

# \*623 Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another Cheshire East Borough Council v Secretary of State for Communities and Local Government and another



Positive/Neutral Judicial Consideration

## Court

Supreme Court

## Judgment Date

10 May 2017

## Report Citation

[2017] UKSC 37

[2017] P.T.S.R. 623



Supreme Court

Lord Neuberger of Abbotsbury PSC , Lord Clarke of Stone-cum-Ebony , Lord Carnwath , Lord Hodge JJSC , Lord Gill

2017 Feb 22; 23; May 10

*Crown—Minister—Powers—Whether Secretary of State's power to formulate and issue national planning policy guidance deriving from Crown's prerogative powers or planning statutes*

*Planning—Development—Development plan document—Policies for supply of housing—Applications for residential planning developments—Meaning of “relevant policies for the supply of housing” for purpose of determining whether policies “up-to-date”—Status of guidance in National Planning Policy Framework—Correct approach for planning decision-maker where housing policies out of date— Town and Country Planning Act 1990 (c 8), s 70(2) (as amended by Housing and Planning Act 2016 (c 22), s 150, Sch 12, para 11(2) )— Planning and Compulsory Purchase Act 2004 (c 5), s 38(6) —National Planning Policy Framework (2012), paras 14, 47, 49*

1

2

3

In the first case the district council refused the developer planning permission for 26 dwellings on land at Yoxford, Suffolk. The inspector appointed by the Secretary of State to hear the developer's appeal upheld the district council's decision. On the developer's application under section 288 of the Town and Country Planning Act 1990 the judge quashed the inspector's decision. The district council appealed to the Court of Appeal. In the second case the developer applied to the borough council for planning permission for up to 170 dwellings on land at Willaston, Cheshire. When the borough council failed to determine the developer's application in time the developer applied to the Secretary of State. The inspector appointed allowed the developer's appeal and granted planning permission for up to 146 dwellings. The judge granted the borough council's application under section 288 of the 1990 Act to quash the inspector's decision and the developer appealed to the Court of Appeal. In each case the inspector had to establish whether particular policies of the relevant development plans

were considered not “up-to-date” under paragraph 49 of the National Planning Policy Framework (“NPPF”), and, if so, what the consequences for his decision should be. Paragraph 14 of the NPPF set out how the general presumption in favour of sustainable development should be applied including whether relevant policies were “out-of-date”. Paragraph 49 of the NPPF provided, inter alia, that “[relevant] policies \*624 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”. The Court of Appeal, concluding that “policies for the supply of housing” in paragraph 49 included policies “affecting” the supply of housing, dismissed the appeal in the first case on the ground that, since the inspector had erred in the interpretation and application of the policy in paragraph 49 of the NPPF so as to vitiate his decision, the judge had been correct to quash his decision. The Court of Appeal allowed the appeal in the second case on the basis that, since the inspector had correctly interpreted paragraph 49 of the NPPF and had correctly applied the relevant development plan policies, he had made no error of law and the judge had been wrong to quash his decision.

On appeal by the local authority in each case—

*Held*, (1) that the modern system of town and country planning was the creature of statute; that the Secretary of State's powers to formulate and adopt national planning policy derived expressly and by implication from the planning statutes which gave him overall responsibility for the planning system; and that, accordingly, any pre-existing common law power conferred by the royal prerogative in relation to the same subject matter had been superseded (post, paras 19–20).

Dicta of Lord Clyde in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, paras 140–143, HL(E) and dicta in *R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] 2 WLR 583, para 48, SC(E) applied.

Dicta of Laws LJ in *R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] PTSR 982, para 12, CA disapproved.

(2) That, in the determination of a planning application, a framework such as the NPPF was no more than “guidance”, and therefore “a material consideration” in that process; but that it did not provide a statutory test and did not displace, or distort, the primacy given by statute to the statutory development plan; that the NPPF was to be interpreted in its overall context and, where the guidance related to decision-making in planning applications, it had to 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 was subordinate; that, while recourse to the court was necessary for the resolution of distinct issues of law or for consistency of interpretation in relation to specific policies, the court's role was not to be overstated and courts should respect the expertise of the specialist planning inspectors and start with the presumption that they would have correctly understood the policy framework; that the inspectors had primary responsibility for resolving disputes between planning authorities and developers in individual cases over the practical application of policies, at national or local level, and their position was in part analogous with that of expert tribunals; and that, accordingly, courts were to exercise caution against intervening unduly in policy judgments falling within the inspectors' areas of special competence (post, paras 21–25, 72–75).

*Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983, SC(Sc) applied.

(3) That the primary purpose of paragraph 49 of the NPPF was to act as a trigger to the operation of “the tilted balance” in favour of permission under paragraph 14, which, unlike paragraph 49, was not solely concerned with housing policy but operated in respect of other forms of development covered by the development plan; that paragraph 49 came within a group of paragraphs dealing with the delivery of housing in the context provided by paragraph 47 which set objectives for boosting the

supply of housing; that the words “policies for the supply of housing” indicated the category of policies concerned, namely, housing supply policies; that the word “for” simply indicated the purpose of the policies in question to distinguish them from other categories and the substitution by the Court of Appeal of the word “affecting” bore a different emphasis and was unjustified; that while other groups of \*625 policies, positive or restrictive, might interact with the housing policies and so affect their operation, that did not make them policies for the supply of housing in the ordinary sense of that expression; that although paragraph 49 was to be construed narrowly it did not require a legalistic exercise to decide whether individual policies fell within the expression in question; and that the central issue was not how to define the individual policies but whether the result was a demonstrable five-year supply of housing meeting the objectives set by paragraph 47 (post, paras 54–59, 76, 80, 82).

(4) Dismissing the appeals, that in respect of the first appeal, since the inspector's approach was open to criticism and might have distorted his approach to paragraph 14 of the NPPF, the Court of Appeal's decision quashing his determination would be upheld and the planning appeal fell to be redetermined; and that in respect of the second appeal the inspector's erroneous approach was not such as to detract from his reasoning and, since there was no basis for questioning the validity of the permission he granted, the Court of Appeal's decision would be upheld (post, paras 62–70, 86).

*Per* Lord Gill, Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony and Lord Hodge JJSC. Where relevant policies fail to deliver the supply of housing the decision-maker should be disposed to grant an application for planning permission unless the presumption in favour of sustainable development in paragraph 14 of the NPPF can be displaced on one of two grounds: (i) that the adverse impacts of a grant of permission, such as encroachment on the Green Belt, will “significantly and demonstrably” outweigh the benefits of the proposal; (ii) that specific policies in the NPPF, such as those described in footnote 9 to the paragraph, indicate that development should be restricted (post, para 85).

Decision of the Court of Appeal [2016] EWCA Civ 168; [2016] PTSR 1315; [2017] 1 All ER 1011 affirmed on different grounds.

The following cases are referred to in the judgments:

*AH (Sudan) v Secretary of State for the Home Department (United Nations High Comr for Refugees intervening)* [2007] UKHL 49; [2008] AC 678; [2007] 3 WLR 832; [2008] 4 All ER 190, HL(E)  
*Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin)  
*Cotswold District Council v Secretary of State for Communities and Local Government* [2013] EWHC 3719 (Admin)  
*Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin)  
*Edinburgh (City of) Council v Secretary of State for Scotland* [1997] 1 WLR 1447; [1998] 1 All ER 174, HL(Sc)  
*Pioneer Aggregates (UK) Ltd v Secretary of State for the Environment* [1985] AC 132; [1984] 3 WLR 32; [1984] 2 All ER 358; 82 LGR 488, HL(E)  
*Proclamations, Case of (1610)* 12 Co Rep 74  
*R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2003] 2 AC 295; [2001] 2 WLR 1389; [2001] 2 All ER 929, HL(E)  
*R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government* [2011] EWHC 97 (Admin); [2011] 1 P & CR 22  
*R (Miller) v Secretary of State for Exiting the European Union (Birnie intervening)* [2017] UKSC 5; [2017] 2 WLR 583; [2017] 1 All ER 593, SC(E)  
*R (West Berkshire District Council) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 441; [2016] PTSR 982; [2016] 1 WLR 3923, CA  
*South Northamptonshire Council v Secretary of State for Communities and Local Government* [2014] EWHC 573 (Admin)  
*Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13; [2012] PTSR 983; 2012 SLT 739, SC(Sc) \*626  
*William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin)

*Wychavon District Council v Secretary of State for Communities and Local Government* [2008] EWCA Civ 692; [2009] PTSR 19, CA

The following additional cases were cited in argument:

*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223; [1947] 2 All ER 680, CA  
*Barker Mill Estates (Trustees of the) v Secretary of State for Communities and Local Government* [2016] EWHC 3028 (Admin); [2017] PTSR 408  
*Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263, CA  
*Daventry District Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1146, CA  
*Europa Oil and Gas Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 825; [2014] PTSR 1471, CA  
*Findlay, In re* [1985] AC 318; [1984] 3 WLR 1159; [1984] 3 All ER 801, HL(E)  
*Loup v Secretary of State for the Environment* (1995) 71 P & CR 175, CA  
*McFarland, In re* [2004] UKHL 17; [2004] 1 WLR 1289, HL(NI)  
*Mordue v Secretary of State for Communities and Local Government* [2015] EWCA Civ 1243; [2016] 1 WLR 2682, CA  
*North Wiltshire District Council v Secretary of State for the Environment* (1992) 65 P & CR 137, CA  
*Oadby and Wigston Borough Council v Secretary of State for Communities and Local Government* [2016] EWCA Civ 1040, CA  
*Obar Camden Ltd v Camden London Borough Council* [2015] EWHC 2475 (Admin); [2015] LLR 782  
*Oxted Residential Ltd v Tandridge District Council* [2016] EWCA Civ 414, CA  
*R (Friends of the Earth Ltd) v North Yorkshire County Council* [2016] EWHC 3303 (Admin)  
*R (Hampton Bishop Parish Council) v Herefordshire Council* [2014] EWCA Civ 878; [2015] 1 WLR 2367, CA  
*R (Khatun) v Newham London Borough Council* [2004] EWCA Civ 55; [2005] QB 37; [2004] 3 WLR 417; [2004] LGR 696, CA  
*R (Lee Valley Regional Park Authority) v Epping Forest District Council* [2016] EWCA Civ 404; [2016] JPL 1009, CA  
*R (Raissi) v Secretary of State for the Home Department* [2008] EWCA Civ 72; [2008] QB 836; [2008] 3 WLR 375; [2008] 2 All ER 1023, CA  
*R (Save Britain's Heritage) v Liverpool City Council* [2016] EWCA Civ 806; [2017] JPL 39, CA  
*R (TW Logistics Ltd) v Tendring District Council* [2013] EWCA Civ 9; [2013] 2 P & CR 9, CA  
*R (Timmins) v Gedling Borough Council* [2015] EWCA Civ 10; [2015] PTSR 837; [2016] 1 All ER 895, CA  
*Redhill Aerodrome Ltd v Secretary of State for Communities and Local Government* [2014] EWCA Civ 1386; [2015] PTSR 274, CA  
*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665; 75 LGR 190, HL(E)  
*Simplex GE (Holdings) v Secretary of State for the Environment* (1988) 57 P & CR 306, CA  
*Solihull Metropolitan Borough Council v Gallagher Estates Ltd* [2014] EWCA Civ 1610; [2015] JPL 713, CA  
*South Bucks District Council v Porter (No 2)* [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E) \*627  
*West v First Secretary of State* [2005] EWHC 729 (Admin); [2005] NPC 58  
*Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin); [2015] JPL 1151

## APPEAL from the Court of Appeal

*Hopkins Homes Ltd v Secretary of State for Communities and Local Government and another*

By a claim form dated 22 August 2014 the developer, Hopkins Homes Ltd, sought an order pursuant to section 288 of the Town and Country Planning Act 1990 quashing the decision of an inspector appointed by the Secretary of State for Communities and Local Government, upholding the decision of the local planning authority, Suffolk Coastal District Council, refusing the developer's planning application for 26 dwellings on land at Yoxford, Suffolk. By a judgment dated 30 January 2015 *Supperstone J* [2015] EWHC 132 (Admin) granted the order sought by the developer.

By an appellant's notice dated 20 February 2015, and pursuant to permission granted by the Court of Appeal (Sullivan LJ), the local planning authority appealed on the grounds that the judge had erred in holding that (1) policy SP29 of the Suffolk Coastal Local Plan was a policy for the supply of housing within the meaning of paragraph 49 of the National Planning Policy Framework ("NPPF"); (2) policies directed at protecting the environment, which had the effect of restricting land available for residential development, should be treated as policies for the supply of housing within the meaning of paragraph 49; (3) the

inspector had wrongly considered that the physical limits boundaries were identified in the recently adopted local plan; (4) the application of the physical limits boundaries should have been given less weight by the inspector because they had been carried over from an earlier plan; (5) the inspector had misinterpreted paragraph 135 of the NPPF and the definition of “significance” in Annex 2 of the NPPF; and (6) the inspector had failed to carry out a separate assessment of the heritage asset and the scale of any harm or loss to it. On 17 March 2016 the Court of Appeal (Jackson, Vos and Lindblom LJ) [2016] PTSR 1315 dismissed the local planning authority's appeal.

Cheshire East Borough Council v Secretary of State for Communities and Local Government and another

By a claim form dated 10 September 2014 the local planning authority, Cheshire East Borough Council, sought an order under section 288 of the Town and Country Planning Act 1990 quashing the decision of an inspector appointed by the Secretary of State for Communities and Local Government, granting outline planning permission to the developer, Richborough Estates Partnership LLP, for up to 146 Dwellings on land at Willaston, Cheshire after the planning authority had failed to determine the developer's application in time and the developer had appealed to the Secretary of State. By a judgment date 25 February 2015 *Lang J [2015] EWHC 410 (Admin)* granted the order sought by the planning authority.

By an appellant's notice filed on 18 March 2015 and pursuant to permission granted by the Court of Appeal (Sullivan LJ) the developer appealed on grounds that the judge had erred (1) in her interpretation of paragraph 49 of the NPPF; (2) in recognising the inspector's assessment of policy NE4 of the Crewe and Nantwich Replacement Local Plan; and \*628 (3) ought to have concluded that the decision would have been the same regardless of the approach taken to the weight given to policy NE4. The appeal was conjoined with that of *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* in recognition of the wider importance to local planning authorities, developers and local communities in the outcome. On 17 March 2016 the Court of Appeal (Jackson, Vos and Lindblom LJ) [2016] PTSR 1315 allowed the developer's appeal.

On 11 July 2016 the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Carnwath and Lord Hodge JJSC) granted the local authority in each case permission to appeal. The issues for the court's determination, as set out in the statement of facts and issues agreed between the parties, were as follows. (1) What was the correct interpretation of the words “relevant policies for the supply of housing” when construed in their proper context? (2) Was the Court of Appeal correct to find that the question whether a policy was a relevant policy for the supply of housing was a matter of planning judgment for the decision-maker and not for the courts, on a case by case basis, subject only to public law review? Further issues were raised in respect of the appeal in the *Hopkins Homes Ltd* case, in particular, whether the Court of Appeal's findings were correct and whether the inspector failed to give proper regard to the effect of the development on the significance of the historic parkland as a heritage asset.

The facts are stated in the judgment of Lord Carnwath JSC, post, paras 30–47.

*Martin Kingston QC, Hugh Richards, Jonathan Clay and Ashley Bowes* (instructed by *Sharpe Pritchard*) for the local planning authorities.

*Christopher Lockhart-Mummery QC and Zack Simons* (instructed by *DLA Piper, Birmingham*) for the developer in the first appeal.

*Christopher Young and James Corbet Burcher* (instructed by *Town Legal LLP*) for the developer in the second appeal.

*Hereward Phillpot QC and Richard Honey* (instructed by *Treasury Solicitor*) for the Secretary of State.

The court took time for consideration.

10 May 2017. The following judgments were handed down.

LORD CARNWATH JSC (with whom LORD NEUBERGER OF ABBOTSBURY PSC, LORD CLARKE OF STONE-CUM-EBONY, LORD HODGE JJSC and LORD GILL agreed)

Introduction



1. The appeals relate to the proper interpretation of paragraph 49 of the National Planning Policy Framework (2012) (“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.”

**\*629**

2. The Court of Appeal [2016] PTSR 1315 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 paragraph 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 [2015] EWHC 132 (Admin) (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 [2015] EWHC 410 (Admin) (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 2012 (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 **\*630** 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), as amended:

“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) of the 1990 Act reproduces the effect of a provision first seen in the Planning and Compensation Act 1991, section 26 (inserting section 54A into the 1990 Act). 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 of Craighead, at 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 **\*631** touched the well established distinction between the respective roles of the decision-maker and the court (p 1458):

“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.”

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. The 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:

**\*632**

“—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 [footnote 9].

“For *decision-taking* this means [footnote 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 [footnote 9].”

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;

**\*633**

“• 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 (paragraph 215):

“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).”

**\*634**

## 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] PTSR 982 , 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 judgment, 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] 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] PTSR 983 . Lord Reed JSC rejected a submission that the meaning of the development plan \*635 was a matter to be determined solely by the planning authority, subject to rationality. He said, at para 18:

“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.”

He added, however, at para 19, 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.”

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 27 et seq 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 JSC'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 \*636 question which Lord Reed JSC identified as one of textual interpretation, “logically prior” to the exercise of planning judgment (para 21). As he recognised (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* [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.

## 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 Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin) (Lang J). 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 \*637 of housing and therefore is not covered by paragraph 49.” (Original 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* [2014] EWHC 573 (Admin) (“the Barwood Land case”). Ouseley J, at para 46, 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, at para 47, 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, none the less 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) at [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) at [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 \*638 in December 1994. Chapter 3 of the 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 SP29: “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.

**\*639**

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 judgment 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, at paras 13–14:

“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.”

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 \*640 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, at paras 31–32:

“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.”

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 the 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 Ltd 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 \*641 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, at para 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, at para 101:

**\*642**

“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 [2016] PTSR 1315* 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, at para 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 recognises 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 \*643 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.”

50. The court rejected the “narrow” interpretation, advocated by the councils, which it thought “plainly wrong”, at para 34:

“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.”

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, at para 46:

“We must emphasise 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 disappplied ...”

52. In relation to the Yoxford site, the court agreed with Supperstone J that the inspector had wrongly applied the erroneous “narrow” interpretation. Policies SP19, SP27 and SP29, 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 \*644 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) at [42] et seq.)

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 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 judgment, 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 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”.

*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 \*645 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 judgment 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 \*646 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. SP19 (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 SP19 and SP27 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.

\*647

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. Para 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 judgment”, 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 redetermined.

#### Conclusion

69. For these reasons I would dismiss both appeals.

LORD GILL (with whom LORD NEUBERGER OF ABBOTSBURY PSC, LORD CLARKE OF STONE-CUM-EBONY and LORD HODGE JJSC agreed)

70. I agree with Lord Carnwath JSC'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.

**\*648**

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] PTSR 983 Lord Reed JSC 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: para 18. The proper context, in my view, is provided by the overriding 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 JSC, 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, paragraph 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 <sup>\*649</sup> 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 to 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 unmistakable.

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 judgment, at para 23, 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. 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. <sup>\*650</sup> 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 Green Belt, 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 JSC 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 JSC, 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.

*Appeals dismissed.*

*Diana Procter, Barrister \*651*

## Footnotes

- 1 Town and Country Planning Act 199, s 70(2) , as amended: “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 ... (b) any local finance considerations, so far as material to the application, and (c) any other material considerations.”
- 2 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.”
- 3 National Planning Policy Framework, para 14: see post,

para 12. Para 47: see post, para  
15. Para 49: see post, para 1.

(c) Incorporated Council of Law Reporting for England & Wales