Neutral Citation Number: [2020] EWHC 518 (Admin)

Case No: CO/3932/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2020

Before :

MR JUSTICE HOLGATE

- -

Between :

GLADMAN DEVELOPMENTS LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT **(2) CORBY BOROUGH COUNCIL**	**Defendants**

Case No: CO/4265/2019

GLADMAN DEVELOPMENTS LIMITED	**Claimant**
- and -	
(1) SECRETARY OF STATE FOR HOUSING, COMMUNITIES AND LOCAL GOVERNMENT **(2) UTTLESFORD DISTRICT COUNCIL**	**Defendants**

- -
- -

Richard Kimblin QC and Thea Osmund-Smith (instructed by **Addleshaw Goddard**) for the **Claimant**

Richard Honey (instructed by **Government Legal Department**) for the **First Defendant**

Estelle Dehon (instructed by **Uttlesford District Council**) for the **Second Defendant**

Corby District Council did not appear and were not represented

Hearing dates: 4-5 February 2020

Approved Judgment

Mr Justice Holgate:

Introduction

1. These challenges by Gladman Developments Limited to two appeal decisions made by Planning Inspectors relate to the interpretation of paragraph 11(d)(ii) of the National Planning Policy Framework issued in February 2019 ("NPPF"). Does that policy require as the Claimant submits, the "tilted balance" to be struck without taking into account policies of the development plan, leaving those matters to be weighed separately under s.38(6) of the Planning and Compulsory Purchase Act 2004 ("PCPA 2004")? The Secretary of State for Housing, Communities and Local Government, the First Defendant in both challenges, supported by Uttlesford District Council ("UDC"), the Second Defendant in CO/4265/2019, contend that the answer to this question is 'no'; relevant development plan policies, whether favourable, unfavourable or neutral towards the development proposed may be taken into account in the tilted balance under paragraph 11(d)(ii).

2. Section 38(6) 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"

3. Section 70(2) of the Town and Country Planning Act 1990 ("TCPA 1990") provides:-

> "In dealing with an application for planning permission or permission in principle the authority shall have regard to—
> (a) the provisions of the development plan, so far as material to the application,
> [(aza), (aa) and (b) …..], and
> (b) any other material considerations."

4. In Monkhill Limited v Secretary of State for Housing, Communities and Local Government [2019] EWHC 1993 (Admin) I explained the framework for decision-making contained in paragraph 11(c) and (d) of the NPPF 2019 ([39] and [45]). That analysis was common ground between the parties to these proceedings. However, Monkhill did not address the issue raised above, nor its implications for the relationship between the tilted balance and s.38(6).

5. Given the nature of the main issue, on 4 December 2019, the Court ordered the applications to be adjourned to a rolled-up hearing.

6. In the Flitch Green appeal (CO/4265/2019 and see below) the Inspector had to apply paragraph 11(d)(i) because of the "less than substantial harm" that would be caused to heritage assets. However, he resolved that matter in the Claimant's favour and so it does not give rise to any issue in that legal challenge. In both cases paragraph 11(d)(ii) applied because the relevant local planning authority ("LPA") was unable to demonstrate a supply of deliverable sites to provide at least five years' supply against the local housing requirement set out in their adopted strategic policies (footnote 7 to paragraph 11 and paragraph 73 of the NPPF). Consequently, the policies which were "most important" for determining the appeals were deemed to be "out-of-date" so as to engage the tilted balance.

In each of the appeal decisions it was found that the harmful effects would "significantly and demonstrably" outweigh the benefits of the proposal.

The National Planning Policy Framework

NPPF 2012

7. The National Planning Policy Framework was first issued in March 2012 ("NPPF 2012"). Paragraph 14 introduced the presumption in favour of sustainable development which is now to be found in paragraph 11. It gave rise to prolific litigation in the courts and resulted in a number of legal principles becoming established, some of which are referred to below.

8. Paragraph 14 provided: -

> "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:[10]
> - 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]"

9. Footnote 9 provided: -

> "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."

10. Footnote 10 qualified the presumption applicable in the case of decision-taking as follows:-

> "unless material considerations indicate otherwise"

11. Paragraph 47 explained how LPAs should meet the objective "to boost significantly the supply of housing".

12. Paragraph 49 contained the trigger by which the presumption in favour of sustainable development in paragraph 14 was engaged if an LPA could not demonstrate a 5 year supply deliverable housing sites: -

> "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."

NPPF 2019

13. The presumption in favour of sustainable development is now contained in paragraph 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[5], 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 area[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.
>
> 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[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[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."

14. The sequence of the two limbs (i) and (ii) under which the presumption in favour of sustainable development may be overcome has been reversed as compared with paragraph

14 of the 2012 version. Where both limbs (i) and (ii) are engaged this is generally the logical order in which to apply them, as explained in Monkhill at [39-45].

15. The protection policies to which paragraph 11(b)(i) and 11(d)(i) apply are identified in footnote 6: -

> "The 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."

16. The trigger or deeming provision by which an inadequate supply of housing land causes paragraph 11(d)(ii) to apply is now contained in footnote 7: -

> "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); 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. …"

17. Paragraphs 73 to 75 set out the main principles upon which housing land supply and delivery are to be measured. Paragraph 73 provides (in part): -

> "Strategic policies should include a trajectory illustrating the expected rate of housing delivery over the plan period, and all plans should consider whether it is appropriate to set out the anticipated rate of development for specific sites. 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[36], or against their local housing need where the strategic policies are more than five years old[37]."

The decision letters

Gretton appeal

18. The Claimant appealed to the Secretary of State against the refusal by Corby District Council ("CDC") of outline planning permission for 120 dwellings (of which 40% was to be affordable housing), landscaping, informal public open space, an access point, surface water flood attenuation and associated works at Southfield Road, Gretton. The Inspector dismissed the appeal by a decision letter dated 27 August 2019. He identified two main issues: firstly, whether the development would be appropriately located having regard to the strategy in the development plan, accessibility of services and facilities and its effect on the character and appearance of the area and secondly whether CDC could demonstrate a 5 year supply of deliverable housing sites.

19. The Inspector dealt with the development plan strategy at DL 6 to 8. Gretton is a village. The proposal did not represent infill development nor was it required to support the rural economy or support a local need which could not be met more sustainably in a nearby larger settlement. The site had not been identified for development in a Local Plan or a Neighbourhood Plan. Development of the site therefore conflicted with Policy 11 of the

North Northamptonshire Joint Core Strategy ("JCS"). The site lay in the open countryside beyond any settlement. The proposal also conflicted with the spatial strategy which focused growth on Corby and planned for only 120 additional dwellings in the rural areas as a whole. The Inspector did not accept the Claimant's contention that this was merely "black letter harm" in the absence of any site-specific harm. He considered that accessibility to facilities and services to limit the need for residents to travel, a genuine choice of transport modes, and effect on the character and appearance of the area, underpinned the recently adopted strategy in the JCS. That conclusion has not been criticised in the Claimant's challenge to the decision.

