State for Communities and Local Government* [2016] EWHC 1173 (Admin), at paragraph 102, that it is “not necessary to conduct a full analysis of requirements and supply in every case”, and “[whether] one has to do so depends on the circumstances”.

37. On the basis of the inspector’s conclusion in paragraph 108 of his report, having regard to “the updated material before him from the Bubb Lane [decision letter] and the Botley Road [decision letter]”, and Hallam Land having provided “no further evidence” on housing land supply since the inquiry, the Secretary of State was, said Supperstone J., “entitled to note the agreed shortfall, describe it as “limited” (DL17), and agree with his Inspector that the scheme’s contribution to the Council’s housing shortage would be “significant” (DL19)”. Nothing more was required (paragraph 29).
38. In his submissions to us, Mr Hill argued that the authorities on which Supperstone J. had based his conclusions did not deny the need for a decision-maker to establish the extent of a shortfall against the five-year supply of housing land when conducting the balancing exercise under paragraph 14 of the NPPF. Relevant parts of the judgment of the Court of Appeal in *Hopkins Homes Ltd.* – particularly paragraph 47 – which were effectively endorsed by Lord Carnwath in the Supreme Court, indicate that there is such a requirement. Detailed analysis may not always be necessary. A range or an approximate figure may be enough. But, submitted Mr Hill, the judge’s view that the crucial question is simply whether the supply of housing land exceeds or falls below five years was unduly simplistic. In this case there were several factors that made it imperative for the Secretary of State to define the shortfall: in particular, the size of the development – more than 150 dwellings – which had led to the appeal being recovered by the Secretary of State; the significance of the shortfall for the weighting of policies in the development plan that went against the proposal, which could be decisive, especially policy 3.CO of the local plan; and the fact that there were other relevant and recent appeal decisions in which the scale of the shortfall had been considered, and on which the parties had made representations. In the circumstances, Mr Hill submitted, it was not enough for the Secretary of State merely to describe the shortfall as “limited”, without resolving what it actually was by the time he made his decision.
39. Mr Hill also submitted that, in any event, the Secretary of State had failed to explain how and why he had reached a markedly different conclusion on housing land supply from the conclusions recently reached by the inspectors in the Bubb Lane and Botley Road appeals – in spite of the further representations he had received from Hallam Land in the light of them. Those two decisions were clearly relevant in this case. Yet the Secretary of State did not even refer to them in his decision letter. He said he had given “careful consideration” to the representations made after the inquiry, but in this important respect it is not clear that he had in fact done so. In both cases the decision-maker had identified a considerable shortfall against the required five-year supply materially greater than the council had conceded here. In the Bubb Lane appeal the inspector had found “something in the order of a four year supply” (paragraph 45) and had described the shortfall as “significant” (paragraph 52). In the Botley Road appeal the supply was found to be 4.25 years. And the inspector there had also described the shortfall – which amounted to “some 833 dwellings” – as “significant” (paragraphs 18, 19 and 52).

40. Those conclusions, and those descriptions of the shortfall, Mr Hill submitted, simply cannot be reconciled with the figure of 4.86 years' supply put forward by the council in its "Update on Housing Land Supply" of 23 June 2016. An explanation of some kind was clearly called for in the Secretary of State's decision letter. None was provided. Even if he did not have to resolve the precise level of the shortfall, the Secretary of State had fallen short of his duty to provide intelligible and adequate reasons for his conclusion on an issue crucial to the outcome of the appeal (see the speech of Lord Brown of Eaton-under-Heywood in *South Bucks District Council v Porter (No.2)* [2004] 1 W.L.R. 1953, at paragraph 36). In the circumstances it was not enough for him simply to refer to the shortfall as "limited", without more.
41. Mr Simons and Mr Stinchcombe supported the judge's analysis. They submitted that it is not always, or generally, a decision-maker's task to determine the precise level of housing land supply. The critical question will always be whether or not a five-year supply of housing land has been demonstrated. Under NPPF policy, the degree of detail required in ascertaining housing need and supply is left largely to the decision-maker's planning judgment in the circumstances of the case before him – as Gilbert J. emphasized in *Dartford Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 649 (Admin) (at paragraphs 43 to 45), and in *South Oxfordshire District Council* (at paragraph 102). Mr Stinchcombe pointed to the recent decision of this court in *Jelson Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 24 as lending support to this submission (see, in particular, paragraph 25). Mr Simons recalled Sir David Keene's warning in *City and District Council of St Albans v Hunston Properties Ltd.* [2013] EWCA Civ 1610 (at paragraph 26) about section 78 appeals descending into the kind of exercise appropriate only for the process of plan preparation.
42. In this case, Mr Simons and Mr Stinchcombe submitted, by the time the Secretary of State came to make his decision in November 2016, the evidence given by Hallam Land at the inquiry in June 2015 in contending for a housing land supply of between 1.78 and 2.92 years was stale. The Secretary of State did not have to go beyond his conclusions that the shortfall was now "limited", and that the provision of market and affordable housing in an area with an "acknowledged" shortfall merited "substantial weight". These conclusions were, in themselves, fully justified. The existence of a shortfall in housing land supply was not a "principal controversial issue" in this appeal, even if it was in the Bubb Lane and Botley Road appeals. The parties had drawn the Secretary of State's attention to the inspectors' decisions in those appeals. But that did not make it necessary for him to deal with those decisions in the reasons he gave for concluding as he did on the evidence in this case. The reasons he gave were sufficient to explain the decision he made.
43. Mr Hill's argument was persuasively presented, but I accept it only in part.
44. The Secretary of State's decision here was taken in the light of the judgment of this court in *Hopkins Homes Ltd.*, but before the Supreme Court had dismissed the subsequent appeals – though on the basis of a narrower reading of the policy in paragraph 49 of the NPPF. As this case shows, however, nothing turns on the difference between the so-called "wider" interpretation of paragraph 49, in which the phrase "policies for the supply of housing" embraces local plan policies that create and constrain the supply, and the "narrow" interpretation, which excludes policies that operate to constrain the supply but does not prevent the decision-maker from giving such policies reduced weight under the policy in paragraph 14 of the NPPF when five years' supply is not demonstrated. Either way, the consequences will, in the end, be the same. The weight given to a policy ultimately depends not on its status but

on its effect – whether it enables the requisite five-year supply to be realized or acts contrary to that objective. Policies in a local plan are liable to carry less weight in the making of a decision on a proposal for housing development if – and because – their effect is to prevent a five-year supply of housing land (see the judgment of Lord Carnwath in *Hopkins Homes Ltd.*, at paragraphs 59 and 61, followed in this court in *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2017] EWCA Civ 893, at paragraph 22).

45. None of that is controversial here, nor should it be. As Lord Carnwath said in *Hopkins Homes Ltd.* (at paragraph 54), “the primary purpose of paragraph 49 [of the NPPF] is simply to act as a trigger to the operation of the “tilted balance” under paragraph 14”. And he went on to say (in paragraph 59) that the “important question” is “not how to define individual policies, but whether the result is a five-year supply in accordance with the objectives set by paragraph 47”. If the local planning authority fails to demonstrate that supply, “it matters not whether the failure is because of the inadequacies of the policies specifically concerned with housing provision, or because of the over-restrictive nature of other non-housing policies”. In such a case “[the] shortfall is enough to trigger the operation of the second part of paragraph 14”. As Lord Carnwath emphasized (in paragraph 61), a restrictive policy may not itself be “out of date” under paragraph 49, “but the weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles”.
46. As this court said in *Hopkins Homes Ltd.* (in paragraph 47), the policies in paragraphs 14 and 49 of the NPPF do not prescribe how much weight is to be given to relevant policies of the development plan in the determination of a planning application or appeal. Weight is always a matter for the decision-maker (see the speech of Lord Hoffmann in *Tesco Stores Ltd. v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H) (paragraph 46). It will “vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy – such as the protection of a “green wedge” or of a gap between settlements”. The decision-maker must judge “how much weight should be given to conflict with policies for the supply of housing that are out-of-date”. This is “not a matter of law; it is a matter of planning judgment” (see the first instance judgments in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) (at paragraphs 70 to 75), *Phides* (at paragraphs 71 and 74), and *Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government and Mid-Sussex District Council* [2015] EWHC 1173 (Admin) (at paragraphs 87, 105, 108 and 115)).
47. The NPPF does not state that the decision-maker must reduce the weight to be given to restrictive policies according to some notional scale derived from the extent of the shortfall against the five-year supply of housing land. The policy in paragraph 14 of the NPPF requires the appropriate balance to be struck, and a balance can only be struck if the considerations on either side of it are given due weight. But in a case where the local planning authority is unable to demonstrate five years’ supply of housing land, the policy leaves to the decision-maker’s planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small. Other considerations will be relevant too: the nature of the restrictive policies themselves, the interests they are intended to protect, whether they find support in policies of the NPPF, the implications of their being breached, and so forth.

48. Relevant authority in this court, and at first instance, does not support the proposition that, for the purposes of the appropriate balancing exercise under the policy in paragraph 14 of the NPPF, the decision-maker's weighting of restrictive local plan policies, or of the proposal's conflict with such policies, will always require an exact quantification of the shortfall in the supply of housing land. This is not surprising. If the court had ever said there was such a requirement, it would have been reading into the NPPF more than the Government has chosen to put there, and more than is necessarily implied in the policies it contains.
49. Several decisions at first instance were cited in argument before Supperstone J., including those in *Jelson Ltd.* (at paragraphs 2 and 13) – upheld on appeal, *Shropshire Council* (at paragraph 28), *South Oxfordshire District Council* (at paragraph 102), *Dartford Borough Council* (at paragraphs 44 and 45), *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2015] EWHC 1879 (Admin) (at paragraphs 42(ii) and 48) – upheld on appeal, and *Phides* (at paragraph 60). Mr Simons also referred to *Eastleigh Borough Council v Secretary of State for Communities and Local Government* [2014] EWHC 4225 (Admin) (at paragraphs 17 and 18). It is not necessary to explore the facts of these cases, or to set out the relevant observations of the judges who decided them. In summary, however, three main points emerge.
50. First, the relationship between housing need and housing supply in planning decision-making is ultimately a matter of planning judgment, exercised in the light of the material presented to the decision-maker, and in accordance with the policies in paragraphs 47 and 49 of the NPPF and the corresponding guidance in the Planning Practice Guidance (“the PPG”). The Government has chosen to express its policy in the way that it has – sometimes broadly, sometimes with more elaboration, sometimes with the aid of definitions or footnotes, sometimes not (see *Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040, at paragraph 33; *Jelson Ltd.*, at paragraphs 24 and 25; and *St Modwen Developments Ltd. v Secretary of State for Communities and Local Government* [2017] EWCA Civ 1643, at paragraphs 36 and 37). It is not the role of the court to add to or refine the policies of the NPPF, but only to interpret them when called upon to do so, to supervise their application within the constraints of lawfulness, and thus to ensure that unlawfully taken decisions do not survive challenge.
51. Secondly, the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. This is a matter for the decision-maker's planning judgment, and the court will not interfere with that planning judgment except on public law grounds. But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the local planning authority is doing to reduce it, and how much of it the development will meet.
52. Thirdly, the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker. It will not be the same in every case. The parties will sometimes be able to agree whether or not there is a five-year supply, and if there is a shortfall, what that shortfall actually is. Often there will be disagreement, which the decision-maker will have to resolve with as much certainty as the decision requires. In some cases the parties will not be able to agree whether there is a shortfall. And in others it will be agreed that a shortfall exists, but its extent will be in dispute. Typically, however, the question for the decision-maker will not be simply whether or not a five-year supply of housing land has been demonstrated. If there is a

shortfall, he will generally have to gauge, at least in broad terms, how large it is. No hard and fast rule applies. But it seems implicit in the policies in paragraphs 47, 49 and 14 of the NPPF that the decision-maker, doing the best he can with the material before him, must be able to judge what weight should be given both to the benefits of housing development that will reduce a shortfall in the five-year supply and to any conflict with relevant “non-housing policies” in the development plan that impede the supply. Otherwise, he will not be able to perform the task referred to by Lord Carnwath in *Hopkins Homes Ltd.*. It is for this reason that he will normally have to identify at least the broad magnitude of any shortfall in the supply of housing land.

53. With those three points in mind, I do not think that in this case the Secretary of State could fairly be criticized, in principle, for not having expressed a conclusion on the shortfall in the supply of housing land with great arithmetical precision. He was entitled to confine himself to an approximate figure or range – if that is what he did. Government policy in the NPPF did not require him to do more than that. There was nothing in the circumstances of this case that made it unreasonable for him in the “Wednesbury” sense, or otherwise unlawful, not to establish a mathematically exact figure for the shortfall. It would not have been an error of law or inappropriate for him to do so, but if, as a matter of planning judgment, he chose not to do it there was nothing legally wrong with that.
54. But what was his conclusion on housing land supply? He obviously accepted, as the council had acknowledged, that the requisite five-year supply had not been demonstrated. In paragraph 30 of his decision letter he referred to the “absence of a 5-year housing land supply”. And in the same paragraph he made it plain that he was applying “the presumption in favour of sustainable development”, which, as he said, meant “that permission should be granted unless any adverse impacts of doing so significantly and demonstrably outweigh the benefits”. He went on, in the following paragraphs, to apply that presumption, in accordance with the policy in paragraph 14 of the NPPF. In the course of that balancing exercise, he referred, in paragraph 31, to the “acknowledged shortfall”, which went into the balance on the positive side. All of this is clear.
55. Not so clear, however, is whether the Secretary of State reached any concluded view on the scale of the “acknowledged shortfall”. His reference in paragraph 17 to “the limited shortfall in housing land supply” suggests he had not found it possible to accept Hallam Land’s case at the inquiry, as recorded by the inspector in paragraph 62 of his report, that the supply of housing land was as low as “2.92 years, or 1.78 years if the need for affordable housing is included”, or even the “material shortfall” to which the inspector had referred in paragraph 108, in the light of the council’s concession that it was “not able to demonstrate more than a four and a half years supply of deliverable housing land”. A “limited shortfall” could hardly be equated to a “material shortfall”. It would have been a more apt description of the shortfall the council had now acknowledged in conceding, or contending, that it was able to demonstrate a supply of 4.86 years – the figure to which the Secretary of State referred in paragraphs 19 and 30 of his decision letter.
56. On a fair reading of the decision letter as a whole, I do not think one can be sure that the Secretary of State did fix upon a precise figure for the housing land supply. It may be that, in truth, he went no further than to conclude that the supply remained below five years. He certainly did not adopt the figures put forward by Hallam Land at the inquiry, nor did he even mention those figures. And he neither adopted nor rejected the council’s position at the inquiry. Instead, he took care to say, in paragraph 19 of his decision letter, that he “notes” the inspector’s comment that at the time of the inquiry the council was not able to demonstrate

more than four and a half years' supply. He was equally careful not to adopt or reject the figure that was now put forward by the council – a supply of 4.86 years. In paragraph 19, again, he said merely that he “notes” the council was now of the view that it was “able to demonstrate a 4.86 year supply”. In paragraph 30, once again, he used the word “notes” when referring to the position the council had taken in its letter of 23 June 2016 – “now claiming to be able to demonstrate a 4.86 year supply”. He was not, I think, unequivocally endorsing that figure, but rather was relying on it as proof of “the absence of a 5-year housing land supply”.

57. The Secretary of State's conclusions on housing land supply are not said to be irrational on their face – nor could they be. If one leaves aside for the moment the decisions in the Bubb Lane and Botley Road appeals and what had been said about those decisions in the parties' further representations, they make sense. To describe the shortfall in housing land supply as “limited”, as the Secretary of State did in paragraph 17, seems reasonable if he was assuming – though without positively finding – that the housing land supply now stood at or about 4.86 years. And there is nothing necessarily inconsistent between that conclusion and his later conclusions: in paragraph 19, that the amount of new housing proposed was a “significant advantage”; in paragraph 30, that the “presumption in favour of sustainable development” fell to be applied in this case; and, in paragraph 31, that the provision of housing in an area with an “acknowledged shortfall” carried “substantial weight in favour of the development”.
58. All of this is logical, as far as it goes. It may reflect an assumption on the part of the Secretary of State that he could rely on the figure of 4.86 years for the housing land supply, or at least on a range of between four and half and 4.86 years, and that this was sufficient to found his conclusions on the weight to be given to the benefits of the housing development proposed and to its conflict with restrictive policies in the local plan.
59. This reading of the decision letter may be overly generous to the Secretary of State, because it resolves in his favour the doubt as to what figure, or range, he was actually prepared to accept for the present supply of housing land in the council's area. Assuming it to be correct, however, he can be acquitted of any misunderstanding or unlawful misapplication of NPPF policy. If he did adopt, or at least assume, a figure of 4.86 years' supply of housing land, or even a range of between four and half and 4.86 years, his approach could not, I think, be stigmatized as unlawful in either of those two respects. It could not be said, at least in the circumstances of this case, that he erred in law in failing to calculate exactly what the shortfall was. In principle, he was entitled to conclude that no greater precision was required than that the level of housing land supply fell within a clearly identified range below the requisite five years, and that, in the balancing exercise provided for in paragraph 14 of the NPPF, realistic conclusions could therefore be reached on the weight to be given to the benefits of the development and its conflict with relevant policies of the local plan. Such conclusions would not, I think, exceed a reasonable and lawful planning judgment.
60. However, even if that assumption is made in favour of the Secretary of State, there is in my view a fatal defect in his decision in his failure to engage with the conclusions on housing land supply in the recent decisions in the Bubb Lane and Botley Road appeals. Here, it seems to me, Mr Hill's argument is demonstrably well founded.
61. At least by the time the parties in this appeal were given the opportunity to make further representations, an important issue between them, and arguably the focal issue, was the extent of the shortfall in housing land supply. This was, or at least had now become, a “principal controversial issue” in the sense to which Lord Brown of Eaton-under-Heywood referred in *South Bucks District Council v Porter* (at paragraph 36 of his speech). A related issue was the

weight to be given to restrictive policies in the local plan – in particular, policy 3.CO. These were, in my view, clearly issues that required to be properly dealt with in the Secretary of State’s decision letter, in the light of the representations the parties had made about them, so as to leave no room for doubt that the substance of those representations had been understood and properly dealt with. This being so, it was in my view incumbent on the Secretary of State to provide intelligible and adequate reasons to explain the conclusions he had reached on those issues, having regard to the parties’ representations.

62. There is no explicit consideration of the inspectors’ decisions in the Bubb Lane and Botley Road appeals in the Secretary of State’s decision letter, nor any reference to them at all, despite the fact that they had been brought to his attention and their implications addressed in the further representations made to him after the inquiry. The inspectors’ conclusions on housing land supply in those two decisions, and the consequences of those conclusions for the weight to be given to local plan policies, clearly were material considerations in this appeal. They would, in my view, qualify as material considerations on the basis of the case law relating to consistency in decision-making (see the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P. & C.R. 137, at p.145, most recently followed by this court in *DLA Delivery Ltd. v Baroness Cumberlege of Newick and Secretary of State for Communities and Local Government* [2018] EWCA Civ 1305, at paragraphs 29, and 42 to 56). But leaving aside the principle of consistency, they would have been, it seems to me, material considerations if only on the basis that they represented an up to date independent assessment of housing land supply in the council’s area, which had been squarely put before the Secretary of State. Yet he said nothing at all about them. Nor is there any explicit reference to the relevant content of the representations the parties had made. It is clear that the reference in paragraph 19 of the decision letter to the council’s view that it was now able to demonstrate 4.86 years’ supply of housing land was taken from the “Update on Housing Land Supply” that it produced on 23 June 2016. But he did not refer to the very firm and thoroughly reasoned conclusions of the inspector in the Botley Road appeal, which were reached in the light of that evidence.
63. So it is not clear whether the Secretary of State confronted the conclusions of the inspectors in the Bubb Lane and Botley Road appeals, and in particular the latter. Had he done so, he would have appreciated that the conclusions they had reached on the scale of the shortfall in housing land supply could not reasonably be reconciled with his description of that shortfall, in paragraph 17 of his decision letter, as “limited”. The language used by those two inspectors was distinctly different from that expression, and incompatible with it unless some cogent explanation were given. No such explanation was given. In both decision letters the shortfall was characterized as “significant”, which plainly it was. This was more akin to saying that it was a “material shortfall”, as the inspector in Hallam Land’s appeal had himself described it in paragraph 108 of his decision letter. Neither description – a “significant” shortfall or a “material” one – can be squared with the Secretary of State’s use of the adjective “limited”. They are, on any view, quite different concepts.
64. Quite apart from the language they used to describe it, the inspectors’ findings and conclusions as to the extent of the shortfall – only “something in the order of four year supply” in the Bubb Lane appeal and only “4.25 years’ supply” in the Botley Road appeal – were also substantially different from the extent of the shortfall apparently accepted or assumed by the Secretary of State in his decision in this case, which was as high as 4.86 years’ supply on the basis of evidence from the council that had been before the inspector in the Botley Road appeal and rejected by him.

65. One is left with genuine – not merely forensic – confusion on this important point, and the uncomfortable impression that the Secretary of State did not come to grips with the inspectors’ conclusions on housing land supply in those two very recent appeal decisions. This impression is not dispelled by his statement in paragraph 7 of the decision letter that he had given “careful consideration” to the relevant representations.
66. The significance of the parties’ dispute over the extent of the shortfall in housing land supply was not confined to that issue alone. It also bore on the question of how much weight should be given to restrictive policies in the local plan – in particular, policy 3.CO – for the purposes of the balancing exercise required by the policy in paragraph 14 of the NPPF. A factor to which the Secretary of State attached some importance in determining that “significant weight” should be given to policy 3.CO was that the shortfall in housing land supply was, as he said in paragraph 17 of the decision letter, only “limited”. This was an important issue in itself, and potentially decisive in the planning balance.
67. In the circumstances I am driven to the conclusion that the Secretary of State’s reasons were in this respect deficient, when considered in the light of the familiar principle in *South Bucks District Council v Porter*, and that Hallam Land was substantially prejudiced by the failure to provide intelligible and adequate reasons. The parties, and in particular Hallam Land, whose section 78 appeal was being dismissed after a protracted exchange of post-inquiry representations, were entitled to know why the Secretary of State had concluded as he did not only on the question of housing land supply but also on its consequences, in spite of two very fresh appeal decisions in which the question of supply had been decided in a materially different way. This was a matter on which proper reasons were undoubtedly called for, but were not given. In the absence of those reasons, one cannot be sure that the Secretary of State had come to his conclusion lawfully, having regard to all material considerations. It follows, in my view, that in failing to provide such reasons the Secretary of State erred in law and his decision is liable to be quashed for that error. I can see no basis on which the court, in the circumstances, could properly withhold an order to quash his decision. To do so, we would have to speculate as to the outcome of Hallam Land’s section 78 appeal on the assumption that the Secretary of State had regard to all material considerations, including the decisions in the Bubb Lane and Botley Road appeals.
68. Having come to that conclusion, I can take the other main issue more shortly.

Should the Secretary of State have had regard to the inspector’s report on the Boorley Green appeal?

69. The argument here is that the Secretary of State’s conclusion in this case that the shortfall in housing land supply was “limited” is impossible to reconcile with the conclusion in his decision letter in the Boorley Green appeal, issued about three weeks later, that the supply of housing land in the council’s area was “around four years”. This offended the principle that there is a public interest in planning decisions in like cases being consistent, and that, in cases of inconsistency, the decision-maker should explain that inconsistency (see the judgment of Mann L.J. in *North Wiltshire District Council*). Where relevant matters arose after the close of an inquiry, such as an inspector reporting to him on an appeal raising closely similar planning issues in the same area as the appeal in hand, it was incumbent on the Secretary of State to take reasonable steps to inform himself of those matters, and so avoid inconsistent decisions. The inspector’s report in the Boorley Green appeal fell into that category. By the time the Secretary

of State eventually came to make his decision on Hallam Land's appeal, he had had that report for almost three months.

70. Supperstone J. rejected this argument, on the simple basis that the Secretary of State's decision in the Boorley Green appeal had not yet been made when the decision in this case was issued, and "accordingly, it cannot have been a material consideration to which the principle of consistency can apply". Although the inspector's report on the Boorley Green appeal had been submitted to the Secretary of State before he made his decision in this case, "the principle of consistency in decision taking has no application to Inspectors' reports which are not decisions" (paragraph 33 of the judgment). The proposition that the Secretary of State must always have imputed knowledge of an inspector's report in an undetermined appeal was incorrect (paragraph 35). So was the submission that it was irrational, and a breach of the principle recognized by the House of Lords in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1976] 3 W.L.R. 641 that a decision-maker must take reasonable steps to acquaint himself of relevant matters, for the Secretary of State not to take into account an unpublished inspector's report in another appeal that was yet to be decided on its own, different facts (paragraph 38).
71. The judge also accepted the submission of Mr Simons and Mr Stinchcombe that there was, in fact, no material inconsistency between the two decisions. In both cases the Secretary of State had found that there was less than the requisite five-year supply of housing land, and that the consequences provided for by NPPF policy must follow. In his decision on the Boorley Green appeal the Secretary of State did not adopt the inspector's description of the shortfall as "significant". His conclusion in that case that the housing land supply "should be regarded as standing at around four years" was consistent with his corresponding conclusions in his decision in this case. And in both cases, given the shortfall, he gave significant weight to the provision of housing: "substantial weight" in this case, "considerable weight" in the Boorley Green case (paragraph 39). The Secretary of State's application of policy 3.CO of the local plan in this appeal, the weight he gave to that policy, and his relevant reasons did not betray an inconsistent approach with his inspector's or his own in the Boorley Green appeal (paragraphs 40 to 46).
72. I agree with the judge's approach to this issue, and the conclusions he reached upon it, essentially for the reasons he gave.
73. The principle of consistency in planning decision-making is not a principle of law. It is a principle of good practice, which the courts have traditionally supported and the Court of Appeal has recently confirmed in *DLA Delivery Ltd.*.
74. The principle applies to decisions of planning decision-makers, and is exercised with a view to the public interest in planning decisions in like cases being consistent, or if inconsistency arises, a clear explanation for it being given in the second of the two decisions concerned (see *DLA Delivery Ltd.*, at paragraphs 28 to 30, 46 and 47). It does not apply, in the case of decisions on planning appeals made by the Secretary of State, to inspectors' reports that have been submitted to the Secretary of State but on which his decision is still to be made at the time of the decision subject to challenge in the case before the court. The purpose and status of such a report is, essentially, that of advice given to the Secretary of State by his appointed inspector, which will inform the decision itself, but which the Secretary of State is not bound to follow and is free to reject, so long as he gives adequate reasons for doing so. It is an intermediate stage in the process of decision-making. The assessment and conclusions contained in the report do not constitute the Secretary of State's decision, nor do they form any

part of that decision unless and until they are incorporated into it, whether in whole or in part. Usually, as in the Boorley Green appeal, the inspector's report is not published until the Secretary of State has made his decision. On occasions, however, it may be released by the Secretary of State with a view to inviting further representations or evidence from the parties to deal with a particular issue raised in it.

75. It would be a radical and unjustified extension to the principle of consistency to embrace within it unpublished inspectors' reports, whose conclusions and recommendations the Secretary of State may in due course choose to accept or reject. Indeed, this would not be an extension of the principle of consistency but a distortion of it, because the basis for it would not be consistency between one decision and another, but consistency between a decision and a non-decision, a decision yet to be made. That is not a principle the court has ever recognized, nor even, in truth, a meaningful principle at all.

76. In my view, therefore, this part of the appeal is mistaken, and I would reject it.

Conclusion

77. For the reasons I have given, I would allow this appeal on the first issue alone and on the basis I have indicated.

Lord Justice Hickinbottom

78. For the reasons given by Lindblom L.J., with which I entirely agree, I agree that the appeal is allowed on the first issue alone.

Lord Justice Davis

79. I also agree that the appeal should be allowed.

80. I would like to make some observations of my own on the first issue.

81. Clearly a determination of whether or not there is a shortfall in the 5 year housing supply in any particular case is a key issue. For if there is then the "tilted balance" for the purposes of paragraph 14 of the NPPF comes into play.

82. Here, it was common ground that there was such a shortfall. That being so, I have the greatest difficulty in seeing how an overall planning judgment thereafter could properly be made without having at least some appreciation of the extent of the shortfall. That is not to say that the extent of the shortfall will itself be a key consideration. It may or not be: that is itself a planning judgment, to be assessed in the light of the various policies and other relevant considerations. But it ordinarily will be a relevant and material consideration, requiring to be evaluated.

83. The reason is obvious and involves no excessive legalism at all. The extent (be it relatively large or relatively small) of any such shortfall will bear directly on the weight to be given to the benefits or disbenefits of the proposed development. That is borne out by the observations of Lindblom LJ in the Court of Appeal in paragraph 47 of *Hopkins Homes*. I agree also with

the observations of Lang J in paragraphs 27 and 28 of her judgment in the *Shropshire Council* case and in particular with her statements that "...Inspectors generally will be required to make judgments about housing need and supply. However these will not involve the kind of detailed analysis which would be appropriate at a "Development Plan inquiry" and that "the extent of any shortfall may well be relevant to the balancing exercise required under NPPF 14." I do not regard the decisions of Gilbert J, cited above, when properly analysed, as contrary to this approach.

84. Thus exact quantification of the shortfall, even if that were feasible at that stage, as though some local plan process was involved, is not necessarily called for: nor did Mr Hill QC so argue. An evaluation of some "broad magnitude" (in the phrase of Lindblom LJ in his judgment) may for this purpose be legitimate. But, as I see it, at least some assessment of the extent of the shortfall should ordinarily be made; for without it the overall weighing process will be undermined. And even if some exception may in some cases be admitted (as connoted by the use by Lang J in *Shropshire Council* of the word "generally") that will, by definition, connote some degree of exceptionality: and there is no exceptionality in the present case.
85. In this case (and in striking contrast to the Bubb Lane and Botley Road cases) a sufficient evaluation of the extent of the shortfall did not happen. Instead, the Secretary of State, having "noted" the council's updated figure of 4.86 year supply and without any express reference to the Bubb Lane and Botley Road cases, simply announced a bald conclusion that there was a "limited" shortfall in the housing land supply. Broad statements elsewhere in the decision letter to the effect that "the Secretary of State has taken into account" the post-inquiry representations do not overcome the defect of a demonstrable lack of engagement with the actual extent of the shortfall: thereby resulting in an absence of a reasoned conclusion on this material issue. Moreover, such a conclusion departs – again, for no stated reason – from the inspector's statement in paragraph 108 of his report that "it can be said that there is a material shortfall against the five year supply...".
86. Although it was submitted on behalf of the council that the result would still inevitably have been the same, even had the extent of the shortfall been properly addressed, I cannot accept that that is necessarily so. So the matter must be the subject of further consideration.
87. Thus I too would allow the appeal on this basis. I would reject the appellant's arguments on the second issue, for the reasons given by Lindblom LJ.

Court of Appeal

**Regina (Mynydd y Gwynt Ltd) v Secretary of State for
Business, Energy and Industrial Strategy**

[2018] EWCA Civ 231

2018 Feb 13, 14; 22

Lewison, Floyd, Peter Jackson LJJ

Planning — Development consent — “Appropriate assessment” — Claimant seeking development consent order for wind farm near special protection area protecting red kite population — Secretary of State seeking further “information” to determine whether project would have adverse impact on special protection area — Claimant failing to submit further information — Secretary of State accepting evidence of conservation body that adverse impact on red kite population could not be discounted and refusing to make order — Whether appropriate assessment made — Whether Secretary of State applying inappropriate test of certainty — Whether decision unlawful — Conservation of Habitats and Species Regulations 2010 (SI 2010/490), reg 61 — Council Directive 92/43/EEC, art 6(3)

The claimant applied for a development consent order for the construction and operation of a wind farm on a site adjoining a special protection area (“the site”) whose qualifying species included the red kite. By virtue of that juxtaposition the Conservation of Habitats and Species Regulations 2010¹ (implementing Council Directive 92/43/EEC²) applied to the project. Regulation 61(1) of the 2010 Regulations required an “appropriate assessment” of the implications for the site’s conservation objectives of any project that was “likely to have a significant effect” on the site and regulation 61(5) provided that the competent authority might agree to such a project only after having ascertained that it would not adversely affect the integrity of the site. The appointed examiner, having considered data submitted by the claimant and by the appropriate nature conservation body (“NRW”), recommended that the order be made but advised the Secretary of State that an appropriate assessment might be necessary in the light of concerns expressed by NRW that the project might adversely affect red kites from the site, through collision with turbine blades. The Secretary of State, being the competent authority, requested further information from the claimant and NRW, under regulation 61(2) of the 2010 Regulations, about red kite mortality rates in combination with other wind farms. NRW responded but the claimant did not. In her decision letter the Secretary of State, noting that the burden of proof was on the claimant to demonstrate that the proposed development would not adversely affect the site rather than on statutory advisers to demonstrate that harm would occur, substantially accepted NRW’s advice that there was insufficient information to enable a decision to be taken that there were no adverse effects on the red kite feature or to consider whether the public interest might override those effects. She therefore concluded that development consent could not be granted under regulation 61(5) and refused the application. The claimant’s challenge to that refusal by way of judicial review was dismissed. The claimant appealed on the grounds that the Secretary of State had made no proper appropriate assessment, as required by regulation 61(1) of the 2010 Regulations, and in particular that she had

¹ Conservation of Habitats and Species Regulations 2010, reg 61: see post, para 5.

² Council Directive 92/43/EEC, art 6(3): “Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

A erred by requiring certainty in relation to each element of the data instead of using the available information and making a reasoned judgment, and that the judge had erred in rejecting those grounds of challenge.

On the appeal—

B *Held*, dismissing the appeal, that regulation 61(2) of the Conservation of Habitats and Species Regulations 2010 required a person applying for a consent, permission or authorisation for a site falling within the Regulations to provide such information as the competent authority reasonably required for the purposes of conducting an appropriate assessment of the implications for the affected site in view of its conservation objectives; that, using the normal meaning of the word, the “information” in regulation 61(2) which a competent authority might reasonably require could extend beyond raw data to encompass explanation, analysis and professional opinion depending on the context of the case; that the task of the decision-maker was to make an assessment applying the appropriate legal test on the basis of all the available information, and the use of the expression “burden of proof” in the context of that assessment was not helpful; that while there had been a default position in consideration of the claimant’s application by virtue of regulation 61(5), that was not the same thing as a legal burden of proof weighing upon one party to the process, but rather it meant no more than that it was in the interests of the claimant, who self-evidently wanted the application to succeed, to provide the information necessary to enable a favourable decision to be made; that in the circumstances the Secretary of State had been entitled to accept the advice of NRW and to conclude that she did not have the information necessary to enable her to grant development consent; that in so concluding the Secretary of State had not been asking for absolute certainty about the red kite population but rather had been seeking clarity and, in the circumstances, had been entitled to take the view that such clarity had not emerged from the information before her; and that, accordingly, the judge had been right to dismiss the claim (post, paras 25, 26, 29, 30–31, 34, 36, 39, 40, 41).

D Decision of Hickinbottom J [2016] EWHC 2581 (Admin); [2017] Env LR 14
E affirmed.

The following cases are referred to in the judgment of Peter Jackson LJ:

Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA

European Commission v Federal Republic of Germany (Case C-142/16) EU: C:2017:301, ECJ

F *Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) EU:C:2004:482; [2005] All ER (EC) 353; [2004] ECR I-7405, ECJ

Pye (JA) (Oxford) Estates Ltd v West Oxfordshire District Council (1982) 47 P & CR 125

R (Champion) v North Norfolk District Council [2015] UKSC 52; [2015] 1 WLR 3710, SC(E)

G *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] EWHC 1204 (Admin); [2008] 2 P & CR 16

Smyth v Secretary of State for Communities and Local Government [2015] EWCA Civ 174; [2015] PTSR 1417, CA

Sweetman v An Bord Pleanála (Galway County Council intervening) (Case C-258/11) EU:C:2013:220; [2014] PTSR 1092, ECJ

H The following additional cases, although not cited, were referred to in the skeleton arguments:

R (Akester) v Department for the Environment, Food and Rural Affairs [2010] EWHC 232 (Admin); [2010] Env LR 33

R (Bateman) v South Cambridgeshire District Council [2011] EWCA Civ 157; [2011] NPC 22, CA

R (*Boggis*) v *Natural England* [2009] EWCA Civ 1061; [2010] PTSR 725; [2010] A
1 All ER 159, CA

R (*DLA Delivery Ltd*) v *Lewes District Council* [2015] EWHC 2311 (Admin)

APPEAL from Hickinbottom J

On 30 July 2014 the claimant, Mynydd y Gwynt Ltd, applied under section 37 of the Planning Act 2008 for a development consent order in respect of the construction and operation of a wind farm on a site in mid-Wales lying in the neighbourhood of a special protection area, a proposal which amounted to a nationally significant infrastructure project within the meanings of sections 14(1)(a) and 15(2) of the 2008 Act. On 20 November 2015 the Secretary of State for Energy and Climate Change (since 2016 the Secretary of State for Business, Energy and Industrial Strategy), having requested further information from the parties, declined to grant development consent under regulation 61(5) of the Conservation of Habitats and Species Regulations 2010 as she was not satisfied that the project would not have a detrimental effect on a protected population of red kite as a result of the risk of collision with turbine blades. The claimant challenged that decision by way of judicial review pursuant to section 118 of the 2008 Act on the grounds, inter alia: (i) that the Secretary of State had made no proper appropriate assessment since had she done so she would have been convinced that there was no real risk to the red kite population; (ii) that there was inconsistency in applying guidance on foraging distances in the case compared to others; and (iii) that no proper consideration had been given to granting consent on the grounds of the overriding public interest. On 19 October 2016 Hickinbottom J [2017] Env LR 14 dismissed the claim.

By an appellant's notice filed on 18 November 2016, and with permission granted by the Court of Appeal (Lindblom LJ), the claimant appealed on the ground that the judge had erred in rejecting the contentions that the Secretary of State had not in reality made an appropriate assessment pursuant to regulation 61(1) of the 2010 Regulations and in particular that she had erred by requiring certainty in relation to each element of the data instead of using the available information and making a reasoned judgment, always taking the precautionary approach.

The facts are stated in the judgment of Peter Jackson LJ, post, paras 10–18.

Richard Kimblin QC (instructed by *Aaron & Partners LLP, Chester*) for the claimant.

Richard Moules (instructed by *Treasury Solicitor*) for the Secretary of State.

The court took time for consideration.

22 February 2018. The following judgments were handed down.

PETER JACKSON LJ

Introduction

1 This appeal arises from a challenge to the refusal of planning consent for the construction of an onshore wind farm. The Secretary of State refused consent because she was not satisfied that the project would not have a

A detrimental effect on a protected population of red kite as a result of the risk of collision with turbine blades. The issue on this appeal is whether that was a valid decision.

2 On 30 July 2014 the claimant company applied for permission to build and operate a 27-turbine wind farm on a site in mid-Wales. As a generating station of this size, the proposal amounted to a nationally significant infrastructure project and required a development consent order (“DCO”) under section 37 of the Planning Act 2008. On 20 November 2015 the Secretary of State refused to grant a DCO. The claimant challenged that decision by way of judicial review under section 118 of the 2008 Act, and the case was heard by Hickinbottom J, sitting in the Planning Court at Cardiff on 19 October 2016. By his decision, which is to be found at [2017] Env LR 14, he dismissed the application. It is against that decision that the claimant now appeals.

3 The proposed development site adjoins the Elenydd Mallaen Special Protection Area (“the SPA”), which covers most of the Cambrian Mountains. SPAs, also known as “European sites”, are areas that are strictly protected under Council Directive 92/43/EEC on the conservation of natural habitats and wild fauna and flora (OJ 1992 L206, p 7) (“the Habitats Directive”), both in relation to development within them and development in neighbouring areas. One of the conservation objectives of this SPA was to support at least 15 pairs of breeding red kite, or 0.5% of the British population. The main issues facing the Secretary of State on this aspect of the application concerned: (1) reliability of the bird survey data; (2) whether red kite observed on the application site came from the SPA or elsewhere; (3) the effectiveness of proposals for mitigation; and (4) in-combination effects on the red kite population from the project site taken together with other wind farms in the area.

The law

4 The decision of the Secretary of State was subject to article 6 of the Habitats Directive, which was at the relevant time transposed into domestic law by the Conservation of Habitats and Species Regulations 2010^{*}. The 2010 Regulations applied to this project because the development site adjoins the SPA.

5 Article 6(3) of the Habitats Directive is reflected in regulation 61 of the 2010 Regulations, which provides:

G “*Assessment of implications for European sites and European offshore marine sites*

H “(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—
(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and (b) is not directly connected with or necessary to the management of that site, must make an appropriate assessment of the implications for that site in view of that site’s conservation objectives.

* *Reporter’s note.* The superior figure in the text refers to the note at the end of the judgment of Peter Jackson LJ, on p 1286.

“(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable them to determine whether an appropriate assessment is required. A

“(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specify. B

“(4) They must also, if they consider it appropriate, take the opinion of the general public, and if they do so, they must take such steps for that purpose as they consider appropriate.

“(5) In the light of the conclusions of the assessment, and subject to regulation 62 (considerations of overriding public interest), the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be). C

“(6) In considering whether a plan or project will adversely affect the integrity of the site, the authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which they propose that the consent, permission or other authorisation should be given.” D

6 The Secretary of State was therefore obliged by regulation 61(1) to make “an appropriate assessment” of the implications for the site’s conservation objectives of any project that was “likely to have a significant effect” on the neighbouring SPA. The claimant was obliged by paragraph (2) to provide such “information” as the Secretary of State reasonably required. The Secretary of State was obliged by paragraph (3) to consult the appropriate nature conservation body, in this case Natural Resources Wales (“NRW”) and to have regard to any representations from them. By paragraph (5) consent could only be given, absent overriding public interest considerations, if the Secretary of State ascertained that the project would not adversely affect the integrity of the SPA’s conservation objectives. E

7 The decision-making framework is not prescribed by the Habitats Directive but is contained in the 2008 Act, and was described by the judge in this way at para 7: F

“Part 6 of the 2008 Act imposes a rigid procedure on the decision-making process for DCOs, including pre-application consultation and examination subject to a strict timetable lasting no longer than six months, with representations being mainly in written form at successive ‘deadline’ dates, with few and short issue specific hearings. From 2009 the examiner appointed in any case has been drawn from the Planning Inspectorate. He makes a recommendation to the Secretary of State, who then takes the final decision on whether a DCO should be made.” G

8 The proper approach to the Habitats Directive has been considered in a number of cases at European and domestic level, which establish the following propositions: H

(1) The environmental protection mechanism in article 6(3) is triggered where the plan or project is likely to have a significant effect on the site’s conservation objectives: see *Landelijke Vereniging tot Behoud van de*

A *Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (Case C-127/02) [2005] All ER (EC) 353, para 42 (“*Waddenzee*”).

(2) In the light of the precautionary principle, a project is “likely to have a significant effect” so as to require an appropriate assessment if the risk cannot be excluded on the basis of objective information: see *Waddenzee*, at para 39.

B (3) As to the appropriate assessment, “appropriate” indicates no more than that the assessment should be appropriate to the task in hand, that task being to satisfy the responsible authority that the project will not adversely affect the integrity of the site concerned. It requires a high standard of investigation, but the issue ultimately rests on the judgment of the authority: *R (Champion) v North Norfolk District Council* [2015] 1 WLR 3710, para 41 per Lord Carnwath JSC.

C (4) The question for the authority carrying out the assessment is: “What will happen to the site if this plan or project goes ahead; and is that consistent with ‘maintaining or restoring the favourable conservation status’ of the habitat or species concerned?”: see the opinion of Advocate General Sharpston in *Sweetman v An Bord Pleanála (Galway County Council intervening)* (Case C-258/11) [2014] PTSR 1092, point 50.

D (5) Following assessment, the project in question may only be approved if the authority is convinced that it will not adversely affect the integrity of the site concerned. Where doubt remains, authorisation will have to be refused: see *Waddenzee*, at paras 56–57.

(6) Absolute certainty is not required. If no certainty can be established, having exhausted all scientific means and sources it will be necessary to work with probabilities and estimates, which must be identified and reasoned: see *Waddenzee*, points 107 and 97 of the Advocate General’s opinion, endorsed in *Champion’s* case, at para 41 and by Sales LJ in *Smyth v Secretary of State for Communities and Local Government* [2015] PTSR 1417, para 78.

E (7) The decision-maker must consider secured mitigation and evidence about its effectiveness: *European Commission v Federal Republic of Germany* (Case C-142/16) EU:C:2017:301, para 38.

F (8) It would require some cogent explanation if the decision-maker had chosen not to give considerable weight to the views of the appropriate nature conservation body: *R (Hart District Council) v Secretary of State for Communities and Local Government* [2008] 2 P & CR 16, para 49.

(9) The relevant standard of review by the court is the *Wednesbury* rationality standard (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) and not a more intensive standard of review: see *Smyth’s* case, at para 80.

G
H 9 Drawing matters together, the task of the decision-maker is first to consider whether the risk of the project having a significant effect on the site’s conservation objectives can be excluded. If it cannot, an assessment must be undertaken to ascertain the impact of the project and identify whether it is consistent with maintaining the site’s conservation status. Mitigation measures must be taken into account and considerable weight should be attached to the views of the nature conservation body. Once the assessment has been carried out, approval can only be given if the authority is convinced that the project will not adversely affect the integrity of the site concerned. Absolute certainty is not required, and where it cannot be achieved after all

scientific efforts, the decision-maker must work with reasoned probabilities and estimates; but where doubt remains authorisation will be refused. A

The examination of the application

10 The application having been issued on 30 July 2014, a planning inspector was appointed by the Secretary of State on 27 October 2014 to be the examining authority. His examination began on 20 November 2014 and was completed on 20 May 2015 after a number of hearings and site inspections and the submission of many documents, particularly from the claimant and NRW. B

11 The examination covered a large number of issues, of which the impact on the red kite population was but one. Added to that, the arguments on that issue evolved in a way that was not altogether straightforward. When filing its application, the claimant submitted a *Habitats Regulation Assessment Screening Report* (“the screening report”). This included 2005, 2009–2010 and 2010–2011 red kite survey data and collision risk modelling based upon “vantage point” surveys from November 2009 and November 2010, which concluded that the predicted collision risk was less than one pair of birds per year. This data led the claimant to argue that there was no real risk that the integrity of the red kite population in the SPA would be adversely affected by the project: in other words, that because of the distances there was no “connectivity”. C D

12 NRW’s initial response was to agree. However, by December 2014, it had withdrawn from this position and raised concerns about the age and methodology of the surveys underpinning the screening report. This led to a detailed rebuttal from the claimant’s expert in the same month and from then on battle was joined. In January 2015 NRW raised the possibility of connectivity and in March it expressed the view that the project could not be shown to have no likely significant effect on the SPA alone or in combination with other projects. For its part, the claimant commissioned further survey data in March and April and provided a revised screening report in May, to which NRW responded, maintaining its position in relation to the effects of the project alone or in combination with other wind farms. Its conclusion was not that there was a real risk to the kite population, but rather that the claimant had not provided enough evidence to show that there was not. (On this appeal, there has been some discussion of whether NRW’s opposition related only to in-combination effects; the examiner considered that it did, while the Secretary of State and the judge interpreted NRW’s stance as referring to both. Having reviewed the sequence of submissions before and after May 2015, it seems to me that NRW was maintaining its submissions in relation to both aspects.) E F G

13 The examiner’s substantial report, dated 20 August 2015, was accompanied by a report on the impact on European sites. His conclusion was that the claimant’s survey data from March/April 2015 provided a reasonable degree of certainty that red kite on the project site did not originate from the SPA or its buffer zone and that consequently the project would not result in a likely significant effect, either alone or in combination with other wind farms. He therefore recommended approval but nevertheless advised the Secretary of State that in the light of the concerns expressed by NRW she might decide that an appropriate assessment was necessary. H

A 14 On 14 September 2015 the Secretary of State requested further information from NRW and from the claimant, including further information about red kite mortality rates in combination with other wind farms. This was correctly interpreted by the judge as being a request made under regulation 61(2) for information for the purposes of an appropriate assessment.

B 15 In a letter of 28 September 2015, the claimant responded to some of the issues raised by the Secretary of State, but provided no further information about red kite. For its part, NRW reiterated that the available information did not enable a decision to be taken that there was no adverse effect on the integrity of the red kite population from this project alone or in combination with other wind farms.

C 16 The decision of the Secretary of State was based upon the examiner's report and the subsequent correspondence. It was expressed in a decision letter of 20 November 2015, which was accompanied by a detailed document (*Record of the Habitats Regulations Assessment*), which constituted the appropriate assessment. These are detailed documents, with the treatment of the red kite issue extending to nine pages.

D 17 The issue was dealt with in paras 6.4–6.34 of the record. In essence, the Secretary of State accepted the advice of NRW to the effect that: it had not been proven beyond reasonable scientific doubt that red kite using the project site do not come from the SPA; there was no certainty that the mitigation proposed by the claimant (reducing the availability of carrion that might attract foraging birds) would be effective; there were concerns about the age and methodology of the surveys produced by the claimant; information had not been provided by the claimant about the in-combination impact of the project with other wind farms.

E 18 In the decision letter, the Secretary of State noted that the burden of proof was on the claimant to demonstrate that the proposed development would not adversely affect the SPA, rather than on statutory advisers to demonstrate that harm will occur. She recorded that she could only grant consent for an application where there was a positive assessment of no adverse effect on the integrity of the site, and considered that she did not have that information. She concluded that under regulation 61(5) she could not grant development consent and therefore refused the application.

The decision of Hickinbottom J

G 19 The claimant challenged the decision of the Secretary of State on three grounds: (1) that she had made no proper appropriate assessment: had she done so she would (or at least, may) have been convinced that there was no real risk to the red kite population; (2) that there was inconsistency in applying guidance on foraging distances in this case compared to others; and (3) that no proper consideration had been given to granting consent on the grounds of the overriding public interest. Each of these challenges was dismissed by the judge, and only the first, and to an extent the second, are taken forward on this appeal.

H 20 The judge dealt in considerable detail with the first ground. He noted that the examiner had accepted that there was no risk to red kite within the SPA and that an appropriate assessment was not necessary. However, the Secretary of State had preferred the alternative view of the NRW that the evidence for this conclusion did not exist. She had received

very little help from the examiner's report, which did not engage with the issue, or from the claimant who had made no substantive representations about it following her request in September 2015. She undertook her assessment, as expressed in the decision letter "as far as she is able to in the light of the absence of the required information referred to above". She was not, the judge considered, obliged to go further by making assumptions in relation to matters that were uncertain, such as the mortality rate from the proposed turbines, the proportion of those red kites that would come from the SPA, and the "acceptable" mortality rate that would leave the integrity of the SPA population unaffected. The burden was on the claimant to provide the necessary information and analysis; it had had reasonable opportunities to do so; reasonable assumptions needed to be made where certainty was impossible, but these needed to be based on reasoned material; here, there were a substantial number of important unknowns; and the Secretary of State was entitled to perform the evaluative balancing exercise on the very limited information that was available.

21 In summary, the judge considered, at para 67(xvi), that the effect of the Secretary of State's decision, read fairly and as a whole, was:

"The claimant had failed to provide information reasonably required to determine the appropriate assessment. The Secretary of State had, however, done the best she could on the available information. In line with advice from NRW, she had concluded that there was some risk of red kite on the application site originating from the SPA. Again in accordance with advice from NRW, she was not convinced that the project in combination with other wind farms would not pose a risk to the red kite population of the SPA in terms of the conservation objectives, and thus was not convinced that it would not result in adverse effects that would impact on the integrity of the SPA. Given the absence of reasoned estimates and probabilities, she was also not convinced that there would be no risk looking at the effects of the project alone."

The appeal to this court

22 Before this court, as before the judge, Mr Richard Kimblin QC accepts that, notwithstanding the claimant's case on connectivity and likely significant effect, the Secretary of State had been entitled to decide that an appropriate assessment should be undertaken. His argument is that she did not in reality make such an assessment at all. In particular, she had gone wrong by: (1) requiring certainty in relation to each element of the data, instead of using the available information and making a reasoned judgement, always taking the precautionary approach; (2) reaching an inconsistent conclusion about the in-combination level of risk to the red kite population in this SPA to those reached in relation to other Mid-Wales wind farm proposals; (3) not referencing or showing that she had considered the claimant's December 2014 response to NRW's concerns about survey methodology.

23 As for the judge, Mr Kimblin argues that he was wrong to have rejected the above points, and that his "fair reading" of the decision letter and the record was unduly indulgent. Further, and as a matter of law, the judge required too much of the claimant by extending the meaning of

A “information” in regulation 62(2) of the 2010 Regulations to include not only information but assessment.

24 When granting permission to appeal Lindblom LJ considered that the grounds were properly arguable and potentially raised issues of wider significance. However, he acknowledged that the Secretary of State’s understanding of the Habitats Directive and the 2010 Regulations may prove to have been entirely sound, that she did not err in her approach to appropriate assessment, and that the claimant’s only real grievances relate simply to unimpeachable findings of fact.

Conclusions

25 I shall examine each of the claimant’s arguments in more detail below, but will first state my overall conclusion. For this appeal to succeed it must be shown that the judge was wrong not to have concluded that the Secretary of State’s decision was unlawful on *Wednesbury* principles—that she had taken account of irrelevant matters or failed to take account of relevant matters, or that her decision was so unreasonable that no reasonable authority could have made it.

26 For my part, I am not persuaded that the Secretary of State’s decision was unlawful, nor that the judge’s careful review of the decision was wrong. The Secretary of State was required to exercise a judgment at the junction between two important social objectives—renewable energy and species protection. She was faced with a conflict of views between her statutory conservation adviser and her examiner. She asked for further assistance: NRW responded, the claimant did not. I accept that the Secretary of State might have been persuaded by the arguments that found favour with the examiner, but in the overall circumstances I consider that she was entitled to accept the advice of NRW and conclude that she did not have the information necessary to enable her to grant the application. In reaching this conclusion, I have taken full account of the claimant’s arguments, to which I now turn.

F “Information”

27 I start with the interpretation of regulation 62(2). The judge said at para 20(viii): “Information is a broad concept, stretching beyond relevant raw material: it includes appropriate analysis”; and at para 67(i): “That obligation extended to any appropriate analysis of (or assumptions or estimates drawn from) raw material, upon which the claimant relied.”

28 Mr Kimblin accepts that it is for applicants to provide information and that it is not for decision-makers to undertake surveys. However, he says that there is no obligation upon applicants to go further than that and to provide assessments. To this Mr Moules, for the Secretary of State, replies that the judge did not require the claimant to produce an assessment. The evaluative assessment remains a matter for the Secretary of State to undertake but it may be reasonable for her to ask an applicant to explain how it says the data should be interpreted and applied to lead to a positive appropriate assessment. None of this is burdensome on applicants and it is commonly carried out, including by this applicant when providing its screening report.

29 In my view, this issue is of no direct relevance to the present case. In her September letter the Secretary of State asked for “additional information . . . which could be used to inform an appropriate assessment”. This concerned in-combination mortality rates and the maximum level of mortality that could occur without adverse effect on the integrity of the SPA. There was nothing objectionable about that request. It seems to me that Mr Kimblin’s argument is really another way of expressing his more fundamental point about the level of certainty required by the Secretary of State. None the less, since the point has arisen, and in agreement with the judge, I can see no reason to put a limit on what “information” might entail. Using the normal meaning of the word, it can clearly extend beyond raw data to explanation, analysis and professional opinion, depending on the context of the case. As Lewison LJ observed in the course of argument, the ultimate assessments are made by a range of administrative decision-makers, from the Secretary of State to planning inspectors to local councillors, none of whom are conservation experts, and the regulation must be interpreted in a way that ensures that each decision-maker is able to lay hold of the information that is needed. To this I would add that the regulation itself only requires the applicant to provide “such information as the competent authority may reasonably require”. If a request is unreasonable, the applicant can say so. But that is not what happened in this case.

“Burden of proof”

30 During the course of his submissions, Mr Kimblin drew attention to the use of the concept of a “burden of proof” by both the Secretary of State and the judge. He referred to the decision in *JA Pye (Oxford) Estates Ltd v West Oxfordshire District Council* (1982) 47 P & CR 125, in which it was stated that the term “burden of proof” is not appropriate in the context of planning appeals. Once again, this was not a central plank of his argument but an adjunct to his main submission about certainty.

31 I agree that the use of the expression “burden of proof” in this context is not helpful. The task of the decision-maker is to make an assessment on the basis of all the available information, applying the appropriate legal test. In the present case, there was a default position by virtue of regulation 61(5). But that is not the same thing as a legal burden of proof weighing upon one party to the process. It means no more than that it is in the interests of the applicant, who will self-evidently want the application to succeed, to provide the information necessary to enable a favourable decision to be made. It is clear that the judge did not mislead himself in this respect, because he described the “burden of proof” upon the applicant in this way: “In effect, the burden upon him is to ensure that the competent authority is provided with sufficient information to convince the authority . . .”

“Certainty”

32 Mr Kimblin’s central submission is that the Secretary of State and the judge effectively required the claimant to prove a negative beyond reasonable doubt. That, he says, is inconsistent with *Waddenzee* [2005] All ER (EC) 353 and *Champion’s* case [2015] 1 WLR 3710: see para 8(6) above. It led to the Secretary of State failing to engage with the real issues, including

A the dispute about the validity of the survey methodology, and the reality of the large numbers of red kite known to be outside the SPA. A further example is the Secretary of State's position on mitigation. By alighting on the fact that there was no certainty about the effectiveness of the mitigation, she overlooked the fact that the minimisation of carrion on the project site would be bound to have some effect, but that this would be difficult to quantify.

B 33 In response, Mr Richard Moules says that the judge was right to say that the Secretary of State did not require certainty but rather, as the judge found, she reasonably required the probabilities, assumptions and estimates necessary to perform an appropriate assessment. In particular, the Secretary of State was entitled to identify a number of "unknowns", recorded by the judge at para 67(x), and it was reasonable for her not to go beyond the evidence and representations and make assumptions.

C 34 My conclusion is that the judge dealt comprehensively and correctly with this issue, which he described as the core issue, at paras 46–79 of his judgment. In my view, the Secretary of State was not asking for absolute certainty about the red kite population. Rather, she required clarity. She was entitled to take the view that did not emerge from the information before her.

D In so far as it takes matters further, I also reject the submission that the judge characterised the decision in an unduly generous way.

Inconsistency

E 35 Mr Kimblin points to the outcomes of two other inquiries: the Mid-Wales Inquiry, where the Secretary of State had on 7 September 2015 concluded that there was no likely significant effect upon the red kite population in combination with the proposed development in this case, and the Bryn Blaen decision, given in April 2016, where the Welsh Ministers reached a similar conclusion. Mr Moules responds that the mid-Wales decision is not inconsistent as there was no "connectivity" between those application sites and the SPA, and because the advice of NRW was different in that case. As to the Bryn Blaen decision, the claimant accepts that a later decision cannot of itself vitiate the Secretary of State's decision in this case.

F 36 It is easy to see why the juxtaposition of two nearly contemporaneous decisions has been galling for the claimant, but I cannot accept that they are irreconcilable, for the reasons given by Mr Moules. I also consider that the Secretary of State was entitled to note that she had not received further information from the claimant on this very issue in response to a specific request.

G

The December 2014 submission

H 37 Finally, Mr Kimblin argues that the Secretary of State did not show any regard to the claimant's December 2014 submission, which came into being as a first response to NRW's concerns about survey methodology. This submission rests upon the absence of any specific reference to that particular document in the record or the decision letter. Mr Moules replies that the Secretary of State specifically identified NRW's response to the document. Further, the claimant had not disputed the age of its surveys or the fact that they did not comply fully with the terms of the relevant guidance.

38 Having now had the advantage of following the entire sequence of submissions on this issue, it is clear to me that the interested parties, the examiner, and the Secretary of State were all aware of the full documentation that had been provided, and the issues that arose from them. The absence of specific reference to a document filed so long before the examiner's report and the Secretary of State's decision does not take the claimant any further forward.

39 For all of these reasons, I would dismiss this appeal.

Note

1. Since repealed and replaced in materially the same terms by the Conservation of Habitats and Species Regulations 2017 (SI 2017/1012).

FLOYD LJ

40 I agree.

LEWISON LJ

41 I also agree.

Appeal dismissed.

JEANETTE BURN, Barrister

Queen's Bench Division

A

**Monkhill Ltd v Secretary of State for Housing,
Communities and Local Government and another**

[2019] EWHC 1993 (Admin)

B

2019 July 9; 24

Holgate J

Planning — Development — Sustainable development — Application for planning permission for residential development in area of outstanding natural beauty — Application of presumption in favour of sustainable development — Whether displaced by national planning policies protecting areas or assets of particular importance and providing clear reason for refusal of permission — Effect of national planning policy requiring great weight be given to conserving and enhancing landscape and scenic beauty in AONBs and that scale and extent of development in such areas be limited — Planning and Compulsory Purchase Act 2004 (c 5), s 38(6)¹ — National Planning Policy Framework (2018), paras 11, 172²

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D

The claimant appealed to the Secretary of State against the local planning authority's refusal to grant planning permission for proposed residential development in the grounds of a former country house by the erection of up to 28 new dwellings, the demolition of two existing dwellings, glasshouses and outbuildings and the change of use and refurbishment of the existing main building from office to residential to provide a new dwelling. The greater part of the site lay within a designated area of outstanding natural beauty ("AONB") while the remainder was designated as an area of great landscape value. The Secretary of State's appointed inspector found that the local authority could not demonstrate a five-year housing land supply with the result that the presumption in favour of sustainable development in paragraph 11 of the National Planning Policy Framework (2018) ("NPPF") applied, but that planning permission ought nonetheless to be refused pursuant to paragraph 11(d)(i), applicable where "the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed". In reaching that conclusion the inspector took the view that, in particular, the urbanising impact of the proposed cul-de-sac of dwellings would not accord with its location in the rural setting of a former country house in that part of the AONB, and that the development would have an adverse effect of major significance on the landscape character of the area, contrary to, inter alia, the first part of paragraph 172 of the NPPF which required that great weight should be given to conserving and enhancing landscape and scenic beauty in AONBs and that the scale and extent of development within such designated areas should be limited. The claimant applied pursuant to section 288 of the Town and Country Planning Act 1990 to quash the inspector's decision, contending that a policy could not fall within paragraph 11(d)(i)

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¹ Planning and Compulsory Purchase Act 2004, s 38(6): "If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise."

² National Planning Policy Framework (2018), para 11: see post, para 2.
Para 172: see post, para 8.

H

A of the NPPF unless it was expressed in language the application of which was capable of providing a clear reason for refusal, in the form of a self-contained balancing exercise or test, and that the first part of paragraph 172 was not such a policy.

On the application—

B *Held*, refusing the application, (1) that policies of the kind in question were to be interpreted in a straightforward manner and on the basis that their purpose was to guide or shape practical decision-making; that the presumption of sustainable development in paragraph 11 of the National Planning Policy Framework did not displace section 38(6) of the Planning and Compulsory Purchase Act 2004 which required a planning application or appeal to be determined in accordance with the relevant policies of the development plan unless material considerations indicated otherwise; that, subject to section 38(6), if the proposal accorded with the policies of an up-to-date development plan taken as a whole, then, unless other considerations indicated otherwise, paragraph 11(c) of the NPPF required that planning permission be granted without delay; that where there were no relevant development plan policies, or where the most important development plan policies for determining the application were out-of-date, then, subject to section 38(6), paragraph 11(d) required that planning permission be granted unless either limb (i) or limb (ii) was satisfied so as to disapply the presumption in favour of sustainable development, that being essentially a matter of planning judgment for the decision-maker; that paragraph D 11(d) prioritised the application of policies for the protection of the relevant “areas or assets of particular importance” so that, where limb (i) was engaged, it was generally to be applied first before going on to consider whether limb (ii) should be applied; that limb (i) might be satisfied, and the presumption in favour of sustainable development overcome, where the individual or cumulative application of one or more relevant policies produced a clear reason for refusal; that the mere fact that such a policy was engaged was insufficient to satisfy limb (i), so that whether limb (i) was met instead E depended on the outcome of applying the relevant policies by taking into account only those factors which fell within the ambit of the relevant policy, although some such policies, such as those concerning the Green Belt, required all relevant planning considerations to be weighed in the balance; that if the test under limb (i) was met, then permission was to be refused, subject to applying section 38(6) of the 2004 Act, and limb (ii) was irrelevant and was not to be applied; but that if limb (i) was not satisfied, then the decision-taker was to proceed to limb (ii) and determine the F application by applying the tilted balance for which it provided and section 38(6) of the 2004 Act (post, paras 38, 39, 40, 45).

Further guidance on the application of paragraph 11 of the NPPF (post, paras 39, 45).

Forest of Dean District Council v Secretary of State for Communities and Local Government [2016] PTSR 1031 considered.

G (2) That paragraph 172 of the NPPF, read as a whole and in context, required “great weight” to be given to the conservation and enhancement of landscapes and scenic beauty; that the clear and obvious implication was that if a proposal harmed those objectives, great weight was to be given to the decision-maker’s assessment of the nature and degree of harm, and thus the policy increased the weight to be given to that harm; that in a simple case where there would be harm to an area of outstanding natural beauty but no countervailing benefits, the effect of giving great H weight to what might otherwise be assessed as a relatively modest degree of harm might be sufficient as a matter of planning judgment to amount to a reason for refusal of planning permission, when, absent that policy, that might not be the case; that where there were also countervailing benefits, the issue for the decision-maker was whether those benefits outweighed the harm assessed, the significance of the latter being increased by the requirement to give “great weight” to it; that that connoted a

simple planning balance which was so obvious that there was no interpretive or other legal requirement for it to be mentioned expressly in the policy, it being necessarily implicit in the application of the policy and a matter of planning judgment; that the great weight to be attached to the assessed harm to an AONB was capable of being outweighed by the benefits of a proposal, so as to overcome what would otherwise be a reason for refusal; that, interpreted in that straightforward, practical way, the first part of paragraph 172 of the NPPF was capable of sustaining a clear reason for refusal in the context of paragraph 11(d)(i) and was also capable of sustaining a freestanding reason for refusal in general development control in AONBs, National Parks and the Broads; that there was no legal justification for the claimant's suggested requirement that a policy had to be linguistically self-contained in order to qualify as a policy to be applied under limb (i) of paragraph 11(d) of the NPPF; and that, accordingly, the first part of paragraph 172 of the NPPF, properly interpreted, qualified as a policy to be applied under limb (i) (post, paras 51–53, 60, 63).

East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88, CA applied. C

The following cases are referred to in the judgment:

Canterbury City Council v Secretary of State for Communities and Local Government [2018] EWHC 1611 (Admin); [2019] PTSR 81

East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2017] EWCA Civ 893; [2018] PTSR 88, CA D

Forest of Dean District Council v Secretary of State for Communities and Local Government [2016] EWHC 421 (Admin); [2016] PTSR 1031

Hopkins Homes Ltd v Secretary of State for Communities and Local Government [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865; [2017] 4 All ER 938, SC(E)

R (Mansell) v Tonbridge and Malling Borough Council [2017] EWCA Civ 1314; [2019] PTSR 1452, CA E

R (Watermead Parish Council) v Aylesbury Vale District Council [2017] EWCA Civ 152; [2018] PTSR 43, CA

St Modwen Developments Ltd v Secretary of State for Communities and Local Government [2017] EWCA Civ 1643; [2018] PTSR 746, CA

Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc) F

The following additional cases were cited in argument or referred to in the skeleton arguments:

Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin); [2017] PTSR 1283

Horada v Secretary of State for Communities and Local Government [2016] EWCA Civ 169; [2016] PTSR 1271; [2017] 2 All ER 86, CA G

Telford and Wrekin Borough Council v Secretary of State for Communities and Local Government [2016] EWHC 3073 (Admin)

APPLICATION under section 288 of the Town and Country Planning Act 1990

By a CPR Pt 8 claim form the claimant, Monkhill Ltd, applied under section 288 of the Town and Country Planning Act 1990 to quash the decision dated 10 January 2019 of an inspector appointed by the first defendant, the Secretary of State for Housing, Communities and Local Government, dismissing the claimant's appeal against the decision of the second defendant local planning authority, Waverley Borough Council, refusing planning permission for residential development on land at H

- A Longdene House, Hedgehog Lane, Haslemere, Surrey, much of which lay within a designated area of outstanding natural beauty (“AONB”) and the remainder of which was designated as an area of great landscape value. The ground of challenge was that the inspector had erred in law in concluding that the application of policies in the National Planning Policy Framework (2018) (“NPPF”) that protected areas or assets of particular importance provided a clear reason for refusing the development proposed,
- B so as to engage paragraph 11(d)(i) and displace the presumption in favour of sustainable development; and in particular (1) that a policy could not fall within paragraph 11(d)(i) of the NPPF unless it was expressed in language the application of which was capable of providing a clear reason for refusal, and (2) that the first part of paragraph 172 of the NPPF, upon which the inspector had relied, was not a policy falling within the scope of paragraph
- C 11(d)(i).

The facts are stated in the judgment, post, paras 5–7, 12–28.

Charles Banner QC and *Matthew Fraser* (instructed by *Penningtons Manches llp*) for the claimant.

- Richard Moules* (instructed by *Treasury Solicitor*) for the Secretary of State.
- D The local planning authority did not appear and was not represented.

The court took time for consideration.

24 July 2019. **HOLGATE J** handed down the following judgment.

E *Introduction*

- 1 This claim raises important issues about the interpretation of the presumption in favour of sustainable development for decision-taking in paragraph 11(d) of the National Planning Policy Framework (2018) (“NPPF”). The challenge brought by the claimant, Monkhill Ltd, asks the
- F court to consider how paragraph 11(d)(i) should be interpreted so as to determine which policies in the NPPF fall within its scope. This in turn raises an important issue about the interpretation of paragraph 172 of the NPPF in relation to development in an area of outstanding natural beauty (“AONB”), or a National Park, or the Broads.

2 Paragraph 11 of the NPPF (in so far as relevant) provides:

- G “Plans and decisions should apply a presumption in favour of sustainable development.”

- “For *decision-taking* this means: (c) approving development proposals that accord with an up-to-date development plan without delay; or (d) where there are no relevant development plan policies, or the policies which are most important for determining the application
- H are out-of-date [footnote 7], granting permission unless: (i) the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed [footnote 6]; or (ii) 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.”

Paragraph 11(d)(ii) is often referred to as the “tilted balance”.

3 In summary, the effect of footnote 7 is that where a local planning authority is unable to demonstrate a five-year supply of deliverable housing sites in accordance with paragraph 73 of the NPPF, or where the housing delivery test indicates that the delivery of housing was substantially below (that is less than 75% of) the housing requirement over the previous three years, “the policies which are most important for determining the application” are deemed to be “out-of date”, so that the presumption in favour of sustainable development applies and planning permission should be granted unless either limb (i) or limb (ii) is satisfied.

4 Footnote 6 explains that the policies in limb (i) are:

“those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.”

5 The claimant applies under section 288 of the Town and Country Planning Act 1990 to quash the decision of the first defendant’s inspector given by a letter dated 10 January 2019 dismissing its appeal against the refusal of planning permission by the second defendant, Waverley Borough Council. The appeal arose from an application for planning permission to redevelop land at Longdene House, Hedgehog Lane, Haslemere, Surrey. The application was in two parts: first, outline planning permission for the erection of up to 28 new dwellings and the demolition of two existing dwellings, glasshouses and outbuildings; and second, full planning permission for the change of use and refurbishment of Longdene House from office (Class B1a) to residential (Class C3) to provide a new dwelling.

6 The appeal site comprised Longdene House, a Victorian dwelling currently in use as offices, its gardens and adjoining fields. Access is gained from Hedgehog Lane via a private driveway along a tree-lined avenue. The hybrid planning application related to four areas of the appeal site. Area A is to the north of the driveway. It is an open field, except for a small wooden storage building, and is used to raise horses. Outline planning permission was sought to build 25 dwellings on Area A. In Area B outline permission was sought for the replacement of a pair of semi-detached cottages in Area B with two dwellings. Area C comprised Longdene House. This was the subject of an application for full planning permission for change of use to a single dwelling with a detached garage. Within Area D, which includes the existing glass houses, it was proposed to erect one dwelling. The submitted plans showed that the other fields within the site would remain undeveloped.

7 The majority of Area A and all parts of Areas B, C and D lie within the Surrey Hills AONB. The remaining part of Area A is designated as an area of great landscape value (“AGLV”). The town centre of Haslemere lies about 1.3 kilometres from the site.

A *NPPF policy on AONBs, National Parks and the Broads*

8 Paragraph 172 of the NPPF sets out the policy on development in AONBs, National Parks and the Broads. The first part of the policy applies to development generally within these designated areas and provides:

B “Great weight should be given to conserving and enhancing landscape and scenic beauty in National Parks, the Broads and Areas of Outstanding Natural Beauty, which have the highest status of protection in relation to these issues. The conservation and enhancement of wildlife and cultural heritage are also important considerations in these areas, and should be given great weight in National Parks and the Broads. The scale and extent of development within these designated areas should be limited.”

C 9 The second part of paragraph 172 applies solely to “major development”. Footnote 55 explains that for the purposes of paragraphs 172–173 (paragraph 173 being a similar policy concerned with areas defined as Heritage Coast):

D “whether a proposal is ‘major development’ is a matter for the decision-maker, taking into account its nature, scale and setting, and whether it could have a significant adverse impact on the purposes for which the area has been designated or defined.”

That explanation raises essentially a matter of planning judgment for the decision-maker.

E 10 The development control policy applicable to major development in an AONB, National Park or the Broads is:

F “Planning permission should be refused for major development [footnote 55] other than in exceptional circumstances, and where it can be demonstrated that the development is in the public interest. Consideration of such applications should include an assessment of: (a) the need for the development, including in terms of any national considerations, and the impact of permitting it, or refusing it, upon the local economy; (b) the cost of, and scope for, developing outside the designated area, or meeting the need for it in some other way; and (c) any detrimental effect on the environment, the landscape and recreational opportunities, and the extent to which that could be moderated.”

G 11 It was common ground between the claimant and the second defendant that the proposal in this case did not constitute a “major development”. The inspector reached the same conclusion in para 31 of his decision letter (DL31).

The decision letter

H 12 The inspector stated in DL6 that one of the main issues to be determined was whether the proposal would cause “material harm to the intrinsic character, beauty and openness of the countryside beyond the Green Belt, the AONB and the AGLV” as a result of its urbanising impact and harm to the landscape character. He dealt with that issue between DL18 and DL33. Between DL34 and DL37 he addressed issues concerning highway safety, which had been raised not by the second defendant but by local residents.

In DL37 the inspector concluded that any resultant harm to highway safety should not weigh significantly against the proposal. He added: A

“residual cumulative impacts on the road network would not be severe, and any increased risk to highway safety would fall far short of an unacceptable impact which would, in accordance with the Framework, justify preventing the development on highway grounds.”

13 In DL38–DL42, the inspector dealt with housing land supply. In DL41, he concluded: B

“I find that the housing land supply here would be between 3.37 and 4.6 years. There is not enough information about individual sites for me to assess where within this range the current supply falls. Nevertheless, this is a significant shortfall.” C

14 In DL42, the inspector continued:

“The additional dwellings from the proposed development would make a significant contribution to the supply of housing in Haslemere. The provision of ten affordable dwellings would be particularly important in providing for local needs and would comply with LPP1 policy AHN1. Given the housing land supply situation and the degree of shortfall, these are benefits which will be given significant weight in the planning balance.” D

15 Between DL43 and DL45, the inspector dealt with “other matters”. In DL43, he concluded that the proposal, whether alone or in combination with other developments, would not be likely to have a significant effect on the Wealden Heath Special Protection Area and therefore no appropriate assessment was required. In DL44, the inspector identified employment benefits and ecological benefits to which he attributed moderate weight in the planning balance. In DL45, the inspector explained that other matters raised in evidence, for example the claimant’s case that some development of AONB land would inevitably be required to meet the housing need in Haslemere, did not have any significant effect on his overall conclusions on the appeal. E
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Effect of the proposal on the character and appearance of the AONB

16 In DL18 the inspector agreed with the parties that the development proposed in Areas B, C and D would conserve the landscape and scenic beauty of the AONB. However, it was the effect of development proposed in Area A which was in contention. G

17 In DL19 the inspector referred to the “Guidelines for Landscape and Visual Impact Assessment” and endorsed the agreement of the experts at the inquiry that a distinction needed to be made between the impact of the proposal on landscape character and its visual effects. On the latter aspect, he accepted that Area A is well screened in views from public vantage points.

18 In DL26 the inspector described Area A as being bounded by trees, some almost 20 metres in height. He concluded that the scope for siting dwellings so as to minimise the potential harm to nearby trees would be limited and in the long term there was likely to be further harm through pressure from future occupiers of the proposed development to cut or lop trees to overcome adverse impacts on residential amenity. H

A 19 In DL27 the inspector stated:

“The tall trees along the driveway adjoining Area A are a significant feature of the local landscape and are visible from vantage points in the wider area. If pressure from owners/occupiers resulted in their loss or cutting back that would harm the local distinctiveness of the area. In coming to this finding I have had regard to the pattern of development in Haslemere, where many dwellings are set within mature vegetation, often on sloping sites. But it seems to me that within this part of the AONB the loss or diminution of such a significant landscape feature would harm the character and appearance of the area.”

C 20 The inspector’s conclusion on visual impact in DL30 was: “Given the limited visibility into the site from public vantage points, but having regard to the visual significance of the avenue of trees, I consider that the proposal would have an adverse visual effect of minor/moderate significance.”

D 21 As for the effect of the development on landscape character, in DL20 the inspector rejected the claimant’s suggestion that the only issue concerned the effect of the proposal on the landscape character of the appeal site itself. He stated that the “area of landscape that needs to be covered in assessing landscape effects should include the site itself and the full extent of the wider landscape around it which the proposed development may influence in a significant manner”. He considered that this area included at least the grounds of Longdene House and that the tree-lined approach through open countryside to what had been a country house with some parkland features “makes an important contribution to the landscape and character of this part of the AONB”. In DL21 the inspector said that in his judgment “the proposed residential development of Area A would introduce an urban form of development and associated activity into a countryside location, resulting in a loss of openness and local distinctiveness”. He also had concerns about the proposals for access and landscaping on landscape character.

F 22 In DL28 the inspector referred to concerns about the urbanising impact of the proposed cul-de-sac development. He judged that the “urban road configuration proposed for Area A would not accord with its location within the setting of a former country house in this part of the AONB” which he described as “rural”. In DL29 the inspector explained why he considered the proposals to be in conflict with paragraphs 127 and 130 of the NPPF.

G 23 In DL30 the inspector said: “Taking all the above into account I find that the scheme would have an adverse effect on the landscape character of the area, not just for the site itself, of major significance.”

H 24 In DL31 the inspector concluded that although the development proposals did not amount to “major development” in the AONB, nevertheless, “the proposal would be likely to result in harm of major significance to landscape character” and “of minor/moderate significance to visual amenity”. “This would result in significant overall harm to the character and appearance of the area.”

25 In DL33 the inspector said in relation to this main issue:

“I consider that the outline proposal, with the submitted access and landscaping details, would be likely to result in a scheme that had a significant adverse effect on the character and appearance of the area. This would not conserve or enhance the landscape and scenic beauty

of the AONB. The resultant harm, in accordance with the Framework, should be given great weight in the planning balance.” A

He also explained why these conclusions led to the proposal being in conflict with policies in the local plan which he found to be consistent with the NPPF.

26 The inspector set out his overall conclusions in DL46–DL51. In DL46, he accepted that the proposals gain some support from development plan policies to provide housing in Haslemere, to increase the supply of affordable housing and to enhance biodiversity. On the other hand, he concluded that the proposals would conflict with local plan policies for the protection of the AONB and AGLV, and also a countryside protection policy. He concluded that the proposal would be contrary to the provisions of the development plan taken overall. On that basis, he decided that paragraph 11(c) of the NPPF did not apply because the proposal did not accord with an up-to-date development plan. The claimant makes no challenge to this reasoning in DL46. B C

27 In DL47 the inspector concluded that because the second defendant could not demonstrate a five-year supply of deliverable housing sites, paragraph 11(d) of the NPPF was engaged by virtue of footnote 7. He then rejected the claimant’s contention that this proposal did not engage any policies falling within the scope of paragraph 11(d)(i): D

“In paragraph 11(d)(i), the reference to ‘protect’ has its ordinary meaning to keep safe, defend and guard. It seems to me that that is precisely what paragraph 172 seeks to achieve with respect to landscape and scenic beauty in AONBs. This Framework policy for AONBs states that they have a highest status of protection in relation to conserving and enhancing landscape and scenic beauty, and that within AONBs the scale and extent of development should be limited.” E

28 The inspector’s conclusions in DL48–DL50 need to be quoted in full:

“48. Given my findings about the effects on the character and appearance of the area, as set out above, I consider that applying Framework policies for the AONB here provides a clear reason for refusing the proposed development. So the provisions of paragraph 11(d)(i) disengage the tilted balance. Therefore, the planning balance in this case is a straight or flat balance of benefits against harm. F

“49. The appeal scheme would provide additional housing in Haslemere, including affordable units, in an area of need. There would also be some benefits to the local economy and to biodiversity. But in my judgment these benefits would be outweighed by the harm to the character and appearance of the area, along with the harm to the AONB which attracts great weight. I find that the planning balance falls against the proposal. G

“50. The proposal would be contrary to the provisions of the development plan taken as a whole. It would not gain support from the Framework. There are no material considerations here which indicate that the determination of the appeal should be other than in accordance with the development plan.” H

For these reasons the inspector dismissed the appeal.

A *The issues in this claim*

29 On behalf of the claimant, Mr Charles Banner QC and Mr Matthew Fraser submitted that on a true interpretation:

(i) A policy cannot fall within paragraph 11(d)(i) of the NPPF unless it is expressed in *language* the *application* of which is capable of providing a *clear reason for refusal*.

(ii) The first part of paragraph 172 (see para 8 above) which applies to development generally within an AONB, a National Park or the Broads, and irrespective of whether it constitutes “major development” does not satisfy the test in (i) above.

30 On behalf of the Secretary of State, Mr Richard Moules argued against both submissions. He said that the way in which submission (i) was developed involved putting an unwarranted gloss on paragraph 11(d)(i) of the NPPF. He pointed out that that provision refers to “policies” in the plural, recognising that in some cases two or more “footnote 6” policies may be engaged. Where that is so, a decision-maker is entitled to treat the combined application of those policies as providing a “clear reason” for refusing planning permission, even if the separate application of each policy would not provide freestanding reasons for refusal.

31 Nevertheless, he recognised that in a case where a proposal engages only *one* “footnote 6” policy, then it is necessarily implicit that paragraph 11(d)(i) cannot be used to overcome the presumption in favour of sustainable development unless that policy is capable of sustaining a reason for refusal. The argument during the hearing focused on what type of language is sufficient for that purpose.

32 In relation to submission (ii), Mr Moules submits that, when properly understood and applied, the first part of paragraph 172 of the NPPF is capable of sustaining a clear and independent reason for refusal of a planning application.

33 The claimant accepts that the second part of paragraph 172, concerning proposals for “major development” (see para 10 above), qualifies as a policy falling within paragraph 11(d)(i) of the NPPF. The claimant’s argument is therefore limited to the first part of paragraph 172. It also became clear during the hearing that Mr Banner accepts that, on his submissions, this passage is the only policy in the NPPF dealing with subjects listed in footnote 6 that would not qualify as a policy within paragraph 11(d)(i). In a nutshell, his submission is that the first part of paragraph 172 does not so qualify because it does no more than specify a degree of weight, namely “great weight”, that should be applied to one factor, namely “conserving and enhancing landscape and scenic beauty” in the designated areas.

34 If Mr Banner’s interpretation of the first part of paragraph 172 of the NPPF is correct, it is common ground that the inspector’s decision must be quashed. This is because the inspector decided that the presumption in favour of sustainable development was overcome by relying solely upon limb (i) and by applying that test solely to the first part of paragraph 172. Mr Banner accepts that the first part of paragraph 172 could properly have been taken into account under limb (ii) of paragraph 11(d), as the alternative route by which the presumption in favour of sustainable development may be overcome. But, it is plain that the inspector did not apply limb (ii). Although the inspector did apply section 38(6) of the Planning and Compulsory

Purchase Act 2004 in this case (about which no complaint is, or could be, made), it is plain that he applied only limb (i) and not limb (ii). A

35 The issue about the interpretation and effect of the first part of paragraph 172 of the NPPF only arises in the present case because the local planning authority was unable to demonstrate a five-year housing land supply and this was the only policy relied upon to overcome the presumption in favour of sustainable development. Understandably the claimant's argument is targeted at the way in which this particular appeal was determined under paragraph 11(d)(i). However, it will readily be appreciated that Mr Banner's submission about the meaning and effect of paragraph 172 goes far beyond his client's appeal or even the application of paragraph 11(d)(i). It affects the application of paragraph 172 of the NPPF generally in AONBs, National Parks or the Broads, certainly where "major development" is not proposed. If Mr Banner's submission is correct, then, as he accepted during the hearing, it would follow that a breach of the first part of paragraph 172 of the NPPF could never by itself support a freestanding reason for refusal. It could only be one consideration along with others in an overall planning balance. B C

36 This outcome would have a serious effect on the determination of relatively common, straightforward cases where the only material consideration is the harmful impact of the proposal on the landscape and scenic beauty of the designated area, or alternatively that impact has to be weighed against any benefits of the proposal. In such cases the harm to the landscape resulting from a single development proposal may sometimes be less than substantial, but the importance attached to protection in an AONB, for example, may enable the planning authority to refuse planning permission and to resist incremental or "creeping" change to the character of such an area resulting from the cumulative effect of multiple small developments. Such developments might typically include the building of a single dwelling, or an extension to an existing property, or the construction of small business development generating economic benefits. This issue would also arise where local policy in the development plan simply followed the approach set out in paragraph 172 of the NPPF. Policies of the kind set out in that paragraph have existed in one form or another for many years and must have been applied on countless occasions in areas where special protection is given to the landscape. So, it is surprising that the issue in this challenge has not arisen before. D E F

Legal principles on the interpretation of planning policy

37 The principles governing the interpretations of planning policy have been set out in a number of authorities, including *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983; *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623; *East Staffordshire Borough Council v Secretary of State for Communities and Local Government* [2018] PTSR 88; *R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452; *St Modwen Developments Ltd v Secretary of State for Communities and Local Government* [2018] PTSR 746; *Canterbury City Council v Secretary of State for Communities and Local Government* [2019] PTSR 81. G H

38 The principles are well known and do not need to be rehearsed in this judgment. For the present case I would simply emphasise that NPPF policies

A of the kind we are dealing with are to be interpreted in a straightforward manner and on the basis that their purpose is to guide or shape practical decision-making.

The interpretation of paragraph 11 of the NPPF

B 39 I am grateful for counsel’s written and oral submissions, which I found to be of great assistance. It became clear during the course of the hearing that they were agreed on a number points to do with the interpretation and effect of paragraphs 11 and 12 of the NPPF, forming part of the context for the arguments for and against the ground of challenge. Taking those agreed points into account, it would be helpful to summarise my understanding of the meaning and effect of this part of the NPPF, before going on to consider the legal challenge in this case:

C (1) The presumption in favour of sustainable development in paragraph 11 does not displace section 38(6) of the 2004 Act. A planning application or appeal should be determined in accordance with the relevant policies of the development plan unless material considerations indicate otherwise.

D (2) Subject to section 38(6), where a proposal accords with an up-to-date development plan, taken as a whole, then, unless other material considerations indicate otherwise planning permission should be granted without delay (paragraph 11(c)).

(3) Where a proposal does not accord with an up-to-date development plan, taken as a whole, planning permission should be refused unless material considerations indicate otherwise (see also paragraph 12).

E (4) Where there are no relevant development plan policies, planning permission should be granted *unless either* limb (i) *or* limb (ii) is satisfied.

(5) Where there are relevant development plan policies, but the most important for determining the application are out-of-date, planning permission should be granted (subject to section 38(6)) *unless either* limb (i) *or* limb (ii) is satisfied.

F (6) Because paragraph 11(d) states that planning permission should be granted *unless* the requirements of either alternative is met, it follows that if either limb (i) or limb (ii) is satisfied, the presumption in favour of sustainable development ceases to apply. The application of each limb is essentially a matter of planning judgment for the decision-maker.

G (7) Where more than one “footnote 6” policy is engaged, limb (i) is satisfied, and the presumption in favour of sustainable development overcome, where the individual or cumulative application of those policies produces a clear reason for refusal;

H (8) The object of expressing limbs (i) and (ii) as two alternative means by which the presumption in favour of granting permission is overcome (or disapplied) is that the tilted balance in limb (ii) may not be relied upon to support the grant of permission where a proposal should be refused permission by the application of one or more “footnote 6” policies. In this way paragraph 11(d) prioritises the application of “footnote 6” policies for the protection of the relevant “areas or assets of particular importance”.

(9) It follows that where limb (i) is engaged, it should generally be applied first before going on to consider whether limb (ii) should be applied.

(10) Under limb (i) the test is whether the *application* of one or more “footnote 6 policies” provides a clear reason for refusing planning permission. The mere fact that such a policy is *engaged* is insufficient to

satisfy limb (i). Whether or not limb (i) is met depends upon the outcome of *applying* the relevant “footnote 6” policies (addressing the issue on paragraph 14 of NPPF 2012 which was left open in *R (Watermead Parish Council) v Aylesbury Vale District Council* [2018] PTSR 43, para 45 and subsequently resolved in *East Staffordshire* [2018] PTSR 88, para 22(2)). A

(11) Limb (i) is applied by taking into account only those factors which fall within the ambit of the relevant “footnote 6” policy. Development plan policies and other policies of the NPPF are not to be taken into account in the application of limb (i): see footnote 6. (I note that this is a narrower approach than under the corresponding limb in paragraph 14 of the NPPF 2012: see eg Lord Gill in *Hopkins* [2017] PTSR 623, para 85). B

(12) The application of some “footnote 6” policies (eg Green Belt) requires *all* relevant planning considerations to be weighed in the balance. In those cases because the outcome of that assessment determines whether planning should be granted or refused, there is no justification for applying limb (ii) in addition to limb (i). The same applies where the application of a legal code for the protection of a particular area or asset determines the outcome of a planning application (see, for example, the Conservation of Habitats and Species Regulations 2010 (SI 2010/490) in relation to European protected sites). C

(13) In other cases under limb (ii), the relevant “footnote 6” policy may not require all relevant considerations to be taken into account. For example, paragraph 196 of the NPPF requires the decision-maker to weigh only the “less than substantial harm” to a heritage asset against the “public benefits” of the proposal. Where the application of such a policy provides a clear reason for refusing planning permission, it is still necessary for the decision-maker to have regard to all other relevant considerations before determining the application or appeal: section 70(2) of the 1990 Act, as amended, and section 38(6) of the 2004 Act. But that exercise must be carried out without applying the tilted balance in limb (ii), because the presumption in favour of granting permission has already been disapplied by the outcome of applying limb (i). That is the consequence of the decision-making structure laid down in paragraph 11(d) of the NPPF. D

(14) There remains the situation where the application of limb (i) to a policy of the kind referred to in (13) does *not* provide a clear reason for refusal. The presumption in favour of sustainable development will not so far have been disapplied under limb (i) and it remains necessary to strike an overall planning balance (applying also section 38(6)). Because the presumption in favour of granting planning permission still remains in play, it is relevant, indeed necessary, to apply the alternative means of overcoming that presumption, namely limb (ii). This is one situation where the applicant for permission is entitled to rely upon the “tilted balance”. E

(15) The other situation where the applicant has the benefit of the “tilted balance” is where no “footnote 6” policies are engaged and therefore the decision-maker proceeds directly to limb (ii). F

40 Applicants for planning permission may object that under this analysis of paragraph 11(d), the availability of the tilted balance is asymmetric. Where a proposal fails the test in limb (i), the tilted balance in limb (ii) is not applied at all. In other words, the tilted balance in limb (ii) may only be applied where the proposal either passes the test in limb (i) (and there still remain other considerations to be taken into account), or where limb (i) is not engaged at G H

A all. This analysis is wholly unobjectionable as a matter of law. It is simply the ineluctable consequence of the Secretary of State’s policy expressed through the language and structure of paragraph 11(d).

B 41 The current version of the NPPF should be capable of being understood and applied without needing to make textual comparisons with the 2012 version. But in this case reference has been made to decisions on the earlier NPPF, notably the decision of Coulson J in *Forest of Dean District Council v Secretary of State for Communities and Local Government* [2016] PTSR 1031. I note that at paras 36–37 the judge dealt with the relationship between limbs (i) and (ii) (which appeared in the NPPF 2012 but in the reverse order). He indicated that if a proposal passed the test corresponding to what is now limb (i), then the “broader review” under limb (ii) should take place. But that was in the context of a limb (i) assessment where the relevant “restrictive” policy required only *some* and *not all* relevant planning considerations to be taken into account at that stage: see para 36 and the submissions of Mr Gwion Lewis for the Secretary of State at para 16. The analysis I have set out above is entirely consistent with what was said by Coulson J in *Forest of Dean*. The judge did not go any further. In particular, he is not to be taken as having suggested that limb (ii) should be applied in all cases, whether or not a proposal overcomes objections under limb (i).

D 42 The above analysis is also consistent with the written submissions by Mr Lewis in the previous section 288 claim justifying the Secretary of State’s decision to submit to an order quashing the decision dated 4 September 2017 of a different inspector on this same planning appeal.

E 43 Any suggestion that because limb (ii) falls to be applied where a development *passes* limb (i), it follows that limb (ii) should also be applied where a proposal *fails* limb (i) involves false logic. It has nothing to do with the way in which paragraph 11(d) of the NPPF 2018 has been structured and drafted.

F 44 In the present case Mr Banner did not fall into that trap. He rightly accepted that if the first part of paragraph 172 of the NPPF qualifies as a “footnote 6” policy, (a) the claimant could not challenge the inspector’s judgment reached on the application of limb (i), and (b) the proposal having failed that limb, it would have been improper for the inspector then to have applied limb (ii). Mr Banner accepted that if the inspector had been entitled as a matter of law to determine the limb (i) issue as he did, he did not err in law by not applying or addressing limb (ii). I agree with Mr Banner’s analysis on this point.

G 45 The following practical summary may assist practitioners in the field, so long as it is borne in mind that this does not detract from the more detailed analysis set out above:

- It is, of course, necessary to apply section 38(6) in any event.
- If the proposal accords with the policies of an up-to-date development plan taken as a whole, then unless other considerations indicate otherwise, planning permission should be granted without delay (paragraph 11(c) of the NPPF).
- If the case does not fall within paragraph 11(c), the next step is to consider whether paragraph 11(d) applies. This requires examining whether there are no relevant development plan policies or whether the most important development plan policies for determining the application are out-of-date.

• If paragraph 11(d) does apply, then the next question is whether one or more “footnote 6” policies are relevant to the determination of the application or appeal (limb (i)). A

• If there are no relevant “footnote 6” policies so that limb (i) does not apply, the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and section 38(6)).

• If limb (i) does apply, the decision-taker must consider whether the application of the relevant “footnote 6” policy (or policies) provides a clear reason to refuse permission for the development. B

• If it does, then permission should be refused (subject to applying section 38(6) as explained in para 39(11)–(12) above). Limb (ii) is irrelevant in this situation and must not be applied.

• If it does not, then the decision-taker should proceed to limb (ii) and determine the application by applying the tilted balance (and section 38(6)). C

Whether the first part of paragraph 172 of the NPPF is a policy falling within the scope of paragraph 11(d)(i) of the NPPF

46 Mr Banner relied upon the effect of the NPPF that where limb (i) is engaged and is satisfied (ie the proposal fails to pass that test), the “tilted balance” in limb (ii) is, as he put it, disapplied: see para 20 of the claimant’s statement of facts and grounds. He submitted that this consequence underscores the importance of adopting the correct approach for determining which policies may be relied upon under limb (i). D

47 Mr Banner submitted that in a case such as the present one, where the application of limb (i) was applied to a single “footnote 6” policy: “For a policy in the NPPF to provide a ‘clear reason’ for refusal, it has to impose a self-contained balancing exercise or test, eg exceptional circumstances or very special circumstances.” (Para 27 of the statement of facts and grounds.) He went on to say that the first part of paragraph 172 of the NPPF fails to satisfy that test because it merely requires “great weight” to be given to conserving and enhancing landscape and scenic beauty. E

48 Essentially the same point was advanced in para 8 of the claimant’s skeleton, albeit in slightly different language: F

“a policy which simply specifies a degree of weight to one particular factor is not capable of itself of providing a ‘clear reason for refusal’, since whether planning permission should be refused or allowed requires a balancing of all the considerations in favour and against the proposed development. The application of a policy is only capable of providing a ‘clear reason for refusal’ without proceeding to the application of the tilted balance in NPPF paragraph 11(d)(ii) if that policy itself provides—in terms—that permission should (or should normally) be refused unless certain requirements or criteria are met.” G

49 Mr Banner accepts that the second part of paragraph 172 dealing with “major development” meets his suggested test because it not only specifies factors to be taken into account, but also states that permission should be refused “other than in exceptional circumstances and where it can be demonstrated that the development is in the public interest”. Mr Banner submits that this “major development” policy qualifies to be applied under limb (i) because it refers to the carrying out of a balancing exercise and contains provisions which “constrain” how “the pros and cons” of a H

A proposal are to be weighed against each other in that exercise. By contrast, Mr Banner submits that the first part of paragraph 172 does not qualify under limb (i) because it does not state any test for a balancing exercise, and therefore cannot provide a clear reason for refusing the development proposed.

B 50 I do not accept these submissions which, with respect, are far too legalistic and fail to interpret the NPPF in a practical, straightforward way capable of being operated by decision-makers up and down the country.

C 51 It is necessary to read the policy in paragraph 172 as a whole and in context. Paragraph 170 requires planning decisions to protect and enhance valued landscapes in a manner commensurate with their statutory status and any qualities identified in the development plan. Paragraph 172 points out that National Parks, the Broads and AONBs have “the highest status of protection” in relation to the conservation and enhancement of landscapes and scenic beauty. Not surprisingly, therefore, paragraph 172 requires “great weight” to be given to those matters. The clear and obvious implication is that if a proposal harms these objectives, great weight should be given to the decision-maker’s assessment of the nature and degree of harm. The policy increases the weight to be given to that harm.

D 52 Plainly, in a simple case where there would be harm to an AONB but no countervailing benefits, and therefore no balance to be struck between “pros and cons”, the effect of giving great weight to what might otherwise be assessed as a relatively modest degree of harm, might be sufficient as a matter of planning judgment to amount to a reason for refusal of planning permission, when, absent that policy, that might not be the case. But where there are also countervailing benefits, it is self-evident that the issue for the decision-maker is whether those benefits outweigh the harm assessed, the significance of the latter being increased by the requirement to give “great weight” to it. This connotes a simple planning balance which is so obvious that there is no interpretive or other legal requirement for it to be mentioned expressly in the policy. It is necessarily implicit in the *application* of the policy and a matter of planning judgment. The “great weight” to be attached to the assessed harm to an AONB is capable of being outweighed by the benefits of a proposal, so as to overcome what would otherwise be a reason for refusal.

F 53 Interpreted in that straightforward, practical way, the first part of paragraph 172 of the NPPF is capable of sustaining a clear reason for refusal, whether in the context of paragraph 11(d)(i) or, more typically where that provision is not engaged, in the general exercise of development management powers.

G 54 Furthermore, there is no proper distinction to be drawn between the first part of paragraph 172 and other NPPF policies which Mr Banner accepted qualify as policies to be applied under limb (i), notably paragraphs 173 and 196 of the NPPF.

55 Paragraphs 173 of the NPPF dealing with the Heritage Coast provides:

H “Within areas defined as Heritage Coast (and that do not already fall within one of the designated areas mentioned in paragraph 172), planning policies and decisions should be consistent with the special character of the area and the importance of its conservation. Major development within a Heritage Coast is unlikely to be appropriate, unless it is compatible with its special character.”

56 The first sentence of paragraph 173 provides only two criteria for the determination of planning applications: consistency with the character of the Heritage Coast area and the conservation objective, and “the importance”, the *weight*, to be attached to that objective. On the claimant’s argument, there is no express reference to a balance or to how any balancing exercise should be carried out. But the straightforward, common sense understanding of this policy is that development which is inconsistent with the character of a Heritage Coast area is harmful, the nature and degree of any harm being a matter of judgment in each case, and that conflict with the conservation objective is to be weighed as an “important” factor. Conclusions of this kind may sustain a reason for refusal. But, of course, it must go without saying that any countervailing factors, such as benefits of the proposal, must be taken into account, to see whether they outweigh the harm to the character of the area and the conservation objective.

57 Neither the express language of the first sentence, nor that of the second sentence (dealing with “major development”), in paragraph 173 of the NPPF come any closer to satisfying the test set by Mr Banner than the first part of paragraph 172. Moreover, for the purpose of disapplying under limb (i) the presumption in favour of sustainable development, there is no material difference between paragraph 173 of the current NPPF and its predecessor, paragraph 114 of the NPPF 2012, and so the analysis by Coulson J in *Forest of Dean* [2016] PTSR 1031, paras 21–22 is analogous and lends further support to my conclusion.

58 In the section of the NPPF dealing with the protection of heritage assets, paragraph 196 (which is in the same terms as paragraph 134 of NPPF 2012) provides:

“Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal including, where appropriate, securing its optimum viable use.”

59 This policy does not identify the weighting to be given to “less than substantial harm” in the balance. Instead, the requirement to give “considerable importance and weight” to the “less than substantial harm” identified comes from section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990, as amended. Even so, according to Mr Banner’s argument, paragraph 196 fails to specify what the outcome of striking the balance should be. But in my judgment, as with the first part of paragraph 172 and also paragraph 173, the implication of these *weighted* balances coming down one way or the other is obvious; planning permission is either granted or refused.

60 Each of these polices involves the application of planning judgment in a straightforward manner. As a matter of law, none of them lacks any element necessary to found a freestanding reason for refusal of permission, or to engage paragraph 11(d)(i) of the NPPF. There is no legal justification for Mr Banner’s suggested requirement that a policy must be linguistically self-contained. The claimant’s argument does not accord with the precepts in *East Staffordshire* [2018] PTSR 88, para 50. For these reasons, the main ground of challenge must be rejected.

61 For completeness, I should mention Mr Banner’s submissions about the effect of the claimant’s argument. Having accepted that the first part

A of paragraph 172 of the NPPF would be the only NPPF policy dealing with a “footnote 6” subject which would fall outside the ambit of limb (i), he went on to submit that it would nevertheless be dealt with under limb (ii) (assuming that that provision is engaged). In other words, he says that the “great weight” to be attached to the objectives of, for example, an AONB, would still be taken into account as part of an overall planning balance. As far as it goes, that submission is correct. However, the balance under limb (ii) is tilted in favour of the grant of permission, which may run in the opposite direction to the objectives of AONB policy. Furthermore, that presumption is only overcome where the adverse impacts of granting permission would “significantly and demonstrably outweigh” the benefits of the proposal. I agree with Mr Moules that it is not a sensible reading of paragraph 172 to treat only “major development” proposals as falling within limb (i) and not lesser proposals. That kind of dichotomy is not to be found in the Heritage Coast policies (paragraph 173) or elsewhere in the application of paragraph 11(d) of the NPPF.

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D 62 The claimant did plead a challenge to the adequacy of the reasons given by the inspector in his decision letter as an alternative to the main ground of challenge which I have already rejected. However, Mr Banner quite properly confirmed that if the court should reject the main challenge in this claim, then the reasons challenge would fall away, and he advanced no further argument on the point. In these circumstances, I need say no more about this aspect.

Conclusions

E 63 For all these reasons the claim is dismissed. The first part of paragraph 172 of the NPPF qualifies as a policy to be applied under limb (i) of paragraph 11(d) of the NPPF; it is also capable of sustaining a freestanding reason for refusal in general development control in AONBs, National Parks and the Broads.

Application refused.

F SALLY DOBSON, Barrister

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Neutral Citation Number: [2020] EWCA Civ 805

Case No: C1/2019/2124

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE PLANNING COURT
HHJ KLEIN
CO/4430/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/06/2020

Before:

LORD JUSTICE UNDERHILL
VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)
LORD JUSTICE LEWISON
and
LADY JUSTICE CARR

Between :

OXTON FARM **Appellant**
- and -
HARROGATE BOROUGH COUNCIL **Respondent**
- and -
D NOBLE LIMITED **Interested Party**

Richard Wald QC (instructed by **Pinsent Masons LLP**) for the **Appellant**
John Hunter (instructed by **Harrogate Borough Council (Legal Services)**) for the **Respondent**

Hearing date : 9 June 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Thursday 25th June 2020.

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether Harrogate BC (“Harrogate”) lawfully granted outline planning permission for 21 new houses and a village shop on land at Turnpike Lane, Bickerton, North Yorkshire. HHJ Klein held that the grant was lawful. His judgment is at [2019] EWHC 1370 (Admin).
2. D Noble Ltd applied to Harrogate for planning permission on 8 December 2017. One of Harrogate’s planning officers reported on 28 August 2018; and, following her recommendation, conditional outline planning permission was granted on 25 September 2018.

Legal and policy framework

3. Section 70 (2) of the Town and Country Planning Act 1970 provides that:

“In dealing with an application for planning permission ... the authority shall have regard to -

 - (a) the provisions of the development plan, so far as material to the application, ... [and]
 - (c) any other material considerations.”
4. Section 38 (6) of the Planning and Compulsory Purchase Act 2004 provides that:

“If regard is to be had to the development plan for the purpose of any determination to be made under the planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise.”
5. The starting point, therefore, is the development plan. In February 2009, Harrogate adopted Core Strategy Policies SG1, SG2 and SG3. Those policies provide that:

“[Policy SG1:] [Harrogate] will make provision for 390 new homes per annum (net annual average) in Harrogate District during the period 2004 to 2023. In doing so it will seek to ensure that (as an interim target) about 160 of this annual provision will be homes for local people at affordable prices and that 70% of these new homes are in new buildings or conversions on previously developed land...

[Policy SG2:] Development or infill limits will be drawn around the settlements listed...to allow the sustainable growth and development of those settlements within the District that have the best access to jobs, shops and services...

[Policy SG3:] Outside the development and infill limits of the settlements listed in policy SG2 of this Core Strategy, land will be classified as countryside and there will be strict control over new development in accordance with national and regional planning policy protecting the countryside and Green Belt...”

6. Bickerton was not among the settlements listed under policy SG2. The explanatory notes to policy SG2 stated:

“Those settlements (villages and hamlets) not listed in this policy have very few services and facilities and often no defined built up area. In accordance with national and regional planning policy regarding the promotion of more sustainable patterns of growth, the settlements should not accommodate new market housing apart from the suitable conversion of existing buildings...”

7. The heart of the case for Oxton Farm is that the grant of planning permission did not comply with policy SG3.

8. Apart from the development plan, a local planning authority must also have regard to material considerations; and material considerations may justify a departure from the development plan. Material considerations fall into two categories: those which the decision-maker may take into account (but need not) and those which the decision-maker must take into account. The point was neatly encapsulated by Holgate J in *R (Client Earth) v Secretary of State for Business, Energy and Industrial Strategy* [2020] EWHC 1303 (Admin) at [99]:

“In *R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] PTSR 221 the Supreme Court endorsed the legal tests in *Derbyshire Dales District Council* [2010] 1 P & CR 19 and *CREEDNZ Inc v Governor General* [1981] 1 NZLR 172, 182 which must be satisfied where it is alleged that a decision-maker has failed to take into account a material consideration. It is insufficient for a claimant simply to say that the decision-maker did not take into account a legally relevant consideration. A legally relevant consideration is only something that is *not* irrelevant or immaterial, and therefore something which the decision-maker is *empowered or entitled* to take into account. But a decision-maker does not *fail* to take a relevant consideration into account *unless he was under an obligation to do so*. Accordingly, for this type of allegation it is necessary for a claimant to show that the decision-maker was expressly or impliedly required by the legislation (or by a policy which had to be applied) to take the particular consideration into account, or whether on the facts of the case, the matter was so “obviously material”, that it was irrational not to have taken it into account.” (Original emphasis)

9. Among the material considerations to which a local planning authority must have regard is national planning policy. At the date of the decision, that policy was

contained in the 2018 version of the National Planning Policy Framework (“the NPPF”). One of the key policies of the NPPF is that local planning authorities must be able to demonstrate a 5 year supply of deliverable sites for housing.

10. Paragraph 11 of the NPPF provides:

“Plans and decisions should apply a presumption in favour of sustainable development...

For **decision-taking** this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date⁷, granting permission unless:

...ii. 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.”

11. Footnote 7 provides:

“This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73) ...”

12. The buffer referred to varies from 5 to 20 per cent. The approach to decision-taking in paragraph 11 of the NPPF is referred to in the jargon as the “tilted balance”.

13. Paragraph 48 of the NPPF provides:

“Local planning authorities may give weight to relevant policies in emerging plans according to:

a) the stage of preparation of the emerging plan (the more advanced its preparation, the greater the weight that may be given);

b) the extent to which there are unresolved objections to relevant policies (the less significant the objections, the greater the weight that may be given);

c) the degree of consistency of the relevant policies in the emerging plan to this Framework (the closer the policies in the emerging plan to policies in the Framework, the greater the weight that may be given).”

14. Paragraph 59 of the NPPF reaffirms the Government’s objective of significantly boosting the supply of homes. It continues at paragraph 60:

“To determine the minimum number of homes needed, strategic policies should be informed by a local housing need assessment, conducted using the standard method in national planning guidance – unless exceptional circumstances justify an alternative approach which also reflects current and future demographic trends and market signals. In addition to the local housing need figure, any needs that cannot be met within neighbouring areas should also be taken into account in establishing the amount of housing to be planned for.”

15. Paragraph 73 of the NPPF provides:

“Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period... Local planning authorities should identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of five years’ worth of housing against their housing requirement set out in adopted strategic policies, or against their local housing need where the strategic policies are more than five years old.³⁷”

16. Footnote 37 qualifies this by allowing benchmarking against strategic policies that are more than five years old where they have been reviewed and found not to require updating. The glossary to the NPPF defines “local housing need” as:

“... the number of homes identified as being needed through the application of the standard method set out in national planning guidance, or a justified alternative approach.”

17. The “standard method” to which paragraph 60 and the glossary referred takes the most recent household projections made by the Office of National Statistics as its baseline. The Government policy document (NPPG) giving guidance on the standard method explained that:

“The standard method set out below identifies a minimum annual housing need figure. It does not produce a housing requirement.”

18. It also made it clear that use of the standard method was not mandatory. It went on to state:

“The government is committed to ensuring more homes are built and are supportive of ambitious authorities who want to plan for growth. The standard method provides the minimum starting point in deciding the number of homes needed in an area.”

19. A later part of the policy document states:

“Where a strategic policy-making authority can demonstrate an alternative approach than that identified using the standard

method for assessing local housing need, the approach should be considered sound as it will have exceeded the minimum starting point.”

The facts

20. In July 2018, Harrogate published its Housing Land Supply Update showing the land supply as at 30 June 2018. The Update recorded that (i) a Housing and Economic Development Needs Assessment had concluded that housing need for the Harrogate District was 669 dwellings per year, (ii) that need was the starting point for calculating Harrogate's 5 Year Housing Land Supply and that Harrogate had, as at 30 June 2018, 5.02 years Housing Land Supply. It will be noted that this calculation of housing need was considerably greater than that envisaged by policy SG1.
21. At the same time, Harrogate had been preparing an updated development plan, which adopted the figure of 669 dwellings per year derived from the Housing Land Supply Update. The plan was sufficiently advanced for it to be sent for examination on 31 August 2018. A few days earlier the planning officer had compiled her report on the application for planning permission.
22. Her recommendation appeared in the summary at the start of the report:

“On balance, it is considered that there are no adverse impacts that would significantly and demonstrably outweigh the benefits of this scheme. [Harrogate] can only demonstrate a 5.02 year supply of housing and this is not sufficiently above the 5 year supply that paragraph 11 of the NPPF can be ignored. Given this position and the proximity of nearby service settlements, officers consider the scheme should be approved. **RECOMMENDATION: Approve subject to conditions.**”
23. It will be noted that the summary did not say that paragraph 11 of the NPPF applied; but that it could not be ignored. Section 5 of the report identified the relevant policies in the development plan documents and also stated that the application was to be determined in accordance with the development plan unless material considerations indicated otherwise. Section 9 of the report dealt with housing land supply. The relevant parts of it read:

“9.8 [Harrogate's] Housing and Economic Development Needs Assessment provides information on objectively assessed housing need. This document concludes that there is a requirement for 669 dwellings per annum to meet the needs of the district.

9.9 NPPF requires local planning authorities to identify and update annually a supply of specific deliverable sites sufficient to provide a minimum of 5 years' worth of housing against their housing requirement with appropriate buffer. Where an authority cannot demonstrate a five year supply of housing land, policies relating to the supply of housing land are

rendered out of date (NPPF, para.11(d), footnote 7). Instead, housing applications should be assessed under paragraph 11 of the NPPF and the presumption in favour of sustainable development, with permission granted unless policies of the NPPF provide a clear reason for refusing the development proposed or any adverse impacts would significantly and demonstrably outweigh the benefits.

9.10 The July 2018 update has been completed. This shows that [Harrogate] has a 5.02 year supply, meaning that paragraph 11 of the NPPF is not automatically triggered on that particular basis. However, the supply position is marginal and it will be important to take steps to maintain it.

9.11 In order to maintain supply position, greenfield land outside the existing development limits will continue to be needed. This means that development limits are considered out of date and can be given no more than limited weight. Only limited weight can be attached to Core Strategy policies SG1, SG2 and SG3 as these were based on a housing target that is out of date. By virtue of this paragraph 11 of the NPPF is once again engaged.

9.12 In light of the benefits that would come from the delivery of new homes in maintaining the 5 year supply, applications will therefore need to be determined on a case-by-case basis, only refusing them where the planning harm significantly and demonstrably outweighs the benefits."

24. At paragraph 9.18 the officer repeated her view that Harrogate's "existing development limit policies can only be given limited weight"; and that the proposed development would create "a reasonable rounding off of the existing built area of Bickerton". At paragraph 9.23 she said that the introduction of houses would help to sustain facilities in nearby and neighbouring settlements.

25. The final substantive section of the report was headed "Planning Balance and Conclusion". It stated:

"10.1 At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development....

10.2 In the absence of a five year housing land supply, planning permission should be approved for the proposal unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits of the development.

10.3 The scheme will provide 21 new homes to the District. [Harrogate] can only demonstrate a 5.02 year supply of housing and this is not sufficiently above the 5 year supply that paragraph 11 of the NPPF can be ignored. The consideration

therefore is whether the site's location is so unsustainable as to create significant harm...

10.5 The lack of sustainable transport choices in Bickerton is a negative aspect of allowing new houses here. However, the NPPF and High Court ruling state that in rural areas, approaches to transport modes should be flexible. It is therefore considered that the positive benefits of allowing the scheme outweigh the negative sustainability concerns.”

26. This led to the recommendation for conditional approval.
27. On 20 September 2018 the Office of National Statistics published its 2016-based household projections for England. The application for planning permission went before Harrogate’s planning committee on 25 September 2018. Mr Stuart Vendy, a planning consultant engaged by Mr Alan Shackell, a local resident, attended the meeting and spoke against the proposal. His speaking note stated:

“1. Para.9.10 - 5 year land supply - advice of 5.02 years. Harrogate July 2018 Housing Plan Supply Update.

- a. not up-to-date - need advice on weight to be attached.
 - b. also recently released (20 Sept 2018) ONS Population Projections.
 - c. The Effect?...Equals 669 dpa [dwellings per annum] to 383 understanding methodology.
2. 10.2 - Not only wrong on my analysis, even on the officer's own evidence. There is no "absence" of a 5 year land supply, either with [Harrogate's] last position, nor the more up-to-date ONS data.
3. Para 11 of NPPF not triggered - even if it was, there is no advice with regard weight (if any) to be attached to land supply position...
5. Failures in the report lead to incomplete information and mis-advice.”

28. We were given an explanation of how Mr Vendy arrived at his figure of 383 dwellings per annum; although the figure itself is not agreed.
29. Mr Vendy amplified what happened at the meeting in his two witness statements. In the first, he said:

“I can confirm that I explained to members of the Planning Committee the importance of the weight that the officer had attached to the housing land supply situation in Harrogate Borough, DCLG's position with regard [to] the adoption of the standard methodology and the fact that there was no update

from officers reflecting this and the newly released ONS data. I went on to explain that the application of the standard methodology and the up-to-date population data resulted in a reduction to the annual housing need for [Harrogate] from its current 669 dwellings per annum to approximately 383 dwellings per annum and that this was highly material to the consideration of the application...

I explained that I considered the lack of advice from officers on both of these matters...amounted to incomplete information and consequently [mis-advice].”

30. In his second statement he said:

“[F]rom my first-hand knowledge of the events that took place at [Harrogate's] Planning Committee meeting on 25 September 2018 I can make the following comments:

Neither the planning officer nor anyone else provided any meaningful response to my point relating to the existence or effect of the publication of the 2016 ONS data and standard methodology. In fact the only response of any type given in relation to this matter was a tongue-in-cheek remark by one of the committee members to the effect that "it is refreshing to hear a planning consultant arguing that we have a larger than 5 year land supply"...

The drop in minimum requirement from 669 dwellings per annum to 383 dwellings per annum which I explained to members of the Planning Committee...would clearly have a profound effect on the 5 year land supply situation...

The difference in the minimum requirement figures alone would, to informed committee members and the attending planning officer, immediately indicate that the calculation of [the 5 Year Housing Land Supply] would be substantially altered...The effect of the application of the standard methodology and the 2016 ONS data is that [the 5 Year Housing Land Supply] would increase and therefore have an important effect on the consideration of the application...

...Given that the only question I received related to existing bus services in the area I assumed that the matters I had raised were understood and would be taken into consideration in the committee's determination of the application before it. It is now apparent, however, that, for whatever reason, no such consideration was in fact given.”

When is the tilted balance engaged?

31. Paragraph 11 (d) of the NPPF provides that the tilted balance is engaged where (a) there are no relevant development plan policies, or (b) the policies which are most important for determining the application are out-of-date. The lack of a 5 year supply of housing land is a policy that is deemed to be out of date by virtue of footnote 7.
32. It is common ground that whether the tilted balance is engaged because of a shortfall in the supply of deliverable sites for housing is a binary question, to be answered yes or no. Either there is a 5 year supply of housing land, or there is not. If there is a 5 year supply then the tilted balance is not engaged on that basis. It does not matter, for this purpose, whether the supply exceeds 5 years by a little or a lot.
33. But the lack of a 5 year supply of housing land is not exhaustive of policies that may be out of date. Other policies which bear on the decision may also be out of date, with the consequence that the tilted balance is triggered on a different basis: *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865 at [58]. A policy may be out of date because of a change in national policy or because of things that have happened on the ground, or for some other reason: *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin), [2017] PTSR 1283 at [45]. Whether a policy is out of date is a matter of planning judgment: *Hopkins Homes* at [55].
34. It is necessary, then, to decide why the report came to the view that the tilted balance was engaged. The approach to reports of planning officers is well-settled. In *R (Watermead Parish Council) v Aylesbury Vale DC* [2017] EWCA Civ 152, [2018] PTSR 43 Lindblom LJ put it as follows at [22]:

“The law that applies to planning officers’ reports to committee is well established and clear. Such reports ought not to be read with undue rigour, but with reasonable benevolence, and bearing in mind that they are written for councillors with local knowledge... The question for the court will always be whether, on a fair reading of his report as a whole, the officer has significantly misled the members on a matter bearing upon their decision, and the error goes uncorrected before the decision is made. Minor mistakes may be excused. It is only if the advice is such as to misdirect the members in a serious way - for example, by failing to draw their attention to considerations material to their decision or bringing into account considerations that are immaterial, or misinforming them about relevant facts, or providing them with a false understanding of relevant planning policy - that the court will be able to conclude that their decision was rendered unlawful by the advice they were given... Unless there is evidence to suggest otherwise, it may reasonably be assumed that, if the members followed the officer’s recommendation, they did so on the basis of the advice that he or she gave...”

35. It is, in my judgment, clear enough that the planning officer's advice did not proceed on the basis that Harrogate could not demonstrate a 5 year supply of housing land. On the contrary, paragraph 9.10 of her report made it clear that Harrogate *could* demonstrate a 5 year supply, with the consequence that the tilted balance was:

“not automatically triggered on that particular basis.”

36. Mr Hunter submitted (and the judge accepted) that the reason why Harrogate took the view that the tilted balance was engaged was because policies SG1, SG2 and SG 3 were out of date. Mr Wald QC disputed this. He pointed out that neither the summary at the beginning of the officer's report, nor her conclusions in section 10 of the report referred to policies being out of date.

37. He also pointed to the concluding sentence of paragraph 9.11 of the officer's report. Having said that policies SG1, SG2 and SG3 were out of date, she said:

“By virtue of this paragraph 11 of the NPPF is once again engaged.”

38. Mr Wald seized on the words “once again” and said that they demonstrated that the officer meant that paragraph 11 of the NPPF was engaged for a second time. If it was engaged for a second time, then it must (in the officer's view) have been engaged for the first time on the basis of a lack of housing supply. But that submission necessarily entails that the officer contradicted herself within two adjacent paragraphs of her report. I do not consider that that is a fair reading of the thrust of the report. While the use of the phrase “once again” is unfortunate, in my judgment paragraph 9.10 makes it clear that Harrogate did have a 5 year supply of deliverable housing sites; and that the officer's advice was given on that basis. Paragraph 9.11 gives two reasons for giving limited weight to policies SG1, SG2 and SG3; and the more natural reading of “once again” is that both the first reason and the second reason engage the tilted balance.

39. On the other hand, in paragraph 9.11 the officer considered that development limits *were* out of date. She gave two reasons for that view. First, in order to maintain the supply of housing land, greenfield sites were needed; and that meant that settlement boundaries were out of date. Second, policies SG1, SG2 and SG3 were themselves based on a housing target that was out of date. That meant that those policies could only be given limited weight. It follows that the basis on which the tilted balance was triggered was on the basis that relevant policies were out of date.

40. It is, I acknowledge, possible that some committee members could have read the officer's report, read overall, as advising that the tilted balance was engaged both because the 5 year supply of housing land was marginal and also because relevant policies were out of date. But if two reasons were given for the engagement of the tilted balance, one of which was good, and one of which was bad, I do not consider that it can be said that overall the advice misdirected the committee in a serious way. Because (a) the latter basis is one of the bases on which the tilted balance is triggered, and (b) whether a policy is out of date is a matter of planning judgment, the court can only interfere if the latter judgment is itself vitiated by an error of law.

Was there an error of law in the planning judgment?

41. Mr Wald argued that it was an error of law for Harrogate not to have taken into account the projections based on the ONS 2016 statistics. They were a mandatory consideration in the planning decision. There is nothing in the statutory framework which explicitly requires the ONS statistics to be taken into account. But Mr Wald submitted that it was implicit that they must be. The chain of reasoning was this:
- i) Paragraph 2 of the NPPF states that it “must be taken into account in preparing the development plan and is a material consideration in planning decisions.” This is repeated in paragraph 212.
 - ii) That imperative takes the reader to paragraph 60 of the NPPF and its requirement of the use of the standard method to determine minimum housing need, taking the most recent ONS projections as the starting point.
 - iii) Therefore, the ONS statistics were a mandatory consideration in taking the decision to grant or refuse planning permission.
42. Mr Wald’s argument entails the proposition that the ONS projections were the mandatory starting point for the calculation of objectively assessed housing need. But in my judgment that proposition is itself erroneous. Government policy states quite clearly (a) that the standard method is not mandatory; (b) that the purpose of the standard method is to determine the *minimum* starting point in deciding the number of homes needed in an area; and (c) that higher housing targets than those produced by the standard method will be considered sound. (I add that we were told by Mr Hunter that the position has now changed).
43. Second, the housing target in policy SG1 was well over five years old. In the course of formulating the new development plan, Harrogate had considered the housing target and took the view that it did need updating. Thus, in accordance with NPPF paragraph 73, it was required to assess “local housing need” as defined by the glossary. That assessment permitted an assessment either by the standard method or by a justified alternative approach. In my judgment, therefore, Harrogate was not required to use the standard method in calculating local housing need. Having used a different method, which produced a target figure much higher than the figure in policy SG1, Harrogate was entitled to conclude that that policy was out of date.
44. Third, the target figure for housing that the officer fed through into her advice was the target figure that Harrogate had adopted in the draft development plan. The development plan was sent for examination on 31 August 2018. Its target housing figure would therefore fall to be assessed in accordance with the 2012 version of the NPPF: NPPF paragraph 214. The 2012 version of the NPPF did not require the use of the standard method, even as a starting point. In accordance with NPPF paragraph 48 Harrogate was entitled to give weight to the housing policies in its emerging development plan. In addition, the government explanation of the standard method said in terms that plans that adopted higher housing targets than the minimum produced by the standard method would be considered “sound”.
45. Mr Wald’s second proposition is that it is necessary to calculate correctly the local planning authority’s objectively assessed housing need. That way of formulating the

point seems to suggest that mathematical precision is required. But that is not so. As Lindblom LJ explained in *Hallam Land Management Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808, [2019] JPL 63 at [52]:

“... the NPPF does not stipulate the degree of precision required in calculating the supply of housing land when an application or appeal is being determined. This too is left to the decision-maker.”

46. The underlying premise of this submission is that objectively assessed housing need is only calculated correctly if the standard method is used. But for the reasons I have given, I do not consider that that is correct. Moreover, as Mr Hunter pointed out, whichever method was used to calculate the 5 year supply of housing land, the conclusion would have been that Harrogate could demonstrate such a supply. That was the basis on which the committee took its decision.
47. For these reasons I do not accept that the ONS statistics were a mandatory consideration. Accordingly, the next question is whether they were so fundamental to the decision that it was irrational for Harrogate not to have considered them.
48. On this point, Mr Wald submitted, in effect, that a symmetrical approach had to be taken to housing supply. Just as lesser weight should be given to a contravention of policies in the development plan where there was a shortfall in the 5 year supply, so greater weight had to be given to those policies in a case in which there was a surplus in supply. The tilted balance was still a balance. The extent of the housing surplus was critical to striking that balance. The ONS statistics are a necessary input to determining the extent of the surplus of housing land. The construction of new homes in the countryside may have adverse effects (such as, for example, the loss of green space or open countryside, or increased demands on infrastructure) and the extent of the benefit of creating more homes must be balanced against those adverse effects.
49. In the present case, he said, there was a clear link between the extent of the surplus of housing land and the officer’s advice that policies SG1, SG2 and SG 3 were out of date. The statement in paragraph 9.10 that the surplus of housing land was “marginal” was the lynch-pin for the conclusion in paragraph 9.11 that new greenfield sites were needed and that development limits were out of date. Although her statement about the “marginal” supply of land was correct when written, it was falsified by the ONS statistics published after the report was compiled. Accordingly, if it turned out that the surplus was not marginal, the officer’s advice would have been seriously undermined.
50. He referred us to *Hallam Land Management Ltd v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808, [2019] JPL 63 in which Lindblom LJ said at [47]:

“The NPPF does not state that the decision-maker must reduce the weight to be given to restrictive policies according to some notional scale derived from the extent of the shortfall against the five-year supply of housing land. The policy in paragraph 14 of the NPPF requires the appropriate balance to be struck, and a balance can only be struck if the considerations on either side of it are given due weight. But in a case where the local

planning authority is unable to demonstrate five years' supply of housing land, the policy leaves to the decision-maker's planning judgment the weight he gives to relevant restrictive policies. Logically, however, one would expect the weight given to such policies to be less if the shortfall in the housing land supply is large, and more if it is small. Other considerations will be relevant too: the nature of the restrictive policies themselves, the interests they are intended to protect, whether they find support in policies of the NPPF, the implications of their being breached, and so forth."

51. Mr Wald's point was that just as logic would suggest that the weight to be given to restrictive policies would be less if the shortfall in the housing land supply is large, and more if it is small, so in the case of a surplus one would expect the weight to be given to restrictive policies to be less if the surplus was small and greater if the surplus was large. But at [51] of the same judgment Lindblom LJ made it clear that:

"... the policies in paragraphs 14 and 49 of the NPPF do not specify the weight to be given to the benefit, in a particular proposal, of reducing or overcoming a shortfall against the requirement for a five-year supply of housing land. *This is a matter for the decision-maker's planning judgment, and the court will not interfere with that planning judgment except on public law grounds.* But the weight given to the benefits of new housing development in an area where a shortfall in housing land supply has arisen is likely to depend on factors such as the broad magnitude of the shortfall, how long it is likely to persist, what the local planning authority is doing to reduce it, and how much of it the development will meet." (Emphasis added)

52. I do not consider that Lindblom LJ was laying down a rule of law, but merely stating what he would expect. Weight is, as always, a matter for the decision maker. Lindblom LJ had already made this point in *Secretary of State for Communities and Local Government v Hopkins Homes Ltd* [2016] EWCA Civ 168, [2016] PTSR 1315 at [47]:

"One may, of course, infer from paragraph 49 of the NPPF that in the Government's view the weight to be given to out-of-date policies for the supply of housing will normally be less than the weight due to policies that provide fully for the requisite supply. *The weight to be given to such policies is not dictated by government policy in the NPPF. Nor is it, nor could it be, fixed by the court.* It will vary according to the circumstances, including, for example, the extent to which relevant policies fall short of providing for the five-year supply of housing land, the action being taken by the local planning authority to address it, or the particular purpose of a restrictive policy—such as the protection of a "green wedge" or of a gap between settlements. There will be many cases, no doubt, in which restrictive policies, whether general or specific in nature, are given sufficient weight to justify the refusal of planning permission

despite their not being up-to-date under the policy in paragraph 49 in the absence of a five-year supply of housing land. Such an outcome is clearly contemplated by government policy in the NPPF. *It will always be for the decision-maker to judge, in the particular circumstances of the case in hand, how much weight should be given to conflict with policies for the supply of housing that are out-of-date. This is not a matter of law; it is a matter of planning judgment.*” (Emphasis added)

53. In *Eastleigh Borough Council v Secretary of State for Housing Communities and Local Government* [2019] EWHC 1862 (Admin) Garnham J considered a submission to like effect as Mr Wald’s. He said:

“[49] However, as Mr Glenister put it, in the context of the NPPF, there is a 'one-way consideration' for 5YHLS. As Mr Boyle submits, there is nothing in statute or policy which expressly or impliedly required the Inspector to take into account the existence of a 5YHLS when deciding the weight to be attached to countryside policies. Accordingly, it was for the Inspector to determine the weight to be attached to the fact that there was more than 5YHLS, subject only to a *Wednesbury* challenge.

[50] In my judgment, a failure to give weight to the fact that the Council could demonstrate more than a 5YHLS in determining the weight which should be accorded to development plan policies was not irrational. When the Inspector came to consider the overall planning balance, at DL47, he did consider the weight to be attached to the provision of housing. That was the proper place in the analysis for that consideration. I see no basis for saying he should have *increased* the weight, prior to conducting the balancing exercise because of the absence of a negative, namely that there was no shortage of housing land.” (Original emphasis)

54. In my judgment the same applies here. Moreover, as I have said, questions of weight are for the decision-maker.
55. In addition, the underlying premise of this submission is that the only correct way to calculate the surplus is by using the ONS statistics. But for the reasons I have given, I do not consider that that is correct.

Was Harrogate required to give reasons for its decision?

56. It is now common ground that Harrogate had no statutory duty to give reasons for its decision to grant planning permission. But in some cases, the common law requires reasons to be given. The Supreme Court considered that duty in the context of planning in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79, [2018] 1 WLR 108. It is important to note that in that case the committee that granted planning permission did not follow their officer’s recommendation. At [52] and [54] Lord Carnwath approved the decision of this court in *R (Oakley) v South Cambridgeshire*

District Council [2017] EWCA Civ 71, [2017] 1 WLR 3765. That was a case in which the development would have a “significant and lasting impact on the local community”, and involved a substantial departure from Green Belt and development plan policies, and where the committee had disagreed with its officers' recommendations. As he put it at [57]:

“Thus in *Oakley* the Court of Appeal were entitled in my view to hold that, in the special circumstances of that case, openness and fairness to objectors required the members' reasons to be stated. Such circumstances were found in the widespread public controversy surrounding the proposal, and the departure from development plan and Green Belt policies; combined with the members' disagreement with the officers' recommendation, which made it impossible to infer the reasons from their report or other material available to the public. The same combination is found in the present case, and, in my view, would if necessary have justified the imposition of a common law duty to provide reasons for the decision.”

57. The key point here is that the committee disagreed with the officer's recommendation. Where the committee follow their officer's recommendation it is a fair inference, in the absence of other evidence, that they have accepted the reasoning in the officer's report: *R (Palmer) v Herefordshire County Council* [2016] EWCA Civ 1061, [2017] 1 WLR 411 at [7]. Where, on the other hand, they have rejected the officer's advice, it may be impossible to discern the reasons for the decision. In the present case the committee followed their officer's recommendation. Mr Vendy's intervention was directed to persuading the committee that there was no shortfall in the 5 year supply of housing land; and that was the basis on which the committee took its decision. The reason why the committee's decision departed from the development plan, and in particular from policies SG1, SG2 and SG3, was because they accepted the officer's advice that those policies were out of date.

58. As the judge said at [49]:

“This is not a case where the Planning Committee departed from the officer's recommendation. I was taken to no evidence that established that the Application would have a “significant and lasting impact on the local community” (as Oxton Farm had suggested). There is no evidence that there was widespread public controversy about the Application. The Application did not relate to a major development (a football stadium) on greenbelt land as in *Oakley* or to a major development in an area of outstanding natural beauty as in *CPRE Kent*. The Decision could be accurately described as a run-of-the-mill planning decision.”

59. I agree. In my judgment no further reasons were necessary.

Result

60. I would dismiss the appeal.

Lady Justice Carr:

61. For the reasons given by Lewison LJ I too would dismiss the appeal.

Lord Justice Underhill:

62. I also agree.

Judgments

R v Rochdale Metropolitan Borough Council, ex parte Milne

[2000] EWHC 650 (Admin), (Transcript: WordWave International Limited)

QUEEN'S BENCH DIVISION

SULLIVAN J

31 JULY 2000

31 JULY 2000

J. Howell QC & K. Markus appeared on behalf of the Applicant.

T. Straker QC & P Kolvin appeared on behalf of the First Respondent.

B. Ash QC P. Greatorex appeared on behalf of the Second Respondent.

SULLIVAN J:

INTRODUCTION.

[1] This is round 2 of the battle for Kingsway Park. Round 1 concluded with my judgment on 7 May 1999 reported as *R v Rochdale Metropolitan Borough Council ex parte Tew and Others* [\[1999\] 3 PLR 74](#). (“Tew”) The Applicant in the present proceedings was among the “others” in that title.

[2] The background to the matter is set out in some detail in *Tew* and repetition in this judgment is unnecessary. For convenience, I will use the same definitions or abbreviations as were adopted in *Tew*. If no other source is cited, page references in parenthesis are to *Tew*.

[3] In summary, two applications for planning permission were made by Wilson Bowden Properties Limited (Wilson Bowden) and English Partnerships on 23 February 1998. These were a bare outline application for a business park and a full application for a spine road to serve the park. The Council considered that the proposal required an environmental assessment under the assessment regulations. A detailed environmental statement was prepared by ERM. Having considered that environmental statement and a lengthy report by Mr Beckwith, the Council's Director of the Environment, the Council granted the two planning permissions on 6 August 1998.

[4] The Applicant and others challenged the validity of the planning permissions on five grounds set out on pp 79 E to 80 A. I upheld the challenge of grounds 2 and 3 and quashed both planning permissions. The Council did not appeal against this decision.

[5] The applicants for planning permission made extensive revisions of the form to the business park application, minor amendments to the form of the spine road application and added a new, full application for planning permission to construct the estate roads leading off the spine road together with surface water attenuation areas. A new environmental statement dealing with the project as described in all three applications was prepared by ERM. The three applications (two amended and one new) were submitted for approval accompanied by a new environmental statement on 23 July 1999. Mr Beckwith prepared a lengthy report recommending the grant of planning permission subject to numerous conditions. The Council accepted his recommendation and granted the three planning permissions on 17 December 1999. The Applicant returns to the fray and challenges the validity of these planning permissions.

[6] Before turning to the submissions advanced by Mr Howell QC on behalf of the Applicant, a brief explanation of the basis of the decision in *Tew* will be helpful.

THE TEW DECISION.

[7] I have mentioned that the business park application as submitted in 1998 was a “bare” outline, reserving all detailed matters for subsequent approval. It was accompanied by an illustrative masterplan and an indicative schedule of land uses. ERM's environmental assessment and the resulting environmental statement were based on the illustrative masterplan and indicative schedule.

[8] Although condition 1.3 in the business park planning permission required the development to be carried out in accordance with the mitigation measures set out in the environmental statement, unless otherwise provided for by any other condition in the planning permission, the Council did not approve the illustrative masterplan. It was, effectively, rejected by condition 1.11 and the applicants for planning permission were required by condition 1.7 to submit a new “Framework Document ... showing the overall design and layout of the proposed business park.”

[9] The indicative schedule of uses was not incorporated into the planning permission and the hectareage of B8 uses was substantially altered by condition 1.10 which would in turn have had a knock on effect for the amount of other uses in the schedule: see pp 98 G to 99 C.

[10] Against that background, Mr Howell had submitted under ground 2 of his challenge that the application for planning permission did not contain “a description of the development proposed, comprising information about the site and design and size or scale of the development”, as required by para 2(a) of Sch 3 to the assessment regulations.

[11] In response to that submission I concluded:

“In summary, while the council took into consideration 'environmental information' about the effects of carrying out a business park development in accordance with an illustrative masterplan and an indicative schedule of land uses, that was not the development that was proposed to be carried out in the application for planning permission, nor was it the development for which planning permission was granted; nor was the information sufficient in any event to comply with the requirements of Sch 3: see, for example, para 2(d), as to mitigation measures. It follows that the council did not have power to grant planning permission for the business park: see reg 4(2) of the assessment regulations.” See p 99 C to E.

[12] During the course of his submissions under ground 2 Mr Howell had argued:

“That an application for outline planning permission may not be made if the development falls within Sch 2 or 3 to the assessment regulations”, see p 90 F.

[13] At p 96 C to D I said this:

“I would not wish to go as far as Mr Howell and say that it is not possible to make any application for outline planning permission for a development that falls within Sch 1 or Sch 2. An outline application with only one or two matters reserved for later approval might enable the environmental statement to provide a sufficient description of the development proposed to be carried out. I would not dissent from the approach suggested in para 42 of Circular 15/88, subject to the proviso that the description in the outline application of the development proposed to be carried out must be such as to enable the environmental statement to comply with the requirements of para 2(a) of Sch 3.”

[14] Paragraph 42 of Circular 15/88 is to be found on p 93 F.

[15] I then turned to the description of the development in the 1998 business park application and reached the conclusions set out above. At p 96 H I acknowledged that the outline application procedure is particularly valuable for projects such as a business park which are demand led and which may be expected to evolve over many years (if the 1999 permissions are upheld the new environmental statement explains that construction will commence in 2001 and all the buildings are not expected to be occupied until 2013).

[16] In response to the practical difficulties posed by such developments I said this at p 98 F to G:

“Recognising, as I do, the utility of the outline application procedure for projects such as this, I would not wish to rule out the adoption of a masterplan approach, provided the masterplan was tied, for example, by the imposition of conditions, to the description of the development permitted. If illustrative floorspace or hectareage figures are given, it may be appropriate for an environmental assessment to assess the impact of a range of possible figures before describing the likely significant effects. Conditions may then be imposed to ensure that any permitted development keeps within those ranges.”

[17] Turning from the assessment regulations to the UDP, policy EC/6 allocates the application site for business park use but says that:

“The Council will strictly apply the following criteria to the development of the site (to be known as the Kingsway Business Park): ...

(d) the creation of new, and extension of existing, public open space and informal recreation areas, including the extension and improvement of Stanney Brook Park.”

[18] The Council had proceeded on the basis that the business park application complied with this criterion and was therefore in accordance with the provisions of the UDP. At pp 100 H to 101 D I concluded that the 1998 business park application did not comply with criterion (d): specifically it did not include any proposals for open space and the Council could not, under the terms of the outline planning permission granted, insist on the provision of 32 hectares of land for open space for informal recreation purposes. However, I added this at p 101 D to F:

“There is very often an element of planning judgment as to whether or not a proposed development complies with a development plan policy. It could not reasonably be concluded that this application complied with criterion (d). However, that is but one of a long list of criteria in the policy. The council clearly considered that the remaining criteria within policy EC/6 were fulfilled. The primary purpose of the policy is, after all, to allocate the land as a business park, not the creation of additional open space. It would be for the council to decide whether the failure of this application to meet one of the criteria in policy EC/6 meant that the application was contrary to either the district plan or the emerging UDP. To the extent that the Council erred in concluding that criterion (d) in policy EC/6 was met, ground 3 is made out.”

THE AMENDED/NEW APPLICATIONS.

[19] As amended in 1999 the business park application, whilst still an application for outline planning permission, is no longer a “bare outline” application. It comprises the application form which cross refers to and incorporates into the application:

- (i) an Attachment which describes the development.
- (ii) a Schedule of Development.
- (iii) a Development Framework.
- (iv) a Masterplan.

[20] The attachment describes the proposed development as:

“Outline application together with certain Reserved Matters for a proposed Business Park including buildings on Plots C to X inclusive as identified on the masterplan for:

General and light industrial uses in classes B1 and B2.

Offices in use Class B1.

Distribution and storage use in Class B8.

Research and development facilities in use Class B1.

Uses ancillary to the Business Park uses including:

Retail in use Classes A1, A2 and A3.

Leisure in use Classes D2 and sui generis.

Housing in use Class C1.

Hotels in use Class C3.

Other commercial and local service uses.”

[21] Details of landscaping, design and external appearance of all the buildings were reserved. The application sought approval for siting and means of access to 7 out of the 20 plots (there is no plot V). Thus, on 13 of the 20 plots all matters were reserved. It has been explained that access requirements dictated the need to fix the siting of and means of access to the buildings on the 7 plots where approval was sought for those matters. Reference is made to the schedule of development, and Note 1 says this:

“This Outline Planning Application also includes a masterplan and a framework document showing the overall design and layout of the whole site.”

[22] Other notes refer to the environmental statement, to traffic impact assessments and to the full applications for the spine road and estate roads and other infrastructure.

[23] The Schedule of Development lists each of the plots, dividing them into those plots where approval is sought for siting and means of access and those plots where those matters are reserved for detailed approval. A summary of the total hectareage and floorspace is given, which is then broken down by reference to use class.

[24] Using plot T (which is proposed to contain the largest building in the business park) as an example: the schedule sets out the hectareage, 19.46; the use, B8; the floorspace, 80,412 square metres; the unit size, in the case of plot T 80,412 since there is proposed to be only one very large building on this plot; the height of the building, 25 metres; and the car parking numbers, 804. Assessments are also provided of traffic flows and employment generation.

[25] More than one plan is described as a “Masterplan” in the application, but the plans build up to “The Masterplan”, which is identified in and annexed to the development framework. It shows, within the framework provided by the spine and estate roads, the buildings proposed on each plot together with their associated car parking and servicing areas, levels, the areas set aside for landscaping within and structural landscaping around, each plot, and areas to be left undeveloped along the Stanney Brook corridor, and the surface water attenuation measures proposed in that corridor.

[26] Having described the site, the development framework (63 pages) sets out the “Development Concept” under a number of subheadings, such as, “Land uses”, “Urban design framework”, “Open space network”, et cetera. ERM’s assessment of the environmental effects of the proposed business park was based on the development described in these documents. The 1998 environmental statement was reviewed where necessary and new information was provided. Subject only to the criticisms advanced in the Applicant’s grounds of challenge, which I consider below, the new environmental statement would appear to be a model of its kind, meeting in full measure the aim set out in directive 97/11: to provide the Council with relevant information to enable it to take a decision on the business park project “in full knowledge of the project’s likely significant impact on the environment”, (see p 89 G for the full text of the directive).

[27] Similarly, apart from the matters raised in the Applicant’s grounds, Mr Beckwith’s report to the Council is not, and in my judgment could not fairly be, criticised. In a comprehensive report running to 116 pages he deals with all relevant aspects of the three applications and recommends a series of conditions which are intended inter alia to tie the outline planning permission for the business park to the documents which comprise the application and which I have set out above. These recommendations were accepted, so in addition to incorporating the masterplan and the application and documents submitted therewith into the description of the development permitted, the following conditions inter alia were imposed:

[28] 1.7:

“The development on this site shall be carried out in substantial accordance with the layout included within the Development Framework document submitted as part of the application and shown on (a) drawing entitled 'Master Plan with Building Layouts'.”

[29] The reason given for the imposition of this condition was:

“The layout of the proposed Business Park is the subject of an Environmental Impact Assessment and any material alteration to the layout may have an impact which has not been assessed by that process.”

[30] Condition 1.8:

“No building within any plot shall exceed the height specified for buildings within that plot as set out in the 'Schedule of Development ... submitted with and forming part of the application.’”

[31] Conditions 1.9 and 1.10 modified this by reducing the maximum eaves height of certain buildings in the interests of the amenity of residents in adjacent dwellings.

1.11:

“The development shall be carried out in accordance with the mitigation measures set out in the Environmental Statement submitted with the application unless provided for in any other condition attached to this permission.”

1.12:

“The development shall be carried out in accordance with the principles and proposals contained in the Development Framework document submitted as part of the application unless provided for in any other condition attached to this permission.”

1.13:

“The phasing of works within the site shall be carried out in accordance with the details set out in the Section entitled 'Phasing' in the Development Framework document, subject to the detailed requirements of other conditions in this permission.”

[32] In respect of the Stanney Brook Corridor, condition 1.15 said:

“The area of the Stanney Brook Corridor (as defined on (a) drawing and described in the Development Framework Document) shall remain undeveloped apart from the construction of surface water attenuation areas and footpaths/cycleways.”

[33] The reason given was:

“To ensure that an area of undeveloped open space is retained in the interests of amenity.”

[34] Conditions 1.16 to 1.18 effectively divided the corridor into three parts and required the different parts of the corridor to be enhanced and landscaped in accordance with the principles shown on three application drawings and in accordance with detailed treatment to be approved in writing by the local planning authority, concurrently with the construction of buildings on certain of the plots. The reasons given were:

“In order to ensure the maintenance of areas of nature conservation interest and to create areas of wildlife habitat in a phased order prior to the loss of existing habitat within the application site.”

[35] Under the subheading “Policy Setting” Mr Beckwith set out the terms of policy EC/6 in the UDP in full. He added that other policies in the UDP were also relevant in assessing the applications. Having concluded that the distribution of uses within the application accorded with the uses set out in policy EC/6 he examined each of the 16 criteria in the policy in turn and advised that, “The proposals accord with the relevant policies of the UDP and are not departures from the development plan.”

[36] His report responded to representations made by third parties. In response to a letter from the Applicant's solicitor, which alleged that the proposal was a departure from the UDP. He said this:

“In my view, it is only that part of criterion (d) relating to the creation of formal rights of access by the public which is not being achieved at this stage. I consider that this is not material to make the application contrary to the UDP. Recommended condition 1.15 requires that land within the Stanney Brook Corridor shall remain undeveloped, apart from the construction of water attenuation areas and footpaths and cycleways. Following on from that, recommended conditions 1.16, 1.17 and 1.18 require phased enhancement and landscaping of the corridor in accordance with the general principles in the submitted drawings. Therefore, the retention of the open nature of the land within the corridor, together with its enhancement and landscaping, would be secured by the recommended conditions. The securing of the formal rights of public access to the land cannot be achieved at this stage. This has been raised with applicants and North West Development Agency, which now encompasses English Partnerships, have commented as follows.”

[37] He then set out the text of the NWDA's letter. In summary, NWDA were supportive of the proposal to provide public open space and said this, in conclusion:

“We will undertake that once we have control of the land we will then offer to transfer the ownership of the Stanney Brook Corridor to the Council, at no cost and in its improved state, so that the Council can secure public access, as appropriate, to the open space and thereby satisfy the requirements of this sub-section of UDP policy and allow the Council to decide on the management regime for the open space.”

THE LEGISLATIVE AND POLICY FRAMEWORK.

[38] For practical purposes the legislative framework remains unchanged from that described in Tew. As from 14 March 1999 the assessment regulations referred to in Tew were replaced by the Town and Country Planning, (Environmental Impact Assessment) (England Wales) Regulations 1999, (the 1999 assessment regulations), which apply to any application received after that date. It is common ground that the estate roads application falls under the 1999 assessment regulations. The parties are not agreed as to whether the amended business park and spine roads applications fall under the assessment regulations or the 1999 assessment regulations. It is not necessary to resolve that dispute since the parties are agreed that nothing turns on the minor differences of phraseology between the two sets of regulations. For convenience I will continue to refer to the assessment regulations which are set out in Tew.

[39] Policy guidance on the implementation of the 1999 assessment regulations is contained in Circular 2/1999 entitled “Environmental Impact Assessment”, which replaces Circular 15/88. For present purposes, the guidance remains substantially unchanged, paras 48 and 82 of Circular 2/99 are as follows:

“48. Where EIA is required for a planning application made in outline, the requirement of the Regulations must be fully met at the outline stage since reserved matters cannot be subject to EIA. When any planning application is made in outline, the local planning authority will need to satisfy themselves that they have sufficient information available on the environmental effects of the proposal to enable them to determine whether or not planning permission should be granted in principle. In cases where the Regulations require more information on the environmental effects for the Environmental Statement than has been provided in an outline application, for instance, on visual effects of a development in a National Park, authorities should request further information under reg 19. This may also constitute a request under art 3(2) of the GDPO.”

“82. Whilst every E.S. should provide a full factual description of the development, the emphasis of Sch 4 is on the 'main' or 'significant' environmental effects to which a development is likely to give rise. In many cases, only a few of the effects will be significant and will need to be discussed in the E.S. in any great depth. Other impacts may be of little or no significance for the particular development in question and will need only very brief treatment to indicate that their possible relevance has been considered. While each E.S. must comply with the requirements of the Regulations, it is important that they should be prepared on a realistic basis and without unnecessary elaboration.”

THE GROUNDS OF CHALLENGE

[40] These fall under two heads: failure to comply with the requirements of the assessment regulations and failure to comply with UDP policy EC/6d.

[41] Under the former, it is submitted that, notwithstanding the amendments to the form of the business park application, it still does not provide 'a description of the development proposed', which is sufficient for the purposes of para 2(a) of Sch 3 to the assessment regulations, because although information is provided in respect of the size or scale of the development, design is a reserved matter. The submission that an application for outline planning permission may not be made for development which requires environmental assessment is renewed and it is further contended that if this submission is not accepted, the description of the development provided in the 1999 outline application was insufficiently detailed to comply with the requirements of Sch 3.

[42] Under the second ground of challenge it is argued that criterion (d) was not satisfied, because the business park planning permission did not require the creation of new public open space and informal recreation areas or the extension and improvement of Stanney Brook Park. Since the UDP required the criteria in policy EC/6 to be “strictly applied”, failure to meet criterion (d) meant that the development was not in accord with the development plan, even though it did not infringe other policies. Even if the failure to meet criterion (d) did not have that consequence, Mr Beckwith's report should have referred to the fact that the UDP inspector had specifically rejected a request made during the course of the UDP inquiry that (inter alia) what is now criterion (d) should be omitted, saying that the open spaces proposed in the policy “are an essential element of the scheme and of the plan's proposals for South **Rochdale**.” Moreover, the Council failed to consider imposing a negative condition preventing the erection of some or all of the proposed buildings until such time as the relevant land had been made available for use as an open space by the public, and instead relied on the NWDA's offer which, since it was unenforceable, was an immaterial consideration.

[43] I find it convenient to deal with this ground at the outset.

GROUND 2.

[44] Section 54A of the 1990 Act is in the following terms:

“Where, in making any determination under the planning Acts, regard is to be had to the development plan, the determination shall be made in accordance with the plan unless material considerations indicate otherwise.”

[45] Section 70 deals with the determination of applications for planning permission. Subsection (2) provides:

“In dealing with such an application the authority shall have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.”

[46] Since development plans contain numerous policies, the local planning authority must have regard to those policies (or “provisions”) which are relevant to the application under consideration. The initial judgment as to which policies are relevant is for the local planning authority to make. Inevitably some policies will be more relevant than others, but s 70 envisages that the Council will have regard to all, and not merely to some of the relevant provisions of the development plan.

[47] In my judgment, a similar approach should be applied under s 54A. The local planning authority should have regard to the provisions of the development plan as a whole, that is to say, to all of the provisions which are relevant to the application under consideration for the purpose of deciding whether a permission or refusal would be “in accordance with the plan”.

[48] It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: “is this proposal in accordance with the plan?” The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. In *City of Edinburgh Council v. the Secretary of State for Scotland* [1997] 1 WLR p 1447, Lord Clyde (with whom the remainder of their Lordships agreed) said this as to the approach to be adopted under s 18A of the Town and Country Planning (Scotland) Act 1972 (to which s 54A is the English equivalent):

“In the practical application of s 18A, it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it. He will also have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it.”

[49] In the light of that decision I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be 'in accordance with the plan'. Given the numerous conflicting interests that development plans seek to reconcile: the needs for more

housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive land escapes et cetera, it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies.

[50] For the purposes of s 54A it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein.

[51] Mr Howell points to the fact that policy EC/6 requires criterion (d) to be “strictly applied”. He accepts that some policies may be expressed in somewhat less forthright terms. They may, for example, merely “encourage” certain kinds of development. Other policies may say that certain forms of development will “normally” be refused. In the green belt planning permission will not be given for most kinds of development save in “very special circumstances”. I accept that the terms of the policy -- how firmly it favours or sets its face against -- the proposed development is a relevant factor, so too are the relative importance of the policy to the overall objectives of the development plan and the extent of the breach. These are essentially matters for the judgement of the local planning authority. A legalistic approach to the interpretation of development plan policies is to be avoided: see *R v. Secretary of State for the Environment ex parte Webster* [1999] JPL 1113 at 1118.

[52] In the present case, policy EC/6 was the most, but not the only relevant policy in the UDP. The application was assessed against 23 separate policies in the UDP, one of which was EC/6. The introduction to EC/6 is as follows:

“Land is allocated between the A664 Kingsway, M62 motorway, B6194 Broad Lane and the **Rochdale**-Oldham Railway line for high quality general and light industry, offices, distribution and storage, research and development, and associated and complementary uses.

“The Council will strictly apply the following criteria to the development of the site (to be known as the Kingsway Business Park).”

[53] The criteria are then set out, including criterion (d):

“The creation of new, and extension of existing, public open space and informal recreation areas, including the extension and improvement of Stanney Brook Park.”

[54] No complaint is made about the Council's judgement that the proposal was in accordance with the remaining policies and with all of the criteria in EC/6 save for criterion (d). Mr Beckwith correctly advised the Council that the business park planning permission, subject to conditions 1.16 to 1.18 (above), would achieve all that was required by criterion (d) save for the creation of formal rights of public access. An extensive area of land along Stanney Brook Corridor, where Stanney Brook Park is located, would not merely be left open, it would be appropriately landscaped.

[55] Pausing there, it could not sensibly be concluded that failure to achieve part of what was required by criterion (d) meant that the proposal was not “in accordance” with the UDP or was a departure from that plan. Indeed, such a conclusion by the Council would have been vulnerable to a challenge on the grounds of *Wednesbury* unreasonableness. Mr Beckwith was not required to draw the Council's attention to the views of the UDP inspector, since that inspector's recommendations had been incorporated into the text of the policy EC/6 as adopted, which was set out in full in Mr Beckwith's report.

[56] Dedication of the open land along Stanney Brook Corridor as a public open space could not have been achieved by the imposition of a condition. It is true that the Council could have considered whether dedication should be secured by the imposition of a negative condition, but it was not required to do so, because it was fully entitled to place reliance upon the assurance given by the NWDA, which is a non-departmental public body with a statutory responsibility to promote sustainable economic development and social and physical regeneration in the north-west of England under the [Regional Development Agencies Act 1998](#). Planning conditions should not be imposed on a “belt and braces” basis, but only if they are required. There is no suggestion that the NWDA will fail to honour its undertaking. Mr Howell makes the point that a planning permission runs with the land. That is true, but the background to the NWDA's undertaking was that the application site is in a number of ownerships and, as was foreshadowed in 1998, the Council has authorised the making of a compulsory purchase order to facilitate the carrying out of the business park development, see p 102 G.

[57] Of course, those compulsory purchase order proceedings might fail, in which case the business park would not be able to proceed, but if the development does proceed the Council will be in a position to dispose of the necessary land to the NWDA, which will then be in a position to honour its undertaking. For all of these reasons I reject ground 2.

GROUND 1

[58] Turning to ground 1, Mr Howell submits, correctly, that the conclusion at p 96 C to D of *Tew* (which is set out above) was *obiter*, because in that decision I was dealing with a bare outline application where all matters had been reserved.

[59] He referred to the directive. In addition to the provisions set out between pp 88 D to 89 H, he referred to a number of the recitals, laying particular stress upon the 10th:

“Whereas, for projects which are subject to assessment, a certain minimum amount of information must be supplied concerning the project and its effects.”

[60] As mentioned on p 89 C, art 5.2 of the directive requires the developer of a project subject to assessment to provide “at least”: “a description of the project comprising information on the site, design and size of a project.”

[61] It is this minimal amount of information which must, in all cases, subject to environmental assessment, be provided by the developer, according to Mr. Howell's skeleton argument which, “the information specified in para 2 of Sch 3 to the assessment regulations is intended to specify.”

[62] Mr Howell referred to regs 2 and 3 of the applications regulations (p 80 D to G)) emphasising that whereas a “full” application for planning permission must include the information “necessary to describe the development”, an outline application did not have to describe the development in respect of any matter reserved for subsequent approval. It cannot be said that reserved matters, that is to say siting, design, external appearance, means of access and landscaping, can have no significant effect on the environment.

[63] The purpose of the directive is “to ensure that planning decisions which may affect the environment are made on the basis of full information”: see per Lord Hoffmann at p 404 of *R v. North Yorkshire County Council ex parte Brown* [\[2000\] 1 AC 397](#), as amplified on p 430 of *Berkeley v. Secretary of State for the Environment* [\[2000\] 3 WLR p 420](#).

[64] Lord Hoffmann's speech in the latter case stressed the importance, both of the public being able to participate in the environmental assessment process, and of the need for “a single and accessible compilation, produced by the applicant at the very start of the application process”, see pp 430 H to 431 E, and 432 F.

[65] A partial description of the development proposed, omitting a description of a reserved matter, does not enable that objective to be achieved. A description of the development proposed is also required to ensure that the project which is executed is the project which has been comprehensively assessed: see Tew at p 99 D.

[66] Mr Howell argued that one should not be influenced by the “commercial imperative” for there to be a measure of flexibility in applications for industrial estate developments, or urban development projects, even though he recognised that such projects might well be developed over a period of many years. He submitted, in effect, that all details of a project had to be described at the outset. If, subsequently, it was desired to change those details, then a fresh application for planning permission, accompanied by a fresh environmental statement, should be submitted. In this context he said that assistance could be derived from the decision of the European Court in *World Wildlife Fund v. Bozen* [2000] 1 CMLR 149. The respondents in that case had contended that the project for the restructuring of Bolzano Airport (transforming it from a military to a commercial civil airport) had been authorised by “a specific act of national legislation” falling within art 1(5) of the directive and did not therefore require environmental assessment. The extent to which modifications to projects could be excluded from environmental assessment was also in issue. Citing the Dutch Dykes case [1999] 3 CMLR 1, the European Court said this:

“[40] Thus observing that the scope of the Directive was wide and its purpose very broad, the Court held that the Directive covered 'modifications to development projects' even in relation to projects falling within Annex II, on the ground that its purpose would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment when, by reason of their nature, size or location, they were likely to have significant effects on the environment.”

“[49] In view of the foregoing considerations, the answer to the first and second questions must be that arts 4(2) and 2(1) of the Directive are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2,100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.”

“[62] It follows that the details of a project cannot be considered to be adopted by a Law, for the purposes of art 1(5) of the Directive, if the Law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for that purpose, which must be drawn up subsequently, and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project.”

[67] Mr Howell derives two propositions from *Bozen*:

(1) Any development consent for the purposes of the Directive must be defined in detail, so as not to omit any element which could be capable of having a significant effect on the environment.

(2) Any later modification to a project must be subject to a further environmental assessment unless it is not likely to have a significant effect on the environment.

[68] It follows, he says, that to comply with the requirements of para 2(a) of Sch 3 the development proposed must be described in such detail that nothing is omitted which may be capable of having a significant effect on the environment if comprehensively assessed.

[69] Since it is impossible to say that the ultimate treatment of any of the reserved matters in an outline application is incapable of having a significant effect on the environment, the outline application procedure is inconsistent with the requirements of environmental assessment. Put shortly, the Directive's aim is that decisions should be taken "in full knowledge of the project's likely significant effects on the environment" (see the first recital of the to Directive 97/11 which is set out in full on p 89 G of Tew). It is not aimed at permitting decisions to be taken "in principle" on relevant projects, but only after a comprehensive assessment of them.

[70] Assessment on a "worst case" basis is no answer, because the assessment regulations require the "likely significant effects" to be assessed. The objective of environmental assessment is not to see whether the "worst case" is tolerable but to optimise effects on the environment: see the 11th recital of the Directive which refers to the contribution "of a better environment to the quality of life" and art 174 of the Treaty which states that "community policy on the environment shall contribute to the pursuit of the following objectives ... preserving, protecting and improving the quality of the environment."

[71] If the submission that an outline application is in principle incompatible with the requirements of para 2(a) of Sch 3 to the assessment regulations is not accepted, it is argued that this particular outline application did not provide a sufficient description of the development proposed, because notwithstanding the information supplied about size and scale, information on "the design ... of the development" was not provided. Mr Howell accepts that "design" in para 2(a) of Sch 3 may extend to more than the design of individual buildings within an industrial estate project. It may, for example, encompass such matters as the layout shown on the masterplan, but he submits that it includes their detailed design. In the case of all the plots details of design, external appearance and landscaping were reserved and in the case of the majority of plots, siting and means of access will also be reserved. Mr Howell examined the implications of this under a number of headings: Design, Landscaping, effect on listed buildings, the larger building on plot T and the mitigation measures proposed.

[72] Under "Urban Design Framework" the Development Framework mentions the need for "Landmark buildings" to be located at the locations which form "gateways" to the park. Important views are identified. For example, it is important to ensure that the development "becomes a landmark along the motorway". Under "Building Design" it is said that "A high quality of design of buildings will be required". Among the design and layout principles is a desire to encourage "innovative roof forms and profiles" where appropriate. One finds the following under "Materials":

"External materials should be of a high quality, commensurate with the use of each building. Consideration should be given to the use of masonry at low level and on principal elevations in combination with cladding and glazing.

"The use of colours that blend with the surrounding landscape will be necessary and therefore dense dark or bright colours will be discouraged. Primary colours should be restricted to window and door frames and will not be allowed for major elevational treatment. A preferred colour range will be made available to ensure continuity within the overall development.

“Particular attention should be paid to the design of the elevational treatment of larger scale buildings, which are require to be of high quality and design. The articulation of the facade through the use of contrasting tone, colour and texture is required to provide an attractive appearance.”

[73] In describing the developments proposed on the defined plots table 2.3 in the environmental statement relies on high quality design. Thus, for plot T we find:

“A single building for B8 use. The building is located on the flattest and least intrusive part of the development site and the layout incorporates large setbacks from the plot boundaries and the Stanney Brook Corridor. The elevational treatment of the building will be of high quality and design with articulation of the facade by use of a contrasting tone, colour and texture to provide an attractive appearance.”

[74] Under “Mitigation of impacts” the environmental statement acknowledged that “The phasing and external landscaping will be critical to reducing potential landscape and visual impacts and this is shown in figure 6.9. The principal mitigation measures which will be adopted are also listed in table 6.3.” It is said that table 6.3 is far too general, thus under “Mitigation Description” we find such entries as:

“Create integrated structural, infrastructure and plot landscape throughout the site in accordance with the Development Framework.”

[75] Under “Building design and materials” we find in para 6.59:

“The visual impact, particularly of high sided warehouse buildings can be substantially reduced by appropriate detailed design choices. Each elevation needs to be considered in the context of both short, middle and long distance views. Dark coloured finishes should generally be used for those buildings (or parts of buildings) which will be seen against a landscape or urban backdrop, with light colours where the building will be seen against the sky. Potential nuisance from reflective materials must be avoided. White (as against pale) finishes are also generally unsatisfactory.”

[76] Both the impact on the setting of three listed buildings within the development site and the mitigation measures proposed are also dealt with in very general terms. That, says Mr Howell, is because design and landscaping on adjoining plots are reserved matters. Without detailed information about those reserved matters the public cannot make any meaningful representations about the effects of the project on the listed buildings. The B8 building proposed on plot T, at over 80,000 square metres, will be a very large building indeed and the environmental statement acknowledges that it will have “a significant impact” on certain views from within the development site, although the impact on views from outside the site is assessed as moderate. It is submitted that without details of the design and elevational treatment of this building one cannot sensibly assess its impact on the environment.

[77] Finally, in respect of mitigation measures, Mr Howell points to the Outline Ecology Management Plan which formed part of the environmental statement. It contains a table which summarises, “Key management proposals” under three headings: “Objective”, “Outline management prescription” and “Timetable”. By way of example, the first objective is:

“Ensure that all affected areas have been appropriately surveyed for protected species.”

[78] The prescription is:

“Undertake further bat survey work in all buildings to be demolished and inspect all appropriate trees which are to be removed. The findings will be discussed with English Nature to determine the need for any specific mitigation measures.

“Re-survey the site for great crested newts. The findings to be discussed with English Nature to determine the need for mitigation measures.”

[79] Timescales are given for both surveys.

[80] It is submitted that para 2(d) of Sch 3 to the assessment regulations requires a description of mitigation measures. The environmental statement does not describe measures. It is said it merely sets out objectives.

[81] I have set out the submissions made on behalf of the Applicant in some detail. I find it unnecessary to rehearse the submissions made by Mr Straker QC on behalf of the Council, the first respondent, and Mr Ash QC on behalf of Wilson Bowden and the NWDA, the second respondents. No discourtesy is intended. It is unnecessary to rehearse their submissions, because, in substance, I accept them and their principal points are reflected in my own conclusions which I now set out.

MY CONCLUSIONS

[82] Although Mr Howell laid great stress on the Directive, the proper starting point is the assessment regulations themselves, since it is not suggested that they do not fully and accurately transpose the directive into our domestic law: see the decisions of the Court of Appeal in *R v. London Borough of Hammersmith and Fulham ex parte the Trustees of the London branch of the CPRE* 12 June 2000 paras 24 and 39 to 41 (unreported) and Jackson J in *R v. London Borough of Bromley ex parte Baker* 3 April 2000 para 105 (unreported).

[83] I accept that the assessment regulations should be construed, so far as possible, to accord with the objectives of the directive. If one looks to see what the relevant objectives are, it was plainly not the objective of the Council in including “industrial estate development projects” or “urban development projects” in annex II to the directive, to frustrate the carrying out of such important projects. The intention was that the likely significant environmental effects of such projects should be comprehensively assessed before development consent was granted. The technique of environmental assessment is an important procedural tool whose underlying purpose is to help secure the Community's environmental policies. As art 174 of the Treaty makes clear, in preparing its policy for the environment, which includes the objective of “preserving, protecting and improving the quality of the environment”, the Community:

“Shall take account of ... the economic and social development of the Community as a whole and the balanced development of its regions”, see art 174.3.

[84] The directive does not require environmental assessment of every industrial estate, or urban development project, only those “where Member States consider that their characteristics ... require” assessment. In general terms, it is likely that assessment will be required for substantial projects of this kind. The test adopted in the assessment regulations is whether such a project “would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location”, see the definition of Sch 2 application in reg 2(1).

[85] Save in an old style Soviet command economy, such as would not have been in the contemplation in the framers of the directive, a substantial industrial estate development project is bound to be demand -led to a greater or a lesser degree. The second respondent's evidence explains in some detail why this is so in the case of Kingsway Business Park. Mr Ward, a Director of Wilson Bowden explains:

“For a scheme such as the Kingsway Development to succeed commercially, it is necessary to have an outline planning permission which establishes the principle of development on the whole site. Indeed, this is necessary to give the developer, the occupiers, the grant agencies and the investment institutions the certainty which they require to proceed. For some smaller sites it may be possible, in particular where end users have been identified, to submit a detailed planning application for the whole development. However with a scheme of the size of the Development this would not be possible as it is anticipated that the whole Development will not be completed for approximately 15-20 years. Within that forecast period, it is inevitable that a variety of end users will seek plots to suit their own business requirements and it is therefore necessary for the scheme to remain sufficiently flexible to cater for such users if it is to meet its planning objectives. If one were required to submit a detailed permission for the whole site it would simply be a paper exercise, for at this stage, it is quite impossible to anticipate what the matter can bring forward in future years.”

[86] I have already mentioned the fact that it is not expected that the business park will be completely occupied until 2013. There is no challenge to this evidence and no reason has been advanced as to why the points made by the respondents should not hold good for other substantial projects of this kind.

[87] At pp 96 G to 97 H of Tew I mentioned the contrast between projects such as this and most of the other descriptions of development that are listed in annex II to the directive and repeated in Sch 2 to the assessment regulations. The other projects are either industrial projects for particular processes, or “one off” infrastructure projects, such as the construction of roads, tramways, dams or pipelines, which will, by their very nature, have to be defined in considerable engineering detail at the outset.

[88] Article 2(2) of the directive allows Member States to integrate environmental impact assessment into their existing procedures for giving development consent, or to devise new procedures. Article 3 (which is set out on p 88H) states that the environmental impact assessment will identify, describe and assess the environmental effects of projects “in an appropriate manner, in the light of each individual case.”

[89] Since the “description of the project” required by art 5(2) is a means to that end, in that it provides the starting point for the assessment process, there is no reason to believe that the directive was seeking to be unduly prescriptive as to what would amount to an appropriate description of a particular project. The requirement in art 5(2) (see p 89 C to E) to provide “information on the site, design and size of the project” is, and is intended to be, sufficiently flexible to accommodate the particular characteristics of the different types of project listed in annexes I and II (Schs 1 and 2 to the assessment regulations). It may be possible to provide more or less information on site, design and size, depending on the nature of the project to be assessed.

[90] If a particular kind of project, such as an industrial estate development project (or perhaps an urban development project) is, by its very nature, not fixed at the outset, but is expected to evolve over a number of years depending on market demand, there is no reason why “a description of the project” for the purposes of the directive should not recognise that reality. What is important is that the environmental assessment process should then take full account at the outset of the implications for the environment of this need for an element of flexibility. The assessment process may well be easier in the case of projects which are “fixed” in every detail from the outset, but the difficulty of assessing projects which do require a degree of flexibility is not a reason for frustrating their implementation. It is for the authority responsible for granting the devel-

opment consent (in England the local planning authority or the Secretary of State) to decide whether the difficulties and uncertainties are such that the proposed degree of flexibility is not acceptable in terms of its potential effect on the environment.

[91] In *Tew I* said at p 97 C that projects such as industrial estate developments and urban development projects have been placed “in a legal straitjacket” by the assessment regulations, in transposing the requirements of the directive into domestic law. The Directive did not envisage that the “straitjacket” would be drawn so tightly as to suffocate such projects.

[92] It has to be recognised that even if it was practical (despite the commercial realities described by Mr Ward) to prepare detailed drawings showing siting, design, external appearance, means of access and landscaping for every building within the proposed business park, the resulting environmental statement would be an immensely detailed work of fiction, since it would not be assessing the effect on the environment of any project that was ever likely to be carried out. All concerned with the process would have to recognise that in reality such details could not be known until individual occupiers came forward for particular plots.

[93] In my judgment, integrating environmental assessment into the domestic procedure for seeking outline planning permission, which acknowledges this need for flexibility for some kinds of building projects, is not contrary to the objectives of the Directive. There is no analogy between the procedure for obtaining outline planning permission, with certain matters reserved for detailed approval, and the procedure which was in issue in *Bozen*. In that case, not only was there no environmental assessment, the legislative act which authorised the project was generalised in the extreme, amounting to little more than a proposed programme, which was subject to preliminary feasibility assessments, see paras 5, 71 and 79 of the Advocate General's opinion in that case. The European Court was also concerned with proposed “modifications to development projects”. If such modifications have not been subjected to environmental assessment, the court's conclusion that they should be “when by reason of their nature, size or location they were likely to have significant effects on the environment” (see paras 40 and 49) is readily understandable. Provided the outline application has acknowledged the need for details of a project to evolve over a number of years, within clearly defined parameters, provided the environmental assessment has taken account of the need for evolution, within those parameters, and reflected the likely significant effects of such a flexible project in the environmental statement, and provided the local planning authority in granting outline planning permission imposes conditions to ensure that the process of evolution keeps within the parameters applied for and assessed, it is not accurate to equate the approval of reserved matters with “modifications” to the project. The project, as it evolves with the benefit of approvals of reserved matters, remains the same as the project which was assessed.

[94] Much stress has been laid on the words: “In full knowledge of the project's likely significant impact on the environment...” in directive 97/11, see p 89 H. These words should not be regarded as imposing some abstract state or threshold of knowledge which must be attained in respect of all projects, but should be applied to the particular project in question. For some projects it will be possible to obtain a much fuller knowledge than for others. The directive seeks to ensure that as much knowledge as can reasonably be obtained, given the nature of the project, about its likely significant effect on the environment is available to the decision taker. It is not intended to prevent the development of some projects because, by their very nature, “full knowledge” (in the sense of an abstract threshold level of detail) is not available at the outset.

[95] This does not give developers an excuse to provide inadequate descriptions of their projects. It will be for the authority responsible for issuing the development consent to decide whether it is satisfied, given the nature of the project in question, that it has “full knowledge” of its likely significant effects on the environment. If it considers that an unnecessary degree of flexibility, and hence uncertainty as to the likely significant environmental effects, has been incorporated into the description of the development, then it can require more detail, or refuse consent.

[96] Having stated that the proper starting point was the assessment regulations, I am conscious of the fact that I have spent some time discussing the directive. I have done so to demonstrate that there is no basis for the submission that the application by a Member State of a procedure such as the United Kingdom's procedure for obtaining outline planning permission for projects which require environmental assessment is in some way inimical to the objectives of the directive.

[97] With that introduction, I turn to the assessment regulations.

[98] The full text of the relevant paragraphs in Sch 3 is set out on pp 87 E to 88 C. The flexibility inherent in the Directive's approach to "a description of the development proposed" is faithfully transposed into para 2(a): the description must comprise "information about the site and design and size or scale of the development".

[99] On any sensible interpretation of those words, one may provide "information about" those matters without providing every available piece of information about them.

[100] That the description of the proposed development which must be provided under para 2(a) need not to be exhaustive in terms of the information supplied is reinforced by para 3(a) which enables, but does not require, the developer to include by way of explanation or amplification of (inter alia) the description of the development further information in the environmental statement about "the physical characteristics of the proposed development and the land use requirements during the construction and operational phases."

[101] The role of the public in contributing to the "environmental information" which must be considered by the local planning authority (see reg 2(1)) was emphasised in Berkeley above. Members of the public with local knowledge may well be able to add significantly to the information about the site, thus supplementing the "description of the development" provided by the developer in the environmental statement.

[102] If the local planning authority or the Secretary of State is dissatisfied with the amount of information provided in the environmental statement about the site, design, size or scale of the project, they may under reg 21 require such:

"Further information (as) is reasonably required to give proper consideration to the likely environmental effects of the proposed development."

[103] The fact that the developer then has to supply such further information does not mean that he will have failed to provide "a description of the development proposed" and thus failed to provide an environmental statement.

[104] If one asks the question "how much information about the site, design, size or scale of the development is required to fall within "a description of the development proposed" for the purposes of para 2(a)?, the answer must be: sufficient information to enable "the main", or the "likely significant" effects on the environment to be assessed under paras 2(b) and (c), and the mitigation measures to be described under para 2(d).

[105] In addition, the development which is described and assessed in the environmental statement must be the development which is proposed to be carried out and therefore the development which is the subject of the development consent and not some other development. An assessment of an illustrative masterplan, accompanying a "bare outline" application, which is not tied by condition to the resulting outline planning permission could not meet these requirements: see p 99 C to E (cited above).

[106] Whether the information provided about the site, design, size or scale of the development proposed is sufficient for these purposes is for the local planning authority, or on appeal or call in, the Secretary of State, to decide. I reject Mr Howell's submission that the issue is one for the court to decide, as a question of primary fact. That would be contrary, not merely to the structure of the regulations, but to the statutory Town and Country Planning framework of which they are but a part. Under the regulations it is for the local planning authority, or the Secretary of State, to decide whether a proposed development falls within the descriptions of the development set out in Schs 1 and 2, and in the case of the latter whether it would be likely to have significant effects on the environment: see the speech of Lord Hoffmann at p 429 H to 430 A in Berkeley. The local planning authority's or the Secretary of State's decision is subject to review on Wednesbury grounds. Regulation 4(2) requires the local planning authority or the Secretary of State to take the environmental information (which includes the environmental statement) into consideration before granting planning permission. Against this background the regulations plainly envisage that the local planning authority or the Secretary of State will also consider the adequacy of the environmental information, including any document or documents which purport to be an environmental statement.

[107] The assessment regulations are part of a statutory planning framework which requires the local planning authority in dealing with an application to have regard to all material considerations: see s 70(2) of the 1990 act above.

[108] It is for the local planning authority to decide whether it has sufficient information in respect of the material considerations. Its decision is subject to review by the courts, but the courts will defer to the local planning authority's judgement in that matter in all but the most extreme cases. Regulation 4(2) reinforces this general obligation to have regard to all material considerations in the case of a particularly material consideration; "environmental information" which has been provided pursuant to the assessment regulations.

[109] There is no reason why the adequacy of this information, which includes the sufficiency of information about the site, design, size and scale of development should not be determined by the local planning authority: see para 48 of circular 2/99 above.

[110] The question whether such information does provide a sufficient "description of the development proposed" for the purposes of the assessment regulations is, in any event, not a question of primary fact, which the court would be well equipped to answer. It is pre-eminently a question of planning judgment, highly dependent on a detailed knowledge of the locality, of local planning policies and the essential characteristics of the various kinds of development project that have to be assessed.

[111] I do not accept the Applicant's argument based on regs 2 and 3 of the applications regulations, see p 80 D to G. Reserved matters as defined in those regulations are not "information necessary to describe the development" which may, as a matter of concession, be omitted from an outline application. Such details may be omitted precisely because they may not be necessary to describe some developments for the local planning authority's purposes. The local planning authority will need to be satisfied that the description of the proposed development in the outline planning permission is adequate, given that it will be able to impose conditions in respect of reserved matters so that matters of detail can be dealt with at a later stage.

[112] It will be noted that an outline planning permission is defined as a planning permission for the erection of a building which contains "one or more reserved matters". Thus, a planning permission which simply reserves one matter, for example details of means of access or landscaping is still an outline planning permission. It is difficult to see why an application for outline planning permission that includes details of siting, design and external appearance, should not be able to provide the basis for an environmental statement containing "a description of the development proposed, comprising information about the site and design, size or scale of the development."

[113] Mr Howell submits that reserved matters, details of the means of access or landscaping, are capable of having an effect on the environment, that is why they are reserved for subsequent approval. That ignores the fact that the environmental statement does not have to describe every environmental effect, however minor, but only the “main effects” or “likely significant effects”. It is not difficult to see why this should be so. An environmental statement that attempted to describe every environmental effect of the kind of major projects where assessment is required would be so voluminous that there would be a real danger of the public during consultation, and the local planning authority in determining the application, “losing the wood for the trees. What is “significant” has to be considered in the context of the kinds of development that are included in Schs 1 and 2. Details of landscaping in an application for outline planning permission may be “significant” from the point of view of neighbouring householders, and thus subject to reserved matters approval, but they are not likely to have “a significant effect on the environment” in the context of the assessment regulations

[114] The local planning authority are entitled to say, “We have sufficient information about the design of this project to enable us to assess its likely significant effects on the environment. We do not require details of the reserved matters because we are satisfied that such details, provided they are sufficiently controlled by condition, are not likely to have any significant effect.”

[115] That is the conclusion which was reached by the local planning authority in the present case. Mr Beckwith says this in his witness statement:

“My judgment and that of the Council was that the information given enabled assessment of all the significant effects of the Kingsway Business Park development, and that it amounted to a description of the development comprising information on its site, design and size.”

“The design information given was adequate for the significant environmental effects to be considered. The information included size and mass of the buildings, and the location of the structural planning. In the case of a substantial business park, I consider that such information is key to an understanding of the significant visual impacts of the development. While the number and position of apertures and choice of construction materials are all liable to affect visual impact to some slight degree, they will not alter the appraisal of the significant impacts of development. The simple point is that one can clearly envisage the design and size of the development.”

[116] ERM's expertise in conducting environmental assessment is not challenged. Mr Gilder, its Technical Director and Head of Planning, has provided a detailed witness statement to explain why, in his professional opinion, the environmental statement:

“Considers a development proposal which was sufficiently well defined to enable a robust assessment of the potential significant impacts.”

[117] He said this:

“The environmental statement considers an almost fully defined development. Given the overall scale of the development, any significant visual impacts will arise from the overall massing of the buildings not from the details of their elevational treatments. With the nature of the development clearly defined in the applications, I could make sensible assumptions about the minor details of the elevations, the colour of the surface finishes and the likely growth of the landscaping and hence the residual visual impacts that might affect nearby residents ...”

“Across the whole proposed development, the level of detail defined was more than sufficient to identify the 'likely significant effects', both in relation to design and the worst case that could arise in relation to other environmental effects, for example, archaeology, ecology, traffic, noise, water and air pollution. In my view, only minor matters have been reserved for subse-

quent approval. The Council, when it considered the applications, was fully informed about the worst environmental impact that could arise and was able to make a decision in the knowledge that only minor matters of design and implementation were to be left as reserved matters.”

[118] The approach of Mr Beckwith and Mr Gilder accords with the advice in para 82 of circular 2/99 above. Whilst it is important that a “full factual description” of the development is provided, it is equally important that an environmental statement should be prepared “on a realistic basis and without unnecessary elaboration.”

[119] It has to be remembered that the project which required assessment was an “industrial estate development”, in this case a business park. Plainly, there is a great deal of information about the design of the business park in the documents forming part of the application, see above. Whether information should also be provided about the detailed design of the individual buildings that are to comprise the park is a separate question. In some circumstances such details might be required because they could reasonably be expected to have a significant effect on the environment. The local planning authority concluded that this was not so in the present case. That is not a surprising conclusion. The extent of the information supplied about the site, size and scale of the project is not criticised. The local planning authority had as much information about “the design” of an industrial estate development project of this kind as could reasonably have been expected.

[120] Acknowledging the uncertainties that are inherent in a project of this nature and scale Mr Gilder explained that the environmental statement had considered “the worst environmental impacts which would arise from the development, the so-called worst case.”

[121] He explained that although the definition of the worst case might differ according to which environmental effect was being assessed:

“Where details were to be reserved for subsequent approval by the local planning authority, the worst case was defined as the minimum standards which a reasonable local planning authority might require, taking account of all other matters already fully defined in the applications.”

“In the case of construction impacts, such as noise and dust, the worst case was taken to be the minimum standards which would be required by the regulatory authorities under, for example, the [Control of Pollution Act 1974](#) and/or the relevant British Standards.”

[122] Mr Howell criticised this approach, even though, as Mr Gilder explained, it is regarded as a “proper professional approach”, which is regularly used by those engaged in the process of environmental assessment. Both the directive and the regulations recognise the uncertainties in assessing the likely significant effects, particularly of the major projects, which may take many years to come to fruition. The assessment may conclude that a particular effect may fall within a fairly wide range. In assessing the “likely” effects, it is entirely consistent with the objectives of the directive to adopt a cautious “worst case” approach. Such an approach will then feed through into the mitigation measures envisaged under para 2(c). It is important that they should be adequate to deal with the worst case, in order to optimise the effects of the development on the environment.

[123] Mr Howell pointed to the passage at p 98 A of Tew:

“If consideration of some of the environmental impacts and mitigation measures is effectively postponed until the reserved matters stage, the decision to grant planning permission would have been taken with only a partial rather than a “full” knowledge of the likely significant effects of the project.”

[124] He submitted that the environmental impact of the project could be significantly affected by detailed design at the reserved matters stage, for example, by the materials used -- reflective glass, by the colours adopted, by a particularly “innovative” form of roof design, or a particularly striking “landmark” building.

[125] The passage in Tew continues:

“That is not to suggest that full knowledge requires an environmental statement to contain every conceivable scrap of environmental information about a particular project. The directive and the assessment regulations require the likely significant effects to be assessed. It will be for the local planning authority to decide whether a particular effect is significant, but a decision to defer a description of a likely significant adverse effect and any measures to avoid, reduce or remedy it to a later stage would not be in accordance with the terms of Sch 3, would conflict with the public's right to make an impact into the environmental information and would therefore conflict with the underlying purpose of the directive.”

[126] Whilst the Council has deferred a decision on some matters of detail, which, as Mr Beckwith acknowledges, may have some environmental effect, it has not deferred a decision on any matter which is likely to have a significant effect, or on any mitigation measures in respect of such an effect.

[127] It is true that at the reserved matters stage the council might theoretically approve a building in a particularly shocking colour, or with a particularly visually intrusive roof design, but that is not the test, since it can be satisfied that it is not likely to do so, hence the effect, for example, of a rainbow coloured building T, or a bizarre “landmark” building is not a “likely effect”, let alone a “likely significant effect” on the environment.

[128] Any major development project will be subject to a number of detailed controls, not all of them included within the planning permission. Emissions to air, discharges into water, disposal of the waste produced by the project, will all be subject to controls under legislation dealing with environmental protection. In assessing the likely significant environmental effects of a project the authors of the environmental statement and the local planning authority are entitled to rely on the operation of those controls with a reasonable degree of competence on the part of the responsible authority: see, for example, the assumptions made in respect of construction impacts, above. The same approach should be adopted to the local planning authority's power to approve reserved matters. Mistakes may occur in any system of detailed controls, but one is identifying and mitigating the “likely significant effects”, not every conceivable effect, however minor or unlikely, of a major project.

[129] For all these reasons, I am satisfied that Mr Howell's primary submission that an application for outline planning permission does not satisfy the requirement in para 2(a) of Sch 3 to the assessment regulations because it does not provide “a description of the development proposed” is not well-founded.

[130] I can deal very shortly with the remaining argument that the 1999 application for outline planning permission did not contain sufficient information about the design of the development. As is explained above, a great deal of information was provided in the application documents about the design of the business park, even though details of the design and external appearance of individual buildings were not given. Taking building T as a convenient example, since it is the largest proposed building in the business park, its proposed use (B8), its siting, its size and scale are all known. In particular its principal dimensions, including its height to eaves from a defined plateau level are known. The plot size is known, together with the number of car parking spaces that are to be accommodated with the building on that plot. The position of the spine and estate roads, from which it will obtain access, are fixed. The area that is left for landscaping within the plot once access, servicing and car parking requirements have been met, can be seen on the masterplan and other plans contained in the Development Framework. Those plans also identify areas for structural landscaping around the boundaries of the plot. The Development Framework describes in some detail how these

areas are to be treated. It also describes the kinds of materials, colours and elevational treatments that are likely to be adopted, see above.

[131] The Council has power to ensure that the details which come forward at the reserved matters stage are in “substantial accordance” with the Development Framework: see condition 1.7 above. It will be noted that the effect of condition 1.7 is that even where siting and means of access are reserved they will have to be substantially in accord with the Masterplan. Armed with all of this information about the proposed building on plot T, ERM were able to carry out a comprehensive assessment of its likely significant effects on the environment including, for example, its likely effect on the setting of listed buildings, and the public were able to make informed comments about the reliability of that assessment and to suggest further mitigation measures if they wished.

[132] Mr Howell's criticisms of the proposed mitigation measures illustrates the unreality of the Applicant's approach. It is said, that there is no “description of the measures proposed”, merely a statement of objectives. This criticism stems from an overliteral interpretation of the words in para 2(d). In the case of the bats and the greater crested newts that may be on this site (see above), I do not see why the “measures envisaged to avoid, reduce or remedy” possible harm to them should not comprise the undertaking of further surveys, discussion of the findings of those surveys with English Nature and devising detailed mitigation in the light of those discussions. Where there are well established mitigation techniques for dealing with disturbance to the habitat of certain creatures, such a description will be perfectly adequate. Indeed, it is difficult to see what more could be done. As Mr Beckwith says:

“The areas where further survey work is required are areas in which survey work had already been carried out and the results published, for example for the presence of badgers, bats or voles. But nature is dynamic and the presence or population of such species could (and does) vary over time. Bats do not permit themselves to the spot where they happen to be seen at a particular point in time. It is entirely appropriate, responsible and reasonable to ensure that surveys are carried out prior to the commencement of work on each development plot. The involvement of expert bodies such as English Nature is a reasonable approach and one that I would have thought most reasonable members of the public would expect.”

[133] It is to be noted that neither English Nature nor the Greater Manchester Ecology Unit objected to the application. They expressed certain detailed concerns. The Outline Ecology Management Plan was then prepared as a response to those concerns. Mr Beckwith's report explains that those bodies were satisfied with the response, together with the conditions that were imposed on the outline planning permission.

[134] In short, there was “full knowledge”, in the sense of there being available as much information as could reasonably be expected at this stage, about this kind of mitigation measure.

[135] I repeat the view expressed in Tew that “full knowledge” does not mean “every conceivable scrap of information” about a project. Such an approach would not assist local planning authorities in identifying the likely significant environmental effects of major projects, and would merely serve to obstruct the development of such projects to no good purpose.

[136] I therefore declare the respondents the victors in round 2 and dismiss this application for judicial review.

[137] In conclusion I would like to pay tribute to the very able submissions of all leading counsel.

[138] MISS COLQUHOUN: Yes, my Lord. As perhaps the court will have been told, Mr Straker I am afraid had to disappear and does apologise for not being able to be here throughout your judgment.

[139] SULLIVAN J: Yes, Miss Colquhoun.

[140] MISS COLQUHOUN: He would also like me to thank you for giving this judgment before the end of term. He is extremely grateful for that.

[141] SULLIVAN J: That is very kind of him.

[142] MISS COLQUHOUN: My Lord, of course we would like to apply for costs in this matter, but I understand that the Applicant is legally aided.

[143] SULLIVAN J: Yes.

[144] MISS COLQUHOUN: And therefore would ask that the costs be awarded on the appropriate basis. I understand there is certain wording that the associate would have. Forgive me for not knowing it, my Lord.

[145] SULLIVAN J: I do not know it either.

[146] MISS COLQUHOUN: I am very grateful.

[147] SULLIVAN J: You are asking for the appropriate order I think?

[148] MISS COLQUHOUN: Yes, I am my Lord.

[149] SULLIVAN J: I will not ask you what that is, do not worry. What do you want to say about that for starters, Miss Markus?

[150] MISS MARKUS: I cannot resist the general thrust of that application. I think it might be helpful to say the wording is something like the Applicant pays the costs of the respondent but it is postponed until an application is made, or something along those lines.

[151] SULLIVAN J: We will possibly leave it to the Associate, who will in due course make the appropriate legal aid order, so the Applicant is to pay the first respondents costs, subject to the usual legal aid order, yes.

[152] SULLIVAN J: Second respondents, are you making a pitch?

[153] MR GREATOREX: Yes, my Lord, I am, to ask for costs in this case. I make the submission on the ground it is an appropriate case for the exercise of your discretion. In my submission, all three of the criteria set down by the House of Lords in the *Bolton* case are met here in that there was a difficult question of principle. Secondly -- and this is perhaps the most obvious of the three points -- the scale of the development and the importance of the outcome is exceptional in this case. Your Lordship is well aware of the size of the matter and the approach to development.

[154] The third point follows on from that in that it is an unusual case again, for the reasons that I have just mentioned: the size of the project and the fact that urban developers are obviously a private public the NWDA is a public body in discharging its public duties in this case.

[155] SULLIVAN J: I think those would be absolutely marvellous arguments if the Applicant was not on legal aid, but since the Applicant is on legal aid effectively it is pretty much an empty gesture, is it not? that is the problem I think.

[156] MR GREATOREX: If you think it is an appropriate case to exercise your discretion and award costs then it would be the same order as you have just suggested: the first respondent's legal aid costs and it goes to that.

[157] SULLIVAN J: Thank you very much. I have to say were this not a legal aid case then the second respondent may well have quite a good case for asking for costs in the unusual circumstances, but since it is they do not -- no disrespect to the able submissions put forward.

[158] Any more for any more?

[159] MISS MARKUS: My Lord, I wish to make an application for permission to appeal.

[160] SULLIVAN J: Yes.

[161] MISS MARKUS: My Lord, obviously I do not want to rehearse the arguments that were so ably put by Mr Howell last week and summarised in detail by your Lordship today, but just to summarise the main points of appeal which, in my submission, are points of general importance, your Lordship will be aware, and I do not have new Ord 52 in front of me, but the grounds for grant of permission are these: that the court considers that the grounds have a likely prospect of success, or effectively they are very general points of importance.

[162] SULLIVAN J: Are the words "a reasonable possible prospect of success".

[163] MR GREATOREX: A real prospect.

[164] SULLIVAN J: Real prospect or other compelling reasons.

[165] MISS MARKUS: Other compelling reason. My Lord, I would submit other compelling reason includes cases which raise grounds of appeal which raise points of general importance.

[166] SULLIVAN J: Yes.

[167] MISS MARKUS: My Lord, there are essentially I think five, possibly six points -- I will recount them when I get to the end of my submission -- that raise points of general importance as a result of which there is a compelling reason to grant permission to appeal. The first point is in relation to ground 1 of the application. The question of whether it is possible to grant outline planning permission to a project to which the environmental impact assessment regulations apply.

[168] My Lord, I do not want to rehearse the arguments in support of that, but your Lordship has been through the main issues, but could I just outline two particular features of this, of this ground: first of all, an outline planning permission application, and permission itself clearly does not describe any or all of siting, design, external appearance, means of access or landscaping, and the submission is basically that failing to describe any of those matters would breach the requirements of the regulations --

[169] SULLIVAN J: Yes, I have those.

[170] MISS MARKUS: You have that point?

[171] SULLIVAN J: Yes.

[172] MISS MARKUS: And secondly, that any reserved matters are matters that could have a significant effect on the environment, and there is a real question here as to how one interprets the word "significant" effect on the environment, and that was a point that was raised by your Lordship in your own judgment. At one point, for instance, your Lordship talks about the fact that what is significant in respect of a neighbour, who is concerned about the effects of landscaping, may not be significant in the context of the regulations of the whole of the development, and my Lord there is a point of importance, significant point of importance there.

[173] That really links to the second ground of appeal that I would propose in this case, which is the proper test to be applied as to what can be left undefined in an outline application consistently with the Directive and in the 1998 or 1999 regulations.

[174] My Lord, Mr Howell, paraphrasing what he said -- of course I was not here -- I think what he was saying is that you cannot leave out anything which might be capable of having a significant effect on the environment, and that is a test that is consistent with your Lordship's judgment in *Tew*, the first case.

[175] My Lord, my submission is that that raises a point of general importance, the proper test to be applied.

[176] The third question is who is to judge whether a future development is likely to have a significant effect on the environment. As your Lordship found, there is the authority proposed submitted on behalf of the Applicant that it was for the court. Again, that is a point of general importance.

[177] The fourth set of grounds relate to what was I think described certainly in the skeleton argument on behalf of the NWDA as coming under the grounds of *Wednesbury* unreasonableness but raises significant points in that context. The question is whether the conclusion of the authorities that the design of the buildings will not have a significant effect on the environment, or could not have a significant effect on the environment, is a reasonable one, and that raises points of principle, general points, because the Applicant says that where you have a development of this scale it will always be necessary to know about the design and the visual appearance.

[178] My Lord, this question also raises another point of principle which is really what does design mean in the context of the environmental assessment regulations? What does it cover about which information needs to be provided? Plot T that your Lordship referred to is a good example, and the Applicant's submission on this was that it cannot reasonably be said that a building of this size could not have a significant effect upon the environment, and that the design is not a critical consideration in that respect.

[179] My Lord, design is included in the environmental assessment regulations because it is clearly capable of having a significant effect on the environment. In addition, under this ground it is raised the question whether adopting the worst case scenario in respect of any of these matters constitutes a proper approach, and your Lordship has obviously referred to the submissions that were put by Mr Howell in that respect.

[180] My Lord, again, in all of these submissions, is the question of what is the implicit judgment; what is the judgment as to what counts as significant? That is a point of importance as to effectively the threshold at which the regulations bite.

[181] My Lord, the fifth and penultimate ground of appeal that I request permission in respect of relates to the question of mitigation measures, and the point in this is what constitutes a description for the purpose of the regulations of mitigation measures, and Mr Howell said last week that the proposed mitigation measures really were questions of aspiration rather than actual measures. The Applicant's position is really that the bottom line is that the authority must know that the aspirations and objectives are achievable, and while that does not mean that every tiny detail, no matter how important, has to be dealt with, sufficient has to be provided to know that.

[182] The final point relates to ground 2, which your Lordship dealt with first. The point in this, again, without rehearsing the submissions of the Applicant, is whether it is possible for an authority to consent to a project that does not comply with any of the UDP criteria, or at least noting what your Lordship said about the number of UDP criteria and number of conflicting interests that are involved in considering any matters such as this. At least, is it possible lawfully to consent to a project which does not comply with a criterion or criteria which are so critical within the plan, treated critically by the inspector and said in the plan to be strictly applied?

[183] My Lord, those are the six points on which my submission lies.

[184] SULLIVAN J: There are six. I do not need to trouble you, thank you very much.

[185] Acknowledging, as I do, the possibility of error, I think that since this is the second time that I have had an opportunity to look at this matter and I have had the opportunity to prepare a reasonably comprehensive judgment, I do not think that there is a real prospect of success for an appeal, even though I accept the case does give rise to a number of interesting questions of principle. So on that basis I refuse permission to appeal.

Appeal dismissed.



Neutral Citation Number: [2020] EWCA Civ 508

Case No: C1/2019/2179

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
PLANNING COURT
MR C.M.G. OCKELTON (sitting as a deputy judge of the High Court)
[2019] EWHC 1022 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9 April 2020

Before:

Lord Justice Lewison
Lord Justice Lindblom
and
Lord Justice Leggatt

Between:

R. (on the application of William Corbett) **Respondent**

- and -

The Cornwall Council **Appellant**

- and -

Stephen Tavener **Interested Party**

Mr James Findlay Q.C. and Mr Sancho Brett (instructed by the Cornwall Council)
for the Appellant

Mr Ashley Bowes (instructed by TLT Solicitors LLP) for the Respondent
The Interested Party did not appear and was not represented.

Hearing date: 3 March 2020

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

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 1630 on Thursday, 9 April 2020.

Lord Justice Lindblom:

Introduction

1. The basic question in this appeal is whether a local planning authority erred in law in granting planning permission for a development it found to be in conflict with development plan policies for the protection of Areas of Great Landscape Value but compliant with other relevant policies, including a policy encouraging development for tourism, and thus in accordance with the plan as a whole.
2. With permission granted by Hickinbottom L.J. on 5 November 2019, the appellant, the Cornwall Council, appeals against the order dated 1 May 2019 of Mr C.M.G. Ockelton, Vice President of the Upper Tribunal (Immigration and Asylum Chamber), sitting as a deputy judge of the High Court, by which he quashed the council’s grant of planning permission for development proposed by the interested party, Mr Steven Tavener, on land to the east of the Sun Haven Valley Caravan Park at Mawgan Porth in Newquay. The respondent, Mr William Corbett, is a parish councillor on the St Mawgan in Pydar Parish Council and leader of its Planning Group. The parish council was an objector to the proposed development.
3. The application for planning permission was made on 11 October 2017. The proposal was described in the application as “Use of land for the stationing of 15 static holiday caravans and 15 holiday lodges, provision of access and car parking”. The development would extend the existing caravan site – a site of about 2.7 hectares, with 100 pitches for caravans and tents and 39 static caravans – on to an adjacent field of 1.6 hectares. The site is in the countryside, not in the Cornwall and Tamar Valley Area of Outstanding Natural Beauty, but in the Watergate and Lanherne Area of Great Landscape Value. The council’s decision to approve the proposal was taken at a meeting of its Central Sub-Area Planning Committee on 19 February 2018. Planning permission was granted on 1 March 2018. It was challenged by Mr Corbett in a claim for judicial review issued on 11 April 2018.

The issues in the appeal

4. Three main issues arise from the two grounds of appeal and the respondent’s notice: first, whether the judge was wrong to hold that the council’s decision to grant planning permission was a determination not in accordance with the development plan, because Policy 14 of the Restormel Local Plan, which relates to the effect of development on Areas of Great Landscape Value, prevented permission being granted; second, whether he was wrong to find the council’s reasons for granting permission, indicated in the officer’s report to committee, were inadequate; and third, whether he should have found that the council acted unlawfully by not identifying Policy 7 of the Cornwall Local Plan: Strategic Policies 2010-2030, which relates to the development of housing in the countryside, as relevant to the proposal.

The policies of the development plan

5. At the time of the council’s decision, the development plan for Cornwall comprised the Cornwall Local Plan, adopted by the council in November 2016, and a number of policies in older local plans, including the Restormel Local Plan of October 2001, which were saved by

the Secretary of State for Communities and Local Government in September 2007. Appendix 3 to the Cornwall Local Plan provides a schedule of “saved policies that are not being replaced by the Local Plan policies”, which, it says, “will continue to form part of the development plan and ... be used in conjunction with the Local Plan”. One of the policies in that list is Policy 14 of the Restormel Local Plan.

6. Policy 1 of the Cornwall Local Plan says that “[when] considering development proposals the Council will take a positive approach that reflects the presumption in favour of sustainable development contained in the National Planning Policy Framework [“the NPPF”] and set out by the policies of this Local Plan”, and that it “will work with applicants, infrastructure providers and the local community to find solutions which mean that proposals will be approved wherever possible, and to secure development that improves the economic, social and environmental conditions in the area”.
7. Policy 5 deals with proposals for development that will generate employment or promote tourism:

“Policy 5: Business and Tourism

...

3. The development of new or upgrading of existing tourism facilities through the enhancement of existing or provision of new, high quality sustainable tourism facilities, attractions and accommodation will be supported where they would be of an appropriate scale to their location and to their accessibility by a range of transport modes. Proposals should provide a well balanced mix of economic, social and environmental benefits.

...”

In the text preceding Policy 5, paragraph 2.8 states:

“2.8 Tourism: The quality of Cornwall’s landscapes, seascapes, towns and cultural heritage, enables tourism to play a major part in our economic, social and environmental wellbeing, it generates significant revenues, provides thousands of jobs and supports communities. Our key challenge is to realise this opportunity in better wages through improved quality and a longer season.”

8. Policy 7 concerns the development of new housing in the countryside. It states:

“Policy 7: Housing in the countryside

The development of new homes in the open countryside will only be permitted where there are special circumstances. New dwellings will be restricted to:

1. Replacement dwellings broadly comparable to the size, scale and bulk of the dwelling being replaced and of an appropriate scale and character to their location; or
2. [The] subdivision of existing residential dwellings; or
3. Reuse of suitably constructed redundant, disused or historic buildings that are considered appropriate to retain and would lead to an enhancement to the immediate setting. ... ; or
4. Temporary accommodation for workers (including seasonal migrant workers), to support established and viable rural businesses where there is an

essential need for a presence on the holding, but no other suitable accommodation is available and it would be of a construction suitable for its purpose and duration; or

5. Full time agricultural and forestry and other rural occupation workers where there is up to date evidence of an essential need of the business for the occupier to live in that specific location.”

9. Policy 7 is one of a suite of policies for housing development. It is preceded by Policy 6, on “Housing Mix”, and followed by Policy 8, on “Affordable Housing”. The text for Policy 7, in paragraphs 2.32 to 2.37, explains the council’s approach to the provision of housing in the countryside, stressing, in paragraph 2.33, that “[the] Plan seeks to ensure that development occurs in the most sustainable locations in order to protect the open countryside from inappropriate development”, and explaining the exceptions to the policy’s general restriction on the development of housing in the countryside. Neither in these three policies themselves nor in the text supporting them is there any mention of “tourism accommodation”.

10. Policy 23 relates to the effect of development on Cornwall’s “natural environment”, including its landscape:

“Policy 23: Natural environment

...

2. Cornish Landscapes.

Development should be of an appropriate scale, mass and design that recognises and respects landscape character of both designated and un-designated landscapes.

Development must take into account and respect the sensitivity and capacity of the landscape asset, considering cumulative impact and the wish to maintain dark skies and tranquillity in areas that are relatively undisturbed, using guidance from the Cornwall Landscape Character Assessment and supported by the descriptions of Areas of Great Landscape Value.

...

2(b) The Heritage Coast and Areas of Great Landscape Value

Development within the Heritage Coast and/or Areas of Great Landscape Value should maintain the character and distinctive landscape qualities of such areas.”

Paragraph 2.153 in the supporting text states:

“2.153 Area of Great Landscape Value (AGLV):

Identified on the Local Plan policies map these are areas of high landscape quality with strong and distinctive characteristics which make them particularly sensitive to development. Within AGLVs the primary objective is conservation and enhancement of their landscape quality and individual character.”

11. Policy 14 of the Restormel Local Plan concerns proposals for development that would cause “harm” to Areas of Great Landscape Value. It states:

“AREAS OF GREAT LANDSCAPE VALUE
Policy 14

- (1) Developments will not be permitted that would cause harm to the landscape, features and characteristics of Areas of Great Landscape Value.
- (2) The following parts of the plan area are proposed as Areas of Great Landscape Value:
...
(2) Watergate & Lanherne
... .”

Paragraph 5.25 of the text explaining that policy states:

“5.25 These areas have an attractive landscape where the Council considers special controls should exist. Policy 14 recognises that these areas represent landscapes which are of countywide importance and seeks to protect them from inappropriate development.”

The council’s decision to grant planning permission

12. At the committee meeting on 19 February 2018 the members had before them a report on the proposal, prepared by the council’s Senior Development Officer, Ms Michelle Billing. The recommendation in the report was that delegated authority be granted to approve the application. The committee accepted that recommendation.
13. At the beginning of the officers’ report, under the heading “Balance of Considerations and Conclusion”, the officer said:

“... .”

3. The proposal falls within an Area of Great Landscape Value which is protected under local planning policy.
4. The impact upon the landscape has been assessed and due to the valley location and the surrounding topography it is difficult to gain any long distance views of the site from public [vantage] points. It is accepted that views of the proposal site would be possible when approaching the site from the west and around the immediate location however the proposal would be seen in context with the existing development, therefore tempering its impact.
5. A landscaping condition will be imposed to further soften the localised views of the proposal.
6. It is concluded the proposal would result in a slight/moderate impact upon the AGLV at a localised level.

7. The expansion of existing tourism facilities is supported by both local and national planning policies.
 8. The proposal would provide financial investment in the existing business and provide new full time employment which would support rural economic growth.
 9. The proposal would not have an adverse impact upon residential amenity due to the significant separation distance.
 10. The [council's] highways officer has considered the proposal and has concluded that the proposal would not have a detrimental impact upon highway safety providing the entrance is constructed in accordance with the approved details.
 11. Considering the development in accordance with the development plan and the framework as a whole I would give limited weight to the impact upon the AGLV as the views are localised and can be further mitigated by suitable planting and would attribute greater weight to the economic benefits of the proposal.
 12. The proposal with the recommended conditions would result in a satisfactory development which would add to sustainable economic growth in rural areas and assist the local tourist industry. The recommendation is to request [delegated] powers to approve the proposal.”
14. The officer listed relevant policies of the development plan, including Policies 1, 5 and 23 of the Cornwall Local Plan and Policy 14 of the Restormel Local Plan (paragraphs 15 and 16). The list did not include Policy 7 of the Cornwall Local Plan.
15. She then (in paragraph 17) quoted in full the objection submitted by the parish council, which began in this way:

“The PC objects to this application.

The proposal would represent a major expansion of the existing holiday park into what is currently agricultural land situated on the opposite (eastern) side of the Retorrick lane. All of this land falls within the Watergate/Lanherne Area of Great Landscape Value and so the first question raised by the application is its effect upon the AGLV which is protected from inappropriate development, first by ‘saved’ Policy 14 of the Restormel Local Plan, and also by Policy 23 of the Cornwall Local Plan.

... .”

The objection then referred to appeal decisions in which the effect of “holiday development” had been considered, including a decision in September 2017 on an appeal relating to a site at Lower Sticker:

“... .”

A further policy issue arises following another appeal in September 2017 in relation to the ‘retention of 5 touring caravans for holiday letting’ at Sticker, St

Austell There the inspector made the point that “a caravan used for holiday purposes falls within use class C3 (dwelling houses) and therefore Policy 7 of the CLP is relevant[”]. That policy states that ‘the development of new homes in the open countryside will only be permitted where there are special circumstances’ none of which applied. The appeal was therefore dismissed as “the location of the development is in open countryside and is contrary to the policies of restraint in LP Policies 5 and 7 and paragraph 55 of the Framework”. Policy 7 is equally applicable to the present application.”

The objection went on to contend that Mr Tavener’s proposal appeared to the parish council to “fall foul” of saved Policy 14 of the Restormel Local Plan and “not to conform with the explanatory text to Policy 23” of the Cornwall Local Plan.

16. Under the heading “Assessment of Key Planning Issues”, the officer said that “[the] planning application needs to be assessed against the Development Plan policies and any other material considerations” (paragraph 25). On the “Principle of Development”, she told the members (in paragraphs 27 to 36):

“27. The application site is located within the countryside where open market housing would not be supported by policy. The application is for change of use of land for the stationing of holiday units, a condition will be imposed to restrict their use to holiday and therefore the proposal . . . will be considered under policy 5 of the Cornwall Local Plan.

28. Part 3 of Policy 5 of the Cornwall Local Plan refers to Business and Tourism and that the development of new or upgrading of existing tourism facilities through the enhancement of existing or provision of new, high quality sustainable tourism facilities, attractions and accommodation will be supported where they would be of an appropriate scale to their location and to their accessibility by a range of transport modes. Proposals should provide a well balanced mix of economic[,] social and environmental benefits.

29. Paragraph 28 of Section 3 of [the NPPF] – Supporting a prosperous Rural Economy – states that local authorities should:

- Support sustainable rural tourism and leisure developments that benefits businesses in rural areas, communities and visitors, and which respect the character of the countryside. This should include supporting the provision and expansion of tourist and visitor facilities in appropriate locations where identified needs are not met by existing facilities in rural service centres.

30. The proposed development at Sun Valley Holiday Park is an extension to an existing facility which is relatively self-contained, it has its own shop and recently gained consent for a new games room building There is a bus route (with the bus stop immediately outside the entrance) and there are direct links from the park to the public right of way network to connect to Porth, therefore it is well located for tourist accommodation, this leads me to conclude that this proposal is relatively sustainable and accessible when considered against the NPPF tests.

31. The site area of the existing park is 2.7 hectares and has 100 pitches for caravans/tents which have a restricted occupancy from Good Friday to 31st October each year. The site also has 39 static caravans.
 32. The proposal seeks to increase the site by 1.6 hectares and station 15 static units and 15 holiday lodges. As the application is a change of use of the land the units would have to comply with the Caravan [Licensing] Act and not permanent buildings.
 33. It is considered that the increase in scale of the business is reasonable and the increase of static units would allow the holiday business to enhance the standard of accommodation on the site.
 34. The applicants within their statement have included a business case for the proposal, it states that if approved the expansion of the holiday park would require 3 more full time employees and increase part time cleaners and would see an investment of £1.8 million into the park.
 35. It is concluded that the proposed scheme, namely the expansion of an existing sustainable tourism facility, which contains existing facilities for patrons of the park in an appropriate location where existing needs are not being met. The scheme would support economic growth and safeguard/create jobs in this rural area. The principle of the proposal would therefore comply with paragraph 28 of the NPPF and policy 5 of the CLP.
 36. The identified economic benefit of the area would weigh in favour of the application.”
17. On the “Impact upon Landscape Character”, having reminded the members that the application site lies within the Area of Great Landscape Value (paragraph 39), she referred to Policy 23 of the Cornwall Local Plan, which, she said, “considers the Natural Environment”, and she quoted part 2(b) of the policy (“Development within Areas of Great Landscape Value should maintain the character and distinctive landscape qualities of such areas.”) (paragraphs 40 and 41). She then quoted saved Policy 14 of the Restormel Local Plan (“Development would [sic] not be permitted that would cause harm to the landscape features and characteristics of [Areas] of Great Landscape Value.”) (paragraph 42 and 43). She then considered in detail the visibility of the application site from various rights of way in the locality, and continued (in paragraphs 56 to 58):
- “56. Following my assessment I consider that long distance views of the site are difficult to obtain due to the topography and landscape form of the area combined with the valley location of proposal site. I note that within the Parish Council it is highlighted that the site can be viewed from the Merlin Golf Club, the view point is not accessible by the general public.
 57. It is accepted that localised views of the site can be obtained from the approach road and Retorrack Lane, but these glimpses would be seen in context with the existing holiday park and other built development, it would not break the skyline or project into any views and would therefore temper the impact upon the landscape character.

58. It is considered that the overall impact upon the Area of Great Landscape Value would be slight/moderate at a localised level which would weigh against the proposal.”

18. In other passages of the report the officer advised the members that the proposed development would not, in the light of Policy 22 of the Cornwall Local Plan, involve the loss of “best and most versatile” agricultural land (paragraph 38); that it would not result in a “detrimental impact upon residential amenity” (paragraph 69); that it would not cause “harm to [the] setting” of the listed Gluvian Farmhouse (paragraph 72); that it had not been objected to by the council’s highways officer (paragraph 75); and that its “impact on ecology” would be “low” (paragraph 90).

19. At the end of the report, the officer proposed a number of conditions, including a condition limiting the use and occupation of the development (condition 3):

“3. The 30 pitches hereby permitted shall be used as holiday accommodation only and shall not be occupied as a person’s sole or main place of residence. The owners/operators shall maintain an up-to-date register of the names of all owners/occupiers of each individual unit on the site, and of their main home addresses, and shall make this information available at all reasonable times to the Local Planning Authority.

Reason: To accord with development plan housing policies under which permanent residential accommodation would not normally be permitted on the site and the accommodation, by reason of its construction and/or design, is unsuitable for continuous occupation and in accordance with the aims and intentions of paragraphs 28 and 55 of [the NPPF].”

She also proposed a condition preventing development being begun “until a scheme of hard and soft landscaping has been submitted to and approved in writing by the Local Planning Authority” (condition 4).

The judgment in the court below

20. The judge observed that the officer’s report contains “no discussion of the possibility that approval of the application would amount to making a decision not in accordance with saved Policy 14, nor of any material considerations that might or would justify a decision otherwise than in accordance with the development plan” (paragraph 21 of the judgment). The council had accepted that the proposed development would have an impact on the Area of Great Landscape Value, and had not suggested that the impact would be other than harmful (paragraph 22). The judge continued (in the same paragraph):

“22. ... If saved Policy 14 means what it says, the plan would require the application to be refused. In these circumstances a decision granting planning permission would be a decision made not in accordance with the plan and would have to have been justified by material considerations indicating the desirability of a determination made otherwise than in accordance with the plan. If, on the other hand, Policy 14 is to be interpreted as not imposing a prohibition on the grant of

permission for a development that would cause harm to the AGLV, the Claimant's claim is likely to be properly characterised as merely a disagreement with the assessments made in applying the policy to the application."

21. He observed that there was "no inconsistency between saved Policy 14 and new Policy 23 or any other element of the development plan". Policy 14, he said, "does not in terms prohibit all development in an AGLV: it prohibits only development which would be harmful" (paragraph 26). He went on to say that "[an] application which, under the development plan (including saved policies) would not be permitted is not a planning application according with the policies in the plan", and that the "other policies to which [counsel] made reference could only go to weight in relation to an application which, under the [development plan] might be permitted" (paragraph 27). He concluded (in paragraph 28):

"28. ... [The] development plan read as a whole, including saved Policy 14, does not permit a development that would cause harm to the landscape, features and characteristics of an AGLV covered by that policy. It follows that a determination granting planning permission for such a development would be a determination not in accordance with the development plan."

22. The judge also concluded that the officer's report "should have made it plain to the [committee] that the development plan, in ... Policy 14 required this application to be refused, but that it could be granted if the [committee] were satisfied that material considerations indicated that result" (paragraph 30). The considerations identified as weighing in favour of the proposal were only those that would apply if it was "covered by the general policies relating to developments in the countryside, in particular Policy 23, without consideration of the special requirements in relation to an AGLV" (paragraph 31). The "reasons for the decision under challenge have to be regarded as essentially those in the [officer's report], because the officer's recommendation was accepted by the [committee]". The members "did not appreciate that they were making a decision which did not accord with the development plan, and did not identify or assess any relevant material considerations for departing from the development plan" (paragraph 33).

The Policy 14 issues

23. When he refused the council's application for permission to appeal, the judge said the fact that "there are other parts of the plan that would permit or encourage the development if the site did not have this level of protection is irrelevant to the conclusion that because of the level of protection of AGLVs, this development was not in accordance with the plan and so had to be considered in such terms rather than as a development that accorded with the plan". The council's decision, he said, "was infected by the error of not appreciating the special level of protection given to AGLVs and the fact that departure from the plan was proposed".
24. For the council, Mr James Findlay Q.C. submitted that those observations encapsulated the judge's error. His approach was "unduly strict" and "over-legalistic". What he had to consider was whether the council had correctly understood the relevant policies of the development plan and applied those policies lawfully in considering whether the proposal accorded with the plan as a whole. The council did that.

25. Mr Findlay submitted that if the judge’s approach were right, there would be a real risk of departures from the development plan, which have to be dealt with under the procedure in regulation 15 of the Town and Country Planning (Development Management Procedure) (England) Order 2015, being needlessly generated by minimal conflicts with individual policies – in this case, a proposed development involving only limited harm to an Area of Great Landscape Value but finding support in other provisions of the plan, so that it could properly be said to accord with the plan as a whole.
26. At the heart of Mr Findlay’s argument was the submission that it was not for the judge to form a view on the extent and significance of the breach of Policy 14, as if this were a matter of his own planning judgment and not the council’s as decision-maker. The council did not misunderstand the policy, or misapply it. That the officer accepted there was a breach of it is evident in her report. But as she made plain (in paragraph 11), she concluded that approving the proposal would be a decision taken in accordance with the development plan “as a whole”, notwithstanding the conflict with Policy 14. She was clearly aware of the need for planning judgment to be exercised on that question if the council was to perform its duty under section 70(2) of the Town and Country Planning Act 1990 to “have regard to ... the provisions of the development plan, so far as material to the application” and “other material considerations”, and its duty under section 38(6) of the Planning and Compulsory Purchase Act 2004 to make the determination “in accordance with the plan unless material considerations indicate otherwise”. Mr Findlay reminded us of the principles that emerge from the relevant authorities (see *BDW Trading Ltd. v Secretary of State for Communities and Local Government* [2016] EWCA Civ 493; [2017] P.T.S.R. 1337, at paragraphs 18 to 23; *Gladman Developments Ltd. v Canterbury City Council* [2019] EWCA Civ 669; [2019] P.T.S.R. 1714, at paragraphs 21 and 22; and *Chichester District Council v Secretary of State for Housing, Communities and Local Government* [2019] EWCA Civ 1640; [2020] 1 P. & C.R. 9, at paragraphs 31 and 32).
27. Of the five points I mentioned in *BDW Trading Ltd.* (at paragraph 21), three seem particularly relevant here: that “the decision-maker must understand the relevant provisions of the plan, recognizing that they may sometimes pull in different directions”; that “section 38(6) does not prescribe the way in which the decision-maker is to go about discharging the duty”; but that “the duty can only be properly performed if the decision-maker, in the course of making the decision, establishes whether or not the proposal accords with the development plan as a whole”.
28. In *R. v Rochdale Metropolitan Borough Council, ex parte Milne* [2000] EWHC 650 (Admin) – which seems not to have been referred to in argument before the judge – Sullivan J., as he then was, said (in paragraph 48):
- “48. It is not at all unusual for development plan policies to pull in different directions. A proposed development may be in accord with development plan policies which, for example, encourage development for employment purposes, and yet be contrary to policies which seek to protect open countryside. In such cases there may be no clear cut answer to the question: “is this proposal in accordance with the plan?” The local planning authority has to make a judgment bearing in mind such factors as the importance of the policies which are complied with or infringed, and the extent of compliance or breach. ...”.

He then referred to the observations to that effect made by Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 (at p.1459D-F):

“... [The decision-maker] will ... have to consider whether the development proposed in the application before him does or does not accord with the development plan. There may be some points in the plan which support the proposal but there may be some considerations pointing in the opposite direction. He will require to assess all of these and then decide whether in the light of the whole plan the proposal does or does not accord with it. ...”.

Sullivan J. went on to say (in paragraphs 49 to 51):

“49. In the light of that decision I regard as untenable the proposition that if there is a breach of any one policy in a development plan a proposed development cannot be said to be “in accordance with the plan”. Given the numerous conflicting interests that development plans seek to reconcile: the needs for more housing, more employment, more leisure and recreational facilities, for improved transport facilities, the protection of listed buildings and attractive landscapes etc., it would be difficult to find any project of any significance that was wholly in accord with every relevant policy in the development plan. Numerous applications would have to be referred to the Secretary of State as departures from the development plan because one or a few minor policies were infringed, even though the proposal was in accordance with the overall thrust of development plan policies.

50. For the purposes of section 54A it is enough that the proposal accords with the development plan considered as a whole. It does not have to accord with each and every policy therein.

51. ... I accept that the terms of the policy – how firmly it favours or sets its face against ... the proposed development [–] is a relevant factor, so too are the relative importance of the policy to the overall objectives of the development plan and the extent of the breach. These are essentially matters for the judgement of the local planning authority. A legalistic approach to the interpretation of development plan policies is to be avoided”

29. Those general propositions were acknowledged by Lord Hope of Craighead in *Tesco Stores Ltd. v Dundee City Council* [2012] UKSC 13; [2012] 2 P. & C.R. 9 (at paragraph 34). And Lord Reed observed in his judgment in that case (at paragraph 19):

“19. That is not to say that such statements [of policy] should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse: *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780, per Lord Hoffmann. Nevertheless,

planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean.”

30. Also relevant here is the decision of this court in *R. (on the application of TW Logistics Ltd.) v Tendring District Council* [2013] EWCA Civ 9; [2013] 2 P. & C.R. 9, where Lewison L.J., having referred to that “important point about development plans” in the judgment of Lord Reed in *Tesco v Dundee City Council*, said this (at paragraph 18):

“18. This point has two consequences that are relevant to our case. First, we must not adopt a strained interpretation of the Local Plan in order to produce complete harmony between its constituent parts. Second, we must be wary of a suggested objective interpretation of one part of the Local Plan as having precedence over another. In a case in which different parts of the Local Plan point in different directions, it is for the planning authority to decide which policy should be given greater weight in relation to the particular decision. ...”.

31. Mr Ashley Bowes, for Mr Corbett, made three main submissions, which he sought to base on the judgments in this court in *Canterbury City Council* (in particular, paragraphs 21, 22, 31 and 40 of my judgment, and paragraph 62 of the judgment of the Master of the Rolls): first, the court’s function in interpreting planning policy is not limited to construing the words of the relevant policies, but involves ascertaining the policies’ “true effect in combination”; secondly, where a proposal is “clearly and unambiguously” in conflict with the development plan, the court can intervene; and thirdly, while the breach of a single policy does not necessarily amount to a failure to accord with the development plan as a whole, there are circumstances in which this may be so.

32. Mr Bowes said there is a question of policy interpretation here, which is whether – as he maintained – saved Policy 14 of the Restormel Local Plan overrode Policy 5 of the Cornwall Local Plan. As the judge had observed (in paragraph 26 of his judgment), the relevant policies of the development plan were not inconsistent with each other – which would have offended regulation 8(4) and (5) of the Town and Country Planning (Local Planning) (England) Regulations 2012. Taken together, Mr Bowes submitted, those policies were “clearly and unambiguously” against the proposal – because of the acknowledged breach of Policy 14. That policy had been deliberately saved by the Secretary of State. And it is in unequivocal terms: proposed development “will not be permitted” if it “would cause harm to the landscape, features and characteristics” of an Area of Great Landscape Value. The officer concluded that there would be such harm. In those circumstances, as the judge recognized, Policy 14 had to be seen as a policy whose effect, “by necessary implication”, was to override – or at least to limit or qualify – Policy 5. The officer failed to see this. Her conclusion that the proposal was in accordance with the development plan as a whole betrayed a misinterpretation of policy. That was an error of law.

33. Mr Bowes also submitted that the judge was right to find the officer’s reasoning inadequate. In the sense referred to in *Mansell v Tonbridge and Malling Borough Council* [2017] EWCA Civ 1314; [2019] P.T.S.R. 1452 (at paragraph 42), the advice she gave the members was materially misleading, because she failed to draw to their attention the fact that the application before them was not in accordance with the development plan.

34. I cannot accept Mr Bowes’ submissions. The answer to them, in my view, lies in a straightforward application of the principles in the authorities to which I have referred.

Those principles require no further elaboration here. The approach they suggest is familiar. If one follows that approach, the correct interpretation of the relevant policies in this case does not, in my opinion, yield the understanding of Policy 14, and its relationship to the other policies, for which Mr Bowes contended. On the contrary, I consider the understanding for which the council contends to be both realistic and, as a matter of law, correct.

35. The recent decisions of this court in *Canterbury City Council* and *Chichester District Council* demonstrate the need for care in construing the particular provisions of the development plan in question (see my judgment in *Chichester District Council*, at paragraph 32). In *Canterbury City Council*, as in the first instance decision in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin), the suite of policies for housing development, on their true interpretation, formed a complete strategy and, as a matter of “natural and necessary inference”, left no scope for proposals lacking explicit support in that strategy. By contrast, in *Chichester District Council*, the provisions of the local plan required no such inference, because the policies of central relevance to the proposed housing development were explicit. As always, the interpretation of the relevant policies depended on a sensible reading of the language used in them, in their context, and together (see paragraphs 47 to 49 of my judgment).
36. Like *Chichester District Council*, this is not a case where the interpretation of the relevant policies requires any inference to be drawn of the kind that was necessary in *Canterbury City Council*. The policies provide in their own terms a readily intelligible basis for deciding whether a proposal such as Mr Tavener’s accords with the development plan as a whole. Each policy is clearly expressed. But they must be read together, not in isolation.
37. Mr Tavener’s proposal found support in a policy directly relevant to such development. But it was also in conflict, to some degree, with policies for the protection of Areas of Great Landscape Value.
38. Policy 5 of the Cornwall Local Plan was the policy deliberately included in the development plan to support “new, high quality sustainable tourism facilities, attractions and accommodation”, subject to their being “of an appropriate scale ...”, their “accessibility by a range of transport modes”, and their “benefits”. That support is not subject to any proviso, stated either in the policy itself or in its supporting text, as to the effects a particular development might have on an area of protected landscape – including Areas of Great Landscape Value. Policy 5 does not refer to the policies aimed at the protection of those areas – Policy 23 of the Cornwall Local Plan itself and saved Policy 14 of the Restormel Local Plan.
39. Those policies were of course relevant to Mr Tavener’s proposal, because the application site was in an Area of Great Landscape Value. But neither of them rules out development of any particular type in such areas. Neither precludes new “tourism facilities ... and accommodation”. Both seek to protect Areas of Great Landscape Value, and other designated areas, from unsuitable development. Policy 23 is in positive language. It does not speak of “harm”. It says what proposals for development in an Area of Great Landscape Value “should” do – that they “should maintain the character and distinctive landscape qualities of such areas”. Policy 14 is in negative terms. It says simply that “[developments] will not be permitted that would cause harm to the landscape, features and characteristics of

Areas of Great Landscape Value”. The purpose of the policy, stated in paragraph 5.25 of the supporting text, is to “protect” those areas from “inappropriate development”.

40. I acknowledge that the language of Policy 14 is unqualified. A word such as “normally” or “generally” was not inserted to soften the expression “will not be permitted”. Nor is the policy qualified by any reference to the nature or degree of harm likely to be caused. And it says nothing about development expressly supported in other policies of the plan. None of this means, however, that the policy is intended to operate to the exclusion of those policies, such as Policy 5 of the Cornwall Local Plan, in which the benefits of particular forms of development are emphasized, or that it renders those other policies irrelevant to the question of whether a particular proposal accords with the development plan as a whole. Policy 14 does not purport to limit the operation of any other policy of the plan. It does not “implicitly” limit or qualify Policy 5, as Mr Bowes submitted.
41. When the relevant policies of the plan are read together, as they must be, I do not think it can be said that Policy 14 has automatic primacy among them, so that any breach of that policy, however slight, will always be conclusive when the decision-maker is considering whether a particular proposal is in accordance with the plan as a whole. That understanding of Policy 14 would not only be an unrealistic and unnecessary constraint on the decision-maker’s performance of the section 38(6) duty; it is also incorrect as a matter of construction. None of the policies, including Policy 14, is framed in terms that give it dominance over the others. No order of priority, setting one policy higher than another, or implying that one overrides or displaces any other, is indicated either in the policies themselves or in the accompanying text. Nowhere is it stated, or implied, that any conflict with Policy 14 will necessarily lead to a proposal being found to be not in accordance with the development plan as a whole, or to a refusal of planning permission. And in my view there can be no justification for reading words into Policy 14 that are not there, effectively excluding from the matrix of development plan policy relevant to proposals for “tourism facilities ... and accommodation” the very policy that specifically relates to development of this kind – Policy 5; denying that policy its proper place in the performance by the council of its duty under section 38(6); and nullifying the support that such proposals are given by the plan.
42. I am not saying that, as a matter of principle, the breach of a single policy of a development plan can never be capable of amounting to conflict with the plan as a whole. I would not go that far. But that general question is not the issue here. We need only decide whether, on their correct interpretation, the policies with which we are concerned had such an effect, so that any conflict at all with Policy 14 and Policy 23 would inevitably deprive a proposal of the statutory “presumption in favour of the development plan” – as Lord Hope described it in *City of Edinburgh Council* (at p.1449H). I do not think they did.
43. In my opinion this is a case in which, on their correct interpretation, the relevant policies of the development plan were – as Lewison L.J. put it in *TW Logistics Ltd.* (at paragraph 18) – “[pointing] in different directions”. Policy 5, supportive of new “tourism ... accommodation” being developed in Cornwall, worked in favour of the proposal. Policy 23 and saved Policy 14, unfavourable to development that would harm the Area of Great Landscape Value, worked against it. It was for the council as local planning authority, responsible for the day-to-day application of development plan policy, to “decide which policy should be given greater weight [in this] particular decision”.

44. The officer's assessment in her report sits well with that analysis. She did not misinterpret any of the relevant policies, including Policy 14, or fail to grasp how those policies interact with each other. Nor did she fall into error when applying them to the development proposed.
45. How was the committee to resolve the tension between policy support for the proposal and policy conflict when deciding whether it was in accordance with the development plan as a whole? The answer is not that, as a matter of "necessary inference", Policy 14 on its own, or together with Policy 23, dictated the outcome. Under section 38(6) the members' task was not to decide whether, on an individual assessment of the proposal's compliance with the relevant policies, it could be said to accord with each and every one of them. They had to establish whether the proposal was in accordance with the development plan as a whole. Once the relevant policies were correctly understood, which in my view they were, this was classically a matter of planning judgment for the council as planning decision-maker.
46. The main factors in that exercise of planning judgment were, on one side, the benefit of the proposal in furthering the aims of Policy 5 and, on the other, the extent and significance of the breach of Policy 14 and Policy 23. In her assessment the officer weighed those factors against each other, in conclusions that are not in themselves criticized by Mr Bowes. She concluded that the proposed development "would support economic growth and safeguard/create jobs in this rural area", and "would therefore comply with paragraph 28 of the NPPF and policy 5 of the CLP" (paragraph 35 of the report). Having reminded the committee of the words of Policy 23 and Policy 14 (in paragraphs 40 to 43), she concluded that "the overall impact upon the Area of Great Landscape Value would be slight/moderate at a localised level which would weigh against the proposal" (paragraph 58). The balance between those factors is clearly struck in her decisive conclusion that "considering the proposal in accordance with the development plan and [the NPPF] as a whole", she would give, "limited weight to the impact upon the AGLV as the views are localised and can be further mitigated by suitable planting and ... greater weight to the economic benefits of the proposal" (paragraph 11) – a conclusion amplified by the recognition that it "... would result in a satisfactory development which would add to sustainable economic growth in rural areas and assist the local tourist industry" (paragraph 12). Put simply, therefore, the proposal's compliance with Policy 5 prevailed over its conflict with Policy 14 and Policy 23, and, in the absence of conflict with any other policy, a decision to approve it was a determination made "in accordance with the development plan".
47. Neither that exercise of planning judgment under section 38(6) of the 2004 Act nor any of the ingredient planning judgments made in the course of the officer's assessment of the proposal on its merits was irrational, or vulnerable in any other way to criticism in a public law challenge.

The officer's reasoning

48. The parties agreed that the second of the three main issues in the appeal – whether the officer's reasoning towards her conclusion that the proposal should be approved was inadequate – falls away if the first issue is decided in the council's favour. But in any event I would reject the complaint that the officer's reasons fell short of what was required.

49. When the adequacy of a planning officer's report to committee is called into question, the court does not expect to find a flawless discussion of every planning issue. The principles are well known (see *Mansell*, at paragraph 42 in my judgment and paragraph 63 in the judgment of the Chancellor of the High Court). The court must ask itself whether the officer's advice is "significantly or seriously misleading – misleading in a material way", such as "where the officer has simply failed to deal with a matter on which the committee ought to receive explicit advice if the local planning authority is to be seen to have performed its decision-making duties in accordance with the law". Only if there is "some distinct and material defect" in that advice will the court intervene (paragraph 42(3)).
50. Applying that test to the officer's report in this case, I cannot see how it could be regarded as defective. The officer did not mislead the members. She identified the relevant policies of the development plan, evidently understood those policies correctly, applied them lawfully, addressed the other material considerations, including relevant policy in the NPPF, and guided the committee appropriately in discharging their duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. The assessment and advice in her report are legally sound.
51. I therefore disagree with the analysis that led the judge to quash the council's grant of planning permission. In my view, he was wrong to hold that the proposal's conflict with Policy 14 prevented the council from concluding, on the officer's advice, that a decision to approve it was in accordance with the development plan. He was also wrong to hold that in this respect the reasoning in the officer's report was at fault.

The Policy 7 issue

52. The judge did not find it necessary to come to a concluded view on the question of whether development of the type proposed by Mr Tavener should be regarded as the provision of "housing" within Policy 7 of the Cornwall Local Plan (paragraph 34 of the judgment).
53. On the respondent's notice, Mr Bowes submitted that as well as misunderstanding Policy 14 and Policy 23, the council misconstrued Policy 7 and failed to take into account the breach of that policy, which also made it impossible to conclude that the proposal was in accordance with the development plan. The council did not identify, in full, the relevant provisions of the development plan, and have regard to them all – as section 70(2) of the 1990 Act and section 38(6) of the 2004 Act required (see the speech of Lord Clyde in *City of Edinburgh Council*, at p.1459D-E). It did not "understand the nature and extent of the departure from the plan", and "consider on a proper basis whether such a departure [was] justified by other material considerations" (see the judgment of Lord Reed in *Tesco v Dundee City Council*, at paragraph 22).
54. Apart from the defined exceptions, none of which applied here, Policy 7 prevents the development of "housing", "new homes" or "dwellings" in the countryside, including – said Mr Bowes – changes of use to residential use. Even if read as applying only to development within Class C3 of the Town and Country Planning (Use Classes) Order 1987, it is wide enough to embrace the provision of holiday accommodation in the form of caravans and holiday lodges in seasonal use, and would thus include accommodation whose occupancy was restricted by a condition of the kind imposed by the council in this case (see *Gravesham Borough Council v Secretary of State for the Environment* (1984) 47 P. & C.R. 142). Mr

Bowes submitted, therefore, that the officer's reference simply to "market housing" in paragraph 27 of her report reveals too narrow an understanding of the policy, and that this error was not overcome by a condition preventing the development being used as "permanent residential accommodation".

55. Mr Bowes relied on the proposition, accepted by the Court of Appeal (Criminal Division) in *R. v Akhtar and Akhtar* [2015] EWCA Crim 1430; 2015 WL 4938237 (at paragraph 34), that "[both] permanent residences and short-term holiday homes fall within Class C3". He also referred to the decision of this court in *Moore v Secretary of State for Communities and Local Government* [2012] EWCA Civ 1202; 2012 WL 4050191, where Sullivan L.J. said (at paragraph 27) that "whether the use of a dwellinghouse for commercial letting as holiday accommodation amounts to a material change of use will be a question of fact and degree in each case, and the answer will depend upon the particular characteristics of the use as holiday accommodation". On the facts in that case, as Sullivan L.J. said (at paragraph 36), the "particular use for holiday lettings [was] very far removed from the permitted use as a dwellinghouse and a material change of use has occurred". Mr Bowes submitted, however, that the description of the proposed "comfortable peaceful accommodation for families and couples" given by Mr Tavener in paragraph 10 of his witness statement of 9 November 2018 would fall within the broad concept of a dwelling-house, which is enough to engage Policy 7. In the Lower Sticker enforcement appeal, to which the parish council referred in its objection, the inspector had accepted (in paragraph 9 of his decision letter) that "[a] caravan used for holiday purposes falls within use class C3 and therefore ... Policy 7 of the recently adopted [Cornwall Local Plan] is relevant". The same was so here.
56. I do not accept that argument. Once again one must remember that the development plan has to be read sensibly as a whole. Policy 5 and Policy 7 have quite different objectives. However, as Mr Findlay submitted, on the construction of Policy 7 urged upon us by Mr Bowes, it is hard to conceive of any "tourism ... accommodation" in the countryside of the kind supported by Policy 5 that would escape the restriction in Policy 7, though the latter says nothing about such development. This seems an unjustified reading of the two policies. And in my view it is incorrect. The policies may not be mutually exclusive in the forms of accommodation to which they potentially apply. But they can be read, and should be, without introducing unintended contradiction. And I think that in this case the council's committee, in the light of the officer's advice, was entitled to deal with Mr Tavener's proposal as "tourism ... accommodation" of the kind that earns the support of Policy 5, and not also within the reach of Policy 7.
57. Mr Bowes did not contend that the proposed development lay outside the scope of Policy 5 – and, in particular, the provision expressing support for "new, high quality sustainable tourism ... accommodation" so long as it satisfies the requirements relating to "scale", "accessibility" and "benefits". That would not have been a realistic submission. The proposal, as described by the officer under the heading "Principle of Development" in paragraphs 27 to 36 of her report, undoubtedly fell within Policy 5, and was supported by it.
58. Was the officer wrong to conclude that the proposal did not have to be considered under Policy 7 in addition to Policy 5? In my view, at least in the circumstances of this case, she was not. This much is clear from what she said when dealing with the "Principle of Development" in paragraph 27 of her report, where she noted that the "application site is located within the countryside where open market housing would not be supported by

policy”. She can only have been referring there to the restriction on such development in Policy 7. Mr Bowes did not suggest otherwise.

59. I do not think the officer misinterpreted Policy 7. She made it plain that she was conscious of the restriction it contains on the development of “housing” in the countryside. She did not suggest that any of the exceptions might apply here. Nor did she suggest that the concept of “new homes” or “dwellings” in the policy was to be taken more narrowly than “[use] as a dwellinghouse (whether or not as a sole or main residence)”, within Class C3 of the Use Classes Order. Her understanding of the policy was not at odds with the broad conception of such use in the relevant authorities. She did not advise the members that the development of “holiday accommodation” could never, in any circumstances, be regarded as “housing” within the ambit of the policy.
60. She did, however, confront the crucial question, which was whether in the particular circumstances of this case, where the proposed development was an extension to an existing holiday park and met the relevant criteria in Policy 5, and despite the condition she recommended to control the occupancy of the proposed “holiday accommodation”, the proposal ought nevertheless to be regarded as one to which Policy 7 should be applied.
61. She was aware of what the inspector had said in his decision letter on the Lower Sticker appeal. Not only had that decision had been referred to in the parish council’s objection, which she quoted in her report; it had also been discussed in correspondence between her and Mr Corbett in December 2017. In her email to Mr Corbett dated 4 December 2017, she contrasted the development at Lower Sticker with that proposed by Mr Tavener. On the facts there, as she pointed out, the inspector had concluded that the development against which the council had enforced, which was not an extension of an existing tourism facility, found no support in Policy 5, but ought to be assessed against Policy 7 as “housing in the countryside”. The inspector said (in paragraph 11 of his decision letter):
- “11. LP Policy 5 supports the development of new tourism facilities through the provision of new, high quality sustainable accommodation which is of an appropriate scale to its location and is accessible by a range of transport nodes. As the site is not within a settlement that provides for the day-to-day facilities the development does not accord with LP Policy 5 and paragraphs 28 and 55 of [the NPPF]. No analysis of the contribution the development makes to the local economy or how it augments local tourist needs have been submitted, other than the appellants stating that caravan lettings support their income and that the caravans provide a special low-key type of holiday.”
62. Mr Tavener’s proposal for the extension of the Sun Valley Holiday Park was significantly different. As the officer went on to say in her email, it “would expand the holiday park”. She quoted the relevant provision in Policy 5 supporting the “... the enhancement of existing or provision of new, high quality sustainable tourism facilities ...”. And she confirmed that Mr Tavener’s proposal would be assessed against the considerations in that policy.
63. When she prepared her report for the committee meeting in February 2018, that is what she did. Applying Policy 5, she was satisfied that in this case the proposal was squarely within the policy, complied with it, and would bring about benefits of the kind it sought, contributing to the local economy and meeting a local need for tourism facilities. Her

description of it (in paragraph 35 of the report) as an “expansion of an existing sustainable tourism facility, which contains existing facilities for patrons of [the Sun Valley Holiday Park] in an appropriate location where existing needs are not being met” is not criticized. Nor is her conclusion (in the same paragraph), that the development “would support economic growth and safeguard/create jobs in this rural area”, and so “comply with paragraph 28 of the NPPF and policy 5 of the CLP”.

64. These were matters of planning judgment, which, in my view, the officer, and the members, exercised lawfully. As the officer made clear, her conclusions assumed a condition restricting the use of the proposed “holiday units” to their use as such, thus ensuring they would remain within Policy 5 (paragraph 27 of the report). The condition stipulates that the pitches are to be “used as holiday accommodation only and shall not be occupied as a person’s sole or main place of residence”. And the reason for its imposition – “[to] accord with development plan housing policies under which permanent residential accommodation would not normally be permitted on the site and the accommodation ... is unsuitable for continuous occupation and in accordance with the aims and intentions of paragraphs 28 and 55 of [the NPPF]” – shows the council’s intent that the development will remain, as proposed, “tourism ... accommodation” within Policy 5, and not become “[housing] in the countryside” contrary to Policy 7.

Conclusion

65. Finally, I think it is worth recalling what Baroness Hale of Richmond said about decision-making by local planning authorities in *R. (on the application of Morge) v Hampshire County Council* [2011] UKSC 2; [2011] 1 W.L.R. 268 (at paragraph 36): that “in this country planning decisions are taken by democratically elected councillors, responsible to, and sensitive to the concerns of, their local communities”, who “go about their decision-making in a different way from courts”, aided by “professional advisers who investigate and report to them”, and it is “their job, and not the court’s, to weigh the competing public and private interests involved”.
66. I think it can fairly be said that, in undertaking that role, the professional officers of a local planning authority, and members who sit regularly on a planning committee, will not often be shown to have misinterpreted the policies of its development plan. This is not to cast any doubt on the basic principle that the interpretation of planning policy is ultimately a matter of law for the court, not the policy-making authority, nor is it to overlook Lord Reed’s warning in *Tesco v Dundee City Council* (at paragraph 19) that local planning authorities “cannot make the development plan mean whatever they would like it to mean” – though he did not suggest it was likely that many authorities would think they could. When planning decisions are made, the policies of the local plan must always be properly understood and lawfully applied. Errors of law will sometimes be made, and the court will act when they are.
67. In this case, in my view, no such error occurred. The council did not misconceive the relevant policies of its plan, and did not apply them unlawfully. Its decision was clearly explained in the officer’s report. The grant of planning permission should not have been quashed.
68. For the reasons I have given, I would allow the appeal.

Lord Justice Leggatt

69. I agree.

Lord Justice Lewison

70. I also agree.

R. (ON THE APPLICATION OF AN TAISCE (THE NATIONAL TRUST FOR IRELAND)) v SECRETARY OF STATE FOR ENERGY AND CLIMATE CHANGE

COURT OF APPEAL (CIVIL DIVISION)

Longmore, Sullivan & Gloster, L.JJ.: 1 August 2014

[2014] EWCA Civ 1111; [2015] Env. L.R. 2

☞ Consultation; Development consent orders; EU law; Environmental impact assessments; Nuclear power; Nuclear safety; Risk; Transboundary pollution

H1 *Judicial review—environmental assessment—transboundary environmental impacts—consent for nuclear power station—whether transboundary consultation required—whether project “likely to have significant effects on the environment in another Member State”—whether misdirection as to meaning of “likely” within Article 7 by “scoping out” severe nuclear accidents on basis that very unlikely—whether lawful reliance on existence of nuclear regulatory regime*

H2 The respondent (S) decided to grant a development consent order for a new nuclear power station at Hinkley Point C (HPC). The appellant (AT) then sought judicial review of the decision, arguing that S had failed to comply with reg.24 of the Infrastructure Planning (Environmental Impact Assessment) Regulations 2009 and/or art.7 of the EIA Directive in considering whether HPC was likely to have significant effects on the environment in the Republic of Ireland. AT argued that transboundary consultation should have been undertaken with the Irish people. It was common ground that the construction of HPC was a project that fell within Annex I to the EIA Directive. An environmental impact assessment was required and was carried out, and the necessary public consultation was undertaken within the United Kingdom, in accordance with arts 4-6 of the Directive. No transboundary consultation in accordance with art.7 was undertaken because S did not consider that the HPC project was “likely to have significant effects on the environment in another Member State.” A transboundary screening assessment carried out on S’ behalf said: “On the basis that licensing and monitoring conditions are effective, impacts will not be significant”. The grounds of appeal were that S had: (1) misdirected himself as to the meaning of “likely” within art.7 by “scoping out” severe nuclear accidents on the basis that they were very unlikely; and (2) even if he was correct as to the meaning of “likely”, S had erred in relying on the existence of the UK nuclear regulatory regime to fill gaps in current knowledge when reaching his conclusion as to the likelihood of nuclear accidents. An expert report recognised that the calculated probability of such an accident was that one would not be expected to occur more frequently than once in every 10 million years of reactor operation.

H3 **Held**, in dismissing the appeal:

H4 1. The CJEU had not ruled on the meaning of “likely to have significant effects on the environment” in the EIA Directive. Although AT relied upon *Waddenzee* (C-127/02) in arguing that a project was “likely to have significant effects on the environment” if such effects “cannot be excluded on the basis of objective evidence”, there were clear distinctions between the EIA Directive and the Habitats Directive, with which *Waddenzee* was concerned. The scope of the EIA Directive was wide ranging, and it did not prescribe what decision had to be taken by the competent authority. The Habitats Directive was more focused and the very high level of protection required a stringent approach for approval of projects, and at the screening stage. If AT’s approach were followed, there was a real danger that both the public when consulted and decision takers would “lose the wood for the trees”, thereby causing the EIA process to become less effective as an aid to good environmental decision making.

H5 2. That approach to likelihood was also inconsistent with the selection criteria set out in Annex III to the EIA Directive, which had to be taken into account when a decision was being taken as to whether an Annex II project shall be made subject to an environmental impact assessment; i.e. whether it was likely to have significant effects on the environment.

H6 3. A reference to the CJEU was not necessary. Although there were “Findings” by the ESPOO Convention Implementation Committee, and Guidance from the European Commission that affected Parties should always be notified unless significant adverse transboundary impact could be excluded with certainty, no matter how low the threshold for a likely significant effect might be set by the CJEU, S’ decision would still be lawful.

H7 4. The true nature of the dispute in the case was whether the exclusion of a significant environmental effect from the EIA process was permissible only if it had been demonstrated that there was no risk whatsoever of it occurring, or if exclusion was permissible where it had been demonstrated that the risk was extremely remote. In order to succeed in the claim the appellant had to establish that any risk, no matter how remote, could not be excluded unless it had been demonstrated that there was no possibility of its occurring: in effect a “zero risk” approach to the likelihood of significant environmental effects. It would be surprising if the Grand Chamber had intended to impose such a high and inflexible threshold for “appropriate assessment”, even in the context of the Habitats Directive. Even if the *Waddenzee* approach to likelihood was carried over into the EIA Directive, it had to be open to a competent authority to conclude that the risk of a significant adverse effect on the environment was so remote that there was “no reasonable scientific doubt” as to the absence of that adverse effect for the purpose of the EIA Directive. The competent authority did not have to be satisfied that there was no risk, however remote, that a severe nuclear accident would occur in order to be satisfied that there was “no reasonable scientific doubt” that such an accident would not occur.

H8 5. It was common ground that the probability of a severe nuclear accident was very low indeed. The issue, therefore, was whether the risk of a significant effect on the environment could properly be excluded on the basis of a very low probability, or only upon the basis of a zero probability. Annex III required the Member States to consider both the magnitude and complexity of an environmental impact and the probability of such an impact when deciding whether an Annex II

project was likely to have significant effect on the environment. As a matter of common sense, the greater the potential impact, the lower would be the level of probability at which the competent authority would decide that it should be subjected to the EIA process. That left an area of judgment for the competent authority; balancing the severity of any potential environmental harm against the probability of it occurring. It recognised the fact that some significant effects on the environment, e.g. a significant radiological impact, were much more significant than others. Given the wide range of projects covered by the EIA Directive and the express requirement to consider the probability of any impact, even if it was appropriate to apply the “cannot be excluded on the basis of objective evidence” approach to the likelihood of significant effects on the environment in the EIA Directive, there was no realistic prospect of the “zero risk” approach being adopted by the CJEU. Such an approach to likelihood would frustrate, rather than further, the purpose of the Directive.

H9 6. There was no dispute that S had been, in principle, entitled to have regard to the UK nuclear regulatory regime when reaching a conclusion as to the likelihood of nuclear accidents. There was no basis for the distinction made by AT between “permissible” reliance upon a pollution regulator applying controls which it had already identified in the light of assessments already undertaken, on the basis of a scheme which had already been designed, and reliance upon current gaps in knowledge being filled by the fact of the existence of the pollution regulator making future assessments on elements of the project still subject to design changes, which AT had argued to be impermissible.

H10 Cases referred to:

CILFIT Srl v Ministry of Health (283/81) [1982] E.C.R. 3415; [1983] 1 C.M.L.R. 472

Gateshead MBC v Secretary of State for the Environment [1995] Env. L.R. 37; [1995] J.P.L. 432;

Landelijke Vereniging tot Behoud van de Waddenzee v Staatssecretaris van Landbouw, Natuurbeheer en Visserij (C-127/02) [2004] E.C.R. I-7405; [2005] 2 C.M.L.R. 31; [2005] Env. L.R. 14

R. (on the application of Bateman) v South Cambridgeshire DC [2011] EWCA Civ 157; [2011] N.P.C. 22

R. (on the application of Evans) v Secretary of State for Communities and Local Government [2013] EWCA Civ 114; [2013] J.P.L. 1027

R. (on the application of Jones) v Mansfield DC [2003] EWCA Civ 1408; [2004] 2 P & C.R. 14; [2004] Env. L.R. 21

R. (on the application of Loader) v Secretary of State for Communities and Local Government [2012] EWCA Civ 869; [2012] 3 C.M.L.R. 29; [2013] Env. L.R. 7

R. (on the application of Miller) v North Yorkshire CC [2009] EWHC 2172 (Admin)

R. (on the application of Morge) v Hampshire County Council [2010] EWCA Civ 608; [2010] P.T.S.R. 1882; [2011] Env. L.R. 8

Syllogos Ellinon Poleodomon kai Chorotakton v Ypourgos Perivallontos (C-177/11) *United Kingdom v Commission* (C-180/96) [1998] E.C.R. I-2265; [1998] 2 C.M.L.R. 1125

World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen (C-435/97) [1999] E.C.R. I-5613; [2000] 1 C.M.L.R. 149; [2000] Env. L.R. D14

H11 Legislation referred to:

Directive 92/43 on the conservation of natural habitats and of wild fauna and flora arts 2, 3 & 6 (Habitats Directive)

Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment art. 3 (SEA)

Directive 2011/92 arts 1, 2 & 4-7 and Annexes I-IV (Codified EIA)

Environmental Protection Act 1990

Town and Country Planning Act 1990

(UNECE) Convention on Environmental Impact Assessment in a Transboundary Context 1991 (Espoo Convention) (UNECE)

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 (Aarhus Convention) art. 6 and Annex I

H12 *Mr D. Wolfe Q.C.* and *Mr J. Kenny B.L.*, instructed by Leigh Day, appeared on behalf of the appellant.

Mr J. Swift Q.C., *Mr. R. Warren Q.C.* and *Mr J. Moffett*, instructed by Treasury Solicitor, appeared on behalf of the respondent.

Ms N. Lieven Q.C. and *Mr H. Phillpot*, instructed by Herbert Smith Freehills LLP, appeared on behalf of the interested party.

JUDGMENT**SULLIVAN LJ:****Introduction**

- 1 In this claim for judicial review the Claimant challenges the decision dated 19th March 2013 of the Defendant to make an Order (“the Order”) granting development consent for the construction of a European pressurised reactor (“EPR”) nuclear power station at Hinkley Point in Somerset (“HPC”).

Background

- 2 The background to the claim is explained in considerable detail in the judgment of Patterson J [2013] EWHC 4161 (Admin) dismissing the Claimant's application for permission to apply for judicial review following a “rolled up” hearing. On the 27th March 2014 I granted the Claimant permission to apply for judicial review and ordered that the application should be retained in the Court of Appeal.
- 3 The judge set out the factual background in paragraphs 5-62 of her judgment. There was no challenge to this aspect of her judgment, and I gratefully adopt, and will not repeat, all of the detail that is contained in those paragraphs.
- 4 There is no dispute as to the legal framework, which the judge set out in paragraphs 63-79 of her judgment. Article 7 of Directive 2011/92/EU (“the EIA Directive”) is of central importance in this claim, and for convenience I set out the material paragraphs:

“1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose

territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

- (a) a description of the project, together with any available information on its possible transboundary impact;
- (b) information on the nature of the decision which may be taken.

The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).

3. The Member States concerned, each insofar as it is concerned, shall also:

- (a) Arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and
- (b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.”

5 It is common ground that the construction of HPC is a project which falls within Annex I to the EIA Directive. An environmental impact assessment was required and was carried out, and the necessary public consultation was undertaken within the United Kingdom, in accordance with Articles 4-6 of the Directive.

6 The Defendant did not carry out transboundary consultation in accordance with Article 7 because he did not consider that the HPC project was “likely to have significant effects on the environment in another Member State.” A transboundary screening assessment carried out by the Planning Inspectorate (“PINS”) on the Defendant’s behalf, having referred to Appendix 7E to Volume 1 of the Interested Party’s Environmental Statement, which contained an assessment of potential transboundary effects, said:

“On the basis that licensing and monitoring conditions are effective, impacts will not be significant.”

The screening assessment also said, when dealing the “Probability”:

“The probability of a radiological impact is considered to be low on the basis of the regulatory regimes in place.

There could be direct impacts related to the discharge of water during normal operational conditions. However, the discharge of water is expected to be controlled by appropriate licensing conditions and regular monitoring, and hence the probability of any adverse impacts is likely to be low.

The Developer has indicated that information is included in the Government's submission to the European Commission under Article 37 of the Euratom Treaty to show that transboundary impacts from accidents during operation or decommissioning will be so low as to be exempt from regulatory control.”

- 7 The Austrian Government wrote to the Department of Energy and Climate Change indicating that it wished to participate in the process of considering the application for the Order. It was sent a copy of the application, and its response included an expert report. The decision letter dated 19th March 2013 summarised the expert report, and the Defendant's response thereto, in paragraphs 6.6.2(ii) and (iii):

(ii) The expert report focuses on nuclear safety issues and as such has been reviewed by the Office of Nuclear Regulation (“ONR”). It draws heavily on documents published by the ONR during the Generic Design Assessment of the EPR. Although broadly technically sound, it tends to overemphasise the significance of those areas where ONR has in any event determined that more work needs to be done during any subsequent construction and commissioning of a power station based on the EPR (i.e. such as at Hinkley Point) as part of its own regulatory processes.

(iii) The Austrian expert contends that in assessing the likely environmental effects of HPC project, I should take into account the effects of very low probability, extreme (or severe) accidents. Effectively the report says that unless it can be demonstrated that a severe accident (involving significant radiological release) cannot occur, then no matter how unlikely it is, I must consider its consequences as part of the development consent process, having regard, in particular, to the possible deleterious effects on Austria. However, in my view such accidents are so unlikely to occur that it would not be reasonable to “scope in” such an issue for environmental impact assessment purposes.”

- 8 The Claimant contends that there was a failure to comply with Article 7 of the Directive. The Defendant failed to consult the public in the Republic of Ireland in accordance with Article 7 because:

- (1) He misdirected himself as to the meaning of “likely” within Article 7 by “scoping out” severe nuclear accidents on the basis that they were very unlikely (Ground 1 “likelihood”); and
- (2) Even if he was correct as to the meaning of “likely”, the Defendant erred in relying on the existence of the UK nuclear regulatory regime to fill gaps in current knowledge when reaching his conclusion as to the likelihood of nuclear accidents (Ground 2 “regulatory regime”).

- 9 Before considering these two grounds, it is necessary to understand the reference in the decision letter to “very low probability” severe accidents. The Austrian Expert Report had said that severe accidents with high releases of caesium-37 cannot be excluded, and there would be a need for official intervention in Austria

after such an accident, but the report recognised that the calculated probability of such an accident is below $1E-7/a$, which means that such an accident would not be expected to occur more frequently than once in every 10 million years of reactor operation: see paragraph 53 of Patterson J's judgment.

Discussion

Ground 1 Likelihood

- 10 The words “likely to have significant effects on the environment” occur in a number of places in the EIA Directive : in recitals (7) and (9), in Articles 1(1), 2(1) and 7(1), and in a slightly different formulation – “likely significant effects of the proposed project on the environment” – in Annex IV . In similar vein, an Environmental Statement must include “the data required to identify and assess the main effects which the project is likely to have on the environment”: see Article 5(3).
- 11 Two points should be made at the outset of any consideration of what is meant by “likely” in Article 7(1) . It is now common ground that:
- (1) The words “likely to have significant effects on the environment” must have the same meaning throughout the EIA Directive (not least because the environmental information to be supplied to the authorities and the public in the other Member State under Article 7 is the information that must be provided under Article 6 to the public in the Member State in which the project is located); and
 - (2) Whatever that meaning might be, in the context of the EIA Directive the word “likely” does not mean, as an English lawyer might suppose, more probable than not.
- 12 The CJEU has not ruled on the meaning of “likely to have significant effects on the environment” in the EIA Directive . The Domestic authorities were considered by Patterson J in paragraphs 123-126 of her judgment. None of those authorities is binding on this Court. In *R (Morge) v Hampshire County Council* [2010] EWCA Civ 608 [2010] PTSR 1882 , Ward LJ recorded the parties' agreement that “likely” connotes real risk and not probability (paragraph 80). In *R (Bateman) v South Cambridgeshire District Council* [2011] EWCA Civ 157 Moore-Bick LJ expressed the view in paragraph 17 that “something more than a bare possibility is probably required, though any serious possibility would suffice”, but he did not find it necessary to reach a final decision on the question (paragraph 19).
- 13 The Claimant's submission that a project is “likely to have significant effects on the environment” if such effects “cannot be excluded on the basis of objective evidence” is founded on the decision of the Grand Chamber of the CJEU in *Case C-127/02 Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Bogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* (“Waddenzee”). *Waddenzee* was concerned with the Habitats Directive, Article 6 of which materially provides:
- “1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other

development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex 1 and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.” (emphasis added)

14 In paragraphs 42-44 of its judgment the Grand Chamber said:

“42. As regards Article 2(1) of Directive 85/337 [now Article 2(1) of the EIA Directive], the text of which, essentially similar to Article 6(3) of the Habitats Directive , provides that “Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects”, the Court has held that these are projects which are likely to have significant effects on the environment (see to that effect Case C-117/02 *Commission v Portugal* [2004] E.C.R. I-5517, paragraph 85).

43. It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

44. In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC , and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia *Case C-180/96 United Kingdom v Commission* [1998] E.C.R. I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

45. In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.” (emphasis added)

- 15 On behalf of the Claimant, Mr. Wolfe QC, understandably, placed much emphasis upon the Grand Chamber's interpretation of the “essentially similar” text of Article 6(3) of the Habitats Directive; and the fact that the Grand Chamber had drawn an analogy with the judgment in the *United Kingdom* case in which the Court was considering the meaning of likelihood in a very different context: the United Kingdom's response to the BSE crisis, and a Directive which required notification of

“any zoonoses, diseases or other cause likely to constitute a serious hazard to animals or to human health.”

This demonstrated, he submitted, that the Grand Chamber's approach to the likelihood of significant harm in any context where environmental concerns, including the protection of human health, were in issue was based on first principles, and was not confined to the specific characteristics of the Habitats Directive .

- 16 While the text of Article 2(1) of the EIA Directive and Article 6(3) of the Habitats Directive is essentially similar, and both Directives are concerned with environmental protection, there is in my view a clear distinction between the two Directives. The scope of the EIA Directive is wide ranging, it ensures that any project which is likely to have significant effects on the environment is subject to a process of environmental impact assessment. The EIA Directive does not prescribe what decision must be taken by the competent authority – to permit or to refuse – if the environmental impact assessment concludes that the proposal is likely to have significant effects on the environment. The Habitats Directive is more focussed, it protects particular areas of Community importance, which have been defined as “special areas of conservation”, and which must be maintained at, or restored to, “favourable conservation status”: see Articles 2 and 3 . In order to achieve this aim Article 6(3) provides that, subject only to “imperative reasons of overriding public interest” (see Article 6(4)), where there has been an “appropriate assessment”:

“the competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned .” (emphasis added)

- 17 Thus, where there has been an “appropriate assessment” Article 6(3) imposes a very strict test for approval. The Grand Chamber said that competent authorities may approve a plan or project:

“55 only after having made sure that it will not adversely affect the integrity of the site.

56 It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57 So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58 In this respect it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see [1998] E.C.R. I-2211. paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.

59 Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, [2003] E.C.R. I-8105, paragraphs 106 and 113).” (emphasis added)

- 18 In order to achieve this very high level of protection for special areas of conservation an equally stringent approach is required at the screening stage when the competent authority is deciding whether an “appropriate assessment” is required: see paragraph 70 of the [2004] ECR 1-7405. It is for this reason that in a case falling within the Habitats Directive an “appropriate assessment” must be carried out unless the risk of significant effects on the site concerned can be “excluded on the basis of objective information.” Reading the *Waddenzee* judgment as a whole, it is clear that significant effects can be excluded on the basis of objective evidence if “no reasonable scientific doubt remains as to the absence of such effects.”
- 19 Standing back from a detailed analysis of the text of the two Directives, there is no obvious reason why such a strict approach should apply to the screening stage in the EIA Directive, which merely seeks to ensure that any likely significant effects on the environment are identified and properly taken into account in the decision making process. Even if significant environmental effects are identified, and are not merely likely, but are certain to occur, the EIA Directive does not require that approval for an EIA project within either Annex I or II of the EIA Directive must be refused in the absence of some overriding public interest. The Grand Chamber referred to the precautionary principle in *Waddenzee* (see paragraph 44), but it was applying that principle in the context of the Habitats Directive, where the objective is the protection of the integrity of particular sites designated for their conservation importance. In the wider context of environmental protection a “real risk” test embodies the precautionary principle: see *Evans v Secretary of State for Communities and Local Government* [2013] EWCA Civ 114, per Beatson LJ at paragraph 21.
- 20 I have already mentioned the fact that, by contrast with the Habitats Directive, the EIA Directive has a broad scope: it applies to all “projects which are likely to have significant effects on the environment” (Article 1); and the Environmental

Statements prepared for all such projects must include information about all of the likely significant effects (Article 5), and must be subject to public consultation (Article 6). While the claimant stresses the need for any likely environmental effect to be “significant”, it seems to me that adopting the Claimant’s approach to the meaning of likelihood – that a significant environmental effect is “likely” if it cannot be excluded on the basis of objective evidence – would inevitably have the effect of both (a) materially increasing the number of projects within Annex II which would have to be the subject of an EIA; and (b) increasing the number of “likely” significant effects that would have to be included in all Environmental Statements, and consulted upon.

21 Many Environmental Statements for major projects which are now prepared on a “real risk” basis are already very lengthy. If, in addition to being required for more Annex II projects, Environmental Statements had to deal with every possible significant environmental effect, however unlikely, unless it could be excluded on the basis of objective evidence, there is a real danger that both the public when consulted and decision takers would “lose the wood for the trees”, thereby causing the EIA process to become less effective as an aid to good environmental decision making: see *R (Loader) v Secretary of State for Communities and Local Government* [2012] EWCA Civ 869, [2012] 3 C.M.L.R. 29, per Pill LJ at paragraph 46; and *Bateman* per Moore-Bick LJ at paragraph 19.

22 In addition to these wider policy considerations, it is necessary to consider the text of the EIA Directive as a whole. I accept the submission of Mr. Swift QC on behalf of the Defendant that the Claimant’s approach to likelihood is inconsistent with the selection criteria that are set out in Annex II I, which must be taken into account when a decision is being taken as to whether an Annex II project shall be made subject to an environmental impact assessment, ie. whether it is likely to have significant effects on the environment. The selection criteria include “Characteristics of the Potential Impact”. The potential significant effects of projects must be considered in relation to the criteria set out in points 1 and 2 [the characteristics and the location of projects] and having regard in particular to:

- “(a) the extent of the impact (geographical area and size of the affected population);”
- (b) the transfrontier nature of the impact;
- (c) the magnitude and complexity of the impact;
- (d) the probability of the impact ;
- (e) the duration, frequency and reversibility of the impact”. (emphasis added)

Mr Swift submits, rightly in my view, that the need to have regard to “the probability of the impact” would be redundant if the test of likelihood was whether the risk of any impact, however improbable, could be excluded on the basis of objective evidence.

23 For these reasons, I consider that the differences between the scope, purpose and text of the two environmental Directives are such that it is unduly simplistic to say that, because one part of the text in both Directives is “essentially similar”, the meaning of that part of the text in the context of Article 6(3) of the Habitats Directive as determined by the Grand Chamber in *Waddenzee* can simply be carried over into the EIA Directive . The “real risk” test adopted in the domestic authorities (above) incorporates the protective principle in the context of the EIA Directive .

24 Mr Wolfe submitted that even if we were minded to conclude that the Defendant had not erred in his approach to likelihood for the purposes of Article 7, a reference to the CJEU was required because this Court could not be convinced that applying the “real risk” test in the context of the EIA Directive would be correct as a matter of EU law: see *CILFIT (Srl) v Ministry of Health* [1982] E.C.R. 3415 at paragraphs 16-20. In support of that submission he relied, in addition to the Grand Chamber’s judgment in *Waddenzee* (above), upon five considerations, as follows:

- (a) the German text of Article 7(1) ;
- (b) the Russian text of the Convention on Environmental Impact Assessment in a Transboundary context, (“the Espoo Convention”);
- (c) the interpretation of the Espoo Convention by that Convention’s Implementation Committee;
- (d) the Aarhus Convention; and
- (e) Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (“the SEA Directive”).

25 While both (a) and (b) support the proposition that “likely” in Article 7(1) has a broader meaning than “more likely than not”, they do not support the Claimant’s proposition that “likely” in Article 7(1) means “cannot be excluded no matter how unlikely.” In [2004] E.C.R. 1-7405 Advocate General Kokott explained in paragraph 69 of her opinion:

“As regards the degree of probability of significant adverse effect, the wording of various language versions is not unequivocal. The German version appears to be the broadest since it uses the subjunctive “könntè (could). This indicates that the relevant criterion is the mere possibility of an adverse effect. On the other hand, the English version uses what is probably the narrowest term, namely “likely”, which would suggest a strong possibility. The other language versions appear to lie somewhere between these two poles. Therefore, according to the wording it is not necessary that an adverse effect will certainly occur but that the necessary degree of probability remains unclear.”

26 There is no dispute that Article 7 of the EIA Directive gives effect to the Espoo Convention : see recital (15) to the EIA Directive . The English language version of the Convention uses the word “likely”. The Claimant obtained a translation of the Russian version of the Espoo Convention (of which there are three authentic texts, English, French and Russian). The translator states that the word “may” in the expression “may cause a significant adverse transboundary impact”, “fails to convey the meaning of likelihood and expresses a mere possibility which can be either high or low.” In a further statement, the translator explains that the Russian word for “may” “includes something which cannot be excluded or ruled out.” It seems that the Russian word for “may” conveys a flexible concept of possibility which ranges from a high possibility at one end of the spectrum to a possibility which cannot be excluded. As with the German text of the EIA Directive , the Russian text would not constrain the CJEU to adopt the lowest level of possibility inherent in the Russian version of the Espoo Convention . I will deal with the view expressed by the Implementation Committee after I have considered whether any assistance can be obtained from the Aarhus Convention and the SEA Directive .

27 There is no dispute that the EIA Directive must be construed so as to give effect to the Aarhus Convention . Recital (20) to the EIA Directive records the fact that:

“ Article 6 of the Aarhus Convention provides for public consultation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.” (emphasis added)

In broad terms, Annex I to Aarhus lists the kinds of projects that are listed in Annex I to the EIA Directive , while Annex II projects in the EIA Directive may fall within the second part of Article 6(1) of Aarhus. While the word “may” indicates a lower threshold than “likely” (used in the sense of more likely than not), it does not indicate that the test for public consultation across the board – for all activities which may have a significant effect on the environment – is so low as to include any activity where a significant effect on the environment, however unlikely, cannot be excluded.

28 Article 3(2) of the SEA Directive requires an environmental assessment for all plans and programmes (a) which are prepared for certain purposes and which set the framework for future development consent of projects listed in Annexes I and II to the EIA Directive ; and (b) “which in view of the likely effect on sites [special areas of conservation] have been determined to require an [appropriate] assessment pursuant to Article 6 or 7 of [the Habitats Directive] .” In the latter case, the CJEU has held that an environmental assessment is required if a significant effect on the site cannot be excluded: see *Case C-177/11 Syllogos Ellinon Poleodomon kai Chorotakton v Ypourgos Perivallontos*. This decision of the CJEU merely applies the *Waddensee* approach to plans or programmes which are likely to have a significant effect on sites of Community importance, which have been designated as special areas of conservation by the Member States: see paragraphs 19-23 of the judgment. It does not address the issue in the present case: whether the *Waddensee* approach to likelihood should be carried over into the EIA Directive

29 For these reasons, I am not persuaded that any of these considerations assists the Claimant's case. Against this background, I turn to the views expressed by the Implementation Committee (“the Committee”). The judge dealt with this issue in paragraphs 132-142 of her judgment. In summary, the Claimant had relied upon the endorsement by the Parties to the Espoo Convention at their Fourth Meeting of the findings of the Committee in Annex I that Ukraine had not complied with the Convention in, what for convenience I will call the “Danube Black Sea” case. In paragraph 54 in Part III of the Committee's report “Consideration and Evaluation”, preceding its “Findings” in Part IV , the Committee said:

“Article 3, paragraph 1. of the Convention stipulates that Parties shall notify any Party of a proposed activity listed in Appendix I that is likely to cause a significant adverse transboundary impact. The Committee is of the opinion that, while the Convention's primary aim, as stipulated in Article 2, paragraph 1, is to “prevent, reduce and control significant adverse transboundary environmental impact from proposed activities”, even a low likelihood of such an impact should trigger the obligation to notify affected Parties in accordance with Article 3. This would be in accordance with the Guidance on the Practical Application of the Espoo Convention, paragraph 28, as endorsed by decision III/4 (ECE/MP.EIA/6 annex IV). This means that

notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty. This interpretation is based on the precautionary and prevention principles.” (emphasis added)”

30 The judge concluded that the Meeting of the Parties was not purporting to determine the legal position under the Convention, but was setting out a pragmatic approach for the parties to follow, and also said that the Committee had no status to give a legal ruling: see paragraph 135 of the judgment. At the Fourth Meeting, the Parties also asked the Committee “To promote and support compliance with the Convention including to provide assistance in this respect, as necessary.” In response to that request the Committee published its Opinions, as expressed in the reports of its sessions, from 2001 to 2010. Those Opinions included its views expressed in paragraph 54 of Annex 1 to decision IV/2 (above).

31 In 2013 the European Commission published “*Guidance on the Application of the Environmental Impact Assessment Procedure for large-scale Transboundary Projects.*” Under the heading “Need for notification” the Commission’s guidance says:

“The Espoo Convention requires that the Party of origin notifies affected Parties about projects listed in Appendix 1 and likely to cause a significant adverse transboundary impact (Article 3(2)). The notification triggers the transboundary EIA procedure. The Espoo Convention’s primary aim is to *‘prevent reduce and control significant adverse transboundary environmental impact from proposed activities’* (Article 2(1)), but in fact the Party of origin is obliged to notify affected Parties (in accordance with Article 3 of the Espoo Convention) even if there is only a low likelihood of such impact. This means that notification is always necessary, unless significant adverse transboundary impact can be excluded with certainty.¹⁷ This interpretation is based on the precautionary and prevention principles .” (emphasis added)

Footnote 17 cross-refers to paragraph 54 of decision IV/2 (above).

32 As I explained when granting permission to appeal, [2014] EWCA Civ 666, the Chair of the Committee wrote a letter dated 14th March 2004 to the United Kingdom Government. The Committee had requested a copy of Patterson J’s judgment, and had considered the matter between 25th and 27th February 2014 at its 30th session held in Geneva. The Committee’s letter dated 14th March 2014 expressly endorsed the view that it had expressed in the Danube Black Sea case, as to the circumstances in which transboundary consultation was required by the Convention:

“This means that notification is necessary unless a significant adverse transboundary impact can be excluded (decision IV/2, annex I paragraph 54)”

The letter continued:

“On the above grounds, the Committee found that there was a profound suspicion on non-compliance and decided to begin a Committee initiative further to paragraph 6 of the Committee’s structure and functions. In line with paragraph 9 of the Committee’s structure and functions, the Committee decided that the United Kingdom should be invited to the Committee’s thirty-second session (9–11 December 2014) to participate in the discussion an to present information and opinions on the matter under consideration.”

- 33 Having read the Committee's letter, I was satisfied that there was a compelling reason for granting permission to appeal. There was a need for this Court to decide whether it was possible to give a definitive ruling as to the approach to likelihood in the EIA Directive, or whether there should be a reference of that question to the CJEU. I have explained in paragraphs 16-23 (above) why I consider that the Defendant was not required to apply the *Waddenzee* approach to the likelihood of significant transboundary environmental effects under Article 7 of the EIA Directive. This is not a court of final appeal. If we had to apply *CILFIT* I could not say that I was convinced that the other Member States and the CJEU would necessarily conclude that the “real risk” approach is the correct approach to the likelihood of significant effects on the environment for the purposes of the EIA Directive. Does this mean that a reference to the CJEU is necessary for the purpose of deciding this claim?
- 34 Mr. Swift acknowledged that the threshold for the likelihood of significant effects on the environment for the purposes of the EIA Directive is a very important issue, with EU-wide implications. However, both he and Miss Lieven QC on behalf of the Interested Party submitted that a reference to the CJEU was not necessary for the purpose of determining this claim for judicial review, because no matter how low the threshold for a likely significant effect on the environment might be set by the CJEU, the Defendant's decision dated 19th March 2013 would still be lawful.
- 35 I accept that submission. There is an artificiality in the Claimant's claim. The Defendant was not writing an academic dissertation on the concept of likelihood in the EIA Directive, he was deciding whether to grant development consent for a particular project: the construction of an EPR nuclear power station, HPC. In its submissions, the Claimant posited a stark contrast between the “real risk” and the “cannot be excluded on the basis of objective information”, approaches, to the issue of likelihood in the EIA Directive. The distinction between these two approaches to likelihood is clear as a matter of abstract legal analysis, but the Defendant, unsurprisingly in the context of a proposal for the construction of a nuclear power station, did not purport to apply a “real risk” approach. The disagreement between the approach adopted by the Defendant and the approach advocated in the Austrian expert report was not a disagreement as to whether the “real risk” approach or the “cannot be excluded on the basis of objective evidence” approach should be applied to the risk of a serious nuclear accident. It was a disagreement as to the point at which the significant environmental effects of a severe nuclear accident could properly be “excluded on the basis of objective evidence.” Was that point reached only when it had been demonstrated that the probability of such a severe accident was zero; or was the Defendant entitled to conclude that that point had been reached in this case because the probability of a severe accident was very remote indeed – in circumstances where the Austrian expert report had calculated the probability of such an accident to be as low as 1 in 10 million years of reactor operation?
- 36 The true nature of the dispute in this case – whether the exclusion of a significant environmental effect from the EIA process is permissible only if it has been demonstrated that there is no risk whatsoever of it occurring, or if exclusion is permissible where it has been demonstrated that the risk is extremely remote – emerges most clearly from the response of the Department of Energy and Climate to the letter dated 14th March 2014 from the Espoo Implementation Committee (paragraph 32 above). In its letter dated 19th June 2014 the Department maintained

that the present case was very different from the Danube Black Sea case in which there was no doubt that the Convention was engaged:

“On any analysis, the risk of an accident occurring from the proposed new nuclear development at Hinkley Point C is extremely low. Given the very remote nature of the risk, it is difficult to quantify, and the estimates produced will depend to some extent on the accident scenarios considered. However, the literature on this issue is summarised in the European Commission's 2005 Report ‘Externe – The Externalities of Energy, Methodology 2005 Update’, which points to a probability of major accidents (core meltdown plus containment failure) in the UK of 4×10^{-9} . This suggests that the potential for a major accident in the UK – the meltdown of the reactor's core along with failure of the containment structure – is one in 2.4 billion per reactor year; by comparison, it is thought that the risks of a meteorite over a kilometre hitting the earth, which could have significant global environmental impacts, could be one in 0.5 million per year. The Austrian Government also commissioned its own expert analysis of the risks of an accident from a new nuclear development at Hinkley Point C, which expressed the risk of an accident as being not expected to occur more frequently than once in every 10 million years of reactor operation. On no natural understanding of the term could such a remote risk be considered to constitute a ‘likely significant effect’.”

- 37 The Claimant's challenge to the Defendant's decision in this case does not simply depend upon the proposition that the Grand Chamber's approach in *Waddenzee* to the meaning of “likely to have a significant effect” in the Habitats Directive should be carried over into the EIA Directive, it also depends upon a very literal meaning being given to the Grand Chamber's words “cannot be excluded on the basis of objective information” in its judgment in *Waddenzee*. If a remote risk can properly be excluded, the Claimant does not challenge the Defendant's assessment that the remoteness of the risk in this case was such that it could be excluded. In order to succeed in this claim the Claimant has to establish that any risk, no matter how remote, cannot be excluded unless it has been demonstrated that there is no possibility of its occurring. It is, in effect a “zero risk” approach to the likelihood of significant environmental effects.
- 38 It would be surprising if the Grand Chamber had intended to impose such a high and inflexible threshold for “appropriate assessment”, even in the context of the Habitats Directive. However purposive the interpretation of the Habitats Directive, its text cannot be ignored. The word “likely”, and the concept of likelihood, implies at least some degree of flexibility. There comes a point when the probability (to use the word in Annex III to the EIA Directive) of a significant effect is so remote that it ceases to be “likely”, however broad the concept of likelihood. In *Waddenzee* the Grand Chamber said that, following an appropriate assessment, a project could be authorised only if the competent authority “have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects....” (see paragraph 17 above). Thus, certainty was equated with the absence of reasonable scientific doubt.
- 39 Even if the *Waddenzee* approach to likelihood is carried over into the EIA Directive, it must be open to a competent authority to conclude that the risk of a significant adverse effect on the environment is so remote (eg if it is more remote

than the risk of a meteorite of over a kilometre hitting the earth) that there is “no reasonable scientific doubt” as to the absence of that adverse effect for the purpose of the EIA Directive. The competent authority does not have to be satisfied that there is no risk, however remote, that a severe nuclear accident will occur in order to be satisfied that there is “no reasonable scientific doubt” that such an accident will not occur. This approach is consistent with the guidance that is contained in the Planning Inspectorate's *Advice note 12: Development with significant transboundary impacts consultation*.

40 I do not accept Mr. Wolfe's submission that the Defendant failed to follow this advice from the Planning Inspectorate. When dealing with “Screening”, and with those cases in which it is necessary for the Secretary of State to determine whether or not a proposed development is likely to have significant effects on the environment in another EEA State, the Advice note say this:

“In reaching a view, the precautionary approach will be applied and following the court's reasoning in the *Waddenzee* case such that ‘likely to have significant effects’ will be taken as meaning that there is a probability or risk that the development will have an effect, and not that a development will definitely have an effect...”

Mr. Wolfe emphasised the reference to the CJEU's reasoning in *Waddenzee*; but the Advice note continues:

“As a rule of thumb (taking the precautionary approach), unless there is compelling evidence to suggest otherwise, it is likely that the Planning Inspectorate may consider the following [Nationally Significant Infrastructure Projects] as likely to have significant transboundary impacts:

- nuclear power stations; and
- off-shore generating stations in a Renewable Energy Zone.”

I accept Mr. Swift's submission that evidence that the risk of a severe nuclear accident is not merely unlikely, but extremely remote, is capable of being “compelling evidence” that a proposed nuclear power station is not likely to have significant transboundary effects, since it is common ground that such effects would be likely to occur only if there was such an accident.

41 The contrast between the evidential basis for the low level of risk in the present case and the extent of the scientific uncertainty in the *United Kingdom* case to which the CJEU referred by way of analogy in its judgment in *Waddenzee* (see paragraph 14 above) is instructive. In the *United Kingdom* case the Spongiform Encephalopathy Advisory Committee (“SEAC”) had said that “it was not in a position to confirm whether or not there was a causal link between BSE and the recently discovered variant of Creutzfeldt-Jacob disease, a question which required further scientific research” (paragraph 14). A similar position had been adopted by the Scientific Veterinary Committee of the European Union: while it was not possible on the available data to prove that BSE was transmissible to humans, in view of the possibility of such transmission, which the committee had always considered, it had recommended certain precautionary measures and that research on the question of transmissibility of BSE to humans be continued (paragraph 13). The recitals to the Directive that was challenged by the United Kingdom reflected the extent of the scientific uncertainty:

“Whereas under current circumstances, a definitive stance on the transmissibility of BSE to humans is not possible; whereas a risk of transmission cannot be excluded; whereas the resulting uncertainty has created serious concern among consumers; ...”

- 42 In the present case, it is common ground that the probability of a severe nuclear accident is very low indeed. There may be an issue as to just how low that probability is (see the correspondence with the Implementation Committee, paragraph 36 above) but there is no doubt that the Defendant was entitled to describe it in his decision as a “very low probability”. The issue, therefore, is whether the risk of a significant effect on the environment can properly be excluded on the basis of a very low probability, or only upon the basis of a zero probability. In this case we are concerned with a proposal for a nuclear power station, and the environmental consequences of a severe nuclear accident. In that context, for obvious reasons, “very low probability” means very low probability indeed, far below the levels of probability (or “risk”) that might be regarded as acceptable in the context of other developments. Although Annex I to the EIA Directive includes other inherently dangerous projects, eg chemical installations for the production of explosives, where only the remotest of risks will be acceptable, the Directive covers a very wide range of projects in Annexes I and II . In the context of very many, if not most, of the projects listed in the Directive, it is difficult to see how it could seriously be contended that a significant effect on the environment which would not be expected to occur more frequently than once in every 10 million years could not properly be excluded from environmental impact assessment on the basis of objective information.
- 43 Annex III requires the Member States to consider both the magnitude and complexity of an environmental impact and the probability of such an impact when deciding whether an Annex II project is likely to have significant effect on the environment (see paragraph 22 above). As a matter of common sense, the greater the potential impact, the lower will be the level of probability at which the competent authority will decide that it should be subjected to the environmental impact assessment process: see *Miller v North Yorkshire County Council*, [2009] EWHC 2172 (Admin) per Hickinbottom J at paragraphs 31 and 32. This leaves an area of judgment for the competent authority – balancing the severity of any potential environmental harm against the probability of it occurring. It recognises the fact that some significant effects on the environment, eg a significant radiological impact, are much more significant than others. Given the wide range of projects covered by the EIA Directive and the express requirement to consider the probability of any impact, I am satisfied that, even if it is appropriate to apply the “cannot be excluded on the basis of objective evidence” approach to the likelihood of significant effects on the environment in the EIA Directive , there is no realistic prospect of the Claimant’s “zero risk” approach being adopted by the CJEU. I would add that our attention was not drawn to any decision of a Court in which the Claimant’s approach to exclusion has been adopted. However purposive the interpretation of the EIA Directive , a “zero risk” approach to likelihood would be an interpretative step too far and would frustrate, rather than further the purpose of the Directive.
- 44 In reaching that conclusion, I have not ignored the views expressed by the Committee in its letter dated 14th March 2014. They provide the only possible

support for a “zero risk” approach to the point at which a serious environmental impact may be excluded from the EIA process. While I respect the Committee's view, it is not the function of the Committee to give an authoritative legal interpretation of the Convention. The correspondence with the Committee makes it clear that there is a dispute as to the proper interpretation of the Convention. Article 15 makes provision for the settlement of such disputes. If the dispute cannot be resolved by negotiation between the Parties it may be either submitted to the International Court of Justice, or referred to arbitration in accordance with the procedure set out in Appendix VII to the Convention.

- 45 The Committee does have an important role in promoting best practice under the Convention, and it is noteworthy that its conclusion in paragraph 54 of Annex I to decision IV/2 — that even a low likelihood of a significant adverse transboundary environmental impact would trigger the obligation to notify affected parties in accordance with Article 3 of the Convention [Article 7 of the EIA Directive] — is expressly based upon its “*Guidance on the Practical Application of the Espoo Convention*”, as endorsed by decision III/4. Thus, it would appear that the views expressed by the Committee are based upon a combination of its advice as to what would be best practice, and its view as to what is the legal position, under the Convention. I intend no criticism of the Committee when I say that, insofar as its decision in paragraph 54 of Annex I to decision IV/2 moves from advice as to what would be best practice to a statement of what the legal position is, it is not based upon any legal analysis (that is not surprising, the Committee is not a legally qualified body). Even if a “low likelihood” of a significant transboundary effect not merely should (as a matter of good practice), but does (as a matter of law) trigger the obligation to notify any affected party, the Committee will still have to consider the issue raised in this case: whether a “likelihood” may be so very low that it can be excluded for the purpose of transboundary consultation, or whether exclusion is permissible only when all risk has been eliminated. Of critical importance for present purposes, the Committee understandably focuses simply upon the terms of the Espoo Convention , and does not consider the need for the words “likely to have significant effects on the environment” to have a consistent meaning throughout the EIA Directive . For these reasons, the views expressed by the Committee in its letter dated 14th March 2014 do not persuade me that it is necessary for this Court to make a reference to the CJEU in order to determine this claim.

Ground 2

- 46 The judge dealt with this issue in paragraphs 177-193 of her judgment. She concluded in paragraph 193:

“In my judgment there is no reason that precludes the Secretary of State from being able to have regard to, and rely upon, the existence of a stringently operated regulatory regime for future control. Because of its existence, he was satisfied, on a reasonable basis, that he had sufficient information to enable him to come to a final decision on the development consent application. In short, the Secretary of State had sufficient information at the time of making his decision to amount to a comprehensive assessment for the purposes of the Directive. The fact that there were some matters still to be determined by

other regulatory bodies does not affect that finding. Those matters outstanding were within the expertise and jurisdiction of the relevant regulatory bodies which the defendant was entitled to rely upon.”

I agree with the judge. Had this ground of challenge stood alone I would not have granted the Claimant permission to apply for judicial review.

47 There is no dispute that the Defendant was in principle entitled to have regard to the UK nuclear regulatory regime when reaching a conclusion as to the likelihood of nuclear accidents: see *Gateshead Metropolitan Council v Secretary of State for the Environment* [1995] Env. L.R. 37 .

48 Many major developments, particularly the kind of projects that are listed in Annex I to the EIA Directive , are not designed to the last detail at the environmental impact assessment stage. There will, almost inevitably in any major project, be gaps and uncertainties as to the detail, and the competent authority will have to form a judgement as to whether those gaps and uncertainties mean that there is a likelihood of significant environmental effects, or whether there is no such likelihood because it can be confident that the remaining details will be addressed in the relevant regulatory regime. In paragraph 38 of his judgment in *R (Jones) v Mansfield District Council* [2004] 2 P. & C.R. 14, Dyson LJ (as he then was) adopted paragraphs 51 and 52 of the judgment of Richards J (as he then was) which included the following passage:

“It is for the authority to judge whether a development would be likely to have significant effects. The authority must make an informed judgment, on the basis of the information available to it and having regard to any gaps in that information and to any uncertainties that may exist, as to the likelihood of significant environmental effects. Everything depends on the circumstances of the individual case.”

49 This is precisely what happened on the facts of the present case. The elaborate regulatory regime for nuclear power stations is described in the Witness Statements filed on behalf of the Defendant and the Interested Party. For present purposes, it is sufficient to note that by the time the Defendant made his decision dated 19th March 2013 the Office for Nuclear Regulation (“ONR”) had issued a nuclear site licence, and both the ONR and the Environment Agency had completed the Generic Design Assessment (GDA) process, including a severe accident analysis, for the EPR, the type of reactor to be used at HPC. All of the GDA issues had been addressed, and the ONR had issued a Design Acceptance Confirmation (“DAC”). The ONR had said that it was confident that the design was “capable of being built and operated in the UK, on a site bounded by the generic site envelope, in a way that is safe and secure”. Site specific matters not covered by the GDA process would still need to be considered, but the ONR was confident that they could, and would, be addressed under the site licence conditions. As the ONR explained:

“Whilst the GDA process, leading to the issue of a DAC, is not part of the licensing assessment, the successful completion of GDA does provide confidence that ONR will be able to give permission for the construction, commissioning and operation of a nuclear power station based on that generic design.”

- 50 In view of this factual background, it might be thought that this case was the paradigm of a case in which a planning decision-taker could reasonably conclude that there was no likelihood of significant environmental effects because any remaining gaps in the details of the project would be addressed by the relevant regulatory regime. Undaunted, Mr. Wolfe submitted that there was a distinction between reliance upon a pollution regulator applying controls “which it has *already* identified in the light of assessments which it has *already* undertaken on the basis of a scheme which has *already* been designed”, which he said was permissible, and reliance upon “*current*” gaps in knowledge “being filled by the fact of the *existence* of the pollution regulator [who] will make *future* assessments... on elements of the project still subject to design changes...”, which was not.
- 51 There is no basis for this distinction, which is both unrealistic and unsupported by any authority. The distinction is unrealistic because elements of many major development projects, particularly the kind of projects within Annex I to the EIA Directive, will still be subject to design changes, and applying Mr. Wolfe’s approach those projects will not have “already been designed” at the time when an environmental impact has to be carried out. The detailed design of many Annex I projects, in particular nuclear power stations, is an immensely complex, lengthy and expensive process. To require the elimination of the prospect of all design changes before the environmental assessment of major projects could proceed would be self-defeating. The promoters of such projects would be unlikely to incur the, in some cases, very considerable expense, not to mention delay, in resolving all the outstanding design issues, without the assurance of a planning permission. If the environmental impact assessment process is not to be an obstacle to major developments, the planning authority (in this case the Defendant) must be able to grant planning permission so as to give the necessary assurance if it is satisfied that the outstanding design issues – which may include detailed design changes – can and will be addressed by the regulatory process.
- 52 In support of his submission Mr. Wolfe relied on the decision of the CJEU in Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* [1999] E.C.R. I-5613. *Bozen* was concerned with whether there was a power under Article 4(2) of the EIA Directive to exclude from the environmental impact assessment process, from the outset and in their entirety, certain classes of projects falling within Annex II (paragraph 35). Unsurprisingly, the CJEU decided that it was not permissible to exempt whole classes of projects in advance from the obligation to carry out a screening exercise. The criteria and/or the thresholds mentioned in Article 4(2) must “facilitate examination of the actual characteristics of any given project” (paragraph 37 emphasis added). No project should be exempt from environmental assessment “unless the specific project excluded could, on the basis of a comprehensive assessment be regarded as not being likely to have [significant effects on the environment].” (paragraph 45 emphasis added)
- 53 *Bozen* was not concerned with the level of detail that is required about a project if, as in the present case, an environmental assessment is carried out. The CJEU was not asked to, and did not address the issue raised by Ground 2 in the present case: at what point may the competent planning authority conclude that it has sufficient information about the “actual characteristics” of a project, and/or that the environmental assessment is sufficiently “comprehensive”, to enable it to decide that a significant environmental effect is not likely because any outstanding details will be satisfactorily addressed by the relevant pollution regulator.

54 I have considered Ground 2 upon the basis that, as submitted by the Claimant, it has a life of its own even if Ground 1 is rejected. In the abstract, the Claimant's submission is correct – the circumstances in which a planning authority may rely upon a pollution regulator is a separate issue – but on the facts of this case Ground 2 has no substance if Ground 1 is rejected. The Claimant does not contend that the Defendant's decision that severe nuclear accidents were very unlikely to occur was unreasonable. There has been no suggestion by any Member State, or any recognised scientific body, that such accidents are anything other than very unlikely. If Ground 1 is rejected, and it is concluded that the Claimant's "zero risk" approach is not well founded, there is nothing to suggest that the Defendant's assessment of the degree of unlikelihood of the risk of such accidents was erroneous. The views expressed by the ONR, the European Commission, the Austrian expert report and the Radiological Protection Institute of Ireland, were all to the same effect: that the risk of a severe nuclear accident is very low indeed. If the Defendant was not required to adopt a "zero risk" approach there is no basis for a submission that he should not have concluded that the risk was so unlikely that the environmental effects of such an accident should not be "scoped in" (ie should be excluded) for environmental impact assessment purposes.

Conclusion

55 A reference to the CJEU is not necessary. I would dismiss this application.

GLOSTER LJ:

56 I agree.

LONGMORE LJ:

57 I also agree.



Neutral Citation Number: [2019] EWHC 1862 (Admin)

Case No: CO/371/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2019

Before:

MR JUSTICE GARNHAM

Between:

Eastleigh Borough Council	<u>Claimant</u>
- and -	
Secretary of State for Housing Communities and Local Government	<u>1st Defendant</u>
Mr Robert Janaway	<u>2nd Defendant</u>
Mr Simon Bull	<u>3rd Defendant</u>

Paul Stinchcombe QC (instructed by **Eastleigh Borough Council Legal Services**) for the
Claimant

Leon Glenister (instructed by Government Legal Department) for the **1st Defendant**
Christopher Boyle QC & Andrew Parkinson (instructed by **Moore Blatch LLP**) for the **2nd
& 3rd Defendant**

Hearing dates: 9th & 10th July 2019

Approved Judgment

Mr Justice Garnham :

1. The Claimant Council (“the Council”) applies, with the permission of Lang J granted on 19 March 2018, for statutory review of the decision of the First Defendant’s Inspector, dated 20 December 2018, to allow the appeal of the Second and Third Defendant (“the Developers”) against its decision to refuse planning permission for the development of up to 70 dwellings on land at Satchell Lane, Hamble-le-Rice, in Hampshire (“the Satchell Lane Proposal”).
2. I had the benefit of detailed written and oral argument from Paul Stinchcombe QC for the Claimants, Leon Glenister for the Secretary of State and Christopher Boyle QC and Andrew Parkinson for the Second and Third Defendant. I am grateful to all counsel for their clear and economically expressed submissions.

Background

3. For several years up until 2018, the Council had a significant shortfall against the requirement in paragraph 47 of the 2012 version of the National Planning Policy Framework (“NPPF”) to have a five-year housing land supply (“5YHLS”). At the time of the appeal into the Satchell Lane Proposal, however, the action taken by the Council to address its HLS shortfall (including on occasion granting planning permission for residential development in application of the ‘tilted balance’) had so boosted the HLS that the Council now had a 7-10YHLS.
4. The Developers applied for planning permission for up to 70 dwellings on a green field site in the Hamble Peninsula, outside the urban edge of Hamble and within the open countryside. The section of Satchell Lane adjoining the appeal site is rural in character (twisting, narrow and tree-lined) and has no footways or lighting in a northerly direction. That northern route provides the shortest, (lawfully available) pedestrian route to a local secondary school, health centre and railway station.
5. The Council refused the application for the following reasons:
 - “1. The proposals represent an inappropriate and unjustified form of development which would have an unacceptably urbanising and visually intrusive impact upon the designated countryside, to the detriment of the character, visual amenity, and the quality of the landscape of the locality. The application is therefore contrary to Saved Policies 1.CO, 18.CO, 20.CO of ... of the Eastleigh Borough Local Plan Review (2001-2011), and the provisions of the National Planning Policy Framework.
 2. The site is considered to be in an unsustainable and poorly accessible location such that the development will not be adequately served by sustainable modes of travel including public transport, cycling and walking. The application is therefore contrary to the requirements of Saved Policy 100.T of the Eastleigh Borough Local Plan Review 2001-2011 and Paragraphs 17 and 35 of the National Planning Policy Framework.”
6. Policy 1.CO provides that planning permission for development in a countryside location would not be granted unless it met at least one of four listed criteria – the Council decided that the proposed development did not meet any of the listed criteria.

7. Policy 18.CO provides that “development which fails to respect, or has an adverse impact on, the intrinsic character of the landscape, will be refused”. The Council concluded that developing up to 70 dwellings on any site in the urban countryside, permanently urbanising, it would necessarily have an adverse impact on the intrinsic character of the landscape.
8. Policy 20.CO provides that development which would be detrimental to the quality of the landscape which had been identified for landscape improvements in the Local Plan (as part of the appeal site had) would not be permitted.
9. Policy 100.T provides that for development to be permitted it must meet certain listed criteria which included that it is, or could be, well served by public transport, by cycling and by walking.

The Appeal and the Planning Inspector’s decision

10. The Developers appealed the Council’s decision and a planning inquiry was held on 16-17 and 23-24 October 2018. The Council’s position at the inquiry was that:
 - The Developers were proposing a considerable housing development in the countryside contrary to Policy 1.CO of the extant Development Plan;
 - The proposal would also permanently urbanise an open field causing harm to an area designated for landscape improvement contrary to Policies 18.CO and 20.CO of the Development Plan;
 - The proposal also breached Policy 100.T in that the shortest route (walking) to the secondary school, health centre and railway station was unsafe and that children, the vulnerable and the frail would consequently be at risk;
 - It had a considerable surplus above the 5YHLS called for by paragraph 47 NPPF 2012,
 - The policies were not out of date by reference to the HLS nor could they be rendered out of date because they predated the NPPF or because they were in a Plan which was time-expired;
 - The countryside policies were all either broadly consistent or completely consistent with the NPPF, and that therefore, consistent with all recent Decision Letters (“DL”s) in Eastleigh, between considerable/significant and full weight had to be attached to the breaches of the countryside policies;
 - It was irrelevant that, in the past and on certain sites, it had chosen to permit development in breach of countryside policies in order to secure its 5YHLS;
 - So far as Policy 100.T was concerned it was fully aligned with Part 9 of the 2018 NPPF;
 - The policies were being breached in circumstances in which the ‘tilted balance’ could not apply because an Appropriate Assessment was required and therefore the statutory presumption in favour of the Development Plan applied; and
 - The appeal should be dismissed by straightforward application of the statutory presumption in favour of the Development Plan.

11. The Inspector allowed the appeal.
12. Under the sub heading “Sustainability/accessibility” in his decision letter, he addressed the possible routes, of which there were three, from the site to various facilities. At paragraph 40 of the decision letter (“DL40”), he said that no reliance could be placed on a route through fields as it did not appear to be legally established, and was unlit, unattractive, and unwelcoming in inclement weather and in darkness. That conclusion is no longer in issue. There remained available two route to the facilities to the north of the site, notably the school and the healthcare facility, one is northerly along Satchell Lane, the other southerly.
13. The Inspector recorded that the Council’s sole objection was that the northerly route to the school, health centre and railway station was unsafe for pedestrians [DL34]. He noted that the northerly route to the above facilities was the shortest [DL33]. He noted, having undertaken the journey himself, that walking the northerly route to the above facilities along Satchell Lane was neither safe nor acceptable: the road was unlit; possessed no footpaths for most of the route; included a number of tight bends; and in many places there were steep banks which limited the ability of pedestrians to avoid oncoming traffic [DL36].
14. However, he held that there was no policy requirement to use the northern part of Satchell Lane [DL38 and DL42] and there were alternative routes [DL38-39]. He held that the Council’s case omitted the southern walking routes, the part walking and part bus option, and the agreed acceptability of cycling by either route [DL41]. Accordingly, whilst the northern route was unsafe for pedestrians, Policy 100.T was complied with [DL42].
15. Under the headings “Planning policy background and weight”, “Other matters – housing land supply” and “Planning balance and conclusion”, he dealt with the issues that found Ground 2 before me.
16. He said that whilst Policy 1.CO did not impose blanket protection in the countryside, the approach lacked the flexibility and balance enshrined in the NPPF, such that it should be accorded reduced weight [DL15-16]. He said that the fact that the Council could clearly demonstrate a 5YHLS was not relevant to the weight accorded to Development Plan policies [DL18]. It was, however, relevant in this regard that the Council had achieved its HLS in part by greenfield planning permissions outside settlement boundaries, from which it was reasonable to infer that the Council either considered that the settlement boundary carried reduced weight or that the policy harm was outweighed by other considerations [DL18].
17. Whilst a range, from considerable/significant to full weight, had been attributed to the countryside policies in other cases, given that “they were out of step with national policy” only limited weight should be attributed to them [DL19]. The change from an open field to a housing development would clearly have a permanently urbanising effect and a consequent change in the appreciation of the immediate landscape. This, however, would be the case in relation to any greenfield development proposal; and the conflict would be with policies which themselves have limited weight [DL26].
18. Despite the presence of significantly more than a 5YHLS, the provision of market and affordable housing weighed significantly in favour of the proposal in light of the national policy to significantly boost the supply of homes [DL47].
19. The Proposal had been the subject of Appropriate Assessment, and accordingly the presumption in favour of sustainable development in paragraph 11 of the NPPF did not

apply. The appeal therefore fell to be considered applying the balance provided for by section 38(6) of the Planning and Compulsory Purchase Act 2004 (“PCPA”) and in accordance with the Development Plan, unless material considerations indicated otherwise [DL63].

20. As agreed by the Council, the economic and social benefits of the proposal were worthy of significant weight and, given the national objective of significantly boosting the supply of homes, the provision of market and especially affordable housing carries significant weight [DL64].
21. The proposal met Policy 100.T, which was neutral in the planning balance [DL65].
22. Hence the key factor to be set against the benefits of the proposal was the conflict with the countryside policies. As set out above, limited weight was attached to these matters, and this harm was substantially outweighed by the benefits of the proposal [DL66].
23. For these reasons the appeal was allowed [DL67].

The Grounds

24. The Claimant advances two grounds of challenge:
25. First, it is said that the Inspector erred in law in finding that Policy 100.T was complied with. In particular, it is said that he failed properly to interpret and apply Policy 100.T which required the development to be well served by walking.
26. Second, it is argued that the Inspector erred when weighing the balance between housing land supply and breach of countryside policies.

The Law

27. It is common ground that the principles relevant to a challenge under s288 of the Town and Country Planning Act 1990 are authoritatively set out by Lindblom J (as he then was) in *Bloor Homes East Midlands Ltd v SSCLG*, [2014] EWHC 754 (Admin) at [19]:

“(1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to “rehearse every argument relating to each matter in every paragraph” (see the judgment of Forbes J. in *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at p.28).

(2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the “principal important controversial issues”. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-

under-Heywood in *South Bucks District Council and another v Porter (No. 2)* [2004] 1 W.L.R. 1953, at p.1964B-G).

(3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, “provided that it does not lapse into Wednesbury irrationality” to give material considerations “whatever weight [it] thinks fit or no weight at all” (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for [Environment, Transport and the Regions]* [2001] EWHC Admin 74, at paragraph 6).

(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).

(5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).

(6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

(7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145).”

Submissions and Discussion

Ground 1 - Unsafe Pedestrian Route

Submissions

28. In support of the First Ground, Mr Stinchcombe, for the Council, submits that the Inspector erred in law in finding that Policy 100.T was complied with. In particular, it is said that he failed properly to interpret and apply Policy 100.T which required the development to be well served by walking as well as by other modes of non-car transport; he failed to take into account a relevant planning consideration in application of this policy - viz. that schoolchildren residents of the proposed development who walked to the nearest secondary school would likely do so by the relatively short northerly Satchell Lane route (1.1km), which he had found to be unsafe, rather than the much longer southerly route (3.2 to 3.8km); and he gave no intelligible or adequate reasons for permitting a development which put future schoolchildren at this risk.
29. In response to Ground 1, Mr Glenister for the Secretary of State, submits the argument that the Inspector failed to properly interpret and apply Policy 100.T is fundamentally a rationality challenge. He says that the Inspector’s conclusions were clear, rational and well-reasoned; that the Inspector did take account of the Council’s argument that schoolchildren would be more likely to take the northern route. He noted the northerly route was shorter but unsafe, but still considered that appeal site was “well served”. Mr Glenister argued that the Inspector’s reasons in respect of accessibility met the requirements of *Dover District Council v CPRE Kent* [2018] 1 WLR 108.
30. Mr Boyle, for the Second and Third Defendants, contends that whether the development was “well served” by walking is quintessentially a matter of planning judgment for the Inspector. The Inspector found it was and that it complied with policy. That judgment was not arguably irrational in a situation where there was no policy requirement to be able to walk to the local secondary school by a particular route, or indeed at all; and in any event where there was a safe alternative route. As there was no policy requirement for a particular walking route to the local school to be available, it was not necessary for the Inspector to make a finding on this point. In any event, he expressly referred to the relative distances between the two alternative routes to the school, and therefore this was plainly taken into account. The Inspector did not permit a development which put future schoolchildren at risk, because an alternative route to the school was available. The reasons why the Inspector found this alternative route was suitable are abundantly clear from the DL.

Discussion

31. In my view, the Inspector did not err in his approach to this issue. The issue in question was the sustainability and accessibility of the site. The Council's refusal of permission, which was under appeal before the Inspector, had concluded that the site is "considered to be in an unsustainable and poorly accessible location such that the development will not be adequately served by sustainable modes of travel including...walking". It was said that the application did not comply with Policy 100.T and the local plan and paragraphs 17 and 35 of the NPPF 2012.
32. Policy 100.T requires that the development "is, or could be, well served by...walking". Paragraph 35 provides that:

"plans should protect and exploit opportunities for the use of sustainable transport modes for the movement of goods and people. Therefore, developments should be located and designed where practical to ...create safe and secure layouts which minimise conflicts between traffic and...pedestrians...."
33. There was no doubt that there was a safe, sustainable and short walking route from the site to many facilities to the south and west. The problem concerned facilities to the north, notably the school and the healthcare facility. I accept Mr Stinchcombe's submission that the adequacy of the route to the facilities in the north was one of the main issues in dispute before the Inspector; in fact, he describes it (at DL34) as the "Council's sole objection on accessibility/accessibility grounds".
34. However, in my view, on its proper construction, Policy 100.T is concerned with the provision of *means* of sustainable transport. Similarly, the focus of paragraph 35 of the NPPF is on providing *opportunities* for sustainable modes of transport, such as walking. Whilst it is undeniably the case that a development would not properly be regarded as "well served" by a walking route that was unsafe (and the contrary was not suggested before me), and that it is implicit in paragraph 35 that the opportunities to be provided are opportunities for a safe mode of transport, there is nothing, express or implied, in either policy that requires every possible route from the development to be safe. What matters is whether there was *a* safe route, and there was.
35. Nor, in my judgment, is there an obligation on the decision maker to assess whether residents of the development are likely to make use of unsafe routes between the site and particular facilities. It may well be the case that 14-year-old children living on the site would be tempted to use the shorter, northerly route to school, even though, in the Inspector's view, that is unsafe, rather than the markedly longer, but safer, southern route. But that does not mean that the site is not adequately *served* by a perfectly adequate, safe walking route. It is. The southern route is longer but safe. Nor does the existence of an unsafe alternative mean that there are no adequate *opportunities* for sustainable modes of transport, such as walking, which is entirely safe. There are. It just happens that, as regards the school and the health centre, those opportunities involve a longer route. I see no error of interpretation in the Inspector's approach.
36. Whether, on the facts, the site was "well served by ...walking" involved a planning judgment. The Inspector clearly had in mind how residents of the development could and would access the relevant facilities from the site. In my view, he was plainly entitled to conclude that it was accessible by walking routes and well served by walking routes. His reasons were required to be "proper, adequate and intelligible but can be briefly stated" (see *R (CPRE Kent) v Dover DC* [2018] 1 WLR 108). In my judgment, they were all of

that. At DL36 and 37, he held that the northern route was not safe. At DL39, however, he held that “there is no necessity to use the northern route to access the school because the southern routes...is (sic) within a reasonable walking distance”. At DL42, he concluded that “the appeal site is sustainable in locational terms having regard to the proximity of and accessibility to local services and facilities. It complies with LPR 100.T”. In my judgment that reasoning is unimpeachable.

37. Accordingly, I reject this ground of challenge.

Ground 2 - Planning balance – Housing supply and countryside policies

Submissions

38. The Council argues that the Inspector erred when weighing the balance between housing land supply (HLS) and breach of countryside policies. Mr Stinchcombe broke this ground down into four sub-grounds:

- (i) the Inspector wrongly determined that the fact that the Council could clearly demonstrate a 5YHLS was not relevant to the weight which should be accorded to breach of the countryside policies;
- (ii) he wrongly determined that it was relevant to have regard to how such countryside policies had been applied in the past in order to obtain a 5YHLS, when attributing weight to such breaches;
- (iii) he wrongly reduced the weight attached to the breach of countryside policies by reason of their lacking the flexibility enshrined in the NPPF, in that this was contrary to decided authority; and
- (iv) he wrongly took into account that the harm occasioned by permanently urbanising the countryside “would be the case in relation to any greenfield development proposal” which was an irrelevant consideration where there was double the HLS requirement and no need to develop any greenfield site.

39. In relation to Ground 2, the Secretary of State argues that whilst the level of shortfall may be relevant to the weight of development plan policies where there is less than a 5YHLS, there is no duty to consider the level of shortfall when considering the weight of development plan policies where there is a 5YHLS. He says that the Inspector was entitled to consider the past application of the relevant policies in determining their “currency”; such consideration has been given by other inspectors and the relevance was conceded by the Council’s witness at the inquiry. He argues that the Inspector complied with the principle identified in *Bloor Homes v SSCLG* [2014] EWHC 754 (Admin) and did not suggest that the lack of internal balance in Policy 1.CO meant that the policy was out of date. The observation that any greenfield development proposal would cause some limited harm to the existing landscape character is a matter of common sense, and the Inspector was entitled to make this observation.

40. The Second and Third Defendants argue that there was no policy requirement to take into account the existence of a 5YHLS when considering the weight to be attached to the relevant policies. As such, there was no legal obligation on the Inspector to take this into account. Whether or not he did so was a matter of planning judgment for him. It was not arguably irrational for him to do so where (i) the reason he found the relevant policies to be out of date had nothing to do with the Claimant’s housing supply position and (ii) the existence of a 5YHLS had been achieved by the Claimant through the grant of planning permission in breach of those policies.

41. They say it was not irrational for the Inspector to have regard to the application of the policies in the past in a situation where the Claimant's own planning witness had agreed that this was relevant and previous inspectors had taken this approach. They argue that the Inspector applied, in terms, the approach required by *Bloor Homes*. It is trite law that the fact that a particular policy is not expressly mentioned does not mean that it has been disregarded and the Inspector did give reasons for any departure from previous appeal decisions.
42. Finally, Mr Boyle contends that it was open to the Inspector to conclude that this aspect of landscape harm identified by the Claimant was not site or development specific, but rather would occur any time development took place contrary to Policy 1.CO.

Discussion

43. I address each of the four sub-grounds advanced by Mr Stinchcombe in turn.

Ground 2 (i)

44. Mr Stinchcombe argued that the Inspector wrongly determined that the fact that the Council could clearly demonstrate a 5YHLS was not relevant to the weight which should be accorded to breach of the countryside policies. He said it was plainly relevant and that had been "authoritatively decided".
45. The Council's arguments here did elide somewhat with their arguments as to the overall planning balance, more properly the subject of analysis under the third element of this ground. In my view, it is important to address them discretely if they are properly to be understood.
46. The assertion under challenge, "...the fact that the authority could clearly demonstrate a five-year housing land supply is not relevant to the weight which should be accorded to development plan policies" is found in DL18. That paragraph falls in the section of the decision letter dealing with planning policy, background and weight. It relates to the weight to be attached to the countryside policies, policies 1.CO, 18.CO and 20.CO.
47. It is common ground that where there is *no* 5YHLS, the NPPF, in both its 2012 and 2018 forms, deems such policies out of date. Footnote 7 to Paragraph 11 of the NPPF 2018 provides that "...where the local planning authority cannot demonstrate a five-year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73)" the plan is deemed to be out of date. As is again common ground, being out of date has consequences for decision-taking. Paragraph 11 provides that:

"Plans and decisions should apply a presumption in favour of sustainable development. ... For decision-taking this means:

c) approving development proposals that accord with an up-to-date development plan without delay; or

d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date, granting permission unless:

i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed; or

ii. 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” (emphasis added).

48. Furthermore, where there is no 5YHLS an inspector is obliged to consider the *extent* of the shortfall (*Hopkins Home v SSCLG* [2016] EWCA Civ 168).
49. However, as Mr Glenister put it, in the context of the NPPF, there is a ‘one-way consideration’ for 5YHLS. As Mr Boyle submits, there is nothing in statute or policy which expressly or impliedly required the Inspector to take into account *the existence* of a 5YHLS when deciding the weight to be attached to countryside policies. Accordingly, it was for the Inspector to determine the weight to be attached to the fact that there was more than 5YHLS, subject only to a *Wednesbury* challenge.
50. In my judgment, a failure to give weight to the fact that the Council could demonstrate more than a 5YHLS in determining the weight which should be accorded to development plan policies was not irrational. When the Inspector came to consider the overall planning balance, at DL47, he did consider the weight to be attached to the provision of housing. That was the proper place in the analysis for that consideration. I see no basis for saying he should have *increased* the weight, prior to conducting the balancing exercise because of the absence of a negative, namely that there was no shortage of housing land.

Ground 2 (ii)

51. It is argued that the Inspector wrongly determined that it was relevant to have regard to how such countryside policies had been applied in the past in order to obtain a 5YHLS, when attributing weight to such breaches. It is said that it was plainly irrelevant when the Council did have a 5YHLS.
52. This argument did have a superficial attraction. At first blush, it might be thought wrong to compare the position now, when there is an adequate supply of housing land, with the situation earlier when there was not, and when the Council was required to find ways of meeting the shortfall.
53. However, this can only be a rationality challenge. As Mr Boyle correctly submitted the range of considerations capable of being material are broad: any consideration which relates to the use and development of land is capable of being material: see *Stringer v Minister for Housing and Local Government* [1971] 1 WLR 1281 at p 1294G to H. The history of the application of the countryside policies was *capable* in law of being material for planning purposes.
54. As to the rationality of the Inspector’s reasons, in my judgment, Mr Glenister has a complete answer. He submits that the Inspector’s “consideration of the past application of the policy ... revealed that the current compliance with the 5YHLS was achieved “in part by greenfield planning permissions outside settlement boundaries – in some cases on sites which were within Strategic Gaps”. This indicates that the development plan policies were not consistent with the NPPF, which goes to their “currency”. Consideration of this was clearly rational”. I agree.

Ground 2 (iii)

55. Mr Stinchcombe argued that the Inspector wrongly reduced the weight attached to the breach of countryside policies by reason of their lacking the flexibility enshrined in the

NPPF. He says he failed to take into account the consistency of those policies with paragraph 170 of the NPPF through recognising the intrinsic character and beauty of the countryside; and he gave no intelligible or adequate reason for disagreeing with previous Eastleigh DLs in this regard and therefore breached the principle of consistency in planning decisions established by case law.

56. Mr Stinchcombe relies on [186] in the judgment of Lindblom J in *Bloor Homes* where he said:

“186 I do not think Mr Cahill's argument gains anything from Kenneth Parker J's analysis of the particular policies of the development plan that he had to consider in *Colman's* case, in which he compared of those policies with government policy in the NPPF. In any event I do not read Kenneth Parker J's judgment in that case as authority for the proposition that every development plan policy restricting development of one kind or another in a particular location will be incompatible with policy for sustainable development in the NPPF, and thus out-of-date, if it does not in its own terms qualify that restriction by saying it can be overcome by the benefits of a particular proposal. That is more than I can see in what Kenneth Parker J said, and more than I think one take from the NPPF itself. The question of whether a particular policy of the relevant development plan is or is not consistent with the NPPF will depend on the specific terms of that policy and of the corresponding parts of the NPPF when both are read in their full context. When this is done it may be obvious that there is an inconsistency between the relevant policies of the plan and the NPPF. But in my view that was not so in this case.”

57. That certainly makes good the submission that a policy is not out of date simply because it does not include an internal cost-benefit analysis. Instead, what is required is a comparison of the policy and the relevant parts of the NPPF. That is precisely what the Inspector set out to do at DL14. He said there that “What is important is the degree of consistency of a particular policy or policies with the 2018 Framework. This will depend on the specific terms of the policy/ies and of the corresponding parts of the Framework when both are read in their full context.”
58. At DL16, he concluded that 1.CO and related policies lacked “the flexible and balanced approach...enshrined in the Framework” and as a result accorded “reduced weight” to the countryside policies. At DL19, he gave them only limited weight because, in his view, they were out of step with national policy. That was consistent with [213] of NPPF 2012 which states that “due weight” should be given to development plan policies in light of their consistency with the NPPF.
59. It follows that his approach was entirely correct. The test he applied was correct. What remained to him was a matter of planning judgment, which can only be challenged on the grounds of rationality.
60. In my view, the Inspector was entitled to reach the view that there was an inconsistency between Policies 1.CO, 18.CO and 20.CO, on the one hand, and paragraph 170 of the NPPF on the other.

61. Policy 1.CO provided that planning permission would not be granted for development in the open countryside unless it met at least one of four listed criteria. Policy 18.CO provided that “development which fails to respect, or has an adverse impact on, the intrinsic character of the landscape, will be refused.” Policy 20.CO provided that development which was detrimental to the quality of that landscape would not be permitted.
62. NPPF 2018 [170] adopts a much more nuanced approach. Instead of the blanket refusal of development subject to limited and specific exceptions, it requires that planning decisions should contribute to and enhance the natural and local environment by meeting a series of objectives. The Inspector rightly described the latter as a “flexible and balanced approach”. In my judgment, the Inspector was fully entitled to conclude that this led to reduced weight being attributed to the retained policies.
63. Mr Stinchcombe would quibble with the precise descriptor of the reduction in weight. The Inspector concluded that the countryside policies should attract “limited weight”. In other Eastleigh Borough Council decisions inspectors have used different adjectives indicating, perhaps, a lesser weight reduction. Mr Stinchcombe says other inspectors, who recognised a difference between Policy 1.CO and [170] NPPF, still attached “considerable” or “significant” weight to breaches of Policy 1.CO in earlier decision letters. In my judgment, this is classically a matter of planning judgment, involving as it does a subjective judgment of the significance of differences between policies. I detect no error of law here.

Ground 2 (iv)

64. Finally, Mr Stinchcombe argues that the Inspector wrongly took into account (at DL26) that whilst the development would cause landscape harm, this “would be the case in relation to any greenfield development proposal.” He says that was an irrelevant consideration where there was a substantial excess of the HLS requirement and no need to develop any greenfield site.
65. As set out above, any consideration which relates to the use and development of land is capable of being material (*Stringer*). This consideration clearly relates to the development of land and accordingly is capable of being material. Accordingly, it was a matter of planning judgment for the Inspector to decide whether this factor was material in this case.
66. In my judgment, all the Inspector was doing was stating that this development, like any other greenfield development, would have an “urbanising” effect. That might not be a very remarkable observation, but it was certainly not an irrational one. As Mr Boyle put it, it was open to the Inspector to conclude that this aspect of landscape harm was not site or development-specific, but rather would occur any time development took place contrary to Policy 1.CO.

Conclusion

67. For all those reasons, this review is dismissed.



Neutral Citation Number: [2021] EWHC 1434 (Admin)

Case No: CO/4168/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021

Before:

MR JUSTICE JAY

Between:

**THE QUEEN (on the application of RONALD
WYATT, CHAIRPERSON OF BROOK AVENUE
RESIDENTS AGAINST DEVELOPMENT
(BARAD), ACTING IN A REPRESENTATIVE
CAPACITY)**

Claimant

- and -

FAREHAM BOROUGH COUNCIL

Defendant

- and -

- (1) LORRAINE LOUISE HANSLIP**
(2) MICHAEL HANSLIP
(3) THOMAS LEWIS HANSLIP
(4) NATURAL ENGLAND

**Interested
Parties**

**Gregory Jones QC and Conor Fegan (instructed by Fortune Green Legal Practice) for the
Claimant**

**Timothy Mould QC (instructed by Southampton & Fareham Legal Partnership) for the
Defendant**

**David Elvin QC and Matthew Henderson (instructed by Rachel Francis, Principal
Solicitor) for Natural England**

The **Hanslips** submitted Detailed Grounds of Resistance but were not represented at the hearing

Hearing dates: 11th and 12th May 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 28th May 2021 at 10.00am.

MR JUSTICE JAY:

Introduction: Essential Factual Background

1. The Solent Region is an internationally recognised magnet for bird species, in particular waders and wildfowl which migrate there in the autumn from more northern climes. These birds are under threat from high levels of nitrogen compounds causing excessive growth of algae and similar plant forms at a number of sites which, for this reason (amongst others), attract legal protection through designation. The birds themselves excrete nitrogen, but sources for which mankind is primarily responsible include agriculture and wastewater from existing housing and other development. Effluent discharges from these sources from a wide catchment area eventually leach into protected sites via local rivers and their tributaries, having passed through chemical treatment plants in the case of discharges from *homo sapiens*. The relevant catchment area is shown in the Annex to this judgment. I am told that 12 local planning authorities are within its scope.
2. The Fourth Interested Party, Natural England, has concluded, following condition assessments of various estuaries, mudflats and sandflats within the Solent Region carried out in 2018 and 2019, that a number of Special Areas of Conservation and Special Protection Areas are in an “unfavourable” condition. Furthermore, in 2019 and 2020 examination of the saltmarsh feature within the Chichester Harbour estuary revealed that it was in “unfavourable declining condition due to the poor quality of the remaining marsh and ongoing net loss”. Elevated nitrogen levels are implicated in the causality.
3. In Natural England’s opinion, the already widely unfavourable condition of these environments is at risk from additional nutrient outputs. There is a likely significant effect on several internationally designated sites “due to the increase of wastewater from new developments coming forward”. Unsurprisingly, there is a considerable degree of scientific uncertainty surrounding the impact of new development on these protected sites. It is clear that the precautionary principle applies in these circumstances. Natural England’s philosophy is to ensure, through advice to local planning authorities, that development proposals are closely scrutinised to ascertain their inevitable wastewater implications. Only proposals which are, at worst, “nutrient neutral”, should be granted permission. In the simplest of terms, neutrality, or – far better – a nitrogen credit, may be attained by requiring developers to carry out remedial and mitigation measures, such as the building of wetlands in conjunction with construction of houses and similar dwellings, which will serve to extract nitrogen from the land. In this way the bad is counterbalanced by the good, and equilibrium, so the philosophy goes, will safeguard these designated sites. It should be emphasised that the focus of these proceedings has been Natural England’s advice for the Solent Region. I was told that national advice is being prepared, but that before publication Natural England wish to consider, amongst other things, the terms of this judgment.
4. The First to Third Interested Parties, the Hanslips, own 1.97 ha of land (the exact area is not consistently described in the documents) at former Egmont Nurseries, Brook Avenue, Warsash SO31 9HN. The site is slightly to the east of the mouth of the River Hamble and approximately 5.6 km from the Solent itself. The site was formerly a busy commercial nursery but that activity ceased over twenty years ago. Simplifying the matter somewhat, 0.87 ha comprises derelict glasshouses and other buildings. The

remainder, approximately 1.10 ha, is open grassland with a small Nissen hut occupying a small part of it. There is some controversy as to the use of this grassland area.

5. In June 2018 Mrs Lorraine Hanslip submitted through planning agents an outline application to the local planning authority, Fareham, for development of the site comprising the demolition of the existing buildings and the construction of eight 4-5 bedroom detached houses, together with the creation of a paddock. This was described as a resubmission of a previously refused application.
6. This application was considered by Fareham's planning committee which on 12th December 2019 resolved to grant outline planning permission subject to the completion of a s. 106 agreement. However, before the formal grant of permission, Natural England published an Advice Note which had the consequence that the application had to be reconsidered. When the application was amended in order to reflect the Advice Note and the concept of nitrogen neutrality, it included a wetland area on the north-west corner of the site. Calculations performed on behalf of the applicant purported to show a credit of 4.5 Kilogrammes of Total Nitrogen over a year (-4.5Kg/TN/yr). This was predicated on an occupancy rate of 2.4 persons per property and part of the grassland area being attributed to "lowland grazing".
7. Given that this was an outline application, full details of the proposal were not provided but the illustrative plan forming part of the application shows the eight houses some distance away from the private road, Brook Avenue, which itself leads to the nearest public highway, Brook Lane. To the north of the site, aside from the wetland area is marked an area of Suitable Alternative Natural Greenspace ("SANG"). It is also clear from the accompanying narrative that these houses will not exceed two storeys.
8. Representations were received from members of the public during the consultation period. Many of these came from the Brook Avenue Residents Against Development whom Mr Ronald Wyatt represents as Claimant in these judicial review proceedings. Objections were made on various grounds including those which now feature in these proceedings: in particular, the 2.4 person occupancy rate and the use of the grassland area as "lowland grazing". Other arguments were advanced which feature in Mr Wyatt's Grounds.
9. On 9th June 2020 Natural England provided its first advice to Fareham on the nutrient neutrality issue *qua* statutory consultee: see regulation 63(3) of the Conservation of Habitats and Species Regulations 2017 (2017 SI No 1012) ("the Habitats Regulations"). It noted *inter alia*:

"Provided the council, as the competent authority, is assured and satisfied with the site areas are correct and that the existing uses are appropriately precautionary, then Natural England raise no further concerns with regard to the nutrient budget.

Provided the measures set out in the wetland mitigation report are secured with any planning permission, Natural England accepts the conclusion of the report that the design can achieve nitrogen neutrality in this way.

To ensure that it is effective mitigation, any scheme for neutralising nitrogen must be certain at the time of appropriate assessment so that no reasonable scientific doubt remains as to the effects of the development on the international sites.”

10. I do not understand Mr Wyatt to be taking issue with this advice which is obviously correct. Three points may be highlighted. First, the final paragraph of the foregoing citation is an accurate encapsulation of the precautionary principle. Secondly, the advice correctly recognises the demarcation line between Natural England as consultee/advisor and Fareham as decision-maker. Thirdly, the relevant certainty, which in this context means reasonable scientific certitude, must exist at the time of the appropriate assessment.
11. The fifth version of Natural England’s Advice on Achieving Nutrient Neutrality for New Development in the Solent Region (“the Advice Note”) was issued on 5th June 2020. I cannot judge the extent to which it differed from earlier versions (it matters not) and I have not been told exactly when Fareham became aware of it (again, it matters not). What seems clear is that at some point, whether prompted by the advent of this iteration of the Advice Note or not, the -4.5 Kg/TN/yr figure supplied on behalf of the Hanslips was closely examined by Fareham. Its own calculations, the detailed workings of which have not been disclosed, demonstrated that the development would generate a nutrient “debit” of 10.5 Kg/TN/yr and the wetland mitigation measures a nutrient “credit” of 11.51 Kg/TN/yr. The final figure of -1.01 Kg/TN/yr was, of course, less favourable to the Hanslips but still on the right side of the line for their purposes.
12. The -1.01 Kg/TN/yr figure, and much else, was set out in the planning officer’s report to Fareham’s planning committee. This document bears the date 19th August 2020, being the date of the relevant meeting, although it was made available at least five working days beforehand. I have said that the detailed workings have not been disclosed, but it is apparent from the report that this figure was based on: (1) an occupancy rate of 2.4 persons per dwelling; (2) what I have called the grassland area to the north of the site being divided into two, with the north-western paddock area (0.747 ha) being classified as “lowland grazing” and the rest of the site (1.223 ha) as “natural greenspace”; (3) a water usage within the new dwellings of 110 litres per person per day; and (4) the application of the 20% “precautionary buffer” as recommended by Natural England. No doubt Fareham’s arithmetic could be verified using these basic ingredients, and given Mr Wyatt’s silence on this topic must be taken to be correct.
13. As I have said, the planning officer’s report was promulgated timeously but Mr Wyatt complains that what was not made available on Fareham’s website until 18th August 2020 was the latter’s Habitat Regulation Assessment (“HRA”) being the formal “appropriate assessment” under the Habitats Regulations triggered by Natural England’s conclusion that the proposed development was “likely to have a significant effect” on designated sites. This too referred to the nutrient budget calculation and the resultant “credit” figure of -1.01. The planning officer’s report provided more information on various technical and other environmental aspects, and insofar as there was evidence in the appropriate assessment which members needed to consider and the public, if so advised, to make representations upon, in my view that was accurately summarised in the report.

14. One textual difference between the appropriate assessment and the planning officer's report, and Mr Wyatt has spotted this, is that the latter refers to "a *maximum* water use of 110 litres per day". Proposed condition 10 set out in the report was designed to ensure "potable water consumption does not exceed an *average* of 110 litres per day". It should be understood that the water use figure is used as a proxy for the amount of wastewater generated by a household, and to that extent is clearly precautionary. There may be a material difference between average and maximum figures in this context, and I have also noted that the model condition recommended by Natural England refers to the latter and not the former: proposed condition 10, which found its way into the planning condition granted on 1st October 2020 (the target of this application for judicial review), was not loyal to that advice. I will need briefly to consider the ramifications of this in the light of the limited submissions that have been advanced.
15. Mr Wyatt also complains that Fareham did not publish Natural England's second piece of advice given by email timed at 18:05 on 18th August 2020 until the morning of the planning committee meeting. The reason for this lateness is obvious. What is also obvious, in my judgment, is that this second advice added nothing of materiality to the first.
16. Finally, the point is made that the planning officer's report did not include a list of the background papers but simply enumerated a series of planning application references.
17. There was a further difficulty in that Fareham's website was "down" owing to technical problems between 10:00 on 17th August and 11:00 on 19th August which meant that documents were inaccessible during this period. The meeting itself took place electronically on 19th August and the arrangements were that members of the public were able to submit "deputations" in the form of audio or video recordings which would then be played during the meeting. The deadline for this was 15:00 on 18th August.
18. Also made available to the planning committee in advance of the meeting were: (1) the officer's report; (2) Natural England's email advices; (3) the Advice Note; (4) the HRA; (5) the (voluminous) representations made by members of the public, the vast majority objecting to the application (also summarised in the report); (5) the Hanslips' planning statement and plans; and (6) aerial images of the site and a copy licence agreement. The committee resolved that planning permission be granted, subject to conditions, by 7 votes to 2.

The Judicial Review Application

19. Permission to apply for judicial review was granted on Mr Wyatt's eight grounds of challenge by Lang J. There are factual witness statements from Mr Wyatt and the planning officer, Mr Richard Wright, as well as evidence which is a mixture of fact and opinion from Ms Allison Potts for Natural England (three statements) and Dr James O'Neill (for Mr Wyatt). Lang J gave permission to the respective parties for this opinion evidence to be adduced.
20. Many of the judicial review grounds overlap with those arising in the related case of *R (oao Save Warsash and the Western Wards) v Fareham Borough Council* [2021] EWHC 1435 (Admin) which I heard on 13th May 2021. I have striven to avoid unnecessary duplication.

21. The hearing was conducted remotely and I was assisted by oral submissions from Mr Greg Jones QC (for Mr Wyatt), Mr Tim Mould QC (for Fareham) and Mr David Elvin QC (for Natural England).
22. As has become commonplace in these cases, the delete function has not been judiciously applied both to the plenitude of grounds (many of which are at the fringes of arguability, and some of which have an appeal which can only be described as technical) and the bundle (much documentation could safely have been removed). Furthermore, Mr Jones, if I may say so, has been guilty of “mission creep” in seeking to expand the ambit of this challenge through his “Reply to Detailed Grounds of Defence” and his skeleton argument. My approach has been to be as relaxed as possible about all of this, save where it is clear that a party has been prejudiced.

The Legal Framework

23. The Habitats Regulations have transposed into English law the requirements of Council Directive 92/43/EEC of 21st May 1992 on the Conservation of Natural Habitats and of Wild Flora and Fauna (“the Habitats Directive”). The accuracy of the transposition is not in issue in these proceedings: the obligations in articles 6(2) and 6(3) of the Habitats Directive have been mapped into regulations 9(3) and 63 of the Habitats Regulations respectively. Formally, the Habitats Regulations are “EU-derived domestic law” which means that the lens of English law applies to relevant European sources. No one submitted to me that decisions of the ECJ and CJEU were no longer relevant.
24. Article 6 of the Habitats Directive provides in material part:

“Article 6

...

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”

25. Regulation 9 of the Habitats Regulations provides in material part:

“9.—(1) The appropriate authority, the nature conservation bodies and, in relation to the marine area, a competent authority must exercise their functions which are relevant to nature conservation, including marine conservation, so as to secure compliance with the requirements of the Directives.

...

(3) Without prejudice to the preceding provisions, a competent authority, in exercising any of its functions, must have regard to the requirements of the Directives so far as they may be affected by the exercise of those functions.”

26. Regulation 63 of the Habitats Regulations provides in material part:

“63.—(1) A competent authority, before deciding to undertake, or give any consent, permission or other authorisation for, a plan or project which—

(a) is likely to have a significant effect on a European site or a European offshore marine site (either alone or in combination with other plans or projects), and

(b) is not directly connected with or necessary to the management of that site,

must make an appropriate assessment of the implications of the plan or project for that site in view of that site’s conservation objectives.

(2) A person applying for any such consent, permission or other authorisation must provide such information as the competent authority may reasonably require for the purposes of the assessment or to enable it to determine whether an appropriate assessment is required.

(3) The competent authority must for the purposes of the assessment consult the appropriate nature conservation body and have regard to any representations made by that body within such reasonable time as the authority specifies.

(4) It must also, if it considers it appropriate, take the opinion of the general public, and if it does so, it must take such steps for that purpose as it considers appropriate.

(5) In the light of the conclusions of the assessment, and subject to regulation 64, the competent authority may agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the European site or the European offshore marine site (as the case may be).

(6) In considering whether a plan or project will adversely affect the integrity of the site, the competent authority must have regard to the manner in which it is proposed to be carried out or to any conditions or restrictions subject to which it proposes that the consent, permission or other authorisation should be given.”

27. The relevant principles governing the obligations of competent authorities under the Habitats Regulations, and similar provisions, and the approach of this court on an application for judicial review are well established. In my judgment in *Wealden DC v SSCLG and others* [2017] EWHC 351 (Admin), I ventured an epitome, having been ably assisted by counsel in that case, at paras 44-47. Neither Mr Mould nor Mr Elvin suggested that it required rewriting, although further jurisprudence has come into being since February 1997. There have been other, more authoritative summaries, such as Lindblom LJ's in *R (Mansell) v Tonbridge and Malling BC* [2017] EWCA Civ 1314; [2019] PTSR 1452, at para 42; and – in the context of the court's approach to planning officer's reports – the need for judicial restraint: see Judge LJ in *Selby DC, ex parte Oxtan Farms* [1997] PTSR 1103.
28. In view of the parties' submissions, a number of matters should be highlighted.
29. First of all, it is necessary to underscore the distinction between the degree of rigour the local planning authority must apply to the consideration of its HRAs and the approach this court must take as the reviewing body: the two processes must be kept distinct, *pace* a number of passages in Mr Jones' skeleton argument which suggested otherwise. The application of first principles impels this conclusion, but I will be referring below to relevant authority.
30. Secondly, the CJEU has stated on a number of occasions that appropriate assessments must be based on “the best scientific knowledge in the field” (*Holohan v An Bord Pleanála* (Case C-461/17) [2019] PTSR 1054 at para 33) which is both up-to-date and not based on the bare assertion of an expert (on the latter point, see *Smyth v SSCLG* [2015] EWCA Civ 174; [2015] PTSR 1417, at para 83).
31. Thirdly, the absence of adverse effects must be established at the point of consent, which in the present context means the date the appropriate assessment is made (*Coöperatie Mobilisation for the Environment UA, Vereniging Leefmilieu v College van Gedeputeerde Staten van Limburg* (Case C-293/17) [2019] Env LR 27 (the “Dutch Nitrogen case”), at para 94 of the opinion of Advocate General Kokott).
32. Fourthly, a high standard of investigation is demanded in line with the precautionary principle. This has been stated and reiterated in a large number of cases, including in particular *Waddenzee* (Case C-127/02) [2004] Env LR 14 and the *Dutch Nitrogen* case. In *Waddenzee*, Advocate General Kokott stated that the burden on the competent authority was to prove that there would be no adverse effects, not to a standard of absolute certainty but to being “at least satisfied that there is no reasonable doubt as to the absence of adverse effects on the integrity of the site concerned”. A requirement of absolute certainty would be impossible of scientific attainment as well as being disproportionate (see paras 99, 104, 107 and 108). The ECJ accepted the Advocate General's interpretation of the Habitats Directive in the light of these general principles of EU law, expressing their conclusions in a slightly different way (see paras 44, 58, 59

and 61). At para 58 the CJEU confirmed that the authorisation criterion in the Habitats Directive “integrated” the precautionary principle.

33. In the *Dutch Nitrogen* case the issue was whether Dutch legislation which set generic threshold values for nitrogen deposition could satisfy the requirement for case-specific assessments. That was not the issue which arises in the instant case, and in my view both Advocate General Kokott and the CJEU did no more than restate well-established principles. For example:

“The assessment carried out under the first sentence of art.6(3) of the habitats Directive may not, therefore have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected site concerned.” [AG47]

and:

“ 101. In order to ensure that all the requirements thus recalled are fulfilled, it is for the national courts to carry out a thorough and in-depth examination of the scientific soundness of the ‘appropriate assessment’ within the meaning of Article 6(3) of the Habitats Directive accompanying a programmatic approach and the various arrangements for implementing it, including inter alia the use of software such as that at issue in the main proceedings intended to contribute to the authorisation process. The competent national authorities may be entitled to authorise such an individual project on the basis of such an assessment only if the national court is satisfied that that assessment carried out in advance meets those requirements in respect of each specific individual project.

102. In this regard, it should be noted that under Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is considered to be ‘favourable’ when, inter alia, its natural range and the areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.

103. In circumstances such as those at issue in the main proceedings, where the conservation status of a natural habitat is unfavourable, the possibility of authorising activities which may subsequently affect the ecological situation of the sites concerned seems necessarily limited.

104. In the light of the foregoing, the answer to the second question in Case C-294/17 is that Article 6(3) of the Habitats Directive must be interpreted as not precluding national programmatic legislation which allows the competent authorities to authorise projects on the basis of an ‘appropriate assessment’

within the meaning of that provision, carried out in advance and in which a specific overall amount of nitrogen deposition has been deemed compatible with that legislation's objectives of protection. That is so, however, only in so far as a thorough and in-depth examination of the scientific soundness of that assessment makes it possible to ensure that there is no reasonable scientific doubt as to the absence of adverse effects of each plan or project on the integrity of the site concerned, which it is for the national court to ascertain."

34. I read these paragraphs as requiring a case-specific assessment by the competent authority applying rigorous scientific principles to the endeavour. I reiterate that these paragraphs say nothing about the role of the court in exercising its supervisory function.
35. Fifthly, it is clear from the scheme of the Habitats Regulations, the application of common sense and authority that competent authorities must give condign weight to the expert advice of Natural England, and if minded to deviate from that advice furnish cogent reasons for doing so: see, in particular, Baroness Hale JSC in *R (Morge) v Hampshire CC* [2011] UKSC 2; [2011] 1 WLR 268, at para 45.
36. Sixthly, the judgment whether a proposal will adversely affect the integrity of the protected sites for the purposes of regulation 63(5) of the Habitats Regulations is one for the competent authority. Insofar as case law is required for this proposition, it may be found in *R (Champion) v North Norfolk DC* [2015] UKSC 52; [2015] 1 WLR 3170, per Lord Carnwath JSC at para 41, referring to Advocate General Kokott in *Waddenzee*, at para 107. I was also referred to *Compton Parish Council v Guildford BC* [2019] EWHC 3242 (Admin); [2020] JPL 666, para 207 (*per* Sir Duncan Ouseley). Advocate General Kokott's use of the epithet "subjective" requires some care. I consider that all that she meant by that was that reasonable scientific opinion may not converge in complex or disputatious areas.
37. It was common ground before me that *if* the expert advice of Natural England relied on by Fareham were flawed for public law reasons, then the latter's decision would be impugnable even though the former is not the subject of this application for judicial review. I said as much in *Wealden* at para 109 albeit in the different context of Natural England advice that was quite plainly wrong:

"... if expert advice induces a decision-maker into error in carrying out the judgments mandated by article 6(3), I consider that it would be artificial and wrong to hold that the court should not characterise what has occurred as irrational. The *Wednesbury* error in the underlying advice creates, without more, an equivalent *Wednesbury* error in the evaluative assessments carried out in formulating the HRA."
38. Seventhly, the approach of this court in the exercise of its supervisory function is standard *Wednesbury*, albeit one which accords appropriate cognisance to the nature of the subject-matter and the expertise of the decision-maker: see *Smyth v SSCLG* [2015] EWCA Civ 174; [2015] PTSR 1417 (per Sales LJ at para 80), and *Plan B Earth v Secretary of State for Transport* [2020] EWCA Civ 214; [2020] PTSR 1446, paras 68, 75-79.

39. In this regard, it is true, as we have seen, that para 101 of the judgment of the CJEU in the *Dutch Nitrogen* case refers to the obligations of the national courts to undertake a thorough and in-depth scientific assessment, and that a distinction is made between these and the competent authorities. But as already observed the role of the national court exercising a supervisory function was not in issue in that case: its sole focus was the approach to be taken to the primary assessment under article 6(3). I consider that this point was clearly made by Advocate General Kokott in the passage I have cited at §33 above. It is to be recalled that administrative courts throughout the EU do not apply a uniform standard to what we (and in many cases, they) call judicial review.
40. The parties cited additional authority on discrete matters which I will address at the appropriate stage.

Natural England's Advice Note

41. As Ms Allison Potts explains, the first version of the Advice Note was released in August 2018 and was initially developed to support the realisation of nitrogen neutrality for large, phased developments in the Solent area. In its various iterations the Advice Note has received much expert input and analysis. The fifth version, published in June 2020, covers all development proposals from which treated effluent discharges directly or indirectly into any Solent international site. As Ms Potts further explains:

“The Advice Note has been prepared by Natural England for competent authorities as one way of ensuring that development can proceed whilst not adding to existing nutrient burdens in European marine sites.”

Para 2.6 of the Advice Note makes the same point.

42. Self-evidently, the concept of neutrality indicates that the ambition of the Advice Note is limited to not making things worse. Mr Jones latched onto this apparent limitation and forcefully submitted that it is flawed for that very reason, not least because the environmental condition of some of the protected areas is deteriorating. Article 6(2) of the Habitats Directive requires member states (and now the United Kingdom through a different legal pathway) to take appropriate measures to avoid any deterioration. As was pointed out in the *Dutch Nitrogen* case, the perpetuation of an existing activity is capable of falling within article 6(2). However, I agree with Mr Mould that Mr Jones' submission rather misses the point. Competent authorities are precluded by the terms of the Habitats Directive from sanctioning development which is environmentally harmful. No doubt Natural England and other statutory bodies are taking *other* steps to avoid further deterioration for the purposes of article 6(2), all of which are outside the scope of this application for judicial review. The authorisation of an individual project which is no more than environmentally neutral is not inimical to the language and intent of the Habitats Directive and/or the Habitats Regulations.
43. In order to ascertain whether nitrogen neutrality is attainable, a nitrogen budget has to be calculated. In very simple terms, this entails a four-stage approach: (1) calculate the total nitrogen in kilogrammes per annum derived from the development that would exit the wastewater treatment works after treatment; (2) adjust the nitrogen load to account for existing nitrogen uses from current land, forming a judgment as to what the load would be if permission were refused; (3) adjust the nitrogen load to account for land

uses with the proposed development; and (4) calculate the net change in the nitrogen load that would result from the development.

44. The detailed methodology needs be considered only in three respects (viz. the 2.4 person per dwelling occupancy rate (relevant to item (1) in §43 above); the attribution of the north-western paddock area to “lowland grazing” (relevant to item (2)); and the water usage per person of 110 litres/day (relevant to item (1)). Before considering these, I need to set out Natural England’s explanation of the approach to be taken:

“4.6 For those developments that wish to pursue neutrality, Natural England advises that a nitrogen budget is calculated for new developments that have the potential to result in increases of nitrogen entering the international sites. A nutrient budget calculated according to this methodology and demonstrating nutrient neutrality is, in our view, ***able to provide sufficient and reasonable certainty*** that the development does not adversely affect the integrity, by means of impacts from nutrients, on the relevant internationally designated sites. This approach must be tested through the ‘appropriate assessment’ stage of the Habitats Regulations Assessment. The information provided by the applicant on the nutrient budget and any mitigation proposed will be used by the local planning authority, as competent authority, to make an appropriate assessment of the implications of the plan or project on the designated sites in question. Further information of this process is available here.

4.7 The nutrient neutrality calculation includes key inputs and assumptions that are based on the best-available scientific evidence and research. It has been developed as a pragmatic tool. However, for each input there is a degree of uncertainty. For example, there is uncertainty associated with predicting occupancy levels and water use for each household in perpetuity. Also, identifying current land / farm types and the associated nutrient inputs is based on best-available evidence, research and professional judgement and is again subject to a degree of uncertainty.

4.8 It is our advice to local planning authorities to take a precautionary approach in line with existing legislation and case-law when addressing uncertainty and calculating nutrient budgets. ***This should be achieved by ensuring nutrient budget calculations apply precautionary rates to variables and adding a precautionary buffer to the TN calculated for developments.*** A precautionary approach to the calculations and solutions helps the local planning authority and applicants to demonstrate the certainty needed for their assessments.

4.9 By applying the nutrient neutrality methodology, with the precautionary buffer, to new development, the competent authority may be satisfied that, while margins of error will inevitably vary for each development, ***this approach will ensure***

that new development in combination will avoid significant increases of nitrogen load to enter the internationally designated sites. [emphasis supplied]

45. In my judgment, this advice is impeccable in all material respects. Mr Jones came close to submitting that, because there was scientific uncertainty, no development could properly be permitted because deleterious impacts could not logically be excluded. But that is the whole point of the precautionary principle: the uncertainty is addressed by applying precautionary rates to variables, and in that manner reasonable scientific certainty as to the absence of a predicated adverse outcome will be achieved, the notional burden of proof being on the person advancing the proposal. The application of precautionary values to relevant variables may well have been sufficient, without more; but a further cushion is provided by the application of a precautionary buffer.
46. I invited Mr Elvin in particular to assist me on whether there is any further jurisprudence from international, European or domestic sources as to the meaning of the precautionary principle. I am grateful for his overnight lucubrations although they yielded nothing of additional value. But what I can say – approaching the issue on the basis of both first principles and existing authority - is that paras 4.6-4.9 of the Advice Note represent the implementation *par excellence* of that principle in their acknowledgment that scientific uncertainty and its concomitant margins of error (which will fluctuate in the light of the unknowns) mandate a precautionary approach to the relevant inputs. Exactly how that applies in practice will be considered subsequently.
47. Mr Elvin invited me not to apply any further gloss on the meaning of “apply precautionary rates to variables”. In particular, he submitted that exegetical formulations such as “reasonable worst case scenario” should be abjured. During the hearing there was some discussion of “bell curves” and normal distributions, and I ventured a slightly flippant analogy of the Medieval architect who might wish to apply a precautionary approach, rather than to take a simple height average, to the construction of doorways to avoid headaches in tall monarchs (such an approach has not to my knowledge been applied). A statistician could no doubt contribute to this discourse. I do have my own views on whether “reasonable worst case scenario” is an apt synonym for “precautionary”, but in the context of judicial review proceedings rather than a witness action in a clinical negligence case (where propositions can be tested by interrogating the expert evidence) I am content to go no further, save to point out that the decision of Sullivan J in *R v Rochdale BC, ex parte Tew* [2000] Env LR 1, relied on by Mr Jones in this regard, was addressing a rather different question, namely whether there were “likely significant effects” in the context of the obligation to conduct an environmental impact assessment.
48. Mr Elvin also submitted that the precautionary principle embodies both proportionality and a degree of inherent flexibility to reflect the nature of the harmful outcome. Whereas it is true that Advocate General Kokott in *Waddenzee* referred to proportionality in terms at para 104 of her Opinion, this was in the context of a stream of reasoning which distinguished between absolute and reasonable certainty, the former being unattainable. If all that Mr Elvin was submitting was that in some circumstances it would be close to impossible to obtain precise scientific data and consequently it may be appropriate, as well as proportionate, to draw from generic data and experience in analogous situations, I would agree with him. As for inherent flexibility, I can understand that if the harmful outcome is death or serious disease the scientist would

wish to be even more cautious in the application of particular variables, but ultimately the test does not permit of much latitude. Reasonable scientific certainty means what it says, and this is what the Advice Note requires. No value judgment as to the relevant worth of birds and mankind needs to be carried out.

49. I move on to paras 4.18 and 4.19 of the Advice Note:

“**4.18** New housing and overnight accommodation can increase the population as well as the housing stock within the catchment. This can cause an increase in nitrogen discharges. To determine the additional population that could arise from the proposed development, it is necessary that sufficiently evidenced occupancy rates are used. Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4, as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas.

4.19 However competent authorities may choose to adopt bespoke calculations tailored to the area or scheme, rather than using national population or occupancy assumptions, where they are satisfied that there is sufficient evidence to support this approach. Conclusions that inform the use of a bespoke calculation need to be capable of removing all reasonable scientific doubt as to the effect of the proposed development on the international sites concerned, based on complete, precise and definitive findings. The competent authority will need to explain clearly why the approach taken is considered to be appropriate. Calculations for occupancy rates will need to be consistent with others used in relation to the scheme (e.g. for calculating open space requirements), unless there is a clear justification for them to differ.”

50. These paragraphs are central to Mr Wyatt’s case on Ground 1, and I will defer comment at this stage.

51. As for current land use, the following paragraphs of the Advice Note are relevant:

“**4.45** This next stage is to calculate the existing nitrogen losses from the current land use within the redline boundary of the scheme. The nitrogen loss from the current land use will be removed and replaced by that from the proposed development land use. The net change in land use will need to be subtracted from or added to the wastewater Total Nitrogen load.

4.46 Nitrogen–nitrate loss from agricultural land can be modelled using the Farmscoper model. A study commissioned by Natural England from ADAS modelled this loss for different farm types across the river catchments that drain to the Solent (ADAS UK Ltd. 2015. Solent Harbours Nitrogen Management Investigation).

4.47 If the development area covers agricultural land that clearly falls within a particular farm type used by the Farmscoper model then the modelled average nitrate-nitrogen loss from this farm type should be used ...

**Table 2 Farm types and average nitrogen-nitrate loss
AVERAGE NITRATE-NITROGEN LOSS PER FARM
TYPE IN THE SOLENT CATCHMENT AREA (kg/ha)**

Cereals	31.2
Dairy	36.2
General Cropping	25.4
Horticulture	29.2
Pig	70.4
Lowland Grazing	13.0
Mixed	28.3
Poultry	70.7
Average for catchment area	26.9

4.48 If the proposed development area covers several or indeterminate farm types then the average nitrate-nitrogen loss across all farmland may be more appropriate to use ...

...

4.51 It is important that farm type classification is appropriately precautionary. It is recommended that evidence is provided of the farm type for the last 10 years and professional judgement is used as to what the land would revert to in the absence of a planning application. In many cases, the local planning authority, as competent authority, will have appropriate knowledge of existing land uses to help inform this process.

4.52 There may be areas of a greenfield development site that are not currently in agricultural use and have not been used as such for the last 10 years. In these areas as there is no agricultural input into the land a baseline nitrogen leaching value of 5 kg/ha should be used. This figure covers nitrogen loading from atmospheric deposition, pet waste and nitrogen fixing legumes.”

52. Again, these paragraphs are critical to Mr Wyatt’s case on Grounds 2 and 5, and at this stage I say nothing further about them.

Ground 1

53. By Ground 1, Mr Wyatt contends that the use of the 2.4 person per dwelling occupancy rate in the nutrient budget was irrational, unreasoned and contrary to the precautionary principle.
54. This Ground was developed by Mr Jones in various ways but in essence these all reduce to the same point: that the 2.4 figure, being an average for all dwellings in England and Wales, regardless of size, is by definition not precautionary. Even so, it is right that I recognise the various iterations of the submission in Mr Jones' skeleton argument. First, it is said that the figure is irrational in the sense that it "does not add up" in the face of the evidence (see *R v Parliamentary Commissioner for Administration, ex parte Balchin* [1998] 1 PLR 1, at page 13E-F). Secondly, it is submitted that the precautionary principle is infringed because the figure does not reflect the reasonable worst case scenario. Thirdly, complaint is made about the planning officer's reasons which failed to address what was such an important issue in the case. Finally, it is said that Fareham failed to consider and investigate whether an alternative figure would be more appropriate (see *R (Plantagenet Alliance) v Secretary of State for Justice* [2014] EWHC 1662 (Admin); [2015] 3 All ER 261, at para 100).
55. The planning officer's reasons for recommending to members a 2.4 person per dwelling occupancy rate were as follows:

“8.38 Natural England recommends that, as a starting point, local planning authorities should consider using the average national occupancy rate of 2.4 persons per dwelling as calculated by the Office for National Statistics (ONS), as this can be consistently applied across all affected areas. However competent authorities may choose to adopt bespoke calculations where they are satisfied that there is sufficient evidence to support this approach.

8.39 Concern has been raised by third parties over the use of the average occupancy rate of 2.4 for this development of eight houses. Some have expressed the view that a higher occupancy rate ought to be applied since the houses are likely to be larger than average dwellings (although it should be noted that the application is in outline form and scale and layout of the development are reserved matters). Third parties have noted that the Council used bespoke calculations when determining a recent planning application for a sheltered housing development elsewhere in the Borough.

8.40 It is acknowledged that some houses will have more than the average number of occupants. It is also of course the case that some will have less. The figure of 2.4 is an average based on a well evidenced source (the ONS) and which has been shown to be consistent over the past ten years. As stated above the Natural England methodology allows bespoke occupancy rates however to date the Council has only done so to lower, not raise, the occupancy rate and where clear evidence has been provided to demonstrate that the proposed accommodation has an absolute maximum rate of occupancy. In the case of sheltered housing

which is owned and managed by the Council for example it has previously been considered appropriate to apply a reduced occupancy rate accordingly.

8.41 In all instances it is the case that the Natural England methodology is already sufficiently precautionary because it assumes that every occupant of every new dwelling (along with the occupants of any existing dwellings made available by house moves) is a new resident of the Borough of Fareham. There is also a precautionary buffer of 20% applied to the total nitrogen load that would result from the development as part of the overall nutrient budget exercise.

8.42 Taking the above matters into account, Officers do not consider there to be any specific justification for applying anything other than the recommended average occupancy rate of 2.4 persons per dwelling when considering the nutrient budget for the development.”

For the reasons I have already expounded, it is these reasons, rather than the Advice Note, which are directly under challenge. Even so, the nexus between the two is both obvious and inextricable.

56. One of the objectors made the point in written representations to Fareham that a bespoke rate of 2 persons per dwelling was used by Fareham in Planning Application P/19/0840/FP which was for a development of 1 and 2 bedroom apartments. She also referred to the occupancy rate of 3.4 in the ONS 2011 census report for 4-5 bedroom properties in England and Wales as a whole. Other objectors took the same line, although it would be fairer to say that the 3.4 figure applies to houses with 5 or more bedrooms.
57. Data pertaining to the 2011 census are, of course, readily available online. They will soon be superseded by the 2021 census, and Natural England accepts that later versions of the Advice Note will need to reflect that.
58. Dr James O’Neill BSc, PhD, FRCIS has given expert evidence on this topic, although it was not available to the decision-maker. In his view, the 2.4 national average occupancy rate does not represent the best scientific evidence and is not precautionary. In his opinion:

“The best scientific evidence available are the data that most closely align with the type of development considered, particularly in circumstances, such as the instant case where the regional variations expressed in the local data (in respect of the actual occupancy rates of four and five bedroom house) diverge from the national average.”
59. Dr O’Neill’s analysis of the ONS Fareham data broke down in terms of household and bedroom size is that the occupancy rate for 4-5 bedroom houses in Fareham is 3. This figure does not leap out of the relevant page, but has not been placed in issue. Even if

it were the best available evidence for this particular development, whether it is the legally mandated figure is a different question.

60. Both Messrs Mould and Elvin observed that Mr Jones did not deign to address Ms Potts' detailed evidence on this topic. I will not expose myself to the same criticism.
61. By way of summary, she makes the following points.
62. First, the 2.4 figure has stood the test of time and is consistent with data for the county of Hampshire and the borough of Fareham. For example, 2014 demographic analysis shows that the average figure for newbuilds in Fareham is 2.2 and the wider Fareham average more or less 2.4, which is in line with the figure for Fareham as a whole.
63. Secondly, the 2.4 figure as an average is supported by modelled data from two local water companies.
64. Thirdly, data from 2014 show that 26% of existing development in Fareham had 4 or more bedrooms and the average was 25% for the county as a whole. Despite a quarter of all houses being larger family homes (compared with 19% nationally), the average occupancy remains consonant with the ONS average for England and Wales.
65. Fourthly, there is no direct linear relationship between occupancy rates and water usage. There is *a* relationship, but the notional line is not necessarily straight, or at the very least does not illustrate a relationship of direct proportion. As Ms Potts observes, data from Southern Water demonstrates that currently a 5 person household uses 31% less water person than average, whereas a single person household uses 28% more than average. There are obvious economies of scale.
66. Fifthly, "the use of the ONS average figure is a robust way to capture normal occupancy for the majority of developments". Ms Potts suggests that it may well be inapt to cover extreme or unusual cases, whether atypically high or low. She adds that "it is not considered that large houses generate extreme occupancy figures, unless the property design makes it more likely to accommodate households that comprise a large number of unrelated people, or multiple households".
67. Sixthly, the housing mix is changing and future projections suggest a decline in average occupancy over time. The 2.4 figure is designed to be a robust yardstick which will be protective for the foreseeable future.
68. Seventhly, the 2.4 figure is additionally protective because it assumes that all occupants of each new dwelling are moving into the affected catchments, which does not reflect the real world.
69. Eighthly, there is a need for a strategic approach which is consistent across local planning authorities . As Ms Potts explains:

"The overwhelming majority of these strategic solutions, which have jointly enabled tens of thousands of dwellings, apply the ONS average of 2.4 people per dwelling to calculate impact. There are several examples where robust local evidence has led to a lower average being adopted. I am not aware of any

successful attempts to employ an average greater than 2.4 people per dwelling.

In so far as it is established practice to calculate mitigation requirements based on national occupancy rates, it is also clearly important that LPAs do not apply different occupancy rates within their HRAs for the same house, depending on which international site impacts are considered.”

70. Ninthly, Ms Potts points out in her third witness statement that Natural England did consider using finer grain data such as the Fareham dataset but concluded that it was not the best available scientific evidence because:

“... other inputs to the methodology, such as the water usage figures, were not available at such a specific level, which created additional uncertainties and complexities. A decision to rely on the finer grain detail would have introduced unnecessary and unwieldy complication, as it would have required using 65 different occupancy rates across the area (13 ONS areas x 1-5+ bedroom rates). Had Natural England adopted that more complex approach, it would also have been necessary to use a per bedroom water usage rate to avoid the risk of smaller properties’ impacts being underestimated (due to lower occupancy figures and proportionally greater water consumption than larger properties). These figures are not easily obtainable ...”

71. Tenthly, and very much by way of conclusion:

“The use of the best available scientific evidence here did not require the reasonable worst case scenario to be used. In any event, the situation which Dr O’Neill describes in that paragraph would not come to pass, as the methodology embeds the necessary precaution.”

72. Although Mr Jones’ forensic cannon was not directed to Ms Potts’ reasoning, it seems to me that I must look closely at what she has said. If it led Fareham into legal error, it is my duty to say so and explain why. Further, I understand that this judgment may cause ripples extending beyond the individual stones Mr Jones launched into the metaphorical pond.

73. For the avoidance of doubt, I do not believe that the European Commission’s document, “Managing Natura 2000 Sites the provisions of Article 6 of the Habitats Directive” (November 2018) adds materially to this debate.

74. My point of departure is that the obligation under the Habitats Regulations construed in harmony with the principles derived from the authorities is to carry out an assessment of the environmental impact any particular development will create judged at the time the assessment is being considered. So, the obligation is directed at this particular project and is time-sensitive. This should exclude consideration being given to likely future demographic changes, even if they are (in this sense) beneficial. I put this point

to Mr Elvin and I did not understand him to demur, at least as a general proposition. Direction of future travel provides further support for the 2.4 per person occupancy figure but only if it were otherwise justifiable.

75. In this context, therefore, the use of an average figure may be problematic. Of course there are swings and roundabouts, and the above-average will tend to be cancelled out over time by the below-average; but the obligation under the Habitats Regulations does not favour a balance sheet approach, even if there may be very sound policy reasons for having one.
76. The impermissibility of a balance sheet approach is not negated, in my judgment, by the consideration that Natural England's view (as advanced by Ms Potts, not as set out in the Advice Note) is that a bespoke approach should be saved for extreme or unusual cases. That may be sound in pragmatic terms, but the conceptual difficulty in not thereby surmounted; it is merely softened.
77. Moreover, this concern holds true even if I were to accept, as I think I can as matter of common sense, that there will be more dwellings to the left of the notional mean line than the right, as Mr Mould deftly submitted. It is also troubling that in practice local planning authorities have, it seems, reduced the occupancy figure but have never increased it. There have been, it appears, more roundabouts than swings.
78. It follows that there is a more than superficial attraction to Dr O'Neill's sustained objection to this methodology, not that it does much more than apply basic statistical principles to the exercise.
79. I do not read para 4.19 of the Advice Note (see §49 above), interpreted without reference to Ms Potts' glosses, as being in any way inconsistent with what I have just said. In particular, competent authorities are advised that the ONS average for England and Wales is only a starting-point, and that they may use bespoke calculations tailored *inter alia* to the particular locality, provided that these have the effect of removing all scientific doubt "based on complete, precise and definitive findings". The overall tenor of para 4.19 is that a lower level may be justified, but its language would permit a higher one – even at the price of possible appeals from disappointed developers. It is right to say that I have received no evidence of appeals brought by developers against the application of the 2.4 figure in the context of smaller developments.
80. Finally, I have some difficulty with Ms Potts' argument that an occupancy rate of 3 would not be the best available scientific evidence. Whether or not it represents a reasonable worst case scenario, this figure is both available (Ms Potts has said that Natural England specifically considered it) and more statistically apposite. It cannot be sensibly argued that a figure based on a narrower and more representative cohort is not more cogent than a countrywide statistic. Although in theory this might require 65 separate calculations, if – as is the case – the available evidence does not allow the ascertainment of water usage on a per bedroom basis, the practical realities would in my view justify taking a relatively broad-brush, albeit precautionary, approach to 1, 2, 3, 4 and 5 bedroom houses. These would succumb, as is currently in the position, in the face of robust, case-specific evidence justifying a different figure.
81. The question is whether my concerns should be elevated to a finding of legal error. The need for judicial deference in a domain of technical and scientific expertise remains.

Moreover, Natural England has specifically considered the application of more size-sensitive datasets but rejected the need for it. Only a judge satisfied that all the *minutiae* and ramifications have been completely absorbed and understood should be prepared to intervene in such circumstances. That is a tall order.

82. Mr Mould accepts that if the correct figure for occupancy levels were 3, the overall nitrogen budget, taking into account the mitigation measures, would be in debit rather than credit. This takes into account the extra layer of precaution supplied by the 20% buffer. Thus, the recruitment of the buffer to support the 2.4 figure cannot avail Fareham: it has already been used once in the calculation, and cannot be deployed twice. Furthermore, the requirement under para 4.8 of the Advice note is to apply precautionary rates to each variable and *then* to add the precautionary buffer. The latter is intended to provide a separate margin for error.
83. An occupancy rate of 3 would be the best available scientific evidence for 4-5 bedroom houses in the Fareham region, and to that extent there is an internal tension between paras 4.6-4.9 of the Advice Note and paras 4.18-4.19, but it does not follow that 2.4 is not sufficiently precautionary. The parties have not done the arithmetic, and it is not right that I perform it, but on the basis of an occupancy rate of 3 the overall debit figure is not a high number. The issue for me is whether I am able to accept Ms Potts' argument that other precautionary elements within the methodology should lead me to the conclusion that the grant of planning permission in this case based on this particular appropriate assessment would not lead to a violation of the Habitats Regulations.
84. Of course, it is necessary to be clear as to which additional precautionary elements may legitimately be brought into account. In my judgment, Ms Potts' fourth and seventh points (on my numbering) have force: that the relationship is not one of direct proportionality, and the algorithm assumes 100% migration to the area. Her other arguments are less persuasive, but only because they serve to explain why 2.4 is a robust average. Plainly it is, but the issue here is logically prior.
85. The planning officer did not specifically advise the committee that the 2.4 figure was precautionary because the relationship between occupancy and water usage was not in direct proportion. However, this omission is immaterial because the advice which guided his report reflected this factor.
86. Having examined Ms Potts' evidence with considerable care, yet applying to it the appropriate margin of appreciation in an area which remains technical and complex, Mr Jones has not been able to persuade me on a *Wednesbury* basis that the appropriate assessment carried out for the purposes of this particular planning application was other than sufficiently precautionary, based as it was on an occupancy value of 2.4. On the facts of this case, I am satisfied that there was an adequate precautionary leeway afforded by the two key factors I have highlighted. That is the expert evidence adduced through Ms Potts, and it is not irrational.
87. The Advice Note will need to be reviewed in the light of this judgment. In particular, I recommend that version 6 of the Advice Note sets out more clearly the circumstances in which bespoke calculations should be used. If Natural England's belief is that bespoke levels should be reserved for atypical cases, the Advice Note should say so and provide a brief explanation. In any event, if para 4.19 of the Advice Note is being interpreted such that only lower bespoke levels are justified, this imbalance should be

rectified. The extent to which it would be appropriate to recommend up to five guideline occupancy rates to reflect what I have said at the end of §80 above is also worthy of further consideration. This judgment should not be interpreted as necessarily giving a clean bill of health to the use of a 2.4 occupancy rate in all circumstances, even those which cannot be described as atypical.

88. Mr Jones' remaining arguments on Ground 1 lead nowhere. If the use of the 2.4 figure cannot be impugned in the particular circumstances of this case on the basis that it is not precautionary, Mr Jones' other formulations cannot advance his argument.
89. It follows that Ground 1 must be dismissed.

Ground 2

90. By Ground 2 Mr Wyatt contends that the classification of part of the site as being in "lowland grazing" was irrational, unreasoned and contrary to the precautionary principle. Ground 2, unlike Ground 5, proceeds on the basis that it is appropriate to take average figures. As is apparent from §51 above, land which would be used for "lowland grazing" receives a value of 13 Kg/Ha whereas it is apparent from other evidence that open grassland which is not being put to any agricultural use is valued at 5 Kg/Ha. The lower figure is more protective.
91. Objectors were saying that there was a complete paucity of evidence that any part of the land had been put to grazing use – on the facts of this case, grazing by horses. Mrs Valerie Wyatt, for example, contended that no area of the site was currently in use as a horse paddock and the Hanslips' planning agent had submitted no evidence to support the claim of current use. The photographs were not probative of this, and no other documentary evidence had been presented. Other objectors made similar points, and it must not be overlooked that as local residents they were in a position to give direct evidence on this issue.
92. On the other hand, as Mr Mould draws to my attention, there was evidence pointing the other way. For example, the planning statement referred to the existence of a horse paddock, there was in evidence a copy licence agreement giving a horse owner the right to graze on the land between 2016-19, and there was also reasonably clear photograph evidence depicting the presence of horses and a horse box in 2017. I was less impressed by Mr Mould's submission that there was evidence of haymaking in 2018, given the dates on the photographs.
93. It is correct that the planning officer's reasons for concluding that the north-west paddock should be allocated a lowland grazing value are not particularly expansive. Yet he correctly and fairly summarised the objectors' cases, and accurately directed himself on the law. The challenge for him was to exercise professional judgment and reach a conclusion as to what use the land would be put if planning permission were refused. There was no evidence of grazing by horses since 2017, but – as Mr Mould submitted with only a molecule of cynicism - this was more or less at the stage that this development was under contemplation. If planning permission were refused, it does rather defy common sense to suggest, at least in the particular circumstances of this case, that the land would lie fallow.

94. The question for me is whether the planning officer's advice was perverse. Plainly it was not, and Ground 2 must fail.

Ground 3

95. By Ground 3 it is contended that there was a failure to make documents available in accordance with Fareham's duties in the Local Government Act 1972, and associated issues relating to procedural fairness.
96. The relevant statutory provisions, and governing authority, are considered in my judgment in *Warsash v Fareham*, where the submission carries far greater weight than it does here.
97. The Defendant concedes that certain documents were not made available within the requisite time-frame, largely because its website was "down". These documents comprise Fareham's HRA and the final consultation response from Natural England. The issue for me is whether I may be satisfied that the outcome would inevitably have been the same had Fareham's statutory duty been fulfilled.
98. I should add that I cannot accept Mr Jones' further submission that an issue properly attaches to Fareham's failure to comply with s. 100(D)(1)(b) of the Local Government Act 1972 in connection with the list of background papers. In contrast to the position in *Hale Bank Parish Council v Veolia ES (UK) Ltd* [2019] EWHC 2677 (Admin), all the relevant material was made available to members and objectors, save (in relation to the latter) the specific documents referred to at §§13 and 15 above.
99. In my judgment, there is no merit in Ground 3. The short answer to it is that the HRA was fairly and accurately summarised in the planning officer's report, which was made available in a timely fashion, and the second email advice from Natural England added nothing of substance to the first. I do take Mr Wyatt's point about the difference between an average and maximum water rate, but in my judgment whatever he now says can make no conceivable difference to the outcome. Ms Potts has fully justified the 110 litre figure which she makes clear is intended to be an average, and no challenge in these proceedings has been brought against planning condition 10 as failing to match the model condition in the Advice Note.
100. Ground 3 is not improved with reference to general considerations of procedural fairness. Even assuming that Fareham acted unfairly at common law, in addition to its breaches of statutory duty, the riposte is always the same: the unfairness is immaterial.
101. It is convenient to take Ground 5 before Ground 4.

Ground 5

102. By Ground 5 it is argued that the methodology in the Advice Note does not meet the required standard of certainty under regulation 63 of the Habitats Regulations, as read in conjunction with article 6(3) of the Habitats Directive.
103. Mr Jones' argument under this rubric boiled down to three essential contentions. The first was that the existence of scientific uncertainty rendered it impossible for Fareham properly to conclude that this project may proceed, because the precautionary principle

is infringed. The second is that the use of an average figure for land use was not precautionary. The third is that the precautionary buffer has been fixed by no more than guesswork, and is not scientifically justified.

104. In my judgment, each of these points has little merit, and the first point is unarguable.
105. I have already addressed the submission about scientific uncertainty: see §45 above. The short answer is that it misunderstands the precautionary principle. We are in the realm of the empirical sciences where uncertainty is inevitable. It is in order to meet this unavoidable uncertainty that the precautionary principle has been devised. The apex of Mr Jones' submission must be that uncertainty rules out *any* development in the Solent Region, an unattractive argument given the exigencies of the real world. By requiring the competent authority effectively to rule out, to a very high standard, the possibility of relevant harm, the requirement under both articles 6(2) and (3) of the Habitats Directive is fully satisfied.
106. As for the second submission, it is correct that the figure of 13 Kg/Ha for lowland grazing is an average, because the Farmscoper model is intended to provide average leachate data for a variety of farms and agricultural uses, and Dr O'Neill makes the obvious methodological criticisms of that. His evidence is that, where doubt exists as to the accuracy of data used to inform the HRAs, site specific measurements could and should be undertaken.
107. Ms Potts' primary justification for taking average figures amounts to the following:

“This is a practical and robust approach for several reasons. These figures were used to take account of the impact of agricultural activity which would be ongoing in the absence of development. The use of average figures accounts for the nitrogen variations that may exist between farms of the same type within a catchment, as well as temporal variations of farm operations. The actual leaching rates for any specific field or farm are difficult, time-consuming, costly to monitor and not without margins of error, moreover they are greatly influenced by short-term factors such as specific crops being grown in any season and the timing and severity of rainfall events. So, in effect, to measure a meaningful nitrogen leaching figure for a particular development site, it would be necessary to use an average derived over a significant timescale for the site. As these measurements cannot be collected retrospectively, it would introduce considerable delay, with no guarantee of accurate outputs.”

Ms Potts adds that the degree of uncertainty engendered by the use of averages is met by encouraging a precautionary approach to selecting land type where evidence is not clear-cut, and comprises one element of the precautionary buffer.

108. It is also important to recognise that, as with the occupancy rate, the Advice Note caters for the use of a more precautionary figure where the empirical evidence exists to support it. Furthermore, and in contrast with the occupancy rate, these data are specific to the Solent Region.

109. Dr O'Neill also criticises para 59 of Ms Potts' second witness statement which addresses the issue of total nitrogen, being the largest component of nitrates (NO₃), and organic nitrogen. In my view, Ms Potts has successfully neutralised that argument by pointing out that the underestimate in total nitrogen leaching will be counterbalanced by the underestimate in the effectiveness of mitigation measures.
110. In my judgment, Dr O'Neill's arguments are not persuasive. Site surveys would, as Ms Potts underlines in her third witness statement, provide no more than a snapshot of existing land use. Aside from the time and expense, it is far from clear that undertaking the overly rigorous approach recommended by Dr O'Neill would in fact yield more protective data. Ms Potts explains why Natural England's data are valid for the Solent Region, and even without applying the high margin of appreciation appropriate to this judicial review application I cannot accept that the outcome is perverse.
111. As for the third submission, it is true that the 20% figure is not derived from any arithmetical calculation or other algorithm. However, Ms Potts informs the court that it has resulted from an evaluation of scientific literature and research, combined with expert judgment. The buffer also reflects the fact that water waste treatment operations in the Solent Region are currently performing on average 25% more effectively than the assumed level and that an unknown but nonetheless significant proportion of nitrogen will be discharged into the sea and not touch the designated sites. In any case, the purpose of the buffer is to supply an extra level of protection in circumstances where there is room for debate between reasonable scientists, using their judgment, expertise and experience, as to whether the figure should be, say, 10%, 20% or 30%. There is no place for judicial intervention on any *Wednesbury* basis.
112. Finally, by para 53 of his skeleton argument Mr Jones seeks to develop an entirely new argument. He submits that as matter of principle it is wrong to include anything for existing land use unless it be established that this use subsisted as at the date of the relevant condition surveys in 2018/19. These, so the submission runs, set out the appropriate baseline.
113. I cannot accept this submission even allowing for the fact that Mr Elvin has not been given a proper opportunity to deal with it. The short answer to it is that there is no evidence of any relevant baseline data in 2018/19 because these were general condition surveys and not surveys which would have enabled any such figures to be extrapolated or inferred.

Ground 4

114. By Ground 4 it is contended that reliance on the Advice Note was contrary to the requirement in article 6(2) of the Habitats Directive to take "appropriate steps" to avoid the deterioration or disturbance of protected species and habitats.
115. Save as regards one matter (addressed at §116 below), I agree with Fareham and Natural England that Ground 4 can have no life separate to Ground 5. If, as I have found, Fareham properly discharged its obligations as competent authority under regulation 63 of the Habitats Regulations, no separate issue arises under regulation 9(3): see *Waddenzee*, at paras 35-37.

116. Mr Jones seeks to avoid this snare by submitting that there is an obligation to take positive steps to avoid harm. However, I have already rejected that argument at §42 above.
117. Ground 4 must therefore fail.

Ground 6

118. By Ground 6 it is contended that Fareham did not have power to determine the application because it did not comply with the requirement to give notice to the owner of land which should have been within the red line of the application, contrary to article 7(1) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 [SI 2015 No 595] (“the DMPO”). Put in these terms, this is a straight *vires* challenge, although there is no evidence that any relevant landowner was not notified by some other means.
119. Article 7(1) provides as follows:

“7.— General requirements: applications for planning permission including outline planning permission

(1) Subject to paragraphs (3) to (5), an application for planning permission must—

(a) be made in writing to the local planning authority on a form published by the Secretary of State (or a form to substantially the same effect);

(b) include the particulars specified or referred to in the form;

(c) except where the application is made pursuant to section 73 (determination of applications to develop land without conditions previously attached) or section 73A(2)(c) (planning permission for development already carried out) of the 1990 Act or is an application of a kind referred to in article 20(1)(b) or (c), be accompanied, whether electronically or otherwise, by—

(i) a plan which identifies the land to which the application relates;

(ii) any other plans, drawings and information necessary to describe the development which is the subject of the application;

(iii) except where the application is made by electronic communications or the local planning authority indicate that a lesser number is required, 3 copies of the form; and

(iv) except where they are submitted by electronic communications or the local planning authority indicate that a lesser number is required, 3 copies of any plans, drawings and information accompanying the application.”

120. Mr Jones pointed to articles 7(1)(c)(i) and (ii): the requirements that applications for outline planning permission be accompanied by a plan identifying the land to which the application relates; and any other plans, drawings and information necessary to describe the development in the application. Reading these requirements alongside the Planning Practice Guidance (“PPG”), Mr Jones submitted that the applicant for outline planning permission ought to have included Brook Avenue in the red line of the location plan.

121. The relevant part of the PPG provides:

“What information should be included on a location plan?”

A location plan should be based on an up-to-date map. The scale should typically be 1:1250 or 1:2500, but wherever possible the plan should be scaled to fit onto A4 or A3 size paper. A location plan should identify sufficient roads and/or buildings on land adjoining the application site to ensure that the exact location of the application site is clear.

The application site should be edged clearly with a red line on the location plan. *It should include all land necessary to carry out the proposed development (e.g. land required for access to the site from a public highway, visibility splays, landscaping, car parking and open areas around buildings).* A blue line should be drawn around any other land owned by the applicant, close to or adjoining the application site.” [emphasis supplied]

122. There was no dispute that access to the site of the Proposed Development from the public highway (Brook Lane) would be via Brook Avenue, nor that Brook Avenue was not in fact included within the red line area of the location plan. The question for this court is whether the failure to include Brook Avenue within the red line area meant, as Mr Jones submitted, that Fareham did not have *vires* to determine the application. Some support for Mr Jones’ case is to be found in the relevant passage from the PPG.

123. On this last matter, I accept the submissions made by Mr Mould as to the status of the PPG. It is a guidance document which is subject to change without forewarning or consultation (see *Solo Retail Ltd v Torridge District Council* [2019] EWHC 489 (Admin) at para 33). It is not binding; it cannot be determinative of the *vires* question. When considering a *vires* challenge such as this, one must, of course, examine the relevant legislative provisions.

124. Article 7(1)(c)(ii) does not require that “the development which is the subject of the application” is shown in the location plan. It allows for the development to be described in “any other plans, drawings and information necessary”. The Planning Statement that was submitted with the application explained, in sections 7 and 8, that the site benefits from a right of way over Brook Avenue in order to access Brook Lane. In my judgment, Brook Avenue does not form part of the development which is the subject of the application. But even if it does, by virtue of the fact that Brook Avenue was described in the Planning Statement, being “other...information” accompanying the application, there was no failure to comply with article 7(1)(c)(ii).

125. Mr Jones also raised an issue in relation to article 7(1)(c)(i). It was said that Brook Avenue is “land to which the application relates” such that it needed to be shown in the plan itself. Mr Mould’s riposte was that Brook Avenue is not “land to which the application relates” because it is not “land” as defined in the Town and Country Planning Act 1990. The DMPO was made under powers conferred by the 1990 Act and, by dint of s. 11 of the Interpretation Act 1978, the meaning of the word “land” can be taken to have the same meaning in the DMPO as it has under the 1990 Act, unless the contrary intention appears.
126. Section 336 of the 1990 Act provides:
- ““land” means any corporeal hereditament, including a building, and, in relation to the acquisition of land under Part IX, includes any interest in or right over land;”
127. The relevance of Brook Avenue to the application for outline planning permission is the access that it provides to the site. As it is a private road, that access is enjoyed by virtue of the easement granted over Brook Avenue which Mr Jones accepted covered vehicular access. Mr Mould submitted that an easement is an incorporeal hereditament which therefore falls outside of the definition of “land” within article 7(1)(c)(i). I consider that there is force in this submission. Further, the definition of “land” in s. 205(1)(ix) of the Law of Property Act 1925 covers only corporeal hereditaments.
128. Even if I consider Brook Avenue itself, rather than the easement granted over Brook Avenue, I do not accept that Brook Avenue is land “to which the application relates”. Para 158.2 of *Butterworths Planning Law Service* assists:
- “The site area should include all of the land to be developed, i.e. the land upon which there is either to be operational development or a material change in use. In practice, difficulties are most often encountered in respect of access. Strictly, it is unnecessary to include the public highway within the application site when works are proposed if the works are to be carried out by the local highway authority because works by the highway authority in the public highway do not constitute development and will usually be dealt with by way of legal agreement with the highway authority. Where there is a new private access proposed involving the carrying out of operations the works will require permission and should be included within the site. ***It is desirable that the applicant also includes within the application site other land required for access to the development.***” [emphasis added]
129. The access provided by Brook Avenue does not provide “new private access”. As is discussed further below, in relation to Ground 7, the use of the existing easement over Brook Avenue to access the site from Brook Lane does not require any material change in its use. Nor are there any works being carried out on Brook Avenue. In my judgment, it is therefore not “land to which the application relates” such as to fall within article 7(1)(c)(i). Whilst it may be “desirable” for the applicant to include within the application site other land required for access to the development, that is not a mandatory requirement, the non-fulfilment of which could have affected Fareham’s *vires* to deal with the application.

Ground 7

130. By Ground 7 it is contended that Fareham erred in its approach to Policy DSP40 of the Local Development Plan. This sets out the criteria which must be met in order for a housing development outside of the settlement boundary to be acceptable, if a five-year housing land supply cannot be demonstrated (as it cannot be here).
131. DSP40 provides as follows:
- “Where it can be demonstrated that the Council does not have a five year supply of land for housing against the requirements of the Core Strategy (excluding Welborne) additional housing sites, outside the urban area boundary, may be permitted where they meet all of the following criteria:
- (i) The proposal is relative in scale to the demonstrated 5 year housing land supply shortfall;
- (ii) The proposal is sustainably located adjacent to, and well related to, the existing urban settlement boundaries, and can be well integrated with the neighbouring settlement;
- (iii) The proposal is sensitively designed to reflect the character of the neighbouring settlement and to minimise any adverse impact on the Countryside and, if relevant, the Strategic Gaps;
- (iv) It can be demonstrated that the proposal is deliverable in the short term; and
- (v) The proposal would not have any unacceptable environmental, amenity or traffic implications.”
132. Mr Jones submitted that Fareham was wrong to conclude, in reliance on the planning officer’s report, that the proposal satisfied paras (i), (iii), (iv) and (v) of the policy. The officer concluded that para (ii) had not been fulfilled.
133. The application of planning policy as opposed to its interpretation is not, as acknowledged, the function of this court. However, relying on *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13; [2012] PTSR 983, Mr Jones submitted that Fareham’s errors in the application of Policy DSP40 were *Wednesbury* unreasonable and therefore amenable to judicial review. By contrast, Mr Mould submitted that this challenge constituted a prime example of the excessively legalistic approach to the exercise of planning judgments that the court has consistently deprecated, notably in *Selby DC* and *Mansell*.
134. The first issue taken with the application of Policy DSP40 was the planning officer’s conclusion that the proposal was “relative” to the demonstrated 5-year housing land supply shortfall, as required by para (i). The officer’s report had identified the land supply shortfall as “circa 500 dwellings”. It was submitted that this proposal, which would deliver a maximum of eight 4-5 bedroom dwellings, would make a contribution

so small that it was not reasonably open to Fareham to conclude that it was “relative” to the shortfall.

135. The planning officer’s approach was set out at paragraph 8.82 of his report:

“Officers acknowledge that the proposal could deliver 8 dwellings, as well as an off-site contribution towards affordable housing provision, in the short term. The contribution the proposed scheme would make towards boosting the Borough’s housing supply would be modest but is still a material consideration in the light of this Council’s current 5YHLS.”

136. Mr Jones naturally focused on the epithet “modest”, submitting that it was irrational to conclude that the contribution made by the proposal was “modest” and yet still “relative” to the shortfall. Mr Mould submitted that Policy DSP40’s relativity criterion was clearly designed so that planning permission would not be granted to developments which were “wholly disproportionate” to the shortfall, being far in excess of the housing need. I do not consider it necessary to decide whether “relative” means more than “modest” or less than “wholly disproportionate”.

137. In my judgment, no issue of law arises here. To pore over the language of applicable policy in this way would be contrary to the approach set out in *Tesco*. As Lord Reed JSC said, at para 19:

“Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract...In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of judgment can only be challenged on the ground that it is irrational or perverse”

138. Similarly, to focus too intensely on the adjective “modest” in the planning officer’s report would be contrary to the approach advocated by Lindblom LJ in *Mansell* at para 42 which calls for these reports “not to be read with undue rigour, but with reasonable benevolence”. Taking that reasonably benevolent approach, and looking, without any additional gloss, at the language of Policy DPS40, I can see nothing wrong with the planning officer’s judgment that this proposal, in making a “modest but still...material” contribution to the housing shortfall, satisfied the criterion in para (i). As a matter of ordinary language and common sense, it cannot be said that Fareham’s conclusion on this point was irrational or perverse.

139. The second issue is in relation to Fareham’s conclusion that the proposal was “sensitively designed to reflect the character of the neighbouring settlement and to minimise any adverse impacts on the Countryside”, as required by para (iii). Mr Jones submitted that it was irrational to find that this criterion had been satisfied because: (1) doing so was inconsistent with the planning officer’s conclusion that the proposal “would have an urbanising effect which would be harmful to the character and appearance of the countryside”; (2) the density figure for the proposal, which underpinned the planning officer’s analysis, was incorrect; and, (3) the planning

committee did not have sufficient information about the proposal's scale, appearance and layout to reach a conclusion on para (iii), owing to those matters being reserved in the application.

140. As to (1), as Mr Jones rightly points out, the planning officer considered that the proposal would have a harmful effect on the character and appearance of the countryside. He considered that this impact was relevant to Core Strategy Policies CS17 and CS14, which concerned respect for the key characteristics of the area and the protection of the countryside from development which would adversely affect its character, appearance and function respectively. The case officer concluded that the Proposed Development was in conflict with those policies, and that conclusion is not subject to any challenge before this court. Indeed, Mr Jones relies on it.
141. By contrast, the planning officer did not consider that there was any conflict with para (iii). As Mr Mould observed this exception predicates an adverse impact and invites consideration to its possible alleviation. As is apparent from the report, the planning officer considered that that policy was concerned not with whether or not there would be an adverse impact on the character and appearance of the countryside, but with the need to design the proposal sensitively so as to minimise this. That being the case, there was nothing inconsistent about recognising the existence of a harmful urbanising effect whilst also finding that this policy criterion had been satisfied. In concluding that Policy DSP40 (iii) had been complied with, the planning officer focused on the way in which the illustrative site plan showed the site could be laid out so as to retain an element of green space and open frontage as well as the removal of unsightly derelict buildings. In other words, he considered the sensitivity which had been displayed in the design of the Proposed Development. There is nothing at all wrong with his approach in this respect; indeed, it is completely understandable.
142. As to (2), Mr Jones submitted that the density figure of 5.5 used in the officer's report was based on an error of fact because, rather than being calculated with reference solely to the area of land that was being used for the development of dwellings, it was calculated with reference to the whole site (including that which will be used for wetland pond mitigation and SANG). Mr Jones submitted that, had the smaller area of land been used for the calculation, the density figure would have been 7.4 (a revised calculation showing this was never submitted by Mr Jones, but it matters not).
143. In my judgment, Mr Jones' submission was based on a misunderstanding of para (iii). As already noted, the planning officer, in applying Policy DSP40, was not considering whether or not the proposal would adversely affect the character and appearance of the countryside, but whether it had been sensitively designed. I make no finding as to whether the density figure was wrong but, even if it was, it could not possibly have made a difference to the outcome of the decision under question. The planning officer found, on the basis of a density figure of 5.5, that the proposal would have an urbanising effect detrimental to the character and appearance of the countryside. Had he used a higher density figure, he would have obviously reached the same conclusion. Having reached that conclusion, he would have considered whether the proposals include sensitive design features, which is exactly what he did.
144. As to (3), Mr Jones submits that Fareham was required to address the scale and appearance of the proposal in order to consider whether DSP40 para (iii) was satisfied but was unable to do so owing to a lack of information. This argument is misconceived.

Issues as to the scale and appearance of the proposal would plainly be relevant to the question of whether it adversely impacted on the countryside. The starting point for para (iii) is, however, the continuing assumption that there will be an adverse effect to the countryside and the question is to whether sensitive design can mitigate that effect. The planning officer had regard to an illustrative site plan submitted as part of the planning application which showed how the dwellings in the proposal could be arranged. The planning committee and those advising therefore had sufficient information to consider the question of sensitive design. The approach taken cannot be criticised, and certainly not to a *Wednesbury* standard.

145. The third issue is Fareham’s conclusion that the proposal would be “deliverable in the short term” as required by DSP40 para (iv). Mr Jones submitted that the planning officer failed to consider whether the Hanslips had a viable private right of way over Brook Avenue, and the impact that this would have over access to, and therefore the short-term deliverability of, the site.
146. At first blush, this criticism of the planning officer’s report appeared more promising than the other criticisms levied under Ground 7. Mr Jones referred to a legal opinion he had given on the use and ownership rights over Brook Avenue which he said was either misunderstood or ignored by the planning officer. The opinion noted that Brook Avenue “is private and use is subject to an easement granted to each of the landowners”, and advised that it was “most unlikely” that that easement could be relied upon by the applicants to gain access to the site in the absence of compulsory acquisition procedures. However, on closer examination of the case law upon which the advice was based, I consider that there was no significant issue which was incorrectly evaluated by the case officer.
147. Mr Jones’ advice indicated, in reliance on *McAdams Homes v Robinson* [2004] EWCA Civ 214, that the use of the route over Brook Avenue would be intensified by the traffic for necessary building works and the occupiers of the dwellings if constructed so as to fall outside the existing easement. In my judgment, this mischaracterises what was said in *McAdams*. In that case, Neuberger LJ was considering whether a drainage easement could continue to be enjoyed following the development of a piece of land from the site of a bakery to the site of two residential houses. He drew a distinction between a development which would represent a “radical change in the character” of the land, and one which would result in a “mere change or intensification in the use of the site” and found that it was only the former that could result in the easement being lost or suspended (see paras 49-51). Mr Jones confirmed in oral argument that, under the terms of the existing easement over Brook Avenue, there is a right of way which allows access to all forms of carriage. There is therefore no question that the applicant’s use of the easement would entail a mere intensification of its use, rather than a radical change in its character. When used in the past as a nursery, vehicular traffic passed without let or hindrance over Brook Avenue. That being so, there was no reason for the planning officer to be concerned about the Hanslips’ ability to enjoy the existing easement over Brook Avenue so as to access the site. In his report he rightly stated that “nothing [had] been provided to indicate that a private right of access along Brook Avenue would not still enable suitable vehicle, cycle and pedestrian access to the site”; and his conclusion that the proposal was therefore deliverable in the short term, as required by Policy DSP40 (iv), cannot be faulted.

148. The final complaint under Ground 7, as set out in Mr Jones' skeleton argument, was that "[t]he Defendant erred in its conclusion that the Proposed Development would not have any "adverse traffic implications"". However, it is worth noting that the test under Policy DSP40 (v) is not whether or not there were "adverse" traffic implications; rather it is whether there were "unacceptable" traffic implications. The acceptability or otherwise of the traffic implications of proposal is plainly a matter of planning judgment with which this court will not readily interfere. It is also to be borne in mind that planning officers' reports are "written for councillors with local knowledge" which must be relevant to the question of whether traffic implications are or are not acceptable. In this case, the planning officer reached a conclusion on the acceptability of the traffic implications having taken advice from Fareham's Highways Officer and I am far from being persuaded that anything in his approach was irrational or perverse.
149. For all of these reasons, I consider that Ground 7 is without merit and must therefore fail.

Ground 8

150. By Ground 8 it is contended that Fareham erred in its approach to s 38(6) of the Planning and Compulsory Purchase Act 2004, which gives primacy to the development plan unless material considerations indicate otherwise.
151. In order to make sense of this Ground, I need to set out relevant sections of the planning officer's report:

8.78 Section 38(6) of the Planning and Compulsory Purchase Act 2004 sets out the starting point for the determination of planning applications: "If regard is to be had to the development plan for the purpose of any determination to be made under the Planning Acts the determination must be made in accordance with the plan unless material considerations indicate otherwise".

8.79 This application has previously been the subject of a favourable Committee resolution to grant planning permission. The revised application proposes additional measures to address the matter of nutrient neutrality but is otherwise the same.

8.80 The site is outside of the defined urban settlement boundary and the proposal does not relate to agriculture, forestry, horticulture and required infrastructure. The principle of the proposed development of the site would be contrary to Policies CS2, CS6 and CS14 of the Core Strategy and Policy DSP6 of Local Plan Part 2: Development Sites and Policies Plan.

8.81 Officers have carefully assessed the proposals against Policy DSP40: Housing Allocations which is engaged as this Council cannot demonstrate a 5YHLS. In weighing up the material considerations and conflicts between policies; the development of a greenfield site weighted against Policy DSP40, Officers have concluded that the proposal is relative in scale to the demonstrated 5YHLS shortfall (DSP40(i)), can be delivered

in the short-term (DSP40(iv)) and would not have any unacceptable environmental, traffic or amenity implications (DPS40(v)). Whilst there would be harm to the character and appearance of the countryside the unsightly derelict buildings currently on the site would be demolished. Furthermore, it has been shown that the site could accommodate eight houses set back from the Brook Avenue frontage and an area of green space to sensitively reflect nearby existing development and reduce the visual impact thereby satisfying DSP40(iii). Officers have however found there to be some conflict with the second test at Policy DSP40(ii) since the site is acknowledged to be in a sustainable location but is not adjacent to the existing urban area.

8.82 In balancing the objectives of adopted policy which seeks to restrict development within the countryside alongside the shortage in housing supply, Officers acknowledge that the proposal could deliver 8 dwellings, as well as an off-site contribution towards affordable housing provision, in the short term. The contribution the proposed scheme would make towards boosting the Borough's housing supply would be modest but is still a material consideration in the light of this Council's current 5YHLS.

8.83 There is a clear conflict with development plan policy CS14 as this is development in the countryside. Ordinarily, officers would have found this to be the principal policy such that a scheme in the countryside should be refused. However, in light of the Council's lack of a 5YHLS, development plan policy DSP40 is engaged and officers have considered the scheme against the criteria therein. The scheme is considered to satisfy four of the five criteria and in the circumstances, officers consider that more weight should be given to this policy than CS14 such that, on balance, when considered against the development plan as a whole, the scheme should be approved.

8.84 As an Appropriate Assessment has been undertaken and concluded that the development would not have an adverse effect on the integrity of the sites, Paragraph 177 of the NPPF states that the presumption in favour of sustainable development imposed by paragraph 11 of the same Framework is applied.

8.85 Officers have therefore assessed the proposals against the 'tilted balance' test set out at paragraph 11 of the NPPF.

8.86 In undertaking a detailed assessment of the proposals throughout this report and now applying the 'tilted balance' to those assessments, Officers consider that: i) there are no policies within the National Planning Policy Framework that protect areas or assets of particular importance which provide a clear reason for refusing the development proposed; and ii) any adverse impacts of granting planning permission would not

significantly and demonstrably outweigh the benefits, when assessed against the policies in the National Planning Policy Framework taken as a whole.

8.87 Having carefully considered all material planning matters, and after applying the ‘tilted balance’, Officers recommend that planning permission should be granted subject to the prior completion of a planning obligation pursuant to Section 106 of the Town and Country Planning Act 1990 and the imposition of appropriate planning conditions.”

152. Applying a close textual approach to these paragraphs, Mr Jones identified what he said were a number of flaws. First, he submitted that there was no clear conclusion, contrary to the adjurations of the late Patterson J in *Tiviot Way Investments Ltd v SSHLG* [2015] EWHC 2489 (Admin); [2016] JPL 171, at para 27, as to whether the proposal did or did not accord with the development plan. Secondly, it was said that even if a conclusion as to accordance had been made, this was irrational: the proposal failed to meet the two most important policies in the plan. Thirdly, Mr Jones submitted that the planning officer’s approach to DSP40 was wholly unclear, particularly in circumstances where only four out of the five relevant criteria were said to be satisfied in the context of an exceptional policy. Finally, it is complained that the application of the “tilted balance” was both flawed and inadequately reasoned.
153. There was some force in Mr Jones’ submissions on Ground 8 which I must acknowledge. Aside from Ground 1, it was more propitious than the remainder of his grounds.
154. The correct approach to the application of s. 38(6) of the 2004 Act, or more accurately its predecessor, was set out by Lord Clyde in *City of Edinburgh v Secretary of State for Scotland* [1997] 1 WLR 1447, in various passages:

“...the section has not touched the well-established distinction in principle between those matters which are properly within the jurisdiction of the decision-maker and those matters in which the court can properly intervene. It has introduced a requirement with which the decision-maker must comply, namely the recognition of the priority to be given to the development plan. It has thus introduced a potential ground on which the decision-maker could be faulted were he to fail to give effect to that requirement. But beyond that it still leaves the assessment of the facts and the weighing of the considerations in the hands of the decision-maker. It is for him to assess the relative weight to be given to all the material considerations. It is for him to decide what weight is to be given to the development plan, recognising the priority to be given to it...” [at page 1458F-H]

...

“In the practical application of section 18A it will obviously be necessary for the decision-maker to consider the development plan, identify any provisions in it which are relevant to the

question before him and make a proper interpretation of them. His decision will be open to challenge if he fails to have regard to a policy in the development plan which is relevant to the application or fails properly to interpret it.” [at page 1459D]

155. I do not read Patterson J’s judgment in *Tiviot Way* as altering the position in any material respect.
156. Analysing the planning officer’s report in the appropriate fashion, it is clear that he advised the committee that the proposal did not accord with the development plan in a number of respects. In particular, policies CS2, CS6 and CS14 of the Core Strategy were not fulfilled nor was policy DSP6 of the local plan (para 8.80).
157. As for policy DSP40, which I have already considered at some length, four out of its five elements were satisfied and there was *some* conflict with criterion (ii). The site was in a suitable location but it could not be said to be within an existing urban area. Thus, DSP40 was almost satisfied but not quite. Mr Jones submitted that a miss is as good as a mile, but the extent of compliance (or non-compliance) with the development plan must be relevant.
158. It was also relevant that the proposal made a modest albeit a material contribution towards the housing shortfall (para 8.82). This was clearly germane to the application of the exceptional policy set out in DSP40, and it is arguable that para 8.82 should have preceded para 8.81.
159. Para 8.83 gives rise to a degree of interpretative challenge. As I have said, there is some force in Mr Jones’ submission that its various strands are difficult to identify and disentangle. Furthermore, I have detected a degree of variance between Mr Mould’s very skilful oral submissions and paras 73-74 of his detailed grounds. According to the latter, para 8.83 sets out the planning officer’s conclusion on the first stage of the s. 38(6) analysis whereas paras 8.84-8.87 develop the second stage, namely material considerations. Mr Mould’s oral argument was that para 8.83 contained a composite conclusion on both stages, and that para 8.84 ff sets forth additional, fortifying reasoning which was not strictly necessary.
160. Para 8.83 is somewhat elliptical and a degree of benevolence is required. The issue is: how much? Overall, this report is a well-written and impressive document, and this planning officer’s approach has been diligent and punctilious. Section 38(6) must be familiar territory to him. My reading of para 8.83 corresponds more with Mr Mould’s detailed grounds than his oral argument. There, in my judgment the planning officer was dealing with the first stage of the s. 38(6) analysis. He was considering the extent of compliance with the development plan and the ordering of policies within that plan. He found, as he was entitled to, that policy DSP40 was more important in this case than CS14, owing to the shortfall in housing supply, and that the failure to satisfy the second criterion did not undermine this conclusion. The final clause in para 8.83 could be better worded, but it sets out the planning officer’s conclusion on the first stage. It is not a conclusion on the s 38(6) issue *tout court*, still less the planning application as a whole.
161. Paras 8.84-8.87 address the second stage of the s. 38(6) exercise. I must reject Mr Jones’ conclusion that the planning officer somehow misapplied the “tilted balance”. This was applicable in the light of the conclusions on the environmental issues, leading to the

applicability of the presumption in favour of sustainable development. Para 8.86 is a composite conclusion on all remaining material considerations in the light of the tilted balance. The overall conclusion in para 8.87 is legally unexceptionable.

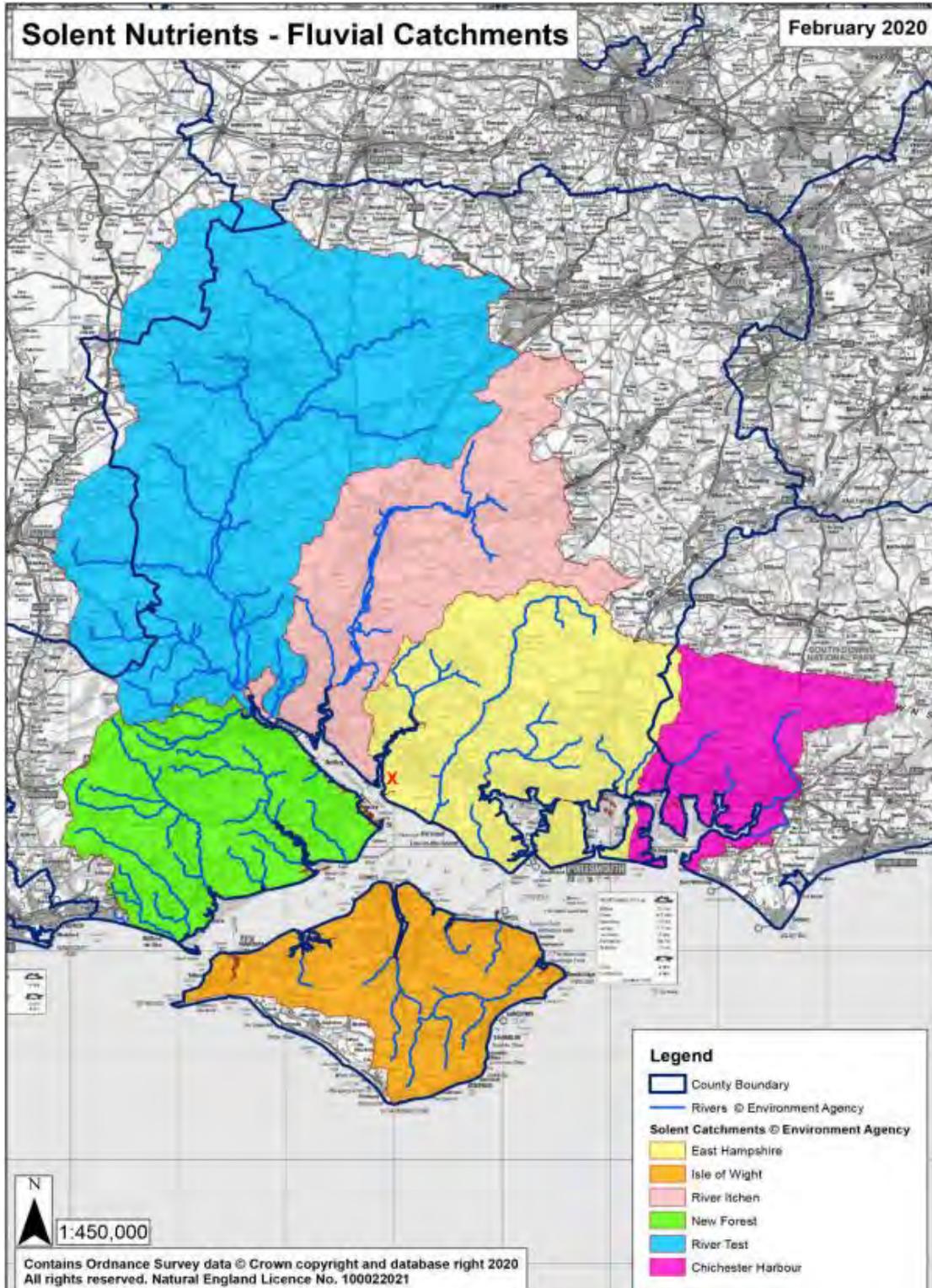
162. Ground 8 therefore fails.

Disposal

163. This application for judicial review must be dismissed.

ANNEX

“X” marks the site





Neutral Citation Number: [2021] EWHC 1435 (Admin)

Case No: CO/3397/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/05/2021

Before:

MR JUSTICE JAY

Between:

**THE QUEEN (on the application of SAVE
WARSASH AND THE WESTERN WARDS)**

Claimant

- and -

FAREHAM BOROUGH COUNCIL

Defendant

- and -

(1) LORRAINE LOUISE HANSLIP
(2) NATURAL ENGLAND

Interested
Parties

Gregory Jones QC and Conor Fegan (instructed by Fortune Green Legal Practice) for the
Claimant

Timothy Mould QC (instructed by Southampton & Fareham Legal Partnership) for the
Defendant

David Elvin QC and Matthew Henderson (instructed by Rachel Francis, Principal
Solicitor) for Natural England
Lorraine Hanslip did not appear

Hearing date: 13th May 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 28th May 2021 at 10.00am.

MR JUSTICE JAY:

Introduction: Essential Factual Background

1. My judgment in this case should be read in conjunction with that in *R (oao Wyatt) v Fareham BC* [2021] EWHC 1434 (Admin) which I am handing down at the same time. Grounds 1, 7 and 8 therefore fail. Although there are minor factual differences (viz. the application here was for full rather than outline planning permission for six 5-bedroom detached houses), these distinctions do not impact on the use of the 2.4 person per dwelling occupancy rate.
2. The application for judicial review succeeds in this case on two, related procedural grounds. It fails on the contention that the planning officer applied the wrong test to the issue of the use to which the subject land would have been put had planning permission not been granted.
3. The planning application brought by Mrs Lorraine Hanslip was for a residential development of six detached houses and garages incorporating wetland habitat creation on land at 79 Greenaway Lane, Warsash, Southampton. Various plans and photographs have been provided, and for ease of comprehension I have annexed to this judgment the plan that I believe is the most helpful for this purpose.
4. In broad outline, the land comprehended by the red line lies to the north of the land in the ownership of Mrs Hanslip and abuts Greenaway Lane. For reasons of clarity, I will be describing the whole area (i.e. the red and the blue land) as “the land”, the area the subject of the application for planning permission as “the site”, and the area which is outwith the planning application, marked in blue on the relevant plan, as “the other land”.
5. As for the site, it comprises 8,232.380 m² of currently undeveloped grassland (this excludes the existing detached property which was built about 8 years ago and is surrounded by its own red line) and 646.952 m² of tree belt which will be retained. The dimensions of the other land to the south have not been supplied, but I can take these to be in the region of 10,000 m² or 1 hectare.
6. Two of the proposed plots (identified as plots 1 and 2) lie to the north west of the existing property; the other four (plots 3-6) to the north east. The dimensions of the individual plots vary slightly. Plots 1 and 2 constitute 47% of the site (3,869 m²) and plots 3-6 the remaining 53% (4,363 m²). It is apparent from the plans supplied in conjunction with the planning application that measures will be taken to screen the development from Greenaway Lane, but the planning implications of that need not be addressed in this judgment. The wetland area will be to the south of the site, abutting the red line separating the site from the other land.
7. Mrs Hanslip was contending that the whole of the site, ignoring the tree belt for this purpose, should be ascribed as “lowland grazing” (by horses) with a resultant value of 13 Kg/Ha of nitrogen loss. There was a body of evidence from objectors to the effect that this alleged use had been minimal. For example, in a written representation lodged on 30th March 2020 by Mrs Hilary Megginson who lives on Greenaway Lane, it is contended that:

“Residents have evidence that 4,350 m² of the site was only actually grazed for a period of around 9 months over a 10 year period. Taking all of this information into account, it is crucial that the calculation within this application includes the amended value of 5 Kg/Ha for the part of the site not used for grazing (approx. 47%) not 13 kg for the whole site as claimed by the applicant.”

There was evidence from other objectors in the form of written representations, not statutory declarations, to the effect that horse grazing had only taken place on the area to the north east of the site, in 2016.

8. Mrs Megginson appeared to be accepting that part of the land should attract a future use value of 13 Kg/Ha with the remainder 5 Kg/Ha. However, Mrs Megginson was also seeking to rely on para 4.52 of Natural England’s Advice Note, which provides (version 4, at the time she was writing, did not differ from version 5 on this topic):

“There may be areas of a greenfield development site that are not currently in agricultural use and have not been used as such for the last 10 years. In these areas as there is no agricultural input into the land a baseline nitrogen leaching value of 5 kg/ha should be used. This figure covers nitrogen loading from atmospheric deposition, pet waste and nitrogen fixing legumes.”

So, Mrs Megginson appeared to be arguing at this point for the application of the lower baseline value of 5 Kg/Ha to the whole of the site. Indeed, in a nitrogen budget calculation which she submitted subsequently (I do not have the date), existing use is calculated on the basis of a value of 5Kg/Ha for the entire site. Her reason for doing that was “the grazing period is negligible”.

9. In para 8.39 of the planning officer’s report to the planning committee, which was provided in good time for the meeting on Wednesday 24th June 2020 (I do not have the date it was placed on Fareham’s website, but I consider that I may proceed on the basis that it was in the first half of June), the existing use issue was addressed in the following manner:

“The land has most recently been used for grazing horses, therefore this use has been used to calculate the current levels of nitrogen produced by the site (or the levels that would be produced at the site in the event that planning permission is not granted) ...”

10. Fareham’s nitrogen budget calculation was not uploaded to its website until shortly before the planning committee meeting. The reason for this failure has not been provided; it is both unexplained and, frankly, inexplicable. However, the calculation did no more than supply the metaphorical nuts and bolts for what was said in the report. Thus, for existing use the calculation adopts a 0.82 Ha figure for the whole site (i.e. 8,200 m², which we know to be the approximate area of the entire site excluding the tree belt) and accords to all of it a value of 13 Kg/Ha for lowland grazing.

11. This aspect of the planning officer's report creates no difficulty, insofar as it goes, nor does her use of the conditional "would". However, I must say that the report represents a wholly inadequate attempt to deal with the objectors' evidence which is simply ignored.
12. The deadline for the objectors' "deputations" was midday on Monday 22nd June 2020. After close of business on Friday 19th June 2020 and less than 5 working days before the meeting of the planning committee, Fareham uploaded onto its website a mass of further material from Mrs Hanslip. There had been an admittedly short period of unacceptable delay because someone within Fareham was persuaded that commercial sensitivity attached to some of this material. For some inexplicable reason, this material (its omission being the apogee of Save Warsash's case) was not included in the hearing bundle, but during and particularly after the hearing I have been able to consider it carefully. I can summarise it as follows.
13. Between 1951 and 2011 the land was put to agricultural use. On 16th August 2011 it was purchased by Mrs Hanslip. On 21st October 2019 she made a statutory declaration which stated rather laconically:

"During the period from September 2012 until August 2015 land at 79 Greenaway Lane ... was used to graze my horse."

The declaration failed to specify the "land" in question: is this the land as a whole, the site, or the other land, I ask rhetorically? Fareham's reasons for failing to upload this admittedly exiguous evidence in time have not been given.
14. There was also a statutory declaration from the previous owner of the detached house at 79 Greenaway Lane. According to her, "during some of this period [May 2014 to June 2018] I was aware that the freehold land ... was used for grazing of a horse". The same epithet may be applied to the quality of this evidence.
15. More compellingly, the late-filed bundle contained a copy of a licence agreement dated 10th January 2016 between Mr Raymond Hanslip and Emma Outers. This accorded her a licence to take "approximately 3.5 acres at land surrounding 79 Greenaway Lane" for the grazing of horses only. Unfortunately, the bundle did not contain the Schedule to the licence agreement which identified the land in question. 3.5 acres is approximately 1.4 hectares and I consider that I may proceed on the basis that this comprised the site and the other land.
16. Mrs Hanslip fairly accepted that horse grazing ceased in late 2016/early 2017 owing to works referable to a different proposed development. There was no grazing in 2017/18 owing to archaeological excavations, and in 2019 the grass had not recovered from trenches and trial pits. The late-filed bundle does contain photographs which appear to show that the other land was used for haymaking in 2019.
17. On 23rd June 2020 Mr Rob Megginson filed representations which attempted to grapple with the late-filed bundle. He had a number of points to make about the quality of the statutory declarations, and said that "residents have not had the chance to prepare their own statutory declarations but are prepared to do so at the earliest opportunity". The arguments he raised about the haymaking photographs were not particularly well-focused but he may be forgiven for that.

18. Under the rubric, “Nitrogen Calculations and Land Usage”, Mr Megginson said this:

“The total site area used for the current use and future use is a critical calculation resulting in the net effect of Nitrate increase/decrease. The area described as “area B” of 8,203 m² has been used in full in the calculation for this application as lowland grazing. Residents have specific evidence that this is wholly inaccurate, and the correct area is just under half that figure (circa 4,350 m²) and for a very limited period of time (9-10 months). Residents will testify under oath that the land to the west [i.e. north west] of Greenaway Lane has not been used for grazing horses during the time that they can remember, up to 10 years ago.”

Mr Megginson, adopting the same reasoning as his wife, put forward a nitrogen calculation based on 5 Kg/Ha throughout.

19. The planning officer submitted a “supplementary agenda” on 23rd June 2020. It provided in material part as follows:

“Additional representations have been received since the committee report was published.

The representations raise the following issues:

-The evidence submitted does not prove that all the land has been used for grazing or that it has been used consistently for grazing during the last 10 years.

-Documents relating to the application were not previously made available to the public online. These include the applicant’s evidence used to establish the existing land use, the Local Planning Authority’s most recent Appropriate Assessment and the Local Planning Authority’s calculation of the site’s nitrogen budget.

Comment: Natural England’s guidance (4.51) states: “It is important that farm type classification is appropriately precautionary. It is recommended that evidence is provided of the farm type for the last 10 years and professional judgement is used as to what the land would revert to in the absence of a planning application. In many cases, the local planning authority, as competent authority, will have appropriate knowledge of existing land uses to help inform this process.”

The representations submitted state that because only part of the land has been used for grazing during the last 10 years, the land use should be categorised as open space which has a lower nitrogen level of 5 kg/ha.

The evidence submitted demonstrates that some of the land has been used for grazing and that the remainder has been used for producing hay during the past 10 years. In the absence of a planning application Officers are satisfied that the land could continue to be used for grazing or for growing hay in light of past use, road frontage and enclosed boundaries. The most recent land use (or the levels that would be produced at the site if planning permission is not granted) informs the levels of nitrogen produced by the site. Natural England's guidance advises that lowland grazing has an average nitrate nitrogen loss level of 13 (kg/ha) and 25.4 kg/ha for general cropping (growing hay.) As explained in the report, in order to be nutrient-neutral the proposed development must produce no more nitrogen than the current land use.

Given that the site has been used for grazing horses and growing hay, the Local Planning Authority has taken a precautionary approach to establishing the existing land use in line with Natural England's guidance and has calculated the levels of nitrogen based on if the site was used solely for grazing. This approach is precautionary because it results in a lower level of nitrogen than if the site was used for growing hay. The proposed development (which will produce increased levels of nitrogen) must provide more mitigation to be nutrient neutral than if the higher level associated with growing hay was used to inform the calculation.

Officers have liaised with Natural England regarding the evidence the applicant has provided and are satisfied that the categorisation of the land as lowland grazing rather than general cropping is a suitably precautionary approach in line with Natural England's guidance."

20. Informal minutes of the planning committee meeting have been made available. Mr Greg Jones QC for Save Warsash objected to their admissibility, but there is nothing to suggest that they may be inaccurate and I reject that submission. In fact, the minutes help him. The planning officer showed members some helpful slides and explained that "the most recent land use, or the levels that would be produced at the site if planning permission wasn't granted, informs the levels of nitrogen produced by the site". She then explained why a 13 Kg/Ha figure for existing land use for the site was precautionary – rather than, for example, the much higher figure for haymaking.
21. Mrs Hilary Megginson provided an "audio deputation" asking for a deferment on the ground of late filing of important documents. Other objectors made a similar application. The Borough Solicitor was then asked to advise, and she said as follows:

"It's a point that has been raised by the deputees the provision of late information. What I would say members is that the information that has been provided at a later point, is all information which amplifies information that is already made available to you and to members of the public in your committee report. None of that information undermines the information in

the report, it supports the Council's position in terms of the use of the land, the conclusions of Natural England and the inputs into the appropriate assessment, and therefore, members, I would say that the information that is set out in your report covers all the pertinent issues that you need to consider when arriving at your decision today. As you will have heard from the deputations they have made a number of comments on those issues that have been covered in further detail by additional information uploaded to the website. So they have already made representations about some of that information, such as the former use of the land and the conclusions of Natural England and the fit for purpose or otherwise of the Council's appropriate assessment, so I would say members that there is nothing to prevent you from making this decision today because the information you're relying on was already to a large extent set out in your officer's report."

22. Councillor Mike Ford asked the following question, and the planning officer replied to it:

"Q. Just going back at the history and this seems to be the subject of lots of correspondence going to and fro. If we accepted the objectors who said there'd only been a horse grazing on there for 10 months in the last 10 years would that still retain its status as being grazing land?

A. I think the point to make is that we don't have evidence from the applicants that is sufficient to counter the evidence that we have from the applicant. The applicant has provided a signed affidavit, that is evidence that we give a lot of weight too. We are content that the whole of that site could be used for grazing horses. I'm happy to confirm that not, in our opinion not all of the land has been used for horse grazing, we've not been given evidence to say that all of the land has been used, but we're happy that as a local authority all of the land could be used for grazing horses."

23. Councillor Price then supported the objectors' application for a deferral, in particular on the ground that the late filing of documents prejudiced them in their inability to obtain professional advice in time. The Chair then made his contribution to the meeting, and observed:

"This morning, by this morning, I had a stack of paperwork, I've run out of ink trying to print off all the documents from either the applicant or the objectors. I had an absolute pile of it around, I spent all the morning looking at the stuff from early, and I have to say that I'm not going to call anybody liars, either the applicant or the objectors but I've seen a series of photographs with no dates on them that claim fields being empty, sometimes occupied some people are suggesting so at the end of the day what you have to come down to is, if we voted to delay this

application further, can we come out with anything different in say next month's meeting or the following month's meeting, or do we just go on delaying for day, month and so on? What we've got here is we've got professional officers. Each of us Councillors are lay people we've got some expertise in something we've done in our lives up to now. But at some stage or other you have to accept the fact that our officers are professional, they're handling this nitrate issue as best they can, and the backup is, is that Natural England have approved the calculations and if we go on and on, the objectors saying no this isn't right and our officers saying it is, Natural England saying it is, and then the objectors come back and say no, no, no, we've got to make a decision and today I see it as today. Keith Evans made a very good point. We need to decide now on the evidence that we've got, the professional advice we've had, the legal advice we've had and all the documentation I've seen which leads me towards saying the objectors are trying to make a point. Whether it's right or wrong, that's for some other time, but not here. We need to make a sensible based decision on officer's recommendation and Natural England who have advised them that we have provided the right evidence, and that's where I stand on it. Does any other member... Do you want to say anything further Rachael I can see you in the apprehensive, or does any member, any other member want to make any further comment?"

24. No member intervened and asked for the deferral application to be put to the vote. In due course, the application was approved by 7 votes to 2, and planning permission was granted subject to conditions on 11th August 2020.

The Judicial Review

25. In this judgment I will address only three of Save Warsash's Grounds. Those which have been covered by my judgment in Wyatt do not require express mention. Given my conclusions on the procedural grounds, I have decided not to express a view about Ground 2.

Ground 3

26. By Ground 3 it is contended that the planning officer's report misinterpreted Natural England's Advice Note. The short point is that, whereas the Advice Note demands that consideration be given to the use to which the land *would* be put in the absence of planning permission, Fareham asked itself the different question, namely the use to which the land *could* be put.
27. I consider that both parties have laboured what is a very short point. There is a material difference between "could" and "would", although the former is of course relevant to the latter. "Would" imports a more stringent test.
28. However, the planning officer's advice must be considered as a whole. Although it is correct that "could" appears twice, "would" appears more often. In my judgment, the

overall tenor of the planning officer's advice to members was that the real question for determination was the use to which the land would be put in the event that the application failed. There were reasonably strong arguments in support of the proposition that the land would be put to some sort of grazing use, rather than no use whatsoever, and members were aware that on any view of the evidence it had not recently been used for horses. There is no reasonable possibility that members applied the wrong legal test.

29. Ground 3 therefore fails.

Ground 4 and 5

30. It is convenient to take these Grounds together.

31. By Ground 4 it is contended that Fareham failed to make documents available in breach of ss. 100B and 100D of the Local Government Act 1972. By Ground 5 it is contended that Fareham unreasonably failed to exercise its power to defer the meeting on 24th June 2020.

32. Section 100B provides in material part:

“100B Access to agenda and connected reports.

(1) Copies of the agenda for a meeting of a principal council and, subject to subsection (2) below, copies of any report for the meeting shall be open to inspection by members of the public at the offices of the council in accordance with subsection (3) below.

...

(3) Any document which is required by subsection (1) above to be open to inspection shall be so open at least five clear days before the meeting, except that —

(a) where the meeting is convened at shorter notice, the copies of the agenda and reports shall be open to inspection from the time the meeting is convened, and

(b) where an item is added to an agenda copies of which are open to inspection by the public, copies of the item (or of the revised agenda), and the copies of any report for the meeting relating to the item, shall be open to inspection from the time the item is added to the agenda;

but nothing in this subsection requires copies of any agenda, item or report to be open to inspection by the public until copies are available to members of the council.

...”

33. By subordinate legislation dealing with the consequences of the pandemic, the words “open to inspection” included, at the material time, “being published on the website of the Council”.

34. Section 100D provides in material part:

“100D Inspection of background papers.

(1) Subject, in the case of section 100C(1), to subsection (2) below, if and so long as copies of the whole or part of a report for a meeting of a principal council are required by section 100B(1) or 100C(1) above to be open to inspection by members of the public —

(a) those copies shall each include a copy of a list, compiled by the proper officer, of the background papers for the report or the part of the report, and

(b) at least one copy of each of the documents included in that list shall also be open to inspection at the offices of the council.”

35. For present purposes “background papers” includes what I am calling the late-filed papers which were uploaded to Fareham’s website on 19th June 2020. In my judgment, nothing turns on other late papers because they could have made no material difference to the outcome.

36. Mr Tim Mould QC for Fareham accepted that his clients were in breach of statutory duty in relation to the late-filed papers.

37. In *R (Joicey) v Northumberland CC* [2014] EWHC 3657; [2015] PTSR 622, Cranston J explained that this court sets a very high standard in determining, in response to submissions made by defendants and respondents, that statutory breaches would have made no difference:

“51. All these cases are relevant material consideration cases. The present case involves a breach of statutory duty to disclose information. However, the remedial test Maurice Kay LJ stated in *Holder*, taken from *Simplex*, is in line with the principle laid down by May LJ in *R (Smith) v North Eastern Derbyshire Care Trust* [2006] EWCA Civ 1291; [2006] 1 WLR 3315, where there was a failure in the statutory duty to consult those affected by a change in medical services. Citing *Simplex* and other authorities, May LJ held that the probability that the decision after consultation would have been the same is not enough. The decision-maker must show that the decision would inevitably have been the same with proper consultation, if the claimant is to be denied relief. In my view this is the appropriate test in the analogous situation of a breach of right to know legislation: *the claimant will be entitled to relief unless the decision-maker can demonstrate that the decision it took would inevitably have*

been the same had it complied with its statutory obligation to disclose information in a timely fashion.” [emphasis supplied]

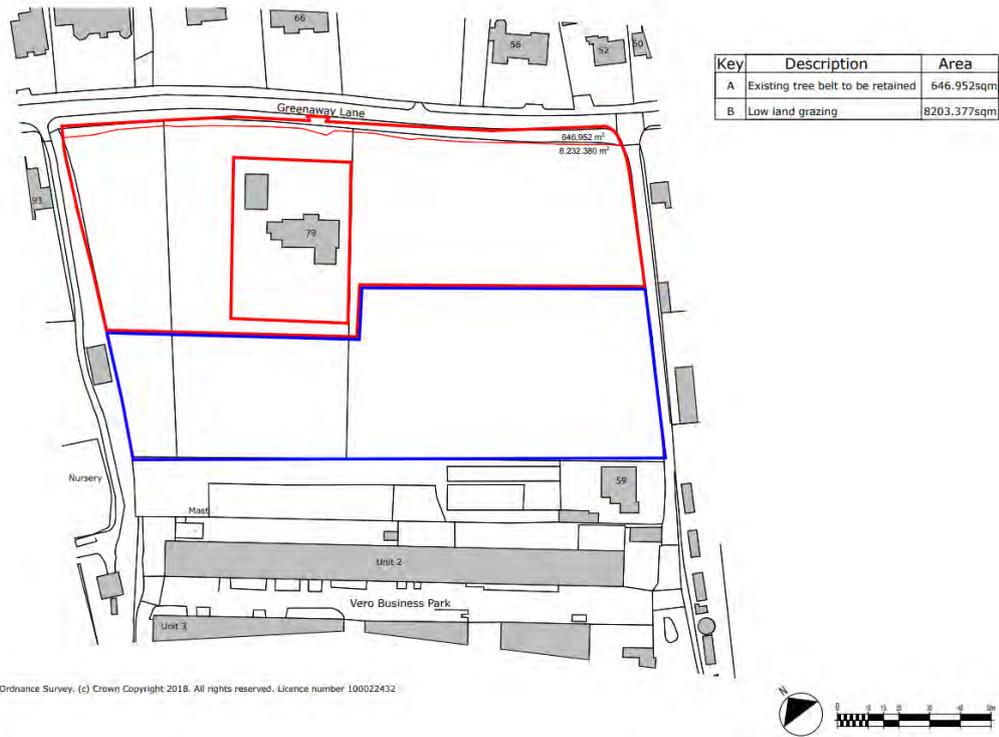
38. Mr Mould accepted that he had this high threshold to surmount.
39. The only jurisprudence relevant to Ground 5 is the decision of McCloskey J (as he then was) in *In the matter of an Application by Belfast City Council for Judicial Review v The Planning Appeals Commission* [2018] NIQB 17. At para 63 he said this:
- “A further brief observation is conveniently made at this point. It is abundantly clear from the aforementioned transcript, considered in conjunction with other items of related and surrounding evidence, that the PC made no attempt to grapple with 31 the IP’s request for deferral. Under the PC’s OP deferral is one of the optional courses. It is an elementary proposition of law that in cases where this is raised it must be considered. A further flaw in both the written and oral presentations of the Council’s planning officers is readily identifiable. No attempt was made to engage with the deferral request. The correct analysis clearly is that the PC, having failed to address itself to the deferral request, made no decision upon it. This is yet another ground upon which its refusal decision is vitiated.”
40. There was a rather arid, if not pointless, debate between the parties as to whether members actually made a decision not to defer the hearing on 24th June 2020. In my judgment, they clearly did, albeit by default. The Chair impressed his personality on the meeting and no one demurred.
41. However, I am completely satisfied that the Chair’s contribution, and members’ supine acceptance of what was happening, was plainly wrong. Members and the Borough Solicitor completely ignored the position of the objectors, who were obviously prejudiced by the late filing of important documents. They failed to grapple with the deferral application, and took a high-handed approach to it. As far as members were concerned, all that mattered was that this corpus of evidence appeared to support the stance officers had taken and which a clear majority of the decision-makers were going to accept. The possibility that it was capable of being effectively countered or rebutted was neither here nor there. As far as the Chair was concerned, no further delay could be countenanced, notwithstanding that this was scarcely the fault of the objectors. This elementary solecism was, I regret to say, contributed to by the advice given by the Borough Solicitor.
42. I must say that the planning committee in this case was guilty of egregious unfairness. I would suggest that my judgment be emailed to all concerned so that lessons may be learned.
43. Ultimately, though, the fate of Ground 5 turns on exactly the same issue that will determine the destiny of Ground 4: would members’ decision inevitably have been the same had there been no breach? This question predicates a fair-minded decision-maker prepared to take on board points that differ from his or her preliminary view.

44. Mr Mould valiantly submitted that I may be satisfied that the outcome would inevitably have been the same. In essence, his argument was that objectors were accepting that 53% of the site had been used for horse grazing, and that the planning officer made it clear during the course of the meeting that “not all of the land had been used for horse grazing”. So, the fact that all of the site could be used for that purpose meant that it was reasonable to conclude that all of it would be.
45. In my judgment, there are two flaws undermining Mr Mould’s submission, attractively though it was presented.
46. The first flaw is that the submission did not accurately encapsulate the objectors’ case. Although there was a modicum of inconsistency in the Megginsons’ representations, they did not speak for all the objectors and were clearly saying that because horse grazing use had been so minimal para 4.52 of the Advice Note applied and any “lowland grazing” could effectively be ignored. So it came about that objectors included a figure of 5 Kg/Ha for the entire site, for these purposes 0.82 Ha. Fareham’s policy, it appears, is to place greater weight on statutory declarations, and Mr Megginson had made it clear that he was in a position to file evidence in this form from a number of people if time had permitted. Mr Megginson’s argument would have had far less force had the statutory declarations filed on behalf of Mrs Hanslip not been so late. As it happens, the declarations filed by Mrs Hanslip and the previous owner of 79 Greenaway Lane were inadequate. In my opinion, it is not inevitable that focused representations to Fareham made on the basis of statutory declarations, read in conjunction with all the other evidence in the case, would result in members arriving at the same conclusion. Members might decide, for example, that the whole of the site should be valued at 5 Kg/Ha, or they might conclude that the figure should be 13 Kg/Ha only in relation to 53% of its area.
47. The second flaw is that it is unfair in my view to judge the likely impact of evidence and submissions advanced by objectors against the touchstone of what Mr Megginson was able to file over the weekend. It is certainly possible to envisage that with the professional advice mentioned by one of the councillors a more cogent case might be advanced.
48. By some considerable margin, I am not satisfied that the outcome would inevitably have been the same had the breaches not occurred, and Grounds 4 and 5 therefore succeed. I emphasise that in reaching this conclusion I am not impliedly commenting on the merits of the underlying case, namely the strength of the parties’ respective arguments on the future use issue.

Disposal

49. This application for judicial review succeeds on Grounds 4 and 5 but otherwise fails. Fareham’s grant of planning permission made on 11th August 2020 must be quashed.

ANNEX





Neutral Citation Number: [2021] EWCA Civ 104

Case No: C1/2020/0542/QBACF

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
(PLANNING COURT)
THE HONOURABLE MR JUSTICE HOLGATE
[2020] EWHC 518 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/02/2021

Before:

SIR KEITH LINDBLOM, SENIOR PRESIDENT OF TRIBUNALS
LADY JUSTICE SIMLER
and
SIR GARY HICKINBOTTOM

Between:

Gladman Developments Limited **Appellant**
- and -
(1) Secretary of State for Housing, Communities and Local Government **Respondents**
- and -
(2) Corby Borough Council
- and -
(3) Uttlesford District Council

Richard Kimblin Q.C. and Thea Osmund-Smith (instructed by **Addleshaw Goddard LLP**)
for the **Appellant**

Richard Honey (instructed by the **Government Legal Department**) for the **First Respondent**

Hearing dates: 9 and 10 November 2020

Approved Judgment

The Senior President of Tribunals:

Introduction

1. At the heart of this case is a question of policy interpretation. Such questions have become familiar work for the Planning Court, and this court too, since the publication of the National Planning Policy Framework (“the NPPF”) in March 2012. This case concerns the policy for the “presumption in favour of sustainable development” in paragraph 11 of the revised versions of the NPPF published in July 2018 and February 2019 – as have two other recent appeals to this court (*Monkhill Ltd. v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 74, and *Paul Newman New Homes Ltd. v Secretary of State for Housing, Communities and Local Government* [2021] EWCA Civ 15). The original version of the policy, in somewhat different terms, had itself been considered in several appeals, including, in the Supreme Court, *Hopkins Homes Ltd. v Secretary of State for Housing, Communities and Local Government* [2017] 1 W.L.R. 1865, and in this court, *Barwood Strategic Land II LLP v East Staffordshire Borough Council* [2018] P.T.S.R. 88, and *Hallam Land Management Ltd. v Secretary of State for Communities and Local Government* [2018] EWCA Civ 1808.
2. Permission to apply for planning statutory review, under section 288 of the Town and Country Planning Act 1990, was granted by Lewison L.J. on 22 May 2020. The appellant, Gladman Developments Ltd., had appealed against the order of Holgate J., dated 6 March 2020, refusing permission to apply for planning statutory review of the decisions of inspectors appointed by the first respondent, the Secretary of State for Housing, Communities and Local Government, each dismissing an appeal under section 78 of the 1990 Act against a local planning authority’s refusal of planning permission for housing development. One of the challenges was to a decision dismissing an appeal against the refusal of planning permission by the second respondent, Corby Borough Council, for a development of up to 129 dwellings on land at Southfield, Gretton. The other was to a decision dismissing an appeal against the refusal of planning permission by the third respondent, Uttlesford District Council, for a development of up to 240 dwellings on land off Station Road, Flich Green.
3. In both section 78 appeals the policy for the so-called “tilted balance” under paragraph 11d)ii of the NPPF applied because, in either case, the local planning authority was unable to demonstrate a five-year supply of deliverable housing sites, so that the policies most important for determining the application were deemed “out-of-date”.

The issues in the case

4. The case raises two main issues: first, whether a decision-maker, when applying the “tilted balance” under paragraph 11d)ii, is required not to take into account relevant policies of the development plan; and second, as a connected issue, whether it is necessary for the “tilted balance” and the duty in section 38(6) of the Planning and Compulsory Purchase Act 2004 to be performed as separate and sequential steps in a two-stage approach. There is a further issue: whether the “tilted balance” under paragraph 11d)ii excludes the exercise indicated in paragraph 213 of the NPPF, which requires that policies in plans adopted before its publication should be given due weight, “according to their degree of consistency with [it]”.

The policy in paragraph 11 of the NPPF

5. In chapter 1, “Introduction”, paragraph 2 of the 2019 version of the NPPF acknowledges that “[p]lanning] law requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise³”, and that “[the NPPF] must be taken into account in preparing the development plan, and is a material consideration in planning decisions”. Footnote 3 refers to section 38(6) of the 2004 Act and section 70(2) of the 1990 Act.

6. In chapter 2, “Achieving sustainable development”, paragraph 7 says that “[the] purpose of the planning system is to contribute to the achievement of sustainable development”. Paragraph 10 says this:

“10. So that sustainable development is pursued in a positive way, at the heart of the Framework is a presumption in favour of sustainable development (paragraph 11).”

7. Paragraph 11, under the heading “The presumption in favour of sustainable development”, states:

“11. Plans and decisions should apply a presumption in favour of sustainable development.

For plan-making this means that:

- a) plans should positively seek opportunities to meet the development needs of their area, and be sufficiently flexible to adapt to rapid change;
- b) strategic policies should, as a minimum, provide for objectively assessed needs for housing and other uses, as well as any needs that cannot be met within neighbouring areas, unless:
 - i. the application of policies in this Framework that protect areas or assets of particular importance provides a strong reason for restricting the overall scale, type or distribution of development in the plan area⁶; or
 - ii. 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.

For decision-taking this means:

- c) approving development proposals that accord with an up-to-date development plan without delay; or
- d) where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date⁷, granting permission unless:

- i. the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed⁶; or
- ii. 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.”

Footnote 6 states:

“⁶The policies referred to are those in this Framework (rather than those in development plans) relating to: habitats sites (and those sites listed in paragraph 176) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, a National Park (or within the Broads Authority) or defined as Heritage Coast; irreplaceable habitats; designated heritage assets (and other heritage assets of archaeological interest referred to in footnote 63); and areas at risk of flooding or coastal change.”

Footnote 7 states:

“⁷This includes, for applications involving the provision of housing, situations where the local planning authority cannot demonstrate a five year supply of deliverable housing sites (with the appropriate buffer, as set out in paragraph 73); or where the Housing Delivery Test indicates that the delivery of housing was substantially below (less than 75% of) the housing requirement over the previous three years. Transitional arrangements for the Housing Delivery Test are set out in Annex 1.”

8. Paragraph 12 confirms that “[the] presumption in favour of sustainable development does not change the statutory status of the development plan as the starting point for decision making”.
9. Paragraph 14 says that “[in] situations where the presumption (at paragraph 11d) applies to applications involving the provision of housing, the adverse impact of allowing development that conflicts with the neighbourhood plan is likely to significantly and demonstrably outweigh the benefits, provided all of the following apply”. Four considerations are then set out, including “b) the neighbourhood plan contains policies and allocations to meet its identified housing requirement” and “c) the local planning authority has at least a three year supply of deliverable housing sites ...”.
10. In Annex 1 to the NPPF, “Implementation”, paragraph 213 states:

“213. ... [Existing] policies should not be considered out-of-date simply because they were adopted or made prior to the publication of this Framework. Due weight should be given to them, according to their degree of consistency with this Framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).”
11. In paragraph 14 of the NPPF published in 2012 the policy for the “presumption in favour of sustainable development”, as it related to “decision-taking”, was in these terms:

“14. ...

For decision-taking this means:

- 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.⁹”

Footnote 9 stated:

⁹For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.”

12. The Government’s consultation document containing its proposals on the draft revised text of the NPPF, issued in March 2018, said the draft had “incorporated ... the effect of caselaw on the interpretation of planning policy since 2012”. Introducing the revised policy for the “presumption in favour of sustainable development” in paragraph 11, it said that “[the] current Framework includes examples of policies which provide a specific reason for restricting development”, and that this was “proposed to be changed to a defined list, which is set out at footnote 7 ...”, adding that “[this] approach does not preclude other policies being used to limit development where the presumption applies, if the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits”.

The section 78 appeal decision in the Gretton case

13. The inspector in the Gretton appeal identified two main issues: first, “[whether] the proposed development would be appropriately located ...”; and second, “[whether] the [borough council] can demonstrate a 5-year supply of deliverable housing sites” (paragraph 5 of the decision letter).
14. On the first main issue, under the heading “Development Plan Strategy”, the inspector found the proposal in conflict with Policy 11 of the North Northamptonshire Joint Core Strategy. The site had not been identified in a local plan or a neighbourhood plan (paragraph 6). It lay in the countryside “outside of any settlement”. The proposal was contrary to the spatial strategy seeking to concentrate growth in Corby, which, in Policy 29, envisaged “only 120 dwellings proposed in the rural areas as a whole” (paragraph 7). In a section headed

“Accessibility”, the inspector said this was “not a location which is, or is likely to be, adequately served by sustainable transport modes for the scale of development proposed ...”. In his view, “[the] number of ... trips generated from 120 such dwellings would be substantial”, and “would result in environmental harm from greenhouse gas emissions ...” (paragraph 18). Under the heading “Appropriately located?”, he found there would be “harm to the character and appearance of the area” (paragraph 30). He said “[these] issues are central planks to realizing the over-arching spatial vision of sustainable development which the plan as a whole is seeking to deliver” (paragraph 31).

15. On the second main issue, under the heading “Conclusion on 5 year housing land supply”, he concluded that the supply of housing land in the borough council’s area was “somewhere between” 4.6 and 4.8 years (paragraph 42).
16. In the final section of the decision letter, headed “Planning balance and overall conclusion”, the inspector found the proposal conflicted with the development plan “read as a whole”, and it was “therefore necessary to consider whether there [were] material considerations [indicating] that permission should be granted ...”. The NPPF was, he said, “a significant material consideration and as the Council has not demonstrated in this appeal that they have a 5 year housing land supply, the policies which are the most important for determining this appeal are out-of-date”, and “[consequently], paragraph 11(d)(ii) requires that permission be granted unless any adverse impacts would significantly and demonstrably outweigh the benefits when assessed [against] the policies in the Framework, taken as a whole” (paragraph 46).
17. Having determined the weight to be given to the benefits of the development as “moderate” (in paragraphs 47 to 51), he concluded (in paragraphs 52 to 56):

“52. Set against these benefits the appeal scheme would be situated beyond the settlement boundary of Gretton and in the countryside. It would conflict with the development plan’s overarching locational strategy, perpetuate unsustainable travel from a relatively poorly served and inaccessible village and would cause harm to the character and appearance of the area. Having regard to the lack of a 5 year housing land supply in the borough the weight to be afforded to this conflict is necessarily reduced. However, having regard to established caselaw, the shortfall in supply is not significant and the Council are, despite a number of setbacks, delays and matters outside of their control actively working and progressing towards its delivery, including a Neighbourhood Plan for Gretton.

53. The appellant contends that the [joint core strategy] is also out-of-date because of its reliance on projections for West Corby in the housing land supply and that the strategy is not being delivered as envisaged. However, this does not take matters any further because the [sustainable urban extension to Corby] provides housing so there is no reason why it should be discounted from the supply figure. I have also preferred the appellant’s assessment of housing supply and the acid test of weight to a policy and any conflicts in such circumstances is the degree of consistency with the Framework. The policies before me are consistent with the Framework for the reasons given by the examining Inspector only 3 years ago and this position has not been altered by the changes to the Framework in 2019.

54. The policies ultimately seek to promote a plan-led approach to site selection and none of the relevant policies or the strategy support ad-hoc developments on unallocated sites outside of settlement boundaries of anything like the scale proposed. The figure of 120 for the rural areas is a minimum but the degree to which it has already been exceeded is likely, in my judgement, to lead towards a distortion of the plan-led strategy. A distortion that would be exacerbated by the appeal proposal which would result in a more dispersed and unsustainable pattern of growth.
55. Drawing my conclusions together, the need to boost the supply of housing is not the be all and end all. Although there are clearly a number of benefits that weigh in favour of the proposal, at this point the adverse impacts of granting permission would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework, taken as a whole. As such the proposal would not be the sustainable development for which Paragraph 11 of the Framework indicates a presumption in favour.
56. For the reasons given above, the proposal would conflict with the development plan, when read as a whole. Material considerations, including the Framework do not indicate that a decision should be made other than in accordance with the development plan. Having considered all other matters raised, I therefore conclude the appeal should be dismissed.”

The section 78 appeal decision in the Flitch Green case

18. The inspector in the Flitch Green appeal noted that the district council could not demonstrate a five-year supply of housing land, and that paragraph 11d) was engaged (paragraph 6 of the decision letter). He identified four main issues in the appeal: first, “the effect [of the proposed development] on the character and appearance of the area”; second, “whether [it] would harm the setting of nearby heritage assets”; third, “the effect on protected species”; and fourth, “whether the policies of the Framework provide a clear reason for refusing the development proposed, or whether any adverse effects of granting planning permission would significantly and demonstrably outweigh the benefits” (paragraph 8).
19. On the first main issue, the inspector concluded that the development would have a “significant adverse effect on the character and appearance of the area”, and that the proposal was in conflict with Policy S7 of the Uttlesford Local Plan (paragraph 22).
20. On the second main issue, he found there would be harm to the significance of the grade I listed Church of the Holy Cross in Felsted, the grade II listed Bouchiers, and the Felsted Conservation Area “through development within their settings” (paragraph 42). Under the policy in paragraph 196 of the NPPF, this was “less than substantial harm”. But because the development would adversely affect the setting of listed buildings, the proposal “would conflict with Policy ENV2” of the local plan (paragraph 43).
21. On the third main issue, the inspector concluded that the effect of the proposed development on protected species would be acceptable (paragraph 49).

22. He found the supply of housing land in the district was only 3.29 years, which was a “significant shortfall” (paragraph 50). The provision of up to 96 affordable homes was in accordance with Policy H9 of the local plan, and “significant” (paragraph 56). The development would “boost the supply of homes” (paragraph 57). The “new housing would have significant economic benefits and substantial social benefits” (paragraph 58).
23. On the fourth main issue, under the heading “Planning Balance and Conclusions”, the inspector gave “substantial weight” to the “significant adverse effect” the development would cause to the character and appearance of the area, and also to the “harm” it would cause to the significance of three designated heritage assets (paragraph 63). He gave “substantial weight” to the economic and social benefits of the proposed new housing, and “limited weight to the benefits for sustainable travel” through the provision of off-site routes (paragraph 64).
24. In his view, Policy S7 and Policy ENV2 of the local plan, with which the proposal was in conflict, were the “most important” development plan policies for determining the appeal, and the proposal “[conflicted] with the development plan overall” (paragraph 66). When assessing the weight to give to those two policies, he considered their consistency with the NPPF (paragraphs 67, 70 and 71). Policy S7 was “predicated on settlement boundaries that are out-of-date” and would inevitably “need to be breached to provide sufficient housing land until [the emerging local plan] is adopted with redrawn boundaries”. Whether such a breach would be acceptable in any individual case would “depend on the level of harm and whether those adverse impacts would significantly and demonstrably outweigh the particular benefits ...” (paragraph 68). Policy S7 was “partly consistent” with the NPPF, and “should be afforded moderate weight” (paragraph 70). In the light of the statutory duty in section 66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990 and the NPPF’s policies on heritage assets, Policy ENV2 should also have “moderate weight” (paragraph 71).
25. The inspector then turned to paragraph 11d) of the NPPF (in paragraphs 72 to 74):
- “72. However, notwithstanding the weight that I give these policies, the most important policies for determining the application are deemed to be out-of-date because the Council cannot demonstrate a five-year supply of deliverable housing sites. In considering the first leg of paragraph 11d) of the Framework, the policies that provide a clear reason for refusing permission include those that relate to designated heritage assets. However, the less than substantial harm to the heritage assets in this case would be outweighed by the substantial weight that I give to the social and economic public benefits derived from up to 240 homes. Therefore, the policies of the Framework in respect of heritage assets would not provide a clear reason for refusing permission.
73. Moving onto the second leg of paragraph 11d), the adverse impacts of the proposed development and the conflict with the development plan that arises from these adverse impacts would significantly and demonstrably outweigh the benefits. Material considerations, including the reduced weight that I give to the most important policies for deciding the appeal, do not indicate that the proposal should be determined other than in accordance with the development plan. Although the development of countryside beyond existing settlement boundaries in Uttlesford is inevitable to meet housing needs in both the short-term and longer-term, the harm in this case would be unacceptable.

74. For the above reasons the proposal would not constitute sustainable development and the appeal should be dismissed.”

The judgment of Holgate J.

26. Holgate J. concluded that the NPPF “does not exclude development plan policies from the tilted balance; they are relevant considerations” (paragraph 112). This issue “essentially involved the same argument as had previously been rejected by the courts” – by the Supreme Court in *Hopkins Homes Ltd.* (at paragraphs 55 and 56), by the Court of Appeal in *Hallam Land Management Ltd.* (at paragraph 46), and at first instance in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) (at paragraphs 57 and 74) and *Woodcock Holdings Ltd. v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin) (at paragraphs 108 to 115). It was “not arguable that the language of [the 2019 version of the NPPF] differs from the 2012 version so as to displace that body of case law in relation to paragraph 11(d)(ii)” (paragraph 128).
27. In coming to that conclusion, Holgate J. observed that when the policy in paragraph 11(d)ii is “triggered” because a five-year supply of housing land cannot be demonstrated, “the decision-maker will still need to assess the weight to be given to development plan policies, including whether or not they are in substance out-of-date and if so for what reasons”. In these circumstances “the NPPF does not prescribe the weight which should be given to development plan policies”. The decision-maker “may also take into account, for example, the nature and extent of any housing shortfall, the reasons therefor, and the prospects of that shortfall being reduced (see e.g. [*Crane*])” (paragraph 82).
28. In *Crane* (at paragraph 74), the court had “explicitly rejected the contention that development plan policies should be disregarded and only NPPF policies taken into account in the tilted balance assessment required by paragraph 14 of [the original version of the NPPF]”, and the same approach was taken in *Woodcock Holdings Ltd.*, at paragraphs 87, 105, and 108 to 115 (paragraph 83). Those passages were approved by the Court of Appeal in *Hallam Land Management Ltd.*, at paragraph 46 (paragraph 84). And this case law was “reinforced by Lord Carnwath’s explanation of the operation of paragraph 14 of [the 2012 version of the NPPF] in [*Hopkins Homes Ltd.*, at paragraphs 54 to 56], in which he “agreed with the Court of Appeal that the weight to be given to development [plan] policies *under paragraph 14* (i.e. in the tilted balance) was a matter of judgment for the decision-maker ([paragraphs 55 and 56])” (paragraph 85). Therefore, “although paragraph 14 required the tilted balance to be “assessed against the policies in this Framework as a whole” without referring explicitly to development plan policies, the courts have made it plain that the weight to be attached to development [plan] policies, whether telling in favour of or against a proposal, was a matter to be assessed in that balance”. This was “wholly unsurprising given that paragraph 14 had to be understood in the context of the development plan led system, established by the presumption in [section] 38(6)” (paragraph 86).
29. As the judge went on to say, paragraph 11(d)ii of the 2019 version of the NPPF repeats the language of paragraph 14 of the 2012 version – “when assessed against the policies in this Framework as a whole” (paragraph 88). Footnote 6 in the 2019 version differs from footnote 9 in the 2012 version, “in that development plan policies are not to be taken into account

under paragraph 11(d)(i)”. But this alteration has been “confined to paragraphs 11(b)(i) and 11(d)(i)”, and “does not apply to paragraph 11(d)(ii)” (paragraph 89). Therefore, on the straightforward approach to interpretation laid down by the case law, “paragraph 11(d)(ii) of [the 2019 version of the NPPF] does not require any development plan policies to be excluded from the tilted balance”, and “[the] position remains the same as under paragraph 14 of [the 2012 version]” (paragraph 90). This conclusion gained support from paragraph 14 of the 2019 version, which “assumes that development plans, which include neighbourhood plans, are relevant considerations in the tilted balance under paragraph 11(d)(ii)” (paragraph 91).

30. The “two stage approach” contended for by Gladman, “would enable some applicants to satisfy the test in paragraph 11(d)(ii) (and gain the benefit of the presumption in favour of sustainable development) without any assessment being made of the weight to be given to relevant development plan policies, even where those policies justifiably attract substantial or full weight” (paragraph 105). There was “no legal justification for the court to prescribe that the tilted balance in paragraph 11(d)(ii) ... and the presumption in [section] 38(6) must be applied in two separate stages in sequence” (paragraph 107). It is “permissible for the decision-maker to assemble all the relevant material and to apply the two balances together or separately” (paragraph 108). This does not involve “any legal error based on so-called double-counting”, but the “same factors [being] assessed against two different criteria or tests to see whether both are satisfied”, and an “overall judgment” being reached on “all relevant considerations”, which “applies both the tilted balance in paragraph 11(d)(ii) and [section] 38(6)” (paragraph 110).
31. The judge also rejected the argument that the policy in paragraph 213 of the NPPF was relevant only in the application of section 38(6) of the 2004 Act, and not paragraph 11(d)ii. The wording of the policy provided no support for this contention (paragraph 117).

Must development plan policies be left out of account when the “tilted balance” under paragraph 11(d)ii is applied?

32. The court’s approach to the interpretation of planning policy is well established. It does not need to be enlarged or refined here. I would emphasise two basic and well-known principles:
- (1) Policy is not statute, and ought not to be construed as if it were. As Lord Carnwath observed in *Hopkins Homes Ltd.* (at paragraph 24), not all planning policies lend themselves to a rigorous judicial analysis. Where they do require interpretation, this should be done objectively in accordance with the language used, read in its proper context (see the judgment of Lord Reed in *Tesco Stores Ltd. v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 19, 21 and 35). A sensible approach should be adopted in seeking the true sense of the policy in question. The courts should not encourage unmeritorious claims based on intricate arguments about the meaning of policy. They should resist the over-complication of concepts that are basically simple (see *East Staffordshire Borough Council*, at paragraph 50).
 - (2) The interpretation of policy is a quite different exercise from judging its lawful application (see *Hopkins Homes Ltd.*, at paragraph 26). Construing policy is, in the end, a task for the court, but the application of policy is for the decision-maker

and may be challenged only on public law principles, and not on the planning merits (see *East Staffordshire Borough Council*, at paragraph 9). Subject to the limits of rationality, it is for the decision-maker to judge the matters to be taken into account in applying planning policy (see the judgment of Lord Carnwath in *R. (on the application of Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council* [2020] P.T.S.R. 221, at paragraphs 30 to 32, and 39).

33. The status of national planning policy within the statutory arrangements for decision-making is also well established. Three points should be kept in mind:
- (1) The NPPF is one of the “other material considerations” to which the decision-maker must have regard in performing the statutory duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act (see *Hopkins Homes Ltd.*, at paragraphs 21 and 75).
 - (2) The policies in the NPPF are predicated on the primacy of the development plan in the “plan-led” system. It was pointed out by the Supreme Court in *Hopkins Homes Ltd.* (at paragraph 21), and by this court in *East Staffordshire Borough Council* (at paragraph 13), that the NPPF must be interpreted and applied – as it recognises itself – consistently with the statutory scheme, within which it takes its place as a material consideration.
 - (3) The weight to be given to conflict or compliance with the policies of the NPPF is a matter for the decision-maker, and the court will not interfere except on public law grounds (see *St Modwen Developments v Secretary of State for Communities and Local Government* [2018] P.T.S.R. 746, at paragraph 6(3)).
34. As I have said, the meaning of NPPF policy for the “presumption in favour of sustainable development” has already been the subject of ample case law. Although the terms of the policy have changed since it was introduced nine years ago in the first version of the NPPF, published in 2012, much of the judicial comment on that original form of the policy remains valid and relevant. Without trying to capture everything, I would take three main points from it:
- (1) The “presumption in favour of sustainable development”, now in paragraph 11 of the 2019 version of the NPPF, is not a statutory presumption. It is a presumption of national planning policy (see *East Staffordshire Borough Council*, at paragraph 35(1)).
 - (2) The presumption itself is not irrebuttable, and is not automatically decisive of any particular outcome for an application for planning permission. The policy in paragraph 11c) and d) provides guidance on decision-making, under the statutory duties in section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, in specified circumstances. It does not purport to be prescriptive (see *East Staffordshire Borough Council*, at paragraph 35(3)).
 - (3) Beyond the statutory provisions governing the making of planning decisions, the decision-maker is left with a discretion to apply the policy faithfully to its own terms, in a manner appropriate to the circumstances of the case in hand (see the

speech of Lord Clyde in *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 W.L.R. 1447 at p.1459D to p.1460D, and *Wynn-Williams v Secretary of State for Communities and Local Government* [2014] EWHC 3374 (Admin), at paragraphs 38 and 39).

35. In *Hopkins Homes Ltd.*, Lord Carnwath, with whom the other members of the court agreed, said this about the policy in paragraph 14 of the 2012 version of the NPPF (in paragraph 14):

“14. ... [Although] the footnote refers in terms only to policies in the Framework itself, it is clear in my view that the list is to be read as including the related development plan policies. Paragraph 14 cannot, and is clearly not intended to, detract from the priority given by statute to the development plan, as emphasised in the preceding paragraphs. Indeed, some of the references only make sense on that basis. ...”

and, under the heading “Interpretation of paragraph 14” (in paragraphs 54 to 56):

“54. ... [Since] the primary purpose of paragraph 49 [of the 2012 version of the NPPF] is simply to act as a trigger to the operation of the “tilted balance” under paragraph 14, it is important to understand how that is intended to work in practice. The general effect is reasonably clear. In the absence of relevant or up-to-date development plan policies, the balance is tilted in favour of the grant of permission, except where the benefits are “significantly and demonstrably” outweighed by the adverse effects, or where “specific policies” indicate otherwise. ...

55. It has to be borne in mind also that paragraph 14 is not concerned solely with housing policy. It needs to work for other forms of development covered by the development plan, for example employment or transport. Thus, for example, there may be a relevant policy for the supply of employment land, but it may become out-of-date, perhaps because of the arrival of a major new source of employment in the area. Whether that is so, and with what consequence, is a matter of planning judgment, unrelated of course to paragraph 49 which deals only with housing supply. This may in turn have an effect on other related policies, for example for transport. The pressure for new land may mean ... that other competing policies will need to be given less weight in accordance with the tilted balance. ...

56. If that is the right reading of paragraph 14 in general, it should also apply to housing policies deemed “out-of-date” under paragraph 49, which must accordingly be read in that light. It also shows why it is not necessary to label other policies as “out-of-date” merely in order to determine the weight to be given to them under paragraph 14. As the Court of Appeal recognised, that will remain a matter of planning judgment for the decision-maker. Restrictive policies in the development plan (specific or not) are relevant, but their weight will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the “tilted balance”.

36. Where the local planning authority has failed to demonstrate the requisite five-year supply of housing land, said Lord Carnwath, “[the] shortfall is enough to trigger the operation of the second part of paragraph 14 [of the NPPF]”, and “[as] the Court of Appeal recognised, it is that paragraph ... which provides the substantive advice by reference to which the

development plan policies and other material considerations relevant to the application are expected to be assessed” (paragraph 59). A recently approved Green Belt policy in a local plan is not in those circumstances “out-of-date”, but “[the] weight to be given to it alongside other material considerations, within the balance set by paragraph 14, remains a matter for the decision-maker in accordance with ordinary principles” (paragraph 61).

37. Lord Gill said in his judgment (at paragraph 85) that the “presumption in favour of sustainable development” could be “displaced on only two grounds both of which involve a planning judgment that is critically dependent on the facts”. The second of those two grounds was that “specific policies in the Framework, such as those described in footnote 9 to the paragraph, indicate that development should be restricted”. On this ground Lord Gill observed:

“85. ... From the terms of footnote 9 it is reasonably clear that the reference to “specific policies in the Framework” cannot mean only policies originating in the Framework itself. It must also mean the development plan policies to which the Framework refers. Green Belt policies are an obvious example.”

38. In *East Staffordshire Borough Council*, in the light of the Supreme Court’s decision in *Hopkins Homes Ltd.*, this court placed the “presumption in favour of sustainable development” in paragraph 14 of the 2012 version of the NPPF in the context of section 38(6) and the “plan-led” system of development control, emphasising (at paragraph 35(3)) that “[when] the section 38(6) duty is lawfully performed, a development which ... does not ... have the benefit of the “tilted balance” in its favour ... may still merit the grant of planning permission”, and that “in a case where a proposal for the development of housing is in conflict with a local plan whose policies for the supply of housing are out of date, the decision-maker is left to judge, in the particular circumstances of the case in hand, how much weight should be given to that conflict”. As had been held in *Crane* (at paragraphs 70 to 74), this is necessarily “a matter of planning judgment”.

39. Similar observations were made by this court in *Hallam Land Management Ltd.* (at paragraphs 44 to 47), again citing the first instance decision in *Crane* and also *Woodcock Holdings Ltd.*. The court accepted (at paragraph 59) that “[in] principle, [the Secretary of State] was entitled to conclude ... that in the balancing exercise provided for in paragraph 14 of the NPPF, realistic conclusions could ... be reached on the weight to be given to the benefits of the development and its conflict with relevant policies of the local plan”.

40. In *Crane* the court rejected (at paragraph 74) “the proposition that, in a case where relevant policies for the supply of housing are out of date, the weighing of “any adverse impacts” against the “benefits” under paragraph 14 [of the 2012 version of the NPPF] should proceed ... “on the basis that the development plan components have been assessed, put to one side, and the balancing act takes place purely within the text of [the NPPF] as a whole””. The court observed that paragraph 14 of the NPPF did “not say that where “relevant policies” in the development plan are out of date, the plan must therefore be ignored”, and did “not prevent a decision-maker from giving as much weight as he judges to be right to a proposal’s conflict with the strategy in the plan, or, in the case of a neighbourhood plan, the “vision” ...”.

41. For Gladman, Mr Richard Kimblin Q.C. repeated the argument that failed in the court below. Both inspectors had erred when conducting the exercise provided for in paragraph 11d)ii – in

the Gretton decision letter at paragraphs 52, 54 and 56, and in the Flitch Green decision letter at paragraph 73 – by taking into account policies of the development plan and the proposals’ conflict with those policies. On a straightforward interpretation, without reading any additional words into it, the meaning of the policy is clear. When applying the “tilted balance” under paragraph 11d)ii, the decision-maker has to assess the proposal against the relevant policies of the NPPF. Local plan policies do not come into that exercise. If, in either of these cases, the inspector had applied the paragraph 11d)ii policy correctly, leaving local plan policies out of account, a different conclusion might have emerged on whether the “tilted balance” was engaged, and this in turn might have led to a different outcome under section 38(6). Mr Kimblin confirmed that, in his submission, the same analysis would have applied to the previous policy for the “presumption in favour of sustainable development” in paragraph 14 of the NPPF issued in 2012. Thus Lord Carnwath’s observations to the contrary in *Hopkins Homes Ltd.* – “obiter”, said Mr Kimblin – were incorrect.

42. I cannot accept that argument. In my view, as Mr Richard Honey submitted for the Secretary of State, it is implicit in previous discussion of this question – not only in the Planning Court but also in this court and in the Supreme Court – that decision-makers are not legally bound to disregard policies of the development plan when applying the “tilted balance” under paragraph 11d)ii. The reasoning in the two judgments given in the Supreme Court in *Hopkins Homes Ltd.* did not doubt that development plan policies were potentially relevant to the application of the policy for the “tilted balance” in paragraph 14 of the NPPF issued in 2012. Both Lord Carnwath and Lord Gill appear to have accepted that the exercise of assessing a proposal’s compliance, or otherwise, with the “policies in this Framework” could properly embrace consideration of related policies in the development plan, and sometimes this would make good sense because of the relationship between the two.
43. That the Supreme Court in *Hopkins Homes Ltd.* accepted, in principle, the appropriateness of assessing the weight that development plan policies should have in the “tilted balance” itself, within the overall performance of the section 38(6) duty, is evident in the conclusions of Lord Carnwath in paragraphs 56 and 61 of his judgment and Lord Gill’s in paragraph 85 of his. This was recognised as a legitimate part of the decision-making process. The relevant conclusions in the judgments in this court are to the same effect (see *East Staffordshire Borough Council* at paragraph 22(2) and (4), and *Hallam Land Management Ltd.*, at paragraphs 45 and 59). As Mr Honey submitted, it is inherent in the reasoning in these decisions of the Supreme Court and the Court of Appeal that, in practice, the performance of the statutory duty under section 38(6) and the performance of the exercise entailed in the NPPF policy for the “tilted balance” may be inter-related, and that, under the provision now in paragraph 11d)ii, conflict or compliance with development plan policies can bear on the assessment required by the NPPF policy itself. As was recognised by Holgate J. (in paragraph 86 of his judgment), the case law has been consistent on this point, at least since the first instance decision in *Crane*.
44. Those decisions of the court relate to the previous formulation of the policy, in paragraph 14 of the 2012 version of the NPPF. But there is no reason to think that a different analysis should apply to the revised policy, which, in its material drafting, is no different from the original. The phrase “when assessed against the policies in this Framework taken as a whole”, which appeared in the original version within the first limb of paragraph 14, is repeated in the present version – though now in the second limb, paragraph 11d)ii, the order having been reversed.

45. Like the equivalent provision in the original version, paragraph 11d)ii is not qualified by the clarificatory footnote attached to the other limb – now footnote 6, then footnote 9. In the context of decision-making, that footnote applies, and only applies, to paragraph 11d)i, which contains a different concept, namely that “the application of policies in this Framework that protect areas or assets of particular importance provides a clear reason for refusing the development proposed” – a change from paragraph 14 of the NPPF as originally published.
46. The reference to “the policies in this Framework taken as a whole” in paragraph 11d)ii is not, therefore, subject to the specific exclusion of development plan policies that was inserted into footnote 6 in its opening words: “[the] policies referred to are those in this Framework (rather than those in development plans) ...” (my emphasis). That parenthesis – “rather than those in development plans” – in a footnote attached only to paragraph 11d)i and paragraph 11b)i was evidently a deliberate adjustment to the policy in the light of the Supreme Court’s decision in *Hopkins Homes Ltd.*. As Mr Honey submitted, the absence of such a change for the provision now in paragraph 11d)ii is significant. For the purposes of that provision, what Lord Carnwath and Lord Gill said about the concept of “policies in this Framework” is unaffected. Holgate J. came to the same conclusion (in paragraph 89 of his judgment). I should add that in my view the passages to which I have referred in the judgments in *Hopkins Homes Ltd.* are not, as Mr Kimblin suggested, “obiter”. They are essential to the reasoning on which the Supreme Court’s decision in that appeal was founded, and thus binding on us.
47. Leaving the previous cases to one side, I would in any event interpret paragraph 11d)ii, in accordance with the principles I have mentioned, as not excluding the taking into account and weighing of development plan policies in the “tilted balance”. I agree with Holgate J.’s analysis and conclusions to the same effect.
48. In paragraph 11 two main currents running through the NPPF converge: the Government’s commitment to the “plan-led” system and its support for “sustainable development”. The former makes its appearance in paragraph 2, which acknowledges the primacy of the development plan in the making of planning decisions. The latter emerges in chapter 2, where paragraph 11 contains the “presumption in favour of sustainable development”, but paragraph 12 states the obvious but important point that the presumption “does not change the statutory status of the development plan as the starting point for decision making”. As I have said, the policy in paragraph 11 does not displace or modify the decision-maker’s statutory responsibilities. Nor could it – because it is policy, not statute. It functions within the statutory arrangements for planning decision-making, not outside them.
49. The provisions on “decision-taking” in the second part of paragraph 11 set out a policy to guide decision-makers on the performance of their statutory responsibilities under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, in the specific circumstances to which they relate. Those circumstances are, first, where “development proposals ... accord with an up-to-date development plan” (paragraph 11c)), and secondly, “where there are no relevant development plan policies, or the policies which are most important for determining the application are out-of-date” (paragraph 11d)). The two limbs of paragraph 11d), connected by the word “or”, are disjunctive. They describe two different situations in which the “presumption in favour of sustainable development” will be disapplied. The first limb, in paragraph 11d)i, is limited to the application of a small number of particular policies, namely “policies in this Framework that protect areas or assets of particular importance”, and those

policies are individually identified in footnote 6. The second limb, in paragraph 11d)ii goes much wider. It replicates the equivalent provision in the original version of the NPPF. It provides for an assessment against “the policies in this Framework taken as a whole”, which are not the subject of a footnote.

50. The technique with which footnotes are used in paragraph 11 is, I think, significant. The footnotes are applied directly to the provisions to which they relate. Footnote 6, which deliberately excludes policies “in development plans”, has been applied to paragraph 11d)i, but not to paragraph 11d)ii. It has also been applied to paragraph 11b)i, but not to paragraph 11b)ii – which is in exactly the same terms as paragraph 11d)ii. A reasonable inference here is that, in the light of the case law, the Government saw the need to introduce this qualification to paragraph 11d)i, but no need to do so for paragraph 11d)ii. Had it wanted to exclude development plan policy from the ambit of paragraph 11d)ii, it could easily have done that. But it did not.
51. As Mr Honey submitted, it is neither a misinterpretation nor misapplication of paragraph 11d)ii, or taking into account an immaterial consideration, to have regard to development plan policies when dealing with the question posed by that provision. Nothing in its wording, or elsewhere in paragraph 11, ousts the development plan from the assessment required.
52. The lack of an express reference to the policies of the development plan in paragraph 11d)ii does not mean that such policies are therefore excluded. There is no justification for reading that exclusion into paragraph 11d)ii, and to do so despite the evidently deliberate decision not to insert words, or to attach a footnote, having that particular effect. The concept of the “adverse impacts” of a proposed development “significantly and demonstrably [outweighing]” its “benefits” does not naturally suggest that one must ignore “adverse impacts” and “benefits” to the strategy or individual policies of the development plan. And the concept of the positive and negative effects of the development being “assessed against the policies in this Framework” does not naturally suggest that such an assessment must necessarily be made without taking into account the relevant policies of the plan. This would be, in my opinion, a mistaken inference. There is no reason to suggest that because this provision refers to an assessment “against the policies in this Framework”, it means to say – though it does not say – “against the policies in this Framework, and leaving aside the policies of the development plan”. Paragraph 11d)ii does not spell out any such qualification, and is not to be read as if it does.
53. This understanding of the meaning and effect of paragraph 11d)ii sits well with the status and role of the NPPF in the making of decisions on applications for planning permission. The decision-making to which it relates, under the statutory scheme, involves the relevant policies of the development plan being taken into account, and a decision being made in accordance with the plan unless material considerations indicate otherwise. Restricting the scope of paragraph 11d)ii to shut out the relevant policies of the development plan, as if they were automatically alien to the assessment it requires, would seem incompatible with the status and role of the NPPF. Fortunately, there is no need to construe the words of paragraph 11d)ii as having that effect. And in my view it would be wrong to do so.
54. There are, as Mr Honey submitted, several other policies in the NPPF that reinforce this understanding of paragraph 11d)ii.

55. Paragraph 14 of the NPPF makes plain the potential relevance of a proposal's conflict with a neighbourhood plan – which is part of the development plan – to the balancing exercise under paragraph 11d)ii. It refers explicitly to the “adverse impacts” of such development being approved as likely to “significantly and demonstrably outweigh the benefits” if all four of the specified considerations apply. The language here mirrors that in paragraph 11d)ii. It is clear in this policy that a conflict with a neighbourhood plan can be relevant to the paragraph 11d)ii balance, and will carry weight in it as an “adverse impact” – which, in the circumstances referred to, is “likely” to be powerful enough to tip the balance against approval. There is no suggestion that this is a unique or exceptional instance of conflict with the development plan being relevant to the exercise required under paragraph 11d)ii.
56. Paragraph 15, which opens chapter 3, “Plan-making”, emphasises the Government's adherence to the “plan-led” system. The policy in paragraph 15, that “the planning system should be genuinely plan-led”, underpins the whole of the NPPF. As Mr Honey argued, the question of whether granting planning permission for a proposed development is consistent with this fundamental policy of the NPPF may be judged by the proposal's compliance or lack of compliance with the relevant policies of the development plan. If the proposal is plainly in conflict with policies in the plan, granting planning permission for it might be seen as undermining the credibility of the plan, inimical to the “plan-led” system itself, and contrary therefore to a basic policy of the NPPF. This might be an “adverse [impact]” within paragraph 11d)ii. But as Mr Honey submitted, this could only be determined if the relevant policies of the development plan were taken into account in the paragraph 11d)ii assessment.
57. We were taken by Mr Honey to a number of specific policies in the NPPF, dealing with a wide range of topics, in each of which there is reference to the role and content of development plans and their policies. They included, in chapter 9, “Promoting sustainable transport”, paragraph 103, which says “[the] planning system should actively manage patterns of growth” to support the identified objectives, and paragraph 104, which says what “[planning] policies” should do; in chapter 12, “Achieving well-designed places”, paragraph 130, which says that “... where the design of a development accords with clear expectations in plan policies, design should not be used by the decision-maker as a valid reason to object to development”; in chapter 14, “Meeting the challenge of climate change, flooding and coastal change”, including paragraph 167, which says that plans “should identify as a Coastal Change Management Area any area likely to be affected by physical changes to the coast”; in chapter 15, “Conserving and enhancing the natural environment”, paragraphs 170 and 174, which indicate, respectively, the measures by which “[planning] policies ... should contribute to and enhance the natural and local environment”, and the measures by which “plans” should “protect and enhance biodiversity and geodiversity”, including the identification of “local wildlife-rich habitats and wider ecological networks”; in chapter 16, “Conserving and enhancing the historic environment”, paragraph 197, which describes the approach to proposals affecting the significance of non-designated heritage assets, such as buildings locally listed in a development plan; in chapter 17, “Facilitating the sustainable use of minerals”, paragraph 204, which sets out steps for “[planning] policies” to take, including the designation of “Mineral Safeguarding Areas”.
58. These are only examples. There are others. As Mr Kimblin said, some of the policies referred to by Mr Honey relate to “areas or assets of particular importance”, which fall therefore within the scope of paragraph 11d)i and footnote 6. However, as Holgate J. recognised (in paragraphs 78 and 79 of his judgment), when one reads the NPPF “as a whole” – as

paragraph 11d)ii requires – one sees a variety of policies interacting with or depending upon the policies of the development plan, or requiring the plan to set a pattern of development or establish a locational strategy in a particular way, or to make allocations or designations of one kind or another, or set in place policies of protection or promotion, consistent with the Government’s own priorities.

59. Thus the policies of the development plan will often inform the balancing exercise required under paragraph 11d)ii. Holgate J. came to this conclusion (in paragraph 102 of his judgment), and in my view he was right. In many cases it will facilitate the assessment of “adverse impacts” and “benefits” to consider not only the relevant policies of the NPPF but also the corresponding policies of the development plan. Sometimes the proposal’s compliance with a policy of the NPPF will best be gauged by considering whether it complies with a relevant policy of the plan. Some “adverse impacts” or “benefits” may only be capable of proper evaluation if policies of the plan are considered. And there will be cases in which the weight given to the proposal’s conflict with a policy of the NPPF will be the greater if it is also embodied in a policy of the development plan, or less if it is not. Mr Honey gave the example of a “valued [landscape]” given general protection under the policy in paragraph 170a) of the NPPF, but also specifically protected for its local importance by an adopted local plan.
60. It is clear, therefore, that a complete assessment under paragraph 11d)ii, in which “adverse impacts” and “benefits” are fully weighed and considered, may well be better achieved if relevant policies of the development plan are taken into account. This is not a substitute for discharging the decision-maker’s duties under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act. It is integral to that process.
61. I would therefore reject an interpretation of paragraph 11d)ii that renders the policies of the development plan irrelevant as a matter of law from the assessment required under that provision. What emerges on the true interpretation of paragraph 11d)ii, read in the broad context of the NPPF’s commitment to the “plan-led” system and its support for “sustainable development”, and in the immediate context of paragraph 11 itself, is that it requires of the decision-maker an assessment of the kind described, in which relevant policies of the development plan may be taken into account. Whether and how policies of the plan are taken into account in the application of the policy comprising paragraph 11d)ii will be a matter for the decision-maker’s planning judgment, in the circumstances of the case in hand. This accords with the Supreme Court’s understanding of paragraph 14 in the original version of the NPPF, in *Hopkins Homes Ltd.*, this court’s in *East Staffordshire Borough Council and Hallam Land Management Ltd.*, and that to be seen in the first instance decisions in *Crane* and *Woodcock Holdings Ltd.*

Must the “tilted balance” and the duty in section 38(6) be performed separately?

62. Mr Kimblin also argued that the performance of the duty under section 38(6) and the application of the “presumption in favour of sustainable development” must be undertaken as separate and sequential stages of decision-making, in which the “tilted balance” under paragraph 11d)ii of the NPPF is carried out as a self-contained exercise.

63. Holgate J. rejected this argument (in paragraphs 107 and 108 of his judgment). I also reject it. No support for it is to be found in statute or in authority. Indeed, it seems contrary to authority.
64. In his speech in *City of Edinburgh Council* (at p.1459H to p.1460D), Lord Clyde considered a similar argument. He said this:
- “Counsel for the Secretary of State suggested ... that in the practical application of [a provision in equivalent terms to that now to be found in section 38(6) of the 2004 Act] two distinct stages should be identified. In the first the decision-maker should decide whether the development plan should or should not be accorded its statutory priority; and in the second, if he decides that it should not be given that priority it should be put aside and attention concentrated upon the material factors which remain for consideration. But in my view it is undesirable to devise any universal prescription for the method to be adopted by the decision-maker, provided always of course that he does not act outwith his powers. Different cases will invite different methods in the detail of the approach to be taken and it should be left to the good sense of the decision-maker, acting within his powers, to decide how to go about the task before him in the particular circumstances of each case. In the particular circumstances of the present case the ground on which the reporter decided to make an exception to the development plan was the existence of more recent policy statements which he considered had overtaken the policy in the plan. In such a case as that it may well be appropriate to adopt the two-stage approach suggested by counsel. But even there that should not be taken to be the only proper course. In many cases it would be perfectly proper for the decision-maker to assemble all the relevant material including the provisions of the development plan and proceed at once to the process of assessment, paying of course all due regard to the priority of the latter, but reaching his decision after a general study of all the material before him. The precise procedure followed by any decision-maker is so much a matter of personal preference or inclination in light of the nature and detail of the particular case that neither universal prescription nor even general guidance are useful or appropriate.”
65. That reasoning has not been doubted in any subsequent decision of the House of Lords or of the Supreme Court. It recognises the realism, in many cases, of a holistic approach to the performance of the duty in section 38(6). There is no prescribed method to adopt. So long as the statutory duty is complied with, the decision-maker can go about the task in a way that seems suitable in the particular circumstances of the case. To split the performance of the duty, in every case, into two distinct stages or steps would be unduly inflexible (see *East Staffordshire Borough Council*, at paragraph 50). If, in substance, it can be properly discharged in a single, comprehensive exercise – rather than in two stages starting with the question of whether a decision to approve the proposal would be “in accordance with the development plan” and then going on to consider whether “material considerations indicate otherwise” – that will not be unlawful (see *Secretary of State for Communities and Local Government v BDW Trading Ltd.* [2016] EWCA Civ 493, at paragraph 21).
66. In my view, therefore, there is nothing to prevent an approach in which the application of the “tilted balance” under paragraph 11d)ii is incorporated into the decision-making under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act in one all-encompassing stage. The decision-maker is not obliged to combine in a single exercise the paragraph 11d)ii

assessment with the assessment required to discharge the duty in section 38(6). In principle, however, he lawfully may.

67. If this is how it is done, the maker of the decision must keep in mind the statutory primacy of the development plan and the statutory requirement to have regard to other material considerations, including the policies of the NPPF and specifically the policy for the “tilted balance” under paragraph 11d)ii, and must make the decision, as section 38(6) requires, in accordance with the development plan unless material considerations indicate otherwise. It will not then be necessary to consider twice, in separate steps, matters that arise both under the relevant policies of the development plan and under the policies of the NPPF. The realistic approach in such a case is likely to be to take into account the development plan policies of relevance to the paragraph 11d)ii assessment within that assessment, rather than outside it. As Holgate J. held (in paragraph 110 of his judgment), the mischief of “double-counting” can thus be avoided. And the integrity of the section 38(6) assessment can be assured. This is not to merge the two presumptions – the statutory presumption in favour of the development plan and the national policy “presumption in favour of sustainable development”. It is to acknowledge the existence and status of both presumptions, but also to recognise that they can be lawfully applied together.

Paragraph 213

68. It follows from the analysis on the two main issues that, as Holgate J. concluded (in paragraph 117 of his judgment), the policy in paragraph 213 of the NPPF may properly be taken into account in the balancing exercise under paragraph 11d)ii, and is not, in principle, of relevance only to the weighting of development plan policies under section 38(6) (see the recent decision of this court in *Peel Investments (North) Ltd. v Secretary of State for Housing, Communities and Local Government* [2020] EWCA Civ 1175, at paragraph 66). Neither the wording of the policy in paragraph 11d)ii nor that of the policy in paragraph 213 itself lends any support to the contention that the latter is excluded from the operation of the “tilted balance” under paragraph 11d)ii.

Did either of the inspectors err in law?

69. I conclude, therefore, that neither of these two challenges has merit. Neither inspector erred in law. Each proceeded lawfully to a decision on the section 78 appeal, in accordance with the requirements of statute, and without lapsing into a misinterpretation of the policy in paragraph 11 of the NPPF or an unlawful application of that policy. In both cases, therefore, Holgate J. was in my view right to uphold the inspector’s decision.

Conclusion

70. For the reasons I have given, I would dismiss these applications for planning statutory review.

Lady Justice Simler

71. I agree.

Sir Gary Hickinbottom

72. I also agree.



Neutral Citation Number: [2014] EWCA Civ 137

Case No: C1/2013/0843

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
THE HON. MRS JUSTICE LANG
CO/4231/2012

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/02/2014

Before:

LORD JUSTICE MAURICE KAY
VICE PRESIDENT OF THE COURT OF APPEAL, CIVIL DIVISION
LORD JUSTICE SULLIVAN
and
LADY JUSTICE RAFFERTY

Between:

BARNWELL MANOR WIND ENERGY LIMITED	<u>Appellant</u>
- and -	
(1) EAST NORTHAMPTONSHIRE DISTRICT COUNCIL	<u>Respondents</u>
(2) ENGLISH HERITAGE	
(3) NATIONAL TRUST	
(4) THE SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT	

Gordon Nardell QC and Justine Thornton (instructed by Eversheds LLP) for the Appellant
Morag Ellis QC and Robin Green (instructed by Sharpe Pritchard) for the First, Second and Third Respondents

The Fourth Respondent did not appear and was not represented

Hearing date: 23rd January 2014

Approved Judgment

Lord Justice Sullivan:

Introduction

1. This is an appeal against the order dated 11th March 2013 of Lang J quashing the decision dated 12th March 2012 of a Planning Inspector appointed by the Secretary of State granting planning permission for a four-turbine wind farm on land north of Catshead Woods, Sudborough, Northamptonshire. The background to the appeal is set out in Lang J's judgment: [2013] EWHC 473 (Admin).

Section 66

2. Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 ("the Listed Buildings Act") imposes a "General duty as respects listed buildings in exercise of planning functions." Subsection (1) provides:

"In considering whether to grant planning permission for development which affects a listed building or its setting, the local planning authority or, as the case may be, the Secretary of State shall have special regard to the desirability of preserving the building or its setting or any features of special architectural or historic interest which it possesses."

Planning Policy

3. When the permission was granted the Government's planning policies on the conservation of the historic environment were contained in Planning Policy Statement 5 (PPS5). In PPS5 those parts of the historic environment that have significance because of their historic, archaeological, architectural or artistic interest are called heritage assets. Listed buildings, Scheduled Ancient Monuments and Registered Parks and Gardens are called "designated heritage assets." Guidance to help practitioners implement the policies in PPS5 was contained in "PPS5 Planning for the Historic Environment: Historic Environment Planning Practice Guide" ("the Practice Guide"). For present purposes, Policies HE9 and HE10 in PPS5 are of particular relevance. Policy HE9.1 advised that:

"There should be a presumption in favour of the conservation of designated heritage assets and the more significant the designated heritage asset, the greater the presumption in favour of its conservation should be.... Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, including scheduled monumentsgrade I and II* listed buildings and grade I and II* registered parks and gardens....should be wholly exceptional."

Policy HE9.4 advised that:

"Where a proposal has a harmful impact on the significance of a designated heritage asset which is less than substantial harm, in all cases local planning authorities should:

- (i) weigh the public benefit of the proposal (for example, that it helps to secure the optimum viable use of the heritage asset in the interests of its long-term conservation) against the harm; and
- (ii) recognise that the greater the harm to the significance of the heritage asset the greater the justification will be needed for any loss.”

Policy HE10.1 advised decision-makers that when considering applications for development that do not preserve those elements of the setting of a heritage asset, they:

“should weigh any such harm against the wider benefits of the application. The greater the negative impact on the significance of the heritage asset, the greater the benefits that will be needed to justify approval.”

The Inspector’s decision

- 4. The Inspector concluded that the wind farm would fall within and affect the setting of a wide range of heritage assets [22]¹. For the purposes of this appeal the parties’ submissions largely focussed on one of the most significant of those assets: a site owned by the National Trust, Lyveden New Bield. Lyveden New Bield is covered by a range of heritage designations: Grade I listed building, inclusion in the Register of Parks and Gardens of Special Historic Interest at Grade I, and Scheduled Ancient Monument [44].
- 5. It was common ground between the parties at the inquiry that the group of designated heritage assets at Lyveden New Bield was probably the finest surviving example of an Elizabethan Garden, and that as a group the heritage asset at Lyveden New Bield had a cultural value of national, if not international significance. The Inspector agreed, and found that:

“...this group of designated heritage assets has archaeological, architectural, artistic and historic significance of the highest magnitude.” [45]

- 6. The closest turbine in the wind farm site (following the deletion of one turbine) to Lyveden New Bield was around 1.3 km from the boundary of the Registered Park and 1.7 km from the New Bield itself. The Inspector found that:

“The wind turbines proposed would be visible from all around the site, to varying degrees, because of the presence of trees. Their visible presence would have a clear influence on the surroundings in which the heritage assets are experienced and

¹ [] refers to paragraph numbers in the Inspector’s decision.

as such they would fall within, and affect, the setting of the group.” [46]

This conclusion led the Inspector to identify the central question, as follows:

“Bearing in mind PPS5 Policy HE7, the central question is the extent to which that visible presence would affect the significance of the heritage assets concerned.” [46]

7. The Inspector answered that question in relation to Lyveden New Bield in paragraphs 47-51 of his decision letter.

“47. While records of Sir Thomas Tresham’s intentions for the site are relatively, and unusually, copious, it is not altogether clear to what extent the gardens and the garden lodge were completed and whether the designer considered views out of the garden to be of any particular significance. As a consequence, notwithstanding planting programmes that the National Trust have undertaken in recent times, the experience of Lyveden New Bield as a place, and as a planned landscape, with earthworks, moats and buildings within it, today, requires imagination and interpretation.

48. At the times of my visits, there were limited numbers of visitors and few vehicles entering and leaving the site. I can imagine that at busy times, the situation might be somewhat different but the relative absence of man-made features in views across and out of the gardens compartments, from the prospect mounds especially, and from within the garden lodge, give the place a sense of isolation that makes the use of one’s imagination to interpret Sir Thomas Tresham’s design intentions somewhat easier.

49. The visible, and sometimes moving, presence of the proposed wind turbine array would introduce a man-made feature, of significant scale, into the experience of the place. The array would act as a distraction that would make it more difficult to understand the place, and the intentions underpinning its design. That would cause harm to the setting of the group of designated heritage assets within it.

50. However, while the array would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the prospect mounds, from within the moated orchard, and various other places around the site, at a separation distance of between 1 and 2 kilometres, the turbines would not be so close, or fill the field of view to the extent, that they would dominate the

outlook from the site. Moreover, the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter). Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.

51. On that basis, the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield and Lyveden Old Bield, or their relationship to each other. As a consequence, the effect on the setting of these designated heritage assets, while clearly detrimental, would not reach the level of substantial harm.”

8. The Inspector carried out “The Balancing Exercise” in paragraphs 85 and 86 of his decision letter.

“85. The proposal would harm the setting of a number of designated heritage assets. However, the harm would in all cases be less than substantial and reduced by its temporary nature and reversibility. The proposal would also cause harm to the landscape but this would be ameliorated by a number of factors. Read in isolation though, all this means that the proposal would fail to accord with [conservation policies in the East Midlands Regional Plan (EMRP)]. On the other hand, having regard to advice in PPS22, the benefits that would accrue from the wind farm in the 25 year period of its operation attract significant weight in favour of the proposal. The 10 MW that it could provide would contribute towards the 2020 regional target for renewable energy, as required by EMRP Policy 40 and Appendix 5, and the wider UK national requirement.

86. PPS5 Policies HE9.4 and HE10.1 require the identified harm to the setting of designated heritage assets to be balanced against the benefits that the proposal would provide. Application of the development plan as a whole would also require that harm, and the harm to the landscape, to be weighed against the benefits. Key principle (i) of PPS22 says that renewable energy developments should be capable of being accommodated throughout England in locations where the technology is viable and environmental, economic, and social impacts can be addressed satisfactorily. I take that as a clear expression that the threshold of acceptability for a proposal like

the one at issue in this appeal is not such that all harm must be avoided. In my view, the significant benefits of the proposal in terms of the energy it would produce from a renewable source outweigh the less than substantial harm it would cause to the setting of designated heritage assets and the wider landscape.”

Lang J’s Judgment

9. Before Lang J the First, Second and Third Respondents (“the Respondents”) challenged the Inspector’s decision on three grounds. In summary, they submitted that the Inspector had failed to:

- (1) have special regard to the desirability of preserving the settings of listed buildings, including Lyveden New Bield;
- (2) correctly interpret and apply the policies in PPS5; and
- (3) give adequate reasons for his decision.

The Secretary of State, the Fourth Respondent, had conceded prior to the hearing that the Inspector’s decision should be quashed on ground (3), and took no part in the proceedings before Lang J and in this Court.

10. Lang J concluded that all three grounds of challenge were made out. [72]² In respect of ground (1) she concluded that:

“In order to give effect to the statutory duty under section 66(1), a decision-maker should accord considerable importance and weight to the “desirability of preserving... the setting” of listed buildings when weighing this factor in the balance with other ‘material considerations’ which have not been given this special statutory status. Thus, where the section 66(1) duty is in play, it is necessary to qualify Lord Hoffmann’s statement in *Tesco Stores v Secretary of State for the Environment & Ors* [1995] 1 WLR 759, at 780F-H that the weight to be given to a material consideration was a question of planning judgment for the planning authority” [39]

Applying that interpretation of section 66(1) she concluded that:

“...the Inspector did not at any stage in the balancing exercise accord “special weight”, or considerable importance to “the desirability of preserving the setting”. He treated the “harm” to the setting and the wider benefit of the wind farm proposal as if those two factors were of equal importance. Indeed, he downplayed “the desirability of preserving the setting” by

² [] refers to paragraph numbers in the judgment.

adopting key principle (i) of PPS22, as a “clear indication that the threshold of acceptability for a proposal like the one at issue in this appeal is not such that all harm must be avoided” (paragraph 86). In so doing, he applied the policy without giving effect to the section 66(1) duty, which applies to all listed buildings, whether the “harm” has been assessed as substantial or less than substantial.” [46]

11. In respect of ground (2) Lang J concluded that the policy guidance in PPS5 and the Practice Guide required the Inspector to assess the contribution that the setting made to the significance of the heritage assets, including Lyveden New Bield, and the effect of the proposed wind turbines on both the significance of the heritage asset and the ability to appreciate that significance. Having analysed the Inspector’s decision, she found that the Inspector’s assessment had been too narrow. He had failed to assess the contribution that the setting of Lyveden New Bield made to its significance as a heritage asset and the extent to which the wind turbines would enhance or detract from that significance, and had wrongly limited his assessment to one factor: the ability of the public to understand the asset based on the ability of “the reasonable observer” to distinguish between the “modern addition” to the landscape and the “historic landscape.” [55] - [65]
12. In respect of ground (3) Lang J found that the question whether Sir Thomas Tresham intended that the views from the garden and the garden lodge should be of significance was a controversial and important issue at the inquiry which the Inspector should have resolved before proceeding to assess the level of harm.[68] However, the Inspector’s reasoning on this issue was unclear. Having said in paragraph 47 of his decision that it was “not altogether clear ...whether the designer considered views out of the garden to be of any significance”, he had concluded in paragraph 50 that “the turbine array would not intrude on any obviously intended, planned view out of the garden, or from the garden lodge (which has windows all around its cruciform perimeter).” It was not clear whether this was a conclusion that there were no planned views (as submitted by the Appellant) or a conclusion that there were such views but the turbine array would not intrude into them. [70] – [71].

The Grounds of Appeal

13. On behalf of the Appellant, Mr. Nardell QC challenged Lang J’s conclusions in respect of all three grounds. At the forefront of his appeal was the submission that Lang J had erred in concluding that section 66(1) required the Inspector, when carrying out the balancing exercise, to give “considerable weight” to the desirability of preserving the settings of the many listed buildings, including Lyveden New Bield. He submitted that section 66(1) did not require the decision-maker to give any particular weight to that factor. It required the decision-maker to ask the right question – would there be some harm to the setting of the listed building – and if the answer to that question was “yes” – to refuse planning permission unless that harm was outweighed by the advantages of the proposed development. When carrying out that balancing exercise the weight to be given to the harm to the setting of the listed

building on the one hand and the advantages of the proposal on the other was entirely a matter of planning judgment for the decision-maker.

14. Turning to the policy ground, he submitted that Lang J had erred by taking an over-rigid approach to PPS5 and the Practice Guide which were not intended to be prescriptive. Given the way in which those objecting to the proposed wind farm had put their case at the inquiry, the Inspector had been entitled to focus on the extent to which the presence of the turbines in views to and from the listed buildings, including Lyveden New Bield, would affect the ability of the public to appreciate the heritage assets.
15. In response to the reasons ground, he submitted that the question whether any significant view from the lodge or garden at Lyveden New Bield was planned or intended was a subsidiary, and not a “principal important controversial”, issue. In any event, he submitted that on a natural reading of paragraph 50 of the decision letter the Inspector had simply found that the turbines would not intrude into such significant views, if any, as were obviously planned or intended, so it had been unnecessary for him to resolve the issue that he had left open in paragraph 47 of the decision.

Discussion

Ground 1

16. What was Parliament’s intention in imposing both the section 66 duty and the parallel duty under section 72(1) of the Listed Buildings Act to pay “special attention to the desirability of preserving or enhancing the character or appearance” of conservation areas? It is common ground that, despite the slight difference in wording, the nature of the duty is the same under both enactments. It is also common ground that “preserving” in both enactments means doing no harm: see South Lakeland District Council v Secretary of State for the Environment [1992] 2 AC 141, per Lord Bridge at page 150.
17. Was it Parliament’s intention that the decision-maker should consider very carefully whether a proposed development would harm the setting of the listed building (or the character or appearance of the conservation area), and if the conclusion was that there would be some harm, then consider whether that harm was outweighed by the advantages of the proposal, giving that harm such weight as the decision-maker thought appropriate; or was it Parliament’s intention that when deciding whether the harm to the setting of the listed building was outweighed by the advantages of the proposal, the decision-maker should give particular weight to the desirability of avoiding such harm?
18. Lang J analysed the authorities in paragraphs [34] – [39] of her judgment. In chronological order they are: The Bath Society v Secretary of State for the Environment [1991] 1 WLR 1303; South Lakeland (see paragraph 16 above); Heatherington (UK) Ltd. v Secretary of State for the Environment (1995) 69 P & CR 374; and Tesco Stores Ltd. v Secretary of State for the Environment [1995] 1 WLR 759. Bath and South Lakeland were concerned with (what is now) the duty under

section 72. Heatherington is the only case in which the section 66 duty was considered. Tesco was not a section 66 or section 72 case, it was concerned with the duty to have regard to “other material considerations” under section 70(2) of the Town and Country Planning Act 1990 (“the Planning Act”).

19. When summarising his conclusions in Bath about the proper approach which should be adopted to an application for planning permission in a conservation area, Glidewell LJ distinguished between the general duty under (what is now) section 70(2) of the Planning Act, and the duty under (what is now) section 72(1) of the Listed Buildings Act. Within a conservation area the decision-maker has two statutory duties to perform, but the requirement in section 72(1) to pay “special attention” should be the first consideration for the decision-maker (p. 1318 F-H). Glidewell LJ continued:

“Since, however, it is a consideration to which special attention is to be paid as a matter of statutory duty, it must be regarded as having considerable importance and weight..... As I have said, the conclusion that the development will neither enhance nor preserve will be a consideration of considerable importance and weight. This does not necessarily mean that the application for permission must be refused, but it does in my view mean that the development should only be permitted if the decision-maker concludes that it carries some advantage or benefit which outweighs the failure to satisfy the section [72(1)] test and such detriment as may inevitably follow from that.”

20. In South Lakeland the issue was whether the concept of “preserving” in what is now section 72(1) meant “positively preserving” or merely doing no harm. The House of Lords concluded that the latter interpretation was correct, but at page 146E-G of his speech (with which the other members of the House agreed) Lord Bridge described the statutory intention in these terms:

“There is no dispute that the intention of section [72(1)] is that planning decisions in respect of development proposed to be carried out in a conservation area must give a high priority to the objective of preserving or enhancing the character or appearance of the area. If any proposed development would conflict with that objective, there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest. But if a development would not conflict with that objective, the special attention required to be paid to that objective will no longer stand in its way and the development will be permitted or refused in the application of ordinary planning criteria.”

21. In Heatherington, the principal issue was the interrelationship between the duty imposed by section 66(1) and the newly imposed duty under section 54A of the Planning Act (since repealed and replaced by the duty under section 38(6) of the Planning and Compulsory Purchase Act 2004). However, Mr. David Keene QC (as he then was), when referring to the section 66(1) duty, applied Glidewell LJ's dicta in the Bath case (above), and said that the statutory objective "remains one to which considerable weight should be attached" (p. 383).
22. Mr. Nardell submitted, correctly, that the Inspector's error in the Bath case was that he had failed to carry out the necessary balancing exercise. In the present case the Inspector had expressly carried out the balancing exercise, and decided that the advantages of the proposed wind farm outweighed the less than substantial harm to the setting of the heritage assets. Mr. Nardell submitted that there was nothing in Glidewell LJ's judgment which supported the proposition that the Court could go behind the Inspector's conclusion. I accept that (subject to grounds 2 and 3, see paragraph 29 et seq below) the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell LJ's judgment is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give "considerable importance and weight."
23. That conclusion is reinforced by the passage in the speech of Lord Bridge in South Lakeland to which I have referred (paragraph 20 above). It is true, as Mr. Nardell submits, that the ratio of that decision is that "preserve" means "do no harm". However, Lord Bridge's explanation of the statutory purpose is highly persuasive, and his observation that there will be a "strong presumption" against granting permission for development that would harm the character or appearance of a conservation area is consistent with Glidewell LJ's conclusion in Bath. There is a "strong presumption" against granting planning permission for development which would harm the character or appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of "considerable importance and weight."
24. While I would accept Mr. Nardell's submission that Heatherington does not take the matter any further, it does not cast any doubt on the proposition that emerges from the Bath and South Lakeland cases: that Parliament in enacting section 66(1) did intend that the desirability of preserving the settings of listed buildings should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given "considerable importance and weight" when the decision-maker carries out the balancing exercise.
25. In support of his submission that, provided he asked the right question – was the harm to the settings of the listed buildings outweighed by the advantages of the proposed development – the Inspector was free to give what weight he chose to that harm, Mr. Nardell relied on the statement in the speech of Lord Hoffmann in Tesco that the

weight to be given to a material consideration is entirely a matter for the local planning authority (or in this case, the Inspector):

“If there is one principle of planning law more firmly settled than any other, it is that matters of planning judgment are within the exclusive province of the local planning authority or the Secretary of State.” (p.780H).

26. As a general proposition, the principle is not in doubt, but Tesco was concerned with the application of section 70(2) of the Planning Act. It was not a case under section 66(1) or 72(1) of the Listed Buildings Act. The proposition that decision-makers may be required by either statute or planning policy to give particular weight to certain material considerations was not disputed by Mr. Nardell. There are many examples of planning policies, both national and local, which require decision-makers when exercising their planning judgment to give particular weight to certain material considerations. No such policies were in issue in the Tesco case, but an example can be seen in this case. In paragraph 16 of his decision letter the Inspector referred to Planning Policy Statement 22 Renewable Energy (PPS22) which says that the wider environmental and economic benefits of all proposals for renewable energy, whatever their scale, are material considerations which should be given “significant weight”. In this case, the requirement to give “considerable importance and weight” to the policy objective of preserving the setting of listed buildings has been imposed by Parliament. Section 70(3) of the Planning Act provides that section 70(1), which confers the power to grant planning permission, has effect subject to, inter alia, sections 66 and 72 of the Listed Buildings Act. Section 70(2) requires the decision-maker to have regard to “material considerations” when granting planning permission, but Parliament has made the power to grant permission having regard to material considerations expressly subject to the section 66(1) duty.
27. Mr. Nardell also referred us to the decisions of Ouseley J and this Court in Garner v Elmbridge Borough Council [2011] EWCA Civ 891, but the issue in that case was whether the local planning authority had been entitled to conclude that no harm would be caused to the setting of another heritage asset of the highest significance, Hampton Court Palace. Such was the weight given to the desirability of preserving the setting of the Palace that it was common ground that it would not be acceptable to grant planning permission for a redevelopment scheme which would have harmed the setting of the Palace on the basis that such harm would be outweighed by some other planning advantage: see paragraph 14 of my judgment. Far from assisting Mr. Nardell’s case, Garner is an example of the practical application of the advice in policy HE9.1: that substantial harm to designated heritage assets of the highest significance should not merely be exceptional, but “wholly exceptional”.
28. It does not follow that if the harm to such heritage assets is found to be less than substantial, the balancing exercise referred to in policies HE9.4 and HE 10.1 should ignore the overarching statutory duty imposed by section 66(1), which properly understood (see Bath, South Somerset and Heatherington) requires considerable weight to be given by decision-makers to the desirability of preserving the setting of

all listed buildings, including Grade II listed buildings. That general duty applies with particular force if harm would be caused to the setting of a Grade I listed building, a designated heritage asset of the highest significance. If the harm to the setting of a Grade I listed building would be less than substantial that will plainly lessen the strength of the presumption against the grant of planning permission (so that a grant of permission would no longer have to be “wholly exceptional”), but it does not follow that the “strong presumption” against the grant of planning permission has been entirely removed.

29. For these reasons, I agree with Lang J’s conclusion that Parliament’s intention in enacting section 66(1) was that decision-makers should give “considerable importance and weight” to the desirability of preserving the setting of listed buildings when carrying out the balancing exercise. I also agree with her conclusion that the Inspector did not give considerable importance and weight to this factor when carrying out the balancing exercise in this decision. He appears to have treated the less than substantial harm to the setting of the listed buildings, including Lyveden New Bield, as a less than substantial objection to the grant of planning permission. The Appellant’s Skeleton Argument effectively conceded as much in contending that the weight to be given to this factor was, subject only to irrationality, entirely a matter for the Inspector’s planning judgment. In his oral submissions Mr. Nardell contended that the Inspector had given considerable weight to this factor, but he was unable to point to any particular passage in the decision letter which supported this contention, and there is a marked contrast between the “significant weight” which the Inspector expressly gave in paragraph 85 of the decision letter to the renewable energy considerations in favour of the proposal having regard to the policy advice in PPS22, and the manner in which he approached the section 66(1) duty. It is true that the Inspector set out the duty in paragraph 17 of the decision letter, but at no stage in the decision letter did he expressly acknowledge the need, if he found that there would be harm to the setting of the many listed buildings, to give considerable weight to the desirability of preserving the setting of those buildings. This is a fatal flaw in the decision even if grounds 2 and 3 are not made out.

Ground 2

30. Grounds 2 and 3 are interlinked. The Respondents contend that the Inspector either misapplied the relevant policy guidance, or if he correctly applied it, failed to give adequate reasons for his conclusion that the harm to the setting of the listed buildings, including Lyveden New Bield, would in all cases be less than substantial. I begin with the policy challenge in ground 2. Lang J set out the policy guidance relating to setting in PPS5 and the Practice Guide in paragraphs 62-64 of her judgment. The contribution made by the setting of Lyveden New Bield to its significance as a heritage asset was undoubtedly a “principal controversial” issue at the inquiry. In paragraph 4.5.1 of his Proof of Evidence on behalf of the Local Planning Authority Mr. Mills, its Senior Conservation Officer, said:

“To make an assessment of the indirect impact of development or change upon an asset it is first necessary to make a judgment about the contribution made by its setting.”

Having carried out a detailed assessment of that contribution he concluded in paragraph 4.5.17:

“In summary, what Tresham created at the site was a designed experience that was intimately linked to the surrounding landscape. The presence of the four prospect mounts along with the raised terrace provide a clear indication of the relationship of the site with the surrounding landscape.”

Only then did he assess the impact of the proposed development on the setting by way of “a discussion as to the impact of the proposal on how the site is accessed and experienced by visitors.”

31. In its written representations to the inquiry English Heritage said of the significance and setting of Lyveden New Bield:

“The aesthetic value of the Lyveden Heritage Assets partly derives from the extraordinary symbolism and quality of the New Bield and the theatrical design of the park and garden. However, it also derives from their visual association with each other and with their setting. The New Bield is a striking presence when viewed on the skyline from a distance. The New Bield and Lyveden park and garden are wonderfully complemented by their undeveloped setting of woodland, pasture and arable land.”

In paragraph 8.23 English Heritage said:

“The New Bield and Lyveden park and garden were designed to be prominent and admired in their rural setting, isolated from competing structures. The character and setting of the Lyveden Heritage Assets makes a crucial contribution to their significance individually and as a group.”

32. In its written representations to the inquiry the National Trust said that each arm of the cruciform New Bield “was intended to offer extensive views in *all directions* over the surrounding parks and the Tresham estate beyond” (paragraph 11). The National Trust’s evidence was that “one if not *the Principal designed view from* within the lodge was from the withdrawing rooms which linked to the important Great Chamber and Great Hall on the upper two levels of the west arm of the lodge” (paragraph 12). The Trust contended that this vista survived today, and was directly aligned with the proposed wind farm site (emphasis in both paragraphs as in the original).

33. In his proof of evidence, the planning witness for the Stop Barnwell Manor Wind Farm Group said that:
- “...the views of Lyveden New Bield from the east, south-east and south, both as an individual structure and as a group with its adjoining historic garden and listed cottage, are views of a very high order. The proposed turbines, by virtue of their monumental scale, modern mechanical appearance, and motion of the blades, would be wholly alien in this scene and would draw the eye away from the New Bield, destroying its dominating presence in the landscape.”
34. This evidence was disputed by the Appellant’s conservation witness, and the Appellant rightly contends that a section 288 appeal is not an opportunity to re-argue the planning merits. I have set out these extracts from the objectors’ evidence at the inquiry because they demonstrate that the objectors were contending that the undeveloped setting of Lyveden New Bield made a crucial contribution to its significance as a heritage asset; that the New Bield (the lodge) had been designed to be a striking and dominant presence when viewed in its rural setting; and that the lodge had been designed so as to afford extensive views in all directions over that rural setting. Did the Inspector resolve these issues in his decision, and if so, how?
35. I endorse Lang J’s conclusion that the Inspector did not assess the contribution made by the setting of Lyveden New Bield, by virtue of its being undeveloped, to the significance of Lyveden New Bield as a heritage asset. The Inspector did not grapple with (or if he did consider it, gave no reasons for rejecting) the objectors’ case that the setting of Lyveden New Bield was of crucial importance to its significance as a heritage asset because Lyveden New Bield was designed to have a dominating presence in the surrounding rural landscape, and to afford extensive views in all directions over that landscape; and that these qualities would be seriously harmed by the visual impact of a modern man-made feature of significant scale in that setting.
36. The Inspector’s reason for concluding in paragraph 51 of the decision that the presence of the wind turbine array, while clearly having a detrimental effect on the setting of Lyveden New Bield, would not reach the level of substantial harm, was that it would not be so distracting that it would not prevent, or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield or Lyveden Old Bield or their relationship to each other.
37. That is, at best, only a partial answer to the objectors’ case. As the Practice Guide makes clear, the ability of the public to appreciate a heritage asset is one, but by no means the only, factor to be considered when assessing the contribution that setting makes to the significance of a heritage asset. The contribution that setting makes does not depend on there being an ability to access or experience the setting: see in particular paragraphs 117 and 122 of the Practice Guide, cited in paragraph 64 of Lang J’s judgment.

Ground 3

38. The Inspector said that his conclusion in paragraph 51 of the decision letter that the presence of the wind turbine array would not be so distracting that it would prevent or make unduly difficult, an understanding, appreciation or interpretation of the significance of the elements that make up Lyveden New Bield had been reached on the basis of his conclusions in paragraph 50. In that paragraph, having said that the wind turbine array “would be readily visible as a backdrop to the garden lodge in some directional views, from the garden lodge itself in views towards it, and from the prospect mounds, from within the orchard, and various other places around the site, at a separation distance of between 1 and 2 kilometres”, the Inspector gave three reasons which formed the basis of his conclusion in paragraph 51.
39. Those three reasons were:
- (a) The turbines would not be so close, or fill the field of view to the extent, that they would dominate the outlook from the site.
 - (b) The turbine array would not intrude on any obviously intended, planned view out of the garden or the garden lodge (which has windows all around its cruciform perimeter).
 - (c) Any reasonable observer would know that the turbine array was a modern addition to the landscape, separate from the planned historic landscape, or building they were within, or considering, or interpreting.
40. Taking those reasons in turn, reason (a) does not engage with the objectors’ contention that the setting of Lyveden New Bield made a crucial contribution to its significance as a heritage asset because Lyveden New Bield was designed to be the dominant feature in the surrounding rural landscape. A finding that the “readily visible” turbine array would not dominate the outlook from the site puts the boot on the wrong foot. If this aspect of the objectors’ case was not rejected (and there is no reasoned conclusion to that effect) the question was not whether the turbine array would dominate the outlook from Lyveden New Bield, but whether Lyveden New Bield would continue to be dominant within its rural setting.
41. Mr. Nardell’s submission to this Court was not that the Inspector had found that there were no planned views (cf. the submission recorded in paragraph 70 of Lang J’s judgment), but that the Inspector had concluded that the turbine array would not intrude into obviously intended or planned views if any. That submission is difficult to understand given the Inspector’s conclusion that the turbine array would be “readily visible” from the garden lodge, from the prospect mounds, and from various other places around the site. Unless the Inspector had concluded that there were no intended or planned views from the garden or the garden lodge, and he did not reach that conclusion (see paragraph 47 of the decision letter), it is difficult to see how he could have reached the conclusion that the “readily visible” turbine array would not “intrude” on any obviously intended or planned views from the garden lodge. I am inclined to agree with Mr. Nardell’s alternative submission that the Inspector’s conclusion that while “readily visible” from the garden lodge, the turbine array would not “intrude” on any obviously intended or planned view from it, is best understood

by reference to his third conclusion in paragraph 50. While visible in views from the garden lodge the turbine array would not intrude upon, in the sense of doing substantial harm to, those views, for the reasons given in the last sentence of paragraph 50.

42. I confess that, notwithstanding Mr. Nardell's assistance, I found some difficulty, not in understanding the final sentence of paragraph 50 – plainly any reasonable observer would know that the turbine array was a modern addition to the landscape and was separate from the planned historic landscape at Lyveden New Bield – but in understanding how it could rationally justify the conclusion that the detrimental effect of the turbine array on the setting of Lyveden New Bield would not reach the level of substantial harm. The Inspector's application of the "reasonable observer" test was not confined to the effect of the turbine array on the setting of Lyveden New Bield. As Lang J pointed out in paragraph 57 of her judgment, in other paragraphs of his decision letter the Inspector emphasised one particular factor, namely the ability of members of the public to understand and distinguish between a modern wind turbine array and a heritage asset, as his reason for concluding either that the proposed wind turbines would have no impact on the settings of other heritage assets of national significance [28] – [31]; or a harmful impact that was "much less than substantial" on the setting of a Grade 1 listed church in a conservation area [36].
43. Matters of planning judgment are, of course, for the Inspector. No one would quarrel with his conclusion that "any reasonable observer" would understand the differing functions of a wind turbine and a church and a country house or a settlement [30]; would not be confused about the origins or purpose of a settlement and a church and a wind turbine array [36]; and would know that a wind turbine array was a modern addition to the landscape [50]; but no matter how non-prescriptive the approach to the policy guidance in PPS5 and the Practice Guide, that guidance nowhere suggests that the question whether the harm to the setting of a designated heritage asset is substantial can be answered simply by applying the "reasonable observer" test adopted by the Inspector in this decision.
44. If that test was to be the principal basis for deciding whether harm to the setting of a designated heritage asset was substantial, it is difficult to envisage any circumstances, other than those cases where the proposed turbine array would be in the immediate vicinity of the heritage asset, in which it could be said that any harm to the setting of a heritage asset would be substantial: the reasonable observer would always be able to understand the differing functions of the heritage asset and the turbine array, and would always know that the latter was a modern addition to the landscape. Indeed, applying the Inspector's approach, the more obviously modern, large scale and functional the imposition on the landscape forming part of the setting of a heritage asset, the less harm there would be to that setting because the "reasonable observer" would be less likely to be confused about the origins and purpose of the new and the old. If the "reasonable observer" test was the decisive factor in the Inspector's reasoning, as it appears to have been, he was not properly applying the policy approach set out in PPS5 and the Practice Guide. If it was not the decisive factor in the Inspector's reasoning, then he did not give adequate reasons for his conclusion

that the harm to the setting of Lyveden New Bield would not be substantial. Since his conclusion that the harm to the setting of the designated heritage assets would in all cases be less than substantial was fed into the balancing exercise in paragraphs 85 and 86, the decision letter would have been fatally flawed on grounds 2 and 3 even if the Inspector had given proper effect to the section 66(1) duty.

Conclusion

45. For the reasons set out above, which largely echo those given by Lang J in her judgment, I would dismiss this appeal.

Lady Justice Rafferty:

46. I agree.

The Vice President:

47. I also agree.

Neutral Citation Number: [2016] EWHC 421 (Admin)

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

Bristol Civil and Family Justice Centre,
Redcliff Street, Bristol, BS1 6GR.

Date: 4 March 2016

Before:

THE HON MR JUSTICE COULSON

Between:

Forest of Dean District Council	<u>Claimant</u>
- and -	
Secretary of State for Communities and Local Government	<u>First Defendant</u>
- and -	
Gladman Developments Ltd	<u>Second Defendant</u>

Mr Peter Wadsley and Mr Philip Robson (instructed by **Legal Services, FDDC**) for the
Claimant

Mr Gwion Lewis (instructed by **Treasury Solicitor**) for the **First Defendant**

Mr David Elvin QC and Mr Peter Goatley
(instructed by **Irwin Mitchell LLP**) for the **Second Defendant**

Hearing date: 23 February 2016

Judgment

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1. On 12 June 2014, the second defendant developer (whom I shall call “Gladman”) applied for planning permission to build up to 85 dwellings and associated works on land north of Ross Road in Newent, GL18 1BE. In February 2015, the claimant (whom I shall call “FDDC”), refused that application. Gladman appealed and there was an Inquiry in late June/early July 2015. In a written decision dated 25 August 2015, the inspector allowed Gladman’s appeal and granted outline planning permission.
2. By an application made pursuant to section 288 of the Town and Country Planning Act 1990 (“the 1990 Act”), lodged on 5 October 2015, FDDC challenges the decision of the planning inspector. There are four grounds of appeal as follows:
 - (1) Failing to consider and give reasons as to whether the site was a ‘valued landscape’;
 - (2) Incorrectly applying the National Planning Policy Framework (“NPPF”) at paragraph 134 and the test on harm to heritage assets;
 - (3) Failing to consider the interaction between paragraph 134 and paragraph 14 of the NPPF and therefore applying the wrong test;
 - (4) Inadequate reasoning.
3. Unusually perhaps, the first defendant (whom I shall call “SSCLG”) expressly accepts that Ground 3, the failure to consider and apply the test created by the interaction between paragraphs 134 and 14 of the NPPF, has been made out. In consequence, SSCLG joins with the claimant, FDDC, in asking me to quash the appeal decision. Gladman do not accept Ground 3. In those circumstances, in order to save both time and costs, at the hearing I invited the parties to deal with Ground 3 only, although it was of course also necessary to deal with the issue of discretion and whether, if Ground 3 was made out, the inspector’s decision would still have been the same.
4. The argument on these two points alone took almost all of the time allocated for the hearing on 23 February 2016. At the end of that hearing, I gave a short ruling in which I indicated that: a) FDDC’s application on Ground 3 had been successful, together with brief reasons; and that b) it could not be said that, if the inspector had applied the right test, he would necessarily have reached the same answer. In those circumstances, I allowed the application to quash. I said that, in view of the importance of the point, not only for the parties, but for what I was told was the planning process generally, I would provide a fuller written judgment explaining the reasons for my decision. This is that Judgment.

2. THE RELEVANT LEGAL PRINCIPLES

2.1 Section 288

5. Section 288 of the 1990 Act provides as follows:

“288 Proceedings for questioning the validity of other orders, decisions and directions

- (1) If any person—
 - (a) is aggrieved by any order to which this section applies and wishes to question the validity of that order on the grounds—
 - (i) that the order is not within the powers of this Act, or
 - (ii) that any of the relevant requirements have not been complied with in relation to that order; or
 - (b) is aggrieved by any action on the part of the Secretary of State to which this section applies and wishes to question the validity of that action on the grounds—
 - (i) that the action is not within the powers of this Act, or
 - (ii) that any of the relevant requirements have not been complied with in relation to that action,

he may make an application to the High Court under this section.

- (2) Without prejudice to subsection (1), if the authority directly concerned with any order to which this section applies, or with any action on the part of the Secretary of State to which this section applies, wish to question the validity of that order or action on any of the grounds mentioned in subsection (1), the authority may make an application to the High Court under this section.
- (3) An application under this section must be made within six weeks from the date on which the order is confirmed (or, in the case of an order under section 97 which takes effect under section 99 without confirmation, the date on which it takes effect) or, as the case may be, the date on which the action is taken.
- (4) This section applies to any such order as is mentioned in subsection (2) of section 284 and to any such action on the part of the Secretary of State as is mentioned in subsection (3) of that section.
- (5) On any application under this section the High Court—

- (a) may, subject to subsection (6), by interim order suspend the operation of the order or action, the validity of which is questioned by the application, until the final determination of the proceedings;
- (b) if satisfied that the order or action in question is not within the powers of this Act, or that the interests of the applicant have been substantially prejudiced by a failure to comply with any of the relevant requirements in relation to it, may quash that order or action.”

I note that this claim was brought under the unamended provisions of the 1990 Act, pursuant to which permission to make the application is not required. Thus the case proceeded directly to a substantive hearing. The amended s.288 only applies to decisions taken on or after 26 October 2015.

2.2 **The Correct Approach to Section 288**

6. The correct approach to be adopted to a s.288 claim was set out in paragraph 19 of the judgment of Lindblom J (as he then was) in **Bloor Homes East Midland Ltd v SSCLG** [2014] EWHC 754 (Admin) as follows:

“19. The relevant law is not controversial. It comprises seven familiar principles:

- (1) Decisions of the Secretary of State and his inspectors in appeals against the refusal of planning permission are to be construed in a reasonably flexible way. Decision letters are written principally for parties who know what the issues between them are and what evidence and argument has been deployed on those issues. An inspector does not need to “rehearse every argument relating to each matter in every paragraph” (see the judgment of Forbes J. in **Seddon Properties v Secretary of State for the Environment (1981) 42 P. & C.R. 26** , at p.28).
- (2) The reasons for an appeal decision must be intelligible and adequate, enabling one to understand why the appeal was decided as it was and what conclusions were reached on the “principal important controversial issues”. An inspector's reasoning must not give rise to a substantial doubt as to whether he went wrong in law, for example by misunderstanding a relevant policy or by failing to reach a rational decision on relevant grounds. But the reasons need refer only to the main issues in the dispute, not to every material consideration (see the speech of Lord Brown of Eaton-under-Heywood in **South Bucks District Council and another v Porter (No. 2) [2004] 1 W.L.R. 1953** , at p.1964B-G).

- (3) The weight to be attached to any material consideration and all matters of planning judgment are within the exclusive jurisdiction of the decision-maker. They are not for the court. A local planning authority determining an application for planning permission is free, “provided that it does not lapse into *Wednesbury* irrationality” to give material considerations “whatever weight [it] thinks fit or no weight at all” (see the speech of Lord Hoffmann in *Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 W.L.R. 759, at p.780F-H). And, essentially for that reason, an application under section 288 of the 1990 Act does not afford an opportunity for a review of the planning merits of an inspector's decision (see the judgment of Sullivan J., as he then was, in *Newsmith v Secretary of State for* [2001] EWHC Admin 74, at paragraph 6).
- (4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration (see the judgment of Lord Reed in *Tesco Stores v Dundee City Council* [2012] P.T.S.R. 983, at paragraphs 17 to 22).
- (5) When it is suggested that an inspector has failed to grasp a relevant policy one must look at what he thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood the policy in question (see the judgment of Hoffmann L.J., as he then was, *South Somerset District Council v The Secretary of State for the Environment* (1993) 66 P. & C.R. 80, at p.83E-H).
- (6) Because it is reasonable to assume that national planning policy is familiar to the Secretary of State and his inspectors, the fact that a particular policy is not mentioned in the decision letter does not necessarily mean that it has been ignored (see, for example, the judgment of Lang J. in *Sea Land Power & Energy Limited v Secretary of State for Communities and Local Government* [2012] EWHC 1419 (QB), at paragraph 58).

- (7) Consistency in decision-making is important both to developers and local planning authorities, because it serves to maintain public confidence in the operation of the development control system. But it is not a principle of law that like cases must always be decided alike. An inspector must exercise his own judgment on this question, if it arises (see, for example, the judgment of Pill L.J. *Fox Strategic Land and Property Ltd. v Secretary of State for Communities and Local Government* [2013] 1 P. & C.R. 6, at paragraphs 12 to 14, citing the judgment of Mann L.J. in *North Wiltshire District Council v Secretary of State for the Environment* [1992] 65 P. & C.R. 137, at p.145).”

2.3 The NPPF

7. During the hearing, numerous paragraphs within the NPPF were referred to. It would make this Judgment unnecessarily prolix if I set out all those paragraphs. In my judgment, the important paragraphs were as follows:

- (a) Paragraph 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.⁹

For **decision-taking** this means:

- approving development proposals that accord with the development plan without delay; and

⁹ For example, those policies relating to sites protected under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of Special Scientific Interest; land designated as Green Belt, Local Green Space, an Area of Outstanding Natural Beauty, Heritage Coast or within a National Park (or the Broads Authority); designated heritage assets; and locations at risk of flooding or coastal erosion.

- 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; or¹⁰
 - specific policies in this Framework indicate development should be restricted.⁹

It is this second bullet point under ‘decision-taking’ that matters for the purposes of this case. Of the two alternatives applicable where the development plan is absent, silent or relevant policies are out-of-date, the first (“any adverse impacts...”) was referred to at the hearing as Limb 1. The second, (“Specific policies...”) was referred to as Limb 2.

(b) Paragraph 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.”

(c) Paragraphs dealing with conserving and enhancing the historic environment, including:

“126. Local planning authorities should set out in their Local Plan a positive strategy for the conservation and enjoyment of the historic environment, including heritage assets most at risk through neglect, decay or other threats. In doing so, they should recognise that heritage assets are an irreplaceable resource and conserve them in a manner appropriate to their significance. In developing this strategy, local planning authorities should take into account:

- the desirability of sustaining and enhancing the significance of heritage assets and putting them to viable uses consistent with their conservation;
- the wider social, cultural, economic and environmental benefits that conservation of the historic environment can bring;
- the desirability of new development making a positive contribution to local character and distinctiveness; and

¹⁰ Unless material considerations indicate otherwise.

- opportunities to draw on the contribution made by the historic environment to the character of a place.

...

132. When considering the impact of a proposed development on the significance of a designated heritage asset, great weight should be given to the asset's conservation. The more important the asset, the greater the weight should be. Significance can be harmed or lost through alteration or destruction of the heritage asset or development within its setting. As heritage assets are irreplaceable, any harm or loss should require clear and convincing justification. Substantial harm to or loss of a grade II listed building, park or garden should be exceptional. Substantial harm to or loss of designated heritage assets of the highest significance, notably scheduled monuments, protected wreck sites, battlefields, grade I and II* listed buildings, grade I and II* registered parks and gardens, and World Heritage Sites, should be wholly exceptional.
133. Where a proposed development will lead to substantial harm to or total loss of significance of a designated heritage asset, local planning authorities should refuse consent, unless it can be demonstrated that the substantial harm or loss is necessary to achieve substantial public benefits that outweigh that harm or loss, or all of the following apply:
- the nature of the heritage asset prevents all reasonable uses of the site; and
 - no viable use of the heritage asset itself can be found in the medium term through appropriate marketing that will enable its conservation; and
 - conservation by grant-funding or some form of charitable or public ownership is demonstrably not possible; and
 - the harm or loss is outweighed by the benefit of bringing the site back into use.
134. Where a development proposal will lead to less than substantial harm to the significance of a designated heritage asset, this harm should be weighed against the public benefits of the proposal, including securing its optimum viable use.”

8. The NPPF itself has to be approached in accordance with the guidance referred to by Lord Reed in *Tesco Stores v Dundee City Council* (as set out in paragraph 19(4) of *Bloor Homes*, above). The NPPF has also been recently considered by the Court of Appeal in *Europa Oil and Gas Ltd v SSCLG* [2014] EWCA Civ. 825 in these terms:

“13. Paragraph 90 of the NPPF is a policy statement which, in accordance with basic principle, “should be interpreted objectively in accordance with the language used, read as always in its proper context” (per Lord Reed JSC in *Tesco Stores Ltd*.

...

15. On the face of it, the NPPF is a stand-alone document which should be interpreted within its own terms. It even contains a glossary (Annex 2) which explains familiar planning terms such as “local plan” and “planning condition”, cross-referring as appropriate to legislation...”

9. More particularly, paragraphs 132-134 of the NPPF were dealt with by Gilbert J in *Pugh v SSCLG* [2015] EWHC 3 (Admin). He noted at paragraph 49 of his judgment that paragraph 134 “can be a trap for the unwary if taken out of context” and he went on to say in paragraph 50:

“There is a sequential approach in paragraphs 132-4 which addresses the significance in planning terms of the effects of proposals on designated heritage assets. If, having addressed all the relevant considerations about value, significance and the nature of the harm, and one has then reached the point of concluding that the level of harm is less than substantial, then one must use the test in paragraph 134. It is an integral part of the NPPF sequential approach. Following it does not deprive the considerations of the value and significance of the heritage asset of weight: indeed it requires consideration of them at the appropriate stage. But what one is not required to do is to apply some different test at the final stage than that of the balance set out in paragraph 134. How one strikes the balance, or what weight one gives the benefits on the one side and the harm on the other, is a matter for the decision maker. Unless one gives reasons for departing from the policy, one cannot set it aside and prefer using some different test.”

2.4 Heritage Assets

10. Heritage assets and the correct approach to them was recently dealt with by the Court of Appeal in *Barnwell Manor Wind Energy Ltd v East Northants DC* [2014] EWCA Civ. 137, and by Lindblom J in *R (Forge Field Society) v Sevenoaks DC* [2014] EWHC 1895 (Admin). At paragraphs 48-51 of his judgment in *Forge Field*, Lindblom J said:

- “48. As the Court of Appeal has made absolutely clear in its recent decision in *Barnwell*, the duties in sections 66 and 72 of the Listed Buildings Act do not allow a local planning authority to treat the desirability of preserving the settings of listed buildings and the character and appearance of conservation areas as mere material considerations to which it can simply attach such weight as it sees fit. If there was any doubt about this before the decision in *Barnwell* it has now been firmly dispelled. When an authority finds that a proposed development would harm the setting of a listed building or the character or appearance of a conservation area, it must give that harm considerable importance and weight.
49. This does not mean that an authority's assessment of likely harm to the setting of a listed building or to a conservation area is other than a matter for its own planning judgment. It does not mean that the weight the authority should give to harm which it considers would be limited or less than substantial must be the same as the weight it might give to harm which would be substantial. But it is to recognize, as the Court of Appeal emphasized in *Barnwell*, that a finding of harm to the setting of a listed building or to a conservation area gives rise to a strong presumption against planning permission being granted. The presumption is a statutory one. It is not irrebuttable. It can be outweighed by material considerations powerful enough to do so. But an authority can only properly strike the balance between harm to a heritage asset on the one hand and planning benefits on the other if it is conscious of the statutory presumption in favour of preservation and if it demonstrably applies that presumption to the proposal it is considering.
50. In paragraph 22 of his judgment in *Barnwell* Sullivan L.J. said this:
- “... I accept that ... the Inspector's assessment of the degree of harm to the setting of the listed building was a matter for his planning judgment, but I do not accept that he was then free to give that harm such weight as he chose when carrying out the balancing exercise. In my view, Glidewell L.J.'s judgment [in *The Bath Society*] is authority for the proposition that a finding of harm to the setting of a listed building is a consideration to which the decision-maker must give “considerable importance and weight””.

51. That conclusion, in Sullivan L.J.'s view, was reinforced by the observation of Lord Bridge in *South Lakeland* (at p.146 E-G) that if a proposed development would conflict with the objective of preserving or enhancing the character or appearance of a conservation area “there will be a strong presumption against the grant of planning permission, though, no doubt, in exceptional cases the presumption may be overridden in favour of development which is desirable on the ground of some other public interest”. Sullivan L.J. said “[there] is a “strong presumption” against granting planning permission for development which would harm the character of appearance of a conservation area precisely because the desirability of preserving the character or appearance of the area is a consideration of “considerable importance and weight”” (paragraph 23). In enacting section 66(1) Parliament intended that the desirability of preserving the settings of listed buildings “should not simply be given careful consideration by the decision-maker for the purpose of deciding whether there would be some harm, but should be given “considerable importance and weight” when the decision-maker carries out the balancing exercise” (paragraph 24). Even if the harm would be “less than substantial”, the balancing exercise must not ignore “the overarching statutory duty imposed by section 66(1), which properly understood ... requires considerable weight to be given ... to the desirability of preserving the setting of all listed buildings, including Grade II listed buildings” (paragraph 28). The error made by the inspector in *Barnwell* was that he had not given “considerable importance and weight” to the desirability of preserving the setting of a listed building when carrying out the balancing exercise in his decision. He had treated the less than substantial harm to the setting of the listed building as a less than substantial objection to the grant of planning permission (paragraph 29).”

2.5 Discretion

11. Of course, even if the court concludes that the inspector may have made an error of law, the decision to quash is not automatic; it is a matter of discretion. In the ordinary case, the decision to quash will only be made if the court cannot say that, even allowing for the error, the decision would inevitably have remained the same. This approach was recently followed in *Europa*. In that case, Ouseley J was not satisfied that, without the error made by the inspector as to the interpretation of ‘mineral extraction’, the decision would inevitably have been the same. The Court of Appeal agreed. They held that the judge was entitled to find that the decision might have been different but for the inspector’s error and thus to exercise his discretion to quash the decision.

3. THE APPEAL DECISION

12. The inspector's appeal decision in the present case was dated 25 August 2015. For present purposes, it is necessary only to set out some of the paragraphs under two of the inspector's own headings: 'The setting of heritage assets' and 'The overall planning balance'.
13. As to the setting of heritage assets, the following paragraphs are relevant:
 - “31. In my view the two fields that make up the appeal site contribute to the significance of the listed Mantley House Farm complex. In their current undeveloped state these fields provide an appropriate rural and tranquil setting for the farm house and the associated former farm buildings. In previous times there may well also have been a functional and historical link between the two as it is likely the fields would have been farmed as part of the extensive Mantley Farm estate. Consequently the appeal proposal would damage the rural setting of the Mantley Farm complex and erode the likely functional and historical relationship that existed between the farm and nearby fields. The effect would be particularly evident from Horsefair Lane as the views of the Mantley Farm complex sitting within a rural landscape would be lost.
 32. It is clear from the Illustrative Masterplan for the appeal site that a real effort has been made to reduce the impact of built development and disturbance on the farm complex's immediate setting. To this end the south-western part of the site next to the Mantley House Farm complex would remain undeveloped and be given over to public open space, whilst the main access road off Ross Road would be located away from the western boundary. Furthermore extensive areas of planting are planned along the edge of the proposed private drives nearest to the farm buildings to provide a green edge to the open space and soften the impact of the new dwellings. I consider that the provision of such a sizeable open area on that part of the site next to the Mantley House Farm complex, together with the associated landscaping, would lessen the impact of the development on the immediate setting of this group of listed buildings. However it would not produce a setting of the same quality and characteristics as currently exists.
 33. Having regard to the effects of the appeal scheme, the proposed mitigation and the high threshold required for 'substantial harm' I consider that the proposed development would cause 'less than substantial harm'

to the Mantley House Farm complex in terms of *the Framework*.”

14. As to the overall planning balance, the relevant paragraphs are set out below. I have put the critical parts in bold:

- “42. The Council cannot demonstrate a 5-year supply of deliverable housing sites and it would appear that the shortfall may be significant. Consequently all relevant policies for the supply of housing have to be regarded as out of date and accorded very limited weight. **Paragraph 14 of the Framework makes it clear that in such cases planning permission should be granted, where relevant policies in the development plan are out-of-date, 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.**
43. I have identified adverse impacts of the appeal scheme. In particular I have concluded that the proposal would detract from the rural character and appearance of Horsefair Lane. I have also found that by causing ‘less than substantial harm’ the development would fail to preserve the special architectural and historic interest of the Grade II listed Mantley Farm complex and would harm the significance of Picklenash Court, a non-designated heritage asset. These findings bring the scheme into conflict with elements of local and national planning policy.
44. I now turn to the weight that should be attached to these adverse impacts in the overall planning balance. As regards the adverse impact on the character and appearance of Horsefair Lane I believe that the visual harm would be fairly localised and confined to a particular part of Horsefair Lane. Consequently I attach only moderate weight to this consideration.
45. Given the statutory duty as regards listed buildings I am obliged to give considerable weight to the desirability of preserving the setting of the Mantley House farm complex in carrying out the balancing exercise, even though I have found that the harm would be ‘less than substantial.’ In my view, however, it is also necessary to take account of the fact that the appeal scheme provides for a substantial area of open space on the part of the appeal site next to the Mantley House farm complex. Although this would not replicate the current rural setting of this former farm it would ensure that the listed buildings continue to sit within an undeveloped area and

away from other built development. Consequently whilst attaching considerable weight to the failure of the scheme to preserve the special architectural and historic interest of the Grade II listed Mantley House farm I believe that this needs to be tempered with my finding that the new setting created would allow the continued appreciation of these heritage assets within an undeveloped area.

46. Similarly the public open space to be created north of Ross Road would ensure that the non-designated heritage asset, Picklenash Court, retains an open setting to the front albeit of a different nature and extent than currently exists. As a result, taking account of the scale of this harm and the nature of the asset and its surroundings, only limited weight should be attached to the harm to the significance of Picklenash Court.
47. There are considerable public benefits associated with the appeal scheme and these need to be given substantial weight. *Paragraph 14* of the *Framework* makes it clear that sustainable development has three dimensions: economic, social and environmental. In my judgement the proposal would fulfil the economic role of sustainable development and would contribute to building a strong, responsive and competitive economy, by helping to ensure that sufficient land is available to support growth. There would also be associated economic benefits in terms of construction jobs, increased spending in the area, additional Council tax revenues, and the New Homes bonus. With reference to the social dimension the scheme would contribute to boosting housing supply, by providing a range of sizes and types of housing for the community, including a sizeable number of acutely-needed affordable housing units.
48. As regards environmental considerations Newent is recognised as a sustainable settlement and considered to be an acceptable location for accommodating new development. The appeal site is well located in terms of accessibility to the various facilities and services in the town and the development would help to support them. For longer trips alternatives to the private car are available with bus services available in the town. The proposed land to be given over to public open space would be of recreational benefit and footpath/cycleway links would be created across the site. There would be increased opportunities for ecological enhancement and habitat creation that would not arise if the land were to

continue in its existing use. In due course a softer edge to the town would be created than currently exists. The site is available and it is likely that it could be developed within the next five years.

49. It is evident that I have identified adverse environmental impacts of the appeal scheme. **The essential test in cases such as this is not confined to the assessment of harm in isolation but rather whether the adverse impacts identified would significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole.** In this regard I have also identified a considerable number of economic, social and environmental benefits that would arise as a result of the appeal that need to be given substantial weight. In my judgement the limited number of adverse impacts identified in this case, and their localised nature, even when added together, would not significantly and demonstrably outweigh the benefits, when assessed against the policies in the Framework taken as a whole. I therefore find that there are insufficient grounds for finding against the development and that when taken as a whole the appeal scheme would constitute sustainable development. Consequently the *Framework's* presumption in favour of sustainable development applies.”

4. GROUND 3: DID THE INSPECTOR APPLY THE WRONG TEST?

4.1 The Principal Issues

15. The principal issues between the parties must be considered against the background of the matters that are not in dispute. It is agreed that the last bullet point in paragraph 14 of the NPPF (paragraph 7a) above) applies to this case, because the inspector found that FDDC's policy was out of date due to their inability to show a 5 year housing supply. Paragraph 49 of the NPPF was therefore engaged. It is also agreed that the inspector's findings in respect of the Mantley House Farm complex, a Grade II listed group of buildings, related to a designated heritage asset. Finally, it is agreed that the inspector found that the development proposal would lead to “less than substantial harm” to the significance of the Mantley House Farm complex. Accordingly, paragraph 134 of the NPPF, set out at paragraph 7c) above, is, on any view, directly applicable to this application.
16. Ground 3 of the s.288 application is in these terms:
- “Failure to consider the interaction between NPPF 134 and NPPF 14, Footnote 9, and applying the wrong test when balancing the harm and benefits of the development.”

Essentially, Mr Wadsley (strongly supported by Mr Lewis for SSCLG) contends that, because the development plan is out-of-date, the presumption in favour of granting planning permission is disapplied in either of the two separate circumstances identified in the last bullet point of paragraph 14 of the NPPF (Limb 1 or Limb 2, set out at paragraph 7(a) above). FDDC and SSCLG submit that Limbs 1 and 2 cover different possibilities. They argue that, in circumstances where there is a finding of less than substantial harm to the significance of a designated heritage asset, the harm has to be weighed against the public benefits of the proposal. Crucially, they say that this balancing exercise must be carried out in the ordinary (or unweighted) way. They say that this is the test required by paragraph 134, and that it is the same test required by Limb 2 of paragraph 14, because paragraph 134 is a policy indicating that development should be restricted.

17. Mr Elvin, on the other hand, maintains that paragraph 134 is not a policy indicating that planning should be restricted, so that Limb 2 does not apply in this case. Further or in the alternative, he argues that the weighted balancing exercise required by Limb 1 of paragraph 14 should be ‘read across’ to the exercise set out in paragraph 134. He says that is what the inspector did, and therefore no criticism can attach to his decision.

4.2 Limb 2 and Footnote 9

18. Limb 2 of the last bullet point of paragraph 14 of the NPPF disapplies the presumption in favour of granting planning permission in circumstances where “specific policies in this Framework indicate development should be restricted.” Footnote 9 gives examples of those policies. One of those policies is identified as relating to “designated heritage assets”.
19. As I have said, the parties disagreed about whether Limb 1 or Limb 2 applied in this case. In consequence, there was a good deal of argument about whether footnote 9 was intended to be an exclusive list of the policies relevant to the test in Limb 2. There was also a debate about whether or not each of the paragraphs within the NPPF which set out the various policies referred to in footnote 9 had to be regarded as a policy indicating that development “should be restricted”. Mr Elvin went so far as to say that, unless FDDC/SSCLG could show that each paragraph in the NPPF setting out every one of the policies noted in footnote 9 amounted to a planning restriction of some sort, they were bound to lose.
20. I am not sure that I derived very much assistance from either of these arguments. On the face of it, footnote 9 cannot be regarded as exhaustive, since it is plain that the policies which it set out were merely provided by way of example. But that does not affect the outcome of this case in any event, since “designated heritage assets” is one of those examples. And as to the second issue, it does not seem to me that either side’s arguments necessarily stand or fall on showing, either that every paragraph of the NPPF dealing with the policies in footnote 9 could be said to restrict planning in one way or another, or that only certain paragraphs within the relevant sections of the NPPF needed to be restrictive in order for Limb 2 to apply. The first substantive issue for me is whether paragraph 134, dealing as it does with what happens if there is finding of a less than significant harm to a designated heritage asset, is a “specific policy [which] indicates development should be restricted”, an issue I address in **Section 4.3** below.

21. However, before coming to that, I think it is worth giving one example of a policy which is expressly referred to in footnote 9, and which may therefore be regarded as a policy restricting development within the definition of Limb 2. That concerns the Heritage Coast. Although this is a policy referred to in footnote 9, the only express reference to the Heritage Coast in the body of the NPPF comes in the second bullet point of paragraph 114. This provides that:

“Local planning authority should...maintain the character of the undeveloped coast, protecting and enhancing its distinctive landscapes, particularly in areas defined as Heritage Coast, and improve public access to an enjoyment of the coast.”

22. I accept Mr Wadsley’s submission that this is a very general statement of policy. But its inclusion in footnote 9 indicates that the policy is considered to be, even in those general terms, restrictive. In my view, it can be regarded as a policy indicating that “development should be restricted” only because the general presumption in favour of development may not apply in areas defined as Heritage Coast, in consequence of the operation of paragraph 114. I note, as Mr Wadsley did, that Mr Elvin did not address this point, although it was expressly raised in Mr Wadsley’s opening submissions.

4.3 Is Section 134 A Policy Indicating That Development Should Be Restricted?

23. Mr Elvin argued that paragraph 134 was not a restriction on development. Instead, he said, a restriction within the NPPF was something like paragraph 87, dealing with the Green Belt, which stipulates that “inappropriate development is...harmful to the Green Belt and should not be approved except in very special circumstances.” His argument was that, because there was not such a clear prohibition in paragraph 134, paragraph 134 should not be regarded as a restriction on development.
24. I do not accept that submission for four reasons.
25. First, based on the words used in paragraph 134 in the context of the NFFP as a whole, I consider that paragraph 134 is a policy indicating that development should be restricted. Throughout the NPPF, there is a presumption in favour of sustainable development, and therefore in favour of granting permission. That is the default setting. However, certain specific policies within the NPPF indicate situations where this presumption does not apply and where, instead, development should be restricted. Paragraph 134 is, I think, one such policy.
26. Paragraph 134 provides for a balancing exercise to be undertaken, between the “less than substantial harm” to the designated heritage asset, on the one hand, and the public benefits of the proposal, on the other. The presumption in favour of development is not referred to and does not apply. Paragraph 134 is thus a particular policy restricting development. Limb 2 of paragraph 14 applies.
27. I should add that, although Mr Lewis submitted that it was always SSCLG’s intention to create this route by which the presumption in favour of development will not apply, I have had no regard to that submission. It is irrelevant to the true meaning of paragraph 134 and Limb 2 of the last bullet point of paragraph 14. The policy is a function of the NPPF itself; not what counsel tell me that the SSCLG intended it to

say. But in my view, the words used in paragraph 134 plainly constitute a restriction of development within the normal meaning of the words used.

28. Secondly, I think that it is appropriate to give the word “restricted” in Limb 2 of paragraph 14 a relatively wide meaning, to cover any situation where the NPPF indicates a policy that cuts across the underlying presumption in favour of development. The alternative is impractical. It is not a sensible approach to the NPPF for everyone involved in a planning application to comb through each of the policies referred to in footnote 9, to try and work out which paragraphs under each policy heading could be said to be unarguably restrictive of development, as opposed to those which, as a function of their wording, might be regarded as more nuanced. That is the sort of exercise which Mr Elvin attempts at paragraph 33 of his written submissions. In my view, it is an approach which runs the risk of construing the NPPF in an overly-prescriptive way, contrary to the principles set out in Tesco Stores and Bloor.
29. At times, such as his submissions on paragraph 133 of the NPPF, Mr Elvin came close to urging that ‘restricted’ in paragraph 14 should be given the same meaning as the word ‘refused’. I consider that this would be an incorrect interpretation of Limb 2; I agree with Mr Wadsley that it is significant that the policy could have said ‘refused’, but instead deliberately used the much wider word ‘restricted’.
30. Thirdly, I consider that Mr Elvin’s approach is not in accordance with the footnote itself. I have, at paragraphs 21 and 22 above, given the example of the Heritage Coast within the NFFP. The only reference to that policy in the whole of the NPPF is at paragraph 114, so the footnote must therefore assume that paragraph 114 is restrictive of development. In my view it is, but only in the same way as paragraph 134 is restrictive, in that it is identifying a situation in which the presumption in favour of development does not apply. To that extent, the wording in paragraph 114 is even more general than in paragraph 134. But since the NPPF assumes that paragraph 114 is restrictive; *a fortiori*, so too is paragraph 134.
31. Fourthly, I have set out at paragraph 7c) above paragraphs 132 – 134 of the NPPF. They contain different tests: for example, paragraph 133 states that planning permission for a development which creates significant harm to a designated heritage asset should be refused, whereas paragraph 134 says that, if the harm is less than significant, it has to be balanced against the benefits. Yet there is nothing in footnote 9 which seeks to differentiate between those paragraphs or those tests. The footnote encompasses the entirety of the policy in relation to designated heritage assets, and therefore includes both paragraphs. Furthermore, as Gilbert J noted in Pugh (paragraph 9 above), those paragraphs have to be read together. This approach again supports the proposition that, albeit in their different ways, both paragraph 133 and paragraph 134 ‘indicate that development should be restricted’.
32. Accordingly, on a proper interpretation of the NPPF, I consider that the exercise at paragraph 134/Limb 2 needs to be undertaken when there is less than substantial harm to the significance to a designated heritage asset. I consider that this conclusion is in accordance with the principles noted in **Sections 2.2 and 2.3** above. Furthermore, on the face of it, this exercise would seem to involve an ordinary (or unweighted) balancing of harm and benefits. However, that point too is disputed by Gladman, and is therefore the second substantive issue which I have to decide.

4.4 Does Paragraph 134 Import Limb 1?

33. Further or in the alternative to his submission that paragraph 134 was not a policy indicating that development should be restricted, Mr Elvin argued that the balancing exercise in paragraph 134 was not an ordinary one. Instead, he said, the weighted balancing exercise envisaged in Limb 1 (that is to say, that the adverse effects of permission would “significantly and demonstrably outweigh the benefits”) should be imported - or as he put it, ‘read across’ - into paragraph 134. He submitted that there was no difficulty with interpreting paragraph 134 as importing that weighted test: indeed, he said, that was in accordance with the NPPF and the presumption in favour of development and the granting of planning permission.
34. I do not accept that submission. It seems to me that it is wholly inconsistent with the words of paragraph 134 itself, which make plain that the balancing exercise is of a standard type, without any weighting. There is no reason to import the weighted test from Limb 1 of the last bullet point of paragraph 14 into paragraph 134, when the words of paragraph 134 can be read entirely satisfactorily without them. Reading across in this way would be unnecessary and over-complicated. Moreover, without any signpost of any sort, it would be unwarranted. It would be contrary to the natural meaning of the words used.
35. Accordingly, I do not accept that the balancing exercise envisaged in paragraph 134 is anything other than the ordinary (unweighted) test described by its wording. I do not consider that the test in Limb 1 can or should be read across in the way submitted.
36. There is a further point. I accept Mr Lewis’ submissions that, in respect of Limb 1, the weighted balancing exercise is of broader scope because it involves an assessment “against the policies in this framework taken as a whole”. Accordingly, the exercise in Limb 1 is designed to take into account everything, not just the specific policies of restriction referred to in Limb 2. Again that suggests that Limbs 1 and 2 are different and separate exercises and there would be no need to read across the test in Limb 1 to any of the specific policies which restrict planning, referred to in footnote 9.
37. The two alternative Limbs also make sense as a matter of policy. It means that Limb 2 encompasses the standard balancing exercise in circumstances where there is a policy of restriction on development. But if the result of that standard balancing exercise comes down in favour of development, notwithstanding the restriction, then it is rational that the broader review under Limb 1, where the whole of the NPPF is considered, should be a weighted exercise, so as to give impetus to the presumption in favour of development.

4.5 The Presumption in Favour of Preserving Listed Buildings

38. I have set out in **Section 2.4** above the law relating to heritage assets, including the extract from the judgment in *Forge Field*. This makes plain, amongst other things, that, when a development will harm a listed building or its setting, the decision-maker must give that harm considerable importance and weight. That harm alone gives rise to a strong presumption against the grant of planning permission. This is of course linked to the SSCLG’s duty under s.66 of the *Planning (Listed Buildings and Conservation Areas) Act 1990* identifying the requirement on the part of the local planning authority or the SSCLG “shall have special regard to the desirability of

preserving the building or its setting or any features of special architectural or historic interest which it possesses.”

39. It is plain that the inspector in this case was aware of the considerable weight and importance to be given to the desirability of preserving the setting of the Mantley House Farm complex: see paragraph 45 of his decision. But I consider that the appropriate place for that considerable weight to be applied was as part of the ordinary balancing exercise under paragraph 134 of the NPPF. Because the inspector did not undertake the ordinary balancing exercise required by paragraph 134, it follows that the considerable weight to be given to the preservation of listed buildings, let alone the presumption against granting permission in such situations, has been at best diluted, and at worst, lost altogether.
40. I note that the inspector himself says that considerable weight has to be given to this issue “in carrying out the balancing exercise”. But since the balancing exercise that he undertook was only the weighted balancing exercise under Limb 1, and not the ordinary balancing exercise under Limb 2/paragraph 134, there is a very real risk that the important guidance in ***Forge Field*** was not fully followed.
41. For these reasons, I can see why (albeit very late) Mr Lewis prayed in aid the submission that the SSCLG’s obligation in respect of listed buildings could only properly be discharged if paragraph 134 and the Limb 2 exercise was undertaken in the way I have indicated. Whilst Mr Elwin was entitled to complain that this point had not been in Mr Lewis’ skeleton argument, it did seem to me to be a matter which was of some importance and therefore fell to be considered by the court. In any event, I consider that it was foreshadowed at paragraphs 54-57 of Mr Wadsley’s skeleton argument. Having considered the issue, I agree with Mr Lewis and Mr Wadsley that it does provide further support for FDDC/SSCLG’s case on Ground 3.

4.6 Other Decisions

42. Both sides endeavoured to support their respective positions by reference to other appeal decisions, whether they were decisions by planning inspectors or decisions by the SSCLG expressly agreeing or confirming the approach of the planning inspector. We looked principally at three of these, concerning proposed developments at:
 - (a) Highfield Farm, Tetbury, Gloucestershire (APP/F1610/A/11/2165778);
 - (b) New Haine Road, Ramsgate, Kent (APP/Z2260/A/14/2213265);
 - (c) The Hawthorns and Keele University Campus, Keele, Newcastle-Under-Lyme (APP/P3420/A/14/2219380; APP/P3420/E/14/2219712).

In each of these cases, the SSCLG had written agreeing with the conclusions of the relevant inspector.

43. I was not persuaded that the decision in relation to Highfield Farm was of any particular relevance because there the restriction on development applied under Limb 2 of paragraph 14 was in respect of Areas of Outstanding Natural Beauty. I accept that the restrictions on development set out in the NPPF relating to such Areas are, on any view, clear-cut.

44. As to the decision in relation to Ramsgate, it seems to me that that is of some assistance because, at paragraph 118 of his decision, the inspector concluded that the harm was outweighed by the significant benefit of the development. That was undertaken as an ordinary Limb 2 balancing exercise, even if it is not recorded in those terms. Having found that the presumption in favour of development was not switched off as a result of the Limb 2 exercise, the inspector properly applied the weighted test in Limb 1, and concluded that there were no adverse impacts that significantly and demonstrably outweighed of the benefits of the development.

45. However, by far the clearest application of Limbs 1 and 2 of paragraph 14 of the NPPF can be found in the decision relating to the University of Keele. In that case the SSCLG expressly agreed with the inspector's conclusions at paragraphs 265-276. At paragraphs 266-268, the inspector said as follows:

“266. The Framework establishes that sustainable development should be seen as a golden thread running through both plan-making and decision-taking. Paragraph 49 advises that housing applications should be considered in the context of the presumption in favour or sustainable development. However it goes on to say that relevant policies for the supply of housing should not be considered up-to-date if the Council cannot demonstrate a 5 year supply of deliverable housing sites. That is the case here and in such circumstances the housing supply policies in the LP are not up-to-date, including those relating to the location of housing. The weight to be given to the policy conflict is therefore reduced. In such circumstances the relevant policy comes from Paragraph 14 of the Framework. Paragraph 14 contains two limbs and it is clear from the word “or” that they are alternatives.

267. The first limb requires a balance to be undertaken whereby permission should be granted unless the adverse impacts significantly and demonstrably outweigh the benefits, when assessed against policies in the Framework as a whole. The second limb indicates that the presumption should not be applied if specific policies indicate development should be restricted. If the Secretary of State does not agree with my GB conclusion, the second limb would apply. Footnote 9 however gives other examples, including those policies relating to designated heritage assets. I have concluded under Consideration Three that the proposal would be harmful in these terms. There was some debate about whether the restriction applies only to cases of substantial harm under Paragraph 133.

268. However the Council makes a persuasive point that Footnote 9 refers to policies in the plural, which would mean the inclusion of circumstances where there is less

that substantial harm as well. It seems to me that if the second limb was only expected to apply to heritage assets where there was substantial harm it would have said so. Whilst Paragraph 133, albeit that this is more stringent as one would expect. In the circumstances the presumption do not apply in this case and it is necessary to balance benefits and harms in accordance with Paragraph 134 of the Framework...”

46. In my judgment, this decision applies Limbs 1 and 2 in the last bullet point of paragraph 14 in precisely the way I would have expected. I accept that the SSCLG’s endorsement of this decision is consistent with the approach that he now takes in agreeing with FDDC that, in this case, in respect of Ground 3, the inspector erred in law. Beyond that, it does not seem necessary for me to go.

4.7 Conclusions

47. For these reasons, I am satisfied that the inspector erred in law in not adopting the same approach as the inspector in the Keele University case. The last bullet point in paragraph 14 meant that the presumption in favour of planning permission was to be dis-applied in two separate situations. Both Limbs had to be considered. In this case, because of the harm to the designated heritage assets, Limb 2 fell to be considered first. The appropriate test was the ordinary (unweighted) balancing exercise envisaged by the words in paragraph 134. Nowhere did the inspector carry out that exercise. He only undertook the weighted exercise in Limb 1. He therefore erred in law.

5. DISCRETION

48. Of course, I would not quash the inspector’s decision, despite the fact that both FDDC and the SSCLG wish me to do just that, if I considered that, allowing for the correction of the error, the inspector would have come to the same conclusion (**Section 2.5** above). However, I cannot be satisfied that the inspector would have reached the same conclusion. There are three reasons for that: one general and two particular.
49. In general, it is always difficult to say that a decision-maker who applied the wrong test in law would inevitably have reached the same conclusion even if he had applied the right test. That is particularly so where, as here, the test in Limb 1 is weighted very firmly in favour of the benefits of development, whilst the ordinary test in paragraph 134 is not. It is a bit like comparing the test to be applied in a criminal case and the test to be applied in a civil case. The results may be the same; but it is difficult to be sure that they would inevitably be the same.
50. The first particular reason why I cannot be sure that the same result would eventuate is set out in paragraphs 38-41 above, in connection with listed buildings. The considerable weight to be given to the harm done to the Mantley House Farm complex in an ordinary planning balancing exercise may make a critical difference.
51. The second arises from paragraphs 41-49 of the decision, where the inspector makes a number of findings of harm to which he attaches weight of various kinds. Thus he

attaches *moderate* weight to the adverse impact on character and appearance of Horsefair Lane (paragraph 44 of the decision); *considerable* weight to the desirability of preserving the setting of the Mantley House Farm complex (paragraph 45); and *limited* weight to the harm to the non-designated heritage asset, Picklenash Court (paragraph 46). Against those matters, the inspector identifies a number of considerable public benefits in paragraphs 47 and 48. It is not difficult to see why he concluded that the adverse impacts would not significantly and demonstrably outweigh the benefits. But it is impossible to be sure that, as part of an ordinary balancing exercise, the harm he identified would not outweigh the benefits.

52. Accordingly, like the court in *Europa*, I cannot be sure that this error of law made no difference to the outcome. It may have made no difference; equally, it may have made a significant difference. For those reasons therefore, in the exercise of my discretion, it is proper to quash the decision on Ground 3. I reiterate that, for the reasons noted above, I have not considered Grounds 1, 2 and 4 of the application to quash the appeal decision.

