Court of Appeal

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

[2017] EWCA Civ 893

2017 May 25;
June 30

Gross, Underhill, Lindblom LJJ

Planning — Development — Sustainable development — Inspector allowing appeal against local planning authority's refusal of planning permission for residential development — Inspector concluding proposal contrary to development plan but presumption in favour of sustainable development being material consideration favouring grant — Scope of "presumption in favour of sustainable development" in national framework policy — Whether inspector adopting proper approach to determination — Whether planning permission lawfully granted — Planning and Compulsory Purchase Act 2004 (c 5), s 38(6) — National Planning Policy Framework (2012), para 14

The local planning authority refused the developer planning permission for a residential development with associated landscaping, infrastructure and other ancillary works. On the developer's appeal, the Secretary of State's planning inspector concluded that the proposed development was in conflict with the local plan so that paragraph 14 of the National Planning Policy Framework ("NPPF")[1] did not apply. Nevertheless, having considered the policies of the NPPF as a whole, the inspector concluded that the proposed development constituted "sustainable development" and that the presumption in favour of sustainable development applied outwith paragraph 14, that being a material consideration capable of justifying a grant of permission pursuant to section 38(6) of the Planning and Compulsory Purchase Act 2004[2]. The inspector therefore allowed the appeal and granted planning permission. Allowing the planning authority's claim for a statutory review of the inspector's decision, the judge held that the inspector had erred in his approach and that the decision granting permission would be quashed.

On the developer's appeal—

Held, dismissing the appeal, that the inspector had erred in law in finding that a proposal which did not, as he accepted, gain the "presumption in favour of sustainable development" under the policy in paragraph 14 of the NPPF could nevertheless acquire it elsewhere in the NPPF, and in accepting that there was a wider "presumption in favour of sustainable development" beyond that described in paragraph 14 of the NPPF; that the inspector's decision constituted a misinterpretation and unlawful application of NPPF policy, by failing to have regard to a material consideration or by having regard to an immaterial consideration; that it could not be said that the decision would inevitably have been the same, or even that it was highly likely that it would not have been substantially different, but for the error; and that, accordingly, the court's discretion was not to be exercised against granting relief (post, paras 47, 48, 52, 53, 54, 55).

Cheshire East Borough Council v Secretary of State for Communities and Local Government [2016] PTSR 1052 and *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2017] PTSR 408 applied.

[1] National Planning Policy Framework, para 14: see post, para 17.

[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."

A *Wychavon District Council v Secretary of State for Communities and Local Government* [2016] PTSR 675 not followed.

Per curiam. The court should adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is
B essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme (post, paras 50, 54, 55).

Dicta of Holgate J in *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2017] PTSR 408, paras 140–143, approved.

C Decision of Green J [2016] EWHC 2973 (Admin); [2017] PTSR 386 affirmed.

The following cases are referred to in the judgment of Lindblom LJ:

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 Test Valley Borough Council [2016] EWHC 3028 (Admin); [2017] PTSR 408

D *BDW Trading Ltd (trading as David Wilson Homes (Central, Mercia and West Midlands)) v Secretary of State for Communities and Local Government* [2016] EWCA Civ 493; [2017] PTSR 1337, CA

Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government [2014] EWHC 754 (Admin); [2017] PTSR 1283

Cheshire East Borough Council v Secretary of State for Communities and Local Government [2016] EWHC 571 (Admin); [2016] PTSR 1052

E *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)

Goodman Logistics Developments (UK) Ltd v Secretary of State for Communities and Local Government [2017] EWHC 947 (Admin); [2017] JPL 1115

Hopkins Homes Ltd v Secretary of State for Communities and Local Government
F [2016] EWCA Civ 168; [2016] PTSR 1315; [2017] 1 All ER 1011, CA; [2017] UKSC 37; [2017] PTSR 623; [2017] 1 WLR 1865, SC(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 (Watermead Parish Council) v Aylesbury Vale District Council [2017] EWCA Civ 152; [2018] PTSR 43, CA

Wychavon District Council v Secretary of State for Communities and Local
G *Government* [2016] EWHC 592 (Admin); [2016] PTSR 675

The following additional case was cited in argument:

South Bucks District Council v Porter (No 2) [2004] UKHL 33; [2004] 1 WLR 1953; [2004] 4 All ER 775, HL(E)

The following additional cases, although not cited, were referred to in the skeleton
H arguments:

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

Simplex GE (Holdings) v Secretary of State for the Environment [2017] PTSR 1041; (1988) 57 P & CR 306, CA

Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening) [2012] UKSC 13; [2012] PTSR 983, SC(Sc)
Thorpe-Smith v Secretary of State for Communities and Local Government [2017] EWHC 356 (Admin)

APPEAL from Green J

By a CPR Pt 8 claim form the local planning authority, East Staffordshire Borough Council, sought a statutory review, pursuant to section 288 of the Town and Country Planning Act 1990, of the decision dated 29 April 2016 of an inspector appointed by the Secretary of State for Communities and Local Government allowing an appeal by the second defendant developer, Barwood Strategic Land II llp, against a refusal of planning permission for a proposed development within its area. By an acknowledgement of service, the Secretary of State indicated that he did not contest the challenge and considered that the permission ought to be quashed. By order dated 23 November 2016 Green J [2017] PTSR 386 allowed the claim and quashed the grant of planning permission.

By an appellant's notice filed on 12 December 2016, and pursuant to permission granted by the judge, the developer appealed on the five grounds referred to post, para 6. The main issues arising for determination on the appeal were: (i) whether the inspector had misdirected himself in performing the task set for him under section 38(6) of the Planning and Compulsory Purchase Act 2004 by mistaking the true meaning and scope of government policy for the "presumption in favour of sustainable development" in the National Planning Policy Framework; and (ii) if the inspector had erred in law, whether the court should exercise its discretion not to quash his decision.

The facts are stated in the judgment of Lindblom LJ, post, paras 2–5.

Satnam Choongh and *James Corbet Burcher* (instructed by *Bird Wilford & Sale Solicitors, Loughborough*) for the developer.

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

Gwion Lewis (instructed by *Treasury Solicitor*) for the Secretary of State.

The court took time for consideration.

30 June 2017. The following judgments were handed down.

LINDBLOM LJ

Introduction

1 What is the scope of the "presumption in favour of sustainable development" in the National Planning Policy Framework ("the NPPF")? That is the basic question in this appeal. Judges in the Planning Court have differed in their answer to it. We have the advantage of being able to approach it in the light of the recent decision of the Supreme Court, upholding the decision of this court, in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 623.

2 The appellant, Barwood Strategic Land II llp, appeals against the order of Green J, dated 23 November 2016, allowing the application of the first respondent, East Staffordshire Borough Council, under section 288 of

A the Town and Country Planning Act 1990 for an order to quash the decision of the inspector appointed by the second respondent, the Secretary of State for Communities and Local Government, in a decision letter dated 29 April 2016, allowing Barwood's appeal under section 78 against the council's refusal of outline planning permission for a development of "up to 150 dwellings" on land off Lower Outwoods Road, Burton upon Trent.

B **3** The site of the proposed development is 6·42 hectares of undeveloped land, outside but adjoining the settlement boundary of Burton upon Trent as defined in the East Staffordshire Local Plan 2012–2031. Because it is outside the settlement boundary, it is subject to strategic policy 8 of the local plan, which restricts development, including the development of housing.

4 Barwood's application for planning permission was made on 25 November 2014. The council refused planning permission on 23 July C 2015. The local plan was adopted on 15 October 2015. The section 78 appeal was submitted to the planning inspectorate on 25 January 2016. It was dealt with on the parties' written representations—in which they had the opportunity to deal with the implications for Barwood's appeal of Coulson J's judgment, handed down on 16 March 2016, in *Wychavon District Council v Secretary of State for Communities and Local Government* [2016] PTSR 675, one of the cases in the Planning Court in D which the meaning of the policy for the "presumption in favour of sustainable development" has been considered. In his decision letter the inspector found that the proposal was in conflict with the development plan, but that this conflict was outweighed by other material considerations, and therefore that planning permission should be granted.

5 Green J [2017] PTSR 386 accepted the council's argument— E unopposed and, indeed, supported by the Secretary of State—that in reaching that conclusion the inspector had erred in law. He granted permission to appeal to this court—because, he said, "[the] case involves the relative merits of two contradictory judgments of the High Court".

The issues in the appeal

F **6** There are five grounds of appeal, which raise these questions:

(1) Did the inspector misdirect himself on his duty, under section 38(6) of the Planning and Compulsory Purchase Act 2004, to determine the application for planning permission in accordance with the development plan unless material considerations indicated otherwise (ground 1)?

(2) Were the inspector's reasons for his conclusion on the proposal's conflict with the development plan deficient (ground 2)?

G (3) Did the inspector misdirect himself as to the meaning and scope of the "presumption in favour of sustainable development" by relying on Coulson J's judgment in the *Wychavon* case [2016] PTSR 675, and, in particular, Coulson J's conclusion that the presumption was not circumscribed by the policy in paragraph 14 of the NPPF (ground 3)?

(4) Was the inspector entitled, in any event, to find that the proposal's conflict with the development plan was outweighed by its sustainability H "when assessed against the NPPF as a whole" (ground 4)?

(5) If the inspector did err in law, should the court exercise its discretion not to quash his decision (ground 5)?

7 In the course of argument before us it was agreed that the first four of those five questions are encompassed in a single main issue: whether, as the

Secretary of State invites us to accept, the inspector misdirected himself in performing the task set for him under section 38(6) by mistaking the true meaning and scope of government policy for the "presumption in favour of sustainable development" in the NPPF. The fifth question—discretion—arises only if that main issue is decided in the Secretary of State's favour.

The court's approach to a challenge under section 288 of the 1990 Act

8 The principles which guide the court's approach in challenges brought under section 288 of the 1990 Act are well established. In my first instance judgment in *Bloor Homes East Midlands Ltd v Secretary of State for Communities and Local Government* [2017] PTSR 1283, para 19 I referred to "seven familiar principles". None of those principles are controversial here, but there is one in particular that ought to be kept in mind:

> "(4) Planning policies are not statutory or contractual provisions and should not be construed as if they were. The proper interpretation of planning policy is ultimately a matter of law for the court. The application of relevant policy is for the decision-maker. But statements of policy are to be interpreted objectively by the court in accordance with the language used and in its proper context. A failure properly to understand and apply relevant policy will constitute a failure to have regard to a material consideration, or will amount to having regard to an immaterial consideration: see the judgment of Lord Reed JSC in *Tesco Stores Ltd v Dundee City Council (Asda Stores Ltd intervening)* [2012] PTSR 983, paras 17–22."

9 That principle has now been underscored in observations made by the Supreme Court in the *Hopkins Homes* case [2017] PTSR 623, emphasising the distinction between the interpretation of planning policy and its application. The interpretation of policy will be suitable, in principle, for legal analysis—though only to a degree that depends on the context and content of the policy in question. The role of the court must not be overstated. The application of policy, however, involves an exercise of planning judgment by the planning decision-maker—which is, of course, not for the court: see paras 22–26 of Lord Carnwath JSC's judgment in the Supreme Court, and paras 72–75 of Lord Gill's; and paras 24, 42 and 45 of the judgment of the Court of Appeal [2016] PTSR 1315.

Section 38(6) and the "plan-led system" of development control

10 Section 70(2) of the 1990 Act requires that, in dealing with an application for planning permission, a local planning authority must have regard to the provisions of the development plan, so far as is material to the application, and to any "other material considerations". Section 38(6) of the 2004 Act provides:

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

11 The section 38(6) duty drives the "plan-led" system of development control. It embodies a "presumption in favour of the development plan", as Lord Hope of Craighead described it in his speech in *City of Edinburgh*

Council v Secretary of State for Scotland [1997] 1 WLR 1447, 1449H), and, as Lord Clyde said in the same case at p 1458B, "a priority to be given to the development plan in the determination of planning matters".

12 There is ample authority on the nature of the duty and the effect of the presumption in section 38(6). It has recently been distilled by this court in *BDW Trading Ltd (trading as David Wilson Homes (Central, Mercia and West Midlands)) v Secretary of State for Communities and Local Government* [2017] PTSR 1337 (in paras 19–23 of my judgment, with which Lord Dyson MR and Macur LJ agreed). Of the five points to which I referred there, at para 21, the first and the fifth are worth repeating here:

> "First, the section 38(6) duty is a duty to make a decision (or 'determination') by giving the development plan priority, but weighing all other material considerations in the balance to establish whether the decision should be made, as the statute presumes, in accordance with the plan: see Lord Clyde's speech in the *City of Edinburgh Council* case [1997] 1 WLR 1447, [1458D –1459A and 1459D–G] . . . And fifthly, the duty under section 38(6) is not displaced or modified by government policy in the NPPF. Such policy does not have the force of statute. Nor does it have the same status in the statutory scheme as the development plan. Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, its relevance to a planning decision is as one of the other material considerations to be weighed in the balance: see *R (Hampton Bishop Parish Council) v Herefordshire Council* [2015] 1 WLR 2367, para 30, per Richards LJ."

The NPPF as one of the "other material considerations"

13 The NPPF is the Government's planning policy for England. It does not have the force of statute, and ought not to be treated as if it did. Indeed, as one might expect, it acknowledges and reinforces the statutory presumption in favour of the development plan, and it also explicitly recognises and emphasises its own place in the plan-led system of development control. Its "Introduction" acknowledges that "[planning] law requires that applications for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise", and that "[the NPPF] must be taken into account in the preparation of local and neighbourhood plans, and is a material consideration in planning decisions". Paragraph 12 recognises 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, correctly, as "guidance for local planning authorities and decision-takers", which, in the context of development control decision-making, is "a material consideration in determining applications". Paragraph 215, in "Annex 1: Implementation", says that "due weight should be given to relevant policies in existing plans according to their degree of consistency with [the NPPF] (the closer the policies in the plan to the policies in [the NPPF], the greater the weight that may be given)", but this too is guidance for decision-makers, without the force of statute behind it.

14 Under section 70(2) of the 1990 Act and section 38(6) of the 2004 Act, government policy in the NPPF is a material consideration external to the development plan: see the first instance judgment in *R (Cala Homes (South) Ltd) v Secretary of State for Communities and Local Government*

[2011] 1 P & CR 22, para 50. Policy in the NPPF, including the "presumption in favour of sustainable development" in paragraph 14 operates within the statutory framework for the making of decisions on applications for planning permission—as paragraph 12 of the NPPF acknowledges. And it is for the decision-maker to decide what weight should be given to NPPF policy in so far as it is relevant to the proposal. Because this is government policy it is likely to command significant weight, but the court will not intervene unless the weight given to it by the decision-maker can be said to be unreasonable in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223): see the *Bloor Homes* case [2017] PTSR 1283, para 46 and *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) at [62] and [70].

The "presumption in favour of sustainable development"

15 In the "Ministerial foreword" to the NPPF, the Minister for Planning said: "Development that is sustainable should go ahead, without delay—a presumption in favour of sustainable development that is the basis for every plan, and every decision."

16 In the part of the NPPF entitled "Achieving sustainable development", paragraph 6 says that "[the] purpose of the planning system is to contribute to the achievement of sustainable development", and that "[the] policies in paragraphs 18–219, taken as a whole, constitute the Government's view of what sustainable development in England means in practice for the planning system". Paragraph 7 identifies "three dimensions to sustainable development: economic, social and environmental". Paragraph 8 advises that "to achieve sustainable development, economic, social and environmental gains should be sought jointly and simultaneously through the planning system". Paragraph 12 says that "[proposed] development that accords with an up to date local plan should be approved, and proposed development that conflicts should be refused unless other material considerations indicate otherwise". It adds that "[it] is highly desirable that local planning authorities should have an up to date plan in place".

17 Paragraph 14 states:

> "At the heart of the National Planning Policy Framework is a presumption in favour of sustainable development, which should be seen as a golden thread running through both plan-making and decision-taking.
>
> "For plan-making this means that:
>
> "• local planning authorities should positively seek opportunities to meet the development needs of their area;
>
> "• Local Plans should meet objectively assessed needs, with sufficient flexibility to adapt to rapid change, unless:
>
> "—any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this Framework taken as a whole;
>
> "—specific policies in this Framework indicate development should be restricted.
>
> "For decision-taking this means:
>
> "• approving development proposals that accord with the development plan without delay; and

A "• 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."

B A footnote to the reference to "specific policies"—footnote 9—which is in the same terms for the policy on "plan-making" and "decision-taking", gives relevant examples:

"For example, those policies relating to sites under the Birds and Habitats Directives (see paragraph 119) and/or designated as Sites of
C 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."

There is also a footnote—footnote 10—to the clause "For decision-taking this means", which says: "Unless material considerations indicate otherwise."

D **18** Under the heading "Delivering sustainable development", 132 paragraphs of the NPPF, paragraphs 18–149, in 13 sections, explain the Government's conception of "sustainable development" in practice.

19 In the part of the NPPF devoted to "Decision-taking", paragraph 197 says that "[in] assessing and determining development proposals, local planning authorities should apply the presumption in favour of sustainable development".

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The imperative for an "up to date" local plan

20 Paragraph 17 of the NPPF sets out the "Core planning principles", which "should underpin both plan-making and decision-taking". The first is that "planning should . . . be genuinely plan-led, empowering local people to shape their surroundings, with succinct local and neighbourhood plans
F setting out a positive vision for the future of the area"; that "[plans] should be kept up to date"; and that "[they] should provide a practical framework within which decisions on planning applications can be made with a high degree of predictability and efficiency". That principle is carried through into the part of the NPPF dealing with "Plan-making", where paragraph 157 enjoins local planning authorities to "plan positively" for the development required in their areas, to "allocate sites to promote development and
G flexible use of land, bringing forward new land where necessary", and to "identify land where development would be inappropriate"; and paragraph 159 emphasises that authorities, when preparing local plans, "should have a clear understanding of housing needs in their area".

21 The imperative for local planning authorities to keep their local plans up to date is at the heart of the policies for "delivering a wide choice of
H high quality homes" in paragraphs 47–55 of the NPPF, and in particular the policy in paragraph 49:

"Housing applications should be considered in the context of the presumption in favour of sustainable development. Relevant policies for the supply of housing should not be considered up-to-date if the local

planning authority cannot demonstrate a five-year supply of deliverable housing sites." A

22 Under the Government's policy in the NPPF, a local planning authority's failure to "demonstrate a five-year supply of deliverable housing sites" when a decision is being made on an application for planning permission, or on a subsequent appeal, is not a failure without consequence. That is well illustrated by the recent decision of the Supreme Court, dismissing the appeals of the two local planning authorities (Suffolk Coastal District Council and Cheshire East Borough Council) in the *Hopkins Homes* case [2017] PTSR 623. In summary, there are five basic points to be taken from that decision: B

(1) The "primary purpose" of the policy in paragraph 49 of the NPPF is "simply to act as a trigger to the operation of the "tilted balance" under paragraph 14": see Lord Carnwath JSC's judgment in the Supreme Court [2017] PTSR 623, para 54 and the Court of Appeal's judgment at [2016] PTSR 1315, paras 42–48. C

(2) In a case where "housing policies" are not up to date under paragraph 49, "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". The weight to be given to "[restrictive] policies in the development plan (specific or not)" in such a case "will need to be judged against the needs for development of different kinds (and housing in particular), subject where applicable to the 'tilted balance' ": para 56 of Lord Carnwath JSC's judgment. The operation of the "tilted balance" involves the two specific exceptions relevant to a case in which "the development plan is absent, silent or relevant policies are out of date". As the Secretary of State has expressly acknowledged and emphasised in this appeal, the second of those two exceptions does not "shut out" the "presumption in favour of sustainable development" simply because any of the "specific policies"—of which examples are given in footnote 9—is in play: see *R (Watermead Parish Council) v Aylesbury Vale District Council* [2017] PTSR 43, para 45. Once identified, the specific policy in question has to be applied—and, where that specific policy requires it, planning judgment exercised—before the decision-maker can ascertain whether the "presumption in favour of sustainable development" is available to the proposal in hand: see Lord Carnwath JSC's judgment in the *Hopkins Homes* case [2017] PTSR 623, paras 14, 55, 56 and 59 and Lord Gill's at paras 79 and 85; and the Court of Appeal's judgment [2016] PTSR 1315, paras 26 to 30, 35, 45 and 46. D E F G

(3) The contest between the different interpretations of the policy in the second sentence of paragraph 49—to which Lord Gill referred (in para 81 of his judgment) as a "doctrinal controversy", by contrast with what he called the "real issue" (para 82)—was not decisive of the outcome in either appeal (see paras 62–68 of Lord CarnwathJSC's judgment, and para 86 of Lord Gill's). The Supreme Court favoured the "narrow" interpretation of the policy—in preference to the "wider" understanding maintained by the Government in submissions made on behalf of the Secretary of State, and adopted by the Court of Appeal. But, as Lord Carnwath JSC emphasised, at para 59: H

". . . 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 [in para 45 of its judgment], 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."

(4) The Court of Appeal was "therefore right to look for an approach which shifted the emphasis to the exercise of planning judgement under paragraph 14": see para 60 of Lord Carnwath JSC's judgment, and paras 80–85 of Lord Gill's. To achieve that, it is not necessary to treat restrictive policies—such as policies for the Green Belt or for an Area of Outstanding Natural Beauty—as "notionally 'out of date' "—nor, of course, would one describe such policies in that way "merely because" the housing policies of the plan "fail to meet the NPPF objectives". Any relevant restrictive policy—Lord Carnwath JSC's example was "a recently approved Green Belt policy"—is to be "brought back into paragraph 14 as a specific policy under footnote 9", and "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": see paras 60–61 of Lord Carnwath JSC's judgment; paras 29, 30, 39 and 45–48 of the Court of Appeal's.

(5) As Lord Gill observed at [2017] PTSR 623, para 77, the "message to planning authorities [in paragraph 47 of the NPPF] is unmistakeable". The "obvious constraints on housing development" include, he said, "development plan policies for the preservation of the [Green Belt], and environmental and amenity policies and designations such as those referred to in footnote 9 of paragraph 14", and the "rigid enforcement of such policies may prevent a planning authority from meeting its requirement to meet a five years' supply" (para 79). If an authority "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". In those circumstances, said Lord Gill, it is "reasonable for the guidance [in paragraph 49] to suggest that . . . the development plan policies for the supply of housing, however recent they may be, should not be considered as being up to date" (para 83). In such cases "the focus shifts to other material considerations" and "the wider view of the development plan policies has to be taken" (para 84). And the decision-maker "should . . . be disposed to grant the application unless the presumption [in favour of sustainable development] can be displaced" (para 85).

23 Those five basic points show how the "presumption in favour of sustainable development" in paragraph 14 of the NPPF is engaged and how it is operated in cases where a local planning authority has failed to "demonstrate a five-year supply of deliverable housing sites". But they also provide the context in which the court has to consider the opposite case—such as the one we are dealing with here—in which the authority has done what government policy in the NPPF requires it to do, has put in place

an up to date local plan, and is able to demonstrate the necessary five-year supply. A

The inspector's decision letter

24 In dealing with "Procedural matters", the inspector acknowledged that "[since] the application was determined by the council the saved policies of the East Staffordshire Local Plan relied upon by the council have been replaced by the policies of the East Staffordshire Local Plan 2012–2031", and that he had "determined the appeal on this basis" (para 4). He referred (in para 6) to Coulson J's judgment in the *Wychavon District Council* case [2016] PTSR 675: B

> "After receipt of the appellants' final comments the council submitted further comments. Before they could be returned the appellants responded referring to the presumption in favour of sustainable development and a recent High Court judgment [here there is a footnote referring to Coulson J's judgment in *Wychavon District Council*]. As this judgment was issued in mid March 2016 it was not possible for it to be referred to in the appellants' appeal statement. As a result, I have taken this decision, and the comments received from the council in relation to it, into account in the appeal." C D

25 The "main issue" in the appeal was, the inspector said, "whether new housing in this location would be acceptable, having regard to the principles of sustainable development" (para 7).

26 He went on to say, under the heading "Planning policy and the location of the proposed development", at paras 8–12: E

> "8. Applications for planning permission are determined in accordance with the development plan, unless material considerations indicate otherwise. The development plan for the area in which the appeal site is located includes the East Staffordshire Local Plan 2012–2031 ('local plan'). The majority of the appeal site is located within Outwoods Parish with the site access falling with Horninglow and Eton Parish. As a result, the Outwoods Neighbourhood Plan and the Horninglow and Eton Neighbourhood Plan also form part of the development plan in relation to the site. F
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> "9. The spatial strategy of the local plan encapsulated in strategic policy 2 is to focus development within the settlement boundaries in a hierarchy of main towns. Burton upon Trent is at the top of this hierarchy, followed by strategic villages and then local service villages. Strategic policy 4 identifies housing allocations in the local plan for main towns and villages. Development outside the settlement boundaries is strictly controlled by strategic policy 8. G
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> "10. The appeal site lies next to, but outside, the settlement boundary for Burton upon Trent. As a result, for planning policy purposes it lies within the open countryside where strategic policy 8 strictly controls development. As the proposal would not comply with any of the exceptions set out in this policy and the site is not a strategic allocation in the local plan the scheme would be contrary to strategic polices 2, 4 and 8. In terms of the neighbourhood plans, the location of the proposed development would not be contrary to their policies. H

A "11. The National Planning Policy Framework ('the Framework') is an important material consideration. Paragraph 14 advises that a presumption in favour of sustainable development lies at the heart of the Framework and paragraph 49 advises that housing applications should be considered in this context. In practice this means that proposals which accord with the development plan should be approved without delay. By virtue of the conflict with strategic policies 2, 4 and 8 that advice does not apply here.

B "12. A recently adopted local plan with policies regarding the location of housing and the protection of the countryside exists. As a result, the development plan is not absent or silent in relation to the proposed development. Furthermore, because it is common ground that a five-year housing land supply exists the policies of the local plan relevant to the C supply of housing are not out of date. As a consequence, the planning balance contained within the final bullet point of paragraph 14 of the Framework does not apply to this appeal. Nevertheless, as the recent High Court judgment mentioned in the procedural matters to this decision reiterates, the presumption in favour of sustainable development is a golden thread that runs throughout the Framework. As a result, D where a proposal is contrary to the development plan this presumption is a material consideration that should be taken into account."

27 The inspector then set out his conclusions on the planning merits, topic by topic. As for the "Character and appearance" of the site and its surrounding area, he observed that "whilst it is open, undeveloped countryside the landscape value and sensitivity of the site is low" (para 14), E that the site "will soon be enclosed by built development on three of its four sides" (para 15) and was "largely screened from public view" (para 16), that the development "would be well screened in public views of the site" (para 17) and "would appear as a natural infill development" (para 18), and that its "overall impact on the landscape would be minor and, upon completion, beneficial" (para 19). Under the heading "Local infrastructure F and services", he took into account the benefits of the proposal (paras 20–26). Under the heading "Site access", he noted that the highway authority had no objection to the proposal (para 27). Under the heading "Accessibility and parking", he acknowledged that the site was "within walking distance of some local facilities and services" (para 28), and that the development "would help address problems with on road parking in the area to the benefit of highway safety and the free flow of traffic" (para 30). Under G the heading "Ecology", he found that the proposed development "would enhance biodiversity" (para 31). As for "Other considerations" he said, at para 33:

"The housing scheme would increase the supply of open market dwellings. The site is not needed to provide an adequate supply of deliverable sites. However there is nothing in the Framework to suggest H that the existence of a five-year supply should be regarded as a limit on further development. In terms of affordable housing, there is a significant annual shortfall against need which the proposed development by contributing up to 50 dwellings would help address. Given these considerations, and the fact that levels of housing provision in recent

years have been below annual targets, the provision of affordable housing is a significant social benefit of the proposal." A

28 He went on to say that "the creation of up to 1·64 hectares of open space to which existing local residents and future residents of the proposed scheme would have access" was a "public benefit" to which he attached "some weight" (para 34). He attached "limited weight to the provision of land for a school as a benefit of the scheme" (para 35). He concluded that B the loss of views of "an open undeveloped field" from the rear of existing houses backing on to the appeal site and other houses to the north "would not result in a standard of amenity lower than that sought by the Framework" (para 36).

29 He then drew his assessment together under the heading "Planning balance and overall conclusion", at paras 37–41: C

"37. The proposal would be contrary to strategic policies 2, 4 and 8 of the local plan. Schemes that conflict with the development plan should be refused unless material considerations indicate otherwise. As I have earlier noted the Framework is an important material consideration and the appeal scheme needs to be considered in the context of its presumption in favour of sustainable development. The policies of the Framework as a whole constitute the Government's view of what development means D in practice. There are three dimensions to sustainable development: environmental, economic and social.

"38. In terms of the environment, the harm that would be caused to the character and appearance of the area through the loss of countryside would be limited, well designed development could be delivered and there would be ecological enhancements. Whilst the improvement of parking E and public open space provision would occur primarily in order to mitigate the effects of the development, there would still be some wider public benefits of these improvements.

"39. Socially, new housing, including affordable housing would be provided. Given the significant annual shortfall in affordable housing that exists, and the fact that levels of housing provision in recent years F have been below annual targets, I attach significant weight to this benefit of the proposal. In terms of the provision of land for a primary school, for the reasons I have given earlier I attached limited weight to this as a benefit of the scheme. Economically, the boost to employment and the local economy would be beneficial.

"40. The social and economic benefits, together with the environmental benefits described are significant and of sufficient weight to clearly G outweigh the limited harm that would be caused. As a result, the proposal would represent sustainable development as defined in the Framework. Consequently, the material considerations in this appeal are such that permission should be granted for development that is not in accordance with the development plan.

"41. There is no doubt that there is strong local feeling about this H proposal, as reflected by the objections received at application and appeal stage. I recognise that this decision will be disappointing for local residents and am mindful, in this regard, of the Government's 'localism' agenda. However, even under 'localism', the views of local residents and parish councils, very important though they are, must be balanced against

other considerations. In coming to my conclusions on the issues that have been raised, I have taken full and careful account of all the representations that have been made, which I have balanced against the provisions of the development plan and the Framework. For the reasons set out above, that balance of the various considerations leads me to conclude that the appeal should be allowed."

30 The inspector accordingly allowed the appeal and granted outline planning permission for the proposed development, subject to conditions.

Did the inspector misdirect himself under section 38(6) by misunderstanding the "presumption in favour of sustainable development" in the NPPF?

31 In the *Wychavon District Council* case [2016] PTSR 675, para 41 Coulson J was persuaded that "it is quite wrong to say that a presumption in favour of sustainable development does not exist in the NPPF outside paragraph 14" and, at para 42, that "[paragraph] 14 does not offer a true definition at all; it is instead an explanation of the *effect* of the presumption". Thus, said Coulson J, at paras 43–44:

> "43. . . . Mr Cahill QC rightly points out that, if the claimant was right, the presumption in favour of sustainable development would only apply if the development plan was silent or absent, or if the relevant policies were out-of-date (the requirements that trigger the last part of paragraph 14). That cannot possibly be right; that would be such an important limitation on the 'golden thread' that, if such was the intention of the NPPF, it would say so in the clearest terms.
>
> "44. Where there is a conflict between a proposal and a development plan, the policies within the NPPF, including the oft-repeated presumption in favour of sustainable development, are important material considerations to be weighed against the [statutory] priority of the development plan. In my view, it is as simple as that."

32 A different view was expressed by Jay J in his judgment in *Cheshire East Borough Council v Secretary of State for Communities and Local Government* [2016] PTSR 1052—also handed down, as it happens, on 16 March 2016. Jay J recognised that the concept of "sustainable development" generally implies for a decision-maker the striking of a balance between different considerations, some of which weigh in favour of granting planning permission, others against (paras 10 and 19). The Government's policy as to the striking of that balance is to be found in paragraph 14 of the NPPF, not elsewhere in the NPPF (paras 19–26). Jay J rejected the notion of a "freewheeling exercise of discretion without parameters". He could not see "on what basis paragraph 14 would have any practical utility if it only applied to cases where the development had already been found to be sustainable" (para 26). In his view, paragraph 14 "is the driver to correct decision-taking" (para 30).

33 Those two judgments were before Green J when he heard argument in this case. More recently, in *Trustees of the Barker Mill Estates v Test Valley Borough Council* [2017] PTSR 408, para 116 Holgate J has disagreed with Coulson J's reasoning in the *Wychavon District Council* case [2016] PTSR 675, concluding that "the *presumption* in favour of sustainable development is solely contained within paragraph 14 of the NPPF".

Holgate J went on to amplify that view (in paras 117 to 137). He said, at para 121:

> "para 44 of [Coulson J's judgment in *Wychavon District Council*] overlooks the point that under paragraph 14 of the NPPF the presumption in favour of sustainable development also applies where a proposal accords with the development plan, in which case the developer gets the benefit of both the presumption in section 38(6) and the further 'tilting of the balance' (from paragraph 14)."

No support for the interpretation of the NPPF adopted in the *Wychavon District Council* case was to be found elsewhere in the NPPF ([2017] PTSR 408, paras 122–124 and 128–130), or in relevant case law—including the judgment in the *Crane* case [2015] EWHC 425 (paras 125, 126, 131 and 136). Indeed, the judgment of Jay J in the *Cheshire East Borough Council* case [2016] PTSR 1052 "undermines" it (paras 132–135).

34 Three salient passages in Holgate J's judgment [2017] PTSR 408 are these:

> "126. The reliance placed upon the phrase 'golden thread' in order to justify a wider presumption in favour of sustainable development is wholly misconceived. The term appears only once in the NPPF, that is in paragraph 14. The presumption is seen as a 'golden thread running through plan-making *and* decision-taking' which then leads directly into the parts of paragraph 14 dealing with each of these two subjects in turn. As Lindblom J explained in *Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin) at [73], paragraph 14 does require (in some circumstances) regard to be had to the NPPF 'taken as a whole', referring back to the concept of 'sustainable development' explained in paragraph 6 of the NPPF. But it is one thing to *define* what may amount to sustainable development, it is another to define the circumstances in which a *presumption* in favour of sustainable development will arise. The claimants' reliance upon paragraph 6 of the NPPF and 'the golden thread' erroneously conflates the two, without pointing to anything in the document which could possibly support that interpretation. The cross-reference in paragraph 14 to that definition of sustainable development does not alter the simple point that it is only that paragraph which identifies the circumstances in which the presumption arises (together with the deeming provision in paragraph 49 which itself only has the effect of taking the decision-maker to the presumption in paragraph 14)."
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> "131. . . . It is plain from the above analysis and from authorities such as *Crane's* case [2015] EWHC 425 and [the Court of Appeal's decision in] the *Hopkins Homes Ltd* case [2016] PTSR 1315 that paragraph 14 of the NPPF is not simply an explanation of the effect of the presumption to which it refers. It also defines the circumstances in which the presumption in favour of sustainable development applies, both for the two limbs applicable to plan-making and the two limbs applicable to decision-taking. The [Secretary of State's] analysis of the NPPF, which I accept, relies upon the *substance* of the relevant provisions and does not depend, or place too much emphasis upon, the use of the word 'means' in paragraph 14."

A "136. . . . even if the presumption in paragraph 14 of the NPPF applies, it is none the less necessary to apply section 38(6) of the 2004 Act and evaluate the weight to be given to policies in the development plan (including policies for the supply of housing land which may have been deemed to be 'out of date), and this may result in a refusal of planning permission (as in *Crane's* case)."

B **35** On behalf of the Secretary of State in this appeal, Mr Gwion Lewis has commended that analysis to us as correct, and a true reflection of the Government's intention in the NPPF. And in my view it is right. Three simple points can be taken from it, which I would add to those I have mentioned in paras 8, 9, 13 and 22 above:

(1) The "presumption in favour of sustainable development" in the NPPF, unlike the presumption in favour of the development plan in section 38(6) of
C the 2004 Act, is not a statutory presumption. It is only a presumption of planning policy, which requires of a planning decision-maker an exercise of planning judgment within the balancing exercise mandated under section 38(6) and undertaken in accordance with the principles in the relevant case law: see para 13 above.

(2) Paragraph 14 of the NPPF describes what the "presumption in favour
D of sustainable development" means, explaining in clear and complete terms the circumstances in which, and the way in which, it is intended to operate. The presumption, as described in paragraph 14, is the so-called "golden thread running through both plan-making and decision-taking". There is no other "presumption in favour of sustainable development" in the NPPF, either explicit or implicit, and no other "golden thread".

(3) When the section 38(6) duty is lawfully performed, a development
E which does not earn the "presumption in favour of sustainable development"—and does not, therefore, have the benefit of the "tilted balance" in its favour—may still merit the grant of planning permission. On the other hand, a development which does have the benefit of the "tilted balance" may still be found unacceptable, and planning permission for it refused: see para 22 above. This is the territory of planning judgment, where
F the court will not go except to apply the relevant principles of public law: see paras 8–9 above. The "presumption in favour of sustainable development" is not irrebuttable. Thus, in a case where a proposal for the development of housing is in conflict with a local plan whose policies for the supply of housing are out of date, the decision-maker is left to judge, in the particular circumstances of the case in hand, how much weight should be given to that conflict. The absence of a five-year supply of housing land will not
G necessarily be conclusive in favour of the grant of planning permission. This is not a matter of law. It is a matter of planning judgment: see *Crane's* case [2015] EWHC 425 at [70]–[74].

36 In his judgment in the present case Green J explained, in a carefully constructed analysis, why he disagreed with the view expressed by Coulson J on the scope of the "presumption in favour of sustainable development" in the
H *Wychavon District Council* case [2016] PTSR 675 and agreed with the view expressed by Jay J in the *Cheshire East Borough Council* case [2016] PTSR 1052: [2017] PTSR 386, paras 21–40. He went on to identify three errors in the inspector's decision letter: first, as he put it, the "[incorrect] resurrection of the presumption [in favour of sustainable development]" (paras 42–43); second, "[the] omission of any balancing exercise taking into account the

reasons why the proposed development was inconsistent with the local plan" (paras 44–52); and third, that the inspector was wrong to find the proposed development "was a "sustainable development" as . . . defined in the NPPF" (para 53). In a postscript, the judge recognised "the existence of a discretion outside [paragraph 14 of the NPPF]", but said it was "likely to be the exception rather than the norm that it will be exercised in favour of approval". He left open the question of "quite how exceptional, "exceptional" has to be" (para 54).

37 Green J's conclusions on the first of the three errors he saw in the decision letter are, at paras 42–43:

> "42. First, the inspector applies the presumption in favour of grant of approval having acknowledged and accepted that the proposed development was inconsistent with the local plan. However paragraph 14 of the NPPF is the embodiment of the presumption and once that paragraph has been worked through and a conclusion has been arrived at that the proposal is inconsistent with the local plan, then there is *no* presumption remaining which can be relied upon in favour of grant . . . At this stage the presumption has been rebutted. This is because, as per paragraph 12 of the NPPF, it is inconsistent with the local plan and the proposal should be refused. Paragraph 12 creates a reverse presumption—'*it should be refused*'. This does *not* mean that there is no discretion outside of paragraph 14 but it does mean that the discretion does not incorporate a presumption in favour of approval and, moreover, the starting point is not neutral but is adverse to the grant of permission.
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> "43. In paragraph 12 of the decision in the present case . . . the inspector held that the presumption applied outwith paragraph 14. The only sensible way therefore to read the operative paragraph 40 of the decision . . . is that having concluded that the proposal was a sustainable development the inspector applied the presumption of approval to it leading therefore to the actual approval. This follows from the structure of the inspector's reasons as a whole and also the specific language that he used in paragraph 40 and in particular the word '*consequently*', in the last sentence of that paragraph. For these reasons in my judgment the inspector materially misdirected himself as to the test to be applied to the evidence."

38 For Barwood, Mr Satnam Choongh did not seek to persuade us that Jay J's analysis in the *Cheshire East Borough Council* case [2016] PTSR 1052 and Holgate J's in the *Trustees of the Barker Mill Estates* case [2017] PTSR 408 was incorrect, or to defend Coulson J's in the *Wychavon District Council* case [2016] PTSR 675. He seemed to concede that if the inspector had given the proposal the benefit of the "tilted balance" in paragraph 14 of the NPPF, this would have been unlawful—because it would have represented a misinterpretation of government policy. But he sought to distance his argument from the submissions which Jay J and Holgate J had rejected. He submitted that Green J was in any event wrong to conclude that the inspector had erred in law. On a fair reading of the decision letter, in particular para 37, it was clear, he argued, that the inspector had not failed to perform his duty under section 38(6) of the 2004 Act. When he referred to "the presumption in favour of sustainable development" in paras 12 and 37, he was only saying that he was going to consider whether the proposed

development would be sustainable when assessed against the "three pillars of sustainability"—or, as he put it in para 37, the "three dimensions of sustainable development"—identified in paragraph 7 of the NPPF, and whether its sustainability outweighed its conflict with the development plan. In paras 38, 39 and 40 he had considered the proposal against those three "dimensions" of sustainable development—"environmental, economic and social"—reaching clear conclusions favourable to Barwood's proposal.

39 Mr Choongh submitted that the inspector had accepted that the "presumption in favour of sustainable development" in paragraph 14 of the NPPF was not engaged. He did not misunderstand the policy in paragraph 14. He had found that the development was "sustainable development"—in all the respects to which he referred in paras 13–36. When he referred, in para 37, to the appeal scheme needing "to be considered in the context of [the NPPF's] presumption in favour of sustainable development", he was only using that expression as a kind of "shorthand" or "label". What he did, in fact, was simply to apply a "straight balance" of harm against benefit, in which the paragraph 14 presumption played no part. In striking that balance he had concluded, as he was entitled to, that the proposed development would be sustainable and that its sustainability outweighed its conflict with the development plan. This was, submitted Mr Choongh, a "classic section 38(6) exercise". So, he argued, in this case at least, it does not matter whether Coulson J was right or wrong to attribute to the "presumption in favour of sustainable development" the scope he did in the *Wychavon District Council* case [2016] PTSR 675.

40 I cannot accept those submissions. In my view they do not reflect the true sense of the inspector's assessment of Barwood's proposal and, in particular, the balancing exercise he undertook in paras 37–41 of his decision letter. I agree with the judge's conclusions, supported in the submissions made on behalf of the Secretary of State by Mr Lewis, that the inspector erred in law in the way the judge described in paras 42–43 of his judgment. The error identified in that part of the judgment went to the heart of the inspector's conclusions and, in my view, is enough to vitiate his decision.

41 There can be no sensible dispute that the inspector's approach was influenced by Coulson J's judgment in the *Wychavon District Council* case, as Barwood plainly intended it to be.

42 In para 6 of his decision letter the inspector confirmed that Barwood had referred to the "presumption in favour of sustainable development" and had drawn Coulson J's judgment to his attention. In paras 11–12, when dealing with national and local planning policy, he made it clear that he could not give the proposal the benefit of the policy for "decision-taking" in paragraph 14 of the NPPF. As he accepted, the proposal did not accord with the development plan because it was in conflict with three policies of the recently adopted local plan—the strategic policy identifying the housing allocations for main town and villages (strategic policy 4) and the counterpart restrictive policies whose effect was to concentrate development within the settlement boundaries and strictly control development outside those settlement boundaries (strategic policy 2 and strategic policy 8). Because there was a recently adopted local plan "with policies regarding the location of housing and the protection of the countryside", it could not be said that the development plan was "absent" or "silent", or, given the

existence of a five-year supply of housing land, that "the policies of the local plan relevant to the supply of housing" were "out of date". Therefore, as the inspector said in the fourth sentence of para 12 of his decision letter, "the planning balance contained within the final bullet point of paragraph 14 of [the NPPF] does not apply to this appeal". A

43 The crucial part of para 12 of the decision letter, however, is in its last two sentences. The penultimate sentence begins with the word "Nevertheless", emphasising the contrast with what has gone before. That contrast explicitly depends on Coulson J's judgment in the *Wychavon District Council* case [2016] PTSR 675, and the meaning he had given to the concept of "the presumption in favour of sustainable development" as a "golden thread running through both plan-making and decision-taking". In the final sentence of para 12 the inspector left no doubt as to what he took from Coulson J's judgment. "As a result", he said, "where a proposal is contrary to the development plan this presumption is a material consideration that should be taken into account". This seems to be saying, in effect, that the NPPF contains a general "presumption in favour of sustainable development", which can be set against the statutory presumption in favour of the development plan in section 38(6) of the 2004 Act. B C

44 The inspector's conclusions on the planning merits of the proposal, in paras 13–36 of his decision letter, were brought together in the five paragraphs headed "Planning balance and overall conclusion": paras 37–41. It was in those five paragraphs that he undertook the balancing exercise whose outcome was his decision to grant planning permission. D

45 It is clear from the first two sentences of para 37 that the inspector had in mind his duty under section 38(6) to determine the appeal application in accordance with the development plan unless material considerations indicated otherwise, and also that he was conscious of the need to ask himself whether the conflict with the development plan to which he now returned—the conflict with three strategic policies of the local plan—was outweighed by material considerations outside the plan. The third sentence of para 37 of the decision letter, which begins with the words "As I have earlier noted", connects it to the conclusions in paras 11–12. The reference here to the NPPF being an "important material consideration" echoes the first sentence of para 11. And the reference to "[the NPPF's] presumption in favour of sustainable development" picks up the theme introduced in the last two sentences of para 12, where the inspector referred to Coulson J's judgment in the *Wychavon District Council* case [2016] PTSR 675: the concept of the "presumption in favour of sustainable development" being a "golden thread" running throughout the NPPF, and the proposition that "[as] a result, where a proposal is contrary to the development plan this presumption is a material consideration that should be taken into account". Then, in the last two sentences of para 37, the inspector referred to the policies of the NPPF "as a whole" constituting the Government's view of what sustainable development means in practice, and to the "three dimensions to sustainable development: environmental, economic and social". This was the way in which he introduced the balancing exercise which followed in paras 38, 39 and 40 of his letter, culminating in his conclusions in the last two sentences of para 40. E F G H

46 The conclusion in the penultimate sentence of para 40 is that "the proposal would represent sustainable development as defined in the

Framework". And the conclusion in the last sentence of that paragraph, introduced by the word "Consequently", is that "the material considerations in this appeal are such that permission should be granted for development that is not in accordance with the development plan". Those conclusions must be read together with the foregoing balancing exercise in paras 38 to 40, introduced by the inspector's statement in para 37 that "the appeal scheme needs to be considered in the context of [the NPPF's] presumption in favour of sustainable development", which in itself depends on his earlier conclusion in para 12 that "where a proposal is contrary to the development plan this presumption is a material consideration that should be taken into account". When that is done, I cannot see how it can be submitted that the inspector left out of account the wider "presumption in favour of sustainable development" to which he had referred in para 12. He explicitly took it into account, and plainly did so as if it were a material consideration weighing in favour of the proposal. In doing so, he fell into error. Once he had discounted the "presumption in favour of sustainable development" in paragraph 14 of the NPPF, which he was clearly right to do, such a presumption had no further part to play in his decision.

47 The inspector's error may be understandable—because he was made aware of Coulson J's judgment in the *Wychavon District Council* case [2016] PTSR 675, but not of Jay J's in the *Cheshire East Borough Council* case [2016] PTSR 1052, and did not have the benefit of Holgate J's in the *Trustees of the Barker Mill Estates* case [2017] PTSR 408, which was handed down only after he had made his decision. But it is an error none the less. It represents a misinterpretation and unlawful application of NPPF policy, and thus a failure to have regard to a material consideration, or having regard to an immaterial consideration. It resulted from the inspector's misconception, in the light of the judgment in the *Wychavon District Council* case, that a proposal which does not—as he accepted here—gain the "presumption in favour of sustainable development" under the policy in paragraph 14 of the NPPF can nevertheless acquire it elsewhere in the NPPF. In stating, at the end of para 12 of his letter, that "the presumption in favour of sustainable development is a golden thread that runs throughout [the NPPF]" and that "[as] a result, where a proposal is contrary to the development plan this presumption is a material consideration that should be taken into account", he was accepting that there was a wider "presumption in favour of sustainable development" beyond that described in paragraph 14 of the NPPF—the error identified by Holgate J in the *Trustees of the Barker Mill Estates* case [2017] PTSR 408, para 126. And this concept of a wider "presumption in favour of sustainable development" clearly played a significant part in his conclusions on the planning balance, and his "overall conclusion", in paras 37–41. It was not merely, as Mr Choongh submitted, a convenient "shorthand" or "label". It was, in truth, a substantial factor in the inspector's assessment of Barwood's proposal. In my view, when one takes para 12 of his decision letter together with paras 37–41, it is quite clear that he was, in fact, applying to the proposal, and giving it the advantage of, a "presumption in favour of sustainable development" outside paragraph 14 of the NPPF. I see no escape from that. Mr Choongh's forceful submissions to the contrary do not overcome what I consider to be a fair reading of the inspector's decision letter as a whole.

48 On that straightforward analysis, I think we should accept as correct the essential conclusion in paras 42–43 of Green J's judgment, that the inspector misdirected himself as to the policy for the "presumption in favour of sustainable development" in the NPPF. The main issue to which I referred in para 7 above—whether the inspector misdirected himself in performing his task under section 38(6) by mistaking the true meaning and scope of government policy for the "presumption in favour of sustainable development"—must therefore be decided against Barwood and in favour of the Secretary of State and the council. And that conclusion, as both Mr Lewis on behalf of the Secretary of State and Mr John Hunter for the council invited us to accept, must be fatal to the inspector's decision, and fatal also to this appeal against the judge's order—unless the inspector's decision can be saved in the exercise of the court's discretion.

49 It is not necessary, therefore, to grapple with other parts of the judge's analysis, where he engaged with concepts such as the "residual scope for the exercise of discretion" (para 24 of his judgment), "an algorithm to describe the process laid down in paragraph [14 of the NPPF]" (para 26), and the question "How exceptional is exceptional?" (para 54).

50 I would, however, stress the need for the court to adopt, if it can, a simple approach in cases such as this. Excessive legalism has no place in the planning system, or in proceedings before the Planning Court, or in subsequent appeals to this court. The court should always resist over complication of concepts that are basically simple. Planning decision-making is far from being a mechanical, or quasi-mathematical activity. It is essentially a flexible process, not rigid or formulaic. It involves, largely, an exercise of planning judgment, in which the decision-maker must understand relevant national and local policy correctly and apply it lawfully to the particular facts and circumstances of the case in hand, in accordance with the requirements of the statutory scheme. The duties imposed by section 70(2) of the 1990 Act and section 38(6) of the 2004 Act leave with the decision-maker a wide discretion. The making of a planning decision is, therefore, quite different from the adjudication by a court on an issue of law: see paras 8–14, 22 and 35 above. I would endorse, and emphasise, the observations to the same effect made by Holgate J in the *Trustees of the Barker Mill Estates* case [2017] PTSR 408, paras 140–143.

Discretion

51 Mr Choongh submitted that if we were to reject his argument on the main issue in the appeal, the court's discretion ought nevertheless to be exercised against quashing the inspector's decision, because if the inspector had not erred in law in his approach to the "presumption in favour of sustainable development" he would still, inevitably, have struck the planning balance in favour of the proposal and granted planning permission for it: see, for example, the judgment of Holgate J in *Goodman Logistics Developments (UK) Ltd v Secretary of State for Communities and Local Government* [2017] EWHC 947 (Admin) at [95]–[108]. It is clear, said Mr Choongh, that the inspector's conclusions on the sustainability of the proposed development, and the economic, social and environmental benefits which he acknowledged, would have outweighed the conflict he found with the development plan even without the aid of the "presumption in favour of sustainable development"—as, for example, in the Secretary of State's

decision allowing an appeal and granting planning permission for major housing development on a site at Watery Lane in Lichfield in February 2017.

52 I disagree, for two reasons. First, this was a case in which the proposal was, and was accepted to be, in conflict with three policies in a recently adopted local plan, and was therefore contrary to the statutory presumption in favour of the development plan, under section 38(6) of the 2004 Act. Secondly, the inspector made a material error of law, not merely an error of form but an error of substance, in concluding, in effect, that there was a countervailing policy presumption—namely, the "presumption in favour of sustainable development"—competing with the statutory presumption in favour of the development plan. Had he not made that error, it is, I accept, possible that he would still have concluded that other material considerations were powerful enough in this case to justify a decision otherwise than in accordance with the development plan. Equally, however, it is possible that he would not have done so. In these circumstances I cannot conclude that his decision would inevitably have been the same, or even that it is highly likely that it would not have been substantially different—the question that arises under section 31(2A) of the Senior Courts Act 1981, as inserted. In my view, therefore, the interests of a lawfully taken decision ought in this case to prevail, in the normal way, and the court's discretion should not be exercised against granting relief.

Conclusion

53 For the reasons I have given, I would dismiss this appeal.

UNDERHILL LJ

54 I agree.

GROSS LJ

55 I also agree.

Appeal dismissed.

SARAH ADDENBROOKE, Barrister