20. The Inspector dealt with accessibility at DL 9 to 18. In DL 17 he concluded: -

> "This proposal would be a significant development and a central plank of sustainable development in the JCS is to minimise the need to travel and reduce car dependency by directing development to the most accessible locations. As there are currently no satisfactory alternative transport modes available, the majority of future residents would have little choice other than to be heavily reliant on private car based journeys for the majority of their day to day trips. Although some trips may be short, to my mind, there seems to be little benefit in growing Gretton such that one exacerbates the need for a substantial number of residents to travel elsewhere to access necessary everyday services and facilities. The fact that larger scale housing developments are to be built on greenfield land elsewhere is not determinative as these are in more accessible locations supported by the evidence heard at the examination into the JCS."

In DL 18 the Inspector added: -

> "…this is not a location which is, or is likely to be, adequately served by sustainable transport modes for the scale of development proposed and for its lifetime. The number of direct and associated trips generated from 120 such dwellings would be substantial."

21. The Inspector addressed the effect of the proposal on the character and appearance of the area at DL 19 to 29. He considered both landscape and visual impacts and concluded that the proposal would cause harm to the character and appearance of the area which would be significant for a substantial period of time, although possibly reducing to moderate in the long term if the mitigation proposals were to be successful.

22. In DL 30 to 32 the Inspector concluded that the proposed location was inappropriate in relation to "central planks" of the spatial strategy in the JCS for sustainable development, namely sustainable access and the character and appearance of the area.

23. The Inspector considered the supply of housing land at DL 33 to 42. He concluded that, on the material placed before him, the supply fell between 4.6 to 4.8 years

24. The Inspector dealt with the planning balance and his overall conclusion at DL 46 to 56.

25. The Inspector's reasoning in DL 46 was that: -

(i) The proposal conflicted with the development plan read as a whole, and so it was necessary to consider whether there were other material considerations indicating that permission should be granted despite that conflict;

(ii) The NPPF was an "other material consideration" of significance;

(iii) Because of the lack of a 5-year supply of housing land, the policies which were the most important for determining the appeal were deemed to be out of date, so that the test in paragraph 11(d)(ii) of the NPPF should be applied.

26. In DL 47 to 51 the Inspector determined how much weight should be given to the benefits of the proposed development.

27. In DL 52 to 54 the Inspector concluded: -

> "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 JCS 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 SUE 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."

28. The Inspector then expressed his overall conclusions in DL 55 to 56:-

> "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."

29. It is common ground that the Inspector was correct to treat the tilted balance in paragraph 11(d)(ii) as an "other material consideration" for the purposes of section 38(6), along with the other relevant policies of the NPPF. The Claimant does not contend that the Inspector failed to take into account any other policy of the NPPF.

30. It is plain that the Inspector did take into account development plan policies when he carried out the balancing exercise in DL 52 to 55. He expressed his conclusions on the application of paragraph 11(d)(ii) of the NPPF and s.38(6) in DL 55 and DL 56 respectively. The Inspector expressed his formal conclusions on the application of those provisions, drawing upon his earlier findings and reasoning.

Flitch Green Appeal

31. The Claimant appealed to the Secretary of State against the refusal by UDC of outline planning permission for up to 240 dwellings with public open space, landscaping, a sustainable drainage system and access point at Station Road, Flitch Green, Essex. The Inspector dismissed the appeal by a decision letter date 23 September 2019.

32. It was common ground at the inquiry that UDC was unable to demonstrate a 5-year supply of housing land and so paragraph 11(d)(ii) applied (DL6). In DL 8 the Inspector considered the main issues to be: -

    (i) the effect of the proposal on the character and appearance of the area;

    (ii) whether the proposal would harm the setting of nearby heritage assets;

    (iii) the effect of the proposal on protected species;

    (iv) the tests in paragraph 11(d)(i) and (ii)

33. The Inspector addressed the effect of the proposed development on the character and appearance of the area at DL 9 to DL 22, in terms of both landscape impact and visual impact. He concluded that there would be a significant adverse effect. The appeal site was in the countryside and so this harm would conflict with policy S7 of the Uttlesford Local Plan.

34. The Inspector considered the effect of the proposal on a number of designated heritage assets at DL 23 to 43. He concluded that there would be harm to the setting of a Grade I listed church, a Grade II listed house, and the Felsted Conservation Area. At DL 43 he assessed this as "less than substantial harm" (paragraph 196 of the NPPF), which had to be weighed against the public benefits of the proposal, having special regard to the desirability of preserving those settings (s.66(1) of the Planning (Listed Buildings and Conservation Areas) Act 1990). This harm also involved conflict with policy ENV2 of the adopted local plan.

35. In DL 44 to 49 the Inspector explained why he considered that the effect of the proposals on protected species would be acceptable.

36. In DL 50 to 57 the Inspector addressed the subject of housing land supply. The supply was only 3.29 years, and so there was a "significant shortfall" or "severe shortage" in the District (DL 50). He decided that the emerging local plan which would replace the adopted local plan could not be relied upon "to plug the housing supply in the short term" and only limited weight could be given to the draft plan at that stage (DL 55). He acknowledged that many households could not afford market housing and so the inclusion of up to 96 affordable homes (or 40% of the total proposed) was significant and in accordance with Policy H9 of the local plan (DL 56). To allow the appeal would "boost the supply of homes", an important objective of the NPPF (DL 57). Having regard to other benefits, the Inspector concluded "that the new housing would have significant economic benefits and substantial social benefits" (DL 58).

37. In DL 59 to 61 the Inspector explained why he considered the development would have reasonable access to services, facilities and public transport and be in a relatively sustainable location.

38. In DL 63 to 74 the Inspector set out his views on the planning balance and his overall conclusions.

39. He began by giving substantial weight to each of the harms that would be caused to the character and appearance of the area and the setting of the three heritage assets (DL 63). He then gave substantial weight to the economic and social benefits of the new homes and limited weight to sustainable travel benefits through the improvement of off-site routes (DL 64). He regarded other matters such as contributions and mitigation as having neutral weight (DL 65).

40. In DL 66 the Inspector concluded that (i) the proposal was contrary to policy S7 and ENV7 of the local plan, (ii) these were the most important development plan policies for determining the appeal, and (iii) the proposal was contrary to the development plan as a whole.

41. At DL 67 to 71 the Inspector assessed the weight to be given to policies S7 and ENV2 of the local plan. In this exercise the Inspector did have regard (inter alia) to the degree of consistency between each policy and the NPPF (see DL 67 and DL 70 to 71). He also considered whether policy S7 was substantively "out-of-date" (and not simply deemed by footnote 7 to be out-of-date because of the shortage of housing land for the purposes of triggering paragraph 11(d)(ii)).

42. The Inspector decided that policy S7 was "predicated on settlement boundaries that are out-of-date" and would inevitably have to be breached to provide sufficient housing land until the adoption of the emerging local plan. Nevertheless, those boundaries provided a "starting point in distinguishing between settlement and countryside" until the new plan was adopted and whether a breach would be acceptable in any individual case would depend upon the level of harm and the application of the test in paragraph 11(d)(ii) of the NPPF (DL 68). He decided that moderate weight should be given to policy S7 (DL 70).

43. Having compared policy ENV2 to the NPPF policies on heritage assets and to s.66(1), the Inspector considered that ENV2 should also be given moderate weight.

44. In DL 72 the Inspector applied paragraph 11(d)(i) of the NPPF to the less than substantial harm he had identified to heritage assets, and concluded that that was outweighed by the

substantial weight given to the socio-economic benefits of providing 240 homes. Accordingly, limb (i) did not have the effect of disapplying the presumption in paragraph 11(d) in favour of sustainable development.

45. In DL 73 the Inspector then drew these conclusions: -

> "Moving onto the second leg of paragraph 11 (d), 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."

46. In the first sentence of DL 73 the Inspector applied the test in paragraph 11(d)(ii) of the NPPF, but the Claimant contends that in doing so he misinterpreted that policy by taking into account the conflict with development plan policies that arose from harm to both the character and appearance of the area and to the setting of designated heritage assets.

47. In the second sentence of DL 73 the Inspector expressed his overall conclusion under s.38(6), namely that material considerations did not indicate that the proposal should be determined otherwise than in accordance with the development plan. The Inspector's reference to allowing for the reduced weight he gave to the development plan policies which were most important for determining the appeal shows that he correctly took paragraph 11(d)(ii) into account as an "other material consideration". This is reinforced by the last sentence of DL 73 which expresses an important judgment reached by the Inspector in this case, one which cross-refers to the approach set out in the last sentence of DL 68 (see paragraph 42 above).

48. Like the Inspector in the Gretton appeal, this Inspector expressed his formal conclusions on the tests in paragraph 11(d)(ii) of the NPPF and s.38(6) in separate sentences, but in doing so he drew upon his earlier findings and reasoning.

The issues in these challenges

49. The parties have helpfully refined the issues for determination as follows:-

(1) When applying paragraph 11(d)(ii) of the NPPF must the decision-maker disregard policies of the development plan, particularly development plan policies which are treated as being out of date, given that 11(d)(ii) refers to "the policies in this Framework taken as a whole"?

(2) Each Inspector erred in law by taking into account paragraph 213 of the NPPF when applying paragraph 11(d)(ii). They ought not to have taken into account in the tilted balance the extent to which any development plan policy was consistent with the Framework;

(3) (a) Each Inspector failed to give adequate reasons for his decision by failing to assess the benefits of the proposal in a manner consistent with the assessment of the harm it would cause, by expressing the value attached to each benefit; and

(b) In relation to the Gretton decision, the Inspector failed to take into account or address those parts of the development plan setting out housing needs and strategic objectives which supported the proposed development;

(4) In relation to the Gretton decision:

(a) In DL 47 the Inspector had regard to an immaterial consideration, namely that certain socio-economic benefits would not be unique to the proposal; and

(b) Alternatively, the Inspector failed to give adequate reasons for his decision because DL 47 raises a substantial doubt as to whether he did in fact give reduced weight to those socio-economic benefits because they would not be unique to the proposal

A summary of the submissions on Issue (1)

50. The Claimant did appear to suggest in its skeleton argument (e.g. paragraph 5), and initially in oral submissions, that where paragraph 11(d)(ii) of the NPPF is engaged development plan policies, or certainly those treated as "out-of-date", must be completely disregarded from then on in the decision-making process, and not simply when applying the tilted balance. However, Mr Kimblin QC clarified that the Claimant was not advancing that submission. That was not surprising because that interpretation would have the unlawful effect or overriding or "displacing" s.38(6). Instead Mr Kimblin QC submitted that where paragraph 11(d)(ii) falls to be applied, the proposal is to be "assessed against the policies in this Framework taken as a whole", and not policies in the development plan. The result of that assessment is *then* to be treated as an "other material consideration" when the decision-maker goes on to apply s.38(6), at which point development plan policies must be taken into account. He contended for a two stage approach.

51. The Claimant submits that paragraph 11(d)(ii) should be interpreted by the court in a straightforward manner without any alteration to its language, citing Lord Carnwath in Hopkins Homes Limited v Secretary of State for Housing Communities and Local Government [2017] 1 WLR 1865 at [60]. On that basis he says that the language used in paragraph 11(d) makes it clear that development plan policies are not to be taken into account in the tilted balance under limb (ii).

52. Mr Kimblin QC also referred to Hopkins at [14] and [85], where Lords Carnwath and Gill said that the reference in the second indent in paragraph 14 of the 2012 NPPF to "specific policies in this Framework" restricting development should be read as including related development plan policies. Footnote 6 to the equivalent provision in the 2019 NPPF states that the policies referred to in paragraph 11(d)(i) "are those in this Framework (rather than those in development plans) …". Leading counsel submitted that the words in parentheses, which apply both to paragraph 11(b)(i) and paragraph 11(d)(i), were inserted in order to reverse the observations of Lords Carnwath and Gill on the 2012 NPPF as regards both plan-making and decision-taking. Mr Honey on behalf of the Secretary of State agreed with that submission to that extent. But Mr Kimblin went further by submitting that the words in parentheses excluding policies in development plans also serve as an aid to the interpretation of paragraph 11(d)(ii), so that this disregard of development plan policies

applies to both of the limbs by which the presumption in favour of sustainable development may be disapplied for the purpose of "decision-taking" (i.e. limbs (i) and (ii)).

53. Mr Kimblin added that even if the Court considers what is *impliedly* rather than expressly referred to in paragraph 11(d)(ii) (see Lord Carnwath in R (Samuel Smith Old Brewery (Tadcaster)) v North Yorkshire County Council [2020] UKSC 3 at [32]), the policy should be interpreted as if it referred to "[solely] the policies in this Framework" rather than "the policies in this Framework [and in the development plan]". He submitted that that approach is justified by the objectives of the NPPF. First, the NPPF seeks to boost the supply of housing land and to support growth by making sufficient provision in development plans for housing, employment and other commercial development in line with paragraph 11(a) and (b) of the NPPF (see paragraphs 8 and 20 and footnote 12). Second, where there are no relevant development plan policies, or those policies are out-of-date, the tilted balance in paragraph 11(d)(ii) provides a "remedy" or "solution" to the problem posed by the development plan. He described this in his oral submissions as a situation in which the development plan was "not working", or was failing to deliver development. He said that conflict with the development plan, or the "most important policies", was a reason why the tilted balance would have been triggered in the first place and so paragraph 11(d)(ii) did not allow those policies to be taken into account in the tilted balance.

54. In my judgment this begs the question how does paragraph 11(d) operate and what kind of solution or remedy does limb (ii) really provide?

55. As to the observations of Lord Clyde in City of Edinburgh Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1459-1460, Mr Kimblin QC submitted that the effect of the language used in the NPPF is that paragraph 11(d)(ii) and s.38(6) cannot be applied simultaneously, or as part of a comprehensive balancing exercise, drawing all the material considerations together and reaching overall conclusions. Instead, the decision-maker must firstly make an assessment under paragraph 11(d)(ii) which disregards development plan policies before going on secondly to apply s.38(6). It is at that second and separate stage that the decision-maker must take into account development plan polices (a mandatory consideration) and the outcome of the balancing exercise carried out under paragraph 11(d)(ii) (as an "other material consideration").

56. Mr Kimblin QC submits that if the policies which are most important for determining an application are treated as out-of-date, then to take into account in the paragraph 11(d)(ii) assessment either those policies, or conflict with the development plan as a whole, would be improper; it would involve double-counting or circularity. In a similar vein, he submits that a decision-maker cannot reach a conclusion on how a proposal relates to the development plan as a whole *within* paragraph 11(d)(ii).

57. Mr Kimblin QC submitted that the alleged error in the two decision letters the subject of these challenges is prevalent, relying upon the witness statement of Mr Kevin Waters, a Senior Planner and Development Director employed by the Claimant, which sought to analyse a substantial number of decision letters issued by Planning Inspectors. Mr Honey submitted that these decisions were not the subject of challenges before the court and were irrelevant to the legal issues raised in these proceedings. Accordingly, the Secretary of State had not filed any evidence in reply.

58. Mr Honey for the Secretary of State and Ms. Dehon for UDC advanced submissions essentially to the same effect.

59. The presumption in favour of sustainable development is contained in paragraph 11(c) and (d) of the NPPF. That presumption is an "other material consideration" for the purposes of s.38(6). It is to be interpreted and applied within the context of the development plan led system established by s.38(6).

60. Footnote 6 in the 2019 NPPF was introduced to reverse the observations at [14] and [85] of Hopkins, in other words to restrict the consideration of policies to those contained in the NPPF and to exclude in particular development plan policies. But the NPPF is expressed so that footnote 6 applies solely to paragraphs 11(b)(i) and 11(d)(i). The exclusion of development plan policies by footnote 6 does not apply to paragraph 11(d)(ii) (or 11(b)(ii)). Given that paragraph 11(d) is to be interpreted within the context of the plan led system, there is nothing in limb (ii) which purports to disregard any relevant policy of the development plan. This a straightforward reading of the NPPF which does not involve adding or reading in any additional language.

61. The Claimant's case is misconceived because paragraph 11(d) is not predicated upon a proposal conflicting with either the development plan as a whole or its most important policies for the determination the application. For example, there may be no relevant plan policies. Alternatively, a proposal may accord with a development plan the most important policies of which are assessed as being out of date, or the "footnote 7" trigger may apply because of a shortfall of housing land, but the development plan (including its most important policies) may be assessed as being up-to-date and attracting substantial or full weight. Thus, treating development plan policies as relevant considerations under the tilted balance is not incompatible with the objectives of the presumption in favour of sustainable development or the NPPF.

62. Paragraph 14 of the NPPF assumes the relevance of development plan policies under paragraph 11(d)(ii) and then gives specific guidance on how certain factors affecting neighbourhood plans are to be weighed.

63. The NPPF is high level national guidance addressed, in part, to each LPA which is then responsible for formulating and adopting local development plans showing how those national policies have been taken into account in local circumstances. The benefits and harms addressed in the balancing exercise under paragraph 11(d)(ii) cannot sensibly be separated from the application of relevant NPPF *and* development plan policies.

64. The line of authority which includes City of Edinburgh makes it plain that a decision-maker need only comply in substance with the legal presumption in s.38(6), and likewise the policy presumption in paragraph 11(d). There is no particular sequence or form which he must follow. Once the decision-maker has assembled the material considerations, he may make an overall assessment and there is no requirement for paragraph 11(d)(ii) and s.38(6) to be applied separately or in two stages.

65. The Defendants submit that if a decision-maker is entitled to apply s.38(6) and paragraph 11(d)(ii) of the NPPF together rather than separately, then there is no double-counting of the assessment against development plan policies, nor any circularity. They also contend that neither of these criticisms apply in any event.

Admissibility of the witness statement of Mr Waters

66. I have had regard to the witness statement *de bene esse*, although ultimately, I accept Mr Honey's submission that it is essentially irrelevant. The decision letters on the Gretton and the Flitch Green appeals either do or they do not contain a misinterpretation of national policy. Either way, that issue is an objective question of law on the interpretation of the NPPF, which is not affected by the fact that a substantial number of other decision-makers have (or for that matter have not) followed the same approach. No submission was made by reference to any of this material which might have assisted the court in coming to a conclusion on the parties' rival interpretations.

67. Parties should not seek to file evidence of this kind in future challenges, whether they be a claimant or a defendant. This practice is objectionable for several reasons. First, costs are incurred unnecessarily, not only by a claimant but also by a defendant in having to consider whether to respond to the material. Second, court time may be taken in up considering the material needlessly. Third, a defendant may be placed in the awkward position of having to decide whether or not they should respond to the material, particularly if it contains material which is partly admissible and partly inadmissible, worse still if those two categories are intertwined.

68. It should also be recalled that the general principle is that evidence must be confined to the material before the decision-maker whose decision is under challenge. Both the principle and exceptions thereto were set out in R. v Secretary of State for the Environment Ex parte Powis [1981] 1 W.L.R. 584. The exceptions have since been very slightly expanded in R. (on the application of Law Society) v Lord Chancellor [2019] 1 W.L.R. 1649 at [37] to [41], but they remain subject to the constraints within which judicial and statutory review operates.

69. It is also necessary to recall the statement of Sullivan J (as he then was) in Newsmith Stainless Limited v Secretary of State for the Environment, Transport and the regions [2017] PTSR 1126 at [9]: on an application under s. 288 of the TCPA 1990 it will seldom be necessary to produce to the court anything beyond the decision letter under challenge and material before the Inspector relevant to the grounds of challenge (see also R (on the application of Network Rail Infrastructure Ltd) v Secretary of State for the Environment, Food and Rural Affairs [2017] PTSR 1662 at [10]).

70. Even where written evidence filed in proceedings refers solely to relevant material, it should be borne in mind that witness statements and expert reports may not make submissions to the court. Sir Terence Etherton in JD Wetherspoon plc v Harris [2013] 1 WLR 3296 stated at [39] that it is generally not the function of a witness statement to provide a commentary on the documents in a trial bundle or to make points which are essentially matters for legal argument or submission.

General Legal Principles

71. The parties helpfully agreed a series of legal propositions drawn from a number of well-known cases. It is unnecessary for me to repeat them all here. I simply refer to a number of those and other legal principles which directly assist in resolving issue (1).

72. The principles on which a Court will intervene in relation to a decision challenged under s.288 of TCPA 1990 are well-established and were helpfully summarised in Bloor Homes East Midlands Limited v Secretary of State for Communities and Local Government [2017] PTSR 1283 at [19].

73. Some key authorities on the interpretation of policy were identified in Monkhill at [39]:-

> "The principles governing the interpretations of planning policy have been set out in a number of authorities, including Tesco Stores Limited v Dundee City Council [2012] PTSR 983; Hopkins Homes Limited v Secretary of State for Communities and Local Government [2017] 1 WLR 1865; 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 Limited 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."

I would now add the decision in Samuel Smith to this list.

74. As the authorities make clear, and needs to be re-emphasised, not all planning policies are suitable for judicial interpretation. Development plans and other documents are full of broad statements of policy, many of which may be mutually irreconcilable, so that one must give way to another. Many policies may be framed in language the application of which requires the exercise of judgment by the decision maker, which may only be challenged in the courts on the ground of irrationality. Where the interpretation of a policy is truly justiciable, the court must interpret it "objectively, in accordance with the language used, read as always in accordance in its proper context". Development plans are not analogous in nature or purpose to a statute or contract and should not be interpreted as if they were (Tesco at [18-19]). Similarly, where submissions on the interpretation of a policy may properly be made to a court, they must also conform to those interpretative principles.

75. Lord Carnwath made essentially the same points in Hopkins at [23] et seq), which he reinforced as follows:-

> "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 [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 *AH (Sudan) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening)* [2008] AC 678, para 30, per Baroness Hale of Richmond.

> 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 judgment in the application of that policy; and not to elide the two."

76. in the Samuel Smith case the Supreme Court treated the concept of "openness" in paragraph 90 of the NPPF as an example of a broad policy concept which is not susceptible to judicial interpretation ([22], [25] and [39]). For example, the issue of whether visual effects may be taken into account under paragraph 90 is not a matter of legal principle. It is not a mandatory consideration which legislation or policy requires to be taken into account. Instead, it is a matter of judgment for the decision-maker whether to have regard to that factor, subject to the legal test whether, in the circumstances of the case, it was so "obviously material" as to require consideration (the legal approach laid down in Derbyshire Dales District Council v Secretary of State for Communities and Local Government [2010] 1 P&CR 19 and approved by the Supreme Court at [30] to [32]).

77. Planning policies are intended to guide or shape practical decision-making, and should be interpreted with that purpose in mind. They have to be applied and understood by planning professionals and by the public to whom they are primarily addressed. Decision-makers are entitled to expect both national and local planning policy to be as clearly and simply stated as it can be and, however well or badly it may be expressed, the courts to provide a straightforward interpretation of such policy (Mansell at [41]; Canterbury at [23]; Monkhill at [38]).

78. In R (Alconbury) Limited v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 Lord Clyde described the relationship between the Secretary of State as the central planning authority and LPAs. The role of the former is to secure some coherence and consistency in the development of land. National planning guidance will influence local development plans and policies which LPAs will use in resolving their own local problems. Development plans lie at the heart of the national system for providing consistent, predictable and prompt decision-making ([139] to [140])

79. The purpose of the NPPF is to express general principles on which decision-makers are to proceed in the pursuit of sustainable development. The Framework also contains more specific provisions which must be interpreted in the context of the document overall. Where the NPPF relates to decision-making on planning applications and appeals, it must be interpreted in the context of s.70(2) of TCPA 1990 and s.38(6) of PCPA 2004 to which it is subordinate. Subject to these statutory requirements, the Secretary of State may give guidance to decision-makers, for example, where the planning system is failing to satisfy an unmet need, by highlighting material considerations to which greater or lesser weight may be given. Guidance in the NPPF is an "other material consideration" (Hopkins at [74] to [75]).

80. Many of the key principles on the presumption in favour of sustainable development contained in the NPPF were helpfully drawn together in the judgment of Lindblom LJ in

East Staffordshire Borough Council v Secretary of State for Communities and Local Government [2018] PTSR 88 at [10] to [23] and [34] to [35]. Where paragraph 11(d)(ii) of the NPPF 2019 is triggered because of a shortage of housing land, it is a matter for the decision-maker to decide how much weight should be given to the policies of the development plan. It is common ground between the parties that this also applies to the "most important policies" referred to in the Framework. But the presumption in favour of sustainable development is not irrebuttable and planning permission may still be refused. This is the territory of planning judgment into which the court may not go save to apply public law principles (approving Crane v Secretary of State for Communities and Local Government [2015] EWHC 425 (Admin) at [70] to [74]).

Discussion

81. Section 38(6) lays down the legal principle that the decision on a planning application is to be governed by the development plan, read as a whole, unless other material considerations indicate otherwise (see e.g. City of Edinburgh at pp. 1449-50 and 1458-9). The policies in the NPPF do not have the force of statute. Under the statutory scheme a policy in the NPPF is relevant to a planning decision as an "other material consideration", to be weighed in the balance under s.70(2) of TCPA 1990 and s.38(6) of PCPA 2004 (BDW Trading Ltd v Secretary of State for Communities and Local Government [2017] PTSR 1337 at [21]). The policies in that Framework have to be understood in the context of the development plan led system. Moreover, the NPPF cannot, and does not purport to, displace or distort the primacy given by the presumption in s.38(6) to the statutory development plan (Hopkins at [21]).

82. When a decision-maker judges that development plan policies are out-of-date it is still necessary for him to consider the weight to be given to that conclusion and the relevant development plan policies bearing upon the proposal. Likewise, where policy 11(d)(ii) is triggered because a 5 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 v Secretary of State for Communities and Local Government [2015] EWHC 425 (Admin)).

83. It should also be noted that in Crane at [74] Lindblom J (as he then was) explicitly rejected the contention that development plan polices should be disregarded and only NPPF policies taken into account in the tilted balance assessment required by paragraph 14 of NPPF 2012. The High Court took the same approach in Woodcock Holdings Limited v Secretary of State for Communities and Local Government [2015] EWHC 1173 (Admin) at [87], [105], and [108] to [115].

84. The passages in Crane and Woodcock were approved by the Court of Appeal in Hallam Land Management Limited v Secretary of State for Communities and Local Government [2018] EWCA Civ 1808 at [46].

85. This case law is reinforced by Lord Carnwath's explanation of the operation of paragraph 14 of NPPF 2012 in Hopkins at [54] to [56]. He pointed out that paragraph 14 did not apply just to housing development and housing policies. It had to be workable for other forms of

development covered by a development plan, such as employment or transport. He agreed with the Court of Appeal that the weight to be given to development policies *under paragraph 14* (i.e. in the tilted balance) was a matter of judgment for the decision-maker ([55] to [56]).

86. Accordingly, 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 policies, whether telling in favour of or against a proposal, was a matter to be assessed in that balance. That was wholly unsurprising given that paragraph 14 had to be understood in the context of the development plan led system, established by the presumption contained in s.38(6).

87. The Claimant did not attempt to distinguish this line of authority or to argue that it was irrelevant to the interpretation of paragraph 11(d)(ii) of NPPF 2019.

88. In Redhill Aerodrome Limited v Secretary of State for Communities and Local Government [2015] PTSR 274 Sullivan LJ stated that where the Government intends to make a significant change to a policy in the Framework, it would be expected to make a clear statement to that effect ([16]). Here, the court has not been shown anything, such as consultation material, which could be treated as a proposal by the Government to alter the policy in paragraph 14 of the NPPF 2012 so that development plan policies should be disregarded in applying the tilted balance. Far from it. Paragraph 11(d)(ii) repeats the same language "when assessed against the policies in this Framework as a whole."

89. I also accept Mr Honey's submission that the language of footnote 6 to the NPPF 2019 does differ materially from footnote 9 to NPPF 2012, in that development plan policies are not to be taken into account under paragraph 11(d)(i). But that alteration has been confined to paragraphs 11(b)(i) and 11(d)(i). It does not apply to paragraph 11(d)(ii).

90. Adopting the straightforward approach to interpretation laid down by the case law, paragraph 11(d)(ii) of the NPPF 2019 does not require any relevant development plan policies to be excluded from the tilted balance. The position remains the same as under paragraph 14 of NPPF 2012.

91. Paragraph 14 of the NPPF 2019 lends further support to this conclusion: -

> 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: -
>
> [criteria (a) to (d) are then set out]

I agree with Mr Honey's submission that paragraph 14 assumes that development plans, which include neighbourhood plans, are relevant considerations in the tilted balance under paragraph 11(d)(ii). I disagree with Mr Kimblin's submission that little weight should be attached to paragraph 14 because it represents an addition to national policy rather than something which formed an intrinsic part of the tilted balance policy when it was first introduced. The simple fact remains that in 2019 the Secretary of State took the opportunity to review the NPPF including the policy presumption in favour of sustainable development.

When NPPF 2019 was published in 2019, paragraph 14 formed an integral part of that policy.

92. For these reasons alone, the Claimant's case under issue (1) must fail. LPAs and Planning Inspectors may continue to weigh development plan policies in the tilted balance in paragraph 11(d)(ii).

93. Although that is sufficient to dispose of this issue, I should deal with other submissions made by the parties in order to lay to rest arguments advanced by the Claimant, so that LPAs and Inspectors are no longer troubled with them.

94. It is important to note that paragraph 11(d)(ii) may operate in three different scenarios: -

(1) There are no relevant development plan policies:

(2) The policies which are most important for determining the application are *assessed* by the decision-maker as being out-of-date:

(3) A shortfall in the requirement for a 5 year supply of housing land triggers the application of paragraph 11(d)(ii) by *deeming* those policies important for the determination of the application to be out-of-date.

95. In scenario (1) there will be no need to consider whether the proposal accords with the development plan; there will only be "other material considerations" to take into account. The same applies when paragraph 11(d)(ii) is applied to this scenario. Accordingly, the phrase "against other policies in this Framework taken as a whole" simply recognises that paragraph 11(d)(ii) may apply where there are no relevant development plan policies. The language has been chosen so as to be applicable to all three scenarios. It has not been drafted so as to have the effect of *excluding* development plan policies from the tilted balance in scenarios (2) and (3).

96. Turning to scenarios (2) and (3), the absence of any explicit reference to development plan policies in limb (ii) is of no significance. The tilted balance applies in the context of the statutory framework, particularly s.38(6), by virtue of which development plan policies must be taken into account in any event.

97. The Claimant's interpretation of paragraph 11(d)(ii) cannot be justified on the basis that the tilted balance is intended simply to overcome either (a) conflict with the development plan as a whole or its most important policies or (b) a failure by the development plan to deliver necessary development. First, there may be no relevant development plan policies. Second, a proposal may accord with the development plan as a whole or its most important policies for determining the application, and yet those policies may also be assessed as being out-of-date (scenario (2)). For example, there may have been substantial factual and/or policy changes since the plan was formulated and adopted. Third, paragraph 11(d)(ii) may be triggered because the LPA cannot demonstrate a 5 year supply of land for housing (scenario (3)), and yet the development plan may be recently adopted and up-to-date in all material respects. The shortage of housing land may have resulted from problems pre-dating the development plan or be a relatively recent or temporary problem. Fourth, under scenarios (2) and (3) it remains necessary for the decision-maker to assess how much weight should be given to development plan policies. In some cases he may conclude that they should be given substantial or even full weight. That is a matter of planning judgment in each case.

98. The Claimant says that its interpretation of paragraph 11(d)(ii) is justified in order to provide a solution for the problem of development plans which are not "working" or which are not delivering necessary development. But as Mr Honey rightly pointed out, the Claimant's interpretation is advanced very much from the perspective of a developer or a housebuilder, particularly where an LPA is unable to demonstrate a 5 year supply of housing land.

99. Where it is appropriate for the court to interpret a planning policy, the objective approach which must be applied means that interpretation should not be considered simply through the lens, or worse still prism, of whichever party happens to be disappointed by a particular planning decision, whether a developer, local planning authority or objector to a scheme. Many, if not most, policies are designed to be applicable to a wide range of circumstances and not just to the facts of the case before the court.

100. There are a number of flaws in the Claimant's argument. First, paragraph 11(d)(ii) does not itself provide a solution for the problem with which the Claimant is concerned, namely a shortfall in housing land or a lack of land to meet identified development needs. It does not automatically lead to the grant of planning permission. Instead, paragraph 11(d)(ii) involves the balancing of competing interests, but with a *tilt towards* granting permission. That exercise may or may not result in planning permission being granted. But there is nothing about the nature of that policy or the assessment it requires which would justify the exclusion of development plan policies from the tilted balance.

101. Second, if development plan policies were to be disregarded under paragraph 11(d)(ii), that would apply not only to policies against, but also those in favour of, the proposed development. Frequently the Claimant's argument focused on the "5 year land supply" trigger to argue that it is necessary for those policies which are "most important" for determining the application to be disregarded. But they are also likely to include polices which support the development as well as others which tell against it. For example, in the present case the Claimant understandably relied upon development plan policies which identified the need to provide more housing, and in particular affordable housing, as underpinning the benefits of the proposals. On the Claimant's reading of paragraph 11(d)(ii) those supportive policies would have to be ignored in the tilted balance.

102. Third, it is not sensible to divorce considerations which are relevant under the tilted balance from related development plan policies. The very need for market housing and affordable housing upon which a developer relies in support of his proposal is likely to gain strength from development plan policies which validate that need. Absent these policies, it would be necessary for evidence to be produced on need without reference to the development plan when the subject is already covered adequately by that plan (together with any updating from the monitoring of the plan's policies). The same would apply for various forms of employment development, the need for which may be supported by specific policies in the development plan.

103. Fourth, the Claimant's focus on the trigger in footnote 7 of NPPF 2019 overlooks the established principle that the trigger only deems certain policies to be out-of-date. Whether they are in fact out-of-date and, if so, in what respects, and how much weight should be attached to those policies remains to be assessed. Such policies are not simply left out of account because of this deeming provision as the Claimant's case sometimes appeared to be on the verge of suggesting. It is sensible for the decision-maker to be able to take those

policies into account in the tilted balance and make an assessment of the weight to be given to them at the same time.

104. Fifth, the Claimant's approach would mean that factors are taken into account in striking the tilted balance without any development plan policies related thereto, leaving those policies to be applied and weighed in a separate exercise under s.38(6). But that would require the decision-maker to consider topics addressed by development plan policies twice; once (without those policies) in the tilted balance and then again (with those policies) under s.38(6). This would require an elaborate form of decision-making which the NPPF does not call for.

105. Sixth, on the Claimant's two stage approach, the second stage applying s.38(6) would only be necessary in practice if the outcome of the tilted balance supported the grant of permission. This decision-making framework is objectionable because it 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.

106. This leads to the question why could not the sort of approach described by Lord Clyde in City of Edinburgh at pp. 1459H to 1460C be applied when paragraph 11(d)(ii) is engaged? He rejected a submission that the Scots equivalent of s.38(6) should be applied in two stages: (1) whether the development plan should be given priority, and (2) if not, setting aside that priority and concentrating on "the material factors which remain for consideration". Lord Clyde stated that the courts should not lay down prescriptions or even general guidance about the method to be followed by decision-makers. It should be left to each decision-maker, acting within his powers, to decide how to go about his task in the circumstances of each case. Lord Clyde stated that, by way of example, a decision-maker might choose to assemble all the relevant material, including the provisions of the development-plan, and then proceed to his assessment, paying due regard to the priority of the plan, but reaching his decision "after a general study of all the material before him".

107. I accept the Secretary of State's submissions that there is no legal justification for the court to prescribe that the tilted balance in paragraph 11(d)(ii) of the NPPF and the presumption in s.38(6) must be applied in two separate stages in sequence. There is nothing in the wording or effect of either provision which would justify the court acting in that way.

108. It is permissible for the decision-maker to assemble all the relevant material and to apply the two balances together or separately. For example, if a proposal accords with the development plan as a whole, but there is a shortfall in the 5 year supply of housing land, so that paragraph 11(d)(ii) applies, both of the balancing exercises are likely to point in favour of the grant of permission and plainly there would be no difficulty in applying them either in either one overall assessment or in two stages. If there is a shortfall in the 5 year supply of housing land or "important" policies are assessed as being out of date, and the proposal conflicts with the development plan as a whole, the two presumptions can still be considered together in an overall assessment, weighing all factors relating to the proposal, whether positive, negative or neutral. There is no incompatibility in the operation of the two presumptions which would require them to be applied separately in two stages. In substance effect is given to paragraph 11(d)(ii) by tilting the balance in favour of the grant of permission unless the benefits of the proposal are significantly and demonstrably outweighed bythe adverse effects (Lord Carnwath in Hopkins at [54]), i.e. by giving more

weight to those benefits. Whichever approach is taken, the amount of weight to be given to benefits, harm and the presumption in favour of sustainable development is a matter of judgment for the decision-maker.

109. It is important to recall the following statement of Lindblom LJ in the East Staffordshire case at [50]: -

> "Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion."

110. The Claimant's interpretation of paragraph 11(d)(ii) would appear to be influenced by its double-counting complaint, namely that factors are taken into account twice: first, under the tilted balance and second, under the s.38(6) balance. But, as I have explained in paragraph 104 above, the Claimant's interpretation would not overcome that supposed problem. Considerations such as harm to landscape and meeting the need for affordable housing would still be taken into account twice, first under paragraph 11(d)(ii) (without reference to development plan policies) and then under s.38(6) (with those policies taken into account). But neither the interpretation of paragraph 11(d)(ii) criticised by the Claimant nor its alternative involves any legal error based on so-called double-counting. All that is happening is that the same factors are assessed against two different criteria or tests to see whether both are satisfied. The position is no different *in substance* if the decision-maker applies an overall judgment to all relevant considerations which applies both the tilted balance in paragraph 11(d)(ii) and s.38(6).

111. The Claimant's complaint about circularity is also unsustainable. Mr Kimblin QC invited the Court to consider a case where harm is found to be caused by a proposal which conflicts with or undermines a spatial strategy policy of the development plan. By way of example, it is said that "if… the spatial policy is a factor which is delaying or preventing delivery of housing, then the feature of the development plan which gives rise to the 5 year land supply trigger… plays a part in the policy mechanism which is intended to address the difficulty in delivery – that is circular." No, with respect, it is not. The argument assumes that a policy deemed to be out-of-date by footnote 7 is the cause of a shortfall in housing land supply. As explained above it may be, it may not. The shortfall may be caused by issues which have little or nothing to do with policies in the development plan. The problem may be historic rather than one created by a recently adopted plan. The argument also assumes that such policies receive reduced weight, whereas that is a matter to be assessed along with the weighing of other material considerations such as the nature and extent of the shortfall and any steps being taken to remedy it.

112. For all these reasons, the Claimant's challenge under issue (1) relating to the interpretation of paragraph 11(d)(ii) of NPPF 2019 must be rejected. The NPPF does not exclude development plan policies from the tilted balance; they are relevant considerations.

113. In Hopkins Lord Carnwath referred at [23] to concerns regarding the over-legalisation of the planning process, as illustrated by litigation on the meaning and effect of paragraph 49

of NPPF 2012. He saw this as unfortunate for a document intended to simplify national policy guidance designed for the lay reader.

114. The arguments presented in this and some other recent cases suggest that it is necessary to remind parties and advocates of a passage in Barker Mill Estates Trustees v Test Valley Borough Council [2017] PTSR 408 at [141] approved by the Court of Appeal in East Staffordshire at [50]:-

> "One factor would appear to be the ingenuity with which lawyers (whether acting for or against a development proposal) put forward interpretations of policy in challenges before courts, which judges have to decide unless it can properly be said that the issue does not arise for decision in a particular case. The interpretations offered to the courts are sometimes "strained", as can be seen, by way of example in the submissions which the Court of Appeal was obliged to consider in the *Hopkins Homes Ltd* case [2016] PTSR 1315, paras 34-41. Such "excessive legalism" does not accord with the approach to interpretation of policy laid down by the Supreme Court in the *Tesco Stores Ltd* case [2012] PTSR 983, para 19. The decisions of the courts are then subjected to the same sort of exegetical analysis, not only in submissions to judges in other cases but also in the arguments advanced before planning inspectors. One can only sympathise with inspectors at inquiries and hearings up and down the country who have to deal with arguments of this nature."

115. Neither NPPF 2019 nor planning policy in general should be subjected to "excessive legalism" in legal challenges brought by any party disappointed by the outcome of a planning application or planning appeal. Hopkins, Samuel Smith, and several decisions of the Court of Appeal and this Court have unequivocally and consistently discouraged such arguments.

Issue (2)

116. Mr Kimblin QC submitted that each Inspector erred by taking into account the consistency of development plan policies with the NPPF when carrying out the tilted balance exercise under paragraph 11(d)(ii) of the Framework. He acknowledged that paragraph 213 of the 2019 NPPF states that development plan policies should not be considered out-of-date simply because they were adopted or made before the publication of the Framework and continues: -

> "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)."

However, Mr Kimblin contends that this guidance is only relevant in the application of s.38(6) and not paragraph 11(d)(ii). He submitted that paragraph 213 is not, "a vehicle to rescue policies rendered out-of-date by the absence of a five year housing land supply."

117. I see nothing in this complaint. The wording of the Framework does not provide any support for Mr Kimblin's contention. Furthermore, in his oral submissions Mr Kimblin accepted that the merits of this ground of challenge are parasitic upon the outcome of issue (1) and so, if the Claimant's challenge fails under issue (1) fails, as I have held it must, this ground also must be rejected. It adds nothing to the legal argument under issue (1). I agree.

Issue (3)

118. In respect of issue (3a) Mr Kimblin QC submitted that each Inspector failed to give adequate reasons for his decision, in that he failed to assess and explain the weight he attached to each benefit of the proposal in terms of both its value and effect. An assessment of weight is the product or combination of the extent of a proposal's effect in relation to a particular factor and the value of that factor. Mr Kimblin accepted that there is no legal requirement for this approach to be followed in all decision-making in planning cases, but he submitted that it is necessary where benefits are to be put into a balance against harm, all the more so where relevant policies are out-of-date and harm has been assessed in terms of both value and effect. In each appeal the Inspector assessed harm to the character and appearance of the area as regards its value and effect. In the Flitch Green appeal the Inspector also applied that approach to his assessment of the proposal's impact on the setting of designated heritage assets.

119. Mr Kimblin suggested initially that the difference of approach between the assessment of benefit and harm amounted to an unlawful inconsistency in the decision on each appeal. However, he accepted in his oral submissions that this challenge amounts solely to a complaint of inadequate reasoning to which the principles in Save Britain's Heritage v Number 1 Poultry Ltd [1991] 1 WLR 153 and South Bucks District Council v Porter (No. 2) [2004] 1 WLR 1953 should be applied.

120. The key question is whether either Inspector failed to resolve a principal important controversial issue, or whether his reasoning gives rise to a substantial doubt as to whether he erred in law, bearing in mind that the decision letter is addressed to parties who are well aware of the issues involved and the arguments deployed in the appeal. Mr Honey pointed out that in the Gretton appeal the Claimant's submissions noted that the value of the benefits of the proposal were not disputed. Ms Dehon for UDC showed the court a passage in the Statement of Common Ground for the Flitch Green appeal where the weight to be given to the benefits of that scheme were agreed. I do not need to lengthen this judgment by going through the decision letters to list the references relied upon by Mr Honey to refute this complaint. It is plain that legally adequate reasoning was given in relation to the benefits of each proposal.

121. Under issue (3b) the Claimant complains that whereas in DL8 of the Gretton decision letter the Inspector said that the effect of development on the character and appearance of an area and the sustainability of development locations were matters underpinning the strategy in the JCS (see paragraph 19 above), he failed to refer to other objectives of the plan supporting the meeting of housing needs.

122. I reject this complaint. The Inspector did address the strategy for meeting housing needs in the Borough. There was no legal requirement for him to refer in any more detail to those needs or the objectives for meeting them. Plainly these were well-known to the parties and understood by the Inspector. There is nothing in the decision-letter to suggest otherwise, or to raise a substantial doubt that a public law error may have been committed.

Issue (4)

123. Issue (4) relates to DL47 of the Gretton decision. The Inspector referred to the socio-economic benefits of the proposal, notably open market housing, affordable housing, construction jobs and increased spending supporting local services. He then said: -

> "None of these social and economic benefits would be unique to the present proposal however, they would be additional to other planned developments. Nonetheless, they do carry a moderate amount of weight in favour."

124. There is no merit in the argument that the Inspector took into account an immaterial consideration, namely that these benefits would not be unique to the Gretton site. It is possible to imagine a case, for example, where one or more benefits of a proposal would only be likely to be achieved within a very tightly defined area or only on the site proposed for development. That would undoubtedly be a relevant consideration. It would then be a matter for the decision-maker to decide how much weight to give to it. Likewise, the absence of that unique quality in another case cannot be treated as legally irrelevant. If a decision-maker then decides to take that matter into account (see paragraph 76 above), it is a matter for him to determine the weight to be attached to it.

125. In any event, the last sentence of DL47 begins with the word "nevertheless", making it clear that the "non-uniqueness" factor was not taken into account by the Inspector when he decided to give "moderate weight" to the socio-economic benefits. The penultimate sentence of DL47 criticised by the Claimant was of no materiality to the Inspector's judgment on the benefits of the proposal or to his overall decision. The Inspector's reasoning cannot be criticised as inadequate.

126. For these reasons, and applying the tests in Save and South Bucks District Council, the Claimant's challenge under issue (4) must fail.

Conclusions

127. The Claimant's complaints under issues (2), (3) and (4) are wholly unarguable and permission to apply for statutory review should be refused in relation to them.

128. Issue (1) essentially involved the same argument as had previously been rejected by the courts in, for example, Crane at [57] and [74], Woodcock Holdings ([108] to [115]), Hallam Land Management [46] and Hopkins at [55] to [56]. It is not arguable that the language of NPPF 2019 differs from the 2012 version so as to displace that body of case law in relation to paragraph 11(d)(ii). Although other submissions were canvassed on both sides, they did not overcome that problem for the Claimant or otherwise render this ground arguable. Indeed, they involved issues which have been determined by the courts in a litany of cases. Permission should also be refused in relation to issue (1).

129. Accordingly, the applications for permission to apply for statutory review in CO/3932/2019 and CO/4265/2019 are refused.

130. The Claimant has accepted that it should pay the costs of the First Defendant in both claims and of the acknowledgment of service ("AoS") of UDC in CO/4265/2019. I will make an order to that effect. But the Claimant resists UDC's application for an order that it be paid the whole of its costs in that claim, including the costs of the hearing. UDC seeks to justify recovery of those costs because of the importance to the Council of the court's decision on issue (1) and the difficult questions of principle it raised.

131. Applying the principles in Bolton Metropolitan District Council v Secretary of State for the Environment [1995] 1 WLR 1176, 1178-9, I do not consider that it would be appropriate to award a second set of costs beyond those relating to the AoS. UDC did not have a

separate issue on which it was entitled to be heard, "that is to say an issue not covered by counsel for the Secretary of State" or an interest which required separate representation. The rival arguments on issue (1) concerned an interpretation of national policy, the resolution of which had no connection with the development proposed on the Flitch Green site or the implications of that policy for decision-making in Uttlesford District. The scale of the development on the appeal site and the importance of the outcome of issue (1) to UDC were not of exceptional size or weight, nor were the points of principle of such difficulty, or the circumstances otherwise sufficient, to justify awarding a second set of costs to UDC beyond those of its AoS.