

Queen's Bench Division

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

[2016] EWHC 571 (Admin)

2016 March 9; 16

Jay J

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*Planning — Development — Sustainable development — Inspector allowing appeal against local planning authority's refusal of planning permission — Whether proposal constituting sustainable development — Correct approach to "presumption in favour of sustainable development" — National Planning Policy Framework 2012, para 14*

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Para 14 of the National Planning Policy Framework 2012 ("NPPF") provides:

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

"For *decision-taking* this means: (footnote 10: unless material considerations indicate otherwise)

- approving development proposals that accord with the development plan without delay; and
- where the development plan is absent, silent or relevant policies are out of date, granting permission unless: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: for example, those policies relating to . . . land designated as Green Belt . . .)."

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The local planning authority refused an application by the developer for outline planning permission for up to 60 dwellings on a site, on the ground that it constituted unsustainable development within the open countryside, contrary to two local plan policies and to para 14 of the NPPF, which provided a presumption in favour of sustainable development. On the developer's appeal to an inspector appointed by the Secretary of State, the planning authority conceded that it did not have a five-year supply of housing land, with the result that its local plan policies were out of date. The inspector concluded that the sustainability of the proposed development was to be judged by a positively weighted balancing of the benefits and adverse impacts against the policies of the NPPF as a whole. He considered that apart from some very limited harm to rural character, the environmental dimension of sustainable development would largely be addressed, that when assessed against the policies of the NPPF as a whole the adverse impacts of the proposed development would not significantly and demonstrably outweigh the benefits, and that the proposal was to be regarded as sustainable development to which the presumption in the NPPF applied. He accordingly allowed the developer's appeal. The local authority applied under section 288 of the Town and Country Planning Act 1990 for an order quashing the inspector's decision, contending that the inspector's approach to the issue of sustainable development in para 14 of the NPPF was legally flawed in that, inter alia, para 14 only applied to development which the decision-maker had already assessed as sustainable.

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On the application—

*Held*, refusing the application, that where a development plan was absent, silent or as here out of date, the last bullet point of para 14 of the NPPF provided that the

- A proposal under scrutiny should be approved as sustainable development unless, according to the first indent/limb, the adverse impacts clearly and significantly outweighed the benefits of the proposal; that the presumption in favour of sustainable development was a rebuttable presumption which would only yield in the face of significant and demonstrable adverse impacts; that the stronger the planning benefits were assessed to be, the more tenaciously the presumption would operate and the harder it would be to displace it; that there was no question of a prior or extrinsic assessment of sustainability of development before applying the presumption in para 14 but, rather, only by obeying the processes mandated by para 14 would a decision-maker know whether a proposal was sustainable or not; and that, accordingly, the inspector's decision betrayed no error of approach (post, paras 10, 19–23, 25, 39).

- Dicta* of Lang J in *William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin) at [37] and *Dartford Borough Council v Secretary of State for Communities and Local Government* [2015] 1 P & CR 2 considered.

The following cases are referred to in the judgment:

- Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin)
- Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 892 (Admin)
- Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263, CA
- Colman v Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin)
- Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin)
- Dartford Borough Council v Secretary of State for Communities and Local Government* [2014] EWHC 2636 (Admin); [2015] 1 P & CR 2
- Exeter City Council v Secretary of State for Communities and Local Government* [2015] EWHC 1663 (Admin)
- Malvern Hills District Council v Secretary of State for Communities and Local Government* [2015] EWHC 2244 (Admin)
- Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) 57 P & CR 306, CA
- Stratford-on-Avon District Council v Secretary of State for Communities and Local Government* [2013] EWHC 2074 (Admin); [2014] JPL 104
- Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] UKSC 13; [2012] PTSR 983, SC(Sc)
- Tewkesbury Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 286 (Admin); [2013] LGR 399
- Wenman v Secretary of State for Communities and Local Government* [2015] EWHC 925 (Admin)
- William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin)

The following additional cases were cited in argument:

- Bolton Metropolitan Borough Council v Secretary of State for the Environment* (1990) 61 P & CR 343, CA
- Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2015] EWHC 410 (Admin)
- Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2016] EWHC 694 (Admin)

- City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447; [1998] 1 All ER 174, HL(Sc) A
- Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 132 (Admin)
- 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 (*Mount Cook Land Ltd v Westminster City Council* [2003] EWCA Civ 1346; [2004] 2 P & CR 22, CA) B
- South Bucks District Council v Porter (No 2)* [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)
- South Lakeland District Council v Secretary of State for the Environment* [1992] 2 AC 141; [1992] 2 WLR 204; [1992] 1 All ER 573; 90 LGR 201, HL(E)
- South Somerset District Council v Secretary of State for the Environment* (1992) 66 P & CR 83, CA C

**APPLICATION** under section 288 of the Town and Country Planning Act 1990

By a decision letter dated 7 September 2015, Brendan Lyons, an inspector appointed by the Secretary of State for Communities and Local Government, allowed an appeal by the developer, Renew Land Developments Ltd, against the decision of the local planning authority, Cheshire East Borough Council, to refuse the developer’s application for outline planning permission for up to 60 dwellings with associated car parking, roads and landscaped open space on land at Kents Green Farm, Kents Green Lane, Haslington, Crewe. On 19 September 2015 the local planning authority applied for an order quashing the inspector’s decision under section 288 of the Town and Country Planning Act 1990 on the ground that the inspector, by adopting the proposition that the presumption only applied to development that was sustainable and at the same time asserting that the presumption was determinative of whether the development was sustainable or not, had approached the question of whether the development constituted “sustainable development”, to which the presumption in favour of sustainable development in para 14 of the National Planning Policy Framework 2012 applied, in a manner that was circular and legally flawed. The developer was served as an interested party. D E F

The facts are stated in the judgment, post, paras 3–9.

*John Hunter* (instructed by *Sharpe Pritchard*) for the local planning authority.

*Richard Honey* (instructed by *Treasury Solicitor*) for the Secretary of State. G

*Jeremy Cahill QC* and *James Corbet Burcher* (instructed by *Irwin Mitchell LLP*) for the developer.

The court took time for consideration.

16 March 2016. JAY J handed down the following judgment. H

### *Introduction*

1 This is an application brought by Cheshire East Borough Council (“the claimant”) under section 288 of the Town and Country Planning Act 1990 for an order quashing the decision of the defendant’s inspector given

A on 7 September 2015 allowing the interested party's appeal against the claimant's refusal of outline planning permission for up to 60 dwellings with associated car parking, roads and landscaped open space on land at Kents Green Farm, Kents Green Lane, Haslington, Crewe.

B 2 The main issue in this application is whether the inspector's approach to the issue of "sustainable development" within para 14 of the National Policy Planning Framework ("NPPF") was legally flawed. As a subsidiary point, the defendant and the interested party contend that, even if it was, this made no difference to the outcome.

### *Essential factual background*

C 3 The interested party's application for planning permission was refused by the claimant on 17 March 2014, on the grounds that it constituted unsustainable development within the open countryside, contrary to two policies within the Crewe and Nantwich Local Plan (constituting the development plan for these purposes) and to principles in the NPPF intended to protect such areas from inappropriate development. On 19–20 May 2015 the interested party's appeal was heard by way of public inquiry, and the inspector's decision letter was issued on 7 September 2015.

D 4 The main issue in the appeal before the inspector was whether the interested party's proposal would amount to a sustainable form of development in accordance with national and local policy, having particular regard to its location on land allocated as open countryside.

E 5 The claimant conceded that it did not have a five-year supply of housing land. The effect of para 49 of the NPPF was that local plan policies, promulgated in 2005, were out of date. The essence of the claimant's objection to the development was that it would harm the rural character of the area.

F 6 The inspector's reasoning process anterior to his addressing the main issue (and which I do not understand to be controversial) was: (i) the development would not comply with the local plan—this was a relevant consideration, even though the relevant policies were out of date; (ii) the effect of section 38(6) of the Planning and Compulsory Purchase Act 2004 was that permission should be refused unless material considerations were found to outweigh the conflict with the development plan; (iii) the considerations of the greatest materiality for present purposes comprised those set out in national policy, namely the NPPF; (iv) the case effectively G hinged on the issue of "sustainable development" within the meaning of para 14 of the NPPF.

H 7 There was a dispute before the inspector as to the correct approach to para 14 of the NPPF. The parties before me seek to take forensic points as to exactly how their and their respective opponents' cases were advanced, but in my view that is an arid line of inquiry. It is apparent from the decision letter that the claimant was contending that "some form of separate assessment of the sustainability of the proposed development is required before deciding whether para 14 is engaged", whereas the interested party was contending that there was no requirement to undertake any such form of free-standing assessment, and that para 14 "itself provides a sufficient basis to decide whether proposed development would be sustainable".

The inspector noted that the interested party's submission had the support of the defendant. A

8 The inspector favoured the interested party's submissions on this issue. His core reasoning in his decision letter is:

"No prior or parallel assessment is needed, but the sustainability of the proposed development is to be judged by a positively weighted balancing of the benefits and adverse impacts against the policies of the NPPF as a whole." (Para 20.) B

"For the reasons set out above, I consider that apart from some very limited harm to rural character, the environmental dimension of sustainable development would largely be addressed. When assessed against the policies of the NPPF as a whole, the adverse impacts of the proposed development would not significantly and demonstrably outweigh the benefits. The proposal must therefore be regarded as sustainable development, to which the presumption in favour set by the NPPF would apply." (Para 40.) C

"For the reasons set out above, I conclude that the proposal would be contrary in principle to [local plan] policies NE2 and RES5, but that the conflict would be outweighed by other material considerations. These are principally the contribution that the proposal would make to meeting unmet need for market and affordable housing that arises from the borough's lack of an adequate housing supply, and the very limited harm that it would cause, thereby benefitting from the presumption in favour of sustainable development set out by the NPPF." (Para 56.) D

9 En route to the second and third of these conclusions, the inspector had examined the planning merits of the case within the framework of the three "dimensions" of the concept of sustainable development. He concluded that the economic and social dimensions would clearly be met, and that the harm to the environmental dimension was not considerable (e.g. "some loss of rural character"; "the environmental dimension would largely be addressed"). There is no challenge in these proceedings to these exercises and expressions of planning judgment. E

### *The legal framework*

10 The concept of "sustainable development" is the bedrock of the NPPF. It is a concept very familiar to those practising and working in this field. I think that it must be obvious from a cursory examination of the concept that it is seeking to secure the attainment of a proper balance between different factors pulling in different directions. In relation to the open countryside, it must also be obvious that the factors potentially telling against development include the ecological, aesthetic and environmental, whereas—in an age of increasing demand for affordable housing—there may be a range of economic, demographic and social factors telling the other way. Thus, or so the framers of the NPPF have conceptualised the matter, development which balances these factors in the right way is "sustainable development". G

11 It is unnecessary for present purposes to cite extensively from the NPPF. Although paras 6, 7 and 8 are also relevant, the key provision is para 14, which provides: H

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

“For *decision-taking* this means:

- B • 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
  - C —specific policies in this Framework indicate development should be restricted.”

12 In the text of para 14, there is footnote 10 after the words, “for decision-taking this means”; the footnote states: “Unless material considerations indicate otherwise.” After the words, “should be restricted”, there is footnote 9 which provides a number of examples, including policies relating to Green Belt.

D 13 In their skeleton arguments the parties have taken time to remind me of familiar principles of planning law applicable to this section 288 application. I naturally take these into account, but generally refrain from setting them out. However, this abstinence should yield to these three exceptions. First, that the court should deploy a straightforward and down-to-earth reading of the inspector’s decision letter “without excessive legalism”: see *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263. Secondly, that the proper interpretation of the NPPF is an objective question of law: see *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983. Thirdly, that an application of this type should be refused if, having found legal error by the inspector, I were satisfied that there is no real possibility that the inspector’s decision F might otherwise have been different: see the *Tesco Stores Ltd* case.

#### *The claimant’s case*

G 14 Mr John Hunter’s core contention on behalf of the claimant was that Mr Jeremy Cahill QC for the interested party’s beguiling submissions drew the inspector into error. Mr Hunter’s submission was that para 14 of the NPPF only applies to development which is assessed to be sustainable, and to allow para 14 to define that question is illogical, because it is circular, a misunderstanding of what the policy says, and accordingly an error of law.

H 15 In developing that submission, Mr Hunter pointed out that para 6 of the NPPF makes no reference to para 14. Indeed, it provides that the policies in paras 18–219, taken as a whole, constitute the Government’s view of what sustainable development in the planning system means. Pressed by me to explain where that leaves para 14, Mr Hunter submitted that it is designed to create an enhanced presumption in favour of development which has already been assessed to be sustainable, and/or exists in order presumptively to trump other material considerations. Mr Hunter also pointed to other provisions in the NPPF, such as paras 64, 87, 109, 112 and



144, which he submitted would be unworkable if the defendant's and interested party's cases were correct. A

16 Against that backdrop, Mr Hunter criticised two parts of the inspector's decision letter. First, the reference to "overall assessment" in the final sentence of para 19 ("where policies are out of date an overall assessment under para 14 is required"), which Mr Hunter submitted was based on a misunderstanding of the decision of Lang J in *Wenman v Secretary of State for Communities and Local Government* [2015] EWHC 925 (Admin). Secondly, the inappropriate deductive reasoning inherent in para 40 of the decision letter; and, in particular, the use of the verb "must". B

17 Mr Hunter referred me to a considerable number of first instance decisions in which both the correct and the erroneous approach were, he said, evident. His overarching theme was that the preponderance of authority favoured his argument. C

### *Discussion and conclusions*

18 My point of departure is not an analysis of the first instance decisions to which I was referred but my own approach to paras 6–8 and 14 of the NPPF, assisted as I have been by the submissions of Mr Richard Honey for the defendant and Mr Jeremy Cahill for the interested party. D

19 Although there may be cases where sustainable development "jointly and simultaneously" achieves economic, social and environmental gains (as per the optimistic language of para 8 of the NPPF), I have already said that it must be obvious that in most situations there will be somewhat of a trade-off between competing desiderata. It follows that a balance must be struck, but on what basis? In my judgment, the answer is to be found in the language of para 14 of the NPPF. Where the second bullet point applies, because the development plan is absent, silent or relevant policies are out of date, the proposal under scrutiny will be sustainable development, and therefore should be approved, unless any adverse impacts significantly and demonstrably outweigh the benefits. E

20 In the absence of para 14, decision-makers would be unable to decide how tensions between the competing desiderata should be reconciled. If, for example, the economic and social merits only slightly outweighed the environmental, what then? The answer is not to be found in paras 6–8. The framers of the NPPF rightly thought that guidance in this regard was necessary. The guidance they have provided in the form of para 14 is to say that the proposal should be approved as sustainable development unless the adverse impacts clearly and significantly outweighed the benefits. F

21 On this approach, the effect of para 14 is that proposals which would otherwise have been refused because their planning merits were finely balanced should be approved—subject to the first indent of the second bullet point being made out. Another way of putting the matter is that the scales, or the balance, is weighted, loaded or tilted in favour of the proposal. This is what the presumption in favour of sustainable development means: it is a rebuttable presumption, although will only yield in the face of significant and demonstrable adverse impacts. G

22 In practice, there will be questions of fact and degree. If, for example, the planning advantages are assessed to be non-existent, the presumption is likely to be easily displaced. The stronger the planning H

A benefits are assessed to be, the more tenaciously the presumption will operate and the harder it will be to displace it.

23 In my judgment, this is not, and cannot be, a question of assessing whether the proposal amounts to sustainable development before applying the presumption within para 14. This is not what para 14 says, and in my view would be unworkable. Rather, para 14 teaches decision-makers how to decide whether the proposal, if approved, would constitute sustainable development.

B 24 I do not fully understand the reference in some of the authorities to sequential decision-making or to decisions being made about the sustainability of development somewhere along the notional road. The whole point of para 14 is to lead decision-makers along a tightly defined and constrained path, at the end of which the decision must be: is this sustainable development or not? If what is being said in these authorities is that decisions about the *weight* to be given to each of the para 7 NPPF dimensions should be made before para 14 is considered and applied, then I would have no difficulty at all, because these are logically prior planning judgments which fall to be made on all the evidence.

C 25 Nor do I believe that it is necessarily helpful to say that para 14 does not apply to development which is not sustainable. If, having applied the para 14 algorithm, that is the conclusion which is reached, I have no difficulty with this formulation. However, a decision-maker will only know if a proposal is sustainable or not by obeying the processes mandated by the paragraph. An integral part of the process is a positive weighting in favour of sustainable development in the sense that the proposal will be assessed as such unless the planning harm clearly and significantly outweighs the planning gain.

D 26 In short, para 14 is about process, not outcome. There is no circularity in the foregoing analysis, because if the adverse impacts do significantly and demonstrably outweigh the benefits (when assessed against the rest of the NPPF), then the proposal will not amount to sustainable development, and will be refused. Indeed, Mr Hunter's argument seems to me to place an almost insurmountable hurdle against development being sustainable, because he fails to explain how the concept should be applied outside the scope of para 14. It is a freewheeling exercise of discretion without parameters. Moreover, I agree with Mr Honey that it is difficult to understand on what basis para 14 would have any practical utility if it only applied to cases where the development had already been found to be sustainable, and to my mind Mr Hunter's "enhanced presumption" is a completely incoherent and unworkable concept, also one being nowhere to be found in the policy wording.

E 27 Further, the possibility of a prior or extrinsic assessment of sustainable development is quite inconsistent with the first bullet point in para 14. No explanation was provided by Mr Hunter as to how and why the two bullet points might work differently.

F 28 Mr Honey made the good point that the meaning of sustainable development is not rigidly to be determined solely by reference to the indented methodology. As I have pointed out, it is always subject to material considerations indicating otherwise, thereby introducing an element of flexibility both ways. If, taking just one example, the impact or harm is substantial but not such as significantly and demonstrably to outweigh



the benefits, then the decision-taker has sufficient flexibility to refuse permission, provided of course that the other material considerations, if any, are carefully defined and assessed. A

29 This point disposes of Mr Hunter’s argument based on later provisions of the NPPF, but his argument is also defeated by the application of the second indent in para 14. If, for example, the proposal falls within one of the specific policies restricting development, then the presumption either is very readily rebutted, or its effect is heavily diluted to reflect the precise provisions of the restrictive policy in question. B

30 Although I would agree that para 6 of the NPPF does not mention para 14, that latter paragraph is highlighted in the text and, furthermore, must refer back to paras 6–8 on account of the clause “when assessed against the policies in this Framework taken as a whole”. So, para 14 is the driver to correct decision-taking, not paras 6–8. C

31 I am not persuaded that it is necessary to conduct an exhaustive analysis of non-binding, first instance authority. I confine myself to two sets of observations.

32 First, my approach is consistent with, if not supported by, the decisions of Hickinbottom J in *Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2013] EWHC 892 (Admin) at [16], *Stratford-on-Avon District Council v Secretary of State for Communities and Local Government* [2014] JPL 104, para 12, *Exeter City Council v Secretary of State for Communities and Local Government* [2015] EWHC 1663 (Admin) at [15] and *Malvern Hills District Council v Secretary of State for Communities and Local Government* [2015] EWHC 2244 (Admin) at [10] and [13]; of Lindblom J in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2014] EWHC 754 (Admin) at [44] and *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) at [72]–[73]; of Males J in *Tewkesbury Borough Council v Secretary of State for Communities and Local Government* [2013] LGR 399, para 14; and of Kenneth Parker J in *Colman v Secretary of State for Communities and Local Government* [2013] EWHC 1138 (Admin) at [52]. D E

33 Secondly, Mr Hunter placed particular reliance on the decision of Lang J in *William Davis Ltd v Secretary of State for Communities and Local Government* [2013] EWHC 3058 (Admin). In that case the developer was appealing the inspector’s finding that the proposal was not sustainable development, notwithstanding the presumption. The following two sentences in para 37 of Lang J’s judgment have been subjected to much scrutiny: F G

“I accept Mr Maurici’s submission that para 14 NPPF only applies to a scheme which has been found to be sustainable development. It would be contrary to the fundamental principles of NPPF if the presumption in favour of development in para 14 applied equally to sustainable development and non-sustainable development.”

34 The only way I can interpret these sentences is that Lang J was holding that the determination of the issue of sustainable development was a matter anterior to, or at least independent from, para 14 of the NPPF. Mr Cahill had submitted to her that sustainable development should not be taken as “a preliminary issue”. The final sentence from this citation can be H

A read in two possible ways, although its more comfortable interpretation is that para 14 applies after a planning judgment has been made. If my interpretation of what Lang J meant is correct, then I must record my respectful disagreement with her. I should add that in my view para 37 was not essential to her decision.

B 35 The *William Davis Ltd* case was analysed by Patterson J in *Dartford Borough Council v Secretary of State for Communities and Local Government* [2015] 1 P & CR 2. At paras 52 and 54 of her judgment:

“52. In my judgment, the claimant’s argument depends on elevating the dicta in *William Davis* (supra) into a formulaic approach to be followed in a step by step sequential order in a decision letter. I reject that approach.”

C “54. In my judgment the claimant’s approach is excessively legalistic. When the decision letter is read as a whole it is clear that the inspector reached an overall conclusion, having evaluated the three aspects of sustainable development, that the positive attributes of the development outweighed the negative. That is what is required to reach an eventual judgment on the sustainability of the development proposal. As was recognised in the case of *William Davis* (supra), para 38, the ultimate decision on sustainability is one of planning judgment. There is nothing in NPPF, whether at para 7 or para 14 which sets out a sequential approach of the sort that Mr Whale, on behalf of the claimant, seeks to read into the judgment of Lang J at para 37. I agree with Lang J in her conclusion that it would be contrary to fundamental principles of the NPPF if the presumption in favour of development, in para 14, applied equally to sustainable and non-sustainable development. To do so would make a nonsense of Government policy on sustainable development.”

D 36 I am not convinced that it would be fruitful for me to seek to reach conclusions about which parts of Lang J’s judgment in the *William Davis Ltd* case Patterson J was assenting to and which parts she was not, at least impliedly. It does seem clear to me that, if Patterson J’s analysis of para 14 of the NPPF is the same as mine, then in the penultimate sentence of the foregoing citation she has interpreted Lang J’s judgment differently to me.

E 37 Finally, I should make clear that in my view paras 74 and 79 of Lang J’s judgment in *Wenman’s case* [2015] EWHC 925 (Admin) seem to be (unsurprisingly I might add) to be wholly consistent with her earlier decision in the *William Davis Ltd* case, save that on this occasion she is making explicit that the free-standing assessment of sustainability being conducted outwith para 14 of the NPPF should be undertaken “at an appropriate stage”. It follows that Lang J and I remain not ad idem on this point.

G 38 Having established the correct legal parameters, I turn now to address the inspector’s decision letter in the instant case.

H 39 In my judgment, para 20 of the decision letter is clearly correct, neatly and appositely characterising the approach mandated by para 14 of the NPPF. By parity of reasoning, the final sentence of para 19 of the decision letter is correct, because the reference to “an overall assessment” is to one carried out according to the algorithm prescribed in para 14, and not somehow extraneous to it.

40 I entirely reject Mr Hunter’s submission that the use of the verb “must” in para 40 of the decision letter betrays an erroneous approach.

All that the inspector is saying is that an application of the presumption in para 14 of the NPPF to the planning judgments he has made on the three dimensions leads inexorably to the conclusion that this is sustainable development. This was because the adverse impacts of the proposed development would not, in his view, significantly and demonstrably outweigh the benefits.

41 Moreover, it is clear from the inspector's assessment of the weight to be given to each of the three dimensions that he was in fact of the view that the adverse impacts would not be significantly harmful: see paras 29–32 and the first sentence of para 40 of the decision letter. It follows, in my judgment, that even if the assessment of the sustainability of the proposal should be carried out independently from para 14 of the NPPF, and the tilted balance contained within it, the preponderance of planning considerations favoured this development. Mr Hunter did not explain by what rules and principles the balancing exercise should be performed if para 14 were excluded from account, but it seems to me that he could not do better than a simple balance of probabilities approach, with the onus on the developer to discharge the burden. Ultimately, I think, Mr Hunter accepted this. On the inspector's express findings, the interested party would have been successful even on that approach, applying either the test in the *Tesco Stores Ltd* case [2012] PTSR 983 or the perhaps slightly narrower test in *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* (1988) P & CR 306.

42 This application under section 288 of the Town and Country Planning Act 1990 must be refused.

*Application refused.*

JOSHUA TENG, Barrister

